

The Law of

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TRADE-MARKS, TRADE-NAME,

AND

MERCHANDISE MARKS,

WITH CHAPTERS ON TRADE SECRET AND TRADE LIBEL, AND

A FULL COLLECTION OF STATUTES, RULES,

FORMS AND PRECEDENTS.

BY

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PREFACE.



THE progressive development in recent years of the law with regard to trade-marks and trade descriptions, and the growing importance of the rights which this branch of the law is designed to protect, originally suggested to the Author that a more detailed and systematised statement of the decisions and statutes in which it is contained than had previously been made might possibly be found useful. The presentation of such a statement has rendered it essential to trace the origin and growth of the rights and remedies which are involved, and to make some attempts at the definition of general principles and the formulation of rules; and this has been the more necessary because the leading authorities on trade-mark law are, in an unusual degree, involved with the facts of the particular cases in which they are embodied.

The Author has sought to present, in his Introductory Chapter, a general view of the law, to trace in outline its origin and history, and to mark the

improvement in the remedies for infringement of trade-mark rights which has attended the growing importance of the rights themselves. A consideration of the common law action on the case for damages for passing off goods as those of another, and the corresponding suit in Equity for an injunction, which seem to have been first admitted and recognised at the beginning of the present century, and which, in a developed form, still afford remedies of great value and importance, and a comparison of them with the highly specialized action for the infringement of a registered trade-mark at present in use, show an interesting and remarkable transition. And that the progress of the law has been beneficial is evidenced by the fact that, besides the many thousands of unregistered trade-marks which are in use, upwards of 70,000 trade-marks have been entered upon the Register.

In addition to the general matter already mentioned, Book I. sets forth the substantive law in relation to trade-mark, trade-name, and analogous rights, and deals with the provisions and effect of the Trade-Mark Acts, and the law and procedure generally with regard to the registration of trade-marks. It is hoped that sufficient regard has been had to the recent decisions which vindicate the principle that the right of property in trade-marks does not depend on registration. The common law right in trade-marks, which is now definitely

established, must obviously be of very great importance so long as the unregistered trade-marks continue to be numerous; and the Author has, accordingly, considered in separate chapters the definition and mode of acquisition of a trade-mark apart from registration, the effect of registration and of the want of it, and the infringement of an unregistered trade-mark.

Book II. is almost wholly occupied with a commentary on the Merchandise Marks Act of 1887. That statute is at present somewhat bare of judicial interpretation, although it is not without difficulties of construction. It has already operated with some success as a deterrent of frauds, especially by checking the importation of foreign goods bearing English names or marks, or other deceptive indications of an English origin. The Act would probably be found of still greater utility if it were so amended as to provide for the summary punishment of frauds effected under cover of false trade descriptions by word of mouth.

The Author has availed himself of the very valuable Report of the Departmental Committee over which the present Lord Chancellor presided in 1887; and also, in dealing with the Merchandise Marks Act, of the evidence given before the Select Committees of the House of Commons appointed in 1887 and 1890 to consider the law with regard to merchandise marks and false marking.

Regarding the procedure of the Customs Authorities as of much practical importance, he has also embodied so much of the Regulations and General Orders of the Commissioners of Customs as appeared to him likely to be of general use.

The Author is indebted to Mr. F. G. UNDERHAY, of the Inner Temple, for his kindness in reading the proof sheets of the work, and for a number of corrections and suggestions.

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ERRATUM.

Page 288, note (e), the reference for *Welcome's Tm.* should be 32 C. D. 213;
3 R. P. C. 76.

Book I.

THE LAW OF TRADE-MARKS.

CHAPTER I.

INTRODUCTION.

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1. Trade-Marks before the Registration Acts.

THE foundation upon which the law relating to trade-marks and trade-names rests is that the deception of the public by the offer for sale of goods as possessing some connection with a particular trader, which they do not in fact possess, is a wrong in respect of which the trader has a cause of action against any person who is the author of, or is responsible for the deception.

“No man,” said James, L. J. (a), “is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate

The leading principle as stated by James, L.J.

(a) *Singer Manufacturing Co. v. Loog*, 18 C. D. p. 412 (1880).



“customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade-designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person.”

Early trade-mark cases at law and in equity.

The law on this subject cannot be traced back further than the present century. It is, indeed, sometimes alleged, upon the authority of *Southern v. How* (b), that an action lay for the infringement of a trade-mark as early as the reign of James I. In that case the defendant, a clothier, had applied the mark of another clothier to his own inferior cloth, and it was held that for this an action for deceit could be brought. According to one report (c), the action was brought by the owner of the mark, and if this is correct the case does undoubtedly establish the proposition suggested. According to another report (d), however, the plaintiff was the defrauded purchaser, and the action, therefore, an ordinary action of deceit. In the case of *Blanchard v. Hill* (e), Lord Hardwicke refused to grant an injunction to restrain a trader from imitating the mark of another; but the language of his judgment suggests that if the defendant had used the mark with a fraudulent design to pass off inferior goods by that means, or to draw away customers from the owner of the mark, he might have granted the injunction.

Lord Eldon, who so greatly extended the jurisdiction of the Court of Chancery in regard to injunction (f), in several instances granted injunctions to restrain a defendant from pretending that his goods were those of, or were

(b) Popham, 144; Cro. Jac. 471; 2 Rolle, 28.

(c) Popham, p. 144.

(d) Cro. Jac. 471.

(e) 3 Atk. 484 (1742), Great Mogul Stamp on playing cards.

(f) See 2 Law Review, p. 282; Kerly's History of Equity, p. 258.

connected with the plaintiff (*g*); and in *Cruttwell v. Lye*, he stated the principle on which he acted in similar language to that of James, L.J., cited above. "There can be no doubt," he said, "that this Court would interpose against that sort of fraud which has been attempted by setting up the same trade in the same place under the same sign or name, the party giving himself out as the same person." The earliest reported case in which the infringement of a trade-mark, in the particular case a label placed upon blacking, was restrained is *Day v. Day* (*h*), in 1816.

The interference of the common law courts for the protection of trade-marks seems to have been a little later in date. The first reported case is *Sykes v. Sykes* (*i*), in 1824. The declaration in that case alleged that the plaintiff carried on the business of a shot-belt and powder-flask manufacturer; that he was accustomed to mark his goods with the words *Sykes' Patent*, to distinguish them from articles of the same description made by other persons; that they enjoyed a great reputation; that the defendants fraudulently marked their own inferior goods with the same mark in imitation of the plaintiff's, and sold them "as and for" goods of the manufacture of the plaintiff, and that the plaintiff thereby had suffered damage in loss of custom and loss of reputation. Bayley, J., who tried the case, asked the jury "whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were not manufactured by them, but by the plaintiff," and the jury found a verdict for the plaintiff. A new trial was moved for on the ground that the evidence did not support the declaration, since the purchasers from the defendants knew whose manufacture the goods were. No authorities were cited, so far as can be judged from the report, but Abbott, C.J., who delivered the judgment of the Court, treated the law

Early cases
at common
law.
Sykes v. Sykes.

(*g*) *Hogg v. Kirby*, 8 Ves. 215 (1803); *Longman v. Winchester*, 16 Ves. 269 (1809); *Cruttwell v. Lye*, 17 Ves. 335 (1810).

(*h*) *Eden on Injunctions*, ed. 1821, p. 314; Seb. Dig. p. 10.

(*i*) 3 B. & C. 541; 3 L. J. K. B. o.s. 46.

as fully settled. "I think," he said, "that the substance of the declaration was proved. It was established most clearly, that the defendants marked the goods manufactured by them with the words *Sykes' Patent* in order to denote that they were the genuine manufacture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers, for the express purpose of being re-sold as goods of the plaintiff's manufacture. I think that is substantially the same thing, and that we ought not to disturb the verdict." This judgment has frequently been cited in subsequent cases as fully establishing, so far as it went, not only the jurisdiction of the Courts, but also the principle upon which they proceed in trade-mark cases (*k*).

Inferiority of the infringer's goods.

In 1833, in *Blofeld v. Payne* (*l*), the Court of King's Bench decided that it was not necessary for the plaintiff, in an action for damages at common law, to prove that the goods sold by the infringer were inferior to those to which the mark in question might rightly be applied, or to prove that he had suffered special damage by the defendant's acts; and in 1863, in *Edelsten v. Edelsten* (*m*), the same rule was referred to, as being settled beyond question in suits in equity (*n*).

Proof of fraud unnecessary in equity.

Millington v. Fox.

Property in a trade-mark.

An important step was taken in 1838, by the decision of Lord Cottenham in *Millington v. Fox* (*o*), that an injunction could be obtained to restrain infringement of a trade-mark, even though the infringement was due to ignorance, and was without fraudulent intent. This decision led, by an obvious deduction, to the establishment of a right of property in trade-marks; and, although the nature of this right gave rise to much discussion, and was defined in different terms by Chancery judges in subse-

(*k*) *Ford v. Foster*, 7 L. R. Ch. at p. 630 (1872); *Singer Manufacturing Co. v. Loog*, 18 C. D. p. 403 (1880), both C. A.

(*l*) 4 B. & Ad. 410; 2 L. J. K. B. N.S. 68.

(*m*) 1 De G. J. & S. 185.

(*n*) See per Lord Blackburn in *Singer Manufacturing Co. v. Loog*, 8 App. Ca. p. 30.

(*o*) 3 My. & Cr. 333.

quent cases, it soon became firmly established, and the protection of trade-marks in equity was expressly based upon it (*p*). No similar step was taken by the common law courts, and in them fraud remained an essential ingredient of a cause of action for the infringement of a trade-mark down to the date of the amalgamation effected by the Judicature Acts.

2. Registration of Trade-Marks.

The principle stated at the beginning of this chapter, and the dicta there cited, have, obviously, a wider application than merely to the case of trade-marks proper. Conduct of every kind which is calculated to pass off the goods of the defendant as those of the plaintiff falls within them, whether it consist of the imitation of the symbol expressly adopted by the plaintiff to distinguish his goods and to identify them with him, that is, his trade-mark; or of the imitation of any other symbols which have become associated with his goods, so as, in fact, to distinguish and identify them; or of the imitation of the general appearance, the "get up," of his goods as they appear in the market; or of an imitation of the name under which he trades. The trade-mark cases, however, were so much the more numerous and important, that, as already stated, a definite property-right in the use of a trade-mark was set up, and the action for infringement became a specialized and distinct form of the more general action to restrain, or to obtain damages for "passing off."

Development of the specialized action of infringement.

The litigation of trade-mark cases was, however, found to be extremely costly, and otherwise unsatisfactory. The essence of a trade-mark right being the reputed association in the market of the symbol in question with the goods of

Difficulty and cost of the old trade-mark suits.

(*p*) *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Hall v. Burrows*, 4 De G. & S. 150; 32 L. J. Ch. 548; 33 L. J. Ch. 204; *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; 32 L. J. Ch. 721; 33 L. J. Ch. 199; 35 L. J. Ch. 53 (all in 1863).

the plaintiff, it was often necessary to call a large number of witnesses to give evidence of the reputation, especially if the defendant alleged that the pretended trade-mark was either mere descriptive matter, or was, on any other grounds, a mark common to the trade; and, as infringers were usually persons of no substance, it was often impossible to recover the costs after the plaintiff had conducted his action to a successful issue. Moreover, success against one infringer did not relieve the owner of a trade-mark from the necessity of proving his title afresh, if, in any action against another infringer, the defendant chose to dispute it. Thus, the case of *Rodgers v. Nowill* (*q*) lasted five years and cost the plaintiff 2,211*l.*, without in the end giving him any security that he might not have to incur equal delay and expense in proceeding against any subsequent infringer of his mark who should venture to run the risk of disputing his title to the exclusive use of it. And these dilatory and expensive proceedings were, practically, the only means of preventing the infringement of a trade-mark available; for such infringement, except in cases where the spuriously-marked goods were sold to persons who were cheated by the seller into buying them under the belief that they were goods upon which the imitated trade-mark might properly be put, was not within the reach of the criminal law (*r*).

The Com-
mittee of
1862.

These evils, and the unsatisfactory state of the law in regard to the false marking of goods in general, led to an urgent demand from the traders of the country for more efficient protection, and in 1862 a Select Committee of the House of Commons were appointed to consider several trade-marks and merchandise-marks Bills then before Parliament. The Committee were strongly urged to report in favour of the establishment of a register of

(*q*) Evidence of G. J. Rodgers before the Committee of 1862. *M. M. A. Report*, 1862, Q. 458. The case is reported in its various stages, 6 *Hare*, 325; 5 *C. B.* 109; 17 *L. J. C. P.* 52; 3 *De G. M. & G.* 614; 22 *L. J. Ch.* 404 (1846).
(*r*) See below, p. 17, and per Mellish, *L. J.*, in *Fisher v. Apollinaris Co.*, *L. R.* 10 *Ch.* p. 303.

trade-marks and the creation of trade-mark rights by registration, in the manner already adopted by several foreign States, and long familiar, as regards cutlers' marks, in and within six miles of the lordship of Hallamshire, in England (s). And Mr. Leonard Edmunds, then Clerk of the Patents, explained to the Committee a scheme which he had drawn up for registering and indexing trade-marks in the manner at that time adopted for patents, many of the features of which were embodied in the Registration Acts subsequently passed. The proposals were, however, strenuously opposed by Mr. Hindmarch, Q.C., the leading patent and trade-mark lawyer of the day, and by the Attorney-General, and they were not indorsed by the Committee. Registration of trade-marks was, in consequence, postponed for some years; but the Bill upon which the Merchandise Marks Act of 1862 (t) was founded, was amended and favourably reported upon by the Committee, and was forthwith passed into law.

The Act just mentioned dealt principally with the criminal law, but it contained some provisions affecting the civil law of trade-marks. It provided that there should be implied on the sale of any article with a trade-mark attached to it, a warranty that the trade-mark was genuine (u). It gave a statutory right of action for damages, and for an injunction to any person aggrieved, against anyone who should apply a forged or counterfeited trade-mark to any article, or to the covering of any article, for the purpose of sale, manufacture, or trade (x), and empowered the Court to order the destruction of goods marked with spurious trade-marks (y). It also authorized Courts of Law to grant injunctions in trade-mark cases (y). These provisions are, however, believed to have been of as little practical service as were the amendments of the

The Merchandise Marks Act of 1862.

(s) See "Sheffield Marks," below, p. 91.

(t) 25 & 26 Vict. c. 38.

(u) Sect. 19, see now M. M. A., 1887, s. 17; Chap. XVII., p. 431.

(x) Sect. 22.

(y) Sect. 21.

criminal law effected by the Act, and which are referred to in a later section of this chapter.

The Regis-
tration Act
of 1875.

Thirteen years later the Trade-Marks Registration Act, 1875 (z), which came into operation on the 13th of August, 1875, established the present register of trade-marks. The object of the Act was two-fold; it was directed, on the one hand, to diminish the difficulty and cost of, or to altogether remove the necessity for the proof of title by use and reputation, which had cast so great a burden upon the owners of trade-marks in proceedings to restrain infringement, and, on the other, to secure the publication of marks which had been appropriated as trade-marks, and to define the rights of their proprietors, for the information of traders, and, further, to limit the classes of marks which should be capable of being so appropriated (a). The Act, accordingly, provided that registration should be *primâ facie* evidence of the right of the registered proprietor to the exclusive use of the trade-mark (b) in connection with goods of the class for which it was registered and used (c), and should, after the expiration of five years, be conclusive evidence of such right, so long as the trade-mark remained upon the register (d); provided that the proprietor of the mark remained the owner of the goodwill of the business in which it was used. And, with a view to compelling registration, the Act provided that from and after the 1st of July, 1876 (a date which was extended by the amending Acts (e)), a person should not be entitled to institute any proceeding to prevent the infringement of any trade-mark as defined by the Act until and unless such trade-mark was registered in pursuance of the Act, or, according to a

(z) 38 & 39 Vict. c. 91. See the chapter on "The Register," below, p. 52.

(a) Per Fry, L. J., in the *Apollinaris Co.'s Tm.*, (1891) 2 Ch. p. 235; 8 R. P. C. 137; and Cotton, L. J., in *Van Duzer's Tm.*, 34 C. D. p. 634; 4 R. P. C. 31 (1887).

(b) Sect. 3.

(c) *Edwards v. Dennis*, 30 C. D. 454 (1885), C. A.; below, p. 257.

(d) *Palmer's Tm.*, 21 C. D. 47; 24 C. D. 504 (1882), C. A.; below, p. 258.

(e) 39 & 40 Vict. c. 33, and 40 & 41 Vict. c. 37.

subsequent modification, in the case of any mark in use as a trade-mark before the passing of the Act of 1875, until and unless registration of the mark as a trade-mark should have been refused (*f*).

The marks admitted to registration as trade-marks under the first Registration Act were required (*g*) to consist of one or more of the following essential particulars: a name of an individual or firm printed, impressed, or woven in some particular or distinctive manner; or a written signature or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label, or ticket; and to these essential particulars there might be added any letters, words, or figures, or combination of letters, words, or figures; and it was further provided that any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of the Act might be registered as such under the Act.

What might be registered as trade-marks under the Act of 1875.

The Act attained a considerable measure of success, and 27,844 trade-marks were registered under it, but its provisions did not allow words to be registered as trade-marks (*h*) unless they were old marks, or were registered in combination with one or more of the enumerated essential particulars; and as word-marks are exceedingly popular in this country, and were admitted and protected as trade-marks abroad, an alteration of the definition clause was determined upon (*i*). This was effected by the Patents, Designs, and Trade-Marks Act, 1883 (*j*), which came into operation on the 1st of January, 1884. The new Act repealed the Act of 1875, with its amending Acts of 1876 and 1877, but re-enacted, in substance, their principal provisions. It directed that the register of trade-marks, of which the old register is to be deemed to be a part (*k*), should be kept at the Patent Office established by the

The Registration Act of 1883.

(*f*) 39 & 40 Vict. c. 33, s. 1. See now sect. 77 of the Act of 1883, below, p. 260.

(*g*) Sect. 10.

(*h*) *Exp. Stephens*, 3 C. D. 659

(1876), Jessel, M. R. (*Acilyton*).

(*i*) See the Comptroller's second report for 1884.

(*j*) 46 & 47 Vict. c. 57.

(*k*) Sect. 114 (2).

Act (*l*), and should be under the control of the Comptroller-General of Patents, Designs, and Trade-marks, who acts under the superintendence and direction of the Board of Trade (*m*). It also introduced a number of new rules and provisions to regulate applications for, oppositions to, and rectifications of registration, and effected important changes with regard to the Sheffield cutlery marks (*n*), which the older Act had, substantially, left untouched.

“Fancy words” allowed to be registered.

The most material alteration introduced by the Act of 1883 was the power it conferred to register a mark of which the essential particular should be a “fancy word or fancy words not in common use.” What was intended by a fancy word not in common use the Act did not define, and the omission was the cause of a great deal of litigation; but a fairly definite meaning was at length put upon the phrase by the Court of Appeal, in the *Melrose* hair restorer, and the *Electric* velveteen cases (*o*). To fall within the meaning, a word must, the Lords Justices held, be “obviously not intended to be descriptive,” and must “speak for itself and be a fancy word of its own inherent strength,” and be “so obviously and notoriously inappropriate as neither to be deceptive or descriptive, nor calculated to suggest deception or description.”

Lord Herschell's Committee, 1887.

Soon after the decisions just referred to, a very distinguished Committee, presided over by Lord Herschell, were appointed by the Board of Trade to inquire into the duties, organization, and arrangements of the Patent Office under the Act of 1883, as far as related to trade-marks and designs, and in August, 1887, the Committee presented an interim, and in March, 1888, a final report, dealing not only with the matters specified, but with the general question of the registration of trade-marks. These important reports are frequently referred to in subsequent pages of this book, and it will be sufficient here to refer to

(*l*) Sect. 78.

(*m*) Sect. 82.

(*n*) Sect. 81, see below, p. 91.

(*o*) *Van Duzer and Leaf's Tms.*,

34 C. D. 623; 4 R. P. C. 31 (1887).

See below, p. 143.

a few only of the suggestions made by the Committee. They recommended that a new definition clause should be enacted, stating what symbols might be registered, and substituting for the fancy-word phrase in the Act of 1883 the phrases "An invented word or invented words; or a word or words having no reference to the character or quality of the goods, and not being a geographical name" (*p*), and that additions to registered trade-marks (that is, matter other than their essential particulars registered with them) should be expressly disclaimed by the applicants for registration (*p*). The alterations and some minor changes were passed into law by the amending Act of 1888 (*q*), which came into operation on the 1st of January, 1889.

Invented
word or
words.

The Committee further reported, as principles which ought to govern the Comptroller in the acceptance for registration or the rejection of marks: that "inasmuch as the object of registration is to secure a distinctive mark, and the registration of a mark which may conflict with a mark already registered would not only be to the detriment of the owner of such prior mark, but of the applicant himself, we think that in cases where it is doubtful whether the mark ought to be accepted or not, the safer and more beneficial course would be to reject it" (*r*); and that, in their opinion, in comparing a new mark tendered for registration with a prior mark which it was alleged to too closely resemble, the question should be determined by considering what is the leading characteristic, or, as it is otherwise expressed, what is the idea, of each mark. The Acts, it has been held, vest in the Comptroller a discretion, to be exercised, of course, judicially and subject to appeal, whether to register or reject any mark first used since the 13th of August, 1875 (*s*); and this discretion, exercised in the light of the recommendations of the committee, has

Doubtful
marks to be
rejected.

(*p*) Act of 1888, s. 10.

(*q*) 51 & 52 Vict. c. 50.

(*r*) Interim Report, par. (2).

(*s*) *Eno v. Dunn*, 15 App. Ca. 253;
7 R. P. C. 311. (*Fruit-Salt Baking
Powder.*)

made the choice of a new trade-mark, or the registration of an existing one, often a matter of considerable uncertainty and trouble.

Unregistered
trade-marks
are still
numerous.

Down to the end of the year 1892, 70,625 trade-marks had been registered under the Acts, and some five or six thousand applications are annually made for registration (*t*); but a very large number of trade-marks in actual use in the country still remain unregistered, either because they are not capable of registration for the reason that they do not fall within the definition clause of the Act (*u*), or because their proprietors do not think it worth while to seek to register them. These unregistered trade-marks, notwithstanding the prohibitory sections of the Acts (*x*) already mentioned, which make registration, in general, a condition precedent to litigation to restrain or to obtain damages for infringement, are in many cases to a great extent protected by the Courts in the passing off actions, next to be referred to. For it is now well settled that if the use by the defendant upon his goods of an unregistered trade-mark belonging to the plaintiff is calculated to pass off or cause to be passed off the defendant's goods as the goods of the plaintiff, an injunction may be granted to restrain such use (*y*), and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive, or not (*z*).

3. Passing off and Trade-name Actions.

By the judgments in *Millington v. Fox* (*a*) and later cases in equity (*b*), and by the Acts referred to above and

(*t*) Comptroller's Report for 1892.

(*u*) Act of 1888, s. 10.

(*x*) Act of 1875, s. 1; Act of 1883, s. 77.

(*y*) *Montgomery v. Thompson*, 41 C. D. 35; (1891) A. C. 217; 8 R. P. C. 361 (*Stone Ales*), where the plaintiff's mark was removed from the register, but he succeeded in

the action.

(*z*) *Reddaway & Co. v. Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; 9 R. P. C. 503; C. A., see below, p. 265.

(*a*) 3 My. & Cr. 338 (1838), *Cottenham, L. C.*

(*b*) See the next chapter.

the decisions upon them, the conditions under which a right of property in a trade-mark may be acquired, and the manner and degree in which it will be protected, have been fully established; but the symbol which a trader adopts as his trade-mark is only one of the badges or *indicia* by which his trade and the goods he deals in are identified with him, and distinguished from the trade of his rivals in business and similar goods which are not his but theirs. These badges are generally numerous, and they comprise in particular the name under which he trades, that is, his trade-name; the names or titles by which his goods are referred to, that is, the trade-name of his goods; and the fashion or "get up" in which the goods appear in the market, so far as these are distinctive of his trade and goods. The principles of the decisions cited above, from which the law of trade-marks was specialized, apply to these cases—of "trade-name" and "passing off" as they are comprehensively termed—also; but the law applicable to them is not so clearly ascertained, and chiefly because, in the earlier stages of its development, the distinction between trade-mark and trade-name was not adverted to. Now, however, when trade-marks, unless registered, cannot generally be protected as such, the distinction must not be overlooked. The first reported judgment in which the two classes of cases were formally contrasted is that of Jessel, M. R., in *The Singer Manufacturing Co. v. Wilson* (c). "The cases which have come before the Court," the late Master of the Rolls said, "may, I think, be conveniently divided into two classes; the first class, which is the more numerous one, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be, as I said before, description, that is, it may consist of a name or names, or a lengthy description consisting of names with superadded words, and that description may be either affixed to, or impressed upon, the goods them-

Trade-names
and "get up."

Actions for
infringement
of trade-
marks and
passing off
actions con-
trasted.

“selves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods. Now, as to this class, it is quite immaterial that the maker of the goods to which—what I will call for the sake of shortness—the trade-mark is affixed did not know that it was a trade-mark, and had not the slightest intention of defrauding anybody.

“The second class (*d*) of cases are of a totally different character: they are always cases of fraud. They are cases where the defendant, without putting any trade-mark at all on his goods, or putting a trade-mark which is admittedly different in substance from the trade-mark, if any, of the plaintiff on the goods, has represented the goods as being goods manufactured by the plaintiff. . . . What the defendant has said or done must amount to a representation that the goods to be sold are the goods of the plaintiff, or that they are manufactured by the plaintiff. What amount of representation will be sufficient for that purpose must again depend, of course, on the facts of each particular case.”

It will be seen that the late Master of the Rolls here limited the right to redress in the second class of cases to cases where the defendants had acted with fraudulent intentions, and for the purpose of deceiving the customers, or intending customers, of the plaintiffs, and in this his judgment was endorsed and approved by the Court of Appeal (*e*). In the House of Lords, however, this distinction between the two classes of cases was not accepted. Lord Cairns said there was no such difference in point of principle (*f*), and that, since the decision in *Millington v. Fox* (*g*), it was necessary neither to aver nor to prove fraud. “In the present case,” he added, “the question must, as it seems to me, be: Are the advertisements of the defendant, having

Proof of fraud unnecessary, if the defendant's conduct is calculated to deceive.

(*d*) 2 C. D. p. 443.

(*e*) There are statements to the same effect in the judgments in *Cheavin v. Walker*, 5 C. D. 850

(1876), decided before the *Singer Case* reached the House of Lords.

(*f*) 3 App. Ca. p. 389 (1877).

(*g*) Above, p. 4.

“regard to the evidence in the case, calculated to mislead an unwary purchaser of the machines.” In this opinion Lord O’Hagan concurred, but Lord Blackburn expressed considerable doubt on the subject, and the remaining judge, Lord Gordon, refrained from discussing it.

The question whether—in order to restrain the defendant from continuing conduct which leads, or is calculated to lead, the public, or some class of the public, to buy his goods as and for those of the plaintiff—it is necessary for the latter to prove that the deception was fraudulently sought and intended by the defendant, came up again in *Singer Manufacturing Company v. Loog* (*h*); and, although the case was decided on the ground that the evidence showed that the conduct of the defendant in question was not, in fact, calculated to deceive, several of the judgments delivered contain passages which are in accordance with Lord Cairns’ opinion. James, L. J., summed up the law in the words quoted at the beginning of this chapter; and Lord Selborne used language to the same effect. “It was contended” (*i*), he said, “that the acts of the defendant enabled his wholesale customers to show these documents to their own retail customers, for the purpose of passing off the goods bought from the defendant as the plaintiffs’ manufacture.” The answer is, that, unless the documents were fabricated with a view to such a fraudulent use of them, or *unless they were in themselves of such a nature as to suggest, or readily and easily lend themselves to such a fraud,* . . . the supposed consequence is too remote, speculative, and improbable to be imputed to the defendant, or to be a ground for the interference of a court of justice with the course of the defendant’s business.”

And it may now be taken as settled that (*k*), even where there is no question of a registered trade-mark, a trader will not be allowed to act in a manner which leads, or is

(*h*) 18 C. D. 395 (1879); 8 App. Ca. 15 (1882).

(*i*) 8 App. Ca. p. 21.

(*k*) *Reddaway & Co. v. Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; 9 R. P. C. 503, C. A.

calculated to lead, to deception, although the deception is entirely unintended by him, unless he has some special justification for his conduct, as, for instance, an independent right to use a name similar to the plaintiff's name (*l*). He does, in fact, commit a fraud when he continues his conduct after discovering its dangerous character (*m*).

“No man,” said Cotton, L. J., in the recent case of *Turton v. Turton* (*l*), “must pass off his goods as the goods of another. Of course, that may be done unintentionally; but where there is a manifest and natural meaning in the words used that the goods are the goods of somebody else, and the man who uses those terms, uses not his name only, but somebody else's, he would be stopped from doing so as soon as he is aware of the facts which make the *primâ jacie* intention and result of what he is doing, passing off his goods as the goods of somebody else. It was formerly said that no action could be maintained unless a man had done so fraudulently and intentionally; but when he finds out that the natural construction of what he is doing, when the facts are known, is to represent his goods to be somebody else's, then he should be stopped, even though he had originally done that unintentionally and innocently.” And in their final report, Lord Herschell's Committee said: “There can be no doubt that if a manufacturer or vendor has obtained for his goods a reputation amongst the public, he could, by process of law, quite apart from the Trade-Marks Acts, prevent goods that were not his from being offered to the public on the representation that they were so” (*n*).

Trade-names.

The protection of the trade-names of individuals, firms, and companies from deceptive imitations is an important application of the principles just stated (*o*); and in connection with them, the chief practical exception to the rule that the defendant will not be allowed to continue conduct

(*l*) See *Turton v. Turton*, 42 C. D. 128 (1889), C. A., and below, pp. 420 *et seq.*

(*m*) See below, p. 317.

(*n*) Report of 1888, p. xii.

(*o*) See below, Chap. XVI., p. 379.

which is calculated to lead to his goods or trade being taken to be the goods or trade of the plaintiff, is found in the rule that a man may honestly trade under his own name, and describe his goods by it, whatever the consequences may be (*p*).

Right to trade under one's own name.

4. The Criminal Law of False Marking.

At the common law, as already stated, it was an offence to cheat by fraudulently selling the goods of A. under the pretence that they were the goods of B., or to sell goods under any material false pretence that they were different goods to what in fact they were, and such false pretences might have been effected by using spurious trade-marks or other deceptive marks of origin or description upon the goods sold; but the mere imitation of a trade-mark, unless it happened to be a Sheffield cutler's mark (*q*), or the impression or use of a false mark, was not criminally punishable (*r*). The committee of 1862, whose report has been already referred to (*s*), were assured by the witnesses called before them that false marking had become extremely prevalent, to the serious detriment of honest trading. Not only were the trade-marks of well-known English manufacturers frequently infringed at home, and flagrantly copied abroad, so that the manufacturers both lost the custom of the buyers of the spuriously marked goods, and suffered in reputation through the inferiority of the goods sold as theirs, but false marks of description, of length, quantity, material, make, and the like—what are now known as trade descriptions (*t*),—were applied to goods by unscrupulous traders with impunity. And the witnesses complained, with good reason, that the existing

(*p*) See *Burgess v. Burgess*, 3 De G. M. & G. 896; 22 L. J. Ch. 675 (1853), L.J.J.; *Turton v. Turton*, 42 C. D. 128 (1889), C. A.; *Saunders v. Sun Life Assurance Co.*, (1893) W. N. 190. See below,

pp. 420 *et seq.*

(*q*) See below, p. 544.

(*r*) See Book II., p. 469.

(*s*) Above, p. 7.

(*t*) Merchandise Marks Act, 1887, s. 3.

law was wholly inadequate to cope with these evils. Unfortunately, however, the committee declined several drastic proposals for amendment, which were afterwards adopted with conspicuous success in the Merchandise Marks Act of 1887, as they refused to recommend the establishment of a register of trade-marks, and the Act, which was passed upon their report, the Merchandise Marks Act of 1862, was, it is believed, a dead letter from its first enactment. At any rate, when another committee on merchandise marks were appointed, in 1887, complaints, precisely similar to those made to the former committee, were urgently repeated to them.

The Merchandise Marks Act of 1862.

As the Act of 1862 was repealed by that of 1887, it is unnecessary here to summarize its clauses. In substance the offences created by it were very nearly the same as those existing under the later statute, but it was vitiated by defects which have now been removed, for, while it enacted that the forgery of a trade-mark with intent to defraud (*u*), or the false application of a trade-mark to goods (*u*), or to the envelope of goods (*x*), with the like intent, should be misdemeanours, it left the onus of proving the intent to defraud of the person charged upon the prosecutor, and it made no provision for the summary prosecution of these offences. The Act was also deficient in omitting to provide for the seizure of falsely marked goods upon importation from abroad (*y*), and it was, moreover, a monument of complicated and redundant drafting.

The International Convention.

