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The Law of
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.

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OF THE INNER TEMPLE, BARRISTER-AT-LAW.

SECOND EDITION

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LONDON:
SWEET & MAXWELL, LIMD., 3, CHANCERY LANE,
Law Publishers.

MEREDITH, RAY, & LITTLER, MANCHESTER;
HODGES, FIGGIS, & CO., LD., AND E. PONSONBY, DUBLIN;
C. F. MAXWELL, MELBOURNE & SYDNEY.

1901.

TX
K 396t
Ed 2

Rec. Dec. 13, 1901.

LONDON:

PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

PREFACE

TO THE SECOND EDITION.



DURING the seven years which have elapsed since the publication of the first edition of this book, a very considerable number of decisions, modifying or illustrating the law of trade-marks, trade-name and merchandise-marks, have been reported. In the present edition these have been embodied in the text and notes, and it has been found necessary to re-write some parts of the book, and, in particular, part of the section of Chapter VIII. dealing with word-marks, and the whole of the section of Chapter XVI. dealing with the supposed right of any trader to the honest use of his own name. In the result a substantial increase in the size of the volume was inevitable, notwithstanding that the pages have been enlarged.

All the recent authorities have been carefully considered and, it is hoped, have been sufficiently stated. The Appendix has also been extended by the addition of a number of forms and official notices, including the Consolidated General Orders of the Custom House under the Merchandise Marks Acts.

For many of the official forms and notices the Editors are indebted to the courtesy of the learned Registrar of Trade-marks (Mr. R. Griffin), to the Solicitor to the Custom House, and to the India Office.

A summary of Foreign and Colonial Laws of Trade and Merchandise Marks has been added, and it is hoped that it will be found useful. It has, for the most part, been abstracted or condensed from the official publications referred to in the notes.

The cases have been brought down to the Whitsun Vacation, 1901.

Of the recent decisions referred to above, the judgment of the House of Lords in the *Solio Case* has, perhaps, attracted most attention. It completely altered the construction put upon sect. 64 (1) (d) and (e) of the principal Act, and threw open the Register to all words which are substantially non-descriptive of the goods for which they are used, notwithstanding that forensic or official ingenuity might be able to find in them some indirect allusion to the nature or use of the goods. This result was unquestionably in accordance with the intention of Parliament when the Act of 1888 was passed, and it gave great satisfaction to the trading community.

The feature of the litigation of the past seven years has, however, been the growing prominence of cases turning upon unregistered trade-marks. The *Camel Hair Belting* and the *Yorkshire Relish Cases* made it plain that it is possible for words which are of the most obviously descriptive character in themselves to

be practically monopolised in a particular trade by a single trader. More recently the *Cellular Clothing Case* has indicated some of the limits within which this can be done. The general tendency of the modern decisions is to sweep away all the subordinate rules as to what can and what cannot be acquired as a Common Law trade-mark, and to return in every instance to the simple inquiry whether what the defendant is doing is calculated to pass off his goods as those of the plaintiff. However attractive this apparent simplicity may appear at first sight, it is doubtful whether it will be satisfactory in the long run. As things stand, the task of advising at what point the wide advertisement and extensive use of a descriptive word by a trader on a large scale enables him to debar his smaller rivals from making use of it has become one of extreme difficulty.

A striking illustration of a difficulty analogous to that just referred to, and of the tendency to abandon rules which were formerly assumed as settled principle, is furnished by the *Valentine* litigation and the recent case before Mr. Justice Kekewich of *Cash v. Cash*. In each instance a defendant was restrained from using his own name, and that not upon any ground of fraud. It is to be hoped that the question how far the rule that a man may under all circumstances honestly use his own name, for which *Burgess v. Burgess* has been cited during more than forty years, is now to be relied on will before long be considered by the highest tribunal.

A Bill to consolidate and amend the law of trade-

marks has been from time to time before the House of Commons for some years past. There appears to be no likelihood of its passing at present or in its existing shape. It can be purchased of Messrs. Eyre & Spottiswoode, East Harding Street, E.C. (Bill No. 79 of 1901, price 3*d.*). The Bill proposes a number of minor amendments and three changes of substantial importance. It is proposed to admit for registration any non-dictionary word, and also any mark or word to the exclusive use of which the applicant is entitled and which is capable of distinguishing his goods. It is further proposed that a *disclaimer* made for the purposes of registration shall not affect any Common Law rights of the applicant in the matter described. Both of these alterations will call for, and will no doubt receive, very careful consideration before they become the law. The Bill further provides that the costs of the Comptroller upon an appeal from his decision shall not be payable by the applicant unless for good cause shown. This would remedy an obvious injustice.

If the Bill is ever seriously considered by Parliament, its drafting, which as it stands is somewhat loose and popular in expression, will no doubt be revised. And inasmuch as the law of registered trade-marks now forms by itself but a very small part of the whole subject, it is eminently desirable that, when the occasion arises, the amendment, if not the codification, of the whole of the law of trade-marks, trade-names and passing-off should be considered.

A minor but useful amendment of the existing

practice might be made without the assistance of Parliament. The classification of goods under the Trade-Mark Rules has never been revised, and it is now seriously defective and out of date. For instance, no proper place is provided for either pneumatic tyres or photographic films.

The writer has been greatly assisted in the preparation of the present edition by Mr. F. G. UNDERHAY, who has undertaken not only the most laborious part of the work, but the whole of the revision of the earlier chapters.

The Editors are also much indebted to the gentlemen already referred to above, and also to Mr. JOHN CUTLER, K.C., Mr. A. WOOD-RENTON, of Gray's Inn, Mr. CRAIES, of the Inner Temple, and Mr. HAROLD WADE, of the firm of Boulton, Wade & Kilburn, Patent Agents, for criticism and suggestions. Several of the gentlemen referred to have been kind enough to read parts of the proof.

D. M. KERLY.

TEMPLE,

June, 1901.

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- 44.—After “Vaseline,” add “(an appeal is, however, pending).”
- 70, note (v).—Add, “It had, however, been expressly disclaimed.”
- 90, note (n).—For “9 R. P. C. 215,” read “9 R. P. C. 213.”
- 170.—For “Emolliorum,” read “Emolliolorum.”
- 18^o, note (t).—At commencement insert, “An appeal is, however, pending.”
- 22^z, note (c).—For “in use in England,” read “use in England.”
- 249, note (u).—For “9 R. P. C. 370,” read “8 R. P. C. 370.”
- 251.—Add to contrasted devices, “J. B. D. in an oval ring an infringement of G. B. D. in an oval ring, *Maréchal and Ruchon v. McColyan*, Chatterton, V.-C. (Ireland), 18 R. P. C. 262.”
- 271, note (k).—For “45 Ch. D. 35,” read “41 Ch. D. 35.”
- 290, note (i).—For “(1892) 3 Ch. 301,” read “(1892) 3 Ch. 201.”
- 298, note (d).—For “(1892) 2 Ch. 402,” read “(1891) 2 Ch. 402.”
- 337, note (g).—After “(1900) 1 Q. B. 310,” add “affirmed by House of Lords, *Times*, May 5th, 1901.”
- 369, note (v).—Add, “*John Jameson & Son, Ltd. v. R. S. Johnston & Co., Ltd.*, Porter, M.R. (Ireland), 18 R. P. C. 259.”
- 407, note (k).—For “17 R. P. C. 817,” read “17 R. P. C. 517.”
- 416, note (g).—After “deception,” add “a perpetual injunction was granted at the trial (about to be reported in 18 R. P. C.).”
- 421, note (h).—Add, “In *Maréchal and Ruchon v. McColyan*, Chatterton, V.-C. (Ireland), 18 R. P. C. 262, the stamp was ordered to be delivered up by the defendant.”
- 429, note (i).—Add, “And as to whether a plaintiff can get the costs of a motion so far as they exceed those of an order in chambers, see *Gandy Belt Manufacturing Co. v. Fleming, Birkley & Goodall, Ltd.* (about to be reported in 18 R. P. C.).”
- 430, note (m).—Add, “See also *Clarke v. Hudson* (about to be reported in 18 R. P. C.).”
- 470.—Add to list of cases in which injunctions have been refused, “*Daimler Motor Co., Ltd. v. British Motor Traction Co.*” (about to be reported in 18 R. P. C.) in which the plaintiffs sought to restrain registration of a company under the name “*Daimler Wagon Co., Ltd.*”
- 470.—For “*Bamstead*,” read “*Bumsted*.”
- 493, note (z).—Add to cases quoted, *Colman v. Farrow*, 15 R. P. C. 198.
- 522, note (o).—For “37 & 38 Vict. c. 51, s. 4,” read “62 & 63 Vict. c. 23, s. 2.”
- 562, note (e).—For “25 & 26 Vict. c. 88, s. 2,” read “25 & 26 Vict. c. 88, s. 1.”
- 817.—Add after “Merchandise Marks (Prosecution) Act, 1894,” “57 & 58 Vict. c. 19.”
- 817.—For “54 & 55 Vict. c. 28,” read “54 & 55 Vict. c. 15; 50 & 51 Vict. c. 28.”

BOOK I.
THE LAW OF TRADE-MARKS.

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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 customer. That being, as

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

(a) *Singer Manufacturing Co. v. Loog*, 18 C. D. p. 412; 52 L. J. Ch. 481 (1880).

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 injunctions (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. See *Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd.*, 17 R. P. C. 477, at p. 464, (1900) H. L.

(c) Popham, p. 144.

(d) Cro. Jac. 471.

(e) 2 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* (*g*) 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 as fully settled. "I think," he said, "that the substance of the declaration was proved. It was established most clearly

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.

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 resold 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 subsequent 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

(*k*) *Ford v. Foster*, L. R. 7 Ch. p. 630 (1872); *Singer Manufacturing Co. v. Loog*, 18 C. D. p. 403; 52 L. J. Ch. 481 (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; 52 L. J. Ch. 481, at

p. 489 (1880).

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

(*p*) *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Hall v. Barrows*, 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

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 the 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 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

Difficulty and cost of the old trade-mark suits.

in 1863) and decisions of Lord Westbury, L. C. And see *Day v. Riley and Whittaker*, 17 R. P. C. 517, at p. 520, (1900) *obiter* by Buckley, J. Also the judgments of Lord Herschell in *Reddaway v. Banham*, (1896) A. C.

p. 209; 13 R. P. C. p. 228; and of Kekewich, J., in *Saxlehner v. Apollinaris Co.*, (1897) 1 Ch. p. 903; 14 R. P. C. p. 656, as to whether there can be "property" in any common law trade-mark,

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 available of preventing the infringement of a trade-mark; 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 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, how-

(*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; 44 L. J. Ch. p. 502 (1875).

(*s*) See "Sheffield Marks," below, p. 101.

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

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 this Act was twofold: 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

The Merchandise Marks Act of 1862.

The Registration Act of 1875.

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

(*y*) Sect. 21.

(*u*) Sect. 19, see now M. M. A. 1887, s. 17; Chap. XVII., p. 520.

(*z*) 38 & 39 Vict. c. 91. See the chapter on "The Register," below, p. 56.

(*x*) Sect. 22.

limit the classes of marks which should be capable of being so appropriated (*a*). The Act, accordingly, provided that registration should be *prima 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 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*).

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

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 and distinctive manner; or a written signature or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label, or ticket; and 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-

(*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. 307.

(*d*) *Palmer's Tm.*, 21 C. D. 47; 24 C. D. 504 (1882), C. A.; below, p. 309.

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

(*f*) 39 & 40 Vict. c. 33, s. 1. See now sect. 77 of the Act of 1883, below, p. 312.

(*g*) Sect. 10.

mark before the passing of the Act might be registered as such under the Act.

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 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.

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

The Registration Act of 1883.

"Fancy words" allowed to be registered.

(*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).

(*l*) Sect. 78.

(*m*) Sect. 82.

(*n*) Sect. 81, see below, p. 101.

(*o*) *Van Duzer's and Leaf's Tms.*, 34

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 the Committee presented in August, 1887, 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 (*oo*), and it will be sufficient here to refer to 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.

Doubtful marks to be rejected.

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

C. D. 623; 4 R. P. C. 31 (1887). See, however, *Re Borvil Tm.*, (1896) 2 Ch. 600; 13 R. P. C. 382; and below, p. 159.

(*oo*) The reports may be referred to on the construction of the Act of 1888, to show the mischief which it

was directed to remedy. *Eastman Photographic Materials Co.'s Application*, (1898) A. C. 571; 15 R. P. C. 476.

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

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

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

For some time after the Act of 1888 was passed a construction was put upon the new clauses allowing the registration of "invented words" and "words having no reference to the character or quality of the goods" for which the mark was to be used, which made the amendment of the law almost wholly inoperative. It was held that no word was qualified to be the "essential particular" of a registered trade-mark unless it satisfied both clauses simultaneously, and that even a remote suggestion of some real or assumed characteristic of the goods would make it objectionable. Thus the word *Somatose* was refused registration as a trade-mark for a medical food (t). In the year 1898, however, in the *Solio* case (u), this decision was overruled by the House of Lords, and it was decided that the clauses referred to are alternative and independent, so that any really new-coined word, whether it has some reference to, or contains some suggestion of, the character or quality of the goods or not, as well as any existing word which has no such reference, may be registered as a

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

Powder (1890).

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

(t) See Chap. VIII., pp. 172, 179.

(u) See Chap. VIII., p. 171.

trade-mark, or may be the essential particular of a trade-mark, unless it is objectionable on other grounds. This decision has greatly increased the usefulness of the Register, by enlarging the area from which new marks may be chosen as well as by admitting to registration large numbers of word-marks already in use.

Down to the end of the year 1899, 93,362 trade-marks had been registered under the Acts, and some eight or nine thousand applications are annually made for registration (*x*); 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 (*y*), 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 (*z*) 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 (*a*), and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive, or not (*b*).

Unregistered
trade-marks
are still
numerous.

3. Passing-off and Trade-name Actions.

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

(*x*) Comptroller's Report for 1899; 3,777 marks were registered in 1899.

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

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

(*a*) *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.

(*b*) *Reddaway & Co. v. Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; 9 R. P. C. 503; C. A., see below, pp. 450 and 451.

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

(*d*) See the next chapter,

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 would 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 also to these cases—of "trade-name" and "passing-off" as they are comprehensively termed. 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* (e). "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 themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods. 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.

Trade names
and "get-up."

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

(e) 2 C. D. 434; 45 L. J. Ch. 490 (1874).

“The second class (*f*) 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 Sir George Jessel here limited the right to redress in the second class of cases to cases where the defendant had acted with fraudulent intention, and for the purpose of deceiving the customers, or intending customers, of the plaintiff, and in this his judgment was endorsed and approved by the Court of Appeal (*g*). 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 (*h*), and that since the decision in *Millington v. Fox* (*i*) 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 regard to the evidence in the case, calculated to mislead an unwary purchaser of the machines?” The question came up again in *Singer Manufacturing Company v. Loog* (*k*), 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

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

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

(*g*) 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.

(*h*) 3 App. Ca. p. 389; 47 L. J. Ch. p. 487 (1877).

(*i*) Above, p. 4.

(*k*) 18 C. D. 395 (1879); 8 App. Ca. 15 (1882); 52 L. J. Ch. 481.

effect. "It was contended" (l), 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 (m), even where there is no question of a registered trade-mark, or of any mark at all attached to the goods, a trader will not be allowed to act in a manner which leads, or is 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 (n). He does, in fact, commit a fraud when he continues his conduct after discovering its dangerous character (o).

"No man," said Cotton, L. J., in the case of *Turton v. Turton* (n), "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 *prima facie* 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,

(l) 8 App. Ca. p. 21; 52 L. J. Ch. Chap. XVI., p. 451.
p. 484. (n) See below, pp. 500 *et seq.*
(m) See Chap. XII., p. 317, and (o) See below, p. 376.

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 (*p*)."

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 (*q*); and in connection with them, the chief practical exception to the rule, that the defendant will not be allowed to continue conduct 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 (*r*). But even this exception, according to the most recent authorities, must give way in extreme cases, where the use of the defendant's own name by itself and without qualification, is calculated to pass off his goods as those of the plaintiff. *Bass' Ale* and *Pears' Soap* have frequently been cited (*rr*) as instances of names which could not be used without qualification and precautions against mistake by a Bass or a Pears entering into the trade in question and competing with the well-known firm of the same name.

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 from what in fact they were, and such false pretences

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

(*q*) See below, Chap. XVI., p. 462.

(*r*) See *Burgess v. Burgess*, 3 De G. M. & G. 896; 22 L. J. Ch. 675 (1853), L. JJ.; *Turton v. Turton*, 42 C. D. 128; 58 L. J. Ch. 677 (1889), C. A.; *Saunders v. Sun Life Assurance Co.*

(1894) 1 Ch. 537; 63 L. J. Ch. 247;

Jamison v. Dublin Distillers Co., (1900)

1 Ir. R. 43. See below, pp. 500 *et seq.*

(*rr*) See *Cash v. Cash*, cited below, p. 508, and the judgment of Vaughan Williams, L. J., in *Jamison v. Jamison*, 15 R. P. C. p. 192.

