

THE LAW OF
TRADE MARKS
AND
TRADE NAME.

*WITH CHAPTERS ON TRADE SECRET AND TRADE
LIBEL, AND A FULL COLLECTION OF
STATUTES, RULES, FORMS AND
PRECEDENTS.*

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FOURTH EDITION.

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PREFACE.

THE third edition of this book was published in 1908, not long, therefore, after the commencement of the Trade Marks Act, 1908. Since its publication there have been many decisions on the Act, both of Courts of first instance and of the Court of Appeal, settling a considerable number of important questions of construction which arose under it and dealing with matters both of principle and procedure. The provisions of the Act which have most frequently come under the consideration of the Court are those of section 9, relating to the registration of distinctive marks, and especially of distinctive words. Very recently these have come before the House of Lords in a case relating to the registration of letters as trade marks. It cannot be said that the Act has been construed with the breadth of view which was hoped for by the commercial community, and the result is that some words and symbols that do effectively operate as trade marks are excluded from the scope of registrable trade marks. It is true that these may not be very numerous, and that there must necessarily be cases near the line, wherever it is drawn. But a less timorous solicitude as to possible dangers to rival traders, including persons who may hereafter enter a particular trade, would have been attended with no serious consequences to such persons, and might have gone far to satisfy applicants for trade marks. For instance, the doctrine has been put forward that distinctiveness must be proved to exist, if not throughout the United Kingdom, at all events very widely indeed. Although this has not been adopted in its full extent by the Courts, it has influenced some decisions of the Court and has certainly affected the practice of the Board of Trade in cases which come before it. User and distinctiveness extending over large areas have, in more than one case, been

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considered by the Court to be insufficient. Again, although section 44 gives full protection to a person *bona fide* using his own name or the name of his place of business, and to the use by any person of any *bona fide* description of the character or quality of his goods, this section has not proved of much assistance to applicants for registration, who have not unreasonably contended that in view of its provisions the rights of other traders would not be interfered with by the registration of the particular mark applied for. This argument has been rejected on the ground that the section puts the onus of establishing *bona fides* on a person who sets up the protection of the section, and that marks ought not to be registered which necessitate recourse to this section for protection for the use by a person of his own name or of words which are primarily descriptive. The section is thus, to a great extent, deprived of operation, and marks have been refused registration, although they could not have interfered with any use shown to be innocent, a matter which should be capable of very easy proof.

A list of distinctive words passed by the Court or the Board of Trade is given in the Appendix, and the Editor desires to express his thanks to Mr. Theodore McKenna for furnishing him with materials for this list.

With regard to trade name, it is now practically settled so far as the Court of Appeal is concerned, that if a plaintiff proves a secondary meaning of a surname in connection with certain goods as meaning his goods, his rights are similar to those of a plaintiff establishing a secondary meaning of a descriptive word, and that even where fraud is absent, it is not necessarily a defence that a defendant is using his own name.

The Trade Marks Acts of the United States and of Australia are again printed in the Appendix to this edition, together with their recent amendments; and notes of decisions in Australia and New Zealand are also included in the Appendix. The Editor has been kindly favoured with these notes by Mr. B. A. Levinson of the firm of Bartlett and Gluckstein, a member of the Australian Bar.

The Merchandise Marks Acts are also printed in the Appendix, but, in view of the publication since the last edition of

a separate volume by the author and editor dealing with those Acts, no special chapter on the Acts is comprised in this edition.

The Revised International Convention of Washington of 1911 was ratified in the course of this year. It is printed in the Appendix, with a list of the countries which have ratified it. Modifications of trade mark law have in view of the Convention been recently made by some foreign countries, *e.g.* Germany.

The Editor is indebted to Sir R. Ellis Cunliffe, solicitor to the Board of Trade, the Comptroller General, and Mr. H. Wade for information kindly supplied by them, and to Mr. R. E. V. Bax and Mr. A. A. Smith of the Chancery Bar for valuable assistance in the reading of proofs, preparation of index, and other matters, in connection with the present edition.

The Cases have been brought down to July 31, 1913.

In the Table of Cases, the principal references to cases more than once cited are specially distinguished.

