THE LAW RELATING TO

THE MERCHANDISE MARKS ACTS

1887 TO 1894

THE LAW RELATING TO THE MERCHANDISE MARKS ACTS 1887 TO 1894

BY

HENRY MILES FINCH, M.A., LL.M.

TRINITY COLLEGE, CAMBRIDGE; OF THE INNER TEMPLE, BARRISTER-AT-LAW

AUTHOR OF

"A HANDY GUIDE TO THE LICENSING LAWS"

LONDON

WILLIAM CLOWES AND SONS, LIMITED

7, FLEET STREET

1904

Ex 492 m

PRINTED BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.

Rec. Sept. 30, 1905

PREFACE

THE object aimed at in this book has been to reduce to order a somewhat involved Act of Parliament; and to enable the reader to find without difficulty on any branch of the subject the authorities thereon, which are brought up to date. The dominant provisions of the Act are comprised in subsections (1) and (2) of § 2. The greater part of the rest of the Statute consists principally of definitions, and explanations of the terms made use of in § 2, to which various sections reference has to be frequently made. As the explanatory sections are scattered indiscriminately throughout the Statute, a study of the Statute to one imperfectly connected with it is at first confusing. It has been the aim of the author to avoid this confusion by quoting the sections whenever referred to, and illustrating the various points dealt with by the Act by setting out fully the contentions both of the prosecution and defence in the cases on a subject which is somewhat complicated, and possibly the less

known because the cases arising out of it are for the most part only unofficially reported.

It is hoped that the work will assist the student to master the difficulties of the law relating to merchandise marks, and be of use to all interested in the suppression of "Trade Deceptions."

H. M. FINCH.

6, Plowden Buildings,
Temple, E.C.
October, 1904.

CONTENTS

		PAGE
	TABLE OF CASES CITED	ix
	THE MERCHANDISE MARKS ACT, 1887	1
CHAPTER		
I.	TRADE MARKS	25
II.	"SO NEARLY RESEMBLING A TRADE MARK AS TO BE CALCULATED TO DECEIVE"	64
III.	FALSE TRADE DESCRIPTION	74
IV.	MASTER AND SERVANT	136
V.	INTENT TO DEFRAUD AND ACTING INNOCENTLY	143
VI.	THE PROSECUTION (INCLUDING FORFEITURE, APPEAL, EVIDENCE, ACCESSORIES, AND COSTS)	149
VII.	THE DEFENCE	169
VIII.	WATCHES	182
	GENERAL ORDERS THEREON	190
IX.	PROHIBITION ON IMPORTATION	195
	GENERAL ORDER	203

APPENDIX

PAGE

FORMS 233

MERCHANDISE MARKS ACT, 1891 242

MERCHANDISE MARKS ACT, 1894 244

PATENT DESIGNS AND TRADE MARK ACT, 1883 . . 245

HALL-MARKING OF FOREIGN PLATE ACT, 1904 . . . 316

INDEX 319

TABLE OF CASES CITED

A

	PAGE
American Tobacco Co. *v.* Guest	167
Anglo-Swiss Condensed Milk Co. *v.* Pearks, Gunston & Tee, Ltd.	57
Anglo-Swiss Condensed Milk Co.'s Trade Mark, *in re*	57

B

Barnett *v.* Leuchars	41
Bischop *v.* Toler	95, 97
Bond *v.* Evans	176
Boord & Son *v.* Huddart	57
Bostock *v.* Ramsey Urban District Council	199
Bow *v.* Hart	61
Brown *v.* Foot	140
Budd *v.* Lucas	81, 164, 165, 174
Burgess *v.* Burgess	144
Burroughs, Wellcome & Co.'s Trade Mark, *in re*	57

C

Cameron *v.* Wiggins	58, 83, 99, 102
Chameleon Patents, &c., Co. *v.* Marshalls	41
Charnock *v.* Merchant	165
Cheavin *v.* Walker	47, 72, 108
Chisholm *v.* Doulton	140
Christy *v.* Tipper	57
Cockrane *v.* McNish	50, 70
Cocks *v.* Chandler	72
Condy *v.* Taylor	42
Copley *v.* Kirk	65
Coppen *v.* Moore (No. 1)	82, 85
Coppen *v.* Moore (No. 2)	137, 141, 148, 171–180
Cornford *v.* Carlton Bank, Ltd.	156
Cotton *v.* Gillard	33

E

PAGE

Edelsten *v.* Wick 49
Eno *v.* Dunn 71

F

Farina *v.* Silverlock 33, 41, 72
Fels *v.* Thomas Hedley & Co., Ltd. 57
Fielden *v.* Mayor of Morley 200
Fisher *v.* Apollinaris Co. 151
Flavell *v.* Harrison 49
Ford *v.* Foster 72

G

Grand Hotel Co. of Caledonia Springs, Ltd. *v.* Wilson and others 56
Gridley *v.* Swinborne . . . 51, 106–108, 145, 150, 153, 201
Guinness *v.* Ulmer 41

H

Hamilton *v.* Walker 166
Hart *v.* Colley 33
Hendricks *v.* Montagu 72
Hennessey *v.* Cooper 41
Hooper *v.* Balfour 85
Horn, *re*, *exp.* Nassau 60
Hubbuck *v.* Brown 47

I

Ihlee *v.* Henshaw 42

J

Jacobson *v.* Blake 200
Jay *v.* Ladler 34, 40, 50, 67, 72
Johnson *v.* Orr-Ewing 65
Johnson *v.* Raylton 73

K

Kirshenboim *v.* Salmon & Gluckstein . . 103, 115, 133, 145, 148

L

Langley *v.* Bombay Tea Co., Ltd. 86, 87, 90, 106
Leather Cloth Co. *v.* American Cloth Co. 48
Lever *v.* Goodwin 66

M

	PAGE
McSymons Stores, Ltd. *v.* Shuttleworth	56
Marshall *v.* Ross	51, 201
Meadows *v.* Catesby	111
Morgan *v.* McAdams	52
Morris *v.* Royle	101
Mullins *v.* Collins	176

N

Nassau, *exp.*, *re* Horn	60
Nassau *v.* Thorley's Cattle Food Co.	72
Newman *v.* Pinto	72
N. K. Fairbank Co. *v.* Cocos Butter Manufacturing Co.	56
North-Eastern Breweries, Ltd. *v.* Gibson	82

P

Palmer's Trade Mark, *re*	47
Payton *v.* Snelling	69, 164
Pearks, Gunston & Tee, Ltd. *v.* Ward	145, 153–156
Pharmaceutical Society *v.* London and Provincial Supply Association	152
Pharmaceutical Society *v.* Wheeldon	140
Pinto *v.* Badman	33
Price's Candle Co.	33

R

Ransome *v.* Graham	58
Raggett *v.* Findlater	71, 85
Reddaway *v.* Barham	69, 70
R. *v.* Adcock, Easton & Co.	131
—— Allpuss (John)	186
—— Ananiadi	92
—— Ardley	29
—— Attenborough	55, 161
—— Barnardo	118, 138
—— Besser	62
—— Bettle & Gent	187
—— Bramall	103
—— Brown & French	62
—— Bryan	29, 71
—— Burgoyne & Co.	35–39, 57, 161
—— Butler	118
—— Callow	119
—— Cam Portland Cement Co.	201
—— Campbell (Andrew)	185
—— Christie, Manson and Woods	135, 146

PAGE

R. v. Clarke 120
—— Clarke (Kate) 63
—— Closs 28
—— Cockshott 151
—— Cohen, Weenen & Co. 135, 145, 201
—— Crampton 52
—— Crosse 120
—— Davies Bros. 130
—— Dr. Deimel Underwear Fabric Co. 110
—— Downing (Thomas Henry) 109, 201
—— Drapkin 133
—— Dundas 28
—— Edmonson (William) 68
—— Egan 119, 162
—— English Farmers' Association, Ltd. . . . 83, 102
—— Essex, JJ. 237
—— Evans 118
—— Fairweather 30
—— Francis 164
—— Glave 68
—— Goff (Samuel) 121–124, 156
—— Graeger 104
—— G.N. England Ry. Co. 152
—— Greenberg (Lazarus) 119
—— Gruebor 53
—— Hall (William) 113
—— Harrod's Stores 101, 201
—— Hermann Rhensius 130
—— Hersey 117, 124
—— Hickling 119
—— Holt 164
—— Horrigan 63
—— Hyland 187
—— Ingold 67
—— Jeffery 121, 162
—— Jenkinson 84
—— Johnson 130
—— Jones Bros. 110
—— Jones (Alexander) 134
—— Jones (Fernmore) 134, 148
—— Jonas Jung 130
—— Julier 119
—— Kondal & Dent 185
—— Lazarus 134
—— Leon Hopeon 135
—— Levy 111, 162
—— Lipton 90, 100, 103, 105, 117
—— McCarthy, Buck & Co. 130
—— McKnight 129
—— Manoukian 90

	PAGE
R. *v.* Midland Education Co.	135
—— Morris (B.) & Sons, Ltd.	135
—— Moss	188
—— Muriatti	132, 145
—— Nicholls	112, 201
—— Peel	82, 111
—— Phillips	104, 148
—— Planner	129
—— Pratt	63
—— Price & Newschild	54, 68
—— Robinson & Barnsdale	100, 118
—— Semprini	129
—— Smith	28
—— Smith	128
—— Stephens	175
—— Styles	117, 130
—— Swan & Edgar	30
—— Tissell	119
—— Tobins (Joseph)	132
—— Tolhurst	130
—— Townsend	53
—— Tooth	125, 144, 147, 162
—— Tweedy	62
—— Tyler	152, 162
—— Van Straughton, Loon & Co.	129
—— Vaughan	54
—— Wallis	52
—— Watts	128
—— Webber	67
—— Weedon	119
—— Welsh	62
—— Whiteley	109
—— Williamson	96-99, 162, 184
—— Woolf Weisberg & Max Strauss	132
—— Wythe	127
Rodgers *v.* Rottgen	72
Rose *v.* Henley	41
Rugby Cement Case	33, 41

S

Saxlehner *v.* Apollinaris Co.	70, 165
Seixo *v.* Provizende	72
Sen Sen Co. *v.* Britten	56
Siegert *v.* Findlater	71
Singer *v.* Loog	72
Singer *v.* Wilson	73
Slazenger *v.* Feltham & Co.	72, 161
Société Anouyme des Verreries de L'Étoile, *in re* Trade mark of	65

	PAGE
Somerville *v.* Schembri	72
Star Tea Co., Ltd. *v.* Whitworth	86-90, 106
Stacey *v.* Chilworth Gunpowder Co.	101, 114, 133, 143
Stephens, *exp.*	58

U

Upmann *v.* Forester	84, 167, 168

W

Watson *v.* Dr. Jaeger's Sanitary Woollen System Co.	59, 163
Whitfield *v.* S.E.R.	151
Wood *v.* Burgess	44, 143
Worthington & Co.'s Trade Mark	71
Wotherspoon *v.* Currie	64, 72
Wragg's Trade Mark, *re*	47
Wright, Crossley & Co. *v.* Wm. Dobbin & Co.	55

THE

MERCHANDISE MARKS ACT, 1887

50 & 51 Vict. c. 28.

An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise. [23rd August, 1887.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Merchandise Marks Act, 1887. Short title.

2.—(1) Every person who— Offences as to trade marks and trade description.

(*a*) forges any trade mark; or

(*b*) falsely applies to goods any trade mark

or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or

(*d*) applies any false trade description to goods; or

(*e*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or

(*f*) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive

is falsely applied, as the case may be, shall, unless he proves—

(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) that otherwise he had acted innocently;

be guilty of an offence against this Act.

(3) Every person guilty of an offence against this Act shall be liable—

(i.) on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in

the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii.) in any case, to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4) The court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the court thinks fit.

(5) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person

42 & 43 Vict. c. 49.

charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the court, and before

the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly.

Definitions. 46 & 47 Vict. c. 57.

3.—(1) For the purposes of this Act—

The expression "trade mark" means a trade mark registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable:

The expression "trade description" means any description, statement, or other indication, direct or indirect,

(*a*) as to the number, quantity, measure, gauge, or weight of any goods, or

(*b*) as to the place or country in which any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act:

The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act:

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise:

The expressions "person," "manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or incorporate:

The expression "name" includes any abbreviation of a name.

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connexion with goods of the same description, and not having authorised the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not bonâ fide carrying on business in connexion with such goods.

Forging trade mark.

4. A person shall be deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Applying marks and descriptions.

5.—(1) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c*) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade mark or trade description.

(2) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3) A person shall be deemed to falsely

apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

Exemption of certain persons employed in ordinary course of business.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the

charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precautions against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied,

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Application of Act to watches.

7. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a

description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall primâ facie be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case.

Mark on watch case.

8.—(1) Every person who after the date fixed by Order in Council sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from

the mark placed by the office on a watch case made in the United Kingdom) and in such a mode as may be from time to time directed by Order in Council.

(2) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in a Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council.

(3) Every person who makes a false declaration for the purposes of this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence.

Trade mark, how described in pleading.

9. In any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to

state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Rules as to evidence.

10. In any prosecution for an offence against this Act,—

(1) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness.

(2) In the case of imported goods, evidence of the port of shipment shall be primâ facie evidence of the place or country in which the goods were made or produced.

Punishment of accessories.

11. Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanour had been there committed.

Search warrant.

12. (1)—Where, upon information of an offence against this Act, a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the same, or a warrant for the arrest of such defendant, and either the said justice on or after issuing the summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant, to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture under this Act.

(2) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a court of summary jurisdiction may cause such notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the court, unless the owner or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

(3) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the court by which the same are forfeited may direct, and the court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent

party any loss he may have innocently sustained in dealing with the goods.

Extension of 22 & 23 Vict. c. 17 to offences under this Act.

13. The Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours," shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in section one of that Act, but this section shall not apply to Scotland.

Costs of defence or prosecution.

14. On any prosecution under this Act the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

Limitation of prosecution.

15. No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.

Prohibition on importation.

16. Whereas it is expedient to make further provision for prohibiting the importation of

goods which, if sold, would be liable to forfeiture under this Act; be it therefore enacted as follows:—

(1) All such goods, and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and, subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were specified in section forty-two of the Customs Consolidation Act, 1876.

39 & 40 Vict. c. 36.

(2) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the

goods are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs may from time to time make, revoke and vary, regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom.

(5) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such

goods or of offences in relation to such goods.

(6) The Commissioners of Customs, in making and in administering the regulations, and generally in the administration of this section, whether in the exercise of any discretion or opinion, or otherwise, shall act under the control of the Commissioners of Her Majesty's Treasury.

(7) The regulations may provide for the informant reimbursing the Commissioners of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(8) All regulations under this section shall be published in the "London Gazette" and in the "Board of Trade Journal."

(9) This section shall have effect as if it were part of the Customs Consolidation Act, 1876, and shall accordingly apply to the Isle of Man as if it were part of the United Kingdom.

46 & 47 Vict. c. 55. (10) Section two of the Revenue Act, 1883, shall be repealed as from a day fixed by regulations under this section, not being later

than the first day of January, one thousand eight hundred and eighty-eight, without prejudice to anything done or suffered thereunder.

Implied warranty on sale of marked goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Provisions of Act as to false description not to apply in certain cases.

18. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or

country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

Savings.

19.—(1) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident

in the United Kingdom who bonâ fide acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

False representation as to Royal Warrant.

20. Any person who falsely represents that any goods are made by a person holding a Royal Warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government department, shall be liable, on summary conviction, to a penalty not exceeding twenty pounds.

Application of Act to Scotland.

21. In the application of this Act to Scotland the following modifications shall be made :—

The expression "Summary Jurisdiction Acts" means the Summary Procedure Act, 1864, and any Acts amending the same.

The expression "justice" means sheriff.

The expression "court of summary jurisdiction" means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on sheriffs.

Application of Act to Ireland.

22. In the application of this Act to Ireland the following modifications shall be made :—

The expression "Summary Jurisdiction

Acts" means, so far as respects the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace of such district, and as regards the rest of Ireland means the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict. c. 93.

The expression "court of summary jurisdiction" means justices acting under those Acts.

Repeal of 25 & 26 Vict. c. 88.

23. The Merchandise Marks Act, 1862, is hereby repealed, and any unrepealed enactment referring to any enactment so repealed shall be construed to apply to the corresponding provision of this Act; provided that this repeal shall not affect—

(*a*) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(*b*) the institution or continuance of any proceeding or other remedy under any enactment so repealed for the recovery of any penalty incurred, or for the punishment of any offence committed, before the commencement of this Act; nor

(*c*) any right, privilege, liability, or obligation acquired, accrued, or incurred under any enactment hereby repealed.

CHAPTER I

TRADE MARKS

By § 2.—(1) Every person who—

(*a*) forges any trade mark; or

(*b*) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or

(*d*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark;

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

And by—

Subsection (2) every person who sells, or

exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark [or false trade description is applied], or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, [or trade description ;] and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things ; or

(*c*) that otherwise he had acted innocently ;

be guilty of an offence against this Act.

Forgery of a trade mark is defined by—

§ 4. A person shall be deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Under § 2 of the repealed Merchandise Marks Act of 1862 it was a misdemeanour to forge or counterfeit any trade mark, or falsely apply any such trade mark to any article, or to any wrapper in which any goods were to be sold, with intent to defraud, but it was incumbent on the prosecution to prove the intention to defraud.

In the offences under this section of the Act of 1887 the burden of proof of intention to defraud is shifted on to the defendant.

It will be observed that in subsection (*b*) of § 4 the assent of the proprietor is no defence.

At common law forgery is the making or alteration

of any document, not comprised amongst those specified by statute, by which some person may be injured. A trade mark is not a document within the definition (*R.* v. *Smith*, 27 L.J.M.C. 225). Nor is it forgery where the imitation of a trade mark consisted of a signature (*R.* v. *Closs*, 7 Cox. 494). But, independently of the Merchandise Marks Act, the sale of goods under a spurious mark, spurious to the knowledge of the vendor, has always been held to constitute the offence of obtaining money by false pretences.