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 (*s*), or the mere impression or use of a false mark, was not criminally punishable (*t*). The Committee of 1862, whose report has been already referred to (*u*), 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 (*x*)—were applied to goods by unscrupulous traders with impunity. And the witnesses complained, with good reason, that the existing 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 Merchandise Marks Act of 1862, which was passed upon their report, 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.

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 (*y*), or the false application of a trade-mark to goods (*y*), or to the

The Merchandise Marks Act of 1862.

(*s*) See below, p. 643.

(*t*) See Book II., p. 563.

(*u*) Above, p. 6.

(*x*) Merchandise Marks Act, 1887.

n. 3.

(*y*) Sect. 2.

envelope of goods (s), 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 (a), and it was, moreover, a monument of complicated and redundant drafting.

The Inter-
national
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 (b), and thereby formally engaged to cooperate in the execution of the stipulations contained in the convention and protocol (c) agreed upon 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 Merchan-
dise Marks
Act of 1887.

The last-mentioned Act (d) 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,

(s) Sect. 5.

(a) The Customs Act of 1876, s. 42, forbade the importation of articles of foreign manufacture bearing the names, marks, or brands of manu-

facturers resident in the United Kingdom, &c.

(b) See list, Appendix, p. 762.

(c) See Appendix, p. 764.

(d) See Book II., Chap. I., p. 554.

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 (*e*). A criminal intention on the part of the person charged is a necessary element of each of the above-mentioned offences (*f*); but the 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 his case within the definition of an offence under the statute. The Act, moreover, forbids (*g*) 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.

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 com-

The Act is directed only against false marking.

(*e*) Subsidiary offences, such as making dies for forging trade-marks, are here passed over. 739, 791; 5 T. L. R. 71 (1888), Coleridge, L. C. J., and Grantham, J.; and see below, p. 603.

(*f*) *Gridley v. Swinborne*, 52 J. P. (*g*) Sect. 16, below, p. 624.

pulsory, and it does not extend to cases of verbal false descriptions (*h*).

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 (*i*) 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 occasioned 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.

The Custom House authorities have recently, however, by the Consolidated Instructions of 1900, given directions under which goods in transit, in the absence of information calling for their examination, will generally be allowed to pass without scrutiny (*k*).

The Merchandise Marks Act, 1891.

The Committee also refused 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 (*l*). On the other hand, with a view to stopping 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" (*m*), 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 com-

(*h*) Below, p. 571.

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

(*k*) Para. 36, printed *post*, p. 825.

(*l*) See below, p. 631.

(*m*) See below, pp. 571, 583.

munity, 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. By an Act of 1894 the Board of Agriculture has been authorized to undertake prosecutions (*u*).

5. International and Colonial Arrangements.

A foreigner who is 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 (*o*) (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 in respect of their trade-marks as were enjoyed by its own subjects (*p*). 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 (*q*), 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 (*r*), 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 (*s*), sect. 103 (*t*) 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 obli-

(*u*) *Post*, p. 613.

(*o*) *The Collins Co. v. Reeves*, 28 L. J. Ch. 56 (1858), Stuart, V.-C.

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

(*q*) Act of 1883, s. 77, Chap. XII., p. 312.

(*r*) See Appendix, p. 764.

(*s*) 17 March, 1884.

(*t*) See Chap. XX., p. 545.

gations but very imperfectly (*u*) 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 (*v*).

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

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 (*z*) or foreign State to which the provisions of the above-mentioned section (sect. 103) are, under Order in Council, for the time being applicable (*a*).

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

(*v*) See last case, and *Carter Medicine Co.'s Tm.*, (1892) 3 Ch. 472; 9 R. P. C. 401, North, J.

(*x*) See the list, Appendix, p. 762.

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

(*z*) Below, p. 762.

(*a*) M. M. A. 1887, s. 3 (1), Book II., Chap. I., p. 560, "trade-mark."

CHAPTER II.

THE DEFINITION OF A TRADE-MARK.

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Definition.

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*).

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 properly 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. It appears to be preferable, 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 them as trade-marks (*i*). But trade-marks can still be

The Registration Acts contain no definition;

(*a*) Below, p. 28.

(*b*) Page 28.

(*c*) Page 32.

(*d*) Page 31.

(*e*) See Chap. XIII., Assignment and Devolution of Trade-Marks, p. 324; and *Pinto v. Badman*, 8 R. P. C. 181 (1891), per Fry, L. J.

(*f*) Page 52.

(*g*) Page 54; and see Chap. XII.,

Effect of Registration, p. 302. As to Cutlers' corporate marks, see Chap. VI., p. 101.

(*h*) Act of 1883, s. 75; Act of 1888, s. 17. See below, p. 54; and Chap. XII., Effect of Registration, p. 302.

(*i*) See Chap. VIII., "What marks may be registered," p. 115.

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 (*l*). 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" (*m*), 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.

The definitions of "mark" and "trade-mark," for the purposes of the Merchandise Marks Act, 1862 (*n*), 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 Definitions in the Merchandise Marks Act of 1862.

(*k*) See below, pp. 316, 317.

Stirling, J.

(*l*) A trade-mark so acquired may, under some circumstances, be properly described as such without necessarily implying that it is registered. *Sen-Son Co. v. Britten*, (1899) 1 Ch. 692; 16 R. P. C. 137,

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

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

or merchandise of such person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark or sign which, in pursuance of any statute or statutes for the time being in force relating to registered designs, 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 Merchandise Marks Act, 1887.

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 (o).

Judicial definitions.

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 no formal definition is to be found in any reported judgment.

Lord Westbury.

In *The Leather Cloth Co. v. The American Leather Cloth Co.* (p), 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."

Bacon, V.-C.

And in *Ford v. Foster* (q), 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 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,

(o) Sect. 3 (1), below, p. 560.

L. J. Ch. 199 (1863).

(p) 4 De G. J. & S. p. 142; 53

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

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."

"User as a trade-mark," Kay, J., said, in *Richards v. Kay, J., and Butcher (r)*, "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 any one else" (s).

In *The Magnolia Metal Company's Trade-Marks (t)*, Rigby, L. J., dealing with the case of a name, said: "In order that the name of an article may in any case be the trade-mark of the manufacturer, it is essential that the name should indicate, not the article only, but also that the article is manufactured by the person claiming it as a trade-mark, as distinguished from other persons also manufacturing or entitled to manufacture it."

The protection afforded to trade-marks has for its object the protection of trade only. In *Batt & Co. v. Dunnett*, Lord Halsbury, in the course of the argument, observed: "The Trade-Mark Acts are not for copyright in marks; they are to protect trade-marks. If you have no goods you are claiming copyright only, you are not claiming for the purpose of protecting your trade" (u).

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

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

(t) (1897) 2 Ch. p. 390; 14 R. P. C. p. 626.

(u) 16 R. P. C. p. 413 (1899).

Object of trade-marks to protect trade.

A Symbol.

What symbols
may be trade-
marks.

Before the Trade-Marks Registration Act, 1875 (*x*), 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 (*y*), 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 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 (*z*).

Applied or attached to Goods (*a*).

It is immaterial whether the mark is attached to the goods or to the covering in which they are sold (*b*). It may be impressed, stamped, cut, drawn, painted or stained on the goods themselves, as the words *Sykes' Patent* were in *Sykes v. Sykes* (*c*), 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 (*d*) tied on to them, or upon reels upon which the goods are wound, or on a card to which the goods are fastened (*e*). 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 (*f*). A device is not a trade-

The mark
must go to
market with
the goods;

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

(*y*) See below, pp. 397 *et seq.*

(*z*) See below, p. 34.

(*a*) See the *dicta* quoted above, pp. 26 and 27, and below, p. 189.

(*b*) *Singer Manufacturing Co. v. Wilson*, 2 C. D. p. 441, Jessel, M. R., and pp. 451, 455, James and Mellish, L. J.; 45 L. J. Ch. pp. 491, 496, 497 (1876).

(*c*) 3 B. & C. 541; 3 L. J. K. B. o. s. 46 (1824).

(*d*) *Edelsten v. Edelsten*, 1 De G. J. & S. 185 (1863), Westbury, L. C.

(*e*) Cf. *Chameleon Patents Manufacturing Co. v. Marshalls, Ltd.*, 17 R. P. C. 527 (1900), Kekewich, J., a passing-off case, where it was held that by such means a defendant might represent his goods to be those of the plaintiff.

(*f*) See *Powell's Tm.*, (1893) 2 Ch.

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 Pears' Soap.

Thus, in *Tompson v. Montgomery* (g), 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 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* (h) 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 (i), "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

388, (1894) A. C. 8; 10 R. P. C. 63, 195; 11 R. P. C. 4. (*Yorkshire Relish*.)

(g) 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.

(h) Note (f); 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, and *Day v. Riley and Whittaker*, 17 R. P. C. 517, Buckley, J., *Day & Sons' Black Drink* stencilled on packing cases.

(i) (1893) 2 Ch. p. 404.

and must sell the goods.

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?

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 (*k*) 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 the customer to buy the wine as that of the proprietor of the mark.

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

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 (*l*). 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" (*m*). Thus, a trade-mark used for carriages might be adopted as a new trade-mark for woollen goods (*n*).

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* (*o*), the defendant had invented a

(*k*) *Kinahan & Co.'s Application*, 10 R. P. C. 393 (1863), 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 *Moet v. Clybourn*, Seb. Dig. p. 316 (1877), Jessel, M. R.; and *Moet v. Pickering*, 8 C. D. 372; 47 L. J. Ch. 527 (1878), C. A.

(*l*) *Somerville v. Schombri*, 12 App. Ca. 453; 4 R. P. C. 179 (1887), on appeal from Malta; and see *Coleman v. Brown*, 16 R. P. C. 619 (1890).

As to registered trade-marks, see below, pp. 307, 366.

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

(*n*) Per Jessel, M. R., in *Singer Manufacturing Co. v. Wilson*, 2 C. D. p. 443; 45 L. J. Ch. 494 (1876). And see Chap. XV., on Infringement, below, p. 366. Cf. *The Australian Wire Importers' Tm.*, 41 C. D. 278; 6 R. P. C. 311, cited p. 217.

(*o*) 44 L. J. Ch. 90 (1874). So a trade-mark cannot be separated

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 under the mark, as the original sauce, an imitation of his own (*p*).

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

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 resell, 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-mark, although he commenced to deal as a merchant in the same goods (*q*). 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 (*r*).

It is clear, however, that the rights arising out of the possession of a trade-mark, registered or unregistered, are not limited to the exact kinds of goods for which the mark has been used; actions for infringement of a registered trade-mark are by virtue of sect. 77 limited to the goods for which the mark is registered, but, subject to that limitation, the extent of the goods to which the rights are limited is a question of fact in each case, depending to a great extent on the commercial connection between the kinds of goods in question, as, for instance, whether they are usually sold by the same class of persons (*s*).

from the goodwill of the business to which it has been attached; see below, pp. 324 and 343.

(*p*) Cf. *Birmingham Vinegar Brewery Co., Ltd. v. Powell*, (1897) A. C.

710; 14 R. P. C. 720.

(*q*) See below, p. 52.

(*r*) Below, p. 52; and see Chap. XII., p. 302, Effect of Registration.

(*s*) *Australian Wine Importers' Trn.*,

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* (ss), 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 (t). And the test of infringement laid down in all the cases is that the defendant's acts shall be calculated to pass off goods as the plaintiff's which are not his (u); and that is all that an ordinary form of the injunction granted in trade-mark cases restrains (x).

Offered for Sale in the Market.

The mark must be applied to goods offered for sale.

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 (y). And in *Lawson v. The Bank of London* (z), 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."

41 Ch. D. 278; 6 R. P. C. 311 (1889), C. A.; and *Eastman Photographic Materials Co., Ltd. v. John Griffiths Cycle Corporation, Ltd.*, 15 R. P. C. 105 (1898), Romer, J.; and see below, Chap. X., p. 237.

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

(t) 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 injunc-

tion in equity, 4 K. & J. 650, Wood, V.-C.; 30 L. T. 242; 31 L. T. 99.

(u) See below, p. 373.

(x) See per Cotton, L. J., in *Thompson v. Montgomery*, 41 C. D. p. 48, 6 R. P. C. 213 (1889); and see the judgment of Lord Halsbury, L. C., in *Reddaway v. Banham*, (1896) A. C. p. 207; 13 R. P. C. p. 225.

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

(z) 18 C. B. 84; 25 L. J. C. P. 188 (1856).

This dictum was cited with approval by Lord Cairns, in *Maxwell v. Hogg* (a). 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, Lord Cairns declared, unnecessary; but, he said (b), 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* (c), was that the article marked with the mark in question was actually a vendible article in the market (d).

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 defen-

Long user of
mark or proof
of actual
reputation
unnecessary.

(a) L. R. 2 Ch. 307; 36 L. J. Ch. 433 (1867).

(b) L. R. 2 Ch. p. 314; 36 L. J. Ch. p. 433.

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

(d) See also *Powell's Tm.*, (1853) 2 Ch. 388; 10 R. P. C. 63, 195, cited above, p. 29; and the observations of Halsbury, L. C., in *Batt & Co. v. Dunnett* (1899), 16 R. P. C. p. 413, cited *supra*, p. 27.

dant's counterclaim in *Marwell v. Hogg* (c), 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 (f).

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 Romilly declared in *Hall v. Barrows* (g), 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.

Mark must be distinctive.

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? (h).

(c) L. R. 2 Ch. 307 (1867); 36 L. J. Ch. 433.

(f) So it is unnecessary for the plaintiff in an infringement action to allege that the defendant is selling inferior goods under his mark: *Blofield v. Payne*, 4 B. & Ad. 410; 2 L. J. K. B. 68 (1833); *Edelsten v. Edelsten*, 1 De G. J. & S. 185 (1863), Lord Westbury, L. C.

(g) 32 L. J. Ch. p. 551 (1863); and see per Wood, V.-C., in

McAndrew v. Bassett, 33 L. J. Ch. 561 (1864).

(h) 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 Ld. Blackburn in *Orr-Ewing v. The Registrar of Trade Marks*, 4 App. Ca. p. 494, 48 L. J. Ch. 715 (1879).

“The right which a manufacturer has in his trade-mark,” Lord Cranworth said, in the *Leather Cloth Case* (i), “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* (k), 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 an article 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.” And in *Massam v. Thorley’s Cattle Food Co.* (l), James, L. J., said, “That in truth is the meaning and object and result of a trade-mark. It indicates this, that you may take this as a warranty that it has come from the particular manufacturer of the goods with which you have been hitherto pleased” (m).

But it is not necessary that the public should know the name of the trader who uses the trade-mark. In *Powell v. The Birmingham Vinegar Brewery Co., Ltd.*, there was evidence that many purchasers of “Yorkshire Relish” knew nothing of the plaintiffs, but in reference to this Lord Herschell said, “in the present case, it seems to me that ‘Yorkshire Relish’ means the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a particular manufacture, and that when a person sold ‘Yorkshire Relish’ as the appellants did, by selling it as ‘Yorkshire Relish’ and calling it ‘Yorkshire Relish,’ they represented to the public that it was that manufacture which was known as and by the name of ‘Yorkshire Relish.’” (n).

Not necessary that public should know the name of the owner of the mark.

A provision in the Registration Acts allows any “special

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

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

(l) 14 Ch. D. 748; 42 L. T. N. S. 851.

(m) See also the passage from the judgment of Rigby, L. J., in *Magnolia Metal Co.’s Tms.*, (1897) 2 Ch. p. 390; 14 R. P. C. p. 626, cited *supra*, p. 27.

(n) (1897) A. C. p. 715; 14 R. P. C. p. 730.

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 (o); and it has been 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 (p).

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 (q), 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 (r); 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 (s). 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 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.*

(o) As to what marks come within the proviso, see Chap. VIII., p. 184, below.

(p) *Hopkinson's Tm.*, (1892) 2 Ch. 116; 9 R. P. C. 102, Kekewich, J.

(q) As to marks common to the

trade, see below, pp. 135 and 204.

(r) Chap. VIII., p. 132.

(s) 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. 145.

Fox (l). 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 (u)* 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*, said (x) Mellish, L. J., must be "whether the use of it by other persons may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods." If 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 name of a new pattern.
Ford v. Foster.

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

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

(u) L. R. 7 Ch. 611 (1872): 41 L. J. Ch. 682.

(x) At page 628. See also *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.*, 17 R. P. C. 461 (1900), Buckley, J.

the mark *Eureka* to any shirts not manufactured by the plaintiff (*y*); 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 of the earlier 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 first case (*z*) had issued advertisements 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 plaintiff's 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" (*a*). 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

(*y*) For form of injunction, see L. R. 7 Ch. p. 634; Appendix, p. 750.