In the preparation of the present edition the Editor has had the assistance of the author upon a number of points of special interest or difficulty.

F. G. UNDERHAY.

Long Vacation, 1913.

NOTE.—Two or three appeals decided just before the Vacation could only be shortly referred to in the text, but are more fully noticed in the Addenda (p. lvii.), references being there given to passages in the text where they are cited.

F. G. U.

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ADDENDA.

In these Addenda there are stated shortly the principal facts and the points decided in very recent Appeals in some cases noticed in the text.

ANDREW C. KUEHNRIED.

In this case the plaintiffs were the registered proprietors of four trade marks, namely, the letters A, and B, and C, and AB, each of such letters being enclosed in a diamond. All the marks except the C mark were old marks, and all the marks were registered in the years 1884 and 1885. All the marks except the C mark had been extensively and continuously used, but the defendant contended that they had been used as quality marks merely and not as trade marks, and in support of this contention he relied on the fact that the marks had been used on the goods in conjunction with other trade marks of the plaintiffs and to denote qualities of the plaintiffs' steel. The plaintiffs complained of the use by the defendant of a mark consisting of the letters A, B, C, each letter being within a device representing a section of steel and the three devices being interlocked. The defendant used his mark in conjunction with the name Darwin & Milner, under which name he was trading, for non-tempering steel, which the plaintiffs did not manufacture. The plaintiff commenced an action against the defendant for passing off his steel as their steel by the use of his A, B, C mark, and at the trial they were allowed to amend by adding claims for relief in respect of infringement of their four trade marks, the defendant at the same time being allowed to serve notice of motion for removal of the trade marks from the register, and the motion was heard with the action. At the date of the notice of motion to rectify, the period of seven years mentioned in section 41 of the Trade Marks Act, 1905, had expired, although

it had not done so at the date of the commencement of the action. Section 41 (see the text, p. 368) enacts that after the expiration of that period the original registration of a trade mark shall be taken to be valid unless (*inter alia*) it offends against the provisions of section 11, that is to say, by being calculated to deceive. Mr. Justice Swinfen Eady upheld all the plaintiffs' trade marks and found in favour of the plaintiffs in the action both on infringement of trade mark and passing-off (30 R. P. C. 93). On appeal it was held that section 41 applied and protected the plaintiffs' trade marks, unless the registrations were invalidated by the marks being calculated to deceive, or, which was the defendant's main contention, that they were liable to be removed from the register under section 37 (see the text, p. 327) on the ground of non-user. With regard to the plaintiffs' three marks A, B, and AB, it was held by the Court of Appeal (Vaughan Williams, L.J., doubting) that, although they were used to indicate quality, they indicated different qualities of the plaintiffs' goods, and that the case of non-user by the plaintiffs of those trade marks failed. The question whether the non-user referred to in section 37 is non-user as a trade mark or non-user of any kind in connection with the goods did not call for decision, but the defendant's point that there was non-user merely because the marks had only been used in combination with other marks was held to be untenable. With regard to C mark it was held that, notwithstanding section 41, it ought to be removed from the register under section 37, there having been no *bonâ fide* user of it for at least upwards of five years. The Court also held that there had been no infringement of the three trade marks A, B, and AB, or passing off by the defendant of his steel as the plaintiffs' steel. Another point decided in the case arose in this way. The plaintiffs had in 1910 applied to the Cutlers' Company for the registration of a mark consisting of the letters A, B, and C, each enclosed in a diamond. This application had been opposed by the defendant Kuehnrich on the ground that he had used his A, B, C trade mark from 1909 onwards; but his opposition was disallowed by the Cutlers' Company, and also on appeal by Swinfen Eady, J., on the ground that his user had not been honest user. In the Court of Appeal the defendant contended that he ought to succeed on the grounds first, that the application was merely made for strategical purposes and was not

proper, and that there was no *bona fide* intention to use the mark; and, secondly, that it was calculated to deceive by reason of his prior user. It was held by all the members of the Court of Appeal that the defendant's user had not been dishonest, and that in view of such user the trade mark applied for was calculated to deceive. Buckley, L.J., also based his decision on the first-mentioned ground, but Hamilton, L.J., held that the application was not bad on that ground.