In 1884 Great Britain acceded to the International Convention for the protection of industrial property, to which all important civilized states, except Germany, Austria and Russia, now belong (*z*), and thereby formally engaged to co-operate in the execution of the stipulations contained in the convention and protocol (*a*) agreed upon

(*u*) Sect. 2.

(*x*) Sect. 3.

(*y*) The Customs Act of 1876, s. 42, forbade the importation of articles of foreign manufacture

bearing the names, marks, or brands of manufacturers resident in the United Kingdom, &c.

(*z*) See list, Appendix, p. 656.

(*a*) See Appendix, p. 658.

between the original parties thereto, at Paris, in the previous year. And by Article IX. of the convention, it is provided that all goods illegally bearing a trade-mark or trade-name may be seized on importation into those States of the Union where the mark or name has a right to legal protection, and that the seizure shall be effected at the request of either the proper public department, or of the interested party, pursuant to the internal legislation of each country. It became necessary, accordingly, to amend the law, and out of several bills introduced into Parliament for this purpose, the Committee of the House of Commons selected and amended the Merchandise Marks Law Consolidation and Amendment Bill, which subsequently became the Merchandise Marks Act of 1887.

The last-mentioned Act (*b*) provides that any person shall be guilty of an offence, punishable on indictment or on summary conviction by fine or imprisonment, who either (1) forges a trade-mark by making or imitating it without the consent of the proprietor, or by falsifying any genuine mark; or (2) falsely applies any trade-mark to goods, by applying it, or an imitation of it, without the consent of the proprietor; or (3) applies to goods any false trade description, that is, a description or indication as to the number, quantity, measure, &c., or the place or country of origin of the goods, or the mode of manufacturing them, or their material, or as to their being the subject of an existing patent, privilege, or copyright, which is false in a material respect; or (4) sells or exposes, or has in his possession for sale, or any purpose of sale or manufacture, any goods to which a forged trade-mark or false trade description is applied, or to which any trade-mark, or imitation of a trade-mark, is falsely applied (*c*). A criminal intention on the part of the person charged is a necessary element of each of the offences (*d*), but the

The Merchandise Marks Act of 1887.

(*b*) See Book II., Chap. I., p. 462.

(*c*) Subsidiary offences, such as making dies for forging trade-marks, are here passed over.

(*d*) *Gridley v. Swinborne*, 52 J. P. 739, 791; 5 T. L. R. 71 (1888), Coleridge, L.C.J., and Grantham, J.; and see below, p. 508.

burden of proving that he has acted with the consent of the proprietor of the trade-mark, or without intent to defraud, or otherwise innocently, as also the burden of establishing any of the special excuses allowed by the Act, is cast upon the person charged as soon as it is established that he has done any of the acts which, coupled with such criminal intention and in the absence of these excuses, bring him within the definition of an offence under the statute. The Act, moreover, forbids (*e*) the importation of goods by means of or in relation to which an offence against it has been committed, and also of all goods of foreign manufacture bearing any name or trade-mark being or purporting to be that of a manufacturer or trader within the country, unless it be accompanied by a definite indication of the country where the goods were made or produced. It contains also some special provisions with regard to the marking of watch cases.

The Act is only directed against false marking.

It will be seen, therefore, that the Act is directed against false marking only. Deceptive marks or deceptive trade descriptions are forbidden by it to be placed upon goods, but it does not operate to make marking of any kind compulsory, and it does not extend to cases of verbal false descriptions (*f*).

The Merchandise Marks Act Committee of 1890.

The Act appears to have attained a considerable success, but it did not fully satisfy the trading community, and three years after its passing another Committee of the House of Commons were appointed to consider its working. And by their report (*g*) the Committee stated that, while there was a consensus of opinion that the Act of 1887 had generally been most beneficial to the manufacturing interests of the country, and that the importation of fraudulently marked goods, or of goods bearing a false indication of origin, had materially diminished since the Act came into operation, yet complaint had been made that its operation in regard to goods in transit to foreign states had occa-

(*e*) Sect. 16, below, p. 526.

(*g*) M. M. A. Report, 1890.

(*f*) Below, p. 476.

sioned serious inconvenience and loss to the shipping industries. This complaint, however, the Committee believed to be ill-founded, and they refused to recommend the exemption from the Act of the goods referred to. They refused also to accept either a proposal to increase the stringency of the Act by providing that all foreign goods should be marked with an indication of origin, or a proposal to relax it by allowing the general mark "made abroad," where the Act now requires the particular country of origin to be signified (*h*). On the other hand, to stop the importation of adulterated articles, which, if they bore no trade description at all, did not come under the Act, they recommended that the "Customs Entry" (*i*), in which both the description of goods imported, and the port from which they come, must be stated, should be made a "trade description" within the Act, and that, in cases affecting the general interest of the country, or of a section of the community, or of a trade, prosecutions under the Act should be undertaken by the State. The Merchandise Marks Act of 1891 was passed to carry these proposals into effect.

The Merchandise Marks Act, 1891.

5. International and Colonial Arrangements.

The owner of a trade-mark, acquired as such in England by use and consequent reputed connection with its owner, has always had the same right to protection in our Courts as a subject of the United Kingdom (*k*) (unless he happened to be an alien enemy), and neither the Registration Act of 1875, nor the Merchandise Marks Acts of 1862 or 1887 conferred any special privilege or right of protection for their trade-marks or trade-names upon subjects of this, as contrasted with subjects of other, States. Many treaties existed, moreover, by which this country agreed to give to the subjects of other countries the same right of protection

(*h*) See below, p. 534.

(*i*) See below, pp. 476, 486.

(*k*) *The Collins Co. v. Reeves*,
28 L. J. Ch. 50 (1858), Stuart,
V.-C.

in respect of their trade-marks as were enjoyed by its own subjects (*l*). On the other hand, when registration of the trade-mark concerned became, under the Acts of 1875 and 1883, in general, a condition precedent to the bringing of an action of infringement, as such (*m*), it was required in the case of foreign as well as of other plaintiffs, and the acquisition of a trade-mark abroad gave no title or right to priority of registration of a trade-mark in the English register.

When the Act of 1883 was passed the International Convention (*n*), already referred to, had just been drawn up, and in contemplation of the accession of this country thereto, which took place in the following year (*o*), sect. 103 (*p*) was inserted, with the view, apparently, of fulfilling the obligations entered into by the United Kingdom with the other contracting states. The section, however, meets those obligations but very imperfectly (*q*), and the bulk of its provisions are inapplicable to trade-marks. Its only substantial operation in regard to them, indeed, is to confer upon an applicant for the protection of a trade-mark, in one of the other contracting states, a priority over other applicants for registration here during the space of four months, without conferring any title to registration based upon the success of the application in the foreign state, or any exemption from the conditions and formalities to be fulfilled and complied with by ordinary applicants for registration here.

Her Majesty is empowered, by sect. 104 of the Act of 1883, by Order in Council (*r*), to apply the provisions of the above-mentioned section, with such variations or additions as may seem fit, to any British possession (*s*).

(*l*) See a paper presented to Parliament, 1872, C. 633.

(*m*) Act of 1883, s. 77, Chap. XII., p. 260.

(*n*) See Appendix, p. 653.

(*o*) 17 March, 1884.

(*p*) See Chap. XX., p. 454.

(*q*) See per Stirling, J., in *The Californian Fig Syrup Tm.*, 40 C. D. 620; 6 R. P. C. 126 (1888).

(*r*) See the list, Appendix, p. 656.

(*s*) See the definition in sect. 117.

The protection of the Merchandise Marks Act, 1887, referred to in the preceding section of this chapter, extends to any trade-mark which, either with or without registration, is protected by law in any British Possession (*t*) or foreign State to which the provisions of the above-mentioned section (sect. 103) are, under Order in Council, for the time being, applicable (*ii*).

(*t*) Below, p. 656.

(*ii*) M. M. A., 1887, s. 3 (1),

Book II., Chap. I., p. 465, "trade-mark."

CHAPTER II.

THE DEFINITION OF A TRADE-MARK.

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A TRADE-MARK is a symbol (*a*) which is applied or attached to goods (*b*) offered for sale in the market (*c*), so as to distinguish them from similar goods, and to identify them with a particular trader (*d*) or with his successors as the owners of a particular business (*e*), as being made, worked upon, imported, selected, certified, or sold (*f*) by him or them, or which has been properly registered under the Acts as the trade-mark of a particular trader (*g*). Definition.

It would, perhaps, have been clearer to have stated the definition in the following form: "A trade-mark is a symbol which is publicly used as the trade-mark of a particular trader, or is registered as such under the Acts," so as to lay stress upon the element of public user which creates the trade-mark, and to which registration is by statute to be deemed equivalent (*h*), and to have added a definition of public user to the effect suggested in the definition selected. I have preferred, however, to cast the whole definition into one in order to avoid the inconvenience of importing into it a reference to the term defined.

The Registration Acts contain no definition of what is a trade-mark, though they do contain enumerations of the classes of symbols which are capable of registration under The Registration Acts contain no definition;

(*a*) Below, p. 28.

(*b*) Page 29.

(*c*) Page 33.

(*d*) Page 35.

(*e*) See Chap. XIII., Assignment and Devolution of Trade-Marks, p. 272; and *Pinto v. Badman*, 8 R. P. O. 181 (1891), per Fry, L.J.

(*f*) Page 49.

(*g*) Page 51; and see Chap. XII., Effect of Registration, p. 252. As to Cutlers' corporate marks, see Chap. VI., p. 91.

(*h*) Act of 1883, s. 75; Act of 1888, s. 17. See below, p. 51; and Chap. XII., Effect of Registration, p. 252.

them as trade-marks (*i*). But trade-marks can still be acquired by user independently of registration (*k*), so as not only to secure a certain measure of protection by the Courts in "passing off" actions, but often to confer a preferential claim to registration, or to constitute an objection to the registration of newer marks for the same goods which bear too close a resemblance to them. Moreover, among the symbols admitted to registration under the Acts are "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" (*l*), and questions still frequently arise as to whether old marks registered, or tendered for registration, under this provision, or the provisions to the like effect in the earlier Acts, were used as trade-marks or not. It is, therefore, necessary to consider what constituted a symbol to be a trade-mark apart from the Acts, and this is the more important because in making registration, or, more precisely, the application for registration, equivalent to public user of the trade-mark, the Acts have imported and adopted the old law determining what the public user of trade-marks is, and what are its effects.

but they import the old law.

Definitions in the Merchandise Marks Act of 1862.

The definitions of "mark" and "trade-mark," for the purposes of the Merchandise Marks Act, 1862 (*m*), embodied in that Act, are in the following terms: "The word 'mark' shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket or other mark of any other description; and the expression 'trade-mark' shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket or other mark as aforesaid, lawfully used by any person to denote any chattel, or (in Scotland) any article of trade, manufacture or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such

(*i*) See Chap. VIII., "What marks may be registered," p. 106.

(*k*) See below, p. 265.

(*l*) Act of 1888, s. 10, replacing sect. 64 of the Act of 1883, and sect. 10 of the Act of 1875.

(*m*) 25 & 26 Vict. c. 88, s. 1.

“person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs, is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them.”

The Act of 1862 was repealed by the Merchandise Marks Act of 1887, which, without further defining “trade-mark,” enacted that, for the purposes of the Act, the expression “trade-mark” should mean a trade-mark registered in the register of trade-marks kept under the Patents, Designs, and Trade-Marks Act, 1883, and should include 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 103rd section of the Patents, &c. Act are, under Order in Council, for the time being applicable (*n*).

The Merchandise Marks Act, 1887.

Although the principles upon which the law of trade-marks rests have been often dwelt upon and explained in the judgments in the leading cases on the subject, many of which have been referred to in the previous chapter, yet judges have but seldom attempted to state precisely what a trade-mark is, and I have found no formal definition in any reported judgment.

Judicial definitions.

In *The Leather Cloth Co. v. The American Leather Cloth Co.* (*o*), Lord Westbury said “the word ‘trade-mark’ is the designation of these marks or symbols, as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property.”

Lord Westbury.

And in *Ford v. Foster* (*p*), Bacon, V.-C., described a trade-mark in the following terms: “The meaning and use of a trade-mark is that the same person dealing in

Bacon, V.C.

(*n*) Sect. 3 (1), below, p. 465.

L. J. Ch. 199 (1863).

(*o*) 4 De G. J. & S. p. 142; 33

(*p*) L. R. 7 Ch. p. 616 (1872).

“goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it that no man may imitate his mark, and the legal right goes no further than that.”

Kay, J., and
Esher, M.R.

“User as a trade-mark,” Kay, J., said, in *Richards v. Butcher* (q), “means, not what the person who uses has in his own mind about it, not what he has registered in a foreign country, but what the public would understand when the trade-mark, or so-called trade-mark, is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade-mark. That is the trade-mark proper; and user as a trade-mark means, and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade-mark of the person who uses them.” And in the same case, on appeal, Lord Esher said: “You use the thing as a trade-mark, if you use it in business, or, as is often said in the market, as a mark to denote your goods, and to distinguish them from the goods of anyone else” (r).

A Symbol.

What symbols
may be trade-
marks.

Before the Trade-Marks Registration Act, 1875 (s), no restriction was placed upon the kind or class of symbols which, if adopted and used as a trade-mark, would be protected against infringement or piracy, except that the Courts refused to interfere where the symbols contained misrepresentation (t), or were, or were so used as to be, calculated to deceive, and they would, no doubt, if any case had occurred, have refused to interfere also where the symbols

(q) (1891) 2 Ch. p. 532; 8 R. P. C. 249, (*Monopole*).

(r) (1891) 2 Ch. p. 543.

(s) Sect. 10, replaced by sect. 64 of the Act of 1883, and now by sect. 10 of the Act of 1888.

(t) See below, pp. 336 *et seq.*

themselves were scandalous or indecent. The only general limit, therefore, put upon the choice of a trade-mark was that it should be capable of distinctive user in accordance with the terms of the definition (*u*).

Applied or attached to Goods (*x*).

It is immaterial whether the mark is attached to the goods or to the covering in which they are sold (*y*). It may be impressed, stamped, cut, drawn, painted, or stained on the goods themselves, as the words *Sykes' Patent* were in *Sykes v. Sykes* (*z*), or on their envelope, as are labels on bottles, and brands on corks, or in any other way attached to the goods, for instance, by being marked upon tallies (*a*) tied on to them, or upon reels upon which the goods are wound. All that is necessary is that there shall be some physical connection between the goods and the mark so that the mark shall go with the goods into market (*b*). A device is not a trade-mark unless it is so applied or attached, although it may be used by a trader in his advertisements, price lists, or trade circulars, so as to become commonly associated with him and his goods, as, for instance, lithographs of Millais' picture "Bubbles" are associated with Fears' Soap.

The mark must go to market with the goods;

Thus, in *Thompson v. Montgomery* (*c*), the ale of the plaintiffs had been known for many years as *Stone Ale*, and there was evidence that that name had been used in ordering goods from them, and in selling goods to their customers, as a description of the ale, or of a particular class of ale made by them. Beyond this there was no

(*u*) See below, p. 35.

(*x*) See the *dicta* quoted above, p. 28, and below, p. 158.

(*y*) *Singer v. Wilson*, 2 C. D. p. 441, Jessel, M.R., and pp. 451, 455, James and Mellish, L.JJ. (1876).

(*z*) 3 B. and Cr. 541; 3 L. J. K. B. O. S. 46 (1824).

(*a*) *Edelsten v. Edelsten*, 1 De G.

J. & S. 185 (1863), Westbury, L.C.

(*b*) See *Powell's Tm.*, (1893) 2 Ch. 388 (1894), A. C. 8; 10 R. P. C. 63, 195; 11 R. P. C. 4. (*Yorkshire Relish.*)

(*c*) 41 C. D. 45; 6 R. P. C. 404 (1889). There was no appeal upon this point to the House of Lords. An injunction was granted notwithstanding the removal of the mark.

evidence of the use of the name as a trade-mark, and the Court of Appeal accordingly held that the words had been wrongly claimed as a trade-mark in use before 1875, and ordered them to be removed from the register. So, in *Powell's Case* (*d*) it was decided that the use of the words *Yorkshire Relish* upon the rough packing cases in which the bottles of sauce were placed for safe carriage was not, under the circumstances of the case, use of the words as a trade-mark. "The function of a trade-mark," Bowen, L.J., said (*e*), "is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. Accordingly, it may either be marked on the goods themselves, or, if that is not possible or convenient, it may be marked on the vehicle of the goods, and may be, and sometimes, I dare say, is, marked upon a covering or exterior, such as a packing case. But when you are considering a mark upon the vehicle as distinct from a mark upon the goods, you must ask yourself carefully, is this mark used as a trade-mark?" And the test to be applied was otherwise stated in the same case to be the question, Does the alleged trade-mark sell the goods?

and must sell
the goods.

Use on corks.

The question whether stamping a mark on the corks of wine bottles at the sides or ends where it cannot be seen is user of it as a trade-mark has been discussed (*f*) but not decided. It is submitted that it may be if, in fact, the known presence of the mark, or the expectation of finding it, induces a customer to buy the wine as that of the proprietor of the mark.

(*d*) Note (*b*); cf. *Richards v. Butcher*, (1891) 2 Ch. 522; 8 R. P. C. 249, Kay, J., and C. A., *Monopole* used on packing cases and wine corks.

(*e*) (1893) 2 Ch. p. 404.

(*f*) *Kinahan & Co.'s Application*, 10 R. P. C. 393 (1893), Chitty, J.;

Richards v. Butcher, (1891) 2 Ch. 522; 8 R. P. C. 249, Kay, J., and C. A. Marks so used were protected in *Moët v. Clybourn*, Seb. Dig. p. 316 (1877), Jessel, M.R.; and *Moët v. Pickering*, 8 C. D. 372 (1878), C. A.

The exclusive rights existing in respect of a trade-mark are restricted to the class of goods to which it has been attached or applied (*g*). It is, therefore, no infringement to apply the same or a similar mark to other goods. This rule was clearly stated in a dictum of Lord Westbury, in the *Leather Cloth Case*, which has often been cited. "Property in a trade-mark," he said, "is . . . the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity; consequently, the use of the same mark in connection with a different article is not an infringement of such right of property" (*h*). Thus, a trade-mark used for carriages might be adopted as a new trade-mark for woollen goods (*i*).

Trade-mark rights are restricted to the class of goods for which the mark is used.

So no one can acquire an exclusive right to affix the trade-mark to goods which do not fall within the class indicated by the mark, or, in other words, to goods which do not possess the attribute the mark is understood and intended to connote. Thus, in *Cotton v. Gillard* (*k*), the defendant had invented a sauce which was prepared from a secret recipe not known to the plaintiff, and was called the *Licensed Victuallers' Relish*. The plaintiff had purchased from the assignee in bankruptcy of the defendant's son all his interest in the sauce, and this, he contended included the right to the trade-mark used with the business. Jessel, M.R., however, held that this right could not exist or be transferred without the goods with which the mark was connected, and that the plaintiff could have no assistance from the Court to enable him to pass off

The use of trade-mark on other goods not protected.

(*g*) *Somerville v. Schembri*, 12 App. Ca. 453 (1887), on appeal from Malta. As to registered trade marks, see below, pp. 256, 308.

(*h*) 4 De G. J. & S. 137; 33 L. J. Ch. p. 201 (1863).

(*i*) Per Jessel, M.R., in *Singer v. Wilson*, 2 C. D. p. 443 (1876). And see Chap. XV., on Infringement,

below, p. 308. Cf. *The Australian Wine Importers' Tm.*, 41 C. D. 278; 6 R. P. C. 311, cited, p. 180.

(*k*) 44 L. J. Ch. 90 (1874). So, a trade mark cannot be separated from the goodwill of the business to which it has been attached: see below, pp. 272 and 287.

under the mark, as the original sauce, an imitation of his own.

Of course, the extent of the class of goods to which a trade-mark is properly applicable will vary very much in different cases. If the mark means that the goods are made by its owner, then it will not rightly be applicable to goods which he has bought to re-sell, and on the principle of the case just cited it would seem that if, in such a case, the owner were to give up manufacturing he would lose his trade-marks, although he commenced to deal as a merchant in the same goods. If, again, the mark means that the goods are selected, shipped, or sold by the owner, then, probably, it may be rightly applicable to many different kinds of goods, and to kinds which may vary, and perhaps very widely, from time to time (?).

Anyone may
apply the
mark to the
right goods.

As the mark must not be applied to the wrong goods, so, on the other hand, it may be applied by anyone to the right goods. Thus, in *Farina v. Silverlock* (m), Lord Cranworth refused an injunction to restrain the defendant, a printer, from printing labels in imitation of the labels on the plaintiff's Eau de Cologne, on the ground that the labels might be intended to be placed upon scent which had actually come from the plaintiff (n). And the test of infringement laid down in all the cases is that the defendant's acts shall be calculated to pass off goods which are not the plaintiff's as his (o); and that is all that an ordinary form of the injunction granted in trade-mark cases restrains (p).

(i) Below, p. 49; and see Chap. XII., p. 252, Effect of Registration.

(m) 1 K. & J. 509; 6 De G. M. & G. 214; 24 L. J. Ch. 632; 26 L. J. Ch. 11 (1855).

(n) The plaintiff was given liberty to try this question at law, and the bill was retained for a year. He succeeded in his action

at law, and was subsequently granted an injunction in equity, 4 K. & J. 650, Wood, V.-C.; 30 L. T. 242; 31 L. T. 99.

(o) See below, p. 314.

(p) See per Cotton, L.J., in *Thompson v. Montgomery*, 41 C. D. p. 48; 6 R. P. C. 213 (1889).

Offered for Sale in the Market.

An allegation that the plaintiff's goods were sold with the trade-mark attached, and that they enjoyed a great reputation, was regularly inserted in the declaration in the old common law action for infringement (*q*). And in *Lawson v. The Bank of London* (*r*), an action to restrain the defendants from usurping the name of the plaintiff's bank, a demurrer was allowed because the declaration did not allege that the plaintiff had carried on business as a banker, but only that he had expended money in advertisements. "No action could, I apprehend," said Willes, J., in that case, "be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forward to the world by the party complaining of the misuser of it."

The mark must be applied to goods offered for sale.

This dictum was cited with approval by Lord Cairns, in *Maxwell v. Hogg* (*s*). In that case the defendant registered at Stationers' Hall the word *Belgravia* as the name of an intended new magazine, in the year 1863. In 1866 the plaintiff began to advertise a different intended new magazine under the same name. The defendant thereupon hurriedly brought out a number of his magazine in September, 1866, and the plaintiff followed in October, and cross suits were then brought by each to restrain the other from using the name. Both suits failed. The plaintiff's was dismissed because his advertisements and expenditure gave him no title to the name before the defendant's first number appeared, and the defendant's because of his uncandid conduct in rushing forward his magazine, knowing of the plaintiff's undertaking, without giving him warning. That the trader's goods should have acquired any reputation for special excellence or quality in order that his mark should be protected, was, however,

(*q*) See *Sykes v. Sykes*, 3 B. & C. 541; 3 L. J. K. B. o.s. 46 (1824); above, p. 3.

(*r*) 18 C. B. 81; 25 L. J. C. P. 188 (1856).

(*s*) L. R. 2 Ch. 307 (1867).

Lord Cairns declared, unnecessary; but, he said (*t*), all the definitions of trade-mark rights given in Equity, "seem to me to be opposed to the idea that protection can be given where there has been no sale or offering for sale of the articles to which the name is to be attached." According to the decisions, he added, no property in a name (or mark) could be acquired except through the process of sale or offering for sale in the market.

And the second of the "essential qualities for constituting property in a trade-mark" enumerated by Lord Westbury, in *McAndrew v. Bassett* (*u*), was that the article marked with the mark in question was actually a vendible article in the market (*x*).

Long user of mark or proof of actual reputation unnecessary.

It is not, however, necessary that the goods should be in the market with the mark affixed for any definite or any considerable time. Thus it was no objection to the defendant's counterclaim in *Maxwell v. Hogg* (*y*), that he had brought out but one number of his magazine, and that only a few days before the plaintiff's issue appeared, and in the same case, as already stated, Lord Cairns decided that reputation for quality was immaterial for the acquisition of the legal right (*z*).

Nor is it essential that the significance of the mark should be proved to have become known to any ascertained person or persons. It is sufficient, subject now to the provisions of the Acts in regard to registration, to entitle a trader to protection for his mark that he has offered goods for sale with the mark so attached that it will, when known, indicate his connection with the goods. It would be an insoluble inquiry, as Lord Remilly declared, in *Hall*

(*t*) L. R. 2 Ch. p. 314.

(*u*) 4 De G. J. & S. 380; 33 L. J. Ch. 561 (1864), (*Anatolia liquorice*).

(*x*) See also *Powell's Tm.*, (1893) 2 Ch. 388; 10 R. P. C. 63, 195, cited above, p. 30.

(*y*) L. R. 2 Ch. 307 (1867).

(*z*) So it is unnecessary for the plaintiff in an infringement action to allege that the defendant is selling inferior goods under his mark: *Blofeld v. Payne*, 4 B. & Ad. 410; 2 L. J. K. B. 62 (1833); *Edelsten v. Edelsten*, 1 De G. J. & S. 185 (1863).

v. Barrows (a), to seek to discover when first a mark acquired a distinctive character in the market as denoting the goods of the trader who first used it.

So as to distinguish the Goods from similar Goods, and to identify them with a particular Trader.

That it is of the essence of a trade-mark that it should have this distinguishing character, is fully established by the statements of the principles upon which the law of trade-marks rests, stated in the last chapter, and the *dicta* quoted at the beginning of this chapter. The rule is further illustrated by the question, which has always been regarded as the test of infringement: Will the use of the trade-mark by the defendant lead purchasers to mistake his goods for those of the plaintiff? (*b*).

Mark must be distinctive.

“The right which a manufacturer has in his trade-mark,” Lord Cranworth said, in the *Leather Cloth Case (c)*, “is the exclusive right to use it for the purpose of indicating where or by whom or at what manufactory the article to which it is affixed was manufactured.” And the same judge, in *Farina v. Silverlock (d)*, after distinguishing copyright from the right to a trade-mark, added, “anyone who has acquired a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or looking exactly like it, but that they may not so sell it as to steal the plaintiff’s trade-mark, and make purchasers believe it is the manufacture of somebody else.”

(a) 32 L. J. Ch. p. 551 (1863); and see *per* Wood, V.-C., in *McAndrew v. Bassett*, 33 L. J. Ch. 561 (1864).

(b) See *per* Ld. Westbury in *Hall v. Barrows*, 4 De G. J. & S. 150; 33 L. J. Ch. p. 208 (1863); and in *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S.

137; 33 L. J. Ch. 199 (1863), and *per* Lord Blackburn in *Orr-Ewing v. The Registrar of Trade Marks*, 4 App. Cas. p. 494 (1879).

(c) 11 H. L. C. 523; 35 L. J. Ch. p. 57 (1865).

(d) 6 De G. M. & G. 214; 26 L. J. Ch. p. 12 (1855).

The provision in the Registration Acts, allowing 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 commencement of the Act of 1875," to be registered as a trade-mark, was intended to include all marks which were trade-marks before the Acts (c). And it is held that the qualification "special and distinctive" does no more than embody the requirements of the existing law in regard to what were or might be trade-marks (f).

A name or device, therefore, which is merely descriptive of the goods themselves or of some quality or attribute which they possess, or are supposed to possess, or which is common to the trade (g), cannot be a trade-mark. And it follows that marks which were once distinctive may have fallen into one of these groups, and so ceased to be available as trade-marks.

What are distinctive marks.

The element of distinctiveness is essential in any mark which is to be registered as a trade-mark under the Acts, and its characteristics as established and illustrated by judicial decisions will be considered in a later chapter (gg); but it will be convenient here to state in outline the leading cases in which this branch of trade-mark law has been discussed, apart from the operation of the Acts, since these cases are still frequently referred to, and turn upon principles of general application.

Descriptive marks, and marks apparently descriptive, but having a secondary distinctive meaning.

The question whether a mark is merely descriptive can hardly arise except with regard to word-marks (h). It may be stated in either of the following forms: do the words which are claimed as a trade-mark (or trade-name, for the same principles apply to both), merely denote the

(c) *Barrow's Tm.*, 5 C. D. 353 (1877), Malins, V.-C.; *Bodega Co. v. Owens*, 6 R. P. C. 241 (1888), Chatterton, V.-C., in Ireland. See Chap. VIII., p. 154, below.

(f) *Hopkinson's Tm.*, (1892) 2 Ch. 116, Kekewich, J.

(g) As to marks common to the trade, see below, pp. 122 and 169.

(gg) Chap. VIII., p. 118.

(h) As to pictures of the goods, see *James' Tm.*, 33 C. D. 392; 3 R. P. C. 340 (1886), C. A. (*Dome Black Lead*), and below, p. 131.

goods, or have they a secondary meaning connoting a connection with the persons who claim them as a trade-mark? or, are the words the known description of all goods of the class by whomsoever they are made or sold, or only of the species within it which are made or sold by those particular manufacturers or traders?

The question arose as early as the case of *Millington v. Fox* (i). There the plaintiffs sued the defendants for infringing their trade-marks, consisting of the words *Crowley Millington*, or one of them, and certain marks which they and their predecessors had used as brands on steel since the seventeenth century; the defendants alleged that both *Crowley* and *Millington* were technical terms understood in the market to mean steel shaped in a particular way, and this would have been a good defence had the evidence been sufficient to support it.

In *Ford v. Foster* (k) the plaintiff sought to restrain the defendants from placing the word *Eureka* upon shirts of the defendants' manufacture. The plaintiff had introduced into the market shirts of a certain shape, which he sold as *Ford's Eureka Shirts*, and the defendants alleged that the word in question was the known description of shirts of that particular shape. They were at liberty to make and sell the shirts, and consequently, they urged, to use the name also. Bacon, V.-C., was in favour of the defendants, upon the evidence as to this, but he decided the case on the ground that the word *Eureka* was only part of the plaintiff's trade-mark, and that he had no right to its exclusive use. The plaintiff appealed, and the decision was reversed, the Lords Justices finding that retail buyers would be led to believe by the use of the word that the goods were goods made by the plaintiff. The test whether a name has become *publici juris*, Mellish, L.J., said (l), must be "whether the use of it by other persons may still have the effect of inducing the public to buy goods not

The name of a new pattern.

Ford v. Foster.

Test whether a trade-mark has become *publici juris*.

(i) 3 My. & Cr. 338 (1838), Cottonham, L.C.

(k) L. R. 7 Ch. 611 (1872).

(l) Page 628.

“made by the original owner of the trade-mark as if they were his goods.” If not, he added, “however hard, to some extent, it may appear on the trader, yet practically, as the right to a trade-mark is simply a right to prevent the trader from being cheated by other persons’ goods being sold as his goods through the fraudulent use of the trade-mark, the right to the trade-mark must be gone.” An injunction was accordingly granted to restrain the defendants from applying the mark *Eureka* to any shirts not manufactured by the plaintiff (*m*); but the defendants were left at liberty to advertise the name between themselves and the trade, as the Court thought that in the trade the name had the meaning contended for by them, and that the use of it in the manner stated could not lead to deception.

The *Singer*
cases.
Singer v.
Wilson.

The most important cases on the subject are two cases in which the Singer Manufacturing Co. sought to maintain a monopoly in the use of the name *Singer* for sewing machines manufactured by them. The cases were, in fact, trade-name not trade-mark cases, but the principles upon which they proceeded, and the judgments delivered in them, are equally applicable to both marks and names. The plaintiffs were an American company carrying on a business, originally founded by one J. M. Singer, in sewing machines which they and their predecessors had extensively advertised under the name in question, and they alleged that their machines were not of any particular type which was known as the *Singer Machine*, but were of many varieties, some of which had specific names appropriated to them. They were accustomed to place a distinctive trade-mark, comprising their name and a particular device, upon each of their machines, but it was not alleged in either case that the defendant had infringed this trade-mark. The defendant in the earlier case (*n*) had issued advertise-

(*m*) For form of injunction, see 7 Ch. p. 634; Appendix, p. 650.

(*n*) *Singer Manufacturing Co. v. Wilson*, 2 C. D. 434 (1875); 3 App. Cas. 376 (1877). See also the Scotch

case of *Singer Manufacturing Co. v. Kimball*, 11 Court of Sess. Cas. 3rd series, 267, where an injunction was granted. It has recently been held, that to a large part of the

ments and price lists in which he professed to sell *Singer* and *New Singer* machines, but in which he described them as manufactured by himself. He had not infringed the plaintiffs' distinctive trade-mark. For the defence it was alleged that the name *Singer* meant one of two particular types of machine, that it had come to be like *Hansom* and *Brougham*, the "name of the article, and not a mark or sign indicating the manufacturer" (o). The case took a somewhat unusual course. It was dismissed by Jessel, M.R., without the defendant having been called upon, and this decision was upheld by the Court of Appeal, but reversed by the House of Lords, the House deciding that, upon the evidence of the plaintiffs, an answer was called for, and that, therefore, the defendant ought to be required to prove the allegation on which he relied (p).