Thus in *R.* v. *Dundas* (6 Cox. 380) the prisoner, who alleged that his name was Everett, was convicted of obtaining money by false pretences for selling blacking in bottles labelled "Everett's Premier Blacking" in the almost identical style of a well-known manufacturer of that name.

In *R.* v. *Bryan* (7 Cox. 312) the prisoner was indicted for having obtained money from pawnbrokers by false pretences by fraudulently representing certain spoons as having as much silver in them as Elkington's "A" spoons, and was convicted before the Recorder of London, who reserved the case for the consideration of the Court for Crown Cases Reserved. It was there held by ten out of twelve judges that the conviction must be quashed on the ground that there had been merely a misrepresentation as to the quality, and not as to the substance of the article. The result of the case was to encourage

frauds of a like nature, the fact that there was a very small percentage of silver in the spoons making the escape of the prisoner possible, whereas, had there been none, he would have been convicted.

In *R.* v. *Ardley* (L.R. 1 C.C.R. 301) the prisoner induced the prosecutor to purchase a watch-chain from him by fraudulently representing that it was 15 carat gold, when, in fact, it was only of a quality a trifle better than 6 carats, knowing at the time that he was falsely representing the quality of the chain as 15 carat gold.

The case of *R.* v. *Bryan* (*supra*) was distinguished because in *R.* v. *Ardley* there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain; and it was held that the statement that the chain was 15 carat gold, not being mere exaggerated praise, nor relating to a matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, was a sufficient false pretence to sustain an indictment for obtaining money by false pretences.

It will be seen that a distinction is made between mere trade puff as to quality and the deliberate misstatement as to a specific fact with intent to defraud.

Consequently, applying a trade mark, whether forged or genuine, to goods which are not the make of the alleged manufacturer, is equivalent to such a misstatement, and the offence under the Merchandise Marks Act of 1887 (§§ 2 (1) (*b*), 2 (1) (*d*), and 3 (2))

is complete unless the intention to defraud is disproved.

In *R.* v. *Swan & Edgar, Ltd.* (Times, Jan. 27, 1904), the defendants had bought certain brooches from a firm in Aldersgate Street, who had imported them from Germany. They consequently did not bear the English mark. The invoice sent with the goods described them as 9 carat gold, and they were stamped "9 carat." They cost 45s. per dozen, and the defendants alleged that they had no reason to suppose that they did not answer the description given to them, but they did not take the precaution to test the brooches.

They sold two brooches for 5s. each, representing them as 9 carat gold. When one was assayed, it was found, instead of being 9 carats, to work out at 2 carats $1\frac{1}{8}$ grain of gold. The other brooch, when assayed, averaged about $3\frac{1}{2}$ carats. The defendants were summoned for having applied a false trade mark to the two brooches, and convicted.

In *R.* v. *Fairweather* (Times, Oct. 10, 1893) the defendant was committed for trial for forging the trade mark of Messrs. Epps, cocoa manufacturers.

In the General Order of Feb. 26, 1900, 1900, par. 24, issued by the Custom House (see *post*, p. 203), "the forging of a trade mark is the application to goods of any figure, words, or marks, or arrangement or combination thereof, reasonably calculated to lead persons to believe that the goods are the manufacture

or the merchandise of some person other than the person whose manufacture or merchandise they really are; and this includes the name or initials of a person. The figures, words, or marks applied need not be an actual trade mark, or actual name or initials, provided they are a colourable imitation of the mark, name, or initials of a person carrying on business in connexion with goods of the same description, and are used without his authority."

The expression "trade mark" is thus defined by § 3 (1).

For the purposes of this Act—

The expression "trade mark" means a trade mark registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable.

See the consolidated instructions in the General Order, $\frac{15}{1880}$ (*post*, p. 203).

By § 10 of the Patents, Designs, and Trade Marks

Act, 1883 (51 & 52 Vict. c. 50), the essential particulars of a trade mark are thus described:—

For § 64 of the principal Act (46 & 47 Vict. c. 57) the following section shall be substituted, namely:—

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

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

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

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

(*d*) An invented word or invented words; or

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

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

(3) Provided as follows:—

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

same name to use that name, or the foreign equivalent thereof:

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

The mark must be considered as a whole, and must contain at least one of the essential particulars (*Price's Candle Co.*, 27 Ch. D. 681). There is no copyright in a trade mark (*Farina* v. *Silverlock*, 24 L.J. Ch. 632); nor can a trade mark exist or be assigned in gross (*Cotton* v. *Gillard*, 44 L.J. Ch. 90; *Pinto* v. *Badman*, 8 P.C. 181), and the right to sue for using a trade mark registered under the Patents, &c., Act of 1883 is restricted to the particular class of goods in respect of which the trade mark was so registered (*Hart* v. *Colley*, 6 T.L.R. 220).

A trade mark registered under one of the classes given by the rules, but in respect of some particular articles in that class, will be protected under the Patents, &c., Act as to those articles only. A trade mark need not be actually affixed to the article. It is sufficient if the trade mark is on the cover or wrapper in which the article is sold (*Rugby Cement case*, 8 P.C. 240).

The common-law rights of a tradesman using a trade mark are not affected by the registration of

the trade mark, so that, if he has acquired a right to a trade mark as to a certain class of goods, and the trade mark as registered is confined to a part of that class of goods, he will be entitled to protection for the whole class of goods (*Jay* v. *Ladler*, 40 C.D. 649).

For particulars as to the registration of a trade mark, see §§ 62, 64, 75 (as amended by § 17 of the Patents, &c., Act, 1888), 76, 77, 78, 89, and 96 of the Patents, &c., Act, 1883, which is set out at length in the Appendix (pp. 245, 315).

Although unregistered trade marks are not protected by the Act as trade marks, such marks are to a certain extent protected by the provisions of the Merchandise Marks Act, 1887, in § 3 (2) and (3), viz. :—

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods,

or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means, as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connexion with goods of the same description, and not having authorised the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not bonâ fide carrying on business in connexion with such goods.

The case of *R.* v. *Burgoyne & Co.*, heard on Jan. 9, 1904, and reported in the Times of that date, is interesting as to the application to goods of "any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or

merchandise of some person other than the person whose manufacture or merchandise they really are."

In that case the defendants were charged on six summonses before the Lord Mayor of London, for that on Oct. 7 and 21, and on Nov. 13, 1903, they did apply a false trade description to goods called soda crystals, such description relating to the material of which the goods were composed, and on the first date did unlawfully sell, with a false trade description thereto applied, goods called soda crystals, such description relating to the material of which the goods were composed.

The defendants pleaded guilty to the summonses for applying a false trade description to the goods, and for selling the goods to which a false trade description had been applied.

The prosecution did not propose to proceed on the other summonses, alleging that there were applied to the goods in question marks so nearly resembling the trade mark of Messrs. Brunner, Mond & Co., Ltd., as to be calculated to deceive; and these summonses were withdrawn.

The prosecutors were Messrs. Brunner, Mond & Co., Ltd., the well-known alkali and soda manufacturers, and the question was whether certain stuff called soda crystals, but which was not soda crystals, could be honestly sold or not under that description. It had been ascertained that an enormous quantity of this

stuff had been imported into this country and got into a good many hands.

Soda crystals—the washing-soda of commerce—consisted principally of carbonate of soda with the water of crystallization; but in the preparation of soda crystals for the convenience of manufacture, in order to make the crystals less sticky, so that they could be crushed and put into the drying machine more conveniently, a very small percentage, which in honest manufacture was never more than 2 per cent. —in the prosecutor's case 1 per cent.—of sulphate of soda was added.

A practice had grown up of adulterating soda crystals—carbonate of soda—with sulphate of soda; the obvious advantage of that being that, whereas soda crystals cost £4 10*s.* per ton, sulphate of soda cost only £1 16*s.* per ton.

Sulphate of soda was called Glauber's salt, and was useless for washing purposes.

The defendants had been sending out to the trade letters asking for a trial order for their No. 1 quality soda crystals, and stating that the War Office and Admiralty used their soda, and it had passed their tests satisfactorily. A ton of the goods in question were ordered by a Mr. Drake from the defendants, and they were forwarded in bags marked "B.M.C." on their outside. Mr. Drake sent the goods on to the prosecutors, who caused them to be analysed by eminent analytical chemists, and it was found that

instead of containing 98 or 99 per cent. of carbonate of soda, they contained 9 to 10 per cent., and not less than 91 per cent. of Glauber's salt in the form of crystals.

As before stated, the prosecution did not offer any evidence on the summonses relating to the placing on the bags of the letters "B.M.C.," their object having been attained by the defendants' plea of guilty, but they asked for an order for the destruction of 4 tons of goods which were in the possession or under the control of the defendants.

For the defence it was urged that the defendants had only been in the trade since the previous May, and only dealt in these goods to a very small extent. The goods were imported from Belgium, and were bought on a representation from the seller that they contained 80 to 85 per cent. of carbonate of soda. The defendants were themselves deceived. The goods were obviously Glauber's salts, and could be sold as such, and it was a pity to destroy articles of commerce because an offence had been committed inadvertently against an Act of Parliament.

The Lord Mayor, in commenting upon the defence, said that if the defendants had taken the trouble to analyse the material, they would very soon have found out that a fraud had been perpetrated upon them. As the prosecutors did not press for a heavy penalty, he should only impose on the defendants a penalty of £5 on each of six summonses—£30 in all.

He would not make an order for destruction, as he did not see any necessity for it. The prosecutors did not ask for costs.

Other cases as to the use of any "figure, word, or mark" will be found *post*, pp. 57, 58.

Applying trade marks or marks or trade descriptions is defined by § 5, viz. :—

5.—(1) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c*) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it

is used are designated or described by that trade mark or mark or trade description.

(2) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3) A person shall be deemed to falsely apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

A trade mark need not be actually affixed to the article. It is sufficient if the trade mark is on the cover or wrapper in which the article is sold, or in circulars or advertisements offering them for sale (*Jay* v. *Ladler*, 40 C.D. 649); or on a slip placed in a package with it, or on a show-card to which the goods are attached (*Chameleon Patents, &c., Co.* v.

Marshalls, 17 R.P.C. 527). There is an infringement of the plaintiff's trade mark if use be made of his labels (*Farina* v. *Silverlock*, 26 L.J. Ch. 11; *Guinness* v. *Ullmer*, 10 L.T. O.S. 127), marked or stamped bottles (*Rose* v. *Henley*, 47 L.J. Ch. 577), casks (*Hennessey* v. *Cooper*, Seb. Dig. 327), or boxes (*Barnett* v. *Leuchars*, 13 L.T. N.S. 405), by the defendant, unless the defendant shews that he is selling the genuine goods of the plaintiff. The question simply is, "Under the circumstances was, what was done by the defendant calculated to deceive?"

In *Rugby Portland Cement Co., Ltd.* v. *Rugby & Newbold Portland Cement Co., Ltd.* (8 P.C. 240), Vaughan-Williams, J., said: "I am for my own part not at all sure that you can prove an infringement of a trade mark without proving that the defendants have imitated the plaintiff's trade mark upon something capable of receiving the impression of the mark. Either the material itself, or the paper which is used, or the sacks, or bags, or boxes, or whatever the material is put into, I should have thought, must have been imitated to constitute an infringement of a trade mark."

See also cases in Chapter II.

The false application must be without the assent of the proprietor.

The proprietor means the registered proprietor (see § 78 of the Patents, &c., Act of 1883), or his

assignee; for when a trade mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade mark without having registered the assignment (*Ihlee* v. *Henshaw*, 31 C.D. 323). It is submitted that this principle will be applied to cases under the Merchandise Marks Acts.

"Proprietor" includes any body of persons corporate or unincorporate (see § 3 (1)).

It was held in *Condy* v. *Taylor* (1887) (56 L.T. N.S. 891) that a manufacturer who sells to a dealer in bulk an article usually sold and used in small quantities, without any restriction as to its disposal, must be taken to authorise the dealer so to sell it as being his (the vendor's) manufacture. The dealer may therefore call the article by the name registered by the manufacturer as his trade mark.

For the special defence of persons employed in the ordinary course of business charged with offences under § 5, see § 6, viz. :—

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description,

or causing any of the things in this section mentioned to be done, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precautions against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied,

he shall be discharged from the prosecution, but

shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Cases such as *Wood* v. *Burgess* (59 L.J.M.C. 11) come within this section. In that case a mineral water manufacturer, who had in his possession for sale mineral water to which a false trade description within the meaning of § 3 of the Act was applied, by reason of the bottles containing the mineral water being stamped with the name and initials of another mineral water manufacturer without his authority, was held to be guilty of an offence against § 2 of the Act, although he had placed on the bottles paper labels, and sent out with them invoices bearing his own name, and had no intent to defraud the purchasers, none of these things, however, constituting proof that he had "acted innocently" within the meaning of the section. The magistrate had held that the respondent had no intent to defraud, and therefore must be taken to have "acted innocently." On appeal it was decided that the magistrate was wrong, for the intent to defraud the purchaser was not a necessary ingredient of the offence charged.

By § 3 (1) the expression "trade description" means any description, statement, or other indication, direct or indirect,

(*c*) as to any goods being the subject of any existing patent, privilege, or copyright. . . .

§ 105 of the Patents, &c., Act, 1883, enacts :—

(1) Any person who represents that any article sold by him is a patented article when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered when it is not so, shall be liable for every offence, on summary conviction, to a fine not exceeding £5.

(2) A person shall be deemed, for the purposes of this enactment, to represent that an article is patented, or a design or a trade mark is registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to the article.

It will thus be noticed that the improper use of the word "patent" is dealt with by two statutes; but under the Merchandise Marks Act the law is more stringent; for, whereas under § 105 of the Patents, &c., Act of 1883 no offence is committed if there has ever been a patent granted which has ceased to exist, under the Merchandise Marks Act there is no such limitation, and an offence is committed against the Act unless a patent is actually in existence, and independently of an intention to defraud.

The Patents, Designs, and Trade Marks Act, 1883, provides generally that a person shall not be entitled to institute any proceedings to prevent or to recover damages for the infringement of a trade mark, unless, in the case of a trade mark capable of being registered under that Act, it has been so registered, or in pursuance of an enactment repealed by that Act, or in the case of any other trade mark in use before the passing of the Act of 1875, registration thereof under that Act or an enactment repealed by that Act has been refused (§ 77). Also that a trade mark must be registered as belonging to particular goods or classes of goods (§ 65); and when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill (§ 70), but, subject as aforesaid, registration of a trade mark shall be deemed to be equivalent to public use of such mark; and that the registration of a person as proprietor of a trade mark shall be primâ facie evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be deemed conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of the Act as to its connexion with the goodwill of a business (§ 76).

A mark, however, which cannot be the subject of a trade mark, and which, therefore, cannot be properly

registered as such, cannot acquire the character of a trade mark by being registered for five years; and no trade mark of a nature similar to one already registered, or very nearly resembling it, is to be registered in respect of the same goods or class of goods (*re Palmer's Trade Mark*, 24 C.D. 504; *re Wragg's Trade Mark*, 29 C.D. 551).

Dealing with the cases under § 105 of the Patents, &c., Act, 1883, the use of the word "patent" in a trade mark for goods not manufactured under an existing patent has led to much litigation. As Mr. Justice Kekewich pointed out in *Hubbuck* v. *Brown* (17 P.C. 148, 156): "The circumstances under which the word 'patent' was used here was certainly peculiar, but if the question had really called for decision, I do not think that it would have been possible to avoid an examination of the authorities cited, which cannot, it seems to me, be easily reconciled under one general rule."

The nearest approach to a general rule seems to be that each case depends on whether the use of the word "patent" is in fact falsely intended to represent that a patent right exists which in reality does not exist.

In *Cheavin* v. *Walker* (5 C.D. 862, C.A.), where the defendant, who had been in the employment of the plaintiff, issued labels bearing the words "S.C.'s improved patent gold-medal self-cleaning rapid-water

filters, improved and manufactured by Walker & Co.," the said patent filters being also manufactured and sold by the plaintiff, but the patent for them had been allowed to lapse, the Court of Appeal held that the label was not a trade mark, but only a description, and there was nothing in the defendant's label which was calculated to mislead the public.

JESSEL, M.R., said: "No doubt a man may use the word 'patent' so as to deceive no one. It may be used so as to mean that which was a patent, but is not so now. In other words, you may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. But if you suggest that it is protected by an existing patent, you cannot obtain the protection of that representation as a trade mark. Protection only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade mark. But, further, no man can claim a trade mark in a falsehood. It is a falsehood to represent that the patent is still subsisting."

In the *Leather Cloth Co.* v. *American Cloth Co.* (11 H.L. Cas. 523), Lord Kingsdown said: "If a

trade mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement, primâ facie, amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade mark to relief in a Court of Equity against any one who pirated it."

In *Edelsten* v. *Vick* (11 Hare 78) the plaintiffs, who represented the original patentees of an article, the patent for the manufacture of which had expired, continued to use labels on their goods printed from the original blocks belonging to the patentees, on which labels the goods were described as "patented." The defendants adopted and issued labels closely resembling those of the plaintiffs'. And under such circumstances, although the description of the plaintiffs' goods on their labels as being "patented" had ceased to be strictly true, the court granted an injunction restraining the defendants from using labels bearing an inscription appearing to designate the goods contained therein as being manufactured by the plaintiffs.

But in *Flavell* v. *Harrison* (22 L.J. Ch. 866), on motion by the manufacturer and seller of an unpatented article invented by his father, and called after his own name, and known as "Flavell's Patent Kitchener," the court refused an injunction to restrain a defendant from selling similar articles under the same name and description, but reserved the motion for six months, with liberty for the plaintiff

to bring an action at law. The court also refused to restrain the defendant from using the name of the plaintiff in selling the above articles (not representing them to be of the plaintiff's manufacture) on the ground that the plaintiff had been aware of the fact for four months previously to filing his bill.