(*z*) *Singer Manufacturing Co. v. Wilson*, 2 C. D. 434; 45 L. J. Ch. 490 (1875); 3 App. Ca. 376; 47 L. J. Ch. 481 (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. See below, p. 40, note (*h*).

(*a*) Per Lord Cairns, 3 App. Ca. p. 385; 47 L. J. Ch. p. 485.

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 (*b*).

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 representation (*c*). 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 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 (*d*). 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.

Many of the same questions were discussed again in the case of the *Singer Manufacturing Co. v. Loog* (*e*). There the

Singer v. Loog.

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

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

(*d*) 3 App. Ca. p. 391; 47 L. J. Ch. p. 488; and see above, p. 14.

(*e*) 18 C. D. 395 (1879); 8 App. Ca. 15; 52 L. J. Ch. 481 (1882).

defendant had placed upon the machines which 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 (*f*); 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 Hansom cabs, he was unable to designate the article in any other way than by its known name (*g*). Lord Selborne, however, found as a fact that the term *Singer* did signify a system of construction for sewing machines known to the trade (*h*).

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

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 (*i*), "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

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

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

(*h*) 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.

(*i*) 8 App. Ca. p. 27; 52 L. J. Ch. p. 487; see also *Leonard and Ellis' Tm.*, 26 C. D. p. 297; 53 L. J. Ch. 603 (1881), C. A.

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."

The Liebig's Extract Case (k) 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 purported 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 (l).

On the other hand, a striking example of words, which in their primary meaning were purely descriptive, acquiring a secondary meaning—namely, that the goods described by them were the manufacture of a particular company—is afforded by the case of *Reddaway v. Banham* (m). The plaintiffs in that case had for many years made belting, consisting mainly of camel-hair, for machinery, and sold it under the name *Camel-hair Belting*. The defendants, who had sold similar belting under other names, commenced to sell it under the name *Camel-hair Belting*, and in most cases put that name only on the belting. The plaintiffs commenced an action for an injunction to restrain the defendants from using the word *camel* in such a manner as to pass off their goods as and for the plaintiffs' goods. The jury found (1) that *Camel-hair Belting* meant belting made

Secondary meaning of words originally common.

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

(l) In *Liebig's Extract of Meat Co., Id. v. Chemists' Co-operative Society, Id.* (1896), 13 R. P. C. 635, 736, it

was held, by Kekewich, J., to be proved that the plaintiffs' goods were known as "Liebig Company's Extract of Meat" or "The Company's Extract of Meat."

(m) (1896) A. C. 199; 13 R. P. C. 218.

by the plaintiffs as distinct from belting made by other manufacturers, and that it did not mean belting of a particular kind without reference to any particular manufacturer; they also found that the description was likely to mislead purchasers, and that the defendants had endeavoured to pass off their goods as the plaintiffs' goods. In spite of these findings, it was held by the Court of Appeal that *Camel-hair Belting* was a true description of the defendants' goods, and that they could not be restrained from using it, and the Court dissolved the injunction granted by Collins, J.; the House of Lords, however, reversed the judgment of the Court of Appeal. In Lord Herschell's judgment the following passages occur: "The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves, without explanation or qualification, by another manufacturer, would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B" (*mm*). And, replying to the argument that the defendants had only used a true description of their goods, he said, "I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used, to persons in the trade who will understand it, and be known and intended to understand it, in its secondary sense, it will none the less be a falsehood because in its primary sense it may be true" (*n*).

In *The Cellular Clothing Company v. Maxton & Murray* (*o*), it was, however, pointed out that such a case as the *Camel-hair Belting Case* was difficult to establish, and the House of Lords held that the plaintiffs in the *Cellular Case* had failed to prove that the word *Cellular* had the secondary meaning of identifying goods so described with the plaintiffs (*p*).

(*mm*) (1896) A. C. p. 210; 13 R. P. C. 228.

(*n*) (1896) A. C. p. 212; 13 R. P. C. p. 229.

(*o*) (1899) A. C. 326; 16 R. P. C.

397. See also *Parsons v. Gillespie*, (1898) A. C. 239; 15 R. P. C. 57.

(*p*) And see the judgment of Cozens-Hardy, J., in *Wolff v. Nopitsch*, 17 R. P. C. at p. 330; and the Scotch case, *John Dewar & Sons v. J. H.*

Where an article has been introduced as new and has been 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.

Name of goods made under an expired patent.

On this subject, Lord Herschell's Committee said in their report (q): "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. v. Shakespear* (r) and *The Linoleum Manufacturing Co. v. Nairn* (s) 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

Dewar, 17 R. P. C. 341, at p. 353, Inner House, First Division; and as to names obtaining a secondary meaning, see Chap. XVI., pp. 500 *et seq.*

(q) Report of 1888, p. xiv.

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

(s) 7 C. D. 834; 47 L. J. Ch. 430 (1878), Fry, J.

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.

The name given to a new article cannot be monopolized. *The Linoleum Case*.

In *The Linoleum Case* (ss), 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 (t), "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 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" (u).

The principle thus laid down has been approved and adopted in more recent cases. Thus, Lord Herschell, in *Reddaway v. Banham* (x), says: "Where a patentee attaches

(ss) *The Linoleum Co. v. Nairn*, 7 C. D. 834; 47 L. J. Ch. 430 (1878); followed in *Formalin Hygienic Co. Ltd.'s Application*, 17 R. P. C. 486 (1900), Farwell, J.; and *Cheseborough Co.'s Tm.*, 18 R. P. C. 191 (1901), Buckley, J. (*Vaseline*); cf. *Young v.*

Macrae, 9 Jur. n.s. 332 (1862), Wood, V.-C., *paraffin* not a trade-mark.

(t) 7 C. D. p. 837; 47 L. J. Ch. p. 432.

(u) See below, p. 243.

(x) (1896) A. C. p. 214; and 13 R. P. C. p. 230.

a particular name to the production he patents, that name becomes common property as the name of the patented article. It possesses, indeed, no other name. That name would necessarily be applied to it by all persons desiring to purchase the article. It is not descriptive of the name of a particular manufacturer, but of the article itself, by whomsoever it is patented."

In *The Magnolia Metal Co.'s Trade Marks* (y), Rigby, L. J., delivering the judgment of the Court of Appeal, said: "When the article is made under a secret process, or its manufacture is protected by a patent, no person who has not acquired the secret, or obtained a licence from the patentee, can manufacture it. Accordingly, it is established as a general rule, that when an article is made under a secret process, or where the manufacturer of it is protected by a patent, the manufacturer or patentee cannot by any means entitle himself to a monopoly in the use, after the secret process has been discovered or the term of the patent has expired, of the name by which the manufactured article is exclusively known whilst the secret is undiscovered or the term of the patent is unexpired. What exceptions this general rule may be subject to it is not necessary for the purposes of this case to inquire into." In the case last quoted from, the manufacture of the metal had been carried on in America under a secret process; but subsequently patents were taken out in America and the United Kingdom, and these patents were unexpired at the date of the application, which was for the removal, from the Register, of marks, one of which consisted of, and another of which included, the word *Magnolia*. One ground of the application was that magnolia metal was the name of a particular alloy; as to two of the marks in question the application succeeded on this ground, it being held that, before the date of the patent or the registration of the marks, the name *Magnolia* had been treated as the name of the article manufactured by the secret process, and therefore, independently of the question arising on the patents, the registration of these marks was bad.

The fact that the patent for the goods is bad is im-

(y) (1897) 2 Ch. 371; and 14 R. P. C. 621.

material, for a practical monopoly may be obtained by a bad patent (s); nor can a person who has given a name to an article which he has wrongly put forward as made under a patent be in a better position than if his statement were true (a). During the maintenance of the monopoly, either by the continuance of the patent or the non-discovery of the secret process, no one, of course, can use the name of the article for a different article so as to pass it off as that of the person having the monopoly (b). On the other hand, although the patent is unexpired, if it be for a process, and a method of making the article without infringing the patent be discovered, a name which indicates the article may be used notwithstanding the existence of the patent (c).

Whether it is open to a patentee to show that, after the expiration of the patent, the word which was the name of the article when the patent expired has subsequently come to denote his manufacture only, is a question which has not arisen for decision. But, although it would no doubt be difficult to establish such a case, it would seem to be possible.

Article
formerly made
under secret
process.

It may, perhaps, be doubted whether the rule in the case of an article manufactured under a secret process is as absolute as in the case of a patented article (d), and whether it is not open to the manufacturer of an article made by him under a process formerly secret but since discovered to show that the mere use of the name by another person would

(s) *Formalin Hygienic Co. Ltd.'s Application*, 17 R. P. C. 486 (1900), Farwell, J.; see also *Magnolia Metal Co.'s Tms.*, *supra*, and *Wincer v. Armstrong*, below, note (f). The *Magnolia* patent was subsequently revoked: *Miller's Patent*, 15 R. P. C. 205.

(a) *Mcaby & Co., Ltd. v. Triticine, Ltd.*, 15 R. P. C. 1 (1898), North, J.; and see below, p. 401, as to misrepresentation respecting patents.

(b) *Birmingham Vinegar Co., Ltd. v. Powell*, (1897) A. C. 710; 14 R. P. C. 720; the question of the rights of the parties if the defendants had been selling the same article as that known

as "Yorkshire Relish" did not arise on the facts, as found.

(c) *Young v. Macrae*, 9 Jur. n.s. 322. With respect to this case, the subsequent comments of Wood, V.-C., on his decision contained in *Braham v. Bustarri*, 1 H. & M. 447 (1863), should be borne in mind: see Lord Macnaghten's judgment in *Reddaway v. Banham*, (1896) A. C. at p. 220; 13 R. P. C. 234.

(d) The means by which the monopoly is obtained is different, and in the case of a secret process the rule cannot be based upon an implied condition in the grant by the Crown.

deceive purchasers into the belief that the goods were those of the original manufacturer, or, in other words, to show that the name indicates not merely the article but the article manufactured by him (e).

If a man registers a new design, and gives the article made in accordance with that design a name, that name describes the article, and it may, after the expiration of the protection, be used for that purpose by other persons (f). Under registered design.

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." Original.

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 rule adopted in the analogous case of a trader using his own name (h), the Courts would not interfere to altogether restrain Name of the place of origin.

(e) The question was left open in the House of Lords in the *Yorkshire Relish Case*; but the proposition as laid down by Lindley, L. J., in the Court of Appeal, (1896) 2 Ch. at p. 72; 13 R. P. C. at p. 252; and approved by Lord Davey, (1897) A. C. at p. 717; 14 R. P. C. at p. 732, is not so absolute as in the case of a patented article. See also the judgment of Rigby, L. J., in the *Magnolia Case*, quoted *supra*, p. 45, and Chap. XIX., p. 538.

Co., 16 R. P. C. 167 (1899), Byrne, J. (*Wincer interceptors*).

(g) *Cocks v. Chandlers*, L. R. 11 Eq. p. 447; 40 L. J. Ch. p. 575 (1871); see also *Broune v. Freeman* (1), 12 W. R. 305 (1864), Wood, V.-C.; S. C. (2), W. N. (1873), 178 (*Chlorodyne*), L. J.J.; *Lazenby v. White*, 41 L. J. Ch. 354, n. (1870) (*Harvey's Sauce*).

(h) See *Turton v. Turton*, and *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, below, pp. 505, 508.

(f) *Wincer & Co. v. Armstrong &*

the use of the name in question by a second trader who is 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 such a way as that his goods are clearly distinguished from those of the other trader (*i*).

*Anatolia
liquorice.*

In *McAndrew v. Bassett* (*j*) 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 monopolized 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."

*Seixo v.
Provezende.*

In *Seixo v. Provezende* (*k*), part of the plaintiff's trade-marks consisted of the word *Seixo*, which was his own name and was 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

(*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: *Thompson v. Montgomery*, (1891) A. C. 217; 8 R. P. C. 365; above, p. 29. The case was one of deliberate fraud; but, in view of the *Valentine Case*, it may be doubted whether the same result

could not have been reached without proof of fraud. The recent case of *Cash v. Cash*, cited p. 508, is the only case of a person being absolutely restrained from using his name in a certain trade.

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

(*k*) L. R. 1 Ch. 192; 14 L. T. N. S. 314 (1865).

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 defendant's 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 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 (*l*), and, on appeal, Cranworth, L. C., upheld this decision. "Assuming the truth of what is contended for by the defendants," the Lord Chancellor said (*m*), "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."

In the *Glenfield Starch Case* (*n*), 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 plaintiff's 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*. *Glenfield starch.*

"I take it to be clear from the evidence," Lord Westbury said (*o*), "that, long antecedently to the operations of the

(*l*) See form of injunction which was approved by the H. L. in *Montgomery v. Thompson* (note (*p*)), L. R. 1 Ch. p. 194; Appendix, p. 749.

(*m*) L. R. 1 Ch. p. 198; 14 L. T. N. S. p. 316.

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

(*o*) L. R. 6 H. L. p. 521.

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 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 was followed and approved by the House of Lords in the *Stone Ales Case* (*p*) in the year 1891, which was a very similar case (*q*).

But a name which originally begins in its use as a geographical term, and long continues to be used as such, cannot readily cease to be a geographical term and acquire the secondary meaning above referred to (*r*).

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

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* (*t*).

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*

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

(*q*) See also *Bewlay & Co., Ltd. v. Hughes*, 15 R. P. C. 290 (1898), where North, J., on an interlocutory motion, restrained the use by the defendant of *Dindigul* in connection with cigars, without clearly distinguishing such cigars from the plain-

tiffs' cigars; but the injunction was not to prevent the defendant from describing any cigars sold by him, in fact made of *Dindigul* tobacco, as being so made.

(*r*) Per Cozens-Hardy, J., in *Wolff v. Nopitsch*, 17 R. P. C. 321, at p. 330 (1900).

(*s*) Act of 1888, s. 10 (1) (e), below, p. 178; see also p. 166.

(*t*) *The Leather Cloth Co. v. The American Leather Cloth Co.*, 11 H. L. C. 523; 35 L. J. Ch. 53 (1865).

Advertisement of the goods not a trade-mark.

Leather Cloth Case.

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 (u), but on appeal (x) 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, Lord Westbury said (y): "I am satisfied that I ought to have regarded this affix to the plaintiff's 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 (z), by Malins, V.-C., who distinguished the case before him from two earlier cases, in one of which (a) words meaning *exactly 12 yards*, printed in three foreign languages, and placed upon long cloth, and in the other (b) the words *Excelsior White Soap*, had been accepted as trade-marks.

And in *Chearin v. Walker* (c), a tablet bearing the words *G. Chearin'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 (d), "is an inscription which he chooses to place or bake on his filters,

Chearin v. Walker.

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

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

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

(z) *Raggett v. Findlater*, L. R. 17 Eq. p. 29; 34 L. J. Ch. 64 (1873). This case and the others here cited must be taken subject to the law established by *Reddaway v. Banham* (*supra*, p. 41), that words *prima facie* of a descriptive meaning may acquire

a secondary meaning if they lose their ordinary meaning and come to indicate the goods of a particular manufacturer.

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

(b) *Braham v. Bustard*, 1 H. & M. 447; 9 L. T. n.s. 199 (1863), Wood, V.-C.

(c) 5 C. D. 850; 46 L. J. Ch. 686 (1876), C. A.

(d) 5 C. D. p. 862.

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

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

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

The office of the trade-mark is to indicate some connection between the goods to which it is applied and a particular trader (*f*); but it is not necessary that the buyers should know the name of the trader, it is sufficient that the mark identifies a particular manufacture (*g*). What this connection is, is immaterial; but it should be a constant one. If a maker chooses to sell under a trade-mark which is 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 (*h*).

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 (*i*), that the

(*e*) 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. 115.

(*f*) See the *dicta* cited above, p. 26.

(*g*) See *Birmingham Vinegar Brewery Co. v. Powell*, (1897) A. C. 710; and 14 R. P. C. 720; and *supra*, p. 35.

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

description. See *Starcy v. Chilworth Gunpowder Co.*, 24 Q. B. D. 90; 59 L. J. M. C. 13 (1890), Lord Coleridge, L. C. J., and Mathew, J. See also *Johnson v. Raylton*, 7 Q. B. D. 438 (1881), a case of implied contract; and the Merchandise Marks Act, 1887, Book II., Chap. I., pp. 569 *et seq.*

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

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 (*k*), the words used were "manufacture, workmanship, production, or merchandise."

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 question arose in *Hirsch v. Jonas* (*l*). There the plaintiff bought cigars of a foreign maker, who, at his request, placed a label bearing the words *Gloria de Inghlaterra Havannah*, which had been 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. (*m*), "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 Inghlaterra 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.

Trade-mark
of selector
of goods.

Hirsch v.
Jonas.

(*k*) Sect. 1, quoted above, p. 25.

(*l*) 3 C. D. 584; 45 L. J. Ch. 364
(1876).

(*m*) 3 C. D. p. 586; 45 L. J. Ch.
p. 365.

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" (*n*).