In non-suiting the plaintiffs, Jessel, M.R., proceeded on the ground that as the word *Singer* was not attached to the goods it was not a trade-mark, and that the plaintiffs could, therefore, only succeed by making out a case of fraudulent personation (q). The representations made in the defendant's price lists and advertisements, were, he held, incapable of misleading anyone as to the origin of the machines. The Court of Appeal took the same view of the representations, and relied chiefly on that in upholding the decision. In the House of Lords, Lord Cairns said the question must be, "Are the advertisements of the defendant, having regard to the evidence in the case, calculated to mislead an unwary purchaser of the machines?" And this question might still be answered affirmatively, he thought, although when the advertisements came to be spelt out with care, there was no actual representation on them that the goods they referred to

public *Singer* denotes the manufacture of the Singer Co. : *Singer Manufacturing Co. v. Spence & Co.*, 10 R. P. C. 297 (1893), Romer, J.

(o) *Per* Lord Cairns, 3 App. Cas. p. 385.

(p) The case does not appear to have been carried any further.

(q) See above, p. 13, where the judgment is quoted at length.

were made by the plaintiffs. And he rejected the distinction suggested by Jessel, M.R., between cases where a trade-mark used on the goods was infringed, and cases where the name by which the goods were advertised and known was pirated. Fraud, or intent to deceive, need not, he said, be alleged or proved in either case (*r*). The other law lords agreed that the plaintiffs had made out a case to show that the defendant's advertisements might lead to his goods being bought as and for theirs, and that, therefore, the defendant ought to have been called upon to displace this case, or to establish by evidence his own contention as to the meaning of *Singer*. The case was sent down for a new trial, but there is no further report of it.

Singer v. Loog. Many of the same questions were discussed again in the case of the *Singer Manufacturing Co. v. Loog* (*s*). There the defendant had placed upon the machines he sold a plate marked *Singer machine*, but bearing also words referring to the foreign makers of the goods. This plate he offered to abandon, but he claimed the right to use the word *Singer* to describe his machines. He did not, in fact, call his machines *Singers*, but advertised them as *our Singer machines*, and as machines made on the *Singer system*. Both the Court of Appeal and the House of Lords, reversing the judgment of Bacon, V.-C., decided that the documents issued by the defendant were not calculated to deceive, and the action, consequently, failed. The question as to the secondary meaning of the word *Singer* did not, therefore, call for decision (*t*); but it was agreed by all the judges, and was admitted by the plaintiffs themselves, that they could claim no exclusive use of the word if the defendant could show that the article in question was a specific article known by a specific name, and that, as in the case of the Wellington boots and

(*r*) 3 App. Cas. p. 391; and see above, p. 14.

(*s*) 18 C. D. 395 (1879); 8 App. Cas. 15 (1882).

(*t*) 18 C. D. p. 419.

Hansom cabs, he was unable to designate the article in any other way than by its known name (*u*). Lord Selborne, however, found as a fact that the term *Singer* did signify a system of construction for sewing machines known to the trade (*x*).

The obvious intention of the plaintiffs in both these cases was to monopolise, if possible, the reputation gained by the machines which they had been the first to introduce into the market by preventing other traders from using the name by which the machines were known, and this they were not allowed to do. "The reputation acquired by machines of a particular form or construction," said Lord Selborne (*y*), "is one thing; the reputation of the plaintiffs is another. If the defendant has no right under colour of the former to invade the latter, neither have the plaintiffs any right under colour of the latter to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common to the trade, provided always that he does this in a fair, distinct, and unequivocal way."

No monopoly can be maintained in the reputation of goods which anyone may make and sell.

The Liebig's Extract Case (*z*) affords a good example of a name which was held to be merely the name of the goods, common to all the world, and subject to no monopoly rights. There Baron Liebig, the inventor of the process by which the extract was prepared, had pur-

(*u*) 18 C. D. p. 398.

(*x*) The question of fact is now settled by *The Singer Manufacturing Co. v. Spence & Co.*, 10 R. P. C. 297 (1893), where it was admitted that to an inner ring of the trade *Singer* means a system of manufacture; but Romer, J., found it means the plaintiffs' manufacture,

to a large part of the public.

(*y*) 8 App. Cas. p. 27; see also *Leonard and Ellis' Tm.*, 26 C. D. p. 297 (1884), C. A.

(*z*) *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298 (1867), Wood, V.-C.; *Id. v. Anderson*, 55 L. T. 206 (1884), Chitty, J.

ported to confer upon the plaintiffs an exclusive right to use his name in connection with the goods, and they sought to restrain the defendant from using the words *Liebig's Extract*. The process of manufacture had, however, been long published and largely employed, and the goods were commonly known by the name in question. The injunction was accordingly refused.

Name of
goods made
under an ex-
pired patent.

Where an article has been introduced as new and first manufactured under a patent, the name by which it is known becomes common property so soon as the expiration of the patent right puts an end to the monopoly in the manufacture and sale of the article; and, although the name may have, down to that time, identified the goods with the maker of them, it is no longer available for him as a trade-mark or trade-name.

On this subject, Lord Herschell's Committee said in their report (a): "It has been suggested that there is a necessity for some statutory definition of the trade-mark rights which are acquired in connection with words used as the names of patented articles. Where a patent has been obtained for some article of commerce, and the patentee gives it a name which he registers as his trade-mark, has he a right, at the end of the term of his patent, to prevent other people from selling it under that name? It is clear that he obtains the patent upon the condition that, at the expiration of the term of his monopoly, the public shall have the right to manufacture and use it; and if the only name by which it is known is that which the proprietor has registered as a trade-mark, it would certainly seem inconsistent with the right thus intended to be conferred on the public, if everyone, except the original patentee, were prevented from calling it or selling it by that name which alone it bears. The authorities appear, however, to show that such a claim could not be maintained."

The cases of *The Wheeler and Wilson Manufacturing Co.*

(a) Report of 1888, p. xiv.

v. Shakespear (b), and *The Linoleum Manufacturing Co. v. Nairn (c)*, are the leading authorities on this head. In the former case, the plaintiffs were manufacturers of sewing machines made according to an expired patent, and in the manufacture, therefore, they had no monopoly. The defendant advertised himself as the "agent for the sale of the Wheeler-Wilson machine" in Birmingham, although he was not the plaintiffs' agent, and was not selling machines made by them. He alleged that his advertisement meant only that he sold the machines. The Court, while restraining him from advertising himself as agent, refused to restrain him from describing the machines he sold as *Wheeler and Wilson's*. It was not, said James, V.-C., the name of the makers but of the thing itself, and the monopoly under the expired patent could not be prolonged by granting a monopoly in the name.

In *The Linoleum Case (d)*, the plaintiffs used a trade-mark containing the word *Linoleum* for a floor-cloth which had been first manufactured and sold by them under a patent, and they unsuccessfully endeavoured to restrain the defendants from selling similar cloth as *Linoleum Floor Cloth* after the patent had expired. Fry, J. found as a fact that the word *Linoleum*, which was taken by the defendants, was not an essential part of the plaintiffs' trade-mark, but was descriptive only. It was, he said, the name of the thing, and the defendants were not bound to invent a new name for it if they made it. The name, he added (e), "only secondarily means the manufacture of the plaintiffs', and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been, by right of some monopoly, the sole manufacturer of a new article, and has given a new name to the new article, meaning that

The name given to a new article cannot be monopolised.

The Linoleum Case.

(b) 39 L. J. Ch. 36 (1870), James, V.-C.

(c) 7 C. D. 834 (1878), Fry, J.

(d) *The Linoleum Co. v. Nairn*, 7 C. D. 834 (1878); cf. *Young v.*

Macrac, 9 Jur. N.S. 332 (1862), Wood, V.-C., *paraffin* not a trade-mark.

(e) Page 837.

“new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur” (f).

Original.

The first introducer of goods which have come to be known by the name which he applied to them, so that that name has been lost to him as a distinctive mark, has, in some cases, been allowed to distinguish his goods by the name with the prefix *original*. Thus, in the *Reading Sauce Case* (g), Romilly, M.R., said, “where there are a great number of persons who produce the same article, *original* means that the article so called is that made by the first inventor. That is the meaning of *original*, which the Court of Chancery has always recognized.”

Name of the place of origin.

The name of the place of origin of the goods would, on the same principles, in general, be bad as a trade-mark, for any importer from the same place would be at liberty to use it; but where the name has acquired a secondary meaning, identifying the goods upon which it appears with a particular trader, the trader has frequently been protected against fraudulent imitators. Even in cases where this secondary meaning has been acquired, however, according to the rules adopted in analogous cases of a trader using his own name, although it closely resembles, or is identical with, that of an earlier established and competing trader (h), the Courts would not interfere to restrain a second trader honestly using the name in question merely for the purpose of indicating the place of origin of his goods, although they might require him to use it in the less deceptive of two or more alternative forms (i). At

(f) See below, p. 201.

(g) *Cocks v. Chandlers*, L. R. 11 Eq. p. 447 (1871); see also *Browne v. Freeman* (1), 12 W. R. 305 (1864); S. C. (2), W. N. (1878), 178, (*Chlorodyne*); *Laxenby v. White*, 40 L. J. Ch. 576; 41 L. J. Ch. 354 (1870), (*Harvey's service*).

(h) See *Burgess v. Burgess, and Turton v. Turton*, below, pp. 421, 424.

(i) There are dicta in the *Stone Ales Case*, in the House of Lords, which suggest that a practical monopoly might be acquired of the use of the name of a place where goods are manufactured; but they

any rate, there is no reported authority in favour of such interference.

In *McAndrew v. Bassett* (*k*) the word *Anatolia* stamped upon liquorice was held to be a good trade-mark. The plaintiff made his goods of a mixture of juices obtained partly from Spain and partly from the district of Andoli, and he chose *Anatolia*, which was one form of the latter name, as his mark. The defendant, having seen the plaintiff's mark in the market, caused it to be applied to goods of his own made solely from Spanish juice. If the name had had a known meaning indicating the origin of the goods it is clear that the plaintiff could not have monopolised it, but as it had, when he assumed it, and at the time of the infringement, no such meaning, the Court decided that it was a good trade-mark. "It is not," said Wood, V.-C., "like the case . . . of there being some district from which a well-known wine, such as Burgundy, is imported, and the first importer calls it *Burgundy*; although he may have stamped *Burgundy* on his corks for twenty years, he could not prevent anybody else from calling a wine produced in Burgundy by the name of the place from which it was imported."

*Anatolia
liquorice.*

In *Seixo v. Provezende* (*l*) part of the plaintiff's trade-marks consisted of the word *Seixo*, which was his own name, and also the name of the estate from which the wine, in connection with which the mark was used, came. The defendants adopted the same word in their trade-mark, and they alleged that their wine came from an estate adjoining the plaintiff's and also known as *Seixo*. It appeared that the produce of the defendants' estate was far less in quantity than that of the plaintiff, that the plaintiff's wine was well known by his trade-mark, and that the district in which both estates were situate was

*Seixo v.
Provezende.*

must, it is submitted, be read by reference to the facts of the case, which was one of deliberate fraud. *Thompson v. Montgomery*, (1861) A. C. 217; 8 B. P. C. 365; above,

p. 29.

(*k*) 4 De G. J. & S. 380; 33 L. J. Ch. 561 (1864), Wood, V.-C., and Westbury, L.C.

(*l*) L. R. 1 Ch. 192 (1855).

known as "Sitio do Seixo," meaning "the stony country." Wood, V.-C., granted an injunction to restrain the defendants from using the word in question without clearly distinguishing the wines they sold under it from the wines of the plaintiff (*m*), and, on appeal, Cranworth, L.C., upheld this decision. "Assuming the truth of what is contended for by the defendants," the Lord Chancellor said (*n*), "that is, that parts of their vineyards are known by the name *Seixo*, that does not justify them in adopting a device or brand the probable effect of which is to lead the public when purchasing their wine to suppose that they are purchasing wine produced from the vineyards, not of the defendants, but of the plaintiffs."

*Glenfield
starch.*

In the *Glenfield Starch Case* (*o*), the defendant was restrained from using the word *Glenfield* on the labels attached to starch made by him, and from calling such starch *Glenfield Starch*, although his starch was actually made, and that of the plaintiffs was not made, at the place of that name. The plaintiffs had formerly manufactured their goods at Glenfield, and had adopted the name *Glenfield Starch*, and a label comprising the words to describe them, and the defendant, as the House of Lords found, set up a factory at Glenfield—an open place with a few cottages—for the express purpose of securing the name, and of profiting by the plaintiffs' reputation. He called his starch *Royal Palace Starch*, but placed the name *Glenfield* in large letters on his labels, and his agents sold his goods as *Glenfield Starch*.

"I take it to be clear from the evidence," Lord Westbury said (*p*), "that, long antecedently to the operations of the respondent, the word *Glenfield* had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellants. It

(*m*) See form of injunction, L. R. 1 Ch. p. 194; Appendix, p. 649.

(*n*) Page 198.

(*o*) *Wotherspoon v. Currie*, 42 L. J. Ch. 130; James, L.J., L. R. 5 H. L. 508 (1872).

(*p*) Page 521.

“was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word *Glenfield*, therefore, as a denomination of starch, had become the property of the appellants.”

This decision has been very recently followed and approved by the House of Lords in the *Stone Ales Case* (q), which was a very similar case.

Geographical names are expressly excepted from the list of essential particulars for registered trade-marks contained in the present Act (r).

So a mere advertisement or description of the goods concerned, or of some quality which they possess, is not a trade-mark. And on this ground Lord Westbury based his judgment, in the House of Lords, in the *Leather Cloth Case* (s).

The trade-mark of the plaintiffs in that case consisted of a circle formed by the words *Crocketts' International Leather Cloth Company, Newark, N. Y., U. S. A., West Ham, England*, inside of which in the upper half was an eagle, with the word *Excelsior* over it, and the words *Crocketts & Co., tanned leather cloth* below it, and in the lower half the words *Patented, January 24, 56, I. R. and C. P. Crockett, Manufacturers, 12 yards*. The defendants had a trade-mark containing features similar to some of these. Wood, V.-C., granted an injunction (t), but on appeal (u) this was rescinded by Lord Westbury on the ground that the plaintiffs' trade-mark contained material misrepresentations which disentitled them to relief. When the case came before him again, in the House of Lords, however,

Advertisement of the goods not a trade-mark.

Leather Cloth Case.

(q) *Montgomery v. Thompson*, (1891) A. C. p. 217; 8 R. P. O. 361; above, p. 29; cf. also *Huntley & Palmer v. The Reading Biscuit Co.*, 10 R. P. O. 277 (1893), Chitty, J. (*Reading biscuits*).

(r) Act of 1838, s. 10 (1) (e), below, p. 156, see also, p. 147.

(s) *The Leather Cloth Co. v. The American Leather Cloth Co.*, 11 H. L. O. 523; 35 L. J. Ch. 53 (1866).

(t) 1 H. & M. 271; 32 L. J. Ch. 721.

(u) 4 De G. J. & S. 137; 33 L. J. Ch. 199.

Lord Westbury said (x): "I am satisfied that I ought to have regarded this affix to the plaintiffs' goods, which is here denominated a trade-mark, as something which, according to the anterior usage and application of the words trade-mark, by no means resembles or comes within the description of anything that has hitherto been properly designated by that name." It was, he added, "in reality, an advertisement of the character and quality of their goods."

So the words *Nourishing Stout* were refused protection (y), by Malins, V.-C., who distinguished the case before him from two earlier cases, in one of which (z) words meaning *exactly 12 yards*, printed in three foreign languages, and placed upon long cloth, and in the other (a) the words *Excelsior White Soap*, had been accepted as trade-marks.

*Cheavin v.
Walker.*

And in *Cheavin v. Walker* (b), a tablet bearing the words *G. Cheavin's Improved Patent Gold Medal Self-Cleaning Rapid Water Filter, Boston, England*, with the Royal Arms and the words *By Her Majesty's Royal Letters Patent*, was held by Jessel, M. R., in the Court of Appeal, not to be a trade-mark. "What (the plaintiff) uses," he said (c), "is an inscription which he chooses to place or bake on his filters, and which tells its own story. The inscription is not in distinctive characters, but in ordinary type. There is nothing in it to show that it was made by any particular manufacturer. It is not possible to say that such an inscription is a trade-mark." The action failed also on the ground that the tablet falsely represented that the goods were made under an existing patent, whereas, in fact, the patent had expired.

The essential quality of distinctiveness as a necessary element in a trade-mark has been carefully preserved by

(x) 35 L. J. Ch. p. 66.

(y) *Raggett v. Findlater*, L. R. 17 Eq. p. 29 (1873).

(z) *Broadhurst v. Barlow*, (1872) unreported; see L. R. 17 Eq. p. 38.

(a) *Braham v. Bastard*, 1 H. & M. 447 (1863).

(b) 5 C. D. 854 (1876), C. A.

(c) Page 863.

the Acts, and by the decisions upon them. These are dealt with in a subsequent chapter (*d*).

Made, worked upon, imported, selected, certified, or sold.

The office of the trade-mark is to indicate some connection between the goods to which it is applied and a particular trader (*e*). What this connection is, is immaterial; but it should be a constant one. If a maker chooses to sell under a trade-mark identified with goods of his manufacture goods made by others, his conduct will tend to destroy the original significance of the mark, and eventually to confer upon it a new meaning; but, until the alteration is known, buyers may justly complain of deception (*f*). All that a trade-mark can effect, however, is to associate the reputation of its owner with the quality and character of the goods upon which it appears, and it will generally be immaterial to anyone who deals with a manufacturer, upon the strength of his reputation for good workmanship, whether he passes off under the mark the goods of other people, or inferior goods of his own,—the reputation will be no longer deserved.

Connection of the owner of the trade-mark with the goods.

Buyers rely on the reputation of the owner of the trade-mark.

The connection most commonly intended by a trade-mark is that of origin or manufacture; but, as already said, many others may be connoted. This is succinctly expressed in the statement of Bowen, L.J., in a recent case (*g*), that the function of a trade-mark is to give an indication of "the trade source from which the goods come, or the trade-hands through which they pass on their way to the market." And in the Merchandise Marks Act of 1862 (*h*),

(*d*) See 38 & 39 Vict. c. 91, s. 10; 46 & 47 Vict. c. 57, s. 64; 52 & 53 Vict. c. 50, s. 10; and below, Chap. VIII., What may be Registered, p. 106.

(*e*) See the *dicta* cited above, p. 27.

(*f*) The deception may constitute the offence of applying a false

trade description. See *Starey v. Oilworth Gunpowder Co.*, 24 Q. B. D. 30; and the Merchandise Marks Act, 1887, Book II., Chap. I., pp. 475 *et seq.*

(*g*) *Powell's Tm.*, (1893) 2 Ch. p. 404; 10 R. P. C. 195.

(*h*) Sect. 1, quoted above, p. 26.

the words used were manufacture, workmanship, production, or merchandise.

Trade-mark
of selector of
goods.

*Hirsch v.
Jonas.*

In some cases it is difficult to decide what the precise meaning of a trade-mark is, for instance, where A. has selected and imported goods made by B. for many years, and has sold them under a particular trade-mark. If A. has been the sole importer, does the reputation of the mark refer to his selection and importation, or to B.'s manufacture? Such a case arose in *Hirsch v. Jonas* (i). There the plaintiff bought cigars of a foreign maker, who, at his request, placed a label, designed and registered as his copyright by the plaintiff, upon the boxes. Subsequently, the maker began to supply to the defendants for sale in the market similar cigars, not purchased by the plaintiff, but bearing the same label, and this the plaintiff unsuccessfully sought to restrain. The name of the plaintiff did not appear on the boxes, but that of the maker did. "The trade-mark of manufactured goods," said Jessel, M.R. (k), "means, I suppose, that the goods are manufactured by the person whose trade-mark it purports to be. I can understand a man saying, 'I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to show that they have been selected and approved of by me will fetch a higher price in the market.' If Hirsch had put on the box '*Gloria de Inglaterra Havannah Cigars selected by Hirsch*,' he might have had a case to prevent other people imitating that. It would show that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him. That is not his case. There is nothing on the boxes to show anything about Hirsch at all. All he says is that the trade knows this mark as denoting cigars sold by him, which I dare say it does."

(i) 3 C. D. 582 (1876).

(k) 3 C. D. p. 586.

In *Robinson v. Finlay* (*l*) the marks in question were held to indicate a connection with three different persons—the manufacturer, the exporter, and the consignee, since they had always and only been used upon goods which had passed through the hands of all of these in their several capacities. The Court of Appeal, accordingly, decided that neither of the parties alone was entitled to the marks.

Registered under the Acts as a Trade-Mark.

Before the Registration Acts were passed, the only general way in which a trade-mark could have been acquired was by public user, in the manner described in the earlier part of the definition (*m*), or in the case of a Cutlers' Corporate Mark, for use by a cutler resident in or within six miles of Hallamshire, by assignment from the Cutlers' Company (*n*). But registration, or, rather, the application for registration, is now to be deemed equivalent to the public use of the registered trade-mark (*o*), and the registration of a person as proprietor of a trade-mark is to be *prima facie* evidence of his right to the exclusive use of the trade-mark, and after the expiration of five years from the date of registration, to be conclusive evidence of his right to such exclusive use, subject to the provisions of the Act (*p*).

These sections, it has been decided, create a new method in which trade-mark rights can be acquired (*q*). Their construction and effect are discussed in a later chapter (*r*).

(*l*) 9 C. D. 487 (1877), Bacon, V.-C., and C. A.; *Jones's Tm.*, 53 L. T. N.S. 1 (1885), C. A.

(*m*) *Hudson's Tm.*, 32 C. D. 311; 3 R. P. C. 155 (1886), C. A.

(*n*) See Chap. VI. Sheffield Marks; below, p. 91.

(*o*) Act of 1888, sect. 17, replacing sect. 75 of the Act of 1883, and sect. 2 of the Act of 1875; below,

p. 254.

(*p*) Act of 1883, sect. 76, replacing sect. 3 of the Act of 1875.

(*q*) *Hudson's Tm.*, 32 C. D. 311; 3 R. P. C. 155 (1886), C. A.; below, p. 254.

(*r*) Chap. VIII., What may be Registered, p. 106. Chap. XII., Effect of Registration, p. 252.

CHAPTER III.

THE REGISTER OF TRADE-MARKS, AND THE TRADE-MARKS
BRANCH OF THE PATENT OFFICE.

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The register.

THE register of trade-marks was set up by the Act of 1875 (a), and it is now continued under sect. 78 of the Act of 1883, which provides that there shall be kept at the Patent Office (b) a book called the Register of Trade-Marks, wherein shall be entered the names and addresses of proprietors of registered trade-marks, notifications of assignments and of transmissions of trade-marks, and such other matters as may be from time to time prescribed. And the books of the original register are treated as part of the present register (c).

The Man-
chester office
and the

There are also registers at Manchester and Sheffield. The former, a copy of the register at the Patent Office, so

(a) Sects. 1 and 7.

(b) 25, Southampton Buildings,
Chancery Lane, London, E.C. The

Sales Department is in Curator
Street, Chancery Lane.

(c) Act of 1883, s. 114.

far as it relates to goods in Classes 23, 24, and 25 (*d*) (*i.e.*, cotton goods), and the latter, a branch register for trade-marks for metal goods registered by residents in Hallamshire, or within six miles of it (*e*).

Sheffield register.

The register was formerly under the control of the registrar appointed in pursuance of the Act of 1875, but it is now, as well as the whole of the Patent Office, of the business of which it forms part, under the immediate control of the Comptroller-General of Patents, Designs, and Trade-Marks, who is appointed by, and acts under the superintendence and direction of, the Board of Trade (*f*), and who may in any case of doubt or difficulty arising in the administration of any of the provisions of the Act, apply to either of the law officers for directions in the matter (*g*). The Comptroller's address is, The Comptroller, Patent Office, Trade-Marks Branch, 25, Southampton Buildings, London.

The Comptroller.

Any act or thing directed by the Acts to be done by or to the Comptroller may, in his absence, be done by or to any officer for the time being in that behalf authorized by the Board of Trade (*gg*).

In addition to the matters directed by sect. 78, quoted above, to be entered upon the register there are entered also the name, address, and description of the proprietor of each mark (*h*), the date of the application for registration (*i*), a statement of the class or classes of goods for which the mark is registered (*k*), disclaimers under sect. 74

Entries on the register.

(*d*) *Belcw*, p. 621.

(*e*) As to the Manchester office, see *belcw*, p. 104, and as to the Sheffield registry, p. 97.

(*f*) Sect. 82 (3). Lord Herschell's committee recommended that the practice which had grown up of consulting the Board of Trade in particular instances, in regard to applications for registration, should cease, except so far as it might be necessary to bring such instances before them by way of

illustration for the purpose of obtaining a direction on some point of general principle or practice. Report of 1888, p. vii.

(*g*) Sect. 95. This power is referred to by Lindley, L.J., in *Re Tm. Normal*, 35 C. D. p. 245 (1887), C. A.

(*gg*) Sect. 82 (4).

(*h*) Rule 32.

(*i*) Rule 34.

(*k*) Sect. 65. See form of application, Form F., Appendix, p. 608.

of the Act (*k*), a note of the orders of the Court made under sects. 62, 63, 72, 90, or 92, and affecting the mark (*l*), and such other particulars as the comptroller thinks necessary (*m*). And these last particulars include notes entered on the register in pursuance of undertakings by the proprietor to confine the use of his mark to a certain district, or to the goods forming part only of a class (*n*), and in regard to other restrictions on the full rights ordinarily conferred by a simple registration.

No trusts to be entered.

No notice of any trust may be entered upon the register or be receivable by the comptroller, whether the trust be express, implied, or constructive (*o*), so that the entry of a reference to an agreement limiting the rights of the proprietor of the mark and not stating its terms, is irregular (*p*).

Title conferred by registration.

There is no patent or other document issued by the comptroller in respect of the title to a trade-mark, but the application, followed by the registration of the trade-mark, is equivalent to the public user (*q*), by which, and by which alone, title to a trade-mark was acquired before the Acts (*r*), and registration confers a right to the exclusive use of the mark (*s*), and, in the case of any trade-mark which is capable of registration, except an old mark of which registration has been refused, is a condition precedent to any proceedings for the infringement of the trade-mark (*t*). The person registered as proprietor has power to assign the trade-mark (*u*).

Alterations of the register.

Provision is made for the rectification of the register, and also for its alteration in any non-essential particular,

(*k*) Act of 1888, s. 16.

(*l*) Rule 46.

(*m*) Rule 34.

(*n*) See below, pp. 182 and 235; and *Re Rabone & Co.*, Seb. Dig. p. 305 (1879), Jessel, M.R.; *De Otaduy's Tm.* (1885), W. N. p. 177, Pearson, J.; *Mitchell & Co.'s Tm.* (2), 28 C. D. 666 (1885), Chitty, J.; *Keep's Tm.*, 26 C. D. 187 (1884), Pearson, J.

(*o*) Sect. 85. Rule of 1876 (22),

cf. Companies Act, 1862, s. 30.

(*p*) *De Otaduy's Tm.* and *Mitchell & Co.'s Tm.*, above.

(*q*) Act of 1888, s. 17.

(*r*) See the last Chapter.

(*s*) Sect. 76. See Chap. XII.; below, p. 252, Effect of Registration.

(*t*) Sect. 77. See Chap. XII.; below, p. 260.

(*u*) Sect. 87.

by order of the Court (*x*), and for the correction of clerical errors (*y*), and the entry of changes of address (*z*), by the comptroller.

The falsification of entries in, or of writings purporting to be copies of entries in, the register, and the tendering or production of any such entry or writing, knowing it to be false, is a misdemeanour (*a*).

Falsification
of the
register.

Devolutions of title to a trade-mark by assignment, transmission, or other operation of law, are directed to be entered on the register by the comptroller at the request of the person becoming entitled, and upon proof to the satisfaction of the comptroller of the title of the applicant (*b*).

Devolution
of title.

A trade-mark may, probably, be removed from the register because the business, to the goodwill of which the rights conferred by the registration are attached (*c*), has come to an end, and it may also be removed, after fourteen years, for non-payment of fees, under sect. 79 (*d*). In the latter case a record of the removal and of the cause thereof is inserted on the register (*e*).

Removal of
entries.

The register is open to the inspection of the public on payment of the prescribed fee (which is at present one shilling for every quarter of an hour spent in inspecting) on every week day between the hours of ten and four, except on the usual holidays (*f*), days of which due notice is given at the Patent Office, and times when the register is required for any purpose of official use (*g*).

Inspection of
the register.

It is generally advisable before offering a trade-mark

Searches.

(*x*) Sects. 90 and 92. Rules 46 to 50. See Chap. XI.; below, p. 218, Rectification of the Register.

(*y*) Sect. 91.

(*z*) Rule 48.

(*a*) Sect. 93; below, p. 541.

(*b*) Sect. 87. Rules 36 to 40. See Chap. XIII.; below, p. 272, Assignment and Devolution of Trade-Mark.

(*c*) Sect. 70. *Ralph's Tm.*, 25 C. D. 194 (1883), Pearson, J. There

is no rule in the present code corresponding to r. 34 of the Rules of 1876. See Chap. XIV.; below, p. 283.

(*d*) Page 292.

(*e*) Rule 47.

(*f*) When the last day for doing any act, under the Statute or the Rules, falls on a public holiday, Sunday or Saturday, such day is not counted. Sect. 98.

(*g*) Sect. 88. Rule 52.

Indexes.

for registration to cause a search to be made through the register, to discover whether any of its essential features have been anticipated in such manner as to be a bar to the application (*h*), and it is often necessary for other purposes. The comptroller does not undertake to make searches except in connection with formal applications for registration (*h*), but the searches are greatly facilitated by the indexes with which the register is provided. There are three of these, and they include both actually registered, and advertised trade-marks. They are:—

I. An index of devices arranged in each class in the order of advertisement;

II. An index of devices arranged in each class under the following heads:

- (1.) Animals, including insects and reptiles.
- (2.) Birds.
- (3.) Buildings and landscapes.
- (4.) Crests, including crowns, coats of arms, and heraldic symbols.
- (5.) Fish.
- (6.) Geometrical forms, including suns, moons, stars, &c.
- (7.) Human figures.
- (8.) Miscellaneous.
- (9.) Monograms.
- (10.) Shipping, including anchors and flags.
- (11.) Trees, flowers, fruit, &c.

(and warning is given that, in using this index, it is often necessary to look under several heads in order to ensure a complete search.)

III. An index of words forming the essential or material features of marks.

It is to be regretted that the recommendation of Lord Herschell's committee (*i*), that a catalogue of words rejected should be kept, has not been followed, or an index

(*h*) Instructions (7). See sects. p. 175.
72 and 73, and Chap. X.; below, (*i*) Report of 1888, p. ix.

of such words, added to this index, of words accepted as marks or parts of marks.

Certified copies of the register, sealed with the seal of the Patent Office, of any entry in the register, are directed to be given to any person requiring the same on payment of the prescribed fee (*k*). And printed or written copies of or extracts from the register, purporting to be certified by the comptroller and sealed with the Patent Office seal, are receivable in evidence without proof or production of the originals (*l*). And a certificate, purporting to be under the hand of the comptroller, of any entry, matter, or thing, which he is authorized by the Act or Rules to make or do, is *prima facie* evidence of the entry and of its contents, and of the matter or thing having been done or left undone (*m*).

Certified copies of the register to be evidence.

Comptroller's certificate to be evidence.

Rule 60 requires that every certificate of registration shall have specified on the face of it a statement whether it is intended to be used in legal proceedings, or for the purpose of obtaining registration in a foreign country, or for other purposes; and the fees payable for the certificates vary according to the uses which they are to serve (*n*).

The seal of the Patent Office and impressions thereof, are to be judicially noticed and admitted in evidence (*o*).

Patent Office seal.

Any application, notice, or other document, authorized or required to be left, made, or given at the Patent Office or to the comptroller, or to any person under the Act, may be sent by a prepaid letter through the post; and if so sent, is to be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post; and it is sufficient, in proving such service or sending, to prove that the letter was properly addressed and put into the post (*p*).

Notices and documents may be sent by post.

(*k*) Sect. 88. For fees, see Appendix, p. 606.

(*l*) Sect. 89.

(*m*) Sect. 96.

(*n*) For fees, see Appendix, p. 606; and for form of request for

certificates, Forms K., R., S., T., and form of certificate, U.; below, pp. 607 *et seq.*

(*o*) Sect. 84.

(*p*) Sect. 97.

CHAPTER IV.

REGISTRATION OF TRADE-MARKS.

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THE registration of trade-marks is governed by sects. 62 to 69, and 71 to 74 of the Act of 1883. Of these, sect. 64

(1) and (3) (ii.), declaring what may be registered (a); sects. 71, 72, and 73, imposing certain restrictions on registration (b), and sects. 74, and 64 (2) and (3) (i.) providing for additions and disclaimers (c), are dealt with in other chapters of this book. The present chapter deals with the application for registration and the procedure consequent upon it.

By sect. 62—

“(1.) The comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register the trade-mark. Sect. 62.
Application
for registra-
tion.

“(2.) The application must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, *the Patent Office in the prescribed manner* [such place and in such manner as may be prescribed] (d).

“(3.) The application must be accompanied by the prescribed number of representations of the trade-mark, and must state the particular goods or classes of goods (e) in connection with which the applicant desires the trade-mark to be registered.