It need not be proved that anybody has been deceived; there need be no proof of actual deceit; there need be only proof of acts likely to deceive (*Jay* v. *Ladler*, *supra*, p. 40).

In the case of *Cockrane* v. *McNish* (1896, A.C. 225), where in an action by the appellant, who had registered his English trade mark of "Club Soda" in Jamaica, under law 17 of 1888, it appeared that the respondents persisted in selling their goods under the same name in a way calculated to deceive, it was held that the appellant was not disentitled to relief merely because he had printed on his label the words "Manufactured in Ireland by H.M. Royal Letters Patent." Those words, explained by the evidence to relate to the patented machinery, did not necessarily represent or induce belief contrary to the fact that the ingredients of their article were patented. Although it was held that the words used were not likely to deceive any one, it is hard to understand with what other object the words were used.

There is, however, no offence created by the use

of the word "patent" as a generic term applied to such articles as "patent" leather, "patent" medicines, to denote a particular and well-known kind; for instance, in *Gridley* v. *Swinborne* (5 T.L.R. 71), the facts of which case will be set out in Chapter III., pp. 106–108.

LORD COLERIDGE, C.J., in giving judgment, said: "The next question was whether there was a false description as to an existing patent. There might be circumstances which would point to fraud if an article was said to be a patent substance when it was not, but where the original patentee, carrying on the patent process as before, merely continued his old labels, which gave a description of the goods as being 'patent' goods, there was not any necessary inference of fraud, and the tribunal, whether Lord Mayor or jury, could decide on that fact."

In *Marshall* v. *Ross* (L.R. 8 Eq. 651) the use of the word "patent" as part of the description in a label or trade mark of goods not protected by a patent, was held to be not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label, where the goods have, from the usage of many years, acquired the designation, in the trade generally, of "patent." The goods in question were known as "Patent Thread," by which name linen thread of a certain class or description is, and for many years past has been, known by thread manufacturers and the trade as such.

In *Morgan* v. *McAdam* (L.J. 36 Ch. 228), where the plaintiffs purchased from a firm established in the United States knowledge of a secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process was never patented, it was held that the plaintiffs could not maintain a bill to restrain others from pirating the designation.

It will thus be seen that the use of the word "patent," as applied to an unpatented article, is only actionable when it is intended thereby to suggest that the article is protected by an existing patent; but if the use of the word is not misleading, as, for instance, if applied to a class of goods, which from the usage of many years have acquired that designation in the trade generally, no action can be taken against such use of the word.

In *R.* v. *Wallis* (3 P.C. 1) the defendant was selling a lamp as a patented article when no patent had been granted for it, although a provisional specification had been filed. On a summons under § 105 it was held that the burden was on the defendant to prove the patent under which he justified the use of the term "patent"; that he was not entitled to use that term because a provisional specification had been filed, and that not having justified his use of the term, a fine must be imposed under the section.

In *R.* v. *Crampton* (3 P.C. 367) the defendant applied for a patent for electric bells, and subsequently,

before the patent had been granted, sold several electric bells stamped with the word "patent." Thirteen summonses were applied for against him by the Patents Investment Company in respect of the sale of such bells, and one was issued. Upon its coming before the magistrate, the other twelve were withdrawn. The magistrate held that the full penalty of £5 ought to be imposed, with £1 3*s.* costs.

In *R.* v. *Townsend* (13 P.C. 265), where a sale of chairs marked with the word "patent" was made, a patent had been applied for, but was not then granted, but a complete specification had been accepted by the Comptroller, the learned magistrate, Mr. Bushby, dismissed the summons on the grounds (1) that § 105 was not aimed at this species of transaction, and (2) that as § 15 of the Act gave the defendant the like privileges and rights as if a patent for the invention had been sealed on the day on which the Comptroller-General had accepted his complete specification, he was entitled to mark with the word "patent" goods made in accordance with that specification.

On the other hand, however, in *R.* v. *Henry Grueber* (Times, Nov. 20, 1894), the defendant sold a disc or medallion on which was marked "Patent," and which contained an advertisement on one side and a calendar on the other. Full specifications of the defendant's article had been accepted at the patent office, but no patent had at that time been granted. The

complainant, a patentee of a similar article, had opposed the defendant's patenting his medallion. In spite of the fact that the full specifications of the defendant's article had been accepted at the patent office, Sir Joseph Savory fined the defendant 20s., and 23s. costs.

In *R.* v. *Vaughan* (Times, Feb. 25, 1888) the defendants were summoned under the Merchandise Marks Act for selling rim-lock furniture stamped "Vaughan's Patent," for which there was no existing patent. For the defence it was alleged that the articles were supplied through the carelessness of a servant of the defendants', who had ceased to falsely describe the furniture. As it was the first case under the Act at Wolverhampton, the defendants were fined 40s. and costs only.

In *R.* v. *Price & Neuschild* (Times, Feb. 1, 1899) the defendants were charged with having unlawfully represented that a certain design or trade mark applied to a piece of china sold by them was a registered design or trade mark contrary to § 105 of the Patents, &c., Act, 1883; also with having used in connexion with their business, without authority from her Majesty, or any of the royal family, or any Government Department, the Royal Arms; also with selling and exposing for sale goods to which a false trade description had been applied. The defendants had sold china ornaments, stamped with the Royal Arms, and bearing the words "Royal Saxon," "Made

in Saxony." For the defence it was attempted to distinguish between real Dresden china and that sold by the defendants, and it was alleged that the defendants had no reason to think that Leichte, where the goods came from, was not in Saxony. A fine of £3 and 2 guineas costs was imposed.

In *R.* v. *Attenborough* (Times, May 5, 1900) the defendant exposed for sale certain china with the forged trade mark of the royal manufactory of porcelain of Saxony (Dresden china). The defence was that before the registration of Dresden trade marks in 1875, crossed swords were often used, and the clock in question was made long before that. The summons was withdrawn on the defendant undertaking to grind out the forged marks.

In *Wright, Crossley & Co.* v. *William Dobbin & Co.* (15 P.C. 21), the defendants, merchants in Belfast, sold a box of baking-powder labelled "Trade Mark—Royal—Registered," and on the obverse side "Manufactured by Royal Baking Powder Company, New York." The trade mark was registered in the United States of America, and had been registered in the United Kingdom, but seven weeks previously to the sale had been expunged from the register in this country. The defendants were prosecuted under § 105 for describing the trade mark as registered, and the magistrates dismissed the summons, but stated a case as to whether the Act had been infringed. It was held that the use of the word

"registered" amounted to a representation that the trade mark was registered in the United Kingdom, which was not affected by the words describing where the article was manufactured, and that the magistrates ought to have convicted the defendants.

McSymons Stores, Ltd. v. *Shuttleworth* (15 P.C. 748) was a similar case of selling a tin or box of "Royal Baking Powder" similar to that which had been sold in *Wright* v. *Dobbin*.

But in *Sen Sen Co.* v. *Britten* (1899, Ch. Div. 692) it was decided that the use by a trader on his goods of the words "trade mark" in connexion with a particular mark which he has used as a trade mark, but for which he has not obtained registration, does not necessarily imply that the trade mark is registered so as to constitute an offence under § 105; and, apart from § 105, is not of itself such a misrepresentation as to disentitle him to relief in an action to restrain the imitation of the get up of his goods.

The law with regard to trade marks and trade names is fully discussed in the recent cases of—

The Grand Hotel Co. of Caledonia Springs, Ltd. v. *Wilson & Others* ("Caledonia Springs")	20 T.L.R. 19.
N. K. Fairbank Co. & Cocos Butter Manufacturing Co. ("Cottolene," "Cocosoline")	20 T.L.R. 53.

Fels v. *Thomas Hedley & Co., Ltd.* ("Naphtha")	20 T.L.R. 69.
In re Burroughs, Wellcome & Co.'s Trade Mark. Burroughs, Wellcome & Co. v. *Thompson & Capper* ("Tabloid")	20 T.L.R. 111.
The same (affirmed on appeal)	20 T.L.R. 415.
Christy v. *Tipper* ("Absorbine")	20 T.L.R. 200.
In re Anglo-Swiss Condensed Milk Co.'s Trade Mark. The Anglo-Swiss Condensed Milk Co. v. *Pearks, Gunston & Tee, Ltd.* ("Milkmaid Brand")	20 T.L.R. 238.
Boord & Son v. *Huddart* (Gin. "Cat Brand")	20 T.L.R. 142.

Section 3 (1) after clause (*c*) goes on to enact that "the use of any figure, word, or mark, which according to the custom of the trade is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act.

The only matter with which we are concerned in this chapter is clause (*c*), which we have already discussed.

We have also (pp. 35–39) dealt with at length the case of *R.* v. *Bunyoyne & Co.* in connexion with § 3

(2) and (3), with reference to the application of goods of any figures, words, or marks, &c.

The word "figure" means a numeral (*cep. Stephens*, 3 Ch. Div. 659).

In *Cameron* v. *Wiggins* (1901, 1 K.B. 1) it was held that any writing or mark, however unintelligible without explanation, may be orally explained by the vendor at the time of sale, independently of any custom of the trade, and may thus constitute a sufficient trade description for the purposes of the Act.

In *Ransome* v. *Graham* (51 L.J. Ch. 897) it was held that combinations of letters may constitute valid and registerable trade marks, notwithstanding that they indicate the quality and pattern of the goods to which they are applied, if, but not unless, they also indicate that the goods have been manufactured by a particular person or firm. The plaintiffs manufactured ploughs and wearing parts of ploughs, and in order to distinguish the various makes, patterns, and sizes, they stamped the different wearing parts with letters or combinations of letters, such as "R.N.D.," "R.N.E.," "R.N.F.," &c., and also with numerals which referred to the sizes and shapes of the several parts, so that a purchaser of one of the plaintiffs' ploughs, who required a new wearing part, could obtain an article of the plaintiffs' manufacture, which would accurately fit his plough, by quoting the letters stamped on it. It was held that the plaintiffs had established their right

to the exclusive use of these combinations of letters, which were valid trade marks, notwithstanding that they were also indicative of the pattern and quality of the goods to which they were applied.

Hence a trade description may be a trade mark.

In *Watson* v. *Dr. Jaeger's Sanitary Woollen System Co.* (13 T.L.R. 150) the respondent was summoned under § 2 (1), charged with unlawfully causing to be applied a false trade description, to wit, a mark purporting to be an English trade mark, to goods of German manufacture. It was proved that the appellant bought a vest from the respondent upon which was imposed a stamp by way of trade mark containing the words, "Dr. Jaeger's Sanitary Woollen System Co., sole concessionaries, pure wool, warranted." The vest was of German manufacture, and the trade mark was stamped on it after its importation into England. Evidence was tendered as to whether, according to the custom of the trade, the imposition of an English trade mark, or a trade mark with English words, indicated, by such custom, that the goods on which it was imposed were made in England. Evidence was also tendered of statements made by the salesman at the time of sale, but the Lord Mayor refused to admit the evidence, and dismissed the information on the ground that the imposition of the respondent's trade mark on the vest was not such a use of a "mark" as defined by § 3 (1) as to constitute its application to such goods a "false trade description" as therein

defined. The Divisional Court remitted the case to the Lord Mayor, Mr. Justice Wright remarking: "This case must go back. It is impossible to say what the Lord Mayor asks us to decide. The case must go back with the direction that the evidence sought to be given is admissible. The trade mark may be a false description, and the appellant may call any evidence he likes to shew that it is so."

In *exp. Nassau, re Horn* (2 T.L.R. 339), it was held that there was no such custom in the furniture trade for goods to be supplied to dealers on "sale or return" as to prevent the operation of the reputed ownership clause (§ 44, subsec. 3) of the Bankruptcy Act, 1883. Such custom must amount to a custom of the trade of so notorious a character that any one making inquiry of persons cognizant of the trade might ascertain it to be a custom.

By the Merchandise Marks Act of 1891, § 1, the Customs entry relating to imported goods shall, for the purposes of the Merchandise Marks Act, 1887, be deemed to be a trade description applied to the goods.

In many instances, goods, often being articles for consumption, and frequently adulterated, are imported bearing no trade description, as defined by §§ 3 and 5 of the Merchandise Marks Act of 1887. Consequently they could not be detained by the Customs authorities under § 3. The amending Act of 1891 has altered this. The Customs entry is made from the bill of lading, which is a memorandum signed by masters

of ships, in their capacity of carriers, acknowledging the receipt of merchants' goods, and is evidence of the title to the goods shipped; and by its endorsement and delivery, the transfer of the property in the goods specified therein is generally effected. The statement made for the purposes of customs as to the name of the place from which the goods came, the number of the packages, and the quantity and description of the goods, is signed by the importer or his agent, and declared by him to be true.

In the recent case of *Bow* v. *Hart* (20 T.L.R. 651) it was held that a trade mark is not a franchise within the meaning of § 56 of the County Courts Act, 1888, and that where the plaintiff brought an action in a County Court for the infringement of a registered trade mark, and the defendant gave notice that he intended to contest the validity of the trade mark, and to apply to the High Court to have it expunged from the register, the County Court had jurisdiction to entertain the action for infringement.

By § 17, on the sale or in the contract for the sale of any goods to which a trade mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of

this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

The following prosecutions have been brought under the Merchandise Marks Act for applying a false trade mark to goods:—

R. v. *Tweedy* (Times, Oct. 17, 1893). Applying a false trade mark to "Guinness's Extra Stout." It was shewn on analysis that nearly 8 gallons of water had been added to 36 gallons of stout. Fined £24.

R. v. *Besser* (Times, June 28, 1899). Falsely applying to brandy the trade mark of Martell & Co. A bottle labelled "Martell's Three Star Brandy" was bought and emptied, and put on one side by a barmaid. It was afterwards filled up from another brand. A customer asked for a pint of Martell's "Three Star" brandy to take away with him, and was served from the bottle filled up as aforesaid. Committed for trial.

R. v. *Welsh* (Times, Oct. 31, 1899). Infringing the trade mark of Messrs. Hennessy. Martell's "Three Star" brandy was asked for by a customer, and the defendant served him from a bottle bearing Messrs. Hennessy's label—"One Star"—which, when empty, was taken to a tap and filled up. Fined £15, and 10 guineas costs.

R. v. *Brown & French* (Times, March 2, 1901). Infringing the trade mark of Hennessy & Co. The

defendants disposed of bottles sealed and bearing the "Three Star" labels of Messrs. Hennessy, representing them to contain brandy, whereas they contained vinegar and water. One month's hard labour.

R. v. *Horrigan* (Times, Nov. 13, 1901). Causing the trade mark of S. Allsopp & Sons to be applied to three bottles of stout. There were similar charges in respect of the trade marks of four other brewers. It was contended for the defence that no trade mark had been falsely applied, as it was the practice for manufacturers, when serving a customer, to receive from the latter an equal number of empty bottles without regard to what might be stamped on them. Fined £10, and £15 costs.

R. v. *Pratt* (Times, May 29, 1902). Selling in bottles labelled "Old Pale Martell's Cognac Brandy" a raw, young, fiery spirit, doctored up for the purposes of sale, and highly diluted. The manager fined £20, and 10 guineas costs, or three months' imprisonment; and the barman £5, and 2*s.* costs, or one month's imprisonment.

R. v. *Kate Clarke* (Times, May 15, 1889). A barmaid took an empty bottle labelled "Martell's Three Star Brandy" to the defendant, and under her directions filled it with ordinary British brandy and then served customers with it. Fined £10, and £7 16*s.* 6*d.* costs.

CHAPTER II

"SO NEARLY RESEMBLING A TRADE MARK AS TO BE CALCULATED TO DECEIVE"

THESE words are used in § 2 (1) (*b*), and in § 2 (2), and in § 4 (*a*), and in § 5 (3), and in § 6; but in § 3 (2) the words used are "reasonably calculated to lead persons to believe that the goods are," &c., which is but another way of saying the same thing.

The application of this phrase has been the subject of much argument, and, although the question is merely one of fact to be determined by the circumstances of each particular case, the various cases illustrating its application are being repeatedly cited as analogous to the case in dispute.

It is therefore proposed to discuss briefly some of the authorities on the subject—

Where a trade mark is not actually copied, the gist of the offence is the fraudulent imitation of it. The fraudulent intention is presumed against the defendant, on whom is shifted the burden of proving the contrary (*Wotherspoon* v. *Currie*, L.R. 5 H.L. 508).

No trade has a right to use a trade mark so nearly

resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade mark may be restrained by injunction, although no purchaser has actually been misled; for the very life of a trade mark depends on the promptitude with which it is vindicated (*Johnson* v. *Orr-Ewing*, 7 App. Cas. 219).

In *In re The Trade Mark of La Société Anonyme des Verreries de L'Étoile* (1894, 1 Ch. 61; 2 Ch. 26), it was held that if B. & Co. (dealers in London in window glass purchased in Belgium, and shipped to the Colonies), whose registered trade mark was "Star Brand," had been opposing the registration of the respondent's mark, namely, "Red Star Brand," the Comptroller would have been justified in refusing to register it, on the ground that "it so nearly resembled B. & Co.'s mark as to be calculated to deceive."

In *Copley* v. *Kirk* (84 L.T. Jo. 140 (1887)) the defendant was charged under § 2 (1) (*b*) of the Merchandise Marks Act, 1887, with falsely applying, and causing to be applied to certain goods, to wit, pocket-knives, a certain mark so nearly resembling a trade mark of John Copley & Sons "as to be calculated to deceive." The defendant had sent knives marked "K.K."—not a registered mark—to India to the same market as the plaintiffs sent their knives, which were marked "X.X.," which was a registered mark.

For the defence it was urged that—

(1) there was no proof that the mark was ordered to be struck since August 23, 1887 (when the Merchandise Marks Act of 1887 came into operation);

(2) it was not calculated to deceive; and

(3) the defendant acted without intent to defraud.

The stipendiary magistrate at Sheffield held that—

(1) the agency was proved;

(2) the mark was calculated to deceive, because it was likely to deceive Hindoos ignorant of English characters; and

(3) the defendant had been careless, but had not apparently intended to defraud, and dismissed the information without costs.