In *Robinson v. Finlay* (*o*) 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.

Designer for
another
person.

A servant who designs a mark which his employer adopts and uses has no claim in regard to it, and is not entitled after leaving his employment to use the mark on his own goods (*p*).

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 given above (*q*), 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 (*r*). But registration, or, rather, the application for registration, is now to be deemed equivalent to the public use of the registered trade-mark (*s*), 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

(*n*) Cf. *Knott v. Marshall*, W. N. (1894) 214, where a person who bought from the manufacturer in bulk, and put the goods up in distinctive packets, was held by Chitty, J., to be entitled to restrain another purchaser from the manufacturer from imitating this get-up.

(*o*) 9 C. D. 487; 39 L. T. N.S. 398 (1877), Bacon, V.-C., and C. A.; *Jones' Tm.*, 53 L. T. N.S. 1 (1885),

C. A.

(*p*) *Roger's Tm.*, 12 R. P. C. at p. 156 (1895), North, J.

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

(*r*) See Chap. VI., Sheffield Marks, below, p. 101.

(*s*) Act of 1888, s. 17, replacing sect. 75 of the Act of 1883, and sect. 2 of the Act of 1875; below, p. 304.

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 (*t*).

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

(*t*) Act of 1883, s. 76, replacing p. 304.
sect. 3 of the Act of 1875.

(*u*) *Hudson's Tm.*, 32 C. D. 311; (x) Chap. VIII., What may be
3 R. P. C. 155 (1886), C. A.; below, Registered, p. 115. Chap. XII.,
Effect of Registration, p. 302.

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 established 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
Sheffield
Register.

There are also Registers at Manchester and Sheffield. The former, a copy of the Register at the Patent Office, so far as

(*a*) Sects. 1 and 7.

(*b*) 25, Southampton Buildings,

Chancery Lane, London, E.C.

(*c*) Act of 1883, s. 114,

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*).

By sect. 101 of the Act of 1883, the Board of Trade may from time to time make general rules, subject to the provisions of the Act, for regulating the practice of registration, for classifying goods and for certain other purposes, and may alter or amend the forms in the First Schedule to the Act. The trade-mark rules and forms at present in force under this section are those of 1890, as amended by those of 1897 and 1898 (*f*).

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 (*g*), 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 (*h*). 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 (*i*). The business in relation to trade-marks is, in practice, undertaken by the Registrar of Trade-Marks on behalf of the Comptroller.

(*d*) Below, p. 718.

(*e*) As to the Manchester office, see below, p. 113, and as to the Sheffield registry, p. 106.

(*f*) See App., p. 691.

(*g*) 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.

(*h*) Sect. 95. See below, p. 74.

(*i*) Sect. 82 (4).

Entries on
the Register.

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 (*k*), the date of the application for registration (*l*), a statement of the class or classes of goods for which the mark is registered (*m*), disclaimers under sect. 74 of the Act (*n*), a note of the orders of the Court made under sects. 62, 69, 72, 90, or 92, and affecting the mark (*o*), and such other particulars as the Comptroller thinks necessary (*p*). 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 goods forming part only of a class, or to restrict the manner of use of his mark (*q*), and in regard to other restrictions on the full rights ordinarily conferred by a simple registration. It has been decided that notes expressing a condition of registration that the mark should only be used, or should not be used, within a certain geographical area ought not to be entered on the Register (*r*).

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 (*s*), 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 (*t*).

Title con-
ferred 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 (*u*), by which, and by which

(*k*) Rule 32.

(*l*) Rule 34.

(*m*) Sect. 65. See form of application, Form F., Appendix, p. 706.

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

(*o*) Rule 46.

(*p*) Rule 34.

(*q*) See below, pp. 219 and 282; and *Re Ratone & Co.*, Seb. Dig. p. 395 (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.

But as to entering notes of undertakings to confine the use of a mark to a certain district, see now *Dewhurst's Tm.*, note (*r*), and below, p. 219.

(*r*) *Dewhurst's Tm.*, (1896) 2 Ch. 137; 13 R. P. C. 288, C. A.; and see below, p. 219.

(*s*) Sect. 85. Rule of 1876 (22), cf. Companies Act, 1862, s. 30.

(*t*) *De Otaduy's Tm.* and *Mitchell & Co.'s Tm.*, above, note (*q*).

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

alone, title to a trade-mark was acquired before the Acts (*x*). Registration confers a right to the exclusive use of the mark (*y*), and, in the case of any trade-mark which is capable of registration, except an old mark of which registration has been refused, it is a condition precedent to any proceedings for the infringement of the trade-mark (*z*). The person registered as proprietor has power to assign the trade-mark (*a*).

Provision is made for the rectification of the Register, and also for its alteration in any non-essential particular, by order of the Court (*b*), and for the correction of clerical errors (*c*), and the entry of changes of address (*d*), by the Comptroller.

Alterations of the Register.

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 (*e*).

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 (*f*).

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 (*g*), has come to an end, and it may also be removed on the ground that at the time of registration the applicant had no *bonâ fide* intention

Removal of entries.

(*x*) See the last Chapter.

(*y*) Sect. 76. See Chap. XII.; below, p. 302, Effect of Registration.

(*z*) Sect. 77. See Chap. XII.; below, p. 312.

(*a*) Sect. 87. See Chap. XIII., p. 324.

(*b*) Sects. 90 and 92. Rules 46 to 50. See Chap. XI.; below, p. 262, Rectification of the Register.

(*c*) Sect. 91.

(*d*) Rule 48.

(*e*) Sect. 93; below, p. 640.

(*f*) Sect. 87. Rules 36 to 40. See Chap. XIII.; below, p. 324, Assignment and Devolution of Trade-Marks.

(*g*) Sect. 70. *Ralph's Tm.*, 25 C. D. 194; 53 L. J. Ch. 188 (1883), Pearson, J.; and *Batt's Tm.*, *infra*, note (*h*). There is no rule in the present code corresponding to r. 34 of the Rules of 1876, which was as follows:—
“The Court may, on the application of any person aggrieved, remove any trade-mark from the Register on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not engaged in any business concerned in the goods with respect to which a trade-mark is registered.” See Chap. XIV.; below, p. 338.

of using it (*h*), or after fourteen years, for non-payment of fees, under sect. 79 (*i*), or whenever the mark is on the Register without sufficient cause (*k*). In the case of non-payment of fees a record of the removal and of the cause thereof is entered on the Register (*l*).

Inspection of
the Register.

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 (*m*) and days of which due notice is given at the Patent Office, and times when the Register is required for any purpose of official use (*n*).

Searches.

It is generally advisable before offering a trade-mark 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 (*o*), and it is often necessary for other purposes. The Comptroller does not undertake to make searches except in connection with formal applications for registration (*o*), 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 :—

Indexes.

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.

(*h*) *Batt's Tm.*, (1898) 2 Ch. 432 ; 15 R. P. C. 262, 534, Romer, J., and C. A. ; and in House of Lords, sub nom. *Batt v. Dunnett*, (1899) A. C. 428 ; 16 R. P. C. 411.

(*i*) Page 349.

(*k*) See the judgment of C. A. in *Batt's Tm.*, *supra* ; and below, Chap. XI., Rectification of the Register, p. 277,

(*l*) Rule 47.

(*m*) 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.

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

(*o*) Instructions (7). See sects. 72 and 73, and Chap. X. ; below, p. 211.

II. Index of devices—*continued*.

- (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 insure 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 (*p*), that a catalogue of words rejected should be kept, has not been followed.

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 (*q*). 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 (*r*). 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 (*s*).

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

(*p*) Report of 1888, p. ix.

(*r*) Sect. 89.

(*q*) Sect. 88. For fees, see Appendix, p. 703.

(*s*) Sect. 96.

purposes; and the fees payable for the certificates vary according to the uses which they are to serve (*t*).

Patent Office seal.

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

Notices and documents may be sent by post.

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 (*x*).

(*t*) For fees, see Appendix, p. 703; and for form of request for certificates, Forms L., R., S., T.1, and form of certificate U.; below, pp. 709 *et seq.*

(*u*) Sect. 84.

(*x*) 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, as amended by the Act

of 1888; and subject to the provisions of the Acts, the practice of registration is regulated by the Trade-Marks Rules, 1890, as amended by those of 1897 and 1898. Of the sections mentioned, 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—

Sect. 62.
Application
for registra-
tion.

“ (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.

“ (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 (*g*), if any, registration is to be permitted.

“ (5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court (*h*); and in that

(*a*) Chap. VIII., p. 115.

(*b*) Chap. X., p. 212.

(*c*) Chap. IX., p. 197.

(*d*) Act of 1888, s. 8. The words in italics were repealed by the Act

of 1888.

(*e*) Chap. V., p. 96.

(*f*) Page 86.

(*g*) See below, p. 92.

(*h*) Page 88.

event the Court shall have jurisdiction to hear and determine the appeal and may make such order as aforesaid.

“[(6.) Where an applicant for the registration of a trade-mark otherwise than under an international convention (i) 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”] (k).

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 (l). 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 (m).

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

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 (p), or else the person who has invented (q) or selected, or caused to be invented or

The proprietor.

(i) Chap. XX., p. 545.

(k) Act of 1888, s. 8.

(l) *Apollinaris Co.'s Tm.*, (1891) 2 Ch. 186; 8 R. P. C. 137, Kekewich, J., and C. A.; and *Butt v. Dunnett*, (1899) A. C. 428; 16 R. P. C. 411. See Chap. XI., p. 262.

(m) *Mouson v. Boehm*, 26 C. D. 398; 53 L. J. Ch. 932 (1884), Chitty, J.; *Paine & Co. v. Daniell & Son's Brew-*

eries, (1893) 2 Ch. 567; 10 R. P. C. 219, C. A.

(n) Rule 7.

(o) Sect. 117. Rule 41.

(p) See Chap. II., p. 24.

(q) *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.

selected (*r*), a mark which is new in respect of the class of goods for which registration is sought.

An importer.

An importer of goods produced abroad, whether by manufacture, or—as, for instance, 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 (*s*). “The registration by the importer was wrong,” said Fry, L. J., who delivered the judgment of the Court of Appeal 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 (*t*); 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).

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.

Where the mark belongs to the importer.

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

(*r*) *I.e.*, for himself. See *Roger’s Tm.*, 12 R. P. C., at p. 156 (1895), North, J.

(*s*) *Apollinaris Co.’s Tm.*, (1891) 2 Ch. pp. 226—230; 8 R. P. C. 137, C. A.; and *European Blair Camera*

Co.’s Tm., 13 R. P. C. 600; 75 L. T. N.S. 63 (1896).

(*t*) Cf. the judgment of Jessel, M. R., in *Hirsch v. Jonas*, 3 C. D. 584; 45 L. J. Ch. 364 (1876), cited, p. 53.

course, that the goods are his manufacture, and this question must be decided according to the manner in which the mark and goods are put before the public (u).

But where a manufacturer abroad sold and sent goods bearing the words *Bull's-eye*, his trade-mark, to a person in England, the importation of such goods into this country, coupled with the circulation of certain pamphlets containing the words, was held to be such a use here of those words by the manufacturer as to prevent the importer setting up a claim to the exclusive use of them, although the words were only known to the public in connection with goods sold by the importer. And the registration of the words by the importer was ordered to be expunged (x).

Where a person has sold goods under a licence from the owner of a patent giving to them a certain name, a question may arise whether the name is the name of the article or indicates the goods of the person dealing in them. Thus, in *Freeman v. Sharpe* (y), the patented article had been sold by the licensees under the name *Capstan*, and they had registered that word as a trade-mark by arrangement with the plaintiffs. On the termination of the licence the licensees made and sold a somewhat different article under the name *Capstan No. 2*, and the plaintiffs, the owners of the patent, which was still unexpired, sought to restrain such use of the word *Capstan*, and to expunge the mark from the Register, on the ground that the word was the name of the article, and that the goodwill

Registration
by licensee
under patent.

(u) See *Hirsch v. Jonas*, note (t), and the *European Blair Camera Co.'s Tm.*, 13 R. P. C. 600 (1896); and Chap. II., p. 53. *Goodfellow v. Prince*, 35 C. D. 9; 56 L. J. Ch. 545 (1887), C. A.; *Robinson v. Finlay*, 9 C. D. 487; 39 L. T. N.S. 393 (1877), C. A.; and *Jones' Tm.*, 53 L. T. 1 (1885), C. A., were cases of joint ownership of trade-marks. In *Saxlehner v. Apollinaris Co.*, (1897) 1 Ch. 893; 14 R. P. C. 645, Kekewich, J. (a passing-off case), the defendants had had by contract for many years the exclusive sale in the United

Kingdom of *Hunyadi Janos* water, and on the determination of the contract they were restrained from using the word *Hunyadi* on other water without clearly distinguishing the same from *Hunyadi Janos* water, but it was held that a red mark which they had used on *Hunyadi*, and also on other waters, was their own trade-mark.

(x) *European Blair Camera Co.'s Tm.*, 13 R. P. C. 600 (1896), Stirling, J.

(y) 16 R. P. C. 205 (1899), North, J. (*Capstan Closets*).

of the defendants in the article had determined. Both the action and the motion to rectify failed, however, the Court finding that the name indicated goods manufactured and sold by the defendants in the action.

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 (z), and the proprietor may appoint an agent to act on his behalf for all purposes connected with the registration (a); but the Comptroller is not bound to recognize as such agent any person whose name has for certain reasons been erased from the Register of Patent Agents, and not restored (z). If the proprietor appoints an agent, he will be bound by his 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 (a). 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 (b).

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 (c). In some cases, where there has been no wrongful intention on the part of the agent, an assignment to the principal (d), or to his successor in business (e), has been permitted, or a rectification of the Register effected (f); but the authorities are conflicting upon the question whether

(z) Rule 9, as amended by T. M. R. 1898. Sect. 63. See also Instructions, 12, Appendix, p. 726. Official notices as to the authorization of agents have from time to time been given and published in the "Trade-Marks Journal"; for these, see below, Appendix, pp. 731, 732.

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

(b) Act of 1888, s. 9, amending

sect. 63 of the Act of 1883.

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

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

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

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

either of these courses ought to be allowed (*g*). Where an agent acting for two separate principals has, by mistake, registered the trade-mark of one in the name of the other, removal and a fresh application are necessary (*h*).

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 (*i*).
- (2.) It is not made in proper form (*k*).
- (3.) It is deemed to be abandoned (*l*).
- (4.) The mark tendered does not consist of or contain any of the essential particulars of a registerable trade-mark (*m*).
- (5.) The application is successfully opposed (*n*). 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 (*o*), or he may show that it is a common mark (*p*).
- (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 (*q*).

(*g*) See *Rivière's Tm.*, 55 L. J. Ch. 545 (1886), C. A., and note (*h*); and cf. *Grocott's Design*, 17 R. P. C. 139 (1900). See also Chap. XI., p. 283, below.

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

(*i*) Sect. 62 (1); above, p. 64.

(*k*) Sects. 62 (2), 64 (2), 74 (2), Rules 7—16, Instructions 8—14, Appendix, pp. 692 to 695, and 725, 726. See also *Wright, Crossley & Co.'s Application*, (1900) 2 Ch. 218; 17 R.

P. C. 386.

(*l*) Sect. 63, p. 76.

(*m*) Sect. 64 (1), Chap. VIII., p. 117.

(*n*) Sect. 69, pp. 79 *et seq.*

(*o*) See per Cotton, L. J., in *Hudson's Tm.*, 32 C. D. p. 320; 3 R. P. C. 155 (1886); *Royer's Tm.*, 12 R. P. C. 149 (1895), North, J. And see Chap. X., p. 211.

(*p*) Chap. VIII., p. 135. Of course a common mark is not distinctive, and therefore falls under the fourth objection.

(*q*) 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 (*r*).
- (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 (*s*).
- (9.) It comprises a scandalous design (*s*).
- (10.) Its use would, in the Comptroller's opinion, be contrary to law or morality (*t*).
- (11.) It contains one or more of the things which, according to the rules, cannot be registered as marks or parts of new marks (*u*), *e.g.*, the royal arms (*v*).

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 as are sanctioned by the terms of the Act (*r*). 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 (*y*).

(*r*) Sect. 72, pp. 212, 220.

(*s*) Sect. 73, p. 253.

(*t*) Sect. 86.

(*u*) Instructions 28—30: p. 728, below. See also the Official Notices, Appendix, p. 731. The Court will be slow to depart from a practice of the Office founded upon the Instructions. See *König and Ibbardt's Tm.*, (1895) 2 Ch. 236; 13 R. P. C. 449, Stirling, J.

(*v*) See *Habbeck v. Brown*, 17 R. P. C. 148 (1900), where Kekewich, J., whose decision was subsequently affirmed by the Court of Appeal (17 R. P. C. 638), said that the exclusive right to the royal arms could

not be claimed by the plaintiffs.