“(4.) The comptroller may, if he thinks fit, refuse to register a trade-mark, but any such refusal shall be subject to appeal (f) to the Board of Trade, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

“(5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court (g); and in that event the Court shall have jurisdiction to hear and determine the appeal and may make such order as aforesaid.

(a) Chap. VIII. p. 106.

(b) Chap. X. p. 175.

(c) Chap. IX. p. 164.

(d) Act of 1888, s. 8.

(e) Chap. V. p. 87.

(f) Page 79.

(g) Page 81.

“[(6.) Where an applicant for the registration of a trade-mark otherwise than under an international convention (*h*) is out of the United Kingdom at the time of making the application he shall give the comptroller an address for service in the United Kingdom, and if he fails to do so the application shall not be proceeded with until the address has been given ”] (*i*).

1. Who may apply to Register a Trade-Mark.

The section says, “any person claiming to be the proprietor,” but if it is shown that the claim is a wrongful or an erroneous one the mark should be refused registration, and, if registered, it can be removed under sect. 90 (*k*). If, however, a mark has been registered by a trader who honestly believes he has invented and is entitled to it, although in fact it belonged at the time to another trader, and if it has been largely used by the registered proprietor, the Court may refuse to remove it (*l*).

Person includes firm or partnership (*m*), also a body corporate (*n*).

The proprietor.

Proprietor means the person who is entitled to a mark in which trade-mark rights have been acquired by user under the law apart from the Acts, either by himself or by his predecessor in business, the trade-mark having been assigned to, or having devolved upon, him with the goodwill of the business in connection with which it is used (*o*), or else the person who has invented (*p*), or caused to be invented, a mark which is new in respect of the class of goods for which registration is sought.

(*h*) Chap. XX. p. 454.

(*i*) Act of 1888, sect. 8.

(*k*) *Apollinaris Co.'s Tm.*, (1891)
2 Ch. 186; 8 R. P. C. 137. See
Chap. XI. p. 218.

(*l*) *Mouzon v. Boehm*, 26 C. D.
398 (1884), Chitty, J.; *Paine & Co.*
v. Daniell & Son's Breweries, (1893)

2 Ch. 567; 10 R. P. C. 219, C. A.

(*m*) Rule 7.

(*n*) Sect. 117. Rule 41.

(*o*) See Chap. II. p. 24.

(*p*) *Hudson's Tm.*, 32 C. D. 311;
3 R. P. C. 155 (1886), C. A.; cf.
Munch's Application, 50 L. T. 12
(1884), Chitty, J.

An importer of goods produced abroad, whether by manufacture, or, as mineral waters, by a process of nature, is not the proprietor of the trade-mark of the producer, even though he has an exclusive contract for importation of the goods into, or for dealing with them in, this country, and notwithstanding that the producer consents to his application to register (*q*). "The registration by the importer was wrong," Fry, L.J., who delivered the judgment of the Court of Appeal, said, in the case in which this was decided. He added, "if the mark registered had been one which indicated the importer it might have been maintained (*r*); but an importer has no right to appropriate to himself a mark which, as in this case, both by user and express statement on its face, asserts itself to be a mark of the producer or of the owner of the place of origin, because at the time of the registration the mark was an old one, and of course could not be registered as a new one; it was an old one of Kreuzberg's (the producer) and, therefore, could not be registered as an old one of the Apollinaris Company" (the importers). The importer.

It was argued on behalf of the company, in the case just referred to, that, being entitled by the terms of a contract with the producer to the whole produce of the spring from which the producer obtained the goods to which the mark was attached, the company were entitled to register the mark as their own; but the Court refused to determine this question, since the contract relied on was, in fact, subsequent in date to the registration of the mark by the company.

In cases where a mark is used by a sole importer there may be a question whether it is his mark, signifying that the goods which bear it have been selected or imported by him, or the mark of the producer, signifying, as in the common course, that the goods are his manufacture, and this question must be decided according to the Where the mark belongs to the importer.

(*q*) *Apollinaris Co.'s Trn.*, (1891) 2 Ch. pp. 226—230; 8 R. P. O. 137, O. A.

(*r*) Cf. the judgment of Jessel, M.R., in *Hirsch v. Jonas*, 3 C. D. 584 (1876), cited, p. 60.

manner in which the mark and goods are put before the public (s).

Application
through
agent.

The application for registration, and all other communications between the applicant and the comptroller, may be made by or through an agent duly authorized to the satisfaction of the comptroller (t), and the proprietor may appoint an agent to act on his behalf for all purposes connected with the registration (u). If he does so, he will be bound by the agent's acts, so that where, under the Act of 1883, by the default of the agent, the registration was not completed within twelve months, it was deemed to have been abandoned (u). Under the Act of 1888, in any such case notice of the non-completion is sent from the Patent Office to the principal, and he is allowed fourteen days, or such further time as the comptroller may direct, to complete the registration (x).

Registration
in the agent's
name.

If the mark is, as sometimes happens, by the agent's mistake or fraud, registered in the name of the agent instead of that of his principal, it may be removed and a new application made (y). In some cases, where there has been no wrongful intention on the part of the agent, an assignment to the principal (z), or to his successor in business (a) has been permitted, or a rectification of the register effected (b); but the authorities are conflicting upon the question whether either of these courses ought to be allowed (c). Where an agent acting for two separate

(s) See *Hirsch v. Jones*, note (r), and Chap. II., p. 50. *Goodfellow v. Prince*, 35 O. D. 9 (1887), O. A.; *Robinson v. Finlay*, 9 O. D. 487 (1877), O. A.; and *Jones' Tm.*, 53 L. T. 1 (1885), O. A., were cases of joint ownership of trade-marks.

(t) Rule 9. Sect. 63.

(u) *Jackson & Co. v. Napper*, 35 O. D. 162; 4 R. P. O. 45 (1887), Stirling, J.; *Loftus' Tm.*, (1894) 1 Ch. 193; 11 R. P. O. 29, North, J.

(x) Act of 1888, s. 2, amending s. 63 of the Act of 1883.

(y) *Harler's Tm.*, 44 L. T. 98 n. (1878), Jessel, M.R.

(z) *Farina's Tm.*, 44 L. T. 99 n. (1881), Jessel, M.R.

(a) *Welcome's Tm.*, 32 O. D. 213; 3 R. P. O. 76 (1886), Chitty, J.; *Re Australian Wine Co.*, 61 L. T. 427 n. (1885), Chitty, J.; *Greenlees' Tm.*, 9 R. P. O. 93 (1892), Stirling, J.

(b) *Rust's Tm.*, 44 L. T. 98 n. (1880), Jessel, M.R.

(c) See *Riviere's Tm.*, 55 L. J. Ch. 545 (1886), O. A., and the next case. See also Chap. XI., p. 236, below.

principals has, by mistake, registered the trade-mark of one in the name of the other, removal and a fresh application are necessary (*d*).

2. The Comptroller's Discretion.

The comptroller has a discretion under the Act to register or to refuse any trade-mark which falls within the class of things which may be registered under sect. 64, and which is not debarred from registration by some other section of the Act. The following table shows the reasons for refusals which arise under the Acts and Rules themselves:—

Reasons for refusal of the application.

- (1.) The application is not made by or on behalf of any person (properly) claiming to be the proprietor of the mark (*e*).
- (2.) It is not made in proper form (*f*).
- (3.) It is deemed to be abandoned (*g*).
- (4.) The mark tendered does not consist of or contain any of the essential particulars of a registerable trade-mark (*h*).
- (5.) The application is successfully opposed (*i*). Besides any other ground for refusal, an opponent may show that the registration of the proposed mark would be unjust to him, *e. g.*, by giving to the applicant the exclusive right to use a mark which he is already lawfully using, though not as a trade-mark (*k*), or he may show that it is a common mark (*l*).
- (6.) Where there are conflicting claims to registration, the comptroller may refuse to register upon any of them until the decision of the Court has been obtained (*m*).

(*d*) *Kingsford & Son's Application*, 6 R. P. C. 413; 41 L. T. 426 (1889), Kay, J.

(*e*) Sect. 62 (1); above, p. 60.

(*f*) Sects. 62 (2), 64 (2), 74 (2), Rules 7—16, Instructions 8—14, Appendix pp. 596, 608 and 628.

(*g*) Sect. 63, p. 68.

(*h*) Sect. 64 (1), Chap. VIII., p. 196.

(*i*) Sect. 69, pp. 71 *et seq.*

(*k*) See per Cotton, L.J., in *Hudson's Tm.*, 32 C. D. p. 320; 3 R. P. C. 155 (1886), and see Chap. X., p. 175.

(*l*) Chap. VIII., p. 122. Of course a common mark is not distinctive, and therefore falls under the fourth objection.

(*m*) Sect. 71. Rules 43—45.

- (7.) The mark tendered is identical with, or has a resemblance which is calculated to deceive to, another mark already on the register for the same goods or description of goods (*n*).
- (8.) It comprises words the use of which, by reason of their being calculated to deceive or otherwise, would be deemed disentitled to protection in a Court of Justice (*o*).
- (9.) It comprises a scandalous design (*o*).
- (10.) Its use would, in the comptroller's opinion, be contrary to law or morality (*p*).
- (11.) It contains one or more of the things which, according to the rules, cannot be registered as marks or parts of marks (*q*), e. g., the royal arms.

The comptroller's discretion to refuse to register.

The discretion to refuse to register which is vested in the comptroller is a judicial discretion, and is subject to the appeal referred to below. It is submitted that, in the exercise of it, regard ought not to be had to considerations other than those just enumerated above, or such further objections, if there are any, as would have been bars to the acquisition of trade-mark rights at common law, or are sanctioned by the terms of the Act. In some of the cases cited in the next paragraphs, however, the comptroller's discretion has been referred to in very general terms; but these references ought, probably, to be understood as directed to cases of suggested deceptive marks, such as those in which the several *dicta* were spoken.

"The comptroller," Kay, J., said in *The Emollio Case* (*r*), "when he is asked to register a trade-mark, is bound to consider whether, looking to all the circumstances of the case, he can exercise his discretion by permitting the trade-mark to be registered." And in *The Australian Wine Importers' Case* (*s*), the same learned judge said: "Does

(*n*) Sect. 72, pp. 177, 182.

(*o*) Sect. 73, p. 209.

(*p*) Sect. 86.

(*q*) Instructions 28-30; p. 631, below.

(*r*) *Grossmith's Tm.*, 6 R. P. C. 180; 60 L. T. 312 (1899)."

(*s*) 41 O. D. 278; 6 R. P. C. 311

(1889).

“it follow that because (the opponent) could not get an injunction, that (the applicant) is entitled to put the trade-mark on the register? In my opinion it does not follow at all, and I have said so many times. In my opinion, the comptroller ought to exercise his discretion in a wise (*t*) and comprehensive way.” The existence of a discretion to refuse registration was asserted in the most decisive manner by the majority of the Law Lords in the House of Lords in *The Fruit Salt Case* (*u*). There, Lord Herschell said: “The case was argued on behalf of the respondent as if he had an absolute right to have any trade-mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. Those sections prohibit the registration of a trade-mark in certain specified cases, but there is no duty cast upon the comptroller of registering every other trade-mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion, whether to register or not, appears to me to be in all other cases plainly conferred. Of course, this discretion must be reasonably and not capriciously exercised; but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it.” And Lord Watson said that in cases where it is doubtful whether a trade-mark tendered for registration is calculated to deceive or not, the application ought to be disallowed. Lord Halsbury, who dissented from the conclusion arrived at in the case, treated the comptroller's discretion as more closely limited. “While I agree,” he said, “that no absolute right to the registration of a trade-mark is given to an applicant for registration, the meaning and intent of the statute itself is that, unless for some of the reasons contemplated by the statute there is an objection to the registration, the trade-mark ought to be registered.

(*t*) *Quære* wide.

(*u*) *Eno v. Dunn*, 15 App. Ca. 252; 7 R. P. O. 311 (1890), Lords Watson, Herschell, and Macnaghton.

Lords Halsbury and Morris dissented from the decision arrived at, which was that the mark in question was calculated to deceive.

*The Orr-
Ewing Case.*

“ Unless we are of opinion that there is something in the proposed trade-mark which the statute renders an objection to its registration, we ought to grant the application ” (to register). And this opinion accords with that expressed by Lord Blackburn in *The Orr-Ewing Case*, soon after the passing of the Act of 1875 (x). “ I cannot construe this section ” (y), his Lordship said, “ as meaning anything else than that, when the Court of Chancery is satisfied that the applicant is a person who is, for the time being, entitled to the exclusive use of a trade-mark in accordance with law, and that the trade-mark is one within (the definition section of the Act) ; the Court is, *ex debito justitiæ*, to rectify the register (z), just as it would, before the Act of 1875, have been bound *ex debito justitiæ* on similar proof, to prevent anyone infringing the trade-mark shown to be his property. The burden of proof lies upon the person making the application to amend the register ; but if he does produce such proof as would, in the opinion of the Court, entitle him to an injunction, I do not think the words, ‘ if satisfied of the justice of the case ’ can, or ought to be, construed as meaning to give the Court a discretion to consider whether the nature of the trade-mark is such as to make it inconvenient that he should exercise the right of property which it is proved he actually has.”

The opinion last cited was delivered in a case where the marks concerned were old marks, and the apparent conflict between it and the opinions of the majority of the Law Lords in *The Fruit Salt Case* may probably be reconciled by treating the doctrine of a right *ex debito justitiæ* to register as applicable only to marks used as trade-marks before the 13th of August, 1875. Sect. 77 expressly excepts from the prohibition of actions for the infringement of unregistered trade-marks the cases of such old

(x) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. 479 (1879). Lord Cairns held the same opinion, for he speaks of the appellant's right to be registered. Lord Gordon, the remaining judge, concurred in Lord Blackburn's judgment.

(y) Sect. 5 of the Act of 1875, corresponding to sect. 90 of the present Act.

(z) Upon the refusal of the registrar to register a mark under the old Act, the procedure by way of appeal was to move to rectify.

marks as have been refused registration, and the corresponding section previously in force contained a similar exception (a). This last mentioned exception was, however, cited by Lord Blackburn in his opinion. He stated that it did not affect the conclusion he had arrived at.

In his dissenting judgment in *The Somatose Case* (aa), Lindley, L.J., said: "The sections (*i. e.*, sects. 70, 72 and 73) and the discretion given by sect. 62 (4) of the Act of 1883 . . . would clearly justify the rejection of any trade-mark, even if it contains one of the statutory requisites, if such mark be of an indecent or libellous character, or if it infringes the rights of some other person, or if it is identical with, or so similar to one already registered as to be calculated to deceive. But I can find no other restriction, and if a person seeks to register a mark which is open to none of these objections, and which does contain one of the essentials mentioned in sect. 10 of the Act of 1888, I am aware of no legal principle which would justify the Court in refusing to direct its registration."

The comptroller is directed, before exercising his discretion adversely to an applicant for registration, if so required within one month from the date of his objection, to give the applicant an opportunity of being heard personally or by his agent, by sending the applicant ten days' notice of a time when he may be so heard, and the applicant is directed, within five days from the date when such notice would be delivered in the ordinary course of the post, to notify to the comptroller whether he intends to be so heard or not (b).

Comptroller to hear applicant before refusing the application.

The decision of the comptroller against an applicant (c) for, or against an opponent (d) of, the registration of a mark is subject to appeal to the Board of Trade, who may refer the question to the Court (e).

(a) Act of 1876, s. 1.

(aa) *Farbenfabriken Vormals, Fried. Bayer & Co.'s Tm.*, 11 R. P. C. p. 88; (1894) 1 Ch. 645. Kay and Smith, L.JJ., did not discuss this point.

(b) Sect. 94. Rules 17 and 18.

(c) Sect. 62 (4), (5); *Re Australian Wines Importers, Limited*, 41 O. D. p. 235.

(d) Sect. 69 (3), (4).

(e) Page 78, below.

The comptroller may consult the law officers, and he acts under the Board of Trade.

The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of the Act, apply to either of the law officers for directions in the matter (*f*). It is also provided by sect. 82 (3), that he shall act under the superintendence and direction of the Board of Trade. It was formerly the practice for him to consult the Board in regard to his decisions in individual cases, but Lord Herschell's Committee recommended that this practice should be abandoned: they said, "we think it was only intended that the Board of Trade should give general directions or settle questions of general practice; not that they should interfere with the personal responsibility of the comptroller in individual cases, except when the matter comes before them in due course of appeal" (*g*).

3. Procedure on application to Register.

The procedure by which an application to register is to be made is described in the paragraphs 8 to 27 of the instructions printed in the appendix (*h*), and by Rules 7 to 16. A printed form of application corresponding with the form F. (*i*) attached to the rules, which is the form at present in use, may be obtained, and it must be filled up, and the necessary representations of the mark must be attached to and sent with it, in accordance with the rules, and the directions given in the notes to the form.

An applicant for registration must state in his application the essential particulars of the trade-mark, and must disclaim any right to the exclusive use of the additional matter, if there is any in the mark, and a copy of the statement and disclaimer are to be entered upon the register (*k*).

What may be essential particulars of registered trade-marks is considered in Chapter VIII. (*l*), and additions and disclaimers are dealt with in Chapter IX. (*m*).

The address of the applicant must in every case be stated

(*f*) Sect. 95. *Re Tm. Normal*, 35 C. D. p. 245; 4 R. P. C. 123, per Lindley, L.J.

(*g*) Report of 1888, p. vii.

(*h*) Page 628.

(*i*) Page 608. Sect. 62 (2).

(*k*) This is an addition to sect. 64 (2) made by sects. 10 and 16 of the Act of 1888.

(*l*) Page 106.

(*m*) Page 164.

Form of application.

Essential particulars and disclaimers.

in full in the form, and it is provided by the Act of 1888 (*n*) that, "where an applicant for the registration of a trade-mark, otherwise than under an international convention (*o*), is out of the United Kingdom at the time of making the application, he shall give the comptroller an address for service in the United Kingdom, and if he fails to do so the application shall not be proceeded with until the address has been given."

It is provided by sect. 63 that—

"Where registration of a trade-mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, *the application shall be deemed to be abandoned* [the comptroller shall give notice of the non-completion to the agent employed on behalf of the applicant, and if at the expiration of fourteen days from that notice the registration is not completed, shall give the like notice to the applicant, and if at the expiration of the latter fourteen days, or such further time as the comptroller may in special cases permit, the registration is not completed, the application shall be deemed to be abandoned]."

Abandonment
of the appli-
cation.

The amendment was made by sect. 9 of the Act of 1888 in accordance with a recommendation of Lord Herschell's Committee, in order to avoid such accidents as had happened in *Jackson v. Napper* (*p*), where the proprietors imagined that their trade-mark had been registered.

Sect. 63, as amended, was held to be retrospective (*q*), but not to operate so as to prevent a fresh application being made in a case where the merits of the abandoned application had never been gone into or considered (*p*).

The comptroller may either accept the mark tendered or refuse it. Unless he refuses to entertain the application (*r*), he is directed to cause it to be advertised (*s*) in the official

Advertisem-
ent.

(*n*) Sects. 8, 62 (6).

(*o*) Sect. 103. Chap. XX. p. 454.

(*p*) 35 C. D. 162; 4 R. P. C. 45 (1886), Stirling, J.; *Loftus' Tm.*, (1894) 1 Ch. 193; 11 R. P. C. 29, North, J.

(*q*) *Hayward's Tm.*, 54 L. J. Ch. 1003 (1885), Kay, J., and the last case.

(*r*) Act of 1888, s. 12.

(*s*) Act of 1883, s. 68. Before the Act of 1888, the mark had to be advertised in any case.

paper during such times and in such manner as he thinks fit (*t*), the advertisement either comprising a representation of the mark or a reference to the place where a specimen or representation is deposited for exhibition (*t*); and it is then open for any one who objects to the registration, within one month, or such further time, not exceeding three months, as the comptroller may allow, of the advertisement, to send in notice of opposition (*u*).

If there is no opposition, or if the opposition is disallowed, and the comptroller is satisfied that the applicant is entitled to registration, the registration proceeds. This is provided by rule 32, which is as follows:—

The registra-
tion.

“As soon as may be after the expiration of one month from the date of the advertisement of the application the comptroller shall, subject to the opposition to the application (if any) and the determination thereof, if he is satisfied that the applicant is entitled to registration, and on payment of the prescribed fee (*x*), enter the name, address, and description of the applicant in the register of trade-marks, as the registered proprietor of the trade-mark in respect of the particular goods or classes of goods described in his application” (*y*),

Death of the
applicant
before regis-
tration.

and if the applicant have died before the registration, the comptroller may register the name of the person owning the goodwill of his business, after the death and ownership have been proved to the satisfaction of the comptroller (*z*).

Refusal to
register.

If the comptroller refuses the application, he gives notice of his objection to the applicant, so that he may, if he thinks it advisable, require the comptroller to hear him upon the application personally, or by his agent (*a*).

Certificate of
refusal to
register an
old mark.

Where the comptroller refuses an old mark, that is, a mark used as a trade-mark before 13th August, 1875, he may, on request, and on payment of the prescribed fee (*b*), grant a certificate that registration has been refused (*c*).

(*t*) Rules 27—30.

(*u*) Sect. 69, as amended by sect. 13 of the Act of 1888. See p. 71, below.

(*x*) See Table of Fees, p. 606.

(*y*) See Chap. III. p. 54, on the

Register, and Rule 34.

(*z*) Rule 33.

(*a*) Sect. 94. Rules 17—19.

(*b*) £1, see Table of Fees, p. 606.

(*c*) Sect. 77. Rule 60. Instruc-
tions 35.

Amendments.

The comptroller may, on request in writing accompanied by the prescribed fee (*d*), correct any clerical error in, or in connection with an application for registration of a trade-mark (*e*), and may permit an applicant for registration of a trade-mark to amend his application by omitting any particular goods or classes of goods in connection with which he has desired the trade-mark to be registered (*f*). And a more general power of amendment is provided by rule 54, by which, "any document or drawing or other representation of a trade-mark for the amending of which no special provision is made by the said Acts may be amended, and any irregularity in procedure, which in the opinion of the comptroller may be obviated without detriment to the interests of any person may be corrected, if the comptroller think fit, and on such terms as he may direct" (*g*).

Amendment of application.

It is further provided that the time prescribed by the Rules for doing any act or taking any proceeding thereunder, may be enlarged by the comptroller, if he shall think fit, and upon such notice to other parties, and proceedings thereon, and upon such terms as he may direct (*h*).

Enlargement of the prescribed times.

4. Opposition to Registration.

When the mark has been accepted and advertised, any person, not merely any person who would be aggrieved by the registration (*i*), may oppose the registration by showing that the mark is, or would, if registered, be, an infringement of his rights, or that on any other ground it ought not to be registered (*k*).

The procedure by which an opposition is to be conducted is regulated by sect. 69 of the Act of 1883, as amended by sect. 13 of the Act of 1888, and by Rule 31 (*l*), which provide as follows:—

Opposition to registration.

Sect. 69. "(1.) Any person may within *two months*

- | | |
|---|---|
| (<i>d</i>) 5s. | (<i>h</i>) Rule 55. |
| (<i>e</i>) Sect. 91 (a). | (<i>i</i>) Cf. sect. 90. |
| (<i>f</i>) Act of 1888, ss. 24, 91 (d). | (<i>k</i>) Below, p. 78. |
| (<i>g</i>) For the decisions under this with regard to notices of opposition, see p. 77, below. | (<i>l</i>) These are summarised in par. 32 of the Instructions, Appendix, p. 632. |

“ [one month or such further time, not exceeding three months, as the comptroller may allow] of the *first* advertisement of the application, give notice in duplicate at the Patent Office of opposition to registration of the trade-mark, and the comptroller shall send one copy of such notice to the applicant.

“ (2.) Within *two months* [one month] after receipt of such notice or such further time as the comptroller may allow, the applicant may send to the comptroller a counter statement in duplicate of the grounds on which he relies for his application, and if he does not do so, shall be deemed to have abandoned his application (*m*).

“ [(3.) If the applicant sends such counter statement the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall, after hearing the applicant and the opponent, if so required, decide whether the trade-mark is to be registered, but his decision shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the opponent and the comptroller, and may make an order determining whether, and subject to what conditions (if any), registration is to be permitted.]

“ [(4.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court, and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid.]

“ [(5.) If the applicant abandons his application after notice of opposition in pursuance of this section he shall be liable to pay to the opponent such costs in respect of the opposition as the comptroller may determine to be reasonable.]

“ [(6.) Where the opponent is out of the United Kingdom (*n*) he shall give the comptroller an address for service in the United Kingdom.]”

(*m*) Cf. sect. 63, above, p. 68.

(*n*) Cf. sect. 62 (6), above, p. 59.

RULE 31. “(1.) A notice of opposition to the registration of a trade-mark shall state the ground or grounds on which the opponent intends to oppose the registration, and be signed by him or by his solicitor, and shall also contain an address for service in the United Kingdom, and shall be in the Form J. (o) in the second schedule to these rules, with such variations as circumstances may require. Notice of opposition.

“ (2.) Where the ground, or one of the grounds, of opposition is that the applicant is applying for the registration of a trade-mark identical with one already on the register with respect to the same goods or description of goods, or having such resemblance to a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive, the notice shall state the date of registration, and the number on the register of such trade-mark already on the register (p). Opposition on the ground of trade-mark already on the register.

“ (3.) Within two months after the expiration of one month or such further time not exceeding three months as the comptroller may allow from the date of the advertisement of the application, the opponent shall leave at the Patent Office, Trade-Marks Branch, such evidence by way of statutory declaration (q) as he may desire to adduce in support of his opposition and deliver to the applicant copies thereof. Opponent's evidence.

“ (4.) Within one month from the delivery of the opponent's copies of his statutory declarations (r) the applicant shall leave at the Patent Office, Trade-Marks Branch, his evidence (s) by way of statutory declaration in answer, and deliver to the opponent copies thereof, and within seven days from such delivery the Applicant's evidence.

(o) Appendix, p. 610.

(p) Sect. 72, Chap. X., p. 176.
The date and number can be ascertained by inspecting the register.

(q) See Rule 61, p. 605.

(r) Ibid.

(s) The applicant's *counter-statement* must be sent to the Comptroller within one month after the receipt of notice of opposition, or such further time as the Comptroller may allow, sect. 69 (2).

Evidence in reply.

“opponent shall leave at the Patent Office, Trade-Marks Branch, his evidence by way of statutory declaration in reply and deliver to the applicant copies thereof. Such last-mentioned evidence shall be confined to matters strictly in reply.

Closing of evidence.

“ (5.) No further evidence shall be left on either side except by leave of the comptroller upon the written consent of the parties duly notified to him, or by special leave of the comptroller given on an application made to him.

Applications for leave to adduce further evidence.

“ (6.) Either party making such application shall give notice thereof to the opposite party, who shall be entitled to oppose the application.

Appointment of time for hearing.

“ (7.) On the completion of the evidence, the comptroller shall, upon application by either party, upon Form E. (t) in the Second Schedule to these Rules, and upon payment of the prescribed fee (u), appoint a time for the hearing of the case, and shall give the parties at least seven days' notice of such appointment.

Disallowance of opposition in certain cases.

“ (8.) On the hearing of the case no opposition shall be allowed in respect of any ground not stated in the notice of opposition, and where the ground or one of the grounds of opposition is that registration is being applied for in respect of a trade-mark identical with one already on the register, with respect to the same goods or description of goods, or having such resemblance to a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive, the opposition shall not be allowed upon such ground, unless the date of registration and the number on the register of the trade-mark already on the register have been duly specified in the notice of opposition (x).

“ (9.) The decision of the comptroller in the case shall be notified to the parties.”

(t) Appendix, p. 608.

(x) Cf. Rule 31 (2), *supra*.

(u) £1, see p. 608, below.

The order of procedure upon an opposed application for registration is summarised in the following table:—

Summary of procedure on an opposed application.

- (1) Application (*y*).
- [(2) Notice of refusal of comptroller to entertain the application (*z*).
- (3) Notification by applicant to the comptroller that he intends to be heard, five days from receipt of (2) (*z*).
- (4) Ten days' notice of appointment for hearing from comptroller to applicant.
- (5) Notice of appeal to Board of Trade, one month from decision of comptroller, with grounds of appeal and case in support (*a*)].
- (6) Advertisement of application (*b*).
- (7) Notice of opposition, one month from advertisement. Notice to be in duplicate, with grounds of opposition, and address in United Kingdom, and to be signed by opponent or his solicitor (*c*).
- (8) Counter-statement, one month from receipt of (7) from comptroller. To be in duplicate with grounds of application (*d*).
- (9) Opponent's evidence, three months from advertisement (6). To be by statutory declaration delivered at the Patent Office. Copies of the declarations to applicant.
- (10) Applicant's evidence in answer, one month from receipt of (9). To be by statutory declarations and copies as (9).
- (11) Opponent's evidence in reply, seven days from receipt of (10). Statutory declarations and copies as (9).
- (12) Notice of appeal to Board of Trade, one month from decision of comptroller, with grounds of appeal and case in support (*e*).

(*y*) Page 68. Form F., p. 608.

(*z*) Page 67. Form E., p. 608.

(*a*) Rules 20—26, below, p. 79.

(*b*) Page 69.

(*c*) Form J., Appendix, pp. 610, 635.

(*d*) See form in Appendix, p. 636.

(*e*) Appendix, pp. 610, 637.

Forms of the several notices and other documents referred to in the above table are set out in the Appendix, pp. 635 to 641.

The last four sub-sections of sect. 69 were introduced by the Act of 1888, and they have the effect of assimilating the procedure upon an opposition to that upon the application before the advertisement (sect. 62). Under the Act of 1883, as it originally stood (*f*), the opponent was required to give security for costs, or was deemed to have withdrawn his opposition. If he duly gave security the case was not, as it now is, determined by the comptroller in the first instance, subject to appeal to the Board of Trade and reference to the Court, but was referred to the Court at once (*g*). The alteration was made, and the power for the comptroller to give the opponent costs of an abandoned application was conferred upon the recommendation of Lord Herschell's Committee. It is somewhat curious that no provision has been made to give the applicant costs of an unsuccessful opposition before the comptroller (*h*).

Objections not contained in the notice of opposition.

It will be seen that the comptroller in determining the case is, under the Rule 31 (8), restricted to the objections raised by the opponent's notice. It is said, however, that the Court must, upon an appeal to it, consider all objections to the registration of the mark (*i*). And it does not follow that the comptroller will necessarily register a mark, even where he is obliged to disallow the opposition to it, if, as it is submitted is the case, his discretion (*k*) to refuse to register remains exerciseable, until the registration has been actually effected.

Amendments and enlargement of times by the comptroller.

The comptroller's powers under sect. 91 and Rules 54 and 55 to amend clerical errors in connection with any application for registration, and to allow the amendment

(*f*) Sect. 69 (3) and (4).

(*g*) As to the old practice, see *Re Simpson, Davies & Sons' Tm.*, 15 C. D. 525 (1880); *Anderson's Tm.*, 26 C. D. 409 (1884), *Sebastian*, 3rd

ed., p. 434.

(*h*) See p. 86, below.

(*i*) See p. 84, below.

(*k*) Under sect. 62, see p. 63, above.

of any document, drawing, or representation of a trade-mark, for the amendment of which no special provision is made by the Acts, and to enlarge the times prescribed by the rules for doing any act or taking any proceeding thereunder, have already been stated (*l*).

Under Rule 54, it seems that a notice of opposition may be amended, even though the amendment raises an entirely new case of fraud against the applicant. So, in *Moët's Trade-Mark (m)*, where the comptroller's deputy had refused to amend an opposition on the ground that he had no power, and notwithstanding that he had also expressed an opinion that, as it was directed to charge fraud against the applicant, it could not be made "without detriment to his interests," and that on the merits it ought not to be allowed, the Divisional Court directed a mandamus to the comptroller to hear and determine the application to allow the amendment, and Mathew, J., said he thought it ought to be made.

The Registrar (sitting for the comptroller) has held that he has no jurisdiction to allow an amendment of a notice of opposition after the expiration of the three months mentioned in sect. 69, or after the case has been heard and disposed of before the comptroller. In the case in question (*n*), the opponent in the course of an appeal to the Courts asked for leave to amend his notice, but this, Stirling, J., held, he had no jurisdiction to grant, and the opponent then made a similar application to the registrar, with the result already stated. Where an appeal is contemplated, it is essential, therefore, that any amendment of the application or notice of opposition which is considered material should be made before the case is determined by the comptroller.

Grounds of Opposition.

The reasons for refusing to register a mark which is propounded for registration are dealt with in detail else-

(*l*) Page 71, above, cf. also Rule 53 (power to dispense with evidence), Appendix, p. 603.

Mathew and Grantham, JJ.

(*n*) *Robertson, Sanderson & Co.'s Tm.*, (1892) 2 Ch. 245; 9 R. P. C.