The case is referred to at p. 291, and also at pp. 127, 202, 261, 370, 522, 532 of the text.

REGISTRAR OF TRADE MARKS *v.* W. & G. DU CROS, LTD.
W. & G. DU CROS' APPLICATION.

In this case W. & G. Du Cros, Limited, had applied to register for motor vehicles the letters "W. & G." in ordinary block form and the same letters in script form, the tail of the G. being brought back under both letters with a thickened end. There had been extensive user of the script mark in and around London for three years. Both applications were refused by the Registrar and by Eve, J., on appeal. On appeal to the Court of Appeal, however, the registration of the script mark was ordered to proceed, Fletcher Moulton, L.J., being of opinion that both applications ought to be allowed to proceed. The case at this stage is fully referred to in the text at pp. 220 and 221, and also at pp. 81, 191, and 207. There were cross appeals to the House of Lords, and judgment was delivered on August 1, 1913, allowing the Registrar's appeal and dismissing the cross appeal, thus refusing both applications to register. Lord Shaw in his judgment said that the Registrar had not only an administrative but a quasi-judicial function, and he referred to the judgment of Lord Herschell in *Eno's case* (quoted at p. 79 of the text) to the effect that the Registrar has in all cases a discretion, to be exercised reasonably and not capriciously. Both Lord Shaw and Lord Parker pointed out that the stage when the application comes before the Registrar before advertisement under section 12 is that at which the interests of the public have to be considered, for if the application be then allowed to proceed, and unless it be subsequently successfully opposed, or the Board of Trade intervene under section 16, the mark must be registered.

They held that neither of the marks was distinctive, *i.e.*

adapted to distinguish, and that the registrations would improperly interfere with the right of existing or future firms having the initials W. & G. to attach the initials of their firm name to their goods. Lord Parker, in whose judgment all the learned lords present concurred, said even if a mark were in fact distinctive, the tribunal was not bound to allow registration of it and that a Common Law mark was not necessarily registrable, and that although the script mark was at the present moment and in a particular area distinctive of the applicants' cars, the area within which and the time during which such distinctiveness had existed were insufficient to displace the opinion he had formed on more general grounds. Lord Loreburn and Lord Mersey concurred. The case is reported in the Times of August 2, 1913, and in the Weekly Notes, [1913] p. 268.

JOHN BRINSMEAD & SONS, LTD. v. STANLEY BRINSMEAD.
(30 R. P. C. 493.)

The Court of Appeal, on July 22, 1913, affirmed the decision of Warrington, J., dismissing the action. The decision below is stated in the text at p. 603. The Court held that, although cases had occurred of persons selling the defendant's pianos as the plaintiffs' pianos, this was not brought about by the name Brinsmead on the pianos—the defendant's name appeared in full on them—but only by some representation added by persons for whom the defendant was not responsible. The following statement of the law relating to the use by a person of his own name is taken from the judgment of Buckley, L.J. :—

“The law, as I understand it, is this: If a man makes a statement which is true, but which carries with it a false representation and induces the belief that his goods are the plaintiffs' goods, he will be restrained by injunction. He cannot rely on the fact that his statement is literally and accurately true if, notwithstanding its truth, it carries with it a false representation. Instances of that proposition are found in the *Glenfield Starch* case, the *Camel-Hair Belting* case, and the *Stone Ale* case; and many other instances might be adduced. Secondly, if it is found that the man's object in doing that which he did was to deceive, that he had an intention to deceive, the Court will be very much more ready to infer that his object has been achieved if the facts tend to show that that is the case,