(*x*) In *Players' Application*, (1901) 1 Ch. 382; 18 R. P. C. 65, Cozens-Hardy, J., upheld the Comptroller's objection that the mark applied for was substantially the same as a previously registered mark of the applicants', the application for which had stated that they would in use vary the words *Navy Cut* (the exclusive use of which was disclaimed). The mark applied for contained the words *Navy Mixture*, the exclusive use of them being disclaimed.

(*y*) And for instance, *Deichurst's Application*, (1896) 2 Ch. 137; 13 R. P. C. 288, C. A.

“The Comptroller,” Kay, J., said, in *The Emollio Case* (z), “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 Importer's Case* (a), the same learned judge said: “Does it follow 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 (b) 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* (c). 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

(z) *Grossmith's Tm.*, 6 R. P. C. 180; 60 L. T. 612 (1889).

(a) 41 C. D. 278; 6 R. P. C. 311 (1889). See also *Turney & Sons' Tm.*, 11 R. P. C. at p. 44, (1894) North, J.

(b) *Quere wide.*

(c) *Eno v. Dunn*, 15 App. Ca. 252; 7 R. P. C. 311 (1890) Lords Watson, Herschell, and Macnaghten. Lords Halsbury and Morris dissented from the decision arrived at, which was that the mark in question was calculated to deceive.

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. 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 (*d*). "I cannot construe this section" (*e*), 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 (*f*), 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 Orr-
Ewing Case.*

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

(*d*) *Orr-Ewing v. The Registrar of
Tms.*, 4 App. Ca. 479; 48 L. J. Ch.
p. 717 (1879). Lord Cairns held the
same opinion, for he speaks of the ap-
pellant's right to be registered. Lord
Gordon, the remaining judge, con-
curred in Lord Blackburn's judgment.

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

(*f*) Upon the refusal of the Regis-
trar to register a mark under the old
Act, the procedure by way of appeal
was to move to rectify.

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 marks as have been refused registration, and the corresponding section previously in force contained a similar exception (g). 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* (h), 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."

In *The Solio Case*, Kekewich, J. (i), in upholding the refusal by the Comptroller to register the word *Solio*, gave considerable weight to the consideration that he would be overruling the discretion of the Comptroller, and reversing a practice of the office not to register in connection with photographic materials words indicating a connection with the sun; but in the Court of Appeal (k), and also in the House of Lords (l), where the registration was allowed, the question was treated

(g) Act of 1876, s. 1.

p. 709; 76 L. T. n.s. at p. 731 (1897).

(h) *Farbenfabriken Formals 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.

(k) 14 R. P. C. 487; 76 L. T. n.s. 732.

(i) *Eastman Photographic Materials Co.'s Application*, 13 R. P. C. at

(l) (1898) A. C. 571; 15 R. P. C. 476.

as being purely whether the word fell within one of the essential particulars defined in the Act (*m*).

Where the Comptroller takes objection to a mark on the ground of its resemblance to a registered mark, the matter is not concluded by the consent of the owner of the latter mark to the registration. Such consent may be evidence as to the probability of deception. It does not bind the Comptroller (*n*).

Comptroller to hear applicant before refusing the application.

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 (*o*).

The decision of the Comptroller against an applicant (*p*) for or against an opponent (*q*) of, the registration of a mark is subject to appeal to the Board of Trade, who may refer the question to the Court (*r*).

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 (*s*). It has been decided by the Court of Appeal in a patent case (*t*) that in any such case the Comptroller may so apply, notwithstanding that the matter involves a question of construction of the Act, and the Court will not in its discretion grant a mandamus against the Comptroller where he has properly taken the direction of the law officer under the section (*u*).

(*m*) And see *Linotype Co.'s Application*, 14 R. P. C. 900, (1897) Kekewich, J.

(*n*) *Dewhurst's Application*, (1896) 2 Ch. 137; 13 R. P. C. 288, C. A.

(*o*) Sect. 94. Rules 17 and 18.

(*p*) Sect. 62 (4), (5): *Re Australian Wine Importers, Limited*, 41 C. D. p. 285; 6 R. P. C. p. 314.

(*q*) Sect. 69 (3), (4).

(*r*) Page 86, below.

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

(*t*) *R. v. The Comptroller-General of Patents, Ex parte Tomlinson*, (1899) 1 Q. B. 909; 16 R. P. C. 233, Grantham and Kennedy, JJ., and C. A.

(*u*) See also the judgment of Lindley, L. J., in *Re Tm. Normal*, 35 C. D. p. 245; 4 R. P. C. p. 128 (1887), C. A.

But, of course, the direction of the law officer would not interfere with any right of appeal expressly conferred by the Act.

It is also provided by sect. 82 (3), that the Comptroller 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" (x).

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 (y), and by Rules 7 to 16 (z). A printed form of application corresponding with the form F. (a) 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.

Form of application.

When a trade-mark contains a word or words in other than Roman characters, a sufficient transliteration and translation to the satisfaction of the Comptroller of each of such words must be given; and where a trade-mark contains a word or words in a language other than English, the Comptroller may ask for an exact translation thereof (b).

The 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

Essential particulars and disclaimers.

(x) Report of 1888, p. vii.

15 of 1890.

(y) Page 725.

(a) Page 706. Sect. 62 (2).

(z) By the Trade-Mark Rules of 1897 and 1898, new rules have been substituted for Rules 9, 13, 14, and

(b) See the present Rule 15, Trade-Mark Rules 1897, below, p. 694.

there is any in the mark, and a copy of the statement and disclaimer are to be entered upon the Register (e).

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

The address of the applicant must in every case be stated in full in the form, and it is provided by the Act of 1888 (f) that, "where an applicant for the registration of a trade-mark, otherwise than under an international convention (g), 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."

Abandonment
of the appli-
cation.

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]."

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* (h), where the proprietors imagined that their trade-mark had been registered.

(c) This is an addition to sect. 64 (2) made by sects. 10 and 16 of the Act of 1888. It applies to all old marks which are not within sect. 63 (3) (ii). See *Wright, Crossley & Co.'s Application*, (1900) 2 Ch. 218; 17 R. P. C. 386.

(d) Page 115.

(e) Page 197.

(f) Sect. 8. Sect. 62 (6) of Act of 1883.

(g) Sect. 103. Chap. XX., p. 546.

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

Sect. 63 was held to be retrospective (*i*), 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 (*j*). By sect. 27 of the Act of 1888 the Act of 1883 is, as from the commencement of the Act of 1888, to take effect subject to the additions, omissions, and substitutions required by the latter, but nothing in the Act of 1888 is to affect the validity of any act done, right acquired, or liability incurred before its commencement (*k*).

The Comptroller may either accept the mark tendered or refuse it. Unless he refuses to entertain the application (*l*), he is directed to cause it to be advertised (*m*) in the official paper during such times and in such manner as he thinks fit (*n*). The advertisement comprises either a representation of the mark or a reference to the place where a specimen or representation is deposited for exhibition (*n*). 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, after the advertisement, to send in notice of opposition (*o*).

Advertisement.

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:—

“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 opposition to the application and the determination thereof, if he is satisfied that the applicant is entitled to registration, and on payment of

The registration.

(*i*) *Hayward's Tm.*, 54 L. J. Ch. 1003; 53 L. T. n.s. 487 (1885), Kay, J.; and *Jackson v. Napper*, *supra*.

(*j*) See note (*h*), *ante*, p. 76.

(*k*) As to this proviso, see *Loftus' Tm.*, *supra*; *Burgoyne's Tm.*, 6 R. P. C. p. 231 (1889), Chitty, J.; *Apolinaris Co.'s Tms.*, (1891) 2 Ch. at p. 201; 8 R. P. C. at p. 148, Stirling, J.; *Talbot's Tm.*, 11 R. P. C. 77; 63 L. J. Ch. 264 (1891), Stirling, J.

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

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

(*n*) Rules 27—30. Since the beginning of the year 1892, the advertisements have included all statements and disclaimers made in pursuance of sects. 64 and 74. See Official Notice, printed in the Appendix, p. 732.

(*o*) Sect. 69, as amended by sect. 13 of the Act of 1888. See p. 79, below.

the prescribed fee (*p*), 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” (*q*).

Death of the applicant before registration.

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 (*r*).

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 (*s*).

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 (*t*), grant a certificate that registration has been refused (*u*).

Amendments.

Amendment of application.

The Comptroller may, on request in writing accompanied by the prescribed fee (*x*), correct any clerical error in, or in connection with, an application for registration of a trade-mark (*y*), 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 (*z*). 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

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|---|---|
| (<i>p</i>) See Table of Fees, p. 703. | (<i>u</i>) Sect. 77. Rule 60. Instructions 35. |
| (<i>q</i>) See Chap. III., p. 56, on the Register, and Rule 34. | (<i>x</i>) 5s. |
| (<i>r</i>) Rule 33. | (<i>y</i>) Sect. 91 (a). |
| (<i>s</i>) Sect. 94. Rules 17—19. | (<i>z</i>) Act of 1888, s. 24, Act of 1883, as amended, and sect. 91 (d). |
| (<i>t</i>) £1, see Table of Fees, p. 703. | |

any person may be corrected, if the Comptroller think fit, and on such terms as he may direct" (a).

It is further provided that the time proscribed 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 (b). Enlargement of the pre-scribed 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 (c)—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 (d).

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 (e), which provide as follows:— Opposition to registration.

Sect. 69. “(1.) Any person may within *two months* [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 (f’).

“[(3.) If the applicant sends such counter-statement

(a) For the decisions under this with regard to notices of opposition, see p. 84, below.

(b) Rule 55.

(c) Cf. sect. 90. But see *R. v. The Comptroller-General of Patents*,

Ex parte Tomlinson, (1899) 1 Q. B. 909; 16 R. P. C. 233, C. A.

(d) Below, p. 85.

(e) These are summarised in par. 32 of the Instructions, Appendix, p. 728.

(f) Cf. sect. 63, above, p. 76.

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.]

Notice of
opposition.

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

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. (*h*) in the second schedule to these Rules, with such variations as circumstances may require.

Opposition on
the ground of
trade-mark
already on
the Register.

“ (2.) Where the grounds, 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

(*g*) Cf. sect. 62 (6), above, p. 65.

(*h*) Appendix, p. 708.

notice shall state the date of registration, and the number on the Register of such trade-mark already on the Register (i).

“(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 (k) 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 (l) the applicant shall leave at the Patent Office, Trade-Marks Branch, his evidence (m) by way of statutory declaration in answer, and deliver to the opponent copies thereof, and within seven days from such delivery the 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. Applicant's evidence.
Evidence in reply.

“(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. Closing of evidence.

“(6.) Either party making such application shall give notice thereof to the opposite party, who shall be entitled to oppose the application. Applications for leave to adduce further evidence.

“(7.) On the completion of the evidence, the Comptroller shall, upon application by either party, upon Form E. (n) in the Second Schedule to these Rules, and Appointment of time for hearing.

(i) Sect. 72, Chap. X., p. 212.
The date and number can be ascertained by inspecting the Register.

(k) See Rule 61, p. 702.

(l) *Ibid.*

(m) 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).

(n) Appendix, p. 705.

upon payment of the prescribed fee (*o*), 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 (*p*).

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

Summary of procedure on an opposed application.

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

- (1) Application (*q*).
- [(2) Notice of objection of Comptroller to entertain the application (*r*).
- (3) Notification by applicant to the Comptroller that he wishes to be heard, within one month of (2) (*s*).
- (4) Ten days' notice of appointment for hearing from Comptroller to applicant, and counter-notice by applicant within five days (*ss*).
- (5) Notice of appeal to Board of Trade, one month from decision of Comptroller, with grounds of appeal and case in support (*t*).]
- (6) Advertisement of application (*u*).
- (7) Notice of opposition, one month from advertisement.
Notice to be in duplicate, with grounds of opposition,

(*o*) £1, see p. 703, below.

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

(*q*) Page 74. Form F., p. 706.

(*r*) Rule 17.

(*s*) Page 74. Form E., p. 706. No

fee appears to be payable except in cases of opposition.

(*ss*) Rule 18.

(*t*) Rules 20—26, below, p. 695.

(*u*) Page 77.

and address in United Kingdom, and to be signed by opponent or his solicitor (v).

- (8) Counter-statement (in support of the application), one month from receipt of (7) from Comptroller. To be in duplicate with grounds of application (x).
- (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 (y).

Forms of the several notices and other documents referred to in the above table are set out in the Appendix, pp. 735 to 741.

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 (z), 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 (a). The alteration was made, and the power of the Comptroller to give the opponent the costs of an abandoned application was conferred upon the recommendation of Lord Herschell's Committee. It is somewhat curious that no provision has

(v) Form J., Appendix, pp. 708, 735.

(x) See form in Appendix, p. 736.

(y) Appendix, pp. 707, 737.

(z) Sect. 69 (3) and (4).

(a) As to the old practice, see *Re Simpson, Davies & Sons' Tm.*, 15 C. D. 525; 42 L. T. 675 (1880), Jessel, M. R.; *Anderson's Tm.*, 26 C. D. 409; 53 L. J. Ch. 664 (1884), Chitty, J. : Sebastian, 3rd ed., p. 434.

been made to give the applicant costs of an unsuccessful opposition before the Comptroller (*b*).

Objections
not contained
in the notice
of opposition.

It will be seen that the Comptroller in determining the case is, under Rule 31 (8), restricted to the objections raised by the opponent's notice. It has been said, however, that the Court must, upon an appeal to it, consider all objections to the registration of the mark (*c*). 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 (*d*) to refuse to register remains exercisable, until the registration has been actually effected.

Amendments
and enlarge-
ment of times
by the Comp-
troller.

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 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 (*e*).

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* (*f*), 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

(*b*) See p. 96, below.

(*c*) See p. 92, below.

(*d*) Under sect. 62, see p. 69, above.

(*e*) Page 78, above; cf. also Rule 53 (power to dispense with evidence), Appendix, p. 701.

(*f*) 7 R. P. C. 226 (1890), Mathew and Grantham, JJ.

in sect. 69, or after the case has been heard and disposed of before the Comptroller. In the case in question (*g*), 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 elsewhere (*h*). 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 of goods for which the mark propounded is sought to be registered as to be calculated to deceive (*i*). 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 (*k*).
- (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 (*l*), or as an advertisement (*m*), or as a mark common in the trade (*n*), and that, consequently, the applicant's mark is not distinctive.
- (iii.) That the mark propounded is his mark, and not that

(*g*) *Robertson, Sanderson & Co.'s Tm.*,
(1892) 2 Ch. 245; 9 R. P. C. 264.

(*h*) See above, p. 69, and the
Chapter on Rectification of the
Register, p. 262; Forms, Appendix,
pp. 735 *et seq.*

(*i*) Sect. 72 (2), p. 220.

(*k*) Rule 31 (2) and (8), above,
p. 80.

(*l*) Page 138.

(*m*) Page 139.

(*n*) Page 135.

of the applicant (*o*), or that it has been acquired by the applicant in fraud of his rights (*p*).

5. Appeal from the Comptroller.

By sect. 62 (4) and (5), and sect. 69 (3) and (4) (*q*), 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 his refusal to accept a mark, on notice of opposition from an opponent under sect. 69, to refuse registration (*r*). 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.
Notice of appeal.

“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.

Grounds of appeal to be stated.

“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.

Transmission of notice.

“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.

Directions by Board.

“23. The Board of Trade may thereupon give such directions (if any) as they may think fit with respect to

(*o*) Sects. 71 and 72 (1), p. 212, and see “proprietor,” p. 65. The mark may be copyright. As to a copy of a foreign picture, see *Schauer v. Field*, (1893) 1 Ch. 35; 62 L. J. Ch. 72, C. A.

(*p*) *Heaton's Tm.*, 27 C. D. 570 (1884), Kay, J. (*Hoop L. Iron*); *Moët's*

Tm., 7 R. P. C. 226 (1890), Mathew and Grantham, JJ.

(*q*) Above, pp. 64 and 79.

(*r*) See the judgments in *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. 479; 48 L. J. Ch. 707 (1879).

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 (s).

“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.**”

“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. **No appeal unless notice duly given.**”

“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.” **Evidence 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 (t). 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 (t). **Notice of and case on appeal.**

The case frequently concludes with a request that the appeal may be referred to the Court, and the Board of Trade, in that case, usually so refer it at once without hearing the parties themselves, in accordance with the recommendation

(s) The directions may include a direction to the applicant to serve a person materially interested, and also directions allowing fresh evidence to be adduced before the Court, if the latter think fit: *Application of Extract of Meat (Baron Liebig) Photo-*

graph Brand, Ltd., 17 R. P. C. 161 (1900), Cozens-Hardy, J., where, and also in the Appendix, at p. 740, the general form of the directions will be found set out.

(t) Pages 707, 737.

of Lord Herschell's Committee (u). 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 (x).

No appeal
to the Court
direct.

There is no appeal other 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 (y); but the authority referred to (y) does not directly apply to the case of an unsuccessful opponent, although much of the reasoning of 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 (z). No doubt, if the opposition had come before the Court the matter would be *res judicata* between the registered owner and the opponent (a).