(*m*) 7 R. P. C. 226 (1890),

264.

where (o). Those which are most commonly relied on by an opponent are the following :

- (i.) That the mark propounded has such resemblance to a trade-mark already on the register with respect to the goods or the description for which the mark propounded is sought to be registered as to be calculated to deceive (p). In this case the register number of the mark already on the register, and the date of its registration, must be stated in the notice of opposition (pp).
- (ii.) That the registration or use of the mark would interfere with the use by the opponent of some mark in which he has rights, or which he is actually lawfully using, whether as an unregistered trade-mark (q), or as an advertisement (r), or as a mark common in the trade (s), and that, consequently, the applicant's mark is not distinctive.
- (iii.) That the mark propounded is his mark, and not that of the applicant (t), or that it has been acquired by the applicant in fraud of his rights (u).

5. Appeal from the Comptroller.

By sect. 62 (4) and (5), and sect. 69 (3) and (4) (x), which are in similar terms, an appeal to the Board of Trade from the decision of the comptroller refusing to register the trade-mark, is given whether there has or has not been any opposition. In the latter case it would still be open to the comptroller, after a successful appeal from

(o) See above, p. 63, and the Chapter on Rectification of the Register, p. 218; Forms, Appendix, pp. 635 *et seq.*

(p) Sect. 72 (2), p. 182.

(pp) Rule 31 (2) and (8) above, p. 73.

(q) Page 125.

(r) Page 126.

(s) Page 122.

(t) Sects. 71 and 72 (1), p. 176, and see "proprietor," p. 60. The mark may be copyright. As to a copy of a foreign picture, see *Schauer v. Field*, (1893) 1 Ch. 35, C. A.

(u) *Heaton's Tm.*, 27 C. D. 570 (1884), *Kay, J. (Hoop L. Iron); Moët's Tm.*, 7 R. P. C. 228 (1890).

(x) Above, p. 59.

his refusal to accept a mark, on notice of opposition from an opponent under sect. 69, to refuse registration (*y*). An appeal is also given by sect. 69 to an opponent who has unsuccessfully resisted the registration of a mark. These appeals were introduced by the Act of 1883.

The practice on appeal to the Board of Trade is governed by rules 20 to 26 inclusive, which are as follows:—

Appeal to the Board of Trade.

“20. When any person intends to appeal to the Board of Trade from a decision of the comptroller in any case in which an appeal is given by the said Acts, he shall, within one month from the date of the decision appealed against, leave at the Patent Office, Trade-Marks Branch, a notice of such his intention.

Notice of appeal.

“21. Such notice shall be accompanied by a statement in writing of the grounds of appeal, and of the appellant’s case in support thereof.

Grounds of appeal to be stated.

“22. A copy of the notice of intention to appeal, accompanied by a statement of the case, shall also be forthwith sent to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London; and, where there has been an opposition before the comptroller, to the opponent or applicant as the case may be.

Transmission of notice.

“23. The Board of Trade may thereupon give such directions (if any) as they may think fit with respect to evidence, or otherwise, for the purpose of the hearing of the appeal by the Board of Trade, or for the purpose of their referring the appeal to the Court to hear and determine the same.

Directions by Board.

“24. Where the Board of Trade intend to hear the appeal, seven days’ notice, or such shorter notice as the Board of Trade may in any particular case direct, of the time and place appointed for the hearing, shall be given to the comptroller and to the appellant; and, where there has been an opposition before the comptroller, to the opponent or applicant as the case may be.

Hearing of appeal.

(*y*) See the judgments in *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. 479 (1879).

No appeal unless notice duly given.

“25. No appeal shall be entertained of which notice has not been given within one month from the date of the decision appealed against, or such further time as the comptroller may allow, except by special leave of the Board of Trade.

Evidence on appeal.

“26. Subject to the directions and leave of the Board of Trade, the evidence to be used on an appeal to the Board of Trade in the matter of an opposition shall be the same as that used at the hearing before the comptroller.”

Notice of and case on appeal.

The fee payable on appeal is at present 1*l.*, and the notice of appeal in use is Form H., which must be filled up in accordance with the marginal notes (s). The case on appeal is a summary statement, generally drafted in a somewhat argumentative form, of the questions raised and the facts upon which the appellant relies, and it may include the statement of the grounds of appeal, which must be sent with the notice. Forms of notice and case on appeal are given in the Appendix (s).

The case frequently concludes with a request that the appeal may be referred to the Court, and unless the Board of Trade see some reason to differ from the comptroller, they usually so refer it at once without hearing the parties themselves, in accordance with the recommendation of Lord Herschell's Committee (a). It is presumed that where any real question was raised either of law or fact the Board would, if requested, refer the matter to the Court (b).

No appeal to the Court direct.

There is no other appeal, than that given by this section, open to an unsuccessful applicant, for he cannot apply to the Court under sect. 90 as a person aggrieved by the omission of his name from the register (c); but the authority referred to does not directly apply to the case of an unsuccessful opponent, although much of the reasoning of

(s) Page 610.

P. C. 123 (1886).

(a) Report of 1888, p. vii.

(c) *Normal Co.'s Tm.*, and cf.

(b) See the *Normal Co.'s Tm.*, 35 C. D. 231; 3 R. P. C. 269; 4 R.

Woolley v. Broad, (1892) 1 Q. B. 806.

it does. It would, however, be anomalous that any other person aggrieved should be able to apply to remove a mark from the register, but that one who had opposed the registration before the comptroller should be barred. No doubt, if the opposition had come before the Court the matter would be *res judicata* between the registered owner and the opponent (*d*).

The Court is the High Court of Justice (*e*), but in practice all the appeals are heard in the Chancery Division. The Court.

The comptroller may, however, under sect. 71, submit, or require the claimants to submit, their rights to the Court direct in any case where each of several persons claims to be registered as proprietor of the same trade-mark. The submission is, unless the Court otherwise directs, by a special case, which may be settled by the comptroller in case of difference (*f*). Reference of rival claims to the same mark to the Court direct.

The appeal may be brought before the Court on summons or by motion (*g*), asking that the appeal may be heard and decided, and that the comptroller be directed to proceed, or not to proceed, as the case may be, with the registration of the mark in question. Procedure by summons is the more usual course (*h*); but as the summons is always adjourned into Court, no expense is saved in this way. Some of the judges (*i*), however, object to determining what are really trials of causes, often involving property rights of considerable value, in the hurry of motion-day. An adjourned summons has, too, the ad- Appeal by summons or notice of motion.

(*d*) In *Re Arbenz's Application*, 35 C. D. p. 257; 4 R. P. C. 143 (1887), the Court of Appeal required the opponent, who was appealing, as a condition for leave to appeal out of time, to undertake not to move to rectify the Register.

(*e*) Sect. 117 (1). So that an order of the House of Lords allowing an appeal from the Comptroller should be remitted to the High Court for execution: *Re Orr-Ewing & Co.*, 28

K.

W. R. 412.

(*f*) Rules 44, 45.

(*g*) Daniels' Chancery Practice, p. 1489, Chanc. Forms, p. 671, and see *Simpson, Davies & Sons' Tm.*, 15 C. D. 525 (1880).

(*h*) It was adopted in the *Apollinaris Cases*, (1891) 2 Ch. 186; 8 R. P. C. 137; and in *Evo v. Dunn*, 15 App. Cas. 262; 7 R. P. C. 311 (1839).

(*i*) Kekewich, J., for instance.

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vantage of coming on in its turn, according to its place in the list at a time which can, to some extent, be guessed by anticipation, so that procedure by summons is usually the more convenient course. But a motion can generally, in case of necessity, be brought to a hearing very rapidly, and it may accordingly be advisable, in some cases, to proceed by way of motion.

Notice of the motion or summons should be given to the comptroller, so that he may appear if he thinks fit, and the opponent, or the applicant, as the case may be, should be made a respondent. And if there has been no opposition, but the comptroller has refused to register because of the presence of marks similar to the mark in question on the register, the Court generally requires notice of the appeal to be sent to the owners of such marks (*k*). If the appeal is allowed, the successful party must forthwith leave an office copy of the order at the Trade Marks Branch of the Patent Office, and the register is thereupon to be rectified or altered, or the purport of the order to be otherwise duly entered in the register, as the case may be (*l*).

Address for service where the applicant or opponent is abroad.

Scotch or Irish applicant or opponent.

Where the applicant or opponent is out of the United Kingdom, he is required to give an address for service (*m*); but this does not provide for the case of a Scotch or Irish applicant or opponent. Where, therefore, a person who would otherwise be named as a respondent to the appeal is in Scotland or Ireland, and so cannot be served with the notice of motion or summons, the practice of sending him notice in writing of the day fixed for the hearing, and of omitting his name as respondent, has been introduced (*n*), for this is all that "natural justice" requires (*o*). And if the person to whom such notice has been sent does not choose to appear at the hearing, he is bound by the decision of the Court (*o*).

(*k*) See *Kenrick & Jefferson's Tm.*, 7 R. P. C. 321 (1890), Chitty, J.

(*l*) Rule 46.

(*m*) Sects. 62 (6) and 69 (6).

(*n*) *Bancroft & Co.'s Tm.*, 5 R. P. C. 209 (1887); *Stringer's Application*,

8 R. P. C. 445 (1891); *Robertson, Sanderson & Co.'s Tm.*, (1892) 2 Ch. 245; 9 R. P. C. 215, all Stirling, J.

(*o*) *King & Co.'s Tm.*, (1892) 2 Ch. 462; 9 R. P. C. 350, Kekewich, J., and C. A.

The evidence before the comptroller, in the case of an opposition, is given by statutory declarations (*p*), or, in special cases, in such other way as the comptroller directs (*q*). The declarations are not, however, evidence upon an appeal to the Court, and the proper course is for the deponents to verify their declarations by affidavit (*r*). The Board of Trade, in referring an appeal to the Court, generally give the appellant liberty to adduce such further evidence as he is advised; and this is usually given on affidavit also (*s*). Where the application to the Court is by summons, the evidence should be completed before the summons is adjourned to the judge (*ss*).

Evidence upon the appeal.

As already stated, the Court has no jurisdiction to amend the application or notice of opposition on appeal (*t*). And it will not generally be influenced by an offer in Court by the appellant to modify his application (*tt*); but in a case where, after the comptroller's decision, the applicant offered to allow a disclaimer sufficient for the protection of the opponent to be entered with his mark on the register, the Court allowed the appeal without costs (*u*). And where the comptroller refused to register on the ground that two other marks already on the register contained the prominent word of the mark in question; and, the owners of these marks having been served with notice of the appeal, one of them did not appear, and the other was satisfied by the consent of the appellant to restrict the rights conferred by the registration to particular goods, the appeal was allowed on payment of costs (*x*).

Modification of the application on the appeal.

And by the express terms of sect. 62 (4) and (5), and

- (*p*) Rule 61.
- (*q*) Rule 53.
- (*r*) *Farrow's Tm.*, 7 R. P. C. 260; 63 L. T. 233 (1890), Stirling, J.
- (*s*) In accordance with Order XXXVIII. r. 1 of the Supreme Court Rules.
- (*ss*) *Jackson v. Napper*, 35 C. D. 166; 4 R. P. C. 45 (1886), Stirling, J.
- (*t*) *Robertson, Sanderson & Co.'s Tm.*, (1892) 2 Ch. 245; 9 R. P. C. 215, Stirling, J.
- (*tt*) It is therefore too late to offer to disclaim on the appeal, see below, p. 167.
- (*u*) *Swift Specific Co.'s Tm.*, 6 R. P. C. 352 (1889), Stirling, J.
- (*x*) *Kenrick and Jefferson's Tm.*, 7 R. P. C. 321 (1890), Chitty, J.

sect. 69 (3) and (4), the Board of Trade and the Court on appeal may respectively make orders for registration, subject to any conditions they may think proper to impose. The conditions usually imposed are the alteration of the mark, *e. g.*, by adding the applicant's name to it, the registration of a disclaimer, or the restriction of the use of the mark to a limited portion of the goods within the class in respect of which it is registered (*y*). The Court cannot, of course, impose conditions except at the applicant's request, or with his consent; and it rarely does so in any case unless the parties have come to terms (*z*).

The Court
must consider
all objections.

Appeal after
actual regis-
tration.

On the appeal the Court has jurisdiction to enter into and determine all questions arising on the objections, including, of course, in a case where the comptroller has already registered the mark, the question whether the mark has been rightly admitted to the register. So, where the appeal against the refusal of the comptroller to register the word *Gem* had been allowed by Kay, J., and the registration had been made accordingly, and it was argued, in the Court of Appeal, that the only questions which could be considered by the Court were the rights as between the applicant and the opponent, treating the registration, subject to those rights, as properly made, and it was alleged that the opponent had obtained the rights on which he relied by fraud on the applicant. The Court of Appeal rejected this suggestion. "The Court is bound," Cotton, L.J., said, "to enter into all the considerations which must be determined in order to see whether the particular mark or word is rightfully on the register," and, *inter alia*, the question whether the word was, and it was held that it was, a descriptive word (*a*). And in the *Sanitas Case*, where the comptroller had refused registration on the ground of the precedent registration of other

(*y*) Cf. Rectification, under sect. 90, Chap. XI., p. 234.

(*z*) In *Eno v. Dunn*, 7 R. F. O. p. 314 (1890), in reply to a suggestion that the respondents were

willing to distinguish their mark, Halebury, L.C., said: "We have nothing to do with offers here."

(*a*) In *Re Arbenz's Application*, 35 C. D. 248; 4 R. P. C. 143 (1866).

marks, and he desired on the appeal to argue also (1) that the word in question was not a fancy word, and (2) that it was part of the appellant's name, Kay, J., said, in answer to an objection to this, "I shall have to consider every possible objection" (b).

The Court has no power to direct the comptroller to register part of the mark shown in the application (c).

6. Costs.

The Court has no jurisdiction to make the comptroller pay costs (d), and the ordinary rule is that even a successful appellant pays the costs of the comptroller as well as his own. In the *Alpine Case* (e), Mr. Justice Chitty said that the comptroller's costs were deemed to be costs incidental to registration. "In fact," he added, "the only method by which the successful appellant might escape paying the costs would be by showing that the refusal to register emanated from personal impropriety on the part of the officers refusing." This statement seems to be somewhat too strongly put, for in several cases a successful appellant has not been ordered to pay costs (d), although no suggestion of improper conduct or motive on the part of the comptroller was made.

Costs of the appeal.

If the opponent appeals, or appears as a respondent to the applicant's appeal, the costs of the application to the Court generally follow the event; but the Court has jurisdiction, which it frequently exercises, to refuse to make any order for costs where it is dissatisfied with the conduct of the successful party. Thus, where the applicants based

(b) *Sanitas Co.'s Tm.*, 4 R. P. C. 533; 58 L. T. 166 (1887).

(c) *Meeus' Application*, (1891) 1 Ch. 41; 8 R. P. C. 25, Chitty, J. (*Key Brand, Geneva*).

(d) *Rotherham's Tm.*, 14 C. D. 585 (1880), C. A.; *Leaf's Tm.*, 33 C. D. 477; 3 R. P. C. 289 (1886),

Bacon, V.-C.; *Colman's Tm.*, 11 R. P. C. 129, (1894) Stirling, J. See next page, "test case."

(e) 54 L. J. Ch. p. 730 (1885). The "Law Reports" do not contain this part of the judgment; see also *Farbenfabriken & Co.'s Tm.*, 11 R. P. C. p. 93; (1894) 1 Ch. 645.

their case in part on an alleged exclusive right to the use of certain words in their label and they had no such right (*f*), and where the judge thought that both appellant and respondent had behaved improperly, no costs were given (*g*).

Test case.

New objection at the hearing.

So, too, where the case was argued as a test case, no costs were given, although the application failed (*h*); and in another case where the comptroller took a new point in Court, after the objection upon which he had refused registration had been removed, and succeeded upon it, he did not press for costs (*i*).

Costs before the comptroller.

No costs of the proceedings before the comptroller, except so far as these are allowed by the taxing master as costs of or occasioned by the proceedings in Court, can be given (*k*); and the same rule applied under the old Act (*l*). But the comptroller has power, where an applicant abandons his application after notice of opposition has been given, in accordance with sect. 69, to direct the applicant to pay to the opponent such costs in respect of the opposition as the comptroller may determine to be reasonable (*m*). This power was conferred upon the recommendation of Lord Herschell's Committee (*n*), in order to spare owners of existing marks from the expense of contesting unwarrantable applications to register marks which would prejudice their rights.

(*f*) *Hudson's Tm.*, 32 C. D. 311; 3 R. P. C. 155 (1886), (*Carbolic Acid Soap Powder*), C. A.; cf. Chap. XI., p. 251.

(*g*) *Fuente's Tm.*, (1891) 2 Ch. 166; 8 R. P. C. 214, Romer, J.

(*h*) *Van Duzer's Tm.*, 34 C. D. 623; 4 R. P. C. 31 (1887), C. A.; *Farbenfabriken Vormals Fried Bayer & Co.'s Tm.*, 11 R. P. C. p. 93; (1894) 1 Ch. 645, C. A. (*Somatose*).

(*i*) *Thompson's Tm.*, 6 R. P. C. 213 (1888); but cf. the *Sanitas Co.'s Tm.*, 4 R. P. C. 533; 58 L. T. 166 (1887), Kay, J.

(*k*) *Australian Wines Importers' Tm.*, 41 C. D. 278; 6 R. P. C. 311 (1889), C. A.

(*l*) *Brandreth's Tm.*, 9 C. D. 618 (1878), Jessel, M.R.

(*m*) Sect. 69 (5); p. 72, above.

(*n*) Report of 1888, p. vii.

CHAPTER V.

CLASSIFICATION OF GOODS.

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It has already been shown that the use of the mark in connection with goods of the particular kind identified with it is of the essence of trade-mark rights (a), and this essential feature is retained by the Registration Acts. It is provided—

“A trade-mark must be registered for particular goods or classes of goods” (b).

And that—

“A trade-mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill” (c).

And the express restrictions on the registration of identical marks and marks having such resemblance to registered trade-marks as to be calculated to deceive, which are contained in sect. 72, apply only where the marks already registered are on the register with respect to the same goods or description of goods as those for which the propounded marks are sought to be registered.

(a) *Ante*, p. 29; and see *Somerville v. Schembri*, 12 App. Cas. 453; 4 R. P. C. 179 (1887).

(b) Act of 1883, s. 65, following

Act of 1875, s. 2

(c) Act of 1883, s. 70, following Act of 1875, s. 2. As to Assignments, see Chap. XIII., p. 272.

Classes.

Accordingly, goods have been divided by the draughtsman of the Trade-Mark Rules into forty-nine classes, and a miscellaneous and residuum class, and the rules provide that if any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the comptroller, and that any wares made of mixed materials (for example, of both cotton and silk) shall be included in such one of the classes appropriated to those materials as the comptroller may desire (*d*). For the convenience of applicants for registration an alphabetical guide to the classification of goods has also been drawn up and published (*e*), and in case of uncertainty, upon application by letter to the comptroller, giving a full description of the goods and the purposes for which they are used, the comptroller will inform any intending applicant what class he should name in his application.

Registration
and protection
for part of a
class.

Many of the classes comprise a number of very different kinds of goods, for example, Class 6: "Machinery of all kinds, and parts of machinery, except agricultural and horticultural machines included in class 7," comprises both engine-boilers and sewing machines. Registration in a class does not, however, confer on the registered proprietor rights in regard to goods of kinds other than those for which he uses his mark. Thus, where the owner of a mark comprising the word *Neptune*, who had used it only for iron sheets, although class 5, for which it was registered, includes also wire, brought an action against a person who had registered and used a mark comprising the same word for wire, the Court of Appeal refused to grant an injunction, and they ordered the register to be rectified by restricting the registration of the plaintiff's mark to iron sheets only (*f*). In this case the plaintiff claimed the mark as assignee of the goodwill of a business which dealt only in the iron sheets, and it was held that, as assignee,

(*d*) Rule 6. Sch. 3. Appendix,
p. 618.

(*e*) It can be procured at the Sales
Department of the Patent Office,

Cursitor Street, Chancery Lane.

(*f*) *Edwards v. Dennis*, 30 C. D.
454, C. A. (1885).

his trade-mark rights under the Acts must, in any event, be restricted to the goods with which the business assigned to him was concerned (*g*); but Cotton, L.J., stated that, in his opinion, it was not the intention of the Act (of 1875) that a man registering a trade-mark for an entire class, and using it only for one article in that class, should be able to claim for himself the exclusive right to use the mark for every article in the class, and with this opinion the other Lords Justices seem to have agreed. This opinion was endorsed and followed by Chitty, J., when the question arose in an action brought by the original proprietors of a trade-mark (*h*), who endeavoured, but unsuccessfully, to secure exclusive rights for cigars in a trade-mark which they had registered in the tobacco class, but which, as it comprised the word "mixture," was appropriate, and had at first been used, only for cut tobacco (*hh*).

A trade-mark may be originally registered for certain only of the goods comprised in a class, and it will then, of course, be protected as to those goods only (*i*). And if it be registered for the whole class, but the proprietor of it be entitled to protection for part of the class only, the Court may rectify the register by restricting the entry, as it did in *Edwards v. Dennis* (*k*) and in *Harrison v. Woodroffe* (*l*). In the latter case Kekewich, J., said: "It was never intended that a man, having a trade-mark for one class of machinery, should register it for all." In practice, leave to register a mark is frequently given, and oppositions to registration are frequently withdrawn, or overruled, on the terms that the registration be restricted in this way to part of a register class (*m*). The restriction is

(*g*) Act of 1875, s. 2. Act of 1883, s. 70. *Hart v. Colley*, 44 C. D. 193; 7 R. P. C. 93 (1890), North, J.

(*h*) *Hargreaves v. Freeman*, (1891) 3 Ch. 39; 8 R. P. C. 237. (*k*) 30 C. D. 454, C. A. (1885).

(*hh*) Cf. Instructions, 31, *post*, p. 632. (*l*) 42 C. D. 691; 7 R. P. C. 25 (1889).

(*i*) *Jay v. Sadler*, 40 C. D. 649; 6 R. P. C. 136 (1888), Kekewich, J.; (*m*) See, for instance, *Jelley's Application*, 51 L. J. Ch. 639 n. (1878), Jessel, M.R.; *Braby & Co.'s*

effected by the entry of a note upon the register, and in a case where, without any formal opposition, it had been agreed between the applicant and an objector, that the registration should be restricted to certain goods in the class for which it was effected, Pearson, J., on an *ex parte* application, directed the comptroller to enter a note of the restriction on the register (*n*).

Series of Marks.

By sect. 86 it is provided that—

“When a person claiming to be proprietor of several trade-marks which, while resembling each other in the material particulars thereof, yet differ in respect of (a) the statement of the goods for which they are respectively used or proposed to be used, or (b) statements of numbers, or (c) statements of price, or (d) statements of quality, or (e) statements of names of places, seeks to register such trade-marks, they may be registered as a series in one registration. A series of trade-marks shall be assignable and transmissible only as a whole, but for all other purposes each of the trade-marks composing a series shall be deemed and treated as registered separately.”

Registration
of a series of
marks.

The section was probably introduced to clear up the difficulties which arose under the earlier Act upon the question how such series were to be registered (*o*).

When an application is made for such a series, a representation of each of the marks included in the series must be affixed to the form of application (*p*), and of the additional representation of the trade-mark sent with the application (*q*).

Applications, 21 C. D. 222 (1882),
North, J. : and *Kenrick and Jeffer-
son's Tm.*, 7 R. P. C. 321 (1890),
Chitty, J.

(*n*) *Keep's Tm.*, 26 C. D. 187
(1884); see also Chap. XI. ; p. 235,
and Chap. X., p. 181.

(*o*) See *Barrow's Tms.*, 5 C. D.
353 (1877), C. A.

(*p*) Chap. IV., p. 68, above;
Rule 14. Separate electrotypes
must be sent also, Rule 30.

(*q*) Instructions, 17; App. p. 630.

CHAPTER VI.

SHEFFIELD MARKS.

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Sheffield Marks and the Cutlers' Company.

THE care of the register, and the registration of marks to be used on metal goods registered under the present Act by a person carrying on business in Hallamshire, or within six miles thereof, is committed, by sect. 81 (*r*) of the Act, to the Cutlers' Company.

This company was incorporated by the Act 21 James I., c. 31, and its members and proceedings are regulated by several Cutlers' Company Acts, referred to below. But long before the seventeenth century Hallamshire had been noted for its cutlery manufactures, and from time to time a jury of cutlers was empannelled with the other juries of the local Court Leet, to assign marks to the different manufacturers, wherewith to distinguish their respective wares; and in the Court Rolls of the Manor of Sheffield of the 7th of Elizabeth, and, again, in the Rolls of 1590, presentments of the regulations governing persons engaged in the knife-making and certain other cutlery trades are recorded (*s*). The seventh of these regulations provided that no person should strike any

The Cutlers'
Company.

(*r*) See below ; p. 96.

(*s*) Hunter's History of Sheffield :
London, 1819, p. 118.

mark upon his wares but that which was assigned him in the Lord's Court, under a penalty of ten shillings. The cutlers had also a charter granted by the lords of the manor (*t*).

The incorporating Act, the Cutlers' Company Act, 1623 (*u*), laid down certain regulations for the control of persons engaged in the businesses of manufacturing knives, shears, scissors, or other cutlery wares, within the specified district, and incorporated the persons then so engaged, and it fixed the limits of the district concerned, as they have ever since remained, to be those of the lordship of Hallamshire, and within six miles compass from it. The Act, in particular, provided that persons engaged in the businesses mentioned, in the said district, should strike such marks, and such marks only, as should be assigned to them by the company. These regulations were repealed by the Cutlers' Company Act of 1791 (*x*), and fresh regulations, chiefly relating to the admission of new freemen and to the taking of apprentices, were enacted. By sect. 17 of the Act last mentioned, members of the company, who alone were then permitted to manufacture the goods referred to (*y*), were forbidden, under a penalty, to strike, engrave, or use any mark like, or counterfeiting a mark assigned to any other person. The Cutlers' Company Act of 1801 (*z*) empowered any freeman of the company to bequeath his mark, as his other personalty, by his will, his widow not to be thereby prevented from carrying on the trade, or selling the right to the mark, for her lifetime, to any other person entitled to carry on the trade. The Cutlers' Company Act of 1814 (*a*) threw open the specified trades to all persons, and removed the existing restrictions as to taking apprentices. It provided, further (sect. 3), that all manufacturers, whether freemen or not, on application, should have marks assigned to them by the company, the marks not to be

(*t*) M. M. A. Report, 1862. Evidence of Mr. Jackson, Q. 104.

(*u*) 21 James 1, c. 31, local.

(*x*) 31 Geo. 3, c. 58, local.

(*y*) Knives, sickles, shears, scissors, razors, files, and forks, or any of them, sect. 3.

(*z*) 41 Geo. 3, c. 97, local.

(*a*) 54 Geo. 3, c. 119, local.

marks previously assigned, and at the time continuing to be the property of any persons other than the applicants, and not to consist of surnames; (sect. 4) that marks in common use should not be assigned; and (sect. 6) that an assigned mark might be bequeathed by will, and if it were not bequeathed, it should go to the widow and family of the proprietor on his death, but not so as to give power to more than one person in the family to use it at the same time. The last Cutlers' Company Act, that of 1860 (*b*), extended the provisions of the Acts to all persons within the district using or exercising the trades of manufacturers of steel, makers of saws and edged tools, and other articles of steel, or steel and iron combined, having a cutting edge, and it enabled persons carrying on any of the trades within the Acts, and not being freemen of the company, to become freemen on payment of the proper fees, and to have marks assigned to them.

It will be seen that, under these Acts, the old corporate marks were assignable personal property of the grantee; this was, at all events, the case where the marks were owned by non-freemen, and where they did not comprise any personal elements calculated to make their use by others than the original grantees misleading (*c*). In this respect they differed from ordinary trade-marks, which are, and always have been, assignable or capable of transmission only in connection with the business in which they are used.

Corporate marks were assignable in gross.

The right to the mark originated in the grant by the company, and lasted for the lives of the grantee and his widow. The grant was made upon the application of the grantee after a search, carried out by the searchers of the company, to ascertain whether the mark applied for was the subject of a then existing grant. Marks, as they lapsed, were re-granted over and over again (*d*).

Grant of a corporate mark.

(*b*) 23 Vict. c. xliii.

(*d*) See the evidence of Mr. Jack-

(*c*) *Bury v. Bedford*, 32 L. J. Ch. 741; 33 L. J. Ch. 465; 4 De G. J. & S. 352 (1863), M.R. and L.JJ.

son, Qq. 113, 117, 142, and Mr. Hunter, Q. 1899; M. M. A., 1862.

Recent legis-
lation and
the Cutlers'
Company.

The rights and privileges of the Cutlers' Company were expressly saved by sect. 25 of the Merchandise Marks Act, 1862. There is no similar provision in the Merchandise Marks Act of 1887, but, except in so far as that Act restricts the use of particular marks as being forged trade-marks, or false trade descriptions, it does not in any way affect the rights or privileges of the company. The Act of 1875 (*e*) empowered the owner of a Sheffield corporate mark to have it registered under that Act in the same manner and on the same terms as if it were not a Sheffield corporate mark. Under the Act of 1883 the old register of corporate marks was closed on the 31st of December, 1888 (*f*).

Closing of
the register.

The Act of
1875.

The Act of 1875 left the register of the Cutlers' Company, and the power of the company to assign marks, untouched, except that it restricted the latter power in regard to marks identical with, or so nearly resembling as to be calculated to deceive, marks registered under the Act in the manner mentioned below (*g*). And it provided generally that:—

“(7.) Nothing in this Act shall prejudice or affect the rights and privileges of the Cutlers' Company, nor, save as is otherwise in this Act expressly provided, shall any of the provisions of this Act apply to or in the case of any Sheffield corporate mark.”

The Act provided (*h*) further, (1) for copies of all the Sheffield corporate marks in force to be delivered to the registrar; (2) for notices of new applications to the company for the assignment of corporate marks, and copies of the marks applied for to be delivered to the registrar, and for notices of applications to the registrar for registration under the Act of marks belonging to any goods or class of goods within the Cutlers' Company Acts (*i*), and copies of the marks referred to, to be delivered to the company (*k*); and (3) for notices of assignment and registration.

(*e*) Sect. 9 (6), set out below.

(*f*) Sect. 81 (9).

(*g*) Sect. 9 (5).

(*h*) Sect. 9. Appendix, p. 590.

(*i*) See list below; p. 96.

(*k*) The company sometimes op-

Sub-sections (4), (5), and (6) of section 9 of the Act of 1875 were in the terms following:—

“(4.) *The registrar, under this Act without the special leave of the Court, to be given only in cases where the applicant proves his right, shall not in respect of any goods or classes of goods with respect to which a Sheffield corporate mark shall have been assigned and actually used, and of which mark a copy, or description, or notice of the assigning whereof shall have been delivered or given to the registrar as aforesaid, register a trade-mark identical with such Sheffield corporate mark, or so nearly resembling the same as to be calculated to deceive (l).*

Mark resembling a corporate mark not to be registered.

“(5.) *The masters, wardens, searchers, and assistants of the Cutlers' Company shall not assign to any person a mark or device identical with any trade-mark registered under this Act, and notice of the registration whereof shall have been given to the Cutlers' Company as aforesaid, or so nearly resembling the same as to be calculated to deceive (l).*

Corporate mark resembling registered mark not to be assigned.

“(6.) *Any person to whom a Sheffield corporate mark legally belongs shall be entitled to have the same mark registered also as a trade-mark under this Act, in respect of any particular goods or classes of goods, in the same manner and upon the same terms and conditions in and upon which he might have registered the same if it were not a Sheffield corporate mark.*”

Corporate mark might be registered.

The Act of 1883, on the other hand, provided for the closing, within five years from the commencement of the Act (m), of the register of corporate marks, and for the commencement of a new register of trade-marks to be kept at Sheffield by the Cutlers' Company, to which the corporate marks might be transferred; and it directed that all corporate marks entered on the register of corporate marks

The Act of 1883.

posed the registration of marks which they deemed to too closely resemble corporate marks in use. See *Re Rosing*, 54 L. J. Ch. 975, n.

(1878).

(l) Cf. sect. 6 of the Act of 1875, and sect. 72 of the Act of 1883.

(m) 1st January, 1884, sect. 3.

and not entered on the new register before the closing of the former, should be deemed to have been abandoned (*m*).

The Act of
1888.

Sect. 81, which is the part of the Act relating to the Sheffield marks, and containing the provisions just referred to, has been amended by sect. 20 of the Act of 1888, the principal alteration being occasioned by the substitution of, and the extension thereby of the section to, "metal goods," meaning "all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal," in place of "cutlery, edge tools, raw steel, goods made of steel, or of steel and iron combined, whether with or without a cutting edge." The last-mentioned class of goods had been inserted in the original section in the place of the list taken by the Act of 1875 from the Cutlers' Co. Act of 1860, namely, knives, sickles, shears, scissors, razors, files, forks, saws, edge tools, or other articles of steel, or of steel and iron combined, having a cutting edge.

The effect of
sect. 81.