In *Lever* v. *Goodwin* (36 C.D. 1) (1886) the defendants, soap manufacturers, brought out their soap in packets "so closely resembling" those in which the plaintiffs—also soap manufacturers—had been in the habit of bringing out their soap, "as to be calculated to deceive" purchasers. It was held by Chitty, J., that, although retail dealers, who bought soap from the defendants, would not be deceived, the defendants, by their imitation of the plaintiffs' packets, put into the hands of retail dealers an instrument of fraud, and ought to be restrained. An injunction was granted, and an account directed to be taken of the profits made by the defendants in selling soap in the form in which it was held they were not entitled to sell it. On

appeal it was held that the injunction was rightly granted, and the account directed to be taken was in proper form, and ought not to be limited by excluding from it soap which the retail dealers sold to persons who bought it as the defendants' soap.

In *R.* v. *Ingold* (Times, Jan. 21, 1896) the defendant was indicted for falsely applying, or causing to be applied, a mark "so nearly resembling" the trade mark of the Edison & Swan United Electric Light Co., Ltd., "as to be calculated to deceive." The defendant had imported lampholders made in Germany, and had them marked "Edison & Swan." He was found guilty, and sentenced to nine months' imprisonment without hard labour.

It need not be proved that any one has been deceived; it is sufficient if proof be given of acts likely to deceive (*Jay* v. *Ladler*, 40 C.D. 649).

The same principle applies to the unauthorised use of the Royal Arms (see § 20).

In *R.* v. *Webber* (Times, Feb. 2, 1897) the defendant, a butcher, was charged with assuming in connexion with his business, without the authority of Her Majesty, or any of the Royal Family, or any Government department, the Royal Arms, or arms "so nearly resembling the same as to be calculated to deceive, or to lead persons to believe" that he carried on his trade by or under such authority. The defendant was under the apprehension that, having purchased for £100 in 1888 a bullock that had been

bred at the Royal Farm at Windsor, he was entitled to use the Royal Coat of Arms. An order had been sent to the defendant to forward to Osborne a joint weighing 36 lbs. of the sirloin cut from the animal. It was contended for the defendant that he was entitled to use the Royal Arms, because he had patented certain improved means of hanging carcasses of meat in his shop, and he was then the patentee of that invention, the Patent Office being a Government department, and the document he held bearing the Royal Arms. The defendant was fined £15, and 5 guineas costs.

In *R.* v. *William Edmonson* (Times, May 14, 1903) the defendant—managing director to J. R. Wood & Co., Ltd., coal merchants—was charged with assuming, and using in connexion with their trade, the Royal Arms, or arms "nearly resembling" the same, without the authority, &c. It was contended that, since Messrs. J. R. Wood & Co., Ltd., were contractors to His Majesty's Government, they were entitled to use the Royal Arms, which they had used for 25 years. The defendant was fined £10, and 5 guineas costs.

See also *R.* v. *Glave* (Times, May 8, 1903), and *R.* v. *Price & Newschild* (*supra*, p. 54).

The principle was applied in the cases cited in Chapter I., on pp. 56, 57, and in many other reported cases; but, as before stated, it is in reality a question of fact, and each case must be judged by its own

circumstances. It must be proved, however, in an action to restrain a colourable imitation of the make-up of goods, that beyond all question the goods were so got up "as to be calculated to deceive "(*Payton* v. *Snelling*, 70 L.J. Ch. 644 (1900)). Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the court, and not for the witness, to decide after inspection of the exhibits, and having regard to the evidence, whether a customer would be likely to be deceived by the make-up of the goods (*Payton* v. *Snelling*, *supra*).

The principle that "nobody has any right to represent his goods as the goods of somebody else" (*Reddaway* v. *Barham* (1896), A.C. 199, 204) has no limit as regards name, origin, honesty of manufacture or sale, or otherwise. Thus a trader, whose goods have acquired a reputation under a particular name, can restrain the user of that name in any way whatever by a rival trader in connexion with the latter's own goods, even though that reputation has been acquired by the exertions or enterprise of the rival trader as an importer and vendor on behalf of the plaintiff.

In an action for an injunction to restrain the use of a trade name, if the defendant's goods, on the face of them, and having regard to surrounding circumstances, are "calculated to deceive," evidence to prove the intention to deceive is unnecessary, the rule being that a man must be taken to have intended the

reasonable and natural consequences of his own acts; but if, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then evidence of intention to deceive is admissible, and this evidence may be supplied by admissions, oral or in writing, or by inference from conduct (*Saxlehner* v. *Apollinaris Co.* (1897), 1 Ch. 893).

But in *Cockrane* v. *McNish*, the facts of which case are set out in Chapter I., on p. 50, it was held that the appellant was not disentitled to relief merely because he had printed on his label words possibly equivocal, but capable of explanation.

In *Reddaway* v. *Barlam* (1896, A.C. 199) the plaintiff had for some years made belting and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting and nothing else. The defendant, who had been in the plaintiff's employment, began to sell belting made of the yarn of camel's hair, and stamped it "Camel's Hair Belting," so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavouring thus to pass off his goods as the plaintiff's. In its primary meaning the name was a true description of the goods. It was held by the House of Lords that the plaintiff was entitled to an injunction restraining the defendant from using the words "Camel Hair" as description of or in connexion with belting made or sold or offered for sale by him, and not manufactured by the plaintiff, without clearly distinguishing

such belting from the plaintiff's belting. Lord Halsbury, L.C., in giving judgment, said: "My Lords, I believe in this case that the question turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult, when examining former decisions, to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else."

It is no offence to adopt the use of a word merely denoting quality; for instance, in *Raggett* v. *Findlater* (L.R. 17 Eq. 29) an injunction to restrain the use by the defendants upon their trade label of the term "Nourishing Stout" was refused on the ground that "nourishing" was a mere English word denoting quality.

Cf. R. v. *Bryan* (*supra*, p. 28).

For other illustrations of what is "calculated to deceive," see—

Siegert v. *Findlater* (L.R. 7 Ch. D. 801) [Angostura Bitters].

Worthington & Co.'s Trade Mark (14 Ch. D. 8) [Bass & Co.'s Triangle trade mark].

Eno v. *Dunn* (15 App. Cas. 252) [Fruit salt].

Wotherspoon v. *Currie* (5 L.R. H.L. 508) [Glenfield starch].

Cocks v. *Chandler* (11 Eq. 446) [Original Reading sauce].

Ford v. *Foster* (7 Ch. 611) [Eureka shirts].

Slazenger v. *Feltham & Co.* (6 R.P.C. 531) ["Demon" and "Demotic" racquet].

Farina v. *Silverlock* (24 L.J. Ch. 632; 26 L.J. Ch. 11) [Labels on eau de Cologne].

Singer v. *Loog* (8 App. Cas. 15) [Singer sewing machines on the Singer system].

Cheavin v. *Walker* (5 C.D. 850) [Filters labelled "Patent"].

Nassau v. *Thorley's Cattle Food Co.* (14 C.D. 748 [Thorley's food for cattle].

Hendriks v. *Montagu* (17 C.D. 638) [Universal Life Assurance Society].

Jay v. *Ladler* (40 C.D. 649) [The Lady and the Bear trade mark].

Rodgers v. *Rottgen* (5 T.L.R. 678) [Copy of label].

Seixo v. *Provizende* (L.R. 1 Ch. 192) [Brands on casks of wine].

Somerville v. *Schembri* (12 App. Cas. 453) [Kaisar-i-hind cigarettes].

Newman v. *Pinto* (4 P.C. 508, 519) [Pictures on cigar-boxes].

In this connexion it may be mentioned that on the sale of goods by a manufacturer of such goods, who is

not otherwise a dealer in them, there is, in the absence of any usage in the particular trade, or as regards the particular goods, to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make (*Johnson* v. *Raylton*, 7 Q.B.D. 438); and fraud is not necessary to be averred or proved in order to obtain protection for a trade mark (*Singer* v. *Wilson*, L.R. 3 App. Cas. 376).

CHAPTER III

FALSE TRADE DESCRIPTION

By § 2—(1) Every person who—

(*d*) applies any false trade description to goods,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

By subsection (2), every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any [forged trade mark or] false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of

the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description ; and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things ; or

(*c*) that otherwise he had acted innocently ;

be guilty of an offence against this Act.

"Trade description" and "false trade description" are defined by § 3 (1).

3.—(1) For the purposes of this Act—

The expression "trade description" means any description, statement, or other indication, direct or indirect,

(*a*) as to the number, quantity, measure, gauge, or weight of any goods, or

(*b*) as to the place or country in which any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act:

The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act:

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise.

The rest of this section (§ 3), and § 5 (1) and (2), and § 6, also refer to "trade descriptions" and "false trade descriptions," namely—

§ 3 (2) The provisions of this Act respecting the

application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connexion with goods of the same

description, and not having authorised the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not bonâ fide carrying on business in connexion with such goods.

5.—(1) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c*) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade mark or mark or trade description.

(2) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule,

case, frame, or wrapper; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not

interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precautions against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

As to the provisions whereby a false description is not to apply in certain cases, see § 18, which is discussed in Chapter IX.

In § 3 (2) and § 5 (1) (*d*) the words "calculated to lead persons to believe that," &c., and "calculated to lead to the belief that," &c., respectively are used, whereas in the other parts of the Act the words "calculated to deceive," or "calculated to mislead,"

are made use of. Apparently the Legislature only wished to leave no room for doubt when they defined the particular deception; but there is no obvious advantage in the variation of the term.

This subsection (*d*) of § 2, and the definition of "trade description" in § 3 (1), are in terms very wide, and have formed the basis of most of the litigation in connexion with the Act.

The expression "trade description" means any description, statement, or other indication, direct or indirect,

(*a*) as to the number, quantity, measure, gauge, or weight of any goods.

It extends to a description in an invoice sent with the goods (*Budd* v. *Lucas* (1891), 1 Q.B. 408). In this case the appellant ordered six barrels of beer from the respondent, a brewer. The six barrels of beer were delivered, and with them an invoice, in which the casks were described as "barrels." The term "barrel" in the beer trade means a cask containing 36 gallons. One of the casks delivered was of a considerably less capacity than 36 gallons. The invoice was not physically attached to any of the casks. The appellant summoned the respondent under § 2, subsec. (1) (*d*), for having applied a false trade description—namely, barrel—to a cask of beer, false as to the measure and gauge thereof. It was

held that the description of the cask in the invoice was not the less applied to the cask within the meaning of the Act because the invoice was not physically attached to the cask; and the case came within § 5, subsec. (1) (*d*).

It was held also that evidence as to the previous transactions between the parties should have been admitted, as such evidence is always admitted where a guilty knowledge is an ingredient in the offence.

A very similar set of facts was disclosed in the recent case of *North-Eastern Breweries (Ltd.)* v. *Gibson* (20 T.L.R. 496), where the appellants purported to supply a "kilderkin" of beer in a cask which, owing to coopering, was incapable of containing a "kilderkin," that is, 18 gallons. An invoice sent with the cask of beer described the amount of beer sent to be a "kilderkin." The conviction of the appellants for applying a false trade description to goods was upheld.

It extends also to a description which, although made orally, was added to the invoice at the request of the purchaser of the goods (*Coppen* v. *Moore* (No. 1), 1898, 2 Q.B. 300).

See also *R.* v. *Peel*, *post*, p. 111.

A merely verbal statement does not constitute a false trade description within the Act (*Coppen* v. *Moore*, *supra*). Nevertheless, although upon a sale of goods a purely oral indication of the country of their production will not amount to a trade description

within the meaning of the Act, any writing, or mark, however unintelligible without explanation, will, if orally explained by the vendor at the time of sale to be intended to indicate a particular country as the country in which the goods were produced, constitute a sufficient trade description for the purposes of the Act (*Cameron* v. *Wiggins*, 1901, 1 K.B. 1; *supra*, p. 38). In this case the appellant entered the shop of the respondent, a dealer in foreign meat, and asked for a leg of New Zealand mutton. The respondent handed him a leg of mutton, at the same time stating it was New Zealand meat. The respondent also handed him an invoice in which the meat was described simply as a leg of mutton. The appellant then asked the respondent to mark on the invoice that it was New Zealand meat; whereupon the respondent wrote on it the letters "N.M.," intending thereby to represent that the mutton was New Zealand mutton. No evidence was given that those letters bore that meaning according to any custom of the trade. It was held that under the circumstances, the letters "N.M." amounted to a trade description of the meat within § 3 of the Act, notwithstanding the absence of any trade custom as to their meaning.

In *R.* v. *English Farmers' Association, Ltd.* (Times, April 27, 1899), the defendants were summoned for having sold certain goods to which a false trade description had been applied. The defendants were the

proprietors of certain direct supply stores, which issued a circular stating that the defendant company was established to supply the public direct with meat of the finest quality, so as to save the consumer the "large profits made by butchers." At the back of the circular were "press opinions." They sold New Zealand or Australian mutton as Welsh. They were fined £20 in each case, and £44 costs.

In *R.* v. *Jenkinson* (Times, Jan. 3, 1901) the defendant sold a bicycle, the invoice accompanying it stating "B.S.A. fittings, Dunlop tyres, Westwood rims." As a fact, only part of the fittings, viz. the front and back hub (with chain-wheel attached) and the two cranks, were genuine, the rest being imitation "B.S.A." fittings. The defendant was charged with selling a bicycle with a false trade description, viz. "B.S.A." fittings. The magistrate fined him 40*s.* and costs, remarking, "'B.S.A.' fittings meant 'B.S.A.' fittings throughout, and not such as the maker of the machine chose to put in."

See also *Upmann* v. *Forester* (24 C.D. 231), where the defendant—a china manufacturer—purchased abroad for his own private use a large number of cigars, which were consigned to him at the docks in cases bearing a spurious brand purporting to be that of the plaintiffs', who are cigar manufacturers. The defendant was not aware that the brands were spurious, nor, except from seeing it on the invoice, was he aware that any such brand was in use.

Although the defendant offered all the relief asked for by the writ, and at the hearing of the motion gave an undertaking in the terms of the writ, he was ordered to pay all the costs of the action.

The application of a false trade description to goods was made an offence by the Merchandise Marks Act of 1862, § 7, from which the provisions in the Act of 1887 are for the most part taken. The Act does not extend to descriptions of quality (see *Ruggett* v. *Findlater*, *supra*, p. 71), but where a merely verbal description as to quality is the subject of complaint, proceedings can be taken under the Sale of Food and Drugs Acts, 1875, 1879, and 1899 (*Coppen* v. *Moore*, *supra*, p. 82).

It is to be regretted, perhaps, that the Merchandise Marks Acts do not take cognizance of verbal descriptions, as frauds can be committed of not sufficient magnitude to invoke the aid of the criminal law, and thus petty deceptions are encouraged.

In *Hooper* v. *Balfour* (62 L.T. 646) the contract was to supply the plaintiffs with 20,000 cases of tinned salmon, "allowances as usual," the cases being marked "one pound cases." The cases were found to be irregular and deficient in weight, although not deficient by more than the alleged customary allowance. It was held that the goods could not be forced on a purchaser, on the ground that the purchaser could not sell them without committing an offence under the Act.

But where a description is applied to goods showing that the weight supplied is less than that for which the customer asks, no offence is committed against § 3 (1) (*a*) (*Langley* v. *Bombay Tea Co., Ltd.* (1900), 2 Q.B. 460).

The facts in *Langley* v. *Bombay Tea Co.* are interesting inasmuch as in a later case (1904) (*Star Tea Co., Ltd.* v. *Whitworth*, 20 T.L.R. 555), upon almost identical facts the appellants were held to have been rightly convicted of having applied a false trade description to goods.

In *Langley* v. *Bombay Tea Co., Ltd.*, the appellant, at the respondents' shop, asked for two half-pounds of tea. The tea was lying on the counter in packets which were stamped on the outside in ink with the words: "The weight of this package, including the wrapper, is half a pound." One of the respondents' salesmen took two packets, wrapped them in paper, and handed them to the appellant, who paid two shillings and sixpence for them. Nothing was said by the salesman, who simply handed over the parcel to the appellant. The latter took it to an inspector of weights and measures. The parcel was then opened, and there were found stamped in ink on each packet the words above set out. Placed under the string securing each packet was a ticket, resembling a railway ticket, upon which was printed: "The Bombay Tea Company (Limited), 50, Bell Street, Birmingham, ½-lb. cheque for tea, coffee, or cocoa."

On presentation of these cheques at the respondents' shop in Newcastle, the appellant would be entitled to receive for each cheque some article as a present, or by way of discount on his purchase. The inspector weighed the packets and their contents. One packet was found to contain 144½ grains, and the other 132 grains less than half a pound. In each case, however, the weight, including the paper wrapper, was more than half a pound by 24 grains in one instance, and 35 grains in the other. Upon these facts an information was laid by the appellant against the Bombay Tea Company, the respondents, for unlawfully selling two half-pounds of tea to which a false trade description, or statement as to the weight of the goods, was applied, contrary to § 2, subsec. 2, of the Merchandise Marks Act, 1887. The Justices for the city and county of Newcastle held that a trade description meant something written, printed, or stamped, and that a description expressed in words, or implied by conduct, was not sufficient to constitute an offence under the Act, and dismissed the information. On appeal to the Divisional Court, the decision of the Justices was upheld.

It does not appear that the point was taken that the ticket placed under the string securing each packet was a false trade description.