The Court.

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

Reference of
rival claims
to the same
mark to the
Court direct.

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 sub-

(u) Report of 1888, p. vii.

(x) See the *Normal Co.'s Tm.*, 35 C. D. 231; 3 R. P. C. 269; 4 R. P. C. 123 (1886). The present practice of the Board is to refer the appeal when the mark has been refused under sect. 72, but (as a rule) to hear it when the mark has been refused under sect. 64.

(y) *Normal Co.'s Tm.*, and cf. *Woolley v. Broad*, (1892) 1 Q. B. 806; 9 R. P. C. 208, Lawrance and Wright, JJ.

(z) See, however, *Moët's Tm.*, 7 R. P. C. 226 (1890), Mathew and Grantham, JJ.

(a) 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.

(b) 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 W. R. 412 (1880), Hall, V.-C. The order is made an order of the High Court on motion of course, which may be *ex parte*: Seton, 5th ed., 746, and *Badische Anilin und Soda Fabrik v. Levinstein*, 4 R. P. C. at p. 470 (1887), Chitty, J.

(c) Sect. 117 (1). The provisions for Scotland, Ireland, and the Isle of Man do not seem to authorise a reference to any other Court.

mission is, unless the Court otherwise directs, by a special case, which may be settled by the Comptroller in case of difference (*d*).

The appeal may be brought before the Court on summons or by motion (*e*), 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 motion is now the more usual course (*f*); and, as a summons is always adjourned into Court, no expense is saved by proceeding by summons. Some of the judges (*g*) object to determining what are really trials of causes, often involving property rights of considerable value, in the hurry of motion-day; and if the question of registration depends on an issue of fact as to which cross-examination is necessary, the motion or summons is ordered to be set down in the witness list.

Appeal by summons or notice 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 (*h*); and the directions given, on a reference by the Board of Trade to the Court, generally direct service on or notice to such owners (*i*), and

(*d*) Rules 44, 45, p. 699.

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

(*f*) Procedure by summons was adopted in the *Apollinaris Cases*, (1891) 2 Ch. 186; 8 R. P. C. 137; in *Eno v. Dunn*, 15 App. Cas. 252; 7 R. P. C. 311 (1889); and in *Wright, Crossley & Co.'s Application*, 17 R. P. C. 386 (1900). *Eastman Photographic Materials Co., Ltd.'s Application*, 13 R. P. C. 707; 76 L. T. 730 (1896); *Extract of Meat (Baron Liebig) Photograph Brand, Ltd.'s Ap-*

plication, 17 R. P. C. 161 (1900); and *Linotype Co.'s Application*, 14 R. P. C. 900 (1897); *Kynoch & Co.'s Tm.*, 14 R. P. C. 905 (1897); *Linotype Co.'s Application (No. 2)*, 17 R. P. C. 380 (1900), are recent instances of motions.

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

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

(*i*) See *Dewhurst's Application*, (1896) 2 Ch. 137; 13 R. P. C. 288; and *König and Ebhardt's Tm.*, (1896) 2 Ch. 236; 13 R. P. C. 449; *Pomril, Ltd.'s Application*, 18 R. P. C. 181.

even though the Comptroller's refusal is not based on similarity to another registered mark, the Board of Trade may direct service on a person materially interested in the matter (*k*). If the appeal is allowed, or an opposition is disallowed, 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*).

Evidence upon the appeal.

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 the

(*k*) *Application of Extract of Meat (Baron Liebig) Photograph Brand, Ltd.*, 17 R. P. C. 161 (1900), Cozens-Hardy, J.

(*l*) Rule 46, p. 700.

(*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.

(*p*) Rules 31 and 61, pp. 697, 702.

(*q*) Rule 53, p. 701.

(*r*) *Farrow's Tm.*, 7 R. P. C. 260; 63 L. T. 233 (1890), Stirling, J.; and *Kingsford's Application*, 15 R. P. C. 197 (1898), where North, J., held that each declaration must be verified by the declarant himself.

Court may see fit to direct or permit (s); and such evidence is usually given on affidavit also (t). Where the application to the Court is by summons, the evidence should be completed before the summons is adjourned to the judge (u).

As already stated, the Court has no jurisdiction to amend the application (v) or notice of opposition on appeal (x). And it will not generally be influenced by an offer made in Court by the appellant to modify his application (y); 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 (z); and where, on an application to register a mark which included a crown, one of the grounds on which the Comptroller refused registration was the presence on the Register of certain marks, all of which included crowns, and on appeal to the Court the applicants offered to disclaim the exclusive use of the crown and certain words, the application was ordered to be proceeded with on the terms of the applicants making such disclaimer (a); and in the same case the applicants were allowed on the appeal to modify their application by limiting it to some only of the goods in respect of which registration was originally asked. 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

Modification of the application on the appeal.

(s) *Kingsford's Application, supra*, and *Application of Extract of Meat (Baron Liebig) Photograph Brand, Ltd.*, 17 R. P. C. 161 (1900), Cozens-Hardy, J.

(t) In accordance with Order XXXVIII. r. 1 of the Supreme Court Rules. For an order made by the judge as to evidence, see *Roger's Tm.*, 12 R. P. C. at p. 153 (1895), North, J.

(u) *Jackson v. Napper*, 35 C. D. 166; 4 R. P. C. 45 (1886), Stirling, J.

(v) *Players' Application*, (1901) 1 Ch. 382; 18 R. P. C. 65, Cozens-

Hardy, J., and the cases as to disclaimers, below, p. 202.

(x) *Robertson, Sanderson & Co.'s Tm.*, (1892) 2 Ch. 245; 9 R. P. C. 264, Stirling, J.

(y) It is therefore too late to offer to disclaim on the appeal, see below, p. 92, 202.

(z) *Swift Specific Co.'s Tm.*, 6 R. P. C. 352 (1889), Stirling, J.

(a) *König and Ebhardt's Application*, (1896) 2 Ch. 236; 13 R. P. C. 449, Stirling, J.

the registration to particular goods, the appeal was allowed on payment of costs (*b*).

The provisions contained in sect. 64 (2) as to the statement in the application of essential particulars, and disclaimer of the exclusive use of added matter, cannot be waived by the Court on an appeal from the Comptroller (*c*).

Registration
subject to
conditions.

By the express terms of sect. 62 (4) and (5), and 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. Conditions have been imposed in particular cases requiring 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 (*d*). A condition that the mark shall only be used within a limited geographical area will not be put on the Register (*e*). 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 (*f*).

The Court
must consider
all objections.

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 contended in the Court of Appeal that the only questions which could be considered by

Appeal after
actual regis-
tration.

(*b*) *Kenrick and Jefferson's Tm.*, 7 R. P. C. 321 (1890), Chitty, J.; but as to the weight to be given to consents by owners of other marks, see *Dewhurst's Application*, (1896) 2 Ch. 137; 13 R. P. C. 288, C. A.

(*c*) *Goodall's Tm.*, 42 C. D. 566; 38 W. R. 189 (1889), North, J.; *Meeus' Application*, (1891) 1 Ch. 41; 8 R. P. C. 25, Chitty, J.; *Wright, Crossley & Co.'s Application*, (1900) 2 Ch. 218; 17 R. P. C. 386, Byrne, J.;

Players' Application, above, note (*v*).

(*d*) Cf. Rectification, under sect. 90, Chap. XI., pp. 281 *et seq.*

(*e*) *Dewhurst's Application*, (1896) 2 Ch. 137; 13 R. P. C. 288, C. A.

(*f*) In *Eno v. Dunn*, 7 R. P. C. p. 314 (1890), in reply to a suggestion that the respondents were willing to distinguish their mark, Halsbury, L. C., said: "We have nothing to do with offers here."

the Court were those affecting the respective rights of the applicant and the opponent, treating the registration, subject to those rights, as properly made, and it was alleged that the user by the opponent on which he relied had been a fraud on the applicant, the Court of Appeal rejected the contention. "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 (*g*). And in the *Sanitas Case*, where the Comptroller had refused registration on the ground of the precedent registration of other 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" (*h*).

The Court has no power to direct the Comptroller to register part of the mark shown in the application (*i*).

If an unsuccessful opponent appeals, and then, after the appeal is referred to the Court, is willing to withdraw his opposition, an order should be obtained dismissing the appeal and directing the Comptroller to proceed with the registration (*j*).

6. Costs.

The Court has no jurisdiction to make the Comptroller pay costs (*k*), and the ordinary rule is that even a successful appellant pays the costs of the Comptroller as well as his own. Costs of the appeal.

(*g*) In *Re Arbenz' Application*, 35 C. D. 248; 4 R. P. C. 143 (1886), Kay, J., and C. A.; and cf. *Paine v. Daniell & Sons' Breweries, Ltd.*, (1893) 2 Ch. 567; 10 R. P. C. 217, C. A.; and *Talbot's Tm.* (1894), 11 R. P. C. 77, Stirling, J., rectification cases.

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

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

(*j*) *Crosfield & Son's Application*, 15 R. P. C. 754 (1898), North, J., required a consent brief to the dismissal to be produced.

(*k*) *Rotherham's Tm.*, 14 C. D. 585; 49 L. J. Ch. 511 (1880), C. A., unsuccessful appeal by Registrar; *Leaf's Tm.*, 33 C. D. 477; 3 R. P. C. 289 (1886), and *Van Duzer's Tm.*, 3 R. P. C. 243, both Bacon, V.-C.; *Colman's Tm.*, (1894) 2 Ch. 115; 11 R. P. C. 129, Stirling, J., all successful ap-

In the *Alpine Case* (*l*) 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 (*k*), although no suggestion of improper conduct or motive on the part of the Comptroller was made.

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 their case in part on an alleged exclusive right to the use of certain words in their label and they had no such right (*m*); and where the judge thought that both appellant and respondent had behaved improperly, no costs were given (*n*). And where opponents appealed from the decision of the Comptroller allowing registration, and succeeded on one ground of objection but failed on other grounds which involved issues of fact, the appellants were ordered to pay the costs so far as they had been increased by these issues, the respondents paying the other costs, with the usual set-off (*o*).

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 (*p*), and in another

peals by applicant from Comptroller; and *Eastman, &c. Co.'s Application*, (1898) A. C. p. 585; 15 R. P. C. p. 487, applicant successful in House of Lords. See below, "test case."

(*k*) See note (*k*), *ante*, p. 93.

(*l*) 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, C. A.; cf. Chap. XI., p. 301.

(*m*) *Hudson's Tm.*, 32 C. D. 311;

3 R. P. C. 155 (1886), (*Carbolic Acid Soap Powder*), C. A.

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

(*o*) *Wright, Crossley & Co.'s Application*, (1900) 2 Ch. 218; 17 R. P. C. 386, Byrne, J.

(*p*) *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*).

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 (*q*).

In a case in which an applicant appealed from the Comptroller's refusal to register, and succeeded only in the House of Lords, the House made no order as to the costs of the appeal to them, but expressed an opinion that the costs in the Court of Appeal, which the appellants had been ordered to pay to the Comptroller, should be repaid to the applicants, but not the costs of the hearing before Kekewich, J. (*r*).

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 (*s*); and the same rule applied under the old Act (*t*). 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 (*u*). This power was conferred upon the recommendation of Lord Herschell's Committee (*x*), in order to spare owners of existing marks from the expense of contesting unwarrantable applications to register marks which would prejudice their rights. But if the applicant puts in a counter statement it would seem that he has not abandoned his application within the meaning of the sub-section, although he does not appear at the hearing (*y*), and this is the view acted on by the Comptroller.

Costs before
the Comptroller.

(*q*) *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.

(*r*) *Eastman, &c. Co.'s Application*, (1898) A. C. at p. 585; 15 R. P. C. p. 488.

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

(*t*) *Brandreth's Tm.*, 9 C. D. 618; 47 L. J. Ch. 816 (1878), Jessel, M. R.

(*u*) Sect. 69 (5); p. 80, above.

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

(*y*) See sub-sects. (2) and (3).

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 that—

“ 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 marks put forward for registration are sought to be registered.

Classes.

Accordingly, goods have been divided by the draughtsman of the Trade-Mark Rules into forty-nine classes, and a mis-

(*a*) *Ante*, p. 28; 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. 324.

cellaneous and residuum class (*d*), 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 (*e*). For the convenience of applicants for registration an alphabetical guide to the classification of goods has also been drawn up and published (*f*), 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.

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 any right to sue for infringement of the mark 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 (*g*). In this case (*Edwards v. Dennis* (*g*)) 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, his trade-mark rights under the Acts must, in any event, be restricted to the goods with

Registration
and protection
for part of a
class.

(*d*) An Official Notice calls attention to the advisability of carefully specifying the goods for which a mark is intended, and no others, on an application to register in class 50. See Appendix, p. 732. See the remarks upon the classification in the
K.

Preface.

(*e*) Rule 6. Sch. 3. Appendix, p. 715.

(*f*) It can be procured at the Sales Department of the Patent Office.

(*g*) *Edwards v. Dennis*, 30 C. D. 454; 55 L. J. Ch. 125, C. A. (1885).

which the business assigned to him was concerned (*h*); 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 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 (*i*), 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 (*j*).

Trade-mark should not be registered for goods in which there is no intention to deal.

A broader question is whether registration can be properly made in respect of goods in which the applicant does not deal or intend to deal. This has recently been decided in *Batt & Co.'s Trade-Marks* (*k*). In that case the respondent, who was a general exporter and dealer, had registered two trade-marks in 1882 and 1889 respectively for all the goods comprised in class 42, and in 1897 an application was made to remove the marks from the Register on the ground that the respondent had never used them in connection with any goods in class 42, and had never had any *bonâ fide* intention of so using them. Romer, J., found these facts against the respondent and ordered the removal of the marks so far as regards class 42, and his decision was upheld in the Court of Appeal and the House of Lords. Lindley, M. R., delivering the judgment of the Court of Appeal, which was approved and affirmed in the House of Lords, held that the decision in *Edwards v. Dennis* (*l*) fairly governed the case in principle and stated the question of law as follows:—
"Can a man properly register a trade-mark for goods in which he does not deal, or intend to deal—meaning by intend-

(*h*) Act of 1875, s. 2. Act of 1883, s. 70.

(*i*) *Hargreaves v. Freeman*, (1891) 3 Ch. 39; 8 R. P. C. 237.

(*j*) Cf. Instructions, 31, *post*, p. 728.

(*k*) (1898) 2 Ch. 432; 15 R. P. C. 262 and 534, Romer, J., and C. A.; (1899) A. C. 428; 16 R. P. C. 411 (*sub nom. Batt v. Dunnett*).

(*l*) See note (*g*), above, p. 97.

ing to deal, having at the time of registration some definite and present intention to deal—in certain goods or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable? This question we answer in the negative” (m).

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 (n). 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* (o) and in *Harrison v. Woodroffe* (p). 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 (q). The restriction is effected by the entry of a note of the agreement 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 (r).

(m) Cf. also *Hedley's Tms.*, 17 R. P. C. 719 (1900), where a mark, on which an applicant for rectification based his application, had been registered but not used, and any intention to use it had been given up, Cozens-Hardy, J., said it could probably be removed from the Register.

(n) *Jay v. Sadler*, 40 C. D. 649; 6 R. P. C. 136 (1888), Kekewich, J.; *Hart v. Colley*, 44 C. D. 193; 7 R. P. C. 93 (1890), North, J.

(o) 30 C. D. 454, C. A. (1885).

(p) 42 C. D. 691; 7 R. P. C. 25 (1889); and see *Batt & Co.'s Tms.*,

supra.

(q) See, for instance, *Jelley's Application*, 51 L. J. Ch. 639 n. (1878), Jessel, M. R.; *Braby & Co.'s Applications*, 21 C. D. 222; 51 L. J. Ch. 637 (1882), North, J.; and *Kenrick and Jefferson's Tm.*, 7 R. P. C. 321 (1890), Chitty, J.

(r) *Keep's Tm.*, 26 C. D. 187; 54 L. J. Ch. 637 (1884); but, as to the particular restriction in this case, see *Dewhurst's Application*, (1896) 2 Ch. p. 143; 13 R. P. C. p. 97, C. A., where the Court distinguished between a condition of registration and

Series of Marks.

By sect. 66 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 (*s*).

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, and to each of the accompanying forms (*t*).

a note of an agreement; see also Chap. XI., p. 282; and Chap. X., p. 219.

(*s*) See *Barrow's Tms.*, 5 C. D. 353 (1877); 46 L. J. Ch. 450, C. A.

(*t*) Chap. IV., p. 75; Rule 14 as now in force, see T. M. R. 1897, and Instructions, 17; App. pp. 694 and 726. Separate electrotypes must be sent also, Rule 30, p. 696.

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 (a) 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 (b). The seventh of these regulations provided that no person should strike any mark upon his wares but that which was assigned him in the

The Cutlers' Company.

(a) See below, p. 106.