The section is set out below, the words printed in italics being repealed, and those in brackets introduced by the amending Act (*n*). The general effect of the section is to make the Sheffield register a branch of the principal register for trade-marks used on metal goods and registered by persons carrying on business in Hallamshire or within six miles thereof, and to place the local register under the charge of the Cutlers' Company. The duties of the company are, however, ministerial only as regards the registration of old corporate marks (*o*); as regards the registration of other marks, the company are substituted for the comptroller, subject to his veto upon any particular registration (*p*), unless such veto is overruled on appeal by the Court, and subject, in cases where the comptroller's veto is not exercised, to appeal from the company to him (*q*).

Duties of
the Cutlers'
Company
with regard
to registra-
tions.

(*m*) Sect. 81 (9).

(*n*) Act of 1888, s. 20.

(*o*) *Lambert's Tm.*, 5 R. P. C.

542; 6 R. P. C. 344 (1889), C. A.

(*p*) Sub-sect. (5).

(*q*) Sub-sect. (12).

The section is as follows :

Sheffield Marks.

“81. With respect to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the county of York (in this Act called the Cutlers' Company) and the marks or devices (in this Act called Sheffield marks) assigned or registered (r) by the master, wardens, searchers, and assistants of that company, the following provisions shall have effect :

Registration by Cutlers' Company of Sheffield marks.

(1.) The Cutlers' Company shall establish and keep at Sheffield a new register of trade-marks (in this Act called the Sheffield register) :

Cutlers' Company to open a new register ;

(2.) *The Cutlers' Company shall enter in the Sheffield register, in respect of cutlery, edge tools, or raw steel and the goods mentioned in the next subsection all the trade-marks entered before the commencement of this Act (s) in respect of cutlery, edge tools, or raw steel and such goods in the register established under the Trade-Marks Registration Act, 1875, belonging to persons carrying on business in Hallamshire, or within six miles thereof, and shall also enter in such register, in respect of the same goods, all the trade-marks which shall have been assigned by the Cutlers' Company and actually used before the commencement of this Act, but which have not been entered in the register established under the Trade-Marks Registration Act, 1875.*

[(2.) The Cutlers' Company shall enter in the Sheffield register, in respect of metal goods (t) as defined in this section, all the trade-marks entered, before the 1st day of January, 1889 (u),

to enter on it the Sheffield marks on the old registers for metal goods, and old corporate marks.

(r) i.e., registered under the Act of 1875.

(s) 1st January, 1884.

(t) Metal goods are defined by sub-sect. (14), below.

(u) Commencement of the Act of

“ in respect of metal goods either in the register established under the Trade-Marks Registration Act, 1875, or in the register of trade-marks under this Act, belonging to persons carrying on business in Hallamshire, or within six miles thereof. The Cutlers' Company shall also, on request made in the prescribed manner (v), enter in the Sheffield register, in respect of metal goods (x), all the trade-marks which shall have been assigned by the Cutlers' Company and actually used before the 1st day of January, 1884 (y), but which have not been entered in either of the said registers] (z).

Application
for Sheffield
mark.

(3.) An application for registration of a trade-mark used *on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge* [on metal goods] (a), shall, if made after the commencement of this Act by a person carrying on business in Hallamshire, or within six miles thereof, be made to the Cutlers' Company (b) :

Notice to
comptroller.

(4.) Every application so made to the Cutlers' Company shall be notified to the comptroller in the prescribed manner (c), and unless the

1888. As regards the registration of old corporate marks, the duties of the company are ministerial only. *Lambert's Tr.*, p. 96, *supra*.

(v) *i.e.*, made according to the last Form in the Rules, Appendix, p. 617. The application must be in duplicate, Rule 56. The procedure is generally the same as on an application to the comptroller. Chap. IV., p. 56.

(x) Metal goods are defined by sub-s. (14), below.

(y) Commencement of the Act of 1883.

(z) Act of 1888, s. 20 (1).

(a) Act of 1888, s. 20 (2).

(b) The effect of this sub-section and sub-sect. (7) is to constitute the Sheffield register a branch register for metal goods. The application must be on Form F., Appendix, p. 608; see Instructions (33), p. 632.

(c) A copy of the application is to be sent within seven days, with two representations of the mark for each class, Rule 57.

“comptroller within the prescribed time (*d*) gives notice to the Cutlers' Company that he objects to the acceptance of the application, it shall be proceeded with by the Cutlers' Company in the prescribed manner (*e*).

(5.) If the comptroller gives notice of objection as aforesaid, the application shall not be proceeded with by the Cutlers' Company, but any person aggrieved may appeal to the Court (*f*): Veto by
comptroller.

(6.) Upon the registration of a trade-mark in the Sheffield register the Cutlers' Company shall give notice thereof to the comptroller, who shall thereupon enter the mark in the register of trade-marks; and such registration shall bear date as of the day of application to the Cutlers' Company, and have the same effect as if the application had been made to the comptroller on that day: Entry on
register also.

(7.) *The provisions of this Act, and of any general rules made under this Act, with respect to application for registration in the register of trade-marks, the effect of such registration, and the assignment and transmission of rights in a registered trade-mark shall apply in the case of applications and registration in the Sheffield register; and notice of every entry made in the Sheffield register must be given to the comptroller by the Cutlers' Company, save and except that*

(*d*) The time is one month from receipt of notice, Rule 58 (1).

(*e*) *i. e.*, as an ordinary application is proceeded with by the comptroller, sub-sect. (7), Rule 59. If no such objection is made by the comptroller, the Cutlers' Co. shall require the applicant to send the comptroller a wood block or electrotype, as the comptroller may direct,

and the comptroller shall, if satisfied with such wood block or electrotype, advertise the application in the same manner as an application made to him at the Patent Office. Rule 58 (2).

(*f*) The Court is defined by sects. 117 and 111. Cf. sub-sect. (12), which gives an appeal from the company to the comptroller.

“ the provisions of this sub-section shall not prejudice or affect any life, estate, and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register :

Procedure
and rules.

[(7.) The provisions of this Act and of any general rules made under this Act with respect to the registration of trade-marks, and all matters relating thereto, shall, subject to the provisions of this section, apply to the registration of trade-marks on metal goods by the Cutlers' Company and to all matters relating thereto ; and this Act and any such general rules shall, so far as applicable, be construed accordingly with the substitution of the Cutlers' Company, the office of the Cutlers' Company, and the Sheffield register, for the comptroller, the Patent Office, and the Register of Trade-Marks respectively ; and notice of every entry, cancellation, or correction made in the Sheffield register shall be given to the comptroller by the Cutlers' Company : provided that this section shall not affect any life estate and interest of a widow (g) of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register] (h).

Widow's corporate mark.

Application
for Sheffield
mark to
comptroller.

(8.) Where the comptroller receives from any person not carrying on business in Hallamshire or within six miles thereof, an application for registration of a trade-mark used *on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with*

(g) The corporate marks were assigned for the life of the assignee and his widow ; see *ante*, p. 93,

and the Cutlers' Company Act, 1814, *ante*, p. 92.

(h) Act of 1888, s. 20 (3).

“ or without a cutting edge [on metal goods] (*i*), he shall in the prescribed manner (*k*) notify the application and proceedings thereon to the Cutlers' Company :

- (9.) At the expiration of five years from the commencement of this Act (*l*) the Cutlers' Company shall close the Cutlers' register of corporate trade-marks, and thereupon all marks entered therein shall, unless entered in the Sheffield register, be deemed to have been abandoned (*m*): Closing of Cutlers' register.
- (10.) A person may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of two or more trade-marks : Registration for two Sheffield marks.
- (11.) A body of persons, corporate or not corporate, may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of a trade-mark or trade-marks (*n*): Firm or company.
- (12.) Any person aggrieved (*o*) by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner (*p*), appeal to the comptroller, who shall have power to confirm, reverse, or modify the decision, but the decision of the comptroller shall be subject to a further appeal to the Court (*q*): Appeal to the comptroller.
- (13.) So much of the Cutlers' Company's Acts as applies to the summary punishment of persons counterfeiting Sheffield corporate marks, that is to say, the fifth section of the Cutlers' Com- Counterfeiting Sheffield marks.

(*i*) Act of 1888, s. 20 (2).

(*k*) *i. e.*, by sending a copy of the official paper, the Trade-Marks Journal, containing the application; Rule 58 (3).

(*l*) 1st of January, 1884.

(*m*) See Chap. XIV., p. 283.

(*n*) Person in the Act includes a body corporate, sect. 117; and in sect. 62 (application for registration), it includes a firm, Rule 7.

(*o*) See sect. 90, p. 221.

(*p*) Form W., Appendix, p. 616.

No time for appeal has been fixed.

(*q*) Cf. sub-sect. (5), above.

“pany’s Act of 1814, and the provisions in relation to the recovery and application of the penalty imposed by such last-mentioned section contained in the Cutlers’ Company’s Act of 1791 (*r*), shall apply to any mark entered in the Sheffield register (*s*) :

Metal goods.

[(14.) For the purposes of this section the expression ‘metal goods’ means all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal (*t*) :]

Certificate of master of the company.

[(15.) For the purpose of legal proceedings in relation to trade-marks entered in the Sheffield register a certificate, under the hand of the master of the Cutlers’ Company, shall have the same effect as the certificate of the comptroller” (*u*).]

(*r*) For the sections referred to, see p. 544, below.

(*s*) The effect of this is to extend the last-mentioned sections to all the locally registered metal goods marks.

(*t*) For the list of goods to which

the Cutlers’ Company’s Acts and the Act of 1875 applied, see pp. 92, 93; and for the list to which the unamended Act of 1883 applied, see the repealed sub-sect. (2).

(*u*) The certificate is evidence, sect. 96; Rule 60, above, p. 57.

CHAPTER VII.

COTTON MARKS AND THE MANCHESTER OFFICE.

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By the rules issued under the Act of 1875 (*a*), marks for cotton goods in Classes 23, 24, and 25 (*b*) were specially treated. An office was set up at Manchester for the exhibition of all devices, marks, &c., used in the cotton trade, and in the rules called *cotton marks*, and every person using any cotton mark was required to send to the office three representations of it. A committee of persons versed in the usages of the cotton trade were appointed to consider the cotton marks, of which representations were sent in to the Manchester office, and to divide them into two classes: (*a*) those which were, in the opinion of the committee, trade-marks within the meaning of the Act; and (*b*) those which were not; and power was given to the Commissioners of Patents to add any cotton marks to either class (*c*). It was provided that any proprietor of a cotton mark not specified in class (*b*) might apply to be registered as proprietor of the mark in the manner and subject to the conditions in and under which he might have applied to be registered in respect of any other trade-

The repealed
Cotton Marks
Rules.

(*a*) Now repealed, see Chitty's Statutes. Rules 57—63a.

(*b*) Class (23), cotton yarn and thread (under the present Rules this is replaced by (*a*) cotton yarn, and sewing cotton not on spools or

reels, (*b*) sewing cotton on spools or reels); (24) cotton piece goods of all kinds; (25) cotton goods not included in Classes 23, 24, or 38. Class 38, articles of clothing.

(*c*) Rule 58 (*a*) of March, 1883.

mark, but that it should not be lawful to register any person as proprietor of any cotton mark in class (b) except in pursuance of an order of the Court.

The Cotton
Marks Com-
mittee.

The committee so appointed was held not to be a judicial tribunal, but merely a body appointed to consider and give an opinion on technical matters peculiarly within the knowledge of its members, and it was decided that its decisions could be reconsidered or disregarded by the Court, or by the registrar by direction of the Court, notwithstanding that it had acted fairly and properly, and had not proceeded on any wrong principle in arriving at them (*d*). And in a number of cases applications to the Court in respect of marks placed by the committee in class (b) were successful, and the marks were registered as trade-marks (*e*).

The Man-
chester
Branch Office.

The special rules have now been repealed (*f*) and the committee of experts dissolved (*g*); but the Manchester office is maintained, and has been constituted a branch office of the registry, and applications for the registration of marks in Classes 23, 24, and 25 must be addressed and sent to it (*h*). Searches also in respect of marks in classes of textiles from Classes 23, 24, and 25 may be made in the Manchester office (*i*).

(*d*) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Cas. 479; *H. L.* reversing the judgment of the C. A. 8 C. D. 794 (1877).

(*e*) *Exp. Ede & Co.*, 28 W. R. 436; *Re Dugdale*, 49 L. J. Ch. 303; *Re Ward, Sturt & Sharp*, 50 L. J. Ch. 347; *Re Sykes*, 43 L. T. 626; and see Sebastian, 3rd ed. p. 548, where the cases are collected.

(*f*) But by the existing r. 13, four representations of marks must accompany an application to register in the cotton classes instead of two only.

(*g*) Lord Herschell's Committee refused to adopt a recommendation

that honorary trade assessors be appointed to pass or reject cotton trade-marks, on the grounds that their appointment would diminish the sense of responsibility of the office, and that they did not feel sure that the creation of such a tribunal, reserving power to override its decisions, would give general satisfaction. Report of 1888, p. x.

(*h*) Rule 8. The address is: The Comptroller, Manchester Trade-Marks Branch, 48, Royal Exchange, Manchester.

(*i*) Instructions (34).

A co-ordinate jurisdiction with that of the High Court of Justice is vested in the Court of Chancery of the County Palatine of Lancashire in respect of any action or other proceeding in relation to trade-marks, the registration whereof is applied for in the Manchester office, subject to the ordinary right of appeal from decisions of that Court (*k*).

The Palatine
Court of
Chancery.

(*k*) Act of 1888, sect. 26. This provision was inserted in compliance with a recommendation of Lord Herschell's Committee (Report, p. x.). The other paragraphs of the reports of the committee, in regard to the Manchester office, may be of interest. The committee said, in an interim report of the previous year: "A very large proportion of the marks registered in the cotton classes, probably not less than 90 per cent., are the result of applications made by Manchester houses, or by houses having a representative in Manchester. We think it would add much to the smooth working of the Act if applications in these classes were, as far as possible, dealt with by the head of the

Manchester branch of the Trade-Marks Office. It is, we think, essential that the registration should take place in London, and that the final decision should rest with the comptroller as head of the office; but we recommend that in the case of each application, the head of the Manchester office should report his opinion as to whether the mark ought to be accepted or refused, and that his opinion should be acted upon, unless the comptroller sees clear reason to come to a contrary conclusion. We think that this duty of revision should in all cases be discharged by the comptroller personally." And these recommendations are endorsed in the final Report of 1888 (19).

CHAPTER VIII.

WHAT MARKS MAY BE REGISTERED AS TRADE-MARKS.

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THE marks which may be registered as trade-marks were determined, from the commencement of the register until the end of 1883, by sect. 10 of the Act of 1875; from the last-mentioned date until the end of 1888, by sect. 64 of the Act of 1883, and they are at present, and from the beginning of 1889 they have been, determined by the revised and amended sect. 64, enacted by sect. 10 of the Act of 1888. Sect. 64 is printed below; the ordinary type

showing the terms as revised and at present in force, the words in brackets being added by the Act of 1868, and the italic type showing the parts of the Act of 1883 which have been repealed.

Scot. 64.

“ **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 (*a*) ; or

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

(c) A distinctive device, mark, brand, heading, label, ticket, or *fancy word or words not in common use* (*bb*) ;

[(d) An invented word or invented words (*c*) ; or]

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

(2.) (*f*) There may be added to any one or more of *these* [the essential] particulars [mentioned in this section] any letters, words, or figures, or combination of letters, words, or figures, or of 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 (*g*), 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] (*f*).

[(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

(a) Page 114.

(b) Page 117.

(bb) For references, see p. 106.

(c) Page 152.

(d) Page 153.

(e) Page 147.

(f) See Chap. IX., p. 164.

(g) See Chap. IV., p. 68.

“ such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof.]

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

Sect. 10 of the Act of 1875 (now repealed) was as follows:— Sect. 10 of the Act of 1875.

“ For the purposes of this Act :

A trade-mark consists of one or more of the following essentials ; that is to say,

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

A written signature or copy of a written signature of an individual or firm (k) ; or

A distinctive device, mark, heading, label, or ticket (l).

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

Any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act (m) may be registered as such under this Act” (n).

Before the Registration Acts it was necessary for the plaintiff in a trade-mark action to plead that the mark in question had acquired a reputation and become known as his by user in connection with his goods ; but the Court did not require him to prove that the user had extended New marks may be registered.

(h) Page 154.

(i) The same as (a) in sect. 64.

(k) (b) adds “ applying for registration thereof as a trade-mark.”

(l) (c) adds “ brand,” and (d)

and (e) admit the word-marks.

(m) 13th of August, 1875.

(n) 64 (3) (ii) adds “ letter, figure,” and combination of “ letters and figures.”

over any long or defined period, and it was therefore practically open to a trader to obtain protection against infringers of a newly devised mark which had hardly been used at all (*o*). The Acts have provided an additional mode of acquiring trade-mark rights, for it is held that marks which have never been used may be registered as trade-marks, and a right of property thereby acquired in them (*p*). "In my opinion," Cotton, L.J., said, in *Hudson's Case*, "the language (of the Act of 1875 (*q*)), though not appropriate, means this, that a man who designs one of those special things pointed out in sect. 10, is, as designer, to be considered as the proprietor of it, and if there is no one else who has used it, or who can be interfered with by the registration and subsequent assertion of title to the mark, then he is to be considered as entitled within the meaning of the Act to the exclusive use of that which in fact he has never in any way used, but which has only been designed by him, and which he can be treated as the person entitled to register, if no one else had so used it as that his user would be interfered with by the registration."

Applicant
must intend
to use the
mark.

But the applicant for the registration of a new and unused mark must intend to use it, as a trade-mark, forthwith, for it is not permitted to place marks on the register merely to prevent other traders using and appropriating them (*r*). Moreover, there can be no infringement of an unused mark (*s*). It will usually be presumed that the applicant does intend so to use the mark, but in a case where it was shown that the registered proprietor of a

(*o*) See above, Chap. II., p. 34.

(*p*) *Hudson's Tm.*, 32 C. D. 311; 3 R. P. C. 155 (1886), C. A.; *Great Tower Street Tea Co. v. Smith*, 6 R. P. C. 165 (1889), North, J.

(*q*) The Court held that it made no difference to this matter whether the case were treated under the Act of 1875 or the Act of 1883. They, in fact, dealt with the case

under the former Act.

(*r*) *Apollinaris Co.'s Tm.*, (1891) 2 Ch. 186, see at p. 234; 8 R. P. C. 137, C. A.

(*s*) *Per* Cotton, L.J., in *Hudson's Tm.*, 32 C. D. p. 319; 3 R. P. C. 155; and see *Edwards & Dennis' Tm.*, 30 C. D. 464 (1885), C. A.; and Chap. XV., below, p. 308.

mark was an importer of foreign goods, and had caused the mark to be registered only for the purpose of excluding from the English market goods similar to those in respect of which the registration was effected, and which had the mark affixed to them by the foreign producer to whom it belonged, the goods being intended by the producer for foreign markets only, the registration was held to be irregular, and was expunged (*t*).

Section 10 of the Act of 1888. (Sect. 64.)

This section governs all applications for registration, and all registrations made or taken to be made since the commencement of the Act, the 1st of January, 1889; but, as the question whether an omission from, or an entry in, the register was made without sufficient cause, and ought, consequently, to be rectified under sect. 90, must be considered with reference to the law in force at the date when the registration complained of was made, or is taken to have been made (*u*), it is necessary to consider the terms of the corresponding sections in the earlier Acts and to compare them with those of this section.

Both the Act of 1883 (*v*) and the Act of 1888 contain saving clauses (*x*), and where an application was made two days before the Act of 1883 came into operation, and the registration was opposed, and the matter came before the Court for decision, the Court of Appeal thought it "undoubtedly the better course" to treat the question as governed by the old Act of 1875. In the particular case,

What Act applied to pending registrations.

(*t*) *Apollinaris Co.'s Tm.*, (1891) 2 Ch. 186, see at p. 234; 8 R. P. C. 137, C. A.

(*u*) See the section, and *Ward, Sturt, & Sharp's Tms.*, 50 L. J. Ch. 347 (1881), Hall, V.-C.; and Chap. XI., below, p. 230.

(*v*) Sect. 113: "this repeal of enactments shall not affect the past operation of any of those enactments, or any . . . right to use a

trade-mark granted or acquired, or application pending, . . . or right . . . acquired, . . . or anything duly done . . . under . . . any of those enactments before or at the commencement of this Act."

(*x*) Sect. 27: "nothing in this Act shall affect the validity of any act done, right acquired, or liability incurred before the commencement of this Act."

however, it made no difference (*y*). So, in *Burgoyne's Case* (*z*), where the application was made in December, 1887, but did not come before the Court until February, 1889, Chitty, J., held that it must be treated as made under the Act of 1883, and that the applicant, therefore, could claim registration of his mark as a "fancy word."

In the *Apollinaris Case* (*a*), Kekewich, J., put a still more favourable construction upon sect. 27 of the Act of 1888, for he held that, under circumstances similar to those of the last cited case, the applicants were entitled to registration if they could bring their mark within the terms of either the Act of 1883 or that of 1888.

Sect. 10
is purely
restrictive.

The section is purely restrictive, as were also the corresponding sections of the earlier Acts, which it has replaced. It is intended to limit and curtail the numerous forms of words and other things which, before the Acts, were appropriated as trade-marks (*b*).

No mark can be put upon the register unless it complies with the terms of this section, but the presence in it of one or more of the specified particulars does not make the mark a good trade-mark, or, of necessity, entitle it to registration. Some restrictions on registration are imposed by the Act itself (*c*), and the comptroller has, as is shown elsewhere (*d*), discretion to allow or refuse registration where all the conditions of the Acts are complied with (*d*).

Essential Particulars.

A registered
trade-mark
must contain
one or more of
the essential

No trade-mark can be properly registered unless it contains one or more of the essential particulars enumerated in the Act under which the registration is made (*e*),

(*y*) *Hudson's Tm.*, 32 C. D. p. 317,
Cotton, L.J.; 3 R. P. C. 115
(1886).

(*z*) 6 R. P. C. 227; 61 L. T. 39.

(*a*) (1891) 2 Ch. p. 201; 8 R. P.
C. 137.

(*b*) *Per* Cotton, L.J., in *Van
Duzer's Tm.*, 34 C. D. p. 634; 4

R. P. C. 31 (1887).

(*c*) Sects. 72, 73 and 86. See
Chap. X., below, p. 176.

(*d*) Chap. IV., p. 63; *Eno v.
Dunn*, 15 App. Cas. 252; 7 R. P. C.
311 (1890); and see *per* Lindley,
L.J., above, p. 67.

(*e*) Above, p. 111.

or unless it is within the proviso relating to old marks. This is clear enough from the Acts, but it is also supported by judicial authority. Thus, in *The Orr-Ewing Case*, Lord Cairns said (*f*): “I cannot think that the Vice-Chancellor Hall sufficiently appreciated the object and provisions of the Act of Parliament when he said that he considered that, in each case, a device or label, registration of which is applied for, must be looked at as a whole, and that if it appears to be such as in the ordinary course of business would be distinguished from other devices or labels it should be registered. To some extent, no doubt, this is true; but I apprehend the first duty cast upon the Court is to ascertain whether some one, or more than one, of the essential particulars of a trade-mark, as defined by the Act, is found to exist, so that the mark may be described with the one, or more than one, essential particular or particulars which distinguish it.” And in a later case, *Chitty, J.*, said (*g*): “The argument is that, though neither of the particulars is within the 64th section, the mark must be looked at as a whole; and being looked at as a whole, it is brought within the sub-section (c) (as a device or label) because as a whole it is distinctive. This point was raised before Mr. Justice Pearson, in *Price’s Patent Candle Co.’s Case* (*h*), and without success. It is quite true that the mark must be looked at as a whole, but we must find in the whole, one at least of the essential particulars; and not one of the essential particulars, in my opinion, can be found in this mark.”

particulars,
or be an old
mark.

To one or more of the essential particulars there may be added any of the other matters enumerated in sect. 64 (2), but the applicant for registration of any such additional matter must now, under the amendment of that sub-section

Additions.

(*f*) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Cas. p. 484 (1879).

(*g*) *Bradley’s Tm.*, 9 R. P. C. p. 207 (1892). The mark in question consisted of the words *Worth’s Corsets* printed in ordinary type.

between two co-axial ovals.

(*h*) 27 C. D. 681 (1884). A conventional label with the words *National Sperm* printed on it. As to labels, see further, pp. 137 to 139.

introduced by the Act of 1888 (*i*), state in his application the essential particulars of the trade-mark, and must also disclaim (*k*), in his application also, any right to the exclusive use of the added matter, and a copy of the statement and disclaimer is to be entered on the register.

The power conferred by sect. 92 of the Act to alter registered marks, does not extend to the alteration of their essential particulars (*l*).

Name-marks.

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

Names are highly valued as trade-marks, or as essential particulars of trade-marks, and they were often adopted and protected as such before the Acts (*m*). Clause (a) is taken from sect. 10 of the original Act.

There is nothing in the clause to restrict the choice of the name, and comparison with the following clause shows that it need not be the name of the individual or firm applying for registration, as the signature referred to in the last-mentioned clause must. The practice of adopting trade-names, which are different from those of the traders or of the partners in the firms using them, is very common and is perfectly lawful, and as this is allowed there is no reason why a trader should not adopt as his trade-mark the name of a stranger or of an imaginary person, for the office of the mark is not necessarily to connect the goods which bear it with him, but to connect them with the business which he conducts in them (*n*).

The question whether the signature of the applicant's predecessor in business can be registered under this subsection is considered under clause (b) (*o*).

(i) Sect. 10 and sect. 16; *Bryant & May's Tm.*, 8 R. P. C. 69; 59 L. J. Ch. 763 (1899), North, J.

(k) See Chap. IX. p. 166.

(l) See Chap. XI. p. 248.

(m) "The name of a firm is a very distinctive word indeed":

per Jessel, M.R., in *Exp. Stephens*, 3 C. D. p. 660.

(n) See *per* Chitty, J., in *Hammond v. Brunner*, 9 R. P. C. p. 308 (1890); see also Chap. XVI. p. 394.

(o) Below, p. 117.

It does not follow that every name of an individual or firm printed, &c. as required by the sub-section which an applicant may select is entitled to registration, for, apart from the general restrictions expressly specified by the Act (*p*), the comptroller, in the exercise of his discretion (*q*), would, no doubt, reject any name which, contrary to the fact, tended to suggest that the goods on which it was used were the manufacture or merchandise of, or had some connection with a particular person or firm, or were goods of a particular kind, especially if the name were not the proper name of the applicant or of his predecessors in trade.

The name must be the mere name in the nominative case. Thus, where *Pirie's Parchment Bank* was registered as a trade-mark, and the two latter words were disclaimed, Lindley, L.J., held that *Pirie's* was not the name of a firm within the sub-section (*r*).

Name must be mere name in nominative case.

And as regards the registration of names in the possessive case, generally, Lord Herschell's Committee reported (*s*), that "complaints have also been made that where words have been refused as not being distinctive, they have afterwards been allowed where the applicant has applied for a mark consisting of the same word preceded by the applicant's name with an apostrophe. We think," they added, "that this course ought not to be pursued. Little or no mischief might result where the name of the applicant was an uncommon one; but where the name was a common one the result would be to deprive all persons bearing the same name of their right to use a common word in connection with their own name, and even if the name were an uncommon one it would be impossible to say that there were not other persons bearing it who might wish to use it in connection with the common word which it is sought to monopolise."

The report continues: "Evidence has been given that

(*p*) Sects. 72, 73 and 86; Chap. X. p. 175.

(*q*) See p. 63.

(*r*) *Pirie v. Goddall*, (1892) 1 Ch. 35; 9 R. P. C. 17; cf. *Colman's Tr.*, 11 R. P. C. 129; W. N. (1894)

30, where Stirling, J., held that *Colman's* occurring in a label need not be disclaimed under sect. 64

(3) (1).

(*s*) Report of 1888, p. xii.

marks consisting of a combination of the applicant's name "with the article he manufactures or sells are highly valued. There can be no doubt that if a manufacturer or vendor has obtained for his goods a reputation amongst the public, he could, by process of law, quite apart from the Trade-Marks Act, prevent goods that were not his from being offered to the public on the representation that they were so. But it would be quite a different thing to give, by virtue of registration under the Trade-Marks Act, a right to prevent another manufacturer or merchant honestly describing his own goods by his own name" (s).

The effect of the decision in *Pirie v. Goodall* will, no doubt, be to put a stop for the future to the registrations which the committee thought objectionable.

Printed, &c.

It may be assumed that *printed, impressed, or woven* must be construed to include any method of marking the name upon, or attaching it to, the goods which it is to distinguish.

Particular
and distinc-
tive manner.

The word "distinctive," where it appears in this section, in sub-sect. (c), and, in conjunction with "special," in sub-sect. (3) (ii.), has been repeatedly construed by the Court (t); but in the present clause it does not seem to present any difficulty. The intention of the requirement that the name should be printed (&c.) in a *particular and distinctive manner* was obviously to prevent a name being so taken as a trade-mark, that any trader might unintentionally infringe it by an honest use of his own name (u). This intention would be carried into effect by construing the words to mean "not ordinary, having regard to the practice in the trade concerned."

Ordinary
type.

A name printed in ordinary type, or in type in ordinary use, as, for instance, capitals (x), or common ornamental

(s) See *Hopkinson's Tm.*, (1892) 2 Ch. 116; 9 R. P. C. 102, Kekewich, J., where something like this seems to have been done by the registration of a name as an old mark.

(t) See below, pp. 118—127.

(u) See the extract quoted above

from the report of Lord Herschell's Committee. As to the right of a man to trade under his own name, see clause 3 (1), and below, p. 167; but cf. *Hopkinson's Tm.*, note (s).

(x) *Gianaclis' Tm.*, 6 R. P. C. 467; 68 L. J. Ch. 752 (1899), North, J., (*Gianaclis Cigarettes*).

letters (*y*), is not within the sub-section; and the addition of marks which are common to the trade makes the words no better as a trade-mark (*z*).

(b) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark. Signature of the applicant.

Under the Act of 1875 the latter words of the clause ran "of an individual or firm." The addition "applying for registration" was effected by the Act of 1883. One result of the alteration is, as Mr. Sebastian points out (*a*), that a trader cannot register the signature of his predecessor in business under this sub-section. He may, however, if it falls within the terms of (3) (ii.) be able to register it as an old mark (*b*); and if the signature is printed (&c.) in a distinctive manner, he can register it under sub-sect. (a) (*c*), unless it should be held that it must be implied from the presence of this clause (b) that signatures were intended to be excluded from clause (a) (*d*); but this is not a necessary or, it is submitted, the true, construction of the section. The object of the insertion of clause (b) may well have been to preclude any question whether a name, reproduced as ordinarily signed by its owner, did or did not fall within (a), although, had (a) stood alone, it would not have been open to doubt that any characteristic signature was within it. Of course, the signature of a predecessor in business, properly registered by him and assigned or transmitted, as a trade-mark, together with the goodwill of the business, is usually as available for use by the successors, and can be as readily protected, as if it had been originally registered by them (*e*).

(*y*) *Re Price's Patent Candle Co.*, 27 C. D. 681 (1884); Pearson, J.

(*z*) *Ibid.*, and *Bradley's Im.*, 9 R. P. C. 205 (1892), Chitty, J.; (*Worth's Corsets*) printed between two co-axial ovals.

(*a*) 3rd edition, p. 36.

(*b*) Below, p. 153.

(*c*) Above, p. 144.

(*d*) Cf. *Exp. Stephens*, 2 C. D. 659 (1876), when, in refusing registration, under the Act of 1875, to the word *Acilyton*, Jessel, M.R., asked: "Why should a written signature be specified, if any signature will do?"

(*e*) See Chap. XIII., p. 272, Assignment and Devolution of Trade-marks.

Requirements
for a good
trade-mark.

Copies of written signatures were frequently protected as trade-marks, or as material parts of trade-marks before the Acts (*f*). As a man's signature has for several centuries been the mark in universal use to authenticate documents which are his, it might have been expected that it would have been used also to authenticate his goods, and that signatures would have occupied a more prominent place among trade-marks than they do. There are, however, several objections to a signature as a trade-mark. A good trade-mark must not only enable a customer to recognize the goods which bear it when he sees them, as those of the manufacturer or trader with whom he wishes to deal, but must also enable him to describe and call for them. As regards the latter requirement, a signature is usually nothing more than a bare name-mark, for the manner of writing it will rarely be such as to enable even a person, who could read and recognize it at sight, to recollect and describe it; and it is obvious that for customers—foreigners, for instance—who are unable to read the signature, it, or, indeed, any name-mark, fulfils neither of the requirements referred to.

The signature itself, being an essential particular of a registered trade-mark, cannot be altered under sect. 92. A corresponding decision was given by Jessel, M.R., under the Act of 1875 (*g*).

Distinctive
device, &c.

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

Brand did not appear in the Act of 1875. It was added by the Act of 1883. The latter Act contained also the clause "fancy word or words not in common use," which is now replaced by sub-sects. (d) and (e) (*h*).

Distinctive governs, and is to be read with, each of the words which follow it (*i*). It merely incorporates what

(*f*) As in *Farina v. Silverlock*, 1 K. & J. 509; 6 Do G. M. & G. 214; 24 L. J. Ch. 632; 26 L. J. Ch. 11; and 4 K. & J. 650 (1855), *Wood, V.-C.*, and Lord Crauworth; *Massam v. Thorley's Cattle Food Co.*,

6 C. D. 574; 14 C. D. 748 (1877), *Malins, V.-C.*, and L.JJ.

(*g*) *Re Dewhurst*, 11th June, 1880, stated in *Sebastian*, 3rd ed. p. 364.