In the *Star Tea Co., Ltd.* v. *Whitworth* (20 T.L.R. 539), the respondent, an inspector of weights and measures for the borough of Walsall, went into

the appellants' shop on Jan. 5, 1904, and asked for a quarter of a pound of tea. Having been told that there were two prices, viz. 7½*d.* and 8*d.*, he said he would take a quarter of a pound at 8*d.* The shop assistant thereupon took from a shelf a packet of tea already folded and tied up with string, inserted under the string a small ticket resembling a railway ticket, and, wrapping the whole in brown paper, delivered it to the respondent. The wrapper in which the tea was contained consisted of a piece of lead paper on which was printed, "The Star Tea Co.'s Special Blend," and in small type, "Quarter pound gross weight." On one side of the ticket, inserted under the string, was printed: "Star Tea Co., Limited. Quarter pound 2*s.* 8*d.* Tea Ticket. 22, Park Street, Walsall. 1, 1887." And on the other side: "Star Tea Company (Limited). Motto: Maintain thy honour and enlarge thy fame. To every purchaser of our teas from ¼ lb. and upwards we give a useful article or check. By saving a number of these checks a valuable present is given in exchange fit to adorn a mansion or cottage. Thousands can testify that they get greater value for their money by our system than has even been attempted before." The respondent was not shown the lead wrapping, nor was it handed to him to read before it was wrapped in brown paper and delivered to him, nor was his attention called to the words printed on it. Before asking for the quarter of a pound of tea, however, he had seen in a

different part of the shop a quantity of tea being weighed and placed in wrappers apparently similar to the wrapper given to him, and it was admitted that he knew what was written on the tea wrappers of the appellants, but his attention had not been called by the appellants specially to those words. As a fact, he did not see the words printed on the packet actually delivered to him until the purchase had been completed and he had taken it from the brown-paper wrapping. The respondent weighed the packet of tea which he had purchased, and found that it contained less than a quarter of a pound of tea—to wit, $3\frac{3}{4}$ ozs. only of tea; but, together with the lead-paper wrapper, on which the words, "The Star Tea Co.'s Special Blend. Quarter pound gross weight," were printed, the packet weighed 5 or 6 grains more than a quarter of a pound. The respondent knew that the gross weight included the weight of the lead paper in which the tea was wrapped, and that it was the custom of the majority in the tea trade to weigh the paper with the tea. It was admitted by the appellants that they had distributed handbills describing and illustrating and enumerating the presents given by them to purchasers of not less than a quarter of a pound of tea; and had placed in the window of their shop printed labels attached to the presents given away by them, on which were printed: "Given with ¼ lb. of tea." It was contended on behalf of the respondent that the ticket placed under the string

tied round the packet of tea, as well as the said handbills and label, constituted a false trade description within the meaning of the Merchandise Marks Act, 1887. On behalf of the appellants it was contended that the ticket and the labels and handbills were not a trade description within the meaning of the Act, nor were they applied to the packet of tea within the meaning of the Act, nor were they false, and that, if they were trade descriptions, they must be taken and read with the words, "Quarter pound gross weight," printed on the packet of tea, and in such case there was no false trade description within the meaning of the Act. The magistrates held that the ticket placed under the string did constitute a false trade description within the meaning of the Act, and convicted the appellants.

The appellants relied on *Langley* v. *Bombay Tea Co.* (16 T.L.R. 441 (1900), 2 K.B. 460).

On appeal the Divisional Court (Lord Alverstone C.J., Wills and Kennedy, JJ.) upheld the decision of the magistrates.

There seems to be little doubt that the respondents in *Langley* v. *Bombay Tea Co.* would have been held guilty of applying a false trade description to goods, if summoned in respect of the ticket placed under the string of the packet of tea sold by them under the circumstances already set out.

See also *R.* v. *Lipton*, *post*, p. 100.

In *R.* v. *Manoukian* (Manchester Guardian, May

10, 11, 1898), Mr. John Manoukian, a merchant, trading as P. & J. K. Manoukian, was summoned for having in his possession for the purposes of his trade certain cotton yarn to which a false trade description had been applied, and for being the cause of such false trade description being applied. The yarn in respect of which the charges were made is known as "extra hard twist yarn." It used to be shipped very largely to the East, and, amongst other places, to Bulgaria. The material is sold by the pound, the price being regulated by what are called "the counts." "The count" simply means the number of times 840 yards, which represent a hank, are contained in a pound weight. Thus a pound of sixes contains six times 840 yards. It was alleged that the defendant had made up an inferior or a lower description of yarn to represent higher counts, the specific offence being that he had made up "fours" to represent "sixes," that is to say, that 3360 yards of yarn were made up to represent 5040 yards.

The defendant swore that yarn was always bought by weight, the length being of little consideration to the purchaser, and that the peasants in Bulgaria would often refuse a finer and better yarn in favour of the coarser kind; and that he received no benefit financially. It was contended for the defence that the question was, Was there any intent to defraud? There was no proof that the ultimate purchasers of yarn were in any way defrauded; and no evidence

that the purchasers imagined they were getting hanks of 840 yards; nor was there any instance of any yarn having been returned on account of short reeling. One reason why "fours" should be made into "sixes" was that before the Merchandise Marks Act of 1887 such divisions were usual; and purchasers, if they found a sudden change, would suspect there was something wrong.

The learned magistrate, in giving his decision, said that no doubt there had been a false trade description. It had been shewn that there was one way of making up "fours," and another way of making up "sixes," but the evidence pointed to the fact that the defendant had made up "fours" as "sixes," and therefore that came within the application of a false trade description. The question arose as to whether the natives of places where the goods were sold were deceived. One witness, who had a knowledge of the methods of trade in Bulgaria, through living there, had said the natives were deceived; and therefore there must be a conviction. A fine of 40s. on each of four informations was imposed, with costs, and £50 extra costs.

A similar case is reported in the Manchester Guardian of June 28, 29, and July 31, 1889. In that case Mr. Gregorie Ananiadi, an exporter of cotton yarns from Manchester, was charged with having in his possession for sale goods to which a false trade description was applied, and for having caused the

false trade description to be applied to goods. The description referred to the "counts" or fineness of the yarn, and such description could be made in two ways—

(1) by the application to bundles of yarn of actual figures; or,

(2) by the "make-up" of the bundles.

By long-established and undoubted custom a "hank" of yarn means 840 yards of 36 inches. If a bundle containing 10 of these hanks weighs 10 lbs., it is called "tens;" if 20 lbs., it is called "twenties," and so on. Usually, however, the finer yarns ("sixties" and upwards) are packed in 5-lb. bundles, and then each bundle contains only 5 hanks to the pound. In both cases, however, the hank must measure 840 yards.

The defendant was in the habit, before the passing of the Merchandise Marks Act of 1887, of having yarns reeled "forties" as "fifties," "forty-fives" as "sixties," "fifties" as "sixties," and so on.

On April 3, 1888, the defendant gave the following order: "Four hundred bundles, 5 pounds crape, in 300 skeins, 7 leas, must be well twisted, and if there is anything wrong, we shall claim £10 from you."

The witness, to whom that order was given, construed it to mean that "forty-fives" must be worked up as "sixties," that is to say, they had to make up 60 hanks to the pound. Thus a purchaser would be led to think that he was getting "sixties."

The price in 1887 for "forty-fives" was 1*s.* 5½*d.*, and the price for genuine "sixties" was 1*s.* 9*d.*

Between April 4 and July 7, 1888, 600 bundles were delivered to the defendant, of which 358 bundles were "forty-fives" made up as "sixties." The order of April 3 could not be carried through unless there was short reeling. There was evidence also that the "make-up" of the yarn ought to indicate the "counts" of the yarn, and that it would be difficult to carry on business if people could not rely upon that indication, for, although "60" was generally put on the outside of the bundle of "sixties," if the bundle were not stamped, or marked, there was nothing else to indicate what the contents of the bundle were. The learned magistrate, in giving his decision, said that the transactions in which the defendant was engaged before the passing of the Act were intended to be prohibited by it, and there should be no deception either in marking or stamping the goods, or indicating in any way that they were something different to what they really were. He held that the "make-up" of "forty-fives" yarn in such a way as that the appearance of the bundle indicated that it was "sixties" afforded a sufficient indication of the measure of the goods within the definition of "trade description" in § 3 (1) (*a*), and that it was immaterial whether or not the number of the "count" was put on the outside of the bundle; and he convicted the defendant.

(*b*) as to the place or country in which any goods were made or produced.

In this connexion, see §§ 16 and 18 and notes thereon, and the regulations made by the Commissioners of Customs with reference thereto, in Chapter IX. See also Chapter VIII., "Watches," and notes, &c., thereon.

This is a very important subsection.

A difficulty arose in connexion with the application of the section to goods not made wholly in one place or country, but composed of parts made or produced in different countries, and finally manufactured into one finished article in one country, *e.g.* watches. The difficulty, however, is to some extent met by the definition of a "false trade description," which necessitates a trade description being false "in a material respect," thus reducing the question to one of fact.

A case in point is that of *Bischop* v. *Toler* (65 L.J. M.C. 1), where a person had in his possession for sale margarine packed in cardboard boxes marked with the words "French Factory." The margarine consisted of a substance called "Le Dansk," manufactured from animal fat at a factory in Paris, and sent thence to an English factory, where by admixture with Danish butter and English milk it assumed the form in which it was offered for sale. It was held that as the margarine became the finished product

for the first time in England, the words "French Factory" on the boxes were a false trade description within the meaning of the second and third sections of the Act.

LORD RUSSELL, C.J., in giving judgment, said the conviction must be supported on the ground that "Le Dansk" is sold in circumstances in which it is represented to the buyer that the article is in fact of foreign manufacture.

In *R.* v. *Williamson* (Times, Oct. 30, Nov. 13, Nov. 27, Dec. 4, Dec. 11, Dec. 18, 1899; Jan. 26, Jan. 29, March 5, March 26, 1900; and 17 T.L.R. 174 and 424) the defendant was summoned for falsely applying the description "English Lever" to certain watches, and for exposing for sale watches falsely described as having been made in England. The watches were enclosed in cases with an English hall-mark. The prosecution alleged that the majority of the parts in a key-wind watch sold by the defendant company for 25*s.* 6*d.*, and in a keyless watch described as a "Keyless English Lever," and sold by the defendant company for 45*s.*, were of foreign origin.

The defendant contended that the value of the material of foreign origin in the key-wind watch was 1*s.* 10½*d.*, and in the keyless watch 1*s.*, that the material was obtained in the rough from abroad, and had to undergo several processes at Coventry before it was put into the watches, and that therefore the watches were substantially English.

The learned magistrate held that the defendant was guilty of applying a false trade description as to the country in which the watches were made or produced; and that the trade description was false "in a material respect." The "train" was the most essential part of the watch, and the "train" in each of the watches consisted of at least three wheels and four pinions of foreign origin, in addition to several other parts of greater or less importance. It was contended that the "train" was on the same footing as the main-spring and the hair-spring, which were nearly all of foreign origin in what were honestly called English watches. That was not so, because by the custom of the watch trade the main-spring and hair-spring were allowed to be of foreign origin in nearly every watch. It was further contended that those portions of the parts need not be considered, because they were imported in the rough, and had to be polished and fitted in this country. The place of origin was not altered by the fact that more or less work was done on them in this country. It was further contended that the watch was not made or produced till all the parts were put together, as in butterine (in *Bischop* v. *Toler*, *supra*, p. 95). There was a distinction between a mechanical combination, in which all the parts remained unaltered, and a chemical combination, in which the several parts were lost in the whole composition. The onus of proving innocence was on the defendant, and by not calling

the manager, he failed to adduce satisfactory evidence to account for their conduct.

The defendant was fined £20, and £10 costs, and all the watches seized at the London warehouse, except those which were not similar to the watches in question, were ordered to be confiscated.

On appeal (Nov. 14, 1900) the case was remitted to the magistrate to ascertain whether he had held as a matter of law that, because some parts of the watches, other than the main-spring, hair-spring, and screws, were partly manufactured abroad, he was bound to convict the appellants of applying in the term "English Lever" a false description; or whether he had arrived at his conclusion as a determination of fact upon evidence as to the recognised meaning of the epithet "English" as applied to watches in the watch trade.

The learned magistrate said he came to the conclusion as a determination of fact upon evidence produced before him that in the watch trade no watch was called "English" which contained foreign parts of material importance, other than the hair-spring and main-spring or things of comparatively insignificant character, such as screws, and that certain parts of the watches which had been specified were of most material importance, and were imported from abroad in such a condition that they were foreign parts when they arrived in this country, and remained foreign parts after they had been operated

upon, polished, and fitted into the watches by the appellants.

The appeal was dismissed on the ground that the question was one of fact, and no appeal lay.

See also cases cited in Chapter VIII.; and *Cameron* v. *Wiggins* (*supra*, p. 83).

The provisions of § 18 as to false descriptions not applying in certain cases are fully dealt with in paragraphs 4 to 11 of the General Order, 1906 (see *post*, p. 203).

It will be noticed that § 18 only applies where the description is without any doubt not calculated to mislead, such as where a description had become associated with a particular class of goods in a manner which practically precludes any possibility of deception, as "Portland Cement," "Bath Chaps," "Brussels Carpet," "French Polish," "Patent Leather," "Wellington Boots," "American Cloth," "German Silver." Although such descriptions as "Kidderminster Carpets," "Balbriggan" on hosiery or "Shetland" on shawls are primâ facie merely phrases descriptive of the method of manufacture, they may yet be misleading as to the place of origin. If goods made in Germany are marked "John Smith, Sheffield," they must be further marked "Made in Germany" in full. The word "Germany" alone would not be enough to counteract "Sheffield." And if goods are made in and bear the name of a place abroad which is identical with or a colourable imitation of the

name of a place in the United Kingdom, the name of the country in which the place is situated must be added; *e.g.* Boston in Massachusetts should be followed by "U.S.A." or "Mass."

But "Havannah" as applied to cigars is not merely a descriptive name. It is an indication that the cigars are made in Havannah and of tobacco grown in Havannah.

In *R.* v. *Robinson & Barnsdale* (Times, April 2, 1901) the defendants were charged with having sold two boxes of cigars to which a false trade description had been applied, and for applying a false trade description to the same, namely, as to the place or country where the goods were made or produced. On each of the two boxes was the word "Havannah;" on one box the words "La Rosa Santiago de Cuba de Lux;" and on the other, "La Rosa Santiago de Favorita." Very little, if any, Havannah tobacco was in the cigars, which were made in Nottingham or London. On the back of the box were the words "Made in England." The defendants were fined £10 on the first, and £5 on the second summons, and 20 guineas costs.

In *R.* v. *Lipton* (32 L R. Irish C.L. 115), however, where the defendant Lipton, who has a large curing establishment in Chicago, sold at his establishment in Ireland hams with the descriptions, (*a*) "Lipton's prime mild cure," and (*b*) "Finest quality smoked ham—own cure—at Lipton's market," it was held

that in neither case was there a false trade description. The justices and one of the judges, however, were of opinion that such use of the description by an Irish tradesman was likely to be deceptive.

In *Morris* v. *Royle* (31 L.J. (Jo.) 339) a tradesman of Salford sold bacon labelled "Finest Wiltshire Cut." The bacon came from Ireland, but the defendant set up successfully before the justices and the High Court that the description referred, not to the place of origin of the bacon, but to its shape and the mode of cutting.

In *Starey* v. *Chilworth Gunpowder Co.* (L.R. 24 Q.B.D. 90) the respondents, who were manufacturers of gunpowder, had contracted to supply the English Government with gunpowder. Owing to an accident, they were unable to supply gunpowder manufactured by themselves, so bought German gunpowder, and packed it in barrels supplied by the English Government. They put labels upon these barrels bearing their own name and a description indicating that it was gunpowder of their own manufacture. It was not disputed that the gunpowder supplied was as good as that which they had contracted to supply, but no indication was given that it was of German manufacture. They were held to be guilty of applying a false trade description to goods with intent to defraud within the meaning of § 2, subsec. (1) (*d*).

In *R.* v. *Harrod's Stores* (Times, Jan. 28 and Feb. 4 and 10, 1898) the defendants were charged with

exposing for sale, selling, and having in their possession for sale china to which the false trade description of "Dresden" was applied. The defendants had issued a Christmas circular stating that their buyer had made purchases at Berlin, Dresden, Meissen, and Vienna. A purchase was made of china for 15*s.* 6*d.*, invoiced as "Dresden," although it was a common ware known in the trade as "Coburg china." On the original invoice "Dresden" did not occur, but the purchaser asked that it should be inserted in the purchase note, as she was buying it for a friend, and wished it designated as it was in the trade circular. The defence was that "Dresden" was a generic name, such as "Venetian" applied to glass made in London, and was applicable only to the style and decoration. The magistrate could not accept the interpretation that china made or decorated anywhere could be properly sold as "Dresden," and fined the defendants £20, and 20 guineas costs.

See also *Cameron* v. *Wiggins* (*supra*, p. 83), and *R.* v. *English Farmers' Association* (*supra*, p. 83), and the cases cited in Chapter VIII.

By § 10 (2). In any prosecution for an offence against this Act, "In the case of imported goods, evidence of the port of shipment shall be primâ facie evidence of the place or country in which the goods were made or produced." And by the Merchandise Marks Act, 1891, § 1, "The Customs entry relating to imported goods shall, for the purposes of the

Merchandise Marks Act, 1887, be deemed to be a trade description applied to goods."

(*c*) As to the mode of manufacturing or producing any goods.

See *R.* v. *Lipton* (*supra*, p. 100).

In *R.* v. *Bramall* (Times, Dec. 18, 1891), on an information laid by the Secretary of the Filecutters Association, the Board of Trade prosecuted the defendant at Sheffield for marking certain files sold to George Pollard of Liverpool as "hand cut," whereas they were "machine cut." The defendant was fined £10, and 10 guineas costs, and an order was made that the mark should be taken off the files.

In *Kirshenboim* v. *Salmon and Gluckstein* (1898, 2 Q.B.D. 19) the respondents were charged with selling cigarettes to which a false trade description, namely, "guaranteed hand made," was applied. The cigarettes were in fact machine made, but were of equally good quality as hand-made cigarettes. The magistrate held that there was no intention to deceive the buyer, but only to save expense by using up a stock of old labels, and that the description, though untrue in fact, was not a false trade description in any material respect, as regarded the cigarettes sold, within the meaning of § 3, and he dismissed the information.