(b) Hunter's History of Sheffield; London, 1819, p. 118.

Lord's Court under a penalty of ten shillings. The cutlers had also a charter granted by the lords of the manor (c).

The incorporating Act, the Cutlers' Company Act, 1623 (d), 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 (e), 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 (f), 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 (g) 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 (h) 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 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

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

(d) 21 James 1, c. 31, local.

(e) 31 Geo. 3, c. 58, local.

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

(g) 41 Geo. 3, c. 97, local.

(h) 54 Geo. 3, c. 119, local.

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 (*i*), 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 (*k*). 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 (*l*).

Grant of a corporate mark.

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

Recent legislation and the Cutlers' Company.

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

(*k*) *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.

(*l*) See the evidence of Mr. Jackson, Qq. 113, 117, 142, and Mr. Hunter, Q. 1899; M. M. A. 1862.

false trade descriptions, it does not in any way affect the rights or privileges of the company. The Act of 1875 (*m*), 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 (*n*).

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 (*o*). 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 (*p*) further, (1) for copies of all the Sheffield corporate marks in force being 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 being 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 (*q*), and copies of the marks referred to, being delivered to the company (*r*); and (3) for notices of assignment and registration.

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

Mark re-
sembling a
corporate
mark not to
be registered.

“(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

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

(*n*) Sect. 81 (9).

(*o*) Sect. 9 (5).

(*p*) Sect. 9. Appendix, p. 686.

(*q*) See list below; p. 106.

(*r*) The company sometimes opposed the registration of marks which they deemed to resemble too closely corporate marks in use. See *Re Rosing*, 54 L. J. Ch. 975, n. (1878).

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 (s).

“(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 (s).

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 (t), 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 and not entered on the new Register before the closing of the former, should be deemed to have been abandoned (u).

The Act of 1883.

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

The Act of 1888.

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

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

(u) Sect. 81 (9).

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' Company 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 section is set out below, the words printed in italics being repealed, and those in brackets introduced by the amending Act (*x*). 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 (*y*); as regards the registration of other marks, the Company are substituted for the Comptroller, subject to his veto upon any particular registration (*z*), 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 (*a*). The rules relating to Sheffield marks are Rules 56 to 59 inclusive (*b*).

Section 81 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 (*c*) by the master, wardens, searchers, and assistants of that company, the following provisions shall have effect:

(1.) The Cutlers' Company shall establish and keep

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

(*y*) *Lambert's Tm.*, 5 R. P. C. 542;
6 R. P. C. 344 (1889), C. A.

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

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

(*b*) See below, p. 701.

(*c*) *I.e.*, registered under the Act of 1875.

The effect of
sect. 81.

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

Registration
by Cutlers'
Company of
Sheffield
marks.

Cutlers' Com-
pany to open a
new register;

at Sheffield a new Register of trade-marks (in this Act called the Sheffield 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 sub-section, all the trade-marks entered before the commencement of this Act (d) 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 (e) as defined in this section, all the trade-marks entered before the 1st day of January, 1889 (f), 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 (g), enter in the Sheffield Register, in respect of metal goods (h), all the trade-marks which shall have been assigned by the Cutlers' Company and actually used before the 1st day of January, 1884 (i), but which have

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

(d) 1st January, 1884.

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

(f) Commencement of the Act of 1888. As regards the registration of old corporate marks, the duties of the company are ministerial only: *Lambert's Im.*, p. 106, *supra*.

(g) *I.e.*, made according to the last

Form in the Rules, Appendix, p. 715.

The application must be in duplicate, Rule 56. The procedure is generally the same as on an application to the Comptroller: Chap. IV., p. 63.

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

(i) Commencement of the Act of 1883.

Application
for Sheffield
mark.

Notice to
Comptroller.

Veto by
Comptroller.

Entry on
Register also.

- not been entered in either of the said Registers] (*k*).
- (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] (*l*), 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 (*m*) :
- (4.) Every application so made to the Cutlers' Company shall be notified to the Comptroller in the prescribed manner (*n*), and unless the Comptroller within the prescribed time (*o*) 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 (*p*).
- (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 (*q*) :
- (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

(*k*) Act of 1888, s. 20 (1).

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

(*m*) 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. 706; see Instructions (33), p. 729.

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

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

(*p*) *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' Company 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).

(*q*) The Court is defined by sects. 117 and 111. Cf. sect. 81, sub-sect. (12), which gives an appeal from the Company to the Comptroller.

of the day of application to the Cutlers' Company, and have the same effect as if the application had been made to the Comptroller on that day :

- (7.) *The provisions of this Act, and of any general rules made under this Act, with respect to application for registration in the Register of trade-marks, the effect of such registration, and the assignment and transmission of rights in a registered trade-mark shall apply in the case of applications and registration in the Sheffield Register; and notice of every entry made in the Sheffield Register must be given to the Comptroller by the Cutlers' Company, save and except that the provisions of this sub-section shall not prejudice or affect any life estate and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield Register :*

- [(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 (r) of the holder

Procedure
and rules.

Widow's cor-
porate mark.

(r) The corporate marks were assigned for the life of the assignee and his widow: see *ante*, p. 103, and the Cutlers' Company Act, 1814, *ante*, p. 102.

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] (*).

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

Closing of Cutlers' Register.

(9.) At the expiration of five years from the commencement of this Act (r) 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 (y):

Registration for two Sheffield marks.

(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:

Firm or company.

(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 (z):

Appeal to the Comptroller.

(12.) Any person aggrieved (a) by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner (b), appeal to the Comptroller, who shall have power to confirm, reverse, or modify the

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

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

(u) *I.e.*, by sending a copy of the official paper, the Trade-Marks Journal, containing the application: Rule 68 (3).

(r) 1st of January, 1884.

(y) See Chap. XIV., p. 338.

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

(a) See sect. 90, p. 264.

(b) Form W., Appendix, p. 713. No time for appeal has been fixed.

decision, but the decision of the Comptroller shall be subject to a further appeal to the Court (e) :

(13.) So much of the Cutlers' Company's Acts as applies to the summary punishment of persons counterfeiting Sheffield corporate marks, that is to say, the fifth section of the Cutlers' Company's Act of 1814, and the provisions in relation to the recovery and application of the penalty imposed by such last-mentioned section contained in the Cutlers' Company's Act of 1791 (d), shall apply to any mark entered in the Sheffield Register (e) :

Counterfeit-
ing Sheffield
marks.

[(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] (f) :

Metal goods.

[(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]" (g).

Certificate of
master of the
company.

A complete collection of representations of pending applications in classes 5, 6, 7, 11, 12, 13, 14 and 22 is now kept for public inspection at the Cutlers' Hall, Sheffield. On an application in any of those classes being made at the Patent Office, one representation of the mark is forwarded by the Comptroller to the Cutlers' Company: see Official Notices printed in the Appendix (pp. 733, 734).

(e) Cf. sub-sect. (5), above.

(d) For the sections referred to, see p. 643, below.

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

(f) For the list of goods to which

the Cutlers' Company's Acts and the Act of 1875 applied, see pp. 103, 106; and for the list to which the un-amended Act of 1883 applied, see the repealed sub-sect. (2).

(g) The certificate is evidence: sect. 96; Rule 60, above, p. 61.

CHAPTER VII.

COTTON MARKS AND THE MANCHESTER OFFICE.

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The repealed
Cotton Marks
Rules.

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 was 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-mark, but that it should not be lawful to register any

(*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.

person as proprietor of any cotton mark in class (b) except in pursuance of an order of the Court.

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 Cotton
Marks Com-
mittee.

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*).

The Man-
chester
Branch Office.

A co-ordinate jurisdiction with that of the High Court of Justice is vested in the Court of Chancery of the County

The Palatine
Court of
Chancery.

(*d*) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. 479; 48 L. J. Ch. 707 (1879); H. L. reversing the judgment of the C. A., 8 C. D. 794; 47 L. J. Ch. 807 (1877).

that affixed to the application: see Appendix, p. 693.

(*e*) *Exp. Ede & Co.*, 28 W. R. 436 (1878), Jessel, M. R.; *Re Dugdale*, 49 L. J. Ch. 303; 28 W. R. 436 (1880), Hall, V.-C.; *Re Ward, Sturt and Sharp*, 50 L. J. Ch. 347; 44 L. T. n.s. 97 (1881), Hall, V.-C.; *Re Sykes*, 43 L. T. 626; 29 W. R. 235 (1880), Hall, V.-C.; and see Sebastian, 4th ed. p. 519, where the cases are collected.

(*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 it 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 (7) and (34).

(*f*) By the existing r. 13, four representations of marks must accompany an application to register in the cotton classes in addition to

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 registration of oriental words as part of a mark, a matter which greatly concerns the cotton trade, will be found dealt with later (*l*).

(*k*) Act of 1888, s. 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 recom-

mend 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).

(*l*) The present Rule 15, which was substituted by the Trade-Mark Rules, 1897, deals with marks containing words in characters other than Roman, or in a language other than English: see also Instructions (14), p. 726. The Office formerly refused to register words in oriental character, except "Chop" and "Hong" marks, *i.e.*, firm names in Chinese: see *Deichurst's Application*, (1896) 2 Ch. p. 141; 13 R. P. C. p. 292.

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 1888, and the italic type showing the parts of the Act of 1883 which have been repealed.

“**64.** (1.) For the purposes of this Act, a trade-mark Sect. 64. 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* (*c*) ;
[or
- (d) **An** invented word or invented words (*d*) ; or]
- [(e) **A** word or words having no reference to the character or quality of the goods (*e*), and not being a geographical name (*f*).]

(2.) (*g*) 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 (*h*), 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] (*g*).

Additions and disclaimers.

[(3.) Provided as follows:]

[(i.) **A** person need not under this section disclaim

(a) Page 124.

(b) Page 129.

(c) For references, see p. 115.

(d) Page 171,

(e) Page 178.

(f) Page 182.

(g) See Chap. IX., p. 197.

(h) See Chap. IV., p. 75.

his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof.]

(ii.) *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* (i).

Sect. 10 of Act of 1875.

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

“ 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 (k) ; or

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

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

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 (n) may be registered as such under this Act” (o).

New marks may be registered.

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 over any

(i) Page 184.

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

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

(m) (c) adds “ brand,” and (d) and

(e) admit the word-marks.

(n) 13th of August, 1875.

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

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 (*p*). 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 (*q*). "In my opinion," Cotton, L. J., said, in *Hudson's Case*, "the language (of the Act of 1875 (*r*)), 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."

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 (*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 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

Applicant must intend to use the mark.

(*p*) See above, Chap. II., p. 33.

(*q*) *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; 5 T. L. R. 232 (1889), North, J.

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

(*s*) *Apollinaris Co.'s Tm.*, (1891)

2 Ch. 186, see at p. 234; 8 R. P. C. 137, C. A.; and *Batt & Co.'s Tm.*, (1898) 2 Ch. 432; 18 R. P. C. 262 and 534, Romer, J., and C. A.; and (1899) A. C. 428; 16 R. P. C. 411; *sub nom. Batt v. Durnett*. See also as to infringement of an unused mark, per Cotton, L. J., in *Hudson's Tm.*, 32 C. D. p. 319; 3 R. P. C. 155; and *Edwards v. Dennis*, 30 C. D. 454; 55 L. J. Ch. 125 (1885), C. A.; and Chap. XV., below, p. 367.

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 (*u*). And where marks had been registered for seventeen years and there was no proof of user in a particular class, and it was found as a fact that there was never any *bonâ fide* intention to use the marks for goods in that class, they were removed from the Register (*x*). "A question of law then arises," said Lindley, L. J., in delivering the judgment of the Court of Appeal in *Batt's Case*, "which may be stated shortly as follows:—Can a man properly register a trade-mark for goods in which he does not deal, or intend to deal—meaning by intending to deal, having at the time of registration some definite and present intention to deal in certain goods or descriptions of goods, and not a more general intention of extending his business at some future time to anything which he may think desirable? This question we answer in the negative. To answer it otherwise would be unduly to strain the language of the Acts relating to trade-marks, and to render those Acts extremely mischievous, instead of beneficial to trade and commerce" (*y*). The judgment of the Court of Appeal was affirmed by the House of Lords (*z*).

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 a mark on the Register was properly qualified for registration or ought to be expunged under sect. 90, must be considered with reference to the law in force at the date when the registration complained of was

(*u*) *Apollinaris Co.'s Tm.*, (1891) (1900).
2 Ch. 186, see at p. 234; 8 R. P. C.
137, C. A.

(*x*) *Batt & Co.'s Tm.*, *supra*, note (*s*).
See also *Ashton's Tm.*, 48 W. R. 389

(*y*) (1898) 2 Ch. at p. 439; 15
R. P. C. at p. 538.

(*z*) *Ubi supra*, note (*s*).

made, or is taken to have been made (a), 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 (b) and the Act of 1888 contain saving clauses (c), 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, however, it made no difference (d). So, in *Burgoyne's Case* (e), 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."

What Act applied to pending registrations.

In the *Apollinaris Case* (f), 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.

Section 10 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 (g).

Sect. 10 is purely restrictive.

(a) See the section, and *Ward, Sturt and Sharp's Tms.*, 50 L. J. Ch. 347; 44 L. T. 97 (1881), Hall, V.-C.; and *Re Borvil Tm.*, 13 R. P. C. 388 (1896); 2 Ch. 604, per Lindley, L. J.; and cf. Chap. XI., below, p. 277.

of this Act."

(c) 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."

(d) *Hudson's Tm.*, 32 C. D. p. 317, Cotton, L. J.; 3 R. P. C. 115 (1886).

(e) 6 R. P. C. 227; 61 L. T. 39 (1889).

(f) (1891) 2 Ch. p. 201; 8 R. P. C. 137.

(g) Per Cotton, L. J., in *Van Duzer's Tm.*, 34 C. D. p. 634; 4 R. P. C. 31 (1887).

(b) 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

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 (*h*), and the Comptroller has, as is shown elsewhere (*i*), discretion to allow or refuse registration where all the conditions of the Acts are complied with (*i*).

Essential Particulars.

A registered trade-mark must contain one or more of the essential particulars, or be an old mark.

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 (*k*), 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 (*l*): “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 (*m*): “The argument is that, though neither of the particulars is within the 64th section, the mark

(*h*) Sects. 72, 73 and 86. See Chap. X., below, p. 211.

(*i*) Chap. IV., p. 69; *Eno v. Dunn*, 15 App. Cas. 252; 7 R. P. C. 311 (1890); and see per Lindley, L. J., above, p. 73.

(*k*) Above, p. 121.

(*l*) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Cas. p. 484; 48 L. J. Ch. 710 (1879).

(*m*) *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.

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* (n), 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." So, in *The Birmingham Vinegar Brewery Co.'s Application* (o), Kekewich, J., in considering a label, set aside the argument that, although there were none of the essential particulars in detail, yet the combination of many particulars which were not essential, might make the whole label into an essential particular. In *Wright, Crossley & Co.'s Application* (p), in which the applicants sought to register a label alleged to be distinctive, Byrne, J., after referring to the cases already quoted, and holding that the mark did contain an essential particular or particulars, inasmuch as it contained certain devices, said: "These devices, as and when used as part of the trade-mark, with the rest of the label appear to me to make the whole label distinctive" (q).

The five divisions into which essential particulars are by sect. 10 of the Act of 1888 divided, are separate and distinct (r). In the case of (d) and (e) a different conclusion was arrived at by the Court of Appeal in the *Somatose Case* (rr), where it was held that a word could not be registered as an "invented word" unless it also was a word "having no reference to the character or quality of the goods," but this

The sub-sections are alternative.

(n) 27 C. D. 681; 54 L. J. Ch. 210 (1884). A conventional label with the words *National Sperm* printed on it. As to labels, see further, pp. 150 to 156.

(o) 11 R. P. C. 195; 70 L. T. 646 (1894).

(p) (1900) 2 Ch. 218; 17 R. P. C. 386.

(q) But, although in *Clement et Cie.'s Tm.*, (1900) 1 Ch. 114; 16 R. P. C. 611, the Court of Appeal were considering a different ques-

tion, namely, whether a word was part of a mark or an addition to it, they appear to have assumed that the label must be considered as a whole. See also *The Smokeless Powder Co.'s Tm.*, (1892) 1 Ch. 590; 9 R. P. C. 109. See also below, "Label."

(r) See Lord Herschell's judgment in *Eastman & Co., Ltd.'s Application*, note (s), p. 124.

(rr) *Farbenfabriken Formuls F. Bayer & Co.'s Tm.*, (1894) 1 Ch. 645; 11 R. P. C. 84.

construction of the Act was disapproved of by the House of Lords in *The Eastman Photographic Materials Co. Ltd.'s Application* (s), and the decision of the Court of Appeal was reversed. Therefore, although in construing one division the scope of another division may be material (t), the fact that a thing is not an essential particular under one heading will not prevent its being a proper essential particular under another heading. It follows, too, from this construction that qualification under more than one heading is possible—for instance, a word might be an invented word within (d), and also be a word having no reference to the character or quality of the goods within (e).