(*h*) *Below*, p. 152.

(*i*) *Waterman v. Ayres*, 39 C. D.

was law before the Registration Acts, in so far as it requires that, in order to be a trade-mark, a symbol must be capable of distinguishing the goods upon which it is placed from similar goods, so as to identify them with the business of the proprietor of the mark (*j*).

The word standing alone in this clause, and coupled with *special*, in clause (3) (ii) (*k*), has been construed in a number of cases. In *Leonard and Ellis' Case*, Fry, L.J., expressed an opinion that the words *special and distinctive* of sub-sect. (3) (ii), "import the specializing of the make and manufacture of a particular maker from all other manufacturers, and distinguishing the manufacture of one person from the manufacture of all others" (*l*). In *Wood v. Butler* (*m*) Lindley, L.J., said that distinctive trade-mark "must mean some mark which distinguishes the goods to which it is attached as those made or sold by the person who uses the mark"; and Fry, L.J., repeated his definition from the earlier case. The whole Court held that it was not sufficient for the mark to be distinctive as regards the trade, it must be distinctive in the eyes of the ultimate customers, the consumers. "It ought," said Lopes, L.J., "to be a special and distinctive mark, not only recognizable by the trade, but also recognizable by the consumer, as connecting the article with the manufacturer. So that, as the proprietor of the mark had put upon the boxes in which his goods were enclosed, words suggesting that they were made, not by him, but by a foreigner, although the suggestion was, as the trade knew, false, he had by his own act prevented the mark from being distinctive."

29; 5 R. P. C. 368 (1888), C. A.; *Burland v. The Broxburn Oil Co.*, 42 C. D. 274; 6 R. P. C. 482 (1889), Chitty, J.; *Pirie v. Goodall*, (1892) 1 Ch. 35; 9 R. P. C. 17, C. A.

(*j*) See Chap. II., p. 35; *Orr-Ewing v. The Registrar of Tms.*, 4 App. Cas. 479 (1879), and *Hopkin-*

son's Tm., (1892) 2 Ch. p. 121; 9 R. P. C. 102, Kekowich, J.

(*k*) Below, p. 154.

(*l*) 26 C. D. p. 304 (1884), C. A. *Falcoline* for valve oil.

(*m*) 32 C. D. 247; 3 R. P. C. 81 (1886), *Eton* for cigarettes, claimed as an old mark.

Lord Halsbury defined the word in similar language to that of Fry, L.J., quoted above, in *Perry-Davis & Son v. Harbord* (*n*), distinctive, he said, "means distinguishing a particular person's goods from somebody else's,—not a quality attributed to the particular article, but distinctive in that respect that it means that it is a manufacture of his distinguished from somebody else's" (*n*). And he held that the word *pain-killer*, as applied to a patent medicine, was neither special nor distinctive (*o*).

"The essence of a trade-mark," said Kay, J., in *Richards v. Butcher*, "is that it is some distinctive thing which points out that the goods are the goods of A. B." (*p*).

And in *Hopkinson's Trade-Marks* (*q*) Kekewich, J., said: "In order to protect a trade-mark before the Act, you were obliged . . . to prove by evidence, and satisfy the Court, that the words used as a trade-mark were known in the market, and—I think it is Lord Westbury's phrase (*r*)—gave a vendible character to the articles to which they were attached, made these articles recognized as coming from a particular manufactory, and so gave them a character different from every other article in the trade. Therefore, it seems to me, that the legislature here (*s*) did no more than adopt the language of the cases."

James' Tm.

In *The Dome Black Lead Case* (*t*) Lopes, L.J., put a somewhat different interpretation on the word *distinctive*. It

(*n*) 15 App. Cas. p. 320; 7 R. P. C. 336 (1890) *Pain-killer* claimed as an old mark for medicine.

(*o*) So also did Lord Morris, in the House of Lords, and Fry and Lopes, L.JJ., in the Court of Appeal.

(*p*) (1891) 2 Ch. p. 536; 8 R. P. C. 249, Kay, J., and C. A. *Monopole* for wines. In each of the last three cases, the marks were claimed as special and distinctive words used as trade-marks before 13th August, 1875. They were all re-

jected.

(*q*) (1892) 2 Ch. p. 121; 9 R. P. C. 102; *J. & J. Hopkinson* for pianos, claimed and allowed as an old mark.

(*r*) *The Leather Cloth Co. v. The American Leather Cloth Co.*, 4 De G. J. & S. 137; 33 L. J. 199 (1863), cited above, p. 47.

(*s*) *i. e.*, by the use of the phrase "special and distinctive" in the old mark clauses of the Acts.

(*t*) *James' Tm.*, 33 C. D. 392; 3 R. P. C. 340 (1886), C. A.

means, he said, "that it must be a mark or device of such a kind as, in case of infringement, it shall be clear what it is that is being infringed, and that the mark is something distinct from all other marks used in the same class of goods." And the Court of Appeal there held, that, upon the evidence, a sketch of a short cylinder terminated by a hemisphere was a distinctive design for black-lead, which was in fact made up for sale in pieces of the shape shown by the sketch. There is, however, no disagreement between the two interpretations, and on consideration it will be seen that the first assumes the second, for no mark can distinguish the goods which bear it from all similar goods, or can create a species within the genus, unless it has itself some recognizable and characteristic peculiarity to separate it from other marks which may be found upon some or all of them. Moreover, a mark which satisfies the second test, and possesses such a peculiarity as is referred to, if this is recognized with sufficient readiness as a peculiarity, must of necessity, when it becomes known, distinguish the goods which bear it in the manner required by the test suggested by the *dicta* first cited. In the case of new marks which have, and can have, acquired no connection by reputation with their owner, all that can be demanded of the mark is that it shall be capable of distinguishing the goods to which it is applied in the required manner, and this accords with the old law (u).

In order to be distinctive, then, a mark must be different from other marks used upon or in connection with the same goods, and the difference must be such as, in the case of a mark already used and known, to distinguish the goods which bear it as the goods of its proprietor; or, in the case of a new mark, to be capable of so distinguishing, and to be likely when used and known, to so distinguish, the goods. Three questions arise upon this:—

(1) What are the other marks from which a mark under consideration is to differ? (2) What kind and degree of

Meaning of
"distinctive."

Questions to
be considered.

(u) See Chap. II., p. 35.

difference will suffice? and (3) What is the function of evidence in the determination of the inquiry? The second and third questions may be more conveniently considered in connection with the restriction put upon the registration of marks which too nearly resemble previously registered marks by sect. 72 (*x*).

1. What Marks are to be distinguished.

Common
marks.

In many trades there are a great number of common marks, which have been generally adopted for ornament or some similar purpose, or which—having been in the first instance appropriated as trade-marks—by abandonment, by wide-spread piracy (*y*), or, in the case of word-marks, by becoming the names (*z*), and therefore descriptive, of the goods, have become *publici juris*. And a mark, to be distinctive, must be distinguishable from all of these.

Thus the committee of experts appointed under the Act of 1875* (*a*), to classify the marks tendered for registration in respect of cotton goods, rejected some marks bearing arrangements of elephants, lions, and crowns, on the ground that such devices or symbols in themselves, and by reason of the extensive use of lions and demi-lions, and crowns and elephants by the trade, were not private property, and did not possess a distinctive character; and on the appeal from the registrar's refusal to register, evidence was given that among the marks rejected by the committee were 31 crowns used by 18 different firms, 52 elephants used by 30 different firms, and 137 lions and demi-lions used by 64 different firms (*b*). In the same case it was shown that triangular tickets in green and gold were in common use in the cotton trade.

*The Orr-
Ewing Case.*

In the early years of the existence of the register, a

(*x*) Chap. X., p. 186. As to question (2), see also below, p. 127.

(*y*) See *Ford v. Foster*, 7 Ch. 611 (1872); and above, p. 37.

(*z*) See Chap. II., p. 36.

(*a*) See Chap. VII., p. 103.

(*b*) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Cas. p. 485 (1879); and see *Kuhn & Co.'s Tm.*, 53 L. J. Ch. 238, n. (1878); and *Hyde & Co.'s Tm.*, 7 C. D. 724 (1878), both Jessel, M.R.

number of common marks were accepted and placed upon it in ignorance of their true character. The committee of experts, to which reference has been made, was instituted to assist the registrar, and, after 1884, the comptroller, in determining what marks were common in the cotton class, and it was the practice of these officers in other cases to consult the representatives of the trade concerned on the subject (c).

It is clear that such marks as these which are in common use in the trade must be standards of comparison by which the distinctiveness of a new mark must be tested (d); and some assistance in determining when a mark is to be taken to be in common use, may be obtained from the decisions on other parts of the Act. Thus, sect. 64 (c) of the Act of 1883 (now repealed) allowed fancy words not in common use to be registered, and on this it was held, that use by several firms in the trade in question, and by others in different trades, was common use (e). And sect. 74 (f) provides for the registration, as additions to a trade-mark, in the case of any mark used as a trade-mark before 13th August, 1875, of any distinctive (g) device, mark, brand, heading, label, letter, word, or figure, or combination of letters, words, or figures; and in the case of any mark not so used of any distinctive (g) word or combination of words, though the same be respectively common to the trade in the goods with respect to which the application is made. The section also provides (3) that a mark which was, before the 13th of August, 1875, publicly used by more than three

What marks
are common.

(c) *Per* Jessel, M.R., in *Kuhn's Case*, *supra*.

(d) See *Bryant & May's Tm.*, 8 R. P. C. 69; 59 L. J. Ch. 763 (1890), North, J.; the cases cited in note (b); *Anderson's Tm.*, 26 C. D. 409, Chitty, J.; affirmed on appeal, 54 L. J. Ch. 1084 (1884); and *Theclis & Blakey's Tm.*, 10 R. P. C. 369 (1893), North, J. *Ancross* rejected because anchors were com-

mon in the trade.

(e) *Great Tower Street Teas Co. v. Smith*, 6 R. P. C. p. 172 (1889), *Tower Tea*; and see below, p. 149.

(f) See Chap. IX., p. 164, Additions and Disclaimers.

(g) This means *primâ facie* distinctive. *Burland v. Broxburn Oil Co.*, 42 C. D. 274; 6 R. P. C. 482 (1889), Chitty, J., (*Washerine*).

persons on the same or a similar description of goods shall, for the purposes of the section, be deemed common to the trade in such goods (*h*).

In *The Washerine Case* (*i*) Chitty, J., held, that marks might be *common to the trade* within the sect. 74, though not publicly used by more than three persons, as required by sub-sect. (3), and that the words do not mean "in common use in the trade," but "open to the trade," and this interpretation was adopted by Kekewich, J., in *The Apollinaris Case* (*k*). In an earlier case the last-named judge said: "Any word which the trade might have used at the date of the registration is, as I construe the Act, common to the trade. I think it means that a word, which might have been used for these particular goods by any other persons at the time is common to the trade" (*l*). Obviously this construction must be read with some limitation, or no new mark could ever be registered, for every unused mark is open to the trade until it is monopolised by someone, either by registration or by user, as a trade-mark. It is submitted that what is meant is that a mark common to the trade is one known in the trade and not appropriated, and this is consonant with the contexts of the passages cited above, and Chitty, J., gives, as an example, the case of a mark widely used and then abandoned by all but two or three persons in the trade. In *The Apollinaris Case* the word in question was the name of a mineral water which might have been sold by the proprietors to other traders than the claimants of the mark, although they were, for the time, the sole importers of it. And in *The Herbalin Case* the word had been extensively used before registration both by the plaintiff and the defendant. They were all cases of descriptive words.

In *The Stone Ales Case* (*m*) Lindley, L.J., expressed an

(*h*) See below, pp. 172 and 177. C. 137.
 The three mark rule. (*l*) *Humphries v. Taylor Drug Co.*, 59 L. T. 820 (1888), (*Herbalin*).
 (*i*) *Burland v. Broxburn Oil Co.*, 42 C. D. 274; 6 R. P. C. 482 (1889). (*m*) *Thompson v. Montgomery*, 41
 (*k*) (1891) 2 Ch. p. 209; 8 R. P. C. D. p. 49; 6 R. P. C. 404 (1889).

opinion that a mark used by one person in the trade only could not be common to the trade.

How far marks which are or have been used by one or more persons in the trade, but which are not commonly used, or common to the trade in the sense just suggested, and are not trade-marks, are to be regarded—in judging whether a mark tendered for registration is distinctive—is unsettled.

Where the marks are trade-marks, whether registered or unregistered, it is clear that they are obstacles to the registration of any mark which so closely resembles them as to be calculated to deceive, unless the applicant has an independent trade-mark right in the mark he puts forward (*n*). This is expressly enacted by sect. 72, in regard to registered trade-marks (*o*); and it follows, in the case of such unregistered trade-marks as are words, from the prohibition placed by sect. 73 upon the registration of any words, the use of which, by reason of their being calculated to deceive or otherwise, would be deemed disentitled to protection in a Court of Justice (*p*). Apart from these sections, however, it is clear that a mark which is calculated to deceive the public by leading them to believe that it is the trade-mark of some person other than its proprietor cannot be distinctive in accordance with the explanations of the term given in the judgments cited above. In the very extraordinary circumstances of the case of *Mouson v. Boehm* (*q*), it was held that a trade-mark which had been registered at a time when a similar and previously acquired unregistered trade-mark for the same goods was in existence might be allowed to remain on the register, on the ground that the later mark had been registered in good faith and in ignorance of the earlier unregistered mark, and had remained unchallenged on the register for two years, during which time it had been extensively used in its

Other trade-marks, registered or unregistered.

(*n*) Cf. Chap. XV., pp. 325 *et seq.*, Infringement.

(*o*) Chap. X., p. 175.

(*p*) Page 209.

(*q*) 26 C. D. 398 (1884), Chitty, J. The facts are stated below, p. 325.

proprietor's business; but the case was treated as exceptional, and the earlier trade-mark was admitted upon the register also.

Abandoned
trade-mark.

But an abandoned unregistered trade-mark is, as such, no obstacle to the registration of a similar mark (*r*), that is, unless it has become a common mark in the trade.

Marks used in
advertisements.

Besides common marks and trade-marks, there are, however, other marks used by traders in their businesses; for instance, marks employed in advertisements, or in the "get up" of his goods by a single trader. Are these to be taken as standards in estimating the distinctiveness of a new mark? This, it is submitted, depends upon the extent to which they are known and used. On the one hand, it would be absurd to compel a trader to collect and discriminate all the marks used by his fellow-traders, otherwise than as recognized trade-marks, in or in connection with their businesses, on peril of finding that the mark he has selected or invented for registration is bad; and, on the other hand, it would be a great hardship, to take a single example, to compel a rival trader to omit a material part of a well-known advertisement of his trade, because someone had registered it as a trade-mark. If a mark is well-known in connection with a particular trader, though not used as a trade-mark by him, its use upon the goods of another would be likely to identify them with him rather than with the latter, and it would not, therefore, be distinctive in regard to such goods, in the sense explained above. Thus, in a recent case (*s*), Kekowich, J., refused to direct the registration, as a trade-mark for wire-bound india-rubber hose, of a device consisting of a sketch of an elaborate knot of the hose, on the ground that it too closely resembled a picture of similar hose printed by the opponents in their price lists, notwithstanding that the device had been employed as an advertisement by the

(*r*) See the last case and *Paine & Co. v. Daniells & Sons' Breweries*, (1893) 2 Ch. 567; 10 R. P. C. 217,

C. A., (*John Bull beer*).

(*s*) *The Sphincter Co.'s Tm.*, 10 R. P. C. 84 (1893).

applicants in their own price lists, and was registered as their copyright design.

2. What Degree of Distinctiveness is required.

The question, what degree of difference from other marks will entitle a mark to be registered, is considered in the chapter dealing with restrictions on registration, and, in particular, with sect. 72 (*t*). In addition to what is there said, it may be pointed out that, although a mark offered for registration may be fairly distinguishable from each of several others, yet the existence of these, if they are in use, opposes a cumulative weight of objection to any new mark which has an apparent resemblance to a number of them (*tt*).

What degree of distinctiveness is required.

It has never been suggested that a secondary meaning acquired by user in connection with the applicant's goods, which would have sufficed to create trade-mark rights in an apparently descriptive mark before the Acts (*u*), will enable such a mark to be registered under them, unless it was used as a trade-mark before the 13th of August, 1875, and in *The Stone Ales Case* (*x*) the mark *Stone Ale* was removed from the register on the ground that there was no evidence of its separate user as a trade-mark before the date mentioned, although its secondary meaning was not only fully established, but was the basis of the injunction granted against the defendant in the case.

Secondary distinctive meaning.

Descriptive Marks.

According to the construction placed upon the Acts, a descriptive mark cannot be distinctive. So that any mark which describes, either directly or by suggestion, the nature of the goods, their quality, or the purpose to which

Descriptive marks.

(*t*) Page 186.

(*tt*) Cf. below, pp. 197, 198.

(*u*) Chap. II., p. 36.

(*x*) *Thompson v. Montgomery*, 41

C. D. 35; 6 R. P. C. 404 (1889).

There was no appeal on this point to the House of Lords. As to old marks, see below, p. 155.

they are to be applied, is not registerable, and this rule has been applied far more strictly than that which rejected mere descriptive words as trade-marks before the Acts (*y*). This subject is discussed under the head of Word-Marks, below (*z*).

Device.

Devices as
trade-marks.

Devices have been registerable under all the Acts. They are the oldest, and, in many ways, they form the most valuable kind of trade-marks. Before the description of shops and factories by street and number became the common and convenient method of identification, every trader had his characteristic "sign," and it was an obvious and natural step to transfer the sign from the shop to goods which it was desired to show had come out of it. And this was done in very early days. Fragments of classic pottery bear the potter's mark of their maker, and, to come to later times, the early editions of the Aldine Classics bear the device of a dolphin wound round an anchor (*a*). A good trade-mark which has a device as its central feature has this peculiar advantage, that its use is not restricted to customers who speak any one language. It is not, of course, necessarily equally useful or distinctive everywhere. For instance, pictures of a stag and a juffalo, though perfectly different to people who are acquainted with the forms of both animals, might well be indistinguishable by the inhabitants of some of the Pacific islands where no quadruped is known which is larger than a pig, and who would have no name for either. The chief objection to a device trade-mark is the difficulty of choosing one which shall be sufficiently simple and striking to fix itself in the customer's memory, and which shall readily suggest a name or description by which it can be referred to, and yet, at the same time, be distinguishable from the other marks in use for the same goods or description of goods.

(*y*) Chap. II., p. 36.

(*z*) Pages 140 *et seq.*

(*a*) Salaman on Trade-Marks,
p. 1.

It was decided under the Act of 1875, which did not provide for the registration of words, that a collection of English letters (*b*), or a single letter (*c*), could not, but that a word printed in Oriental characters might, be registered as a device (*d*). Word or letter is not a device.

The device must be distinctive, irrespective of the colours in which it is printed, although a trade-mark may be registered in colours so as to appropriate to the owner the exclusive right to use it in those or any other colours (*e*). Colour.

In *Anderson's Case* (*f*) a device consisting of a portrait of Baron Liebig, with the words *Brand* above and *Baron Liebig* below it, was rejected as a trade-mark for Liebig's extract of meat, on the ground that the words *Baron Liebig* were open to the trade (*g*), and that the portrait of the inventor of the goods was not a distinctive device, it being, as Cotton, L.J., and Chitty, J., found, a common practice for those engaged in trade to place a photograph of the inventor on the particular article, in order to show that he is the inventor, or to show, in the particular case, that the article is made according to his invention (*h*). Portrait of inventor.

Where a mark consists in part of distinctive matter and in part of matter which is common to the trade, the latter part cannot be registered without a disclaimer. Thus, in *Baker v. Raison* (*i*), where a lighthouse, surrounded by two concentric circles, with initials and a date between Part of mark common to the trade.

(*b*) *Exp. Stephens*, 3 C. D. 659 (1876), Jessel, M.R. (*Acilyton*).

(*c*) *Mitchell's Tm.*, 7 C. D. 36 (1877), Hall, V.-C., application to register A, as an old mark for pens, refused.

(*d*) *Rotherham's Tm.*, 11 C. D. 250; 14 C. D. 585 (1878), Bacon, V.-C., and C. A., *Tod* in Arabic. Cf. *Gout v. Aleploglu*, 6 Beav. 69 n. (1833), *Pessenede* (*i. e.*) warranted in Turkish.

(*e*) *Hanson's Tm.*, 37 C. D. 112; 6 R. P. C. 130 (1887), Kay, J., *red, white, and blue* label. Sect. 67, below, p. 162.

(*f*) 26 C. D. 409, Chitty, J., and on appeal, 54 L. J. Ch. 1084 (1885), see *Liebig, &c. Co. v. Anderson*, 55 L. T. 206, Chitty, J.

(*g*) So held in *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. (N. S.) 298 (1867).

(*h*) 20 C. D. p. 415.

(*i*) 45 C. D. p. 533; 8 R. P. C. 89 (1890); see also *Kuhn's Tm.*, 53 L. J. Ch. 238 n. (1878), Jessel, M.R., where registration with a disclaimer was approved under the Act of 1875. See now, sect. 74, Chap. IX., p. 169.

them, had been registered in 1877 as a new mark, although the circles were in fact common to the trade, an application was made to remove the mark from the register. North, J., held that the circles ought not to have been registered, but as the whole mark had been used for a number of years, instead of ordering its removal, he directed a note, stating that the circles were common to the trade, to be put upon the register. The common matter can, however, be registered, with a disclaimer as an addition, under sect. 74, if the whole mark was used as a trade-mark before 13th August, 1875. In the case of marks not so used additions are restricted to words and combinations of words (*k*).

Combination
device.

A combination of devices which are common to the trade may form a new and distinctive device (*l*). The test by which any such combination must be tried is, it is submitted, correctly stated in the following passage from the report of Lord Herschell's Committee (*m*). The Committee say: "In this connection we may refer to a point which has been the subject of considerable controversy, namely, how far registered or common marks when combined together are to be regarded as a new mark. We think that the juxtaposition of two or more such marks is not, if there be nothing more than this, a combination constituting a new mark. An important test appears to be whether the existing marks are so combined as to suggest a new idea. For instance, assuming a cat and a fiddle to be each an old mark, we do not think that the mere representation of a cat and a fiddle together would be a new mark, but the representation of a cat playing upon a fiddle, the idea conveyed by which would be neither the cat nor the fiddle, but a cat playing upon a fiddle, would be a good combination, and might properly be registered. We think that

(*k*) Chap. IX., p. 164; Additions and Disclaimers.

(*l*) The mark must be looked on as a whole, see Chap. X., p. 192; and below, p. 137, "Label," for instance where a number of common and some distinctive elements combined together did not form, as

wholes, distinctive combinations, see *Orr-Ewing v. The Registrar of Tms.*, 4 App. Cas. 479; and Lord Cairns' judgment, p. 484.

(*m*) Report of 1888, p. ix. The passage follows that upon the "idea of a trade-mark," cited at p. 189.

“this view differs somewhat from that which has been at times, at all events, entertained by the Board of Trade, but it appears to us to be the sound one.”

It has been held, in the case of word-marks, that descriptiveness is inconsistent with distinctiveness, and it would seem to follow, that marks which are descriptive of the goods to which they are to be applied are not within the Acts. In the opinion of Lord Herschell's Committee (*n*), such marks are not legitimate, and since the committee's report the comptroller has refused to accept them. This opinion is in accordance with the judgment of Pearson, J., in *James' Case* (*o*), holding that a representation of the goods on which the mark was to be used was not a good mark. In that case the mark in question was a sketch of a cylinder with a dome top, which had been registered in 1861, as a design, and as a trade-mark in 1877. It was used as a trade-mark for black-lead, which was generally, but not exclusively, sold in blocks of the shape shown by the sketch, and upon which the words “registered shape” were stamped. The Court of Appeal reversed the decision of Pearson, J., but Cotton and Lindley, L.JJ., apparently differed from the learned judge in their view of the facts only. They held that the mark was not a mere representation of the goods, and they laid stress on the circumstance that it might be used, and it had occasionally been used, on blocks of shapes other than that shown by the sketch (*p*). Lindley, L.J., said: “I cannot see why, according to English law, a fish may not be a distinctive mark for a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why

Devices
descriptive of
the goods.

James' Case.

(*n*) Report of 1888, p. xii.

(*o*) 31 C. D. 340 (1885). It also accords with a number of American decisions; see Sebastian, 3rd ed., p. 42. The Court of Appeal, however, thought that little assistance was to be obtained from the Ameri-

can cases; 33 C. D. 392; 3 R. P. C. 340.

(*p*) 33 C. D. 392; 3 R. P. C. 340. The appeal was heard *ex parte*, the respondents not appearing.

“a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned a pigskin into leather, I do not know why a pig should not be a good trade-mark for tanned pig’s hide.” Lopes, L.J., took the same view of the facts; but in the course of his judgment he asked: “Why is it (the mark) the less a distinctive device or mark because it represents the thing upon which it appears?” The suggestion of this question is not only at variance with the opinion cited above, but also with the statement of Lindley, L.J., that a fish would not be a good trade-mark for fish of the same kind (*q*).

Devices
comprising
pictures of
the goods.

But although descriptive devices, including mere representations of the goods upon which the mark is to be used are objectionable, there seems to be no reason why pictures of the goods, worked up into a characteristic and uncommon design, should be refused. Thus a drawing of a mere ordinary coil of wire for wire, of a barrel for beer, a cricket-bat for cricketing materials, would be bad as trade-marks; but not a drawing of the wire woven up into a knot of new and striking design, or of several barrels or bats arranged in a particular and original manner (*r*).

It is somewhat difficult to define what degree of descriptiveness will make a mark objectionable, but the test is, it is submitted, to be found in the rule that, assuming the mark to be distinctive having regard to the marks already in use in the trade, as already defined, it must not be such as to restrict the liberty of any trader to use any drawing, picture, or device, which he may fairly require to enable him to describe his goods to any class of his customers in the ordinary manner.

Mark.

This word is sufficiently wide in its meaning, if it stood alone, to cover not only all the other symbols specified in

(*q*) See *The Sphincter Co.’s Tm.*, 10 R. P. C. 84 (1893), Kekewich, J.

(*r*) The question was discussed, but not decided, in *The Sphincter Co.’s Tm.*, 10 R. P. C. 84 (1893).

the section, but any kind of mark whatever. The insertion of the other words must therefore be taken in some way to limit its meaning; but it is not easy to see what kind of symbol, not registerable under the other words of the clause, could be used as a trade-mark.

Brand.

This word was introduced by the Act of 1883, in consequence of the ruling of Jessel, M.R., that cigar marks burnt into the ends of the boxes could not be registered under the Act of 1875, and in order to allow such marks to be registered (*s*); but it has not been restricted in practice to marks burnt into the goods or their envelope. Thus, a number of word-marks were at one time accepted and registered in the tin-plate trade as brands, which would not have been accepted under any of the other heads (*t*), because the words were geographical words.

Lord Herschell's Committee said, in their report (*u*): Brand.
 "Some controversy has arisen with reference to the meaning of the word *brand* as distinguished from the other words employed. There can be no doubt that the term derives its origin from the practice of producing some mark by means of burning, but it appears now to be in use in certain trades for the purpose of describing trade-marks no longer produced in this way, and differing in no respect from the labels and tickets mentioned in the section; nevertheless a distinction has been made in the practice of the Office, and trade-marks have been allowed registration in certain trades as brands when they would not have been accepted in other classes as labels or tickets. We see no reason for this distinction. It does not appear to us to receive support from the language of the Act, and we

(*s*) See the evidence of the comptroller before Lord Herschell's Committee, Q. 2993. The comptroller stated that he did not see any reason for keeping up the dis-

inction between brand and design or mark. Q. 3295.

(*t*) *Ibid.*, Q. 3294.

(*u*) Report of 1888, p. xi.

“think that, in future, brands should be dealt with in precisely the same way as labels or tickets.”

*Pirie v.
Goodall.*

This opinion corresponds with that expressed in the judgments delivered in *Pirie v. Goodall* (*x*). There the plaintiffs had, in 1885, registered the words *Pirie's Parchment Bank* for paper, disclaiming the exclusive use of both *parchment* and *bank*, which were words in common use in the trade. The defendants in an action for infringement moved to remove the mark from the register, and the plaintiffs tried to support it (*inter alia*) as a brand. Vaughan Williams, J., held, that the word brand must be limited in some way; it could not include all words, whether, for instance, they were *fancy words* (now *invented words*) or not. “I think,” he said, “that before you can register anything as a brand, there must be evidence that, in point of fact, it is as a brand, and as a brand only, that it is used.” The use of the words as a watermark on paper was not, the learned judge thought, user as a brand; but, he added, “I see no reason why a brand should not be woven into the goods just as much as stamped on to them or burnt into them.” He ordered the trade-mark in question to be removed from the register. This decision was affirmed on appeal, and Lindley, L.J., who delivered the judgment of the Court, said he did not see why *mark* did not include *brand*, and he held that word-marks (*y*) could only be registered when they came within those parts of the section (64) which expressly relate to words, and consequently could not be registered as *brands* (*z*).

In *Paine's Case* (*a*), the words *John Bull Brand*, registered in 1885 as a trade-mark for beer, were ordered to be

(*x*) (1892) 1 Ch. 35; 9 R. P. C. p. 295.
17.

(*y*) That is, marks consisting of a word or words, not headings, labels, or tickets, which comprise words.

(*z*) Cf. Lord Selborne's judgment in *Leonard & Ellis's Tm.*, 26 C. D.

(*a*) (1892) W. N. p. 56, and 9 R. P. C. 130, Kekewich, J. The action in which the question arose is further reported, *Paine & Co. v. Daniells & Sons' Breweries*, (1893) 2 Ch. 567; 10 R. P. C. 71, 217.

removed. An attempt was made to support the mark as a brand, but Kekewich, J., pointed out that the mark claimed was the three words, not the first two, and that, consequently, the addition of the last word did not make the whole a brand. Some question was raised in the cases cited above as to whether a brand-mark must not be registered as a brand, but there is no machinery for such registration, as no distinction is made between the different heads referred to in the section upon the register.

The term *brand* was sometimes applied, before the Acts, to trade-marks branded on metal goods, or on wine casks, or corks (*b*), and its use to denote a class of some kinds of goods, as cigars, for instance, is very common; but these uses seem to have nothing to do with its meaning in the Act.

Heading.

The meaning of this term is not at all clear. The word is ordinarily used of a sentence or words placed at the top of a document as a title or to describe the matter contained in it; and it has been held that the words *Family Salve*, printed thus, *Reinhardt's Celebrated Family Salve*, at the top of a wrapper used for patent medicine bottles, formed a distinctive heading (*c*). But it has been held also, under the Act of 1875, which did not provide for the registration of words, that the single word *Valvoline* did not (*d*) form a heading, on the ground that word-marks were specially provided for in the Act. If the first decision can be relied on, and if it indicates the whole significance of the word in the section, the operation of the section under this head is very limited, for documents attached to

(*b*) Sebastian, 3rd ed. p. 39; *Millington v. Fox*, 3 My. & Cr. 338; *Seixo v. Provezende*, L. R. 1 Ch. 192.

(*c*) *Reinhardt v. Spalding*, 49 L. J. Ch. 57 (1879), Hall, V.-C. The mark had been registered in 1876 as an old mark. It would, under

the later decisions, have been refused as descriptive, and also because it was not the whole mark used before the Act.

(*d*) *Leonard & Ellis's Tm.*, 26 C. D. p. 295 (1884), C. A.: see the judgment of Selborne, L.C.

the goods or their envelope can themselves be registered as labels.

Line headings
for cotton
goods.

In the cotton trades a line heading means the pattern or marking woven at the end of a piece of cloth (*e*); and in *The Great Tower Street Tea Co. v. Smith* (*f*), North, J., said that this was what he understood by *heading* as used in this section. These line headings are of great importance in the Manchester trade, but are not registerable under the present Acts, since they are essentially colour-marks (*g*). A great deal of evidence as to the practicability of providing for their registration and protection was taken by Lord Herschell's Committee, and the most opposite opinions were expressed by the witnesses upon the subject. In the result, the committee reported (*h*) that they were disposed to think the registration was not practicable, and that they did not recommend that it should be allowed.

Label.

A label consists of a number of words, or of a word or words combined with a device or devices, or of a device or devices alone, printed on paper or other substance, in order to be stuck upon or attached to the goods or their envelope.

A single word or several words, not registerable alone, and not forming any sentence, will not become registerable by being printed on a plain piece of paper. Thus, in a recent case (*i*), North, J., said: "The plaintiffs would not be in any better position at all if they had put the words *Tower Tea* upon a piece of paper, otherwise blank, and fixed it on to their packages, than if they had, as they

(*e*) *Harter v. Sourazoglu* (1875), W. N. 11, 101; *Carrer v. Bowker*, Seb. Dig. p. 350 (1877); *Robinson v. Finlay*, 9 C. D. 487 (1877).