On a case stated, it was held that the fact that the cigarettes sold as "hand made" were as good in quality as hand-made cigarettes afforded no defence;

that the description was false in a material respect; and that the respondents, by knowingly applying the false description, had not acted innocently, and were guilty of an offence against the Act.

LORD RUSSELL, C.J., in giving judgment, said that the respondents, in utilising an old stock of labels, had acted not innocently, but deliberately.

Similarly, in *R.* v. *Phillips* (Times, Sept. 28, and Dec. 8 and 11, 1900) the defendant was found guilty of applying the term "hand cut" to tobacco not cut by manual labour.

In *R.* v. *Graeger* (Times, Feb. 19 and 20, 1890) the defendant was charged with having in his possession for the purposes of trade a number of bottles of sparkling wine to which a false trade description had been applied. The defendant had been in the habit of importing still wine, and paying thereon the usual still-wine duty; he had never paid the sparkling wine duty of 2*s.* 6*d.* per gallon. He had, however, concealed nothing from the Custom House officers. He converted the still wine into sparkling wine in this country by injecting carbonic acid gas into the bottles.

For the defence it was contended that the method adopted by the defendant of making the still wine into sparkling was rapidly coming into vogue on the Continent, and was much healthier than the other way; that the defendant had brought the machinery over to this country, and had wine from Epernay,

the Mozelle district, the Rhine district, and Burgundy, and having aerated these wines, sold them openly. In these circumstances there was no breach of the law, nothing in fact even equivalent to reprehensible conduct, and the Custom House authorities had treated the defendant harshly in seizing his wine, because they thought he was liable for the additional duty on sparkling wines. There was no evidence that the wine was deteriorated or made unwholesome. It was in fact sparkling wine, and therefore there was no false trade description, and no infringement of the Act. The magistrate, however, held that the defendant had committed a breach of the Act, and fined him £20.

In *R.* v. *Lipton, Ltd.* (Times, June 16, 1899), a prosecution was instituted to test the validity of weighing paper with tea, and including the weight of the paper in the alleged weight of the amount of tea sold. The prosecution alleged that the statements on the packets of tea sold as to the weight of the tea was a description within the meaning of the Act. It was contended on behalf of the defendant that it was the custom of the tea trade to weigh the paper in which the tea sold was wrapped with the tea, and that the packet of tea was sold, and not a certain quantity of tea.

The defendants were charged on three summonses with having sold goods, namely, tea, to which a false trade description as to the weight of the said goods

had been applied contrary to § 2; and on two summonses with having had possession for use for trade (1) of a weight which was not of a denomination of a Board of Trade standard, and (2) of certain weights which were not stamped as required by § 29 of the Weights and Measures Act, 1898.

Evidence of trade custom was rejected. The defendants were fined on the first three summonses £10, and 15 guineas costs, and the other two summonses were withdrawn upon the defendants giving an undertaking and paying 21s. costs.

Compare *Langley* v. *Bombay Tea Co.*; and *Star Tea Co.* v. *Whitworth* (*supra*, pp. 86–90).

The provisions of § 18 as to "generic" terms may apply to cases under this subsection.

(*d*) As to the material of which any goods are composed.

In *Gridley* v. *Swinborne* (5 T.L.R. 71) the question was whether "Swinborne's Patent Refined Isinglass" was an improper description of the article sold under that designation within the meaning of the Act. The charges against the defendant were—

(1) that he did apply to certain goods, to wit, gelatine or other substance, a false trade description as to the material of which such goods were composed, by which description the goods were falsely indicated to be isinglass;

(2) that he did unlawfully sell or expose for sale certain goods, to wit, gelatine or other substance, to which had been applied a false trade description as to the material of which such goods were composed, whereby the goods were falsely indicated to be isinglass;

(3) did unlawfully apply a false trade description, whereby the said goods were falsely described to be subject to an existing patent, or to be patent isinglass (see *supra*, Chapter I., p. 45 *et seq.*); and

(4) did unlawfully sell or expose for sale goods to which a false trade description had been applied.

It was proved that twelve packets of what was termed "Swinborne's Patent Refined Isinglass" were on Feb. 6, 1888, purchased at the respondent's place of business. On the packets were the words "Swinborne's Patent Refined Isinglass," and on the back the words "Swinborne's Patent. Warranted pure and free from adulteration." On analysis the contents of the packets were shewn to be, not isinglass, but gelatine. Isinglass is a particular form of gelatine; it is the swimming bladder of the sturgeon and other fishes. Under Swinborne's Patent—which, being dated 1847, had long since expired—gelatinous matter might be made from hides or skins, or from cod sounds, or other fishy matters. Isinglass is a natural product, and cannot be made. Gelatine, if made

from cod sounds (which are the swimming bladders of that fish) comes from a gelatinous substance, and is altered from being isinglass to being gelatine. Isinglass and gelatine are chemically the same when pure, but not physically, isinglass being chemically one of the forms of gelatine. Swinborne's Patent Refined Isinglass had been generally known as an article of commerce, and sold under that description since 1847.

The Lord Mayor dismissed the information on the ground that there was no evidence of an offence under the section, and that the description was not misleading.

Upon a case stated, the Divisional Court upheld the decision of the Lord Mayor. LORD COLERIDGE, C.J., after referring to the evidence of Professor Attfield that in 1854 the word "isinglass" was used as frequently as gelatine to describe gelatinous matter; and of the well-known chemist Brand, who certified that, having compared isinglass proper with the article sold by the respondent's firm, he found that the latter was the more concentrated and perfect form of isinglass, continued, "This was a criminal charge: a mens rea would have to be made out. It was not admitted that isinglass was scientifically not the same as gelatine. But there was quite enough evidence for the Lord Mayor to be justified in holding that there had been no false trade description."

The case of *Chearin* v. *Walker* (*supra*, p. 47), in

which a wrapper containing words in the form on the wrapper sold in this case was held to be a false representation of an existing patent, was held not to govern the facts in *Gridley* v. *Swinborne*, which, after all, simply amounted to a decision of facts, from which no inference could be drawn that the magistrate had decided wrongly in law.

The cases on this subsection are chiefly in relation to textile fabrics; *e.g.*—

R. v. *Whiteley* (Times, Jan. 16, 1895), in which the defendant was charged with selling a certain material under the name of "flannelette," alleged to bear a false trade description within the Act. "Flannelette" was shewn to be all cotton, and to contain no wool at all. The magistrate held that there was no ground of action unless the public were deceived, and that there was no false trade description; and he dismissed the summons, with 20 guineas costs to the defendant.

R. v. *Thomas Henry Downing* (Times, Oct. 17 and 20, 1893). The defendant was charged at Leicester by the Board of Trade, upon the information of the Secretary of the Nottingham Chamber of Commerce, with having applied a false trade description to women's combination dresses and vests, in breach of the Merchandise Marks Act, with intent to defraud. The goods were marked "natural wool" and "natural cashmere," but were composed of half wool and half cotton. The defence was that "natural

wool" was only a trade term. High-priced articles were composed of all wool, and low-priced articles, although described as "natural wool," were known to contain cotton and wool.

The Bench found as a fact that the description used was a false trade description under the Act, and the case did not come within § 18. A fine of £5 and costs was imposed.

R. v. *Jones Bros.* (Times, Jan. 9 and 16, 1899), for selling as linen a material known in the trade as "Union"—that is, a mixture of cotton and linen. Fined £10, and 10 guineas costs.

R. v. *Dr. Deimel Underwear Fabric Co.* (Times, Aug. 22, and Oct. 24, 1903), for applying the false trade description, viz. "Dr. Deimel's Linen Mesh Underwear Reg^{d}," to goods of linen and cotton mixture (known as "Union"). The description was not registered in this country. The "Linen Mesh" was originated by the defendants and used without complaint in America for many years before its introduction by them to England in 1899. It was contended for the defence that in the trade the description is recognised as relating only to the underwear goods manufactured by the defendants; and that the cost of its manufacture with cotton was more than for linen alone, which was unsatisfactory as underwear. It was argued that the description was on the same footing as that of a "cork hat" or "silk hat," which was not composed wholly of cork

or silk respectively. A fine and costs amounting together to £37 8*s.* was imposed.

R. v. *Levy* (Times, Nov. 26, 1903). The defendant was charged with unlawfully and falsely applying a trade mark to certain goods, viz. a "loofah sock." The sole proprietor of the "Vitalite patent" sock, the retail price of which was 6*d.*, claimed that other loofah socks sold at a much lower price were inferior in quality. The defendant exposed in his shop window for advertising purposes one of these socks, which was two feet in length: he obliterated the words "Vitalite" and "trade mark," leaving untouched the other printed matter, and affixed a label bearing the words "Loofah sock, 3½*d.*" He was fined £10, and 5 guineas costs, and the exhibited sock was ordered to be forfeited.

Meadows v. *Catesby* (L.T. (Jo.) 107, p. 440). The defendant was summoned for unlawfully applying, and causing to be applied, a false trade description to a mattress. The complainant bought a wool mattress for £1 7*s.* It was invoiced as wool. It was really a mixture of hair, string, jute, calico, &c., 60 or 70 per cent. of jute or hemp, and 30 or 40 per cent. of "carpet wool." Fined £10, and 3 guineas costs.

Other cases within this subsection (*d*) are—

R. v. *Peel* (Times, Jan. 11, 1888). The defendant was charged at Birmingham with having applied a false trade description to jewellery. He supplied a number

of trinkets alleged to be composed of silver to the extent of 800 out of 1000 parts. When tested, they were found to be much below the standard mentioned. The defence was that, allowing for solder used in making up the trinkets, the quality was not materially deficient; further, that the description on the invoice was not a trade description within the Act.

The learned stipendiary magistrate said that the questions which arose were: (1) did the defendant apply a false trade description by sending with the goods in the way mentioned the invoice which described the goods as 800 out of 1000 parts silver? (2) was it a trade description? and (3) was it a false trade description?

He was of opinion that a false trade description was applied, and the defendant, not having proved that he acted without intent to defraud, must be convicted of applying the false trade description; and not having proved that he acted innocently, must be convicted of unlawfully selling the goods.

As this was the first prosecution under the Act, a nominal fine of 20*s*. was imposed in each case.

R. v. *Nicholls* (Times, Dec. 14, 1896). The defendant, a provision dealer, was charged with selling American lard with a false trade description. The prosecution alleged that American lard refined in Belfast was stiffened so as to be merchantable and marketable with about 10 per cent. of ox stearine, and sold as pure lard. There were 44 barrels, each

containing 100 to 120 bladders, and each barrel was stamped "Pure bladdered lard. Produce of the U.S. Refined in Belfast." There was also a representation of a snowdrop, the registered trade mark of one Topping, the consignor to the defendant. Also, each bladder was marked "Guaranteed pure."

Mr. De Rutzen said "the case did not come within the eighteenth section inasmuch as for years before its passing 'refined lard' was generally known as meaning 'compound lard,' and the obvious answer to that line of defence was that the trade description of the barrels sold was not 'refined,' but 'pure bladdered lard.'" The contention of the defendant that the words "pure bladdered lard" must be read with the words "refined in Belfast" involved the misinterpretation of the word "refined," for it could not be strained to mean the mixing together of two perfectly different things. The other contention of the defendant, that he had taken all reasonable precautions against committing an offence, and had no reason to suspect the genuineness of the trade description of the goods sold, failed. The defendant was guilty of negligence in not seeing that the lard was accurately described. Fined 40s., and 30 guineas costs.

R. v. *William Hall* (Times, Jan. 4, 1889). Charged with selling a bottle purporting to contain Condy's fluid, whereas it was found to contain carbolic acid. It was held that the sale was made, not wilfully, but

negligently, and a fine of 20s. and £4 costs was imposed.

3.—(1) For the purposes of this Act—

. . . . .

The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act.

We have already dealt at length with the question as to what is a "false trade description," and pointed out that practically each case must be decided on its own merits, the question being whether or not the trade description in dispute is false "in a material respect." The courts have most stringently interpreted this section of the Act, as the case of *Starey* v. *Chilworth Gunpowder Co.* (*supra*, p. 101) will shew. There, although the substituted gunpowder was admittedly as good as that contracted to be supplied, and was accepted by the Government, the

defendants were held guilty of applying a false trade description to their goods.

Again, in *Kirshenboim* v. *Salmon and Gluckstein* (*supra*, p. 103), the fact that the goods supplied were as good in quality as what was asked for did not excuse the false description applied to the goods. That the legislature intended the application of the Act to "false trade descriptions" to be stringently interpreted is shewn by the following two subsections, which extends the definition of a "false trade description" given in § 3 (1), namely—

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person,

and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connexion with goods of the same description, and not having authorised the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not bonâ fide carrying on business in connexion with such goods.

Thus a false trade description not only means a trade description false "in a material respect" as regards the goods to which it is applied, but also includes every alteration of a trade description, where that alteration makes the description false in a material respect; and the application to goods of any such figures, words, or marks, &c., as in subsec. (2); and extends to the application to goods of any false name or initials as provided by subsec. (3).

These extensions of the definition were rendered

necessary by the fact that a trade mark is not a document within the definition of forgery at common law (see *supra*, Chapter I., p. 28), although under § 2 (1) (*a*) forging a trade mark is made an offence.

As to subsec. (2), see *R.* v. *Hersey* (*post*, p. 124); and as to subsec. (3) (*c*), see *R.* v. *Styles* (*post*, p. 130).

In *R.* v. *Lipton* (32 L.R. Irish C.L. 115) (*supra*, p. 100), where to a ham sold by the defendant was applied the description "Tracey's mild cure," and Tracey, whose name was so used, was the foreman curer of Lipton, it was held that Lipton was rightly convicted of an offence under § 3 subsec. (3) (*c*); and further, that subsec. (3) is to be construed disjunctively, and not conjunctively, as regards its subdivisions (*b*) and (*c*), that is to say, from the wording of subsecs. (*b*) and (*c*), in which it will be seen that one subsection refers to a "person carrying on business," and the other subsection to a "person not carrying on business," it is obvious that the word "and" connecting the two subsections should have been "or."

This subsection (3) is also useful as affording the means of stopping the use of "blind names," that is to say, names belonging to no persons or no firm in particular, or to a defunct firm, but made use of to induce people to believe that they represent some bonâ fide firm—such as "John Smith, Sheffield" (see *supra*, p. 99), or foreign-sounding names used with the intention of inducing the belief that the goods

to which they are applied are manufactured in the country to which the assumed dialect belongs, as in *R.* v. *Robinson & Barnsdale* (*supra*, p. 100).

There has been much use made of the names of other firms, whether by the adoption of their names, or a colourable imitation of their names, or the use of their labels.

Amongst other cases may be mentioned the following:—

R. v. *James Butler* (Times, May 31, 1889), for selling mineral waters in bottles of other manufacturers. Although the defendant had gummed his own labels on the bottles, he was convicted and fined.

In *R.* v. *Evans* (Times, Oct. 26, 1888), a similar charge, the objection was taken that the defendant was only the manager, and therefore not responsible. This was overruled, as § 2 made the seller or exposer for sale liable. The defendant was convicted.

In *R.* v. *Barnardo* (Times, Jan. 18, 1889) the defendant was similarly charged, but gave evidence that he had given instructions that no bottles bearing names of other manufacturers were to be filled, and such orders were communicated to the factory. The learned magistrate (Mr. Bushby) said that the defendant could not have taken more care, and the negligence was that of his servants. He dismissed the summons, but declined to grant costs, as the complainants had had their rights infringed.

Other similar cases are—

R. v. *Weedon* (Times, Nov. 25, 1890).
R. v. *Julier* (Times, Dec. 20, 1890).
R. v. *Hickling* (Times, July 28, 1890).
R. v. *Tissell* (Times, April 14, 1892).
R. v. *Lazarus Greenberg* (Standard, June 13, 1904).

In *R.* v. *Egan* (Times, Dec. 24, 1888) the defendants, Jane and Robert Egan, traded as cigar merchants, and the defendant, John Hobbs, was a cigar merchant. They received large quantities of cigars from one Trinchent of Antwerp, with the words "Manufactured in Belgium" upon each box. It was alleged that these words had been effaced by pasting over them certain Spanish labels—"El pavo Real," "Le industria tobaccos legitimos," "Superior Calidad," "Fabrica de Tobaccos de Superior Calidad," "El Felix," &c.—which was equivalent to fraud, as these labels conveyed the impression that the cigars were Spanish cigars. The defence was that the defendants acted in ignorance of anything illegal. The male defendants were fined £5 each and costs, but, as this was the first case under the Act, confiscation was not ordered upon an undertaking being given that no more such labels would be used.

In *R.* v. *Callow* (Times, Jan. 24, 1890) the defendant Callow, a maker of cigar boxes, supplied certain other defendants, cigar merchants, with boxes bearing the brand on the lid, "I. Feunte, Vera Cruz," a firm well known in the tobacco trade. The boxes were filled

by the defendant cigar merchants with cigars made in Shoreditch, and to the boxes were affixed labels—the exact counterpart of those put on at Vera Cruz. The brand was found at the defendant Callow's. Having been committed for trial to the Central Criminal Court, they pleaded guilty to the offences under the Act with which they were charged.

In *R.* v. *Crosse* (Times, Sept. 24, 1891) 24 bottles of the defendant's sauce were purchased, all marked "Yorkshire Relish. Goodall, Backhouse & Co.," but not made by Goodall & Co. It was alleged for the defence that retail tradesmen frequently sold the bottles with the label on, and that no injury was done to the complainants, as their labels were quite different; but Mr. Mead, the learned magistrate, said it was satisfactory to him to believe that what the defendant had done was not with the deliberate intention of misleading the public, and trading on the reputation of the complainants. At the same time he had made use of another man's property, and was open to great censure. Fined 20*s.*, and 23*s.* costs, on each summons.

In *R.* v. *Clarke* (Times, Oct. 26, 1891) the defendant was charged with applying a false trade description to bottles of stout. He had purchased his business twelve months previously, and used labels, of which he had 50,000 in stock, handed over by the trustees of his predecessor. He had stout from another brewer besides Guinness, Son & Co., but having used

up all Guinness's stout, he made use of one of Guinness's labels. He pleaded that he had no intention to defraud, but was convicted and fined.