Additions.

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 that sub-section as amended by the Act of 1888 (u), state in his application the essential particulars of the trade-mark, and must also disclaim (v), in his application also, any right to the exclusive use of the added matter, and under sect. 74, as amended by sect. 16 of the Act of 1888, a like disclaimer must be made as to any addition within sect. 74; 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 (x).

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 (y). Clause (a) is taken from sect. 10 of the original Act.

(s) (1898) A. C. 571; 16 R. P. C. 476.

(t) See, for instance, *Holt's Tm.*, (1896) 1 Ch. 711, 717; 13 R. P. C. 16 and 118 (1896), North, J., and C. A.; and *Pirie v. Goodall*, (1892) 1 Ch. 35; 9 R. P. C. 17, Vaughan Williams, J.

(u) Sect. 10; *Bryant and May's Tm.*, 8 R. P. C. 69; 59 L. J. Ch. 763 (1890), North, J.

(v) See Chap. IX., p. 199.

(x) See Chap. XI., p. 297.

(y) "The name of a firm is a very distinctive word indeed": per

Comparison of clause (a) with the following clause shows that the name need not be that of the individual or firm applying for registration, as the signature referred to in the last-mentioned clause must. But the name must be that of a real individual or firm as opposed to an imaginary individual or firm. Thus, it was held in *Molt & Co.'s Trade-Mark* (z), by Lindley and Smith, L. JJ. (Kay, L. J. dissenting), that *Tribby*, being the name of an imaginary person taken from a novel, was not within clause (a); and Lindley, L. J., said: "Clause (a) does not say that the name to be registered need be the name of a living person, nor the name of the applicant for registration. In this respect clause (a) differs from clause (b). The reference to a firm, however, points rather to real persons than to imaginary persons. In metaphorical language, an imaginary person may perhaps be called an individual, but such a use of the word is unusual, and to my mind rather fanciful. It is hardly to be supposed that the Legislature meant 'individual' to be taken in a fanciful or metaphorical sense, or meant it to denote an imaginary person who has not and never had any real existence." The question whether clause (a) is satisfied if it can be shown that the name has at some time been the name of a real person or firm did not arise; but there is nothing in the judgments of Lindley and Smith, L. JJ., to indicate that they considered that such a name would not fall within clause (a) (zz).

Name of
imaginary
person.

The practice of adopting trade-names which are different from those of the traders or of the partners in the firm using them is very common—for instance, in the Scotch whiskey trade, in which it is a common practice to use a Scotch name.

Jessel, M. R., in *Exp. Stephens*, 3 C. D. p. 660; 46 L. J. Ch. p. 47 (1876).

(z) 13 R. P. C. 16 and 118, C. A., (1896) 1 Ch. 711, reversing North, J. It was argued that if the word fell under clause (a)—with the condition of which it did not comply, as it was not printed in any distinctive manner—it could not be registered under

clause (e). The majority of the C. A. approved the argument, but held that the word did not fall under clause (a).

(zz) In *Banks & James' Tm.*, 12 R. P. C. 333 (1895), Chitty, J., held that *Shakspeare* was not a "fancy word, one of his reasons being that there were many living persons of the name.

The practice is of itself perfectly lawful, and such a name so adopted, and although so adopted for one branch only of a business, would no doubt be within the clause; and as this practice is allowed, there seems to be no reason why a trader should not adopt as his trade-mark the name of a real (a) or imaginary individual, 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 (b). But the effect of the decision in *Holt's Trade-Mark* (c) is that if the name adopted be that of a real person or firm, it comes under clause (a), and must be printed, impressed or woven in some particular and distinctive manner; whilst if it be that of an imaginary person, it can be registered under clause (e) in ordinary lettering, provided that it has no reference to the character or quality of the goods (e). It was pointed out by Stirling, J., in *Colman's Application* (d), that in clause (a) the word "person," which would have included a body corporate (e), is not used, and that a question may arise whether the name of such a body comes within clause (a); there is at present no decision on the point. Names falling within clause (a) are not within clause (e) (f).

The question whether the signature of the applicant's predecessor in business can be registered under this sub-section is considered under clause (b) (g).

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 (h), the Comptroller, in the exercise of his discretion (i), would, no doubt, reject any name which, contrary to the fact, tended

a) Cf. *A. W. Gamage, Ltd. v. H. E. Randall, Ltd.*, 16 R. P. C. 185 (1899) (a passing-off case in which the plaintiffs failed. *Shorland* for cycling shoes).

(b) See *supra*, p. 35; and Chap. XVI., p. 463.

(c) See note (z), p. 125.

(e) See *infra*, p. 180. Cf. an official notice of Nov. 6th, 1889, Appendix,

p. 731.

(d) (1894) 2 Ch. 127; 11 R. P. C. at p. 134.

(e) Sect. 117 (1).

(f) *Holt's Case, supra*.

(g) Below, p. 129.

(h) Sects. 72, 73 and 86; Chap. X., p. 211.

(i) See p. 69.

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 (*j*). And if the name indicated a particular living person, who did not assent to the use of his name, the Comptroller might in his discretion reject it, even although no connection of the person with the particular goods would be suggested (*k*).

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 (*l*). 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 (*m*) 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."

(*j*) Cf. *Thorncloe v. Hill*, (1894) 1 Ch. 569; 11 R. P. C. 61 (*John Forrest*—passing-off case).

(*k*) *Carroll's Application*, 16 R. P. C. 82 (1899), Kekewich, J. (*Princess Christian*), to some extent supports though it does not decide this. Portraits of well-known persons have, with their consent, been registered as trade-marks.

(*l*) *Pirie v. Goodall*, (1892) 1 Ch.

35; 9 R. P. C. 17; cf. *Colman's Tm.*, (1894) 2 Ch. 115; 11 R. P. C. 129, where Stirling, J., held that *Colman's* occurring in a label need not be disclaimed under sect. 64 (3) (1). An official notice was given in 1889 that names of persons in the possessive case in combination with the names of goods would not be accepted as trade-marks, Appendix, p. 731.

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

The report continues: "Evidence has been given that marks consisting of a combination of the applicant's name with the article he manufactures or sells are highly valued. There can be no doubt that if a manufacturer or vendor has obtained for his goods a reputation amongst the public, he could, by process of law, quite apart from the Trade-Marks Act, prevent goods that were not his from being offered to the public on the representation that they were so. But it would be quite a different thing to give, by virtue of registration under the Trade-Marks Act, a right to prevent another manufacturer or merchant honestly describing his own goods by his own name" (n).

The effect of the decision in *Pirie v. Goodall* (o) 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 distinctive 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 (p); 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 from being so taken as a trade-mark that any trader might unintentionally infringe it by an honest use of his own name (q). 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 (r), or in type in ordinary

(n) 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.

(o) See note (l), *ante*, p. 127.

(p) See below, p. 132.

(q) 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. 202; but cf. *Hopkinson's Tm.*, note (n).

(r) *Carroll's Application*, 16 R. P. C. 82 (1899), (*Princess Christian* for needles).

use, as, for instance, capitals (*s*), or common ornamental letters (*t*), 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 (*u*).

The name of a registered proprietor appearing on a registered trade-mark, and not being one of its essential particulars, may be altered under sect. 92, except perhaps in the case of an old mark (*x*).

(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 (*y*), that a trader cannot register the signature of his predecessor in business under this sub-section (*yy*). He may, however, if it falls within the terms of (3) (ii.) be able to register it as an old mark (*z*); and if the signature is printed (&c.) in a distinctive manner, he can register it under sub-sect. (a) (*a*), 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) (*b*); 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

(*s*) *Gianaclis' Tm.*, 6 R. P. C. 467; 58 L. J. Ch. 782 (1889), North, J., (*Gianaclis Cigarettes*).

(*t*) *Re Price's Patent Candle Co.*, 27 C. D. 681; 54 L. J. Ch. 210 (1884), Pearson, J.

(*u*) *Ibid.*, and *Bradley's Tm.*, 9 R. P. C. 205 (1892), Chitty, J.; (*Worth's Corsets*) printed between two co-axial ovals.

(*x*) *Stock-Owners' Meat Co. of New South Wales*, 14 R. P. C. 733 (1897), Romer, J.; and see below, Chap. XI., pp. 297 *et seq.*

(*y*) 4th edition, p. 36.

(*yy*) Nor can a trader register the name of the manufacturer of his goods, even with the latter's consent.

(*z*) Below, p. 184.

(*a*) Above, p. 124.

(*b*) Cf. *Exp. Stephens*, 2 C. D. 659; 46 L. J. Ch. 46 (1876), where, 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?" And see *Holt's Tm.*, (1896) 1 Ch. 711; 13 R. P. C. 16 and 118.

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 (*bb*). The words "written signature of a firm" are construed by the Comptroller to mean a signature (actually used in the ordinary course of business) of the trading style under which the applicant has a *bonâ fide* right to trade, and which consists of a *personal name* or of *personal names*, and not to include mere descriptive trading styles, such as *The Excellent Tea Co.* or *The London Stout Co.* (*c*).

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 (*d*). 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—some foreigners, for instance—who are unable to read the signature, it, or, indeed, any name-mark, fulfils neither

(*bb*) See Chap. XIII., p. 324, Assignment and Devolution of Trade-Marks.

(*c*) Notice in the Trade-Marks Journal, 1 Jan. 1896, printed in the Appendix, p. 733.

(*d*) 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 Cranworth.

of the requirements referred to. Another disadvantage of a signature as a trade-mark is that the protection afforded is very narrow. Thus, a trade-mark of which the signature of one of the complainers (it being a Scotch case), Daniel Crawford, was the essential particular was held not to be infringed by a facsimile of the signature of the respondent, Robert Crawford, and apparently the judgment would have been the same although the names had been identical. Lord Kyllachy, after pointing out that the case put forward was purely a trade-mark case, said: "Now it is new to me that a man who has a registered trade-mark or facsimile of his own signature can complain of another trader using as a trade-mark a facsimile of his own merely because the two names happen to be the same;" and, without hearing evidence, he decided that the case was not sustainable (*e*).

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 (*f*).

(c) A distinctive device, mark, brand, heading, label, or ticket. Distinctive device, &c.

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) (*g*).

Distinctive governs, and is to be read with, each of the words which follow it (*h*). It merely incorporates what 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

(*e*) *Crawford & Son v. Bernard & Co.*, 11 R. P. C. 580 (1894); and cf. *Barber v. Manico*, 10 R. P. C. 93 (1893), where Smith, L. J., sitting as a judge of first instance, held that the words *Edward Barber* were not an infringement of an old trade-mark consisting of the words *Era James Barber, Sheffield*.

(*f*) *Re Dewhurst*, 11th June, 1880, stated in Sebastian, 4th ed., p. 376.

(*g*) Below, p. 171.

(*h*) *Waterman v. Ayres*, 39 C. D. 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.

similar goods, so as to identify them with the business of the proprietor of the mark (i).

“Distinctive.”

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.

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

(i) See Chap. II., p. 34; *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. 479; 48 L. J. Ch. 707, (1879), and *Hopkinson's Tm.*, (1892) 2 Ch. p. 121; 9 R. P. C. 102, Kekewich, J.

(k) Below, p. 185. Also *Faulder's Tm.*, 18 R. P. C. 37 (1901), Kekewich, J.

(l) 26 C. D. p. 304; 53 L. J. Ch. 612 (1884), C. A., *Valvoline* for valve

oil.

(m) 32 C. D. 247; 3 R. P. C. 81 (1886), *Eton* for cigarettes, claimed as an old mark; followed in *Wolff v. Nopitsch*, 17 R. P. C. 321 (1900), Cozens-Hardy, J. (*Spanish graphite pencils*), a passing off case; see the decision of C. A., 18 R. P. C. 27.

(n) 15 App. Ca. p. 320; 7 R. P. C. 336 (1890). *Pain-killer* claimed as an old mark for medicine.

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."

In *The Dome Black Lead Case* (t) Lopes, L. J., put a somewhat different interpretation on the word *distinctive*. It 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 *James' Tm.*

(n) See note (n), *ante*, p. 132.

(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 three cases last referred to, the marks were claimed as special and distinctive words used as trade-marks before 13th August, 1875. They were all rejected.

(q) (1892) 2 Ch. p. 121; 9 R. P. C. 102. *J. & J. Hopkinson* for pianos, claimed and allowed as an old mark.

In *Dewar & Son, Ltd. v. J. H. Dewar*, 17 R. P. C. 341 (1900), Lord Kyl-lachy said he was not satisfied that the words *Dewar's Whisky* were, assuming use prior to 1875, "special and distinctive."

(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. 51.

(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.

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*).

Meaning of
"distinctive."

Questions to
be considered.

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 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*).

(*u*) See Chap. II., p. 34.

(*x*) Chap. X., p. 224. As to question (2), see also below, p. 140.

1. What Marks are to be distinguished.

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 (*y*), by wide-spread piracy (*z*), or, in the case of word-marks, by becoming the names (*a*), 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 (*b*), 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 (*c*). 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 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

(*y*) See below, p. 346.

(*b*) See Chap. VII., p. 112.

(*z*) See *Ford v. Foster*, 7 Ch. 611; 27 L. T. N. s. 210 (1872), C. A. See p. 37, above; also *Ripley v. Bandy*, 14 R. P. C. 591 and 944 (1897), Kekewich, J. and C. A.; and Chap. XIV., p. 338.

(*c*) *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. p. 485; 48 L. J. Ch. 707, (1879); and see *Kuhn & Co.'s Tm.*, 53 L. J. Ch. 238, n. (1878); and *Hyde & Co.'s Tm.*, 7 C. D. 724; 54 L. J. Ch. 395, n. (1878), both Jessel, M. R.

(*a*) See Chap. II., p. 36.

consult the representatives of the trade concerned on the subject (*d*).

What marks
are common.

It is clear that such marks as those above referred to, which are in common use in the trade, must be standards of comparison by which the distinctiveness of a new mark may be tested (*e*); 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 (*e*) 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 (*f*). Sect. 74 (*g*) authorizes 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 (*h*) 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 (*h*) 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 that a mark which was, before the 13th of August, 1875, publicly used by more than three 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 (*i*).

In *The Washetine Case* (*k*) Chitty, J., held, that marks might be *common to the trade* within sect. 74, though not

(*d*) Per Jessel, M. R., in *Kuhn's Case*, *supra*.

(*e*) See *Bryant and May's Tm.*, 8 R. P. C. 69; 59 L. J. Ch. 763 (1890), North, J.; the cases cited in note (*e*); *Anderson's Tm.*, 26 C. D. 409; 53 L. J. Ch. 664, Chitty, J.; affirmed on appeal, 51 L. J. Ch. 1084 (1881); and *Theclis and Blakely's Tm.*, 10 R. P. C. 369 (1893), North, J. *Ancross* rejected because anchors were common in the trade.

(*f*) *Great Tower Street Tea Co. v. Smith*, 6 R. P. C. p. 172; 5 T. L. R.

p. 232, North, J. (1889), *Tower Tea*; and see below, p. 168.

(*g*) See Chap. IX., p. 197, Additions and Disclaimers.

(*h*) This means *prima facie* distinctive: *Burland v. Broxburn Oil Co.*, 42 C. D. 274; 6 R. P. C. 482 (1889), Chitty, J. (*Washetine*); *Thompson v. Miller*, 13 R. P. C. 35 (1895), Stirling, J., (*Roadster*).

(*i*) Sub-sect. (3). See below, pp. 207 and 214. The three mark rule.

(*k*) *Burland v. Broxburn Oil Co.*, 42 C. D. 274; 6 R. P. C. 482 (1889).

publicly used by more than three persons, as required by subsect. (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 Kekowich, J., in *The Apollinaris Case* (l). 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" (m). Obviously this construction must be read with some limitation, otherwise 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* (m) the word had been extensively used before registration both by the plaintiff and by the defendant. The cases cited in this paragraph were all cases of descriptive words.

And in *The Roadster Case*, in which Stirling, J., followed the law as laid down by Chitty, J., in *The Washerine Case* (n), the learned judge held the word *Roadster* to be not obviously non-descriptive, and pointed out that it was a dictionary word (o).

In *The Stone Ales Case* (p) Lindley, L. J., expressed an

(l) (1891) 2 Ch. p. 209; 8 R. P. C. 137.

(m) *Humphries v. Taylor Drug Co.*, 59 L. T. 820; 5 T. L. R. 41, Kekowich, J. (1888), (*Herbalin*).

(n) See note (k), *ante*, p. 136.

(o) *Thompson v. Miller*, 13 R. P. C. 35 (1895).

(p) *Thompson v. Montgomery*, 41 C. D. p. 49; 6 R. P. C. 404 (1889).

In *Ripley v. Bandey*, 14 R. P. C. 591 (1897), (*Oral Blue*), the defendants were proceeded against for selling blue in an oval shape similar to that employed by the plaintiff, from which his goods had acquired the