(*f*) 6 R. P. C. p. 168 (1889).

(*g*) See above, p. 129.

(*h*) Report of 1888, p. ix, because the headings are essentially colour-marks.

(*i*) *The Great Tower Street Tea Co. v. Smith*, 6 R. P. C. p. 170 (1889). Cf. Lord Selborne's judgment in *Leonard & Ellis's Tm.*, 26 C. D. 288 (1884). So a black label, bearing the descriptive word *Monobrut* in its centre, was removed from the register in *Vignier's Tm.*, 6 R. P. C. 490 (1889), Kay, J.

“have done, impressed the words *Tower Tea* upon the packages themselves.” And it would make no difference that the paper was surrounded by a conventional border, or was occupied by other indistinctive matter, not altogether forming a distinctive combination (*k*). So that the name of a firm printed in common letters on an ordinary label does not make a distinctive label (*l*).

Lord Herschell’s Committee reported (*m*) that “it is said that there is often a desire to register short phrases, such as proverbs, &c., and that owing to the difficulty of finding new marks, it is expedient that they should be allowed. We see,” they added, “no objection to this, provided they be in no way descriptive of the character or quality of the goods, or of their place of origin, sale, or manufacture.”

Phrases and proverbs.

If such phrases are registerable under the present Acts, it can be only when printed and used as labels. And although a single word or two or three words, not forming a sentence and not themselves registerable, do not make an ordinary label distinctive, it may well be held that a phrase, such as is suggested in the passage cited, if printed prominently on the label, would do so.

An ordinary arrangement of parts which are in common use, each part remaining as a distinct feature of the combination, does not form a distinctive label (*n*). So a label for match-boxes, bearing representations of a prize medal, with the words *Bryant and May’s Royal War Vestas* printed in ordinary type, medals being common marks in the trade, was held not to be distinctive (*o*); and so also was a label

Ordinary arrangement of common parts.

(*k*) See above, p. 129.

(*l*) *Price’s Patent Candle Co.*, 27 C. D. p. 686 (1884), Pearson, J.; and *Bradley’s Tm.*, 9 R. P. C. 205 (1892), Chitty, J., *Worth’s Corsets*, between co-axial ovals. In *The Birmingham Vinegar Co.’s Tm.*, 11 R. P. C. 195 (1894), Kekowich, J., a label comprising a large H, some common words, and a small device,

was held not to be, as a whole, a distinctive label.

(*m*) Report of 1888, p. xii.

(*n*) Cf. combination of devices, above, p. 130; and the passage from the Report there cited.

(*o*) *Bryant & May’s Tm.*, 8 R. P. C. 69; 59 L. J. Ch. 763 (1890), North, J.

bearing two co-axial ovals, with the words *Worth's Corsets* in ordinary type, and four dots arranged as a star at each end printed between them, ovals being common marks in the trade (*p*). In the last case, Chitty, J., held that the addition of the trade-name of the owner of the mark made it neither better nor worse, and he approved and followed *Price's Case* (*q*).

No disclaimer
of common
parts of label.

Common words, that is, words which any one is at liberty to use, which appear in a label, need not be disclaimed, for they are not essential parts of the label, and sect. 74, which provides for disclaimers, applies only to additions to the trade-mark, and the whole label is itself the trade-mark (*r*). So, in *The Apollinaris Case*, it was held, by the Court of Appeal, that the name *Friedrichshall* occurring on a label need not be disclaimed (*s*), and this was followed by Chitty, J., in the case of the *Smokeless Powder Co.'s* trade-marks, where he refused to order the words *Smokeless Powder* to be disclaimed on the application of rival makers of similar powder (*t*). A dictum of Cotton, L.J., in an earlier case (*u*), decided under the Act of 1875, that such words ought to be disclaimed, was cited in the last-mentioned case; but Chitty, J., declined to follow it. The decision of Stirling, J., in *Edge's Case* (*x*), that the words *Filtered Blue*, which he held to be bad as a separate trade-mark, must be disclaimed when registered on a label, is also in conflict with the rule stated above. None of the above-mentioned cases were, however, cited in *Edge's Case*, and it was not cited in the *Smokeless Powder Case*. A dis-

(*p*) *Bradley's Tm.*, 9 R. P. C. 205 (1892).

(*q*) 27 C. D. 686; cited p. 137.

(*r*) *Pinto v. Badman*, 8 R. P. C. pp. 188, 191 (1891). As to the registration of common marks as additions, see above, p. 108, and Chap. IX., p. 170.

(*s*) (1891) 2 Ch. 233; 8 R. P. C. 137; see also *Atkins' Tm.*, 3 R.

P. C. 164 (1886), C. A.; and *Paine & Co. v. Daniells & Sons' Breweries*, (1893) 2 Ch. 567; 10 R. P. C. 71, 217.

(*t*) (1892) 1 Ch. 590; 9 R. P. C. 109.

(*u*) *Hudson's Tm.*, 32 C. D. 311; 3 R. P. C. 155 (1886), C. A.

(*x*) 8 R. P. C. 207 (1891).

tinctive label may accordingly be properly registered, although it contains words or names to the exclusive use of which no claim could be maintained (y).

The presence of common words in a registered label does not prevent any trader registering a different label with the same or similar words. Thus *Valroleum* printed across a label with a particular device was allowed, although *Valroline* was already registered upon a label with a different device (z), Jessel, M.R., holding that each word was merely equivalent to *valve oil*.

Similar common words in another registered label is no objection to registration.

It is a common practice to register labels with blank spaces which in use are filled up by matter which is either not capable of registration, or which for some other reason it is not convenient to register, because, for example, it is changed from time to time (a). The practice is unobjectionable, and the use of the added matter, which forms, of course, no part of the trade-mark protected by registration, does not interfere with the protection of the label as registered (a). But in considering whether a mark is a proper mark to register regard must be had to the appearance it will present in actual use (b).

Blanks in registered labels.

Ticket.

The only difference between a label and a ticket seems to be that a label is attached by sticking it on to the goods or their envelope, and a ticket by tying (c).

(y) *Hudson's Tm., Atkins' Tm., and Paine & Co. v. Daniells & Sons' Breweries, supra.* C., 4 R. P. C. 215 (1887), both Chitty, J.; and see Chap. X., p. 195.

(z) *Rs Horsburgh & Co.'s Application, 53 L. J. Ch. 237 (1878); see Leonard & Ellis's Tm., 26 O. D. 288 (1884), O. A.; Loftus' Tm., (1894) 1 Ch. 193; 11 R. P. C. 29; North, J. (unco' gwid whisky).* (b) *Christiansen's Tm., 3 R. P. C. 54 (1886), O. A., the Taendstikker Match Case.* And see Chap. X., p. 192.

(a) *Hammond v. Brunner, 9 R. P. C. 301 (1892); Melachrine & Co. v. Melachrine Egyptian Cigarette* (c) The words are used alternatively in *Orr-Ewing v. The Registrar of Tms., 4 App. Cas. 479; and Great Tower Tea Co. v. Smith, 6 R. P. C. 165.*

Word-Marks.

Words as
trade-marks.

Words are highly valued as trade-marks, since when well chosen they combine the necessary quality of distinctiveness with a capacity for being remembered and referred to, which is only equalled by such simple devices as from their resemblance to common objects, or to familiar geometrical figures, at once suggest appropriate names, and, while in many of the classes all, or almost all, the suitable devices are either already appropriated or have ceased to be distinctive, the number of new words which may be invented is practically unlimited.

Word-marks were common enough before the Registration Acts, and provision has been made in all of these for the registration of any special and distinctive word or words used as trade-marks before the 13th of August, 1875, when the Act of 1875 came into operation, and also, under sections already considered, for the registration of the name of an individual or firm printed, &c. in some particular and distinctive manner, and of a written signature or copy of a written signature. Except such old marks, names, and signatures, no other word-marks could be registered under the Act of 1875 (d). This was altered by the Act of 1883, which allowed the registration of "a fancy word or words not in common use." The expression "fancy word," however, gave rise to considerable differences of opinion as to its meaning, and after the report of Lord Herschell's Committee it was struck out of clause (c), and the two new clauses (d) and (e) were substituted for it. They allow the registration of: (d) "an invented word or invented words"; and (e) a "word or words having no reference to the character or quality of the goods, and not being a geographical name."

(d) *Exp. Stephens*, 3 Q. D. 659 (1876), *Jessel, M.R., (Acilyton)*; *Ross v. Evans*, 48 L. J. Ch. 618 (1879), *Hall, V.-C., (Limetta)*; see

per Lindley, L.J., in Van Duzer's Tin., 34 Q. D. 623; 4 R. P. C. 31 (1887).

The portion of the report above referred to, which relates to this subject, was as follows (e) :—“ It will be convenient to consider first what words ought to be allowed as trade-marks. There can be no objection to permitting the registration of an invented word not to be found in the vocabulary of our own or any other country. It seems, further, that existing words may with advantage be permitted as trade-marks, subject to limitations which at once suggest themselves. It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolise them and exclude others from their use. Again, geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods, are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first person who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade-mark. But there are objections to giving a monopoly even in that case, and to attempt to draw any such distinction would be likely to lead to difficulty and litigation (f). We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though spelt differently and with a different meaning, should be registered. The question in such a case would seem to be whether the resemblance between the old mark

The report of Lord Herschell's Committee on word-marks.

Geographical names.

Translated words.

Phonetic equivalents.

(e) Report of 1888, p. xi.

(f) See Chap. II. p. 44.

“and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected.”

A Fancy Word or Words not in common use (*f*).

As already stated, the meaning of these expressions gave rise to considerable differences of opinion, and since the marks registered under the Act of 1883 are still governed by that Act, and the principles employed in the interpretation of these expressions will be employed also in construing the amending Act (*g*), it is necessary to consider the cases. A definition of *fancy word* was ultimately laid down by the Court of Appeal, which seems to be both clear and precise, and it is perhaps to be regretted, after this had been done, and as no great substantial change was desired to be made, that the expression, which was, no doubt, an ill-chosen one, should have been abandoned for another which will in all probability itself require and receive explanation.

Fancy words.

In the latest reported case on the subject (*h*), Chitty, J., summed up the result of the decisions in the following passage: “To be a fancy word, the word must be obviously meaningless as applied to the article in question. On that principle the Court has held that the term *Gem* (*i*), with reference to a gun, is not a registerable fancy word; with reference to hair restorer, that the word *Melrose* (*k*) is not a fancy word; with reference to velveteen, that the word *Electric* (*k*) is not a fancy word; and with reference to lace, the opinion of Lord Justice Cotton appears to have been that the term *Alpine* (*l*) was not a fancy word. These are some of the numerous illustrations that may be given of what may be thought by some to be the severe

(*f*) A fancy word was a good trade-mark before the Acts: “The more ridiculous it is, the better it is.” Wood, V.-C., in *Young v. Macrae*, 9 Jur. N.S. 322 (1862).

(*g*) *Meyerstein's Tm.*, 43 C. D. 604; 7 R. P. C. 114 (1890), Kay, J., (*Satinino*).

(*h*) *Lloyd & Sons' Tm.*, 10 R. P. C. 281 (1893), *Carnival* not a fancy word.

(*i*) *Re Arbenz's Application*, *infra*.

(*k*) *Van Duzer's Tm.* and *Leaf's Tm.*, *infra*.

(*l*) 34 C. D. p. 639.

“and strict construction which the Courts put upon the 64th section. There is another case, which I may also usefully mention, which is the case of *Jubilee* with reference to note paper.” The last-mentioned word was also held not to be a fancy word (*m*).

The leading cases are the consolidated appeals of *Van Duzer's Trade-Mark* and *Leaf and Son's Trade-Mark* in the Court of Appeal (*n*). The former arose out of an application to register the words *Melrose Favorite Hair Restorer*, which had been adopted by the applicant in 1880, and which were identified by reputation with their goods, and with theirs, alone. They had been already registered by the applicants on a label. It was argued that, although *Melrose* happened to be the name of a place, it was registerable because of its secondary meaning, indicating the applicant's goods (*o*); that it was sufficient if the words were not “in common use” in connection with the goods in question; and that an earlier decision of Chitty, J., in *The Alpine Case* (*p*), holding that a word is a *fancy word* if fancifully used, was right. The Court of Appeal did not assent to any of these arguments.

To be a *fancy word*, Cotton, L.J., held, a word must be one “which obviously cannot have reference to any description or designation of where the article is made, or of what character it is.” So that it is not enough that it should be shown by evidence that it, in fact, has no such reference, and the incorrect or inappropriate user of a word which is descriptive does not make it a fancy word. Lindley, L.J., said: “To be a fancy word I think the word must either have, to ordinary English people, to whom this Act of Parliament is addressed, no meaning,

The fancy word must be obviously meaningless.

(*m*) *Towgood Bros. v. Pirie & Sons*, 4 R. P. C. 67; 56 L. T. 394 (1887), Chitty, J.

(*n*) 34 C. D. 623; 4 R. P. C. 31 (1887), Cotton, Lindley and Lopes, L.JJ.

(*o*) This was sufficient to make the words a trade-mark under the law before the Acts. See Chap. II., pp. 36 *et seq.*

(*p*) 29 C. D. 877 (1885). The right of appeal in this case was lost by a slip as to time.

“like the word *Eureka* or the word *Aeilhton*, or if it has any meaning at all, it must be obviously non-descriptive (q) when used as a trade-mark”; and Lopes, L.J. (r), laid down the following conditions as necessary in order that a word should come within the term:—It must be obviously meaningless as applied to the article in question; it must be fanciful in its application to the article to which it is applied, in the sense of being so obviously and notoriously inappropriate as to be neither deceptive nor descriptive, nor calculated to suggest deception or description; and, further, it must have “an innate and inherent character of fancifulness, which must not depend on evidence, and cannot be supported by evidence, to show that, in fact, it is neither deceptive nor descriptive, or calculated to be deceptive or descriptive.” It must speak for itself.

In *Leaf and Son's Case* the Court, applying these criteria, held, that *Electric* for velveteens was not a fancy word.

The definitions given in these judgments have been cited and adopted in all the subsequent cases upon the meaning of the expression. Thus, in *Waterman v. Ayres* (s), the Court of Appeal held, that *Reversi* was not a fancy word for a game. Ordinary Englishmen, Cotton, L.J., said, would consider it was in some way connected with reversing, and Fry, L.J., said that, by its likeness to *reverse*, it was calculated and intended to convey to the minds of persons who read it a notion of the character of the game, and it was, therefore, not a fancy word (t).

A list of words which have been held not to be “fancy words not in common use” is given on a later page (u).

The propositions laid down by the Court of Appeal in the cases last cited do not amount to definitions from which

The decisions
are only
restrictive.

(q) 34 C. D., p. 642; “non-descriptive” was substituted for “meaningless” at the suggestion of Cotton, L.J., p. 645.

(r) Page 644.

(s) 39 C. D. 29; 6 R. P. C. 368

(1888).

(t) See also *Edge's Tm.*, 8 R. P. C. 207 (1891), (*Filtered Blue*); and *Hodgson v. Sinclair*, 9 R. P. C. 22 (1891), *Britannia*, for soap.

(u) Page 151, below.

tests to show affirmatively that any particular word is within the meaning of the Act can be drawn. They are negative propositions only. "To say that every word is a fancy word because it is unknown to an average Englishman, would be plainly to lay down a proposition which could not be for a moment maintained, (for) there are many good English words descriptive of articles which are unknown to an average Englishman, taking a rather high standard" (x).

It follows that a word descriptive of, or suggesting a description of the origin, qualities, or uses of the goods, is not a fancy word. The word *Gem*, therefore, having come into use to indicate excellence in the article to which it is applied, is not a fancy word (y). And on an application to register it as a trade-mark for air-guns, it was a further fatal objection that it had, by user, become descriptive of a particular class and make of gun (y).

The Acts are directed to ordinary Englishmen (z), and the question whether the words put forward are obviously meaningless and non-descriptive in regard to the goods for which the mark is to be used, is to be tried, therefore, in the light of such information as ordinary Englishmen may be supposed to possess. It has, however, been held that *monobrut*, which is a compound of *brut*, meaning "dry" as opposed to "sweet" in the French wine trade, and which itself means "very dry," is descriptive, and therefore not a fancy word (a).

Descriptive words.

Words in a foreign language.

(x) *Per Chitty, J., in Davis v. Stribelt*, 6 R. P. O. p. 211; 59 L. T. 854 (1888), *Bökol*, the name of a Norwegian beer, rejected as a trade-mark for the beer.

(y) *Arboux's Tm.*, 35 O. D. 248; 4 R. P. O. 143 (1887). So held by the O. A., reversing Kay, J., whose judgment was delivered before that of the O. A. in *Van Duzer's Case*. *Reversi*, *Satinino*, and *Carnival* are other instances,

below, p. 151.

(z) See the judgments of Lindley, L.J., in *Van Duzer's Case*, and Cotton, L.J., in *Waterman v. Ayres*, *supra*; *Lloyd & Sons' Tm.*, 10 R. P. O. 281 (1893), (*Carnival*); and *Burgoyne's Tm.*, 6 R. P. O. 227; 61 L. T. 39, *Ocmoo*, cited below. Cf. the Report of Lord Herschell's Committee, cited *ante*, p. 141.

(a) *Vignier's Tm.*, 6 R. P. O. 490 (1889), Kay, J.; cf. *Jackson*

Name of the goods in foreign language.

The name of the goods is not a good trade-mark apart from the Acts (*b*), and it cannot, of course, be registered under them (*c*). So that the introducers of a kind of beer, which was common in Sweden and Norway, were not allowed to retain on the register the names by which it was ordinarily known in those countries, and under which it had been sold in England (*d*). "For the sake of caution limiting my proposition to the European languages," Chitty, J., said, "I am of opinion that, in reference to an article produced in a foreign country and imported into England where it was previously unknown and without a name, the word used in that foreign country as the common term to describe or denote the article is not a fancy word within the meaning of the Act."

And it is clear that a word which, though not English, carries a well understood descriptive meaning (*e*), such as *Sanitas* (*f*) or *Britannia* (*g*), is not a "fancy word."

This rule does not, however, extend to exclude words taken from a barbarous language. So that the word *Oomoo*, which was said to mean "choice" or "select" among some of the Aborigines of Australia, was held by Chitty, J., to be a fancy word notwithstanding. "If it does mean choice," the judge said, "or if it ever meant choice in the Aboriginal language of Australia, it does not mean choice to an ordinary Englishman, or to a sufficient

Co.'s Tm., 6 R. P. C. 80 (1888), where Kay, J., rejected the Chipeway Indian word *Kokoko* because it meant *Owl*, which was a common mark; and *Davis & Co. v. Stribolt & Co.*, *infra*.

(*b*) See Chap. II., pp. 35 *et seq.*, and the judgment of Chitty, J., in *Barlow v. Johnson*, 7 R. P. C. 395 (1890).

(*c*) *Per Fry, J.*, in *Waterman v. Ayres*, *supra*.

(*d*) *Davis & Co. v. Stribolt & Co.*, 8 R. P. C. 207; 59 L. T. 854

(1888), Chitty, J., (*Bökol*).

(*e*) Lord Herschell's Committee reported that, in their opinion, "where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language," see the whole passage cited above, p. 141.

(*f*) *Sanitas Co. Tm.*, 4 R. P. C. 533; 58 L. T. 166 (1887), Kay, J.

(*g*) *Hodgson v. Sinclair*, 9 R. P. C. 22 (1891), Chitty, J.

“number of Englishmen in this country, to enable me to say it has a meaning” (*h*).

The name suggested by a mark which is common in the trade is not a fancy word, and this rule was held to apply where the word was the name in the unwritten language of an uncivilized tribe, the Chippeway Indians, to whom the trade in the goods in question was not shown to have extended (*i*). It is, however, difficult to reconcile this with the rule already referred to, that the Acts are directed to ordinary Englishmen, or to reconcile with it the decision last stated, which was decided a few months later.

Names of
common
marks.

In *The Singer Cases*, and other cases coming under this head before the Acts, the contest was whether the name was that of the article merely, or whether it had acquired a secondary meaning identifying the article with the owners of the marks (*k*); but under the Acts such secondary meaning, so far as regards the right to registration (*l*), is immaterial in the case of marks not used as trade-marks before the 13th of August, 1875. It cannot make a word a fancy word (*m*) (or an invented word).

Secondary
distinctive
meaning does
not constitute
a fancy word.

In *Van Duser's Case* both Cotton and Lindley, L.JJ., refused to hold that no geographical word could possibly be a fancy word. And Lindley, L.J., said (*n*): “If you pick out some name which no Englishman ever heard of, such as *Penj Deh*, to which our attention was called some years ago, I do not know that that would not do. It conveys no meaning to an Englishman, and such a geographical name, for all I know, may be a fair and proper fancy word.” But, as was held in that case, a name which is known to be that of a place from which the goods

Geographical
words.

(*h*) *Burgoyne's Tm.*, 6 R. P. O. 227; 61 L. T. 39 (1889); but cf. the case next cited.

(*i*) *Jackson Co.'s Tm.*, 6 R. P. O. 80 (1888), Kay, J., *Kokoko*, meaning owl.

(*k*) Chap. II., p. 38.

(*l*) It may have an important bearing upon a passing off case,

Slazenger v. Feltham, 6 R. P. O. 531; *Barlow v. Johnson*, 7 R. P. O. 395; see Chap. XVI., p. 404.

(*m*) *Van Duser's Tm.*, 34 C. D. 623; 4 R. P. O. 31 (1887), O. A.; *Sanitas Co.'s Tm.*, 4 R. P. O. 533; 58 L. T. 166 (1887); and see above, p. 127.

(*n*) 34 C. D. p. 643.

might come is not registerable (o). So, in *The Apollinaris Case*, the Court decided that the names of the springs from which the mineral waters came, and which were not the property of, or wholly controlled by, the traders who sought to appropriate the names as trade-marks, could not be registered (p). The words *Britannia* (q), and *John Bull* (r) have also been held to be objectionable on the ground that they are geographical words.

On the other hand, it seems that the name of the factory from which the goods bearing the mark come is not a geographical word within the meaning intended (s).

“Geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods,” Lord Herschell’s Committee reported (t), “are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold goods in the place the name of which he seeks to appropriate as a trade-mark (u). But there are objections to giving a monopoly even in that case, and to attempt to draw any such distinction would be likely to lead to difficulty and litigation. We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale.”

And geographical names are accordingly not permitted to be registered by the present Act (x). It will be noticed

(o) See also *Batt’s Tm.*, 6 R. P. C. 493 (1889), Chitty, J., *Drymbo*, for steel.

(p) (1891) 2 Ch. pp. 203, 221; 8 R. P. C. 137, C. A.

(q) *Hodgson v. Sinclair*, 9 R. P. C. 22 (1891), Chitty, J.

(r) *Faine’s Tm.*, 9 R. P. C. 130; 61 L. J. Ch. 365 (1892), Kekewich, J.

(s) *Finto v. Dadman*, 8 R. P. C.

181 (1891), C. A.; and see *Hall v. Barrows*, 4 De G. J. & S. 150; 32 L. J. Ch. 548; 33 L. J. Ch. 204 (1863), Romilly, M.R., and Westbury, L.C.

(t) The whole passage is cited above, p. 141.

(u) See Chap. II., p. 44; and *Seizo v. Provezende*, and *Wotherspoon v. Currie* there cited.

(x) Sect. 64 (1) (e).

that the recommendation of the committee does not apply to words which "clearly could not be regarded as indicative of the place of manufacture or sale," but the Act contains no such limitation; but it may well be imported upon the construction of the words.

The name of a person, even though the person be a mythical person, is not a fancy word (*y*). Name of a person.

A combination of words, each of which is common to the trade, is not a "fancy word" (*x*). Combination of words.

Not in common use.

In order to come within sect. 64 (c) of the Act of 1883 the word or words must not only be a fancy word or fancy words, but must not be in common use.

In *The Alpine Case* (*a*) Chitty, J., took the view that the use referred to is to be understood to be use in the trade, and this view has been adopted also in a Scotch case, in which Lord Craighill said that the term "common use," as employed in the statute, does not necessarily import that the word must have been used commonly by all members of the community, or by people in all parts of the country. "What is enough, in my opinion," he added, "to establish common use, in the sense of the statute, is this: if it shall be shown that the word has been commonly used by persons who had occasion to use it, and who are connected more or less directly with the use of the commodity to which the term has been applied" (*b*). But it is submitted that the condition suggested by the last

(*y*) *B. Igson v. Sinclair*, 9 R. P. C. 22 (1891), *Britannia*, Chitty, J. The C. A., by consent, reversed the order to expunge this mark. The early case in which *The Lawford* was allowed to be registered seems to be clearly in conflict with the later decisions; (1885) W. N. 124, *Pearson*, J.

(*x*) *Pirie v. Goodall*, (1892) 1 Ch. 35; 9 R. P. C. 17, V. Williams,

J., and C. A.; *Pirie's Parchment Bank*; and see *Perry, Davis & Son v. Harbord*, 15 App. Cas. 316; 7 R. P. C. 336 (1890), (*Perry-Davis' Vegetable Pain Killer*); cf. p. 152, n. (*a*) 29 C. D. 877 (1885).

(*b*) *Stuart & Co. v. Scottish Val de Travers Paving Co.*, 13 Bess. Cas. 4 Ser. 1 (1885), *Granolithic stone*. The word was held to be in common use.

Common use, whether in the trade or popularly.

phrase is not in accordance with the later decisions as to what are fancy words cited above (*b*), and that the construction adopted by Kekewich, J., in the recent case of *Paine's Trade-Mark* (*c*) gives the correct meaning of the Act. "I cannot think," the learned judge said, "it means simply the use applied to this trade only. It cannot mean, I think, that words are not in common use if they are not used in the trade. It must mean something wider and larger than that, and seeing that *John Bull* are two words, or a combination of words, which are in common use wherever the English language is known, I think that I must hold them to be in common use within the meaning of the Act."

The extent of user which amounts to "common use" has not been defined, but it has been held that the words *Tower Tea*, which were used by the plaintiff and the defendant in the case in question, and by three other persons in the tea trade, and of which the word *Tower* was used by several traders in other trades, were words in common use (*d*). On the other hand, the mere use by a single person, other than the applicant for registration, at an exhibition in this country of a word which is not known in the trade concerned, does not amount to common use within the clause (*e*). The phrase may be compared with "common to the trade" in sect. 74 (*f*).

"The" prefixed to word.

Words which are not entitled to registration as fancy words do not become so entitled by having the definite article prefixed to them (*g*). This is clear from the definitions cited above, but a different view was taken by the comptroller (*h*) when first the Act of 1883 came into operation, and before the decision of *Van Duzer's Case*.

Examples

The following words have been held not to be fancy

(*b*) Pages 143 *et seq.*

(*c*) 9 R. P. C. p. 133; 61 L. J. Ch. 365, (1892), (*John Bull* bear).

(*d*) *Great Tower Street Tea Co. v. Smith*, 6 R. P. C. 165 (1889), North, J.

(*e*) *Burgoyne's Tm.*, 6 R. P. C. pp. 230, 232; 61 L. T. 39 (1889),

Chitty, J., (*Oomoo*).

(*f*) See Chap. IX., p. 169.

(*g*) *Lever v. Goodwin*, 36 O. D. 1; 4 R. P. C. 492 (1887), Chitty, J., and C. A., (*The Self-washer*).

(*h*) See the *Alpine Tm.*, 29 O. D. 877 (1885).

words not in common use (i): ALPINE embroidery, p. 149; from decided cases.
 APOLLINARIS water, *Apollinaris Co.'s Tm.*, (1891) 2 Ch. pp. 202, 221; 8 R. P. C. 137; BEATRICE shoes, *Harris' Tm.*, 9 R. P. C. 492; BEN LEDI whiskey, *Ainslie & Co.'s Tm.*, 4 R. P. C. 212; BÖKOL beer, p. 146; BRITANNIA soap, p. 149; BRYMBO iron (Brymbo being a place in Wales), p. 148; CARNIVAL cigarettes, p. 142; ELECTRIC velveteen, p. 144; ELECTROID anti-fouling composition, *Hannay's Tm.*, 7 R. P. C. 46; EMOLLIO cream, *Grossmith's Tm.*, 6 R. P. C. 180; 60 L. T. 612; EMOLLIORUM dubbing, *Talbot's Tm.*, 11 R. P. C. 77; (1894) W. N., 12; FRIEDRICHSHALL water, *Apollinaris Co.'s Tm.*, *supra*; GEM air-guns, p. 145; GRANOLITHIC stone, *Stuart v. Scottish Val de Travers Paving Co.*, 13 Sess. Cas., 4 Ser. 1; HAND GRENADE FIRE EXTINGUISHER, *Harden Star, &c. Co.'s Tm.*, 3 R. P. C. 132; 55 L. J. Ch. 596; HERBALIN (a medicine), *Humphries v. Taylor's Drug Co.*, 59 L. T. 820; HUNYADI JANOS water, *Apollinaris Co.'s Tm.*, *supra*; JOHN BULL and JOHN BULL BRAND beer, p. 150; JUBILEE note paper, p. 143; KOKOKO cotton goods, p. 147; MANOR tin-plates, *Thompson's Tm.*, 6 R. P. C. 213; MELROSE hair restorer, p. 143; MONORRUT champagne, p. 145; RED, WHITE AND BLUE coffee, *Hanson's Tm.*, 37 C. D. 112; 3 R. P. C. 130; REVERSI (for a card game), p. 144; SANITAS (for a disinfectant), *Sanitas Co.'s Tm.*, 4 R. P. C. 533; 58 L. T. 166; SELF-WASHER and THE SELF-WASHER SOAP, *Lever v. Goodwin*, 36 C. D. 1; 4 R. P. C. 492; TOWER tea, *Great Tower Tea Co. v. Smith*, 6 R. P. C. 165; WASHERINE soap, *Burland v. Broxburn Oil Co.*, 42 C. D. 274; 6 R. P. C. 482; ZEPHYR ASIATIC WALNUT PIPE, *Friedlander's Tm.*, (1885) W. N., 85.

The only reported instances of words decided to be within the clause are the words *Oomoo*, for wine (k), *Alpine*, for embroidery, and *The Lawford*, for tennis racquets (l). The decision in the second case was subse-

(i) The pages referred to are those of this book. Most of the words are collected in Sebastian, 3rd ed. p. 46, and in the index to

Mr. Austen-Cartmell's Digest.

(k) *Burgoyne's Tm.*, 6 R. P. C. 227; 61 L. T. 39 (1889), Chitty, J.

(l) (1885) W. N. 124, Pearson, J.

quently disapproved by the Court of Appeal (*m*), and that in the third is certainly not in accord with the interpretation subsequently put upon the clause under which the registration was allowed (*n*). Great numbers of words have, however, been registered by the comptroller as fancy words without objection.

Invented
words.

“(d) *An invented word or invented words.*”

This clause and the following clause (e) were substituted for “fancy word or words not in common use” by the Act of 1888, upon the recommendation of Lord Herschell’s Committee, which has been already quoted (*o*). It seems clear that the alteration was not intended to affect the principles laid down to determine what words might be registered in the leading cases decided upon the earlier Act (*p*), but only to give authoritative expression to them, and to avoid any further difficulty which might arise upon the expression “fancy word.” And these principles will be employed in the application of the new Act, so that, for instance, a word which is descriptive (*q*), or a geographical (*r*) word cannot be registered as an invented word.

The leading case on the present clause is *The Somatose Case* (*rr*), in which the Court of Appeal decided in accordance with the earlier judgment of Kay, J. (*q*), that the two clauses (d) and (e) must be read conjunctively, and not, as

(*m*) *Alpine Tm.*, 29 C. D. 877 (1885), Chitty, J.; see above, p. 143.

(*n*) See above, p. 149.

(*o*) Above, p. 141.

(*p*) *Van Duzer’s Tm.*, *Leaf & Co.’s Tm.*, and *Waterman v. Ayres*, above, pp. 143 *et seq.* Mr. Sebastian is, however, of a different opinion, he says: “The introduction of this expression into the Act appears to be intended to bring within its scope such words as *Washerine* and *Monobrut* (see above, p. 151), which were rejected as fancy words,” 3rd ed. p. 48.

(*q*) *Meyerstein’s Tm.*, 43 C. D. 604; 7 R. P. C. 114 (1890), Kay,

J., (*Satinine*); *Talbot’s Tm.*, (1894) W. N., 12; 11 R. P. C. 77, Stirling, J., (*Emolliorum*).

(*r*) *Apollinaris Co.’s Tm.* (1891), 2 Ch. pp. 203, 221; 8 R. P. C. 137, Kekewich, J., and U. A., (*Apollinaris*, *Hunyadi Janos*, and *Friedrichshall*).

(*rr*) *Farbenfabriken Co.’s Tm.*, (1894) 1 Ch. 645; 11 R. P. C. 84; 10 Times L. R. 260, North, J., and Kay and A. L. Smith, L.J.J.; Lindley, L.J., dissenting. Lindley, L.J., thought the word allowable as a new compound of well-known elements. A. L. Smith, L.J., thought it too near the dictionary words *Soma* and *Somatic*.