In *R.* v. *Jeffery* (Times, Oct. 12, 1892) the defendant bought two old rifles by Webley, which were not in an effective condition for shooting, but were "wasters." He sent them to Ellis & Son, Birmingham, with this letter: "We send you to-day two Webley barrel Martini rifles—Webley's name to remain on the barrels, but we would sooner have the barrels marked only 'Webley barrel,' as we don't care to have 'Birmingham' on it, as the next order might go to Webleys." The barrels had been originally marked "P. Webley & Son, Birmingham. Made expressly for P. McGibbon." The original inscription had been filed out, the only words left marked on the barrel being "P. Webley barrel."

For the defence it was urged that there was no evidence that the rifles were to be sold as new; that the defendant wanted to sell the rifles again as second-hand, but it was necessary for the barrels to be repaired, and that no one was likely to be deceived. The defendant was fined £10 and £5 costs, and the two barrels were ordered to be forfeited, and handed to Mr. Webley.

R. v. *Samuel Goff* (Times, Nov. 6, 1899). The defendant, who traded as Goff & Co., at 136, Strand, was summoned for unlawfully causing a certain false trade description, to wit, "J. Mortimer & Sons, New

Bond Street, W.," to be applied to a double-barrelled gun.

There were five other summonses against the defendant charging him with—

(1) imitating the trade mark of J. Mortimer & Sons;
(2) putting a mark on the gun calculated to deceive;
(3) using a false trade description calculated to lead persons to believe that the gun was the manufacture of J. Mortimer & Sons;
(4) applying a certain false trade description, which was a colourable imitation of the name of Mortimer & Sons; and
(5) unlawfully using the name of J. Mortimer & Sons.

There was also a seventh summons against the defendant, charging him with unlawfully being in possession for sale of divers guns, to which a false trade description, to wit, "Jackson, of Wigmore Street," "Parker, Field & Co., of High Holborn," and others, was applied.

The prosecution was undertaken by the Gun Makers Association, and was instituted especially to stop the offence, which was on the increase, of selling guns of inferior manufacture bearing names of well-known makers.

A Mr. Thorne saw a double-barrelled gun at the defendant's shop bearing the name of "J. Mortimer

& Sons, New Bond Street, W.," and marked "Price £6 15s." He entered the shop, and was also shewn guns bearing the names "Jackson," "Parker, Field & Co.," and "Blissett." They were all represented to be second-hand. He purchased the gun marked "J. Mortimer & Sons" for £6 10s.

It turned out to be a new gun of inferior manufacture which, as was proved by invoices found on the premises, was purchased by the defendant for 35s.

As the object of the prosecution was to get at the real offenders, the prosecution applied to the defendant for information as to where he obtained the guns, and who put the false names and descriptions on them. On Oct. 27 defendant's manager called on the solicitors to the prosecutors, and said he was unable to give the information desired, as they got the guns in exchange for other articles, and kept no record of where they came from.

Inspector Pardo entered the defendant's premises at 17 and 18, King Street, Covent Garden, under a search warrant, and found two other guns bearing the name of "Mortimer," one bearing the name of "Jackson," and two bearing the name of "Blissett." He also found another gun without any name at all, but which was exactly similar to, and evidently by the same maker as, the "Mortimer" gun sold to Mr. Thorne.

Mr. Mortimer, of Edinburgh, gave evidence that

the guns marked with his name were not their manufacture, but were in his opinion "utter rubbish," and the cheapest guns it was possible to make.

The defendant pleaded guilty to all the summonses.

In mitigation of punishment, it was urged on behalf of the defendant, that he was an invalid, over eighty years of age, and took no active part in the business, which was left entirely to the manager, who was present in court. It was admitted that the defendant company had marked the names on the guns in question, but had done so quite innocently, as they were not aware that they were infringing the name or trade mark of other persons. The names used were those of persons believed to be non-existent. They would give an undertaking not to be guilty of a repetition of the offence.

The learned magistrate (Mr. Marsham) said it was clear that there was an intention to deceive purchasers, as the guns were represented to be second-hand, whereas they were new. It was a very serious offence, and dealing with two summonses—the one for selling the gun to Mr. Thorne, and the other for having it in possession for sale—he fined the defendant £20 on each summons, and £21 costs.

In *R.* v. *Hersey* (Times, June 14, 1900) the defendant was charged with selling certain cigarettes to which was applied a false trade description, viz. an arrangement or combination of figures, words, and marks calculated to lead to the belief that the goods

were of the manufacture of S. Gourdontis & Co., of Alexandria. The summons was dismissed on the ground of dissimilarity between the complainant's and defendant's labels.

In *R.* v. *Tooth* (Times, May 25, 1891) the defendants, auctioneers, were summoned for having in their possession for sale a pianoforte to which a false trade description had been applied. The defendants published a catalogue of a sale to take place on May 1, in which was an entry of a piano by "C. H. Backstein." On the piano were the words, "C. H. Backstein, Hof Pianoforte Fabrick." The prosecution was undertaken by Messrs. Beckstein, the well-known pianoforte manufacturers.

Evidence was given as to another piano marked "Schiedmayer, Berlin," which was made by Rosenaar of Berlin.

The defence was that the piano was sent in the ordinary way for sale, and was withdrawn immediately the prosecutors complained. The learned magistrate (Mr. Newton) said the defendants had acted negligently, and fined them £10, and 5 guineas costs.

On appeal to Quarter Sessions (Times, Aug. 7, 1891), SIR PETER EDLIN, in the course of his judgment, said: "Fraud was not a necessary ingredient of the offence charged, and it was not suggested that the appellants were cognizant that the mark was false. The mere possession, for sale, of such spurious articles was primâ facie an offence. Every person who had

in his possession for sale any goods to which a false trade description was applied was to be deemed guilty of an offence against the Act, unless he proved (*a*) that, having taken all reasonable precautions, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark or description; (*b*) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods; or, (*c*) that otherwise he had acted innocently. It was contended for the appellants that the expression 'reasonable' should be applied with regard to the position of the individual possessed of the goods, and to the nature of his business. But this reading of the word, involving infinite distinctions, would be inconsistent with the context, and contrary to the manifest intention of the Act. The liabilities consequent on any infringement of the Act were the same with respect to 'every person,' and it was difficult to see why fewer precautions should be required from one class of persons than from another. Auctioneers, like other dealers in miscellaneous wares, were not presumably experts in respect of the goods they sold, but their dealings might not be the less extensive in trade-marked articles. It was further contended that the words, 'or that otherwise he had acted innocently,' should be read entirely apart from (*a*) and (*b*). If the word 'innocently' were applied

simply in the sense ordinarily attaching to it, proof by the accused person—a competent and presumably a credible witness in his own behalf—that he was ignorant of the fictitious character of the description would suffice to exonerate him. The practical effect of that construction would be to render the immediately preceding paragraphs in the subsection of no force. In the opinion of the Bench the circumstances did not admit of such defence in either of the present cases, and, upon the construction of this enactment indicated above, both convictions must be upheld. The Bench held that upon the facts the defendants had been guilty of negligence, but accepted it as a fact that they had no suspicion that the descriptions were fictitious. As there was no imputation of bad faith, and orders had been made that the goods should be delivered to the prosecutor in one case, and rightful owner in the other, the penalty would be reduced in each case to 20*s.* and costs."

In *R.* v. *Wythe* (L.J. Newspaper, vol. 30, July 15, 1895) the defendant, a grocer, was summoned by Messrs. Guinness, Son & Co., for selling bottles of stout to which a false trade description had been applied. He had received from the prosecutors stout in bulk, with labels in proportion to attach to the bottles, under an agreement not to sell any other brown stout. The prosecutors' agent visited the defendant's place of business, and saw there stout purporting to have been manufactured by Guinness,

as well as stout of other makers. When asked why he sold other brands of stout, the defendant said that old labels were being used up. It was contended in his defence (1) that the labels were put on by mistake by his shop-boy, and (2) that the loss in specific gravity. which the prosecutors alleged was a proof that certain stout sold by the defendant was not manufactured by the prosecutors, was due to evaporation. The defendant was fined £5, and 10 guineas costs.

The Law Journal pertinently suggests that where the identity of the article sold depends on analysis, it would certainly be fairer to a person accused to follow the procedure of the Sale of Food and Drugs Acts; and it doubts whether the evidence before the magistrate proved more than that Guinness's stout had been diluted or adulterated.

There have been many prosecutions for applying false trade descriptions to goods under various circumstances. Reference is made shortly to the following:—

MISCELLANEOUS.

An anonymous case at Wrexham (Times, Nov. 12, 1889), where a German brace and scissors were sold as Sheffield.

R. v. *Smith* (Times, Sept. 11, 1889). German saws as Sheffield.

R. v. *Watts* (Times, April 7, 1897). Canadian ham,

American cured, as York. Defence: sale made by a shopman without authority.

R. v. *Van Straughton, Loon & Co.* (Times, Jan. 20, 1899). Dutch butter as Danish.

R. v. *Semprini* (Times, Jan. 25, 1899), where the defendant applied a false trade description in certain consignment notes in which the article supplied was consigned as "fresh butter," or "butter," and was summoned under the Margarine Act and the Merchandise Marks Act for forwarding margarine without consigning it as margarine, and for not branding margarine on the packages containing it; and for applying a false trade description to it. Fined £10, and 2 guineas costs.

R. v. *Planner* (Times, Feb. 1, 1899). Adulterated butter.

R. v. *McKnight* (Times, Dec. 12 and 20, 1900, and Jan. 22 and Feb. 9, 1901). Defendant supplied a keg of pure Dutch butter every week to a provision merchant. Upon analysis it was found to contain 8 per cent. of foreign fat. Another analyst deposed to its containing as much as 10 per cent. It was labelled "Dutch Produce—Guaranteed Pure Butter," and an invoice also guaranteed it to be pure butter. The summons was dismissed without costs on the ground that there was no evidence that a false trade description was applied to the keg, the butter in which was analysed, another keg having been delivered to which the analysis referred.

R. v. *Davies Bros.* (Times, May 14, 1903). Supplying margarine to one of the Rowton Houses in boxes marked "French Produce—Guaranteed Pure Butter." Fined £20, and £5 costs on one summons, and 1 guinea on three other summonses.

R. v. *Hermann Rhensius* (C. Muller & Co.) (Times, March 9, 1899). German lamp chimneys as Austrian.

R. v. *Tolhurst* (Times, May 18, 1899). White lead described as "genuine white lead ground in oil," in which 25 per cent. of the pigment was barytes, or ponderous earth. In this case information with respect to the persons from whom he obtained the goods was demanded, under § 2, subsec. (2), clause (*b*), by the prosecutor, and refused by the defendant. Fined £20, and 5 guineas costs on one summons, and a nominal penalty on the others.

R. v. *Johnson* (Times, March 7, 1900), a prosecution under § 5, subsec. (3). The defendant used "Hovis" tins for other flour. Fined £15, and 10 guineas costs.

R. v. *Jonas Jung* (Times, Sept. 26, 1900), a similar case.

R. v. *McCarthy, Buck & Co.* (Times, April 6, 1900). Applying the false trade description of "Richards, London," to a gun, being a colourable imitation of the name of Messrs. Westley, Richards & Co., Ltd., Gunmakers, London. The defence was that the gun was marked at the request of the purchaser, and there was no intention to defraud. Fined in all £30 10*s.*

R. v. *Styles* (Times, Feb. 6, 1901). Applying three

fictitious names to three guns, viz. "Cox & Co., London," "Hatton & Co., London," and "Allday & Co., London." Fined in all £45 15*s*.

R. v. *Adcock, Easton & Co.* (Times, Oct. 26 and 28, and Nov. 4, 1901), applying the false trade description of "Chloros" to a disinfectant. The defendants and the United Alkali Co. (the only manufacturers of "Chloros") tendered to supply the Southwark Borough Council with "Chloros" at 1*s*. and 1*s*. 3*d*. per gallon respectively. The defendants' tender was accepted, whereupon they bought "Chloros" from the prosecutors (the United Alkali Co.) at 1*s*. 6*d*. per gallon. Consequently—unless they fulfilled their contract at a considerable loss—the article supplied must have been adulterated with considerable quantities of water, or some other liquid, so as to diminish its efficacy as a disinfectant. "Chloros" was described as sodium hypochlorite of not less than 10 per cent. available chlorine. The defendants delivered sodium hypochlorite of less strength. It was argued for the defendants that they contracted to supply sodium hypochlorite, and, if what they supplied was not of the strength stipulated for, it did not follow that they applied a false trade description; that they had committed no offence under § 3, subsec. (1); if any offence had been committed it was under subsec. (2); and the prosecutors had no monopoly in the word "Chloros." They were fined £20, and £25 costs on each of two summonses, or £90 in all.

R. v. *Joseph Tobins* (Times, May 14, 1904) for selling, &c., phonograph records to which a false trade description had been applied. Proceedings taken for the purpose of protecting Mr. Edison's reputation. Fined £5, and 5 guineas costs on one, and 10 guineas, and 5 guineas costs on another summons.

R. v. *Woolf Weisberg & Max Strauss* (Times, June 14 and 24, 1904). Applying a false trade description to 3120 incandescent gas mantles, and having in their possession for the purposes of trade the trade marks "A.U.R." of the Welsbach Incandescent Gas Lighting Co., Ltd., thus falsely applied. The defence was that the prisoners were in the employment of another German who could not be found. They were found guilty at the Central Criminal Court, and Strauss, who had been previously convicted, was sentenced to nine months', and Weisberg to four months' imprisonment.

TOBACCO, ETC.

R. v. *Muriatti* (Times, April 14, and May 3, 1890). False trade description applied to cigarette boxes. Alderman Renals, in giving his decision, said: "I hold that the covers are an indirect indication that the goods were made or produced in Turkey. As to the intention to defraud, I do not think the defendants intended to defraud, but they have not proved to me that they had no intention to defraud, as in *Starey* v.

Chilworth Gunpowder Co." (*supra*, p. 101). Fined 20*s*., and 5 guineas costs.

R. v. *Cohen, Weenen & Co.* (Times, April 19 and 26, and May 3, 1899). The defendants resorted to a trade expedient by selling machine-cut tobacco as "hand-cut" in order that higher prices might be obtained. For the defence it was urged that the trade description did not come within the Act as defined by § 3. The decision in *Kirshenboim* v. *Salmon & Gluckstein* (*supra*, p. 103) was distinguishable, as cigarettes were a manufactured article. "Bath buns" and "Swiss rolls" are terms denoting a particular class of goods. So "hand-cut" denoted a special kind of dark flake tobacco. The learned magistrate (Mr. Mead) decided that "hand-cut" was a description within the meaning of the Act, and its natural interpretation was that it was tobacco cut with a knife to which the hand was directly applied. No offence was committed with intent to defraud, for "machine-cut" and "hand-cut" tobacco were equally good, but members of the public had been deceived. Fined £4 on the first and £4 on the fourth summons, but no costs were allowed, as the real prosecutors were shrouded in mystery.

R. v. *Draplkin* (Times, June 14, 1900). Cigarettes made in London sold in boxes containing stamps which would give the impression that they were made in Egypt and imported. Fined £20, and 10 guineas costs, and £5, and 2*s*. costs on other summonses.

R. v. *Lazarus* (Times, April 19, and May 17, 1900). Applying "La Firmeza" to boxes of cigars. Committed for trial.

R. v. *Fernmore Jones* (Times, May 12 and 16, 1900). Cigarettes—the false description was "Egyptian." Egyptian cigarettes are made by Greeks, who have a secret way of blending tobacco and making cigarettes. The boxes had on them pictures of the pyramids and the sphinx, with a representation of an Egyptian stamp. A stamp issued by the Turkish Government, when placed on a box of Egyptian cigarettes, was a guarantee that they were genuine. If the cigarettes were made in England, there was a saving of 10*d.* per pound duty. The boxes were marked "Miramaro." The label was designed by Major Drapkin & Co. (see *R.* v. *Drapkin*, *supra*). The defence was that when asked for the cigarettes, they had none, so sent out for them to Drapkins. They paid 31*s.* for them, and sold them for 45*s.* It was held that the defendant had not acted innocently, and a fine of £5, and 5 guineas costs was imposed.

R. v. *Alexander Jones* (Times, May 15, 1900). Packet of cigarettes having upon it "Cigarettes Egyptiennes D. Theocaridi," and a label which, it was alleged, was similar in appearance to the Egyptian Government stamp. Defence: the packages had on them "Made in England." Defendant was formerly in partnership with Mr. Theocaridi, who used to manufacture in Egypt, and send over the cigarettes to

England. He had omitted to do so, hence the "fake." Fined £20, and 10 guineas costs.

R. v. *B. Morris & Sons, Ltd.* (Times, May 31 and June 15, 1900). Applying to certain cigarettes a false trade description, viz. "Seul Fabricant des Osiris, Commission et exportation, Cigarettes Egyptiennes, Qualité, Specialité, Osiris." The cigarettes were made of Turkish tobacco by Greeks. Fined £10, and 20 guineas costs, and 2s. costs on five other summonses.

China.

R. v. *Leon Hopeon* (Times, May 10, 1900). Exposed for sale certain china to which the false trade description "Dresden" was applied. It was manufactured in Thuringia, 250 miles from the Dresden manufactory. Fined 40s., and 2 guineas costs.

R. v. *Midland Education Co.* (Times, Nov. 9, 1901). Defendants had two hundred pieces of pottery marked "Wedgewood." Defence: blunder; apology; flashy imitations made in Germany. Undertaking given that in future such articles should be marked "Made in Germany." Fined £20, and 10 guineas costs above ordinary fees.

R. v. *Christie, Manson & Woods* (Times, Feb. 21, 1900, and 16 T.L.R. 442). For the facts of this case, see Chapter V. (*post*, p. 146).

CHAPTER IV

MASTER AND SERVANT

THE last clause of § 2 (1) decrees every person, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, to be guilty of an offence against the Act, who—

(*f*) causes any of the things above in this section to be done.

And by subsec.—

(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) that having taken all precautions against committing an offence against this Act, he had at the time of the commission of

the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) that otherwise he had acted innocently;

be guilty of an offence against this Act.

Consequently a master is made criminally liable for acts done by his servant in contravention of this Act, except under the circumstances provided for in clauses (*a*), (*b*), and (*c*).

In *Coppen* v. *Moore* (No. 2) (1898, 2 Q.B.D. 306) the question was reserved for a Special Court, whether under the Merchandise Marks Act, 1887, the employer could be punished for the unauthorised act of his servant; and it was held that the provisions of § 2 subsec. (2), which make it an offence to sell goods to which a forged trade mark or a false trade description is applied, make a master criminally liable for acts done by his servants in contravention of the section, when acting within the general scope of their employment, although contrary to their master's orders, unless the master can shew that he has acted in good faith, and has done all that it was

reasonably possible to do to prevent the commission of offences by his servants.

See the judgment of the court, pp. 175, 176.

It was on the ground that the defendant could not have taken more care, and the negligence was that of his servants, that the magistrate dismissed the summons against Dr. Barnardo (*supra*, p. 118).

By § 19 (3) nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who bonâ fide acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

A further exemption is thus made in favour of servants acting bonâ fide in obedience to the instructions of their masters.

And by § 6, where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the

things in this section mentioned to be done, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precautions against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but

shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Although these provisions protect the servant under the circumstances therein set out, servants are generally liable for acts done by them in obedience to the instructions of their masters, if such acts are in themselves illegal; thus it was held that an unregistered chemist's assistant, who, in the absence of his master, sells any poison, or preparation containing poison as defined by the Pharmacy Act, 1868, is liable to a penalty under § 15 of that Act, notwithstanding that he effects such sale on behalf of his master, and that his master is duly registered (*Pharmaceutical Society* v. *Wheeldon*, 24 Q.B.D. 683). But a master milk-seller may be convicted under the Sale of Food and Drugs Acts for selling adulterated milk, although the milk was adulterated by his servant without his knowledge or connivance (*Brown* v. *Foot*, 8 T.L.R. 268); but where defendant was summoned for a nuisance caused by smoke, and the nuisance was caused by a stoker employed by him, it was held that he was not criminally responsible for the negligence of his servant, and could not be convicted of the offence (*Chisholm* v. *Doulton*, 22 Q.B.D. 736).

It is always open to servants charged with any of the offences mentioned in § 6 of the Merchandise

Marks Act, 1887, to prove that they acted without intent to defraud.

The clauses (*b*), (*c*), and (*d*) of § 6 are very similar to clauses (*a*) and (*b*) of § 2 (2).

All three subsections of § 2 begin with the words, "Every person." Moreover, the word "person," whether preceded by "every," or "a," or "any," forms the commencement of many of the sections of the Act. It is therefore interesting to consider what meanings attach to the word "person" in the Act.

By § 3 (1) the expressions "person," "manufacturer," "dealer," or "trader," and "proprietor," include any body of persons corporate or unincorporate; and the expression "name" includes any abbreviation of a name.

By § 6 an exception is created of certain persons employed in the ordinary course of business. It is to be observed, however, that this section does not apply to the offences under the clauses (*a*) and (*c*) of § 2 (1), namely, (*a*) forging any trade mark, and (*c*) disposing of or having in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark.

A corporation or partnership or trade society can thus be convicted and fined, and, although a principal is not liable for the acts of his agent which he has not specially authorised, unless it be expressly so provided by statute, it was held in *Coppen* v. *Moore* (No. 2) (*supra*, p. 137) that a master is criminally

liable for acts done by his servants in contravention of this Act.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63)—

§ (1). In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.

§ (2). Where under any Act passed before or after the commencement of this Act any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

As to the circumstances under which a corporation can be indicted, see notes in Chapter VI. (*post*, pp. 151–156).

CHAPTER V

INTENT TO DEFRAUD AND ACTING INNOCENTLY

THE meaning of "fraud" and an "intent to defraud" has been amply considered.

In *Wood* v. *Burgess* (24 Q.B.D. 162; 59 L.J.M.C. 41) it was held that an intent to defraud a particular purchaser was not a necessary ingredient of the offence charged (see *supra*, p. 44).

In *Starey* v. *Chilworth Gunpowder Co.* (*supra*, p. 101), LORD COLERIDGE, C.J., said: "In the present case all further controversy is superfluous when once one has ascertained with certainty what 'fraud' means in the Act. I agree that if the word is used in the sense of putting off a bad article on a customer in order to get money unfairly, there is no evidence here of anything of the kind having been done. On the contrary, it is expressly found that the article supplied was as good as that which was contracted for. But that, I think, is not the correct meaning of the word 'fraud' as used in this Act of Parliament. The Act is directed against the abuse of trade marks, and the putting off on a

purchaser of, not a bad article, but an article different from that which he intends to purchase, and believes he is purchasing. It would apply to cases where a particular article, manufactured by a particular person, had acquired a widespread reputation (as, for instance, happened in the celebrated case of the fish sauce) (*Burgess* v. *Burgess*, 3 De G.M. & G. 896), and some one supplied another, and a different, article under that name, so as to make the purchaser take something which he did not know he was taking. That, I think, is the meaning of the word 'defraud' as used in the Act of Parliament, and in that sense only there was in the present case an intent to defraud."

MATHEW, J., added: "The words 'without intent to defraud' apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected."

In *R.* v. *Tooth* (*supra*, p. 125), SIR PETER EDLIN, in his able judgment, said: "Fraud was not a necessary ingredient of the offence charged, and it was not suggested that the appellants were cognizant that the mark was false. The mere possession, for sale, of such spurious articles was primâ facie an offence."

Upon every person, therefore, who is charged with an offence under § 2 (1) is cast the burden of proving that he acted without intent to defraud; and if charged with any of the offences enumerated in § 2

(2), he will be deemed guilty of an offence against the Act, unless he satisfies the court that he comes within the provisions of clauses (*a*) and (*b*) or (*c*) of that subsection.

Interesting illustrations of the meaning of the "intent to defraud" are to be found in the cases of—

R. v. *Cohen, Weenen & Co.* (*supra*, p. 133); and

R. v. *Muriatti* (*supra*, p. 132).

It would appear from the decision in *Gridley* v. *Swinborne* (*supra*, p. 106) that the prosecutor must prove a "mens rea" on the part of the defendant; but as to the extent of the "mens rea" and its application to corporations, see the interesting judgment of CHANNELL, J., in *Pearks, Gunston & Tee (Ltd.)* v. *Ward* (71 L.J.K.B. 656; (1902) 2 K.B. 1; 87 L.T. 51; 66 J.P. 774; and 18 T.L.R. 538), which is cited in Chapter VI. (*post*, pp. 153–156). At the same time it is immaterial that the purchaser was not deceived (*Kirshenboim* v. *Salmon & Gluckstein*, *supra*, p. 103).

It has been seen that where the person charged is actually and personally engaged in the commission of the various offences set out in subsec. (1) of § 2, and is in fact alleged to be an active participator in the offence, he has to prove that he acted without intent to defraud; but in subsec. (2), where the defendant may become passively the possessor for sale of any goods in respect of which an offence against the Act has been committed, he has to prove that "he acted innocently," that is to say, he must

explain, to the satisfaction of the court, the circumstances under which he came to have the incriminated article in his possession for sale. The same principles apply as in the plea that he acted without intent to defraud.

In *R.* v. *Christie, Manson & Woods* (1900, 2 Q.B. 522) (Times, Feb. 21, 1900) the defendants were charged with selling a white china dish, a pair of oval baskets, and a pair of candlesticks, to which forged trade marks were applied, namely, the trade mark of the proprietors of the Royal Porcelain Factory of Saxony.

The articles were sold in one lot, and were in fact of inferior French manufacture, but bore the Royal Dresden trade mark.

On the lot being reached, the auctioneer said to those present in the sale rooms, "Our attention has been drawn to this lot, and we sell this lot for what it is—you see what it is," at the same time putting his pen through the word "Dresden," as the lot was marked in the catalogue. No attempt was made to shew that the articles were real Dresden china. The magistrate convicted the defendants, but on a case stated, the Queen's Bench Division quashed the conviction, and held that a person who had reason to suspect the genuineness of the trade mark might, nevertheless, have acted innocently in selling goods to which the trade mark was applied, and might, therefore, be exonerated under this subsection. MR. JUSTICE

CHANNELL, in the course of his judgment, said: "It seems to me quite clear that there may be innocence of any intention to infringe the Act, even although there may be suspicion of the genuineness of the article or trade mark. That is what the word 'otherwise' means, I think."

It is difficult to reconcile this decision with that in *R.* v. *Tooth* (*supra*, pp. 125–127). In the latter case the auctioneers received the incriminated article for sale in the ordinary way of business, just as Messrs. Christie & Co. did; but in *R.* v. *Tooth*, immediately the defendants had a complaint as to the articles catalogued for sale, they withdrew them from the sale, whereas Messrs. Christie deliberately sold articles bearing forged trade marks, although they sold them as spurious articles. Yet in the case of *R.* v. *Tooth* the defendants were held to have acted negligently. It is almost impossible to criticise accurately a decision of fact without having been present at the trial. It must therefore be presumed that the respective facts of the two cases justified the decisions thereon.

In *R.* v. *Tooth*, SIR PETER EDLIN said: "If the word 'innocently' were applied simply in the sense ordinarily attaching to it, proof by the accused person that he was ignorant of the fictitious character of the description would suffice to exonerate him. The practical effect of that construction would be to render the immediately preceding pargaraphs in the subsection of no force."

Clause (*c*) must therefore be read in conjunction with clauses (*a*) and (*b*) according to the judgment of Sir Peter Edlin.

It will be noticed that clauses (*a*) and (*b*) are practically one clause, being connected by the conjunction "and," whereas clause (*c*) is immediately preceded by the word "or," and begins "that otherwise." According to MR. JUSTICE CHANNELL, "otherwise" means that innocence may exist in spite of a suspicion of the genuineness of the article, but the position is more fully explained by LORD RUSSELL, C.J., in delivering the judgment of the court in *Coppen* v. *Moore* (No. 2) (14 T.L.R. 416). "It seems clear," he said, "that clauses (*a*) and (*b*) of subsec. 2 apply to cases where goods in question are in the possession of the accused for sale, or are sold with the forged trade mark, or false trade description already stamped upon them or otherwise applied to them, and not to a case like the present, where the false trade description is applied upon the occasion and as part of the terms of sale; and in the latter case the accused must rely for his exculpation upon clause (*c*), namely, by shewing that he had acted innocently."

Illustrations of the application of the principle may be found in—

Kirshenboim v. *Salmon & Gluckstein* (*supra*, p. 103);

R. v. *Phillips* (*supra*, p. 104); and

R. v. *Fernmore Jones* (*supra*, p. 134).

CHAPTER VI

THE PROSECUTION
(INCLUDING FORFEITURE, APPEAL, EVIDENCE, ACCESSORIES, AND COSTS)

By § 2 (3). Every person guilty of an offence against this Act shall be liable—

(i.) on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii.) in any case, to forfeit to Her Majesty every chattel, article, instrument, or thing by

means of or in relation to which the offence has been committed.

(4) The court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the court thinks fit.

(5) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly.

Whether a person charged with an offence under this Act be dealt with summarily, or on indictment, the same principles are to be applied: *per* LORD COLERIDGE, C.J., in *Gridley* v. *Swinborne* (5 T.L.R. 71).

But it is absolutely necessary that a person charged with an offence to which § 17 of the Summary Jurisdiction Act, 1879, applies, be informed of his right to be tried by a jury, before he pleads to the charge. It is immaterial whether or not he knew of his right to be tried by a jury, or whether or not the court knew before the proceedings commenced that he intended to plead guilty in the course of the case : *R.* v. *Cockshott* (1898, 1 Q.B. 583 ; 67 L.J.Q.B.D. 467).

As a general rule offenders can only be prosecuted in the districts in which their offences were committed. There are, however, several statutory exceptions to this rule.

But where an offence is of such a nature that the offender may be proceeded against either civilly or criminally, there is nothing illegal or improper in a compromise of the criminal proceedings taken against him (*Fisher* v. *Apollinaris Co.*, L.R. 10 Ch. App. 297).

A difficulty may arise in the procedure against a corporation, especially where a corporation elects not to be dealt with summarily, for a corporation can only be indicted for such offences as are capable of punishment by fine alone—as, for example, libel (*Whitfield* v. *S.E.R.*, E.B. & E. 115). In every case, however, the persons actually implicated in the crime—whether they be members, or merely agents, of the corporation—can be indicted and punished : and where the proceedings are civil in substance, as, for instance,

where a corporation is prosecuted for breach of a statutory duty, the corporation is amenable to the criminal law.

As BOWEN, L.J., said in *R.* v. *Tyler* (1891, 2 Q.B. 592): "Where a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company." And this doctrine extends to cases of misfeasance as well as nonfeasance (*R.* v. *G.N. England Ry. Co.*, 9 Q.B. 315).

Since the statute 13 Edw. 1. c. 10 applied only to the Supreme Courts, a corporation can neither prosecute nor defend at quarter sessions. At petty sessions there is no such difficulty, as the provisions of the Summary Jurisdiction Act, 1879, expressly extends to corporations (see Adler's Summary of the Law of Corporations). A writ of certiorari has therefore to be obtained for the removal of the indictment into the King's Bench Division of the High Court of Justice, or the criminal side of the assizes.

But a corporation cannot have a "mens rea"—as BRAMWELL, L.J., said in the case of the *Pharmaceutical Society* v. *London and Provincial Supply Association* (L.R. 5 Q.B.D. 310), "Offences of commission are offences of individuals, not of corporations. A corporation cannot have the 'mens rea:' the individual offender must be got at." We therefore have to face the difficulty that whereas a charge under the Merchandise Marks Act is a criminal charge, and a "mens rea"

has to be made out (see judgment of LORD COLERIDGE, C.J., in *Gridley* v. *Swinborne, supra*, p. 109), a corporation being incapable of having a "mens rea" is incapable of prosecution for all offences in which "mens rea" is an element.

However, in the case of *Pearks, Gunston & Tee (Ltd.)* v. *Ward*, and *Hennen* v. *Southern Counties Dairies Co., Ltd.* (71 L.J.K.B. 656; 1902, 2 K.B. 1; 18 T.L.R. 538), it was held that in the circumstances of those cases a corporation can be liable for an offence under § 6 of the Sale of Food and Drugs Act, 1875.

The judgment of CHANNELL, J., affords a solution of the difficulty referred to. He said: "With regard to the other and important question whether a body corporate can be made liable under § 6, I agree with what has been already said, but having regard to the importance of the question, I will add a few words. By the general principles of the common law, if a matter is made a criminal offence, it is essential that there should be something in the nature of a 'mens rea,' and therefore in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at

any rate in default of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty, whether he had any 'mens rea' or not, and whether or not he intended to commit a breach of the law. Where the act is of this character, then the master, who, in fact, has done the forbidden thing through his servant, is responsible, and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation. If it does the act which is forbidden, it is liable. Therefore, when a question arises, as in the present case, one has to consider whether the matter is one which is absolutely forbidden, or whether it is simply a new offence which has been created to which the ordinary principle as to 'mens rea' applies. Applying this to § 6 of the Sale of Food and Drugs Act, 1875, I think the matter is quite clear, for it has already been decided in at least two cases that there is an absolute prohibition of the particular sale mentioned in the section, and, consequently, there is no reason why the section should not apply to a corporation. In other words, the word 'person' in § 6 includes a corporation, because no contrary intention appears. As to § 3 there is a slight difference, because, reading § 3 and

§ 5 together, it seems that 'mens rea' is involved in the offence, though it need not be proved by the prosecution, as it must be in ordinary criminal cases. It is, however, so far an element in the offence that, if the defendant succeeds in proving that he had no 'mens rea,' he is to be acquitted, the burden of proof thus being shifted from the prosecution to the defence. A provision of that kind is enacted where the Legislature desires to prevent the act from being done, though it is recognised that there may be cases in which the act is done innocently, and in which the person ought, therefore, not to be convicted. In those cases the defendant can prove his innocence; but, as it would be difficult for the prosecution to prove 'mens rea,' if the onus were upon them to do so in the ordinary way, the enactment is consequently framed in this particular way. There may, therefore, be more difficulty in applying the rule in those cases to a corporation than there is under § 6. Speaking for myself, I am inclined to think that a corporation would come under § 3 as well as under § 6, but the question is not quite so clear; and possibly it may have to be argued hereafter. I agree with Mr. Ricketts' argument that § 17 of the Act of 1899, which provides for the imprisonment of offenders in certain cases, assists his case, because it requires proof of something more than is necessary under § 6—some personal act or culpable negligence on the part of the defendant—before imprisonment can be inflicted. If

§ 6 had simply provided that imprisonment should follow a breach of the section, there might have been some difficulty in applying the section to a corporation."

An action for malicious prosecution will lie against a corporation (*Cornford* v. *Carlton Bank, Ltd.*) (1899, 1 Q.B. 392).

The procedure is in accordance with the Summary Jurisdiction Acts; and by § 13 the "Vexatious Indictments Act" is to apply to offences under this Act.

By § 9, in any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

After the summons to appear, or a warrant for arrest has been issued, a search warrant, as in *R.* v. *Goff* (*supra*, pp. 121–124), may be issued under the provisions of § 12, namely—

12.—(1) Where, upon information of an offence against this Act, a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the

same, or a warrant for the arrest of such defendant, and either the said justice on or after issuing the summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant, to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture under this Act.

(2) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a court of summary jurisdiction

may cause notice to be advertised stating that, unless cause is shewn to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the court, unless the owner or any person on his behalf, or other person interested in the goods or things, shews cause to the contrary, may order such goods or things or any of them to be forfeited.

(3) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the court by which the same are forfeited may direct, and the court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

And by § **15**, no prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.