and to say that his intention to deceive ripening into deceit gives ground for an injunction; but it is not necessary to prove intention to deceive. That is quite plain from the judgment of Lord Cottonham in *Millington v. Fox* in 3 Mylne & Craig, where he said (at p. 852), 'I see no reason to believe that there has in this case been a fraudulent use of the plaintiff's marks; there is no evidence to show that the defendants were even aware of the existence of the plaintiffs. In short, it does not appear to me that there was any fraudulent intention in the use of the marks.' I am not reading the whole of the sentence, but simply the relevant words. Then it goes on: 'That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names, and therefore I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual.' If the fact is that the act which the defendant is doing does deceive, with the result that a man who intends to be a customer of the plaintiffs is induced by something which the defendant has done to become a customer of the defendant instead, even if the defendant has done that innocently, yet as soon as he learns that in point of fact that which he had no intention of using for the purpose of deceit does create deception, then he is doing that which is wrong, and he will be restrained from pursuing a course of action the result of which is in point of fact to take that which is the plaintiffs' property and give it to him, to defraud the plaintiffs' customers into becoming the defendant's customers. Thirdly, in the application of the principles which I have stated, there is, in my opinion, no difference whatever where the true statement consists in an accurate statement of the defendant's name as distinguished from any other true statement of fact, if of course you have evidence that by the use of his own name deception results. If a trader takes a name which is not his own name, but is that of a rival trader, and uses it in his trade, no doubt that is very strong evidence that he intends to deceive, and the Court will fasten upon that in any case in which it occurs; but, if that is not so, if he is simply using his own name and it is proved that its use results in deception, he will be restrained even from using his own name, without taking such steps as will preclude the deception which by the hypothesis is engendered by using his own name. There are many authorities for this proposition." The learned judge

then referred to *Burgess v. Burgess*, 3 Do. G. M. & G. 896; *Massam v. Thorley's Cattle Food*, 14 C. D. 748; and *Reddaway v. Banham*, [1896] A. C. 199, at p. 218; and stated that *Turton v. Turton*, 42 C. D. 128, had been qualified by *Reddaway v. Banham*. These cases are all referred to in the text in Chapter XVI., "Passing-off," under the section headed "The Right to Trade under one's own Name," pp. 593 *et seq.*

THE LAW OF TRADE MARKS.

CHAPTER I.

INTRODUCTION.

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1. Trade Marks before the Registration Acts.

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

"No man," said James, L.J.,¹ "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 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

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

¹ *Singer Manufacturing Co. v. Loog*, 18 C. D. p. 412; 52 L. J. Ch. 481 (1880).

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 nineteenth century. It is, indeed, sometimes alleged, upon the authority of *Southern v. How*,¹ 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,² 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,³ however, the plaintiff was the defrauded purchaser, and the action, therefore, an ordinary action of deceit. In the case of *Blanchard v. Hill*,⁴ 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,⁵ in several instances granted injunctions to restrain a defendant from pretending that his goods were those of, or were connected with the plaintiff;⁶ and in *Cruttwell v. Lye*⁶ 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 backing, was restrained is *Day v. Day*,⁷ in 1816.

Early cases at
common law.

The interference of the common law courts for the protection

¹ Popham, 144; Cro. Jac. 471; 2 Rollo, 28. See *Magnolia Metal Co. v. Tandem Smelling Syndicate, Ltd.*, 17 R. P. C. 477, at p. 484, (1900) H. L.

² Popham, p. 144.

³ Cro. Jac. 471.

⁴ 2 Atk. 484 (1742), Great Mogul Stamp on playing cards.

⁵ See 2 Law Review, p. 282; Kerly's History of Equity, p. 258.

⁶ *Hogg v. Kirby*, 8 Ves. 215 (1803); *Longman v. Winchester*, 16 Ves. 269 (1809); *Cruttwell v. Lye*, 17 Ves. 335 (1810).

⁷ Edén on Injunctions, ed. 1821, p. 314; Seb. Dig. p. 10.

of trade marks seem to have been a little later in date. The first reported case is *Sykes v. Sykes*,¹ 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 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.²

*Sykes v.
Sykes.*

In 1833, in *Blofeld v. Payne*,³ 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

Inferiority of
the infrin-
ger's goods.

¹ 3 B. & C. 541; 3 L. J. K. B. (O. S.) 46. 18 C. D. p. 403; 52 L. J. Ch. 481 (1880), both C. A.

² *Ford v. Foster*, 7 Ch. p. 630 (1872); *Singer Manufacturing Co v. Loog*, 4 B. & Ad. 410; 2 L. J. K. B. (N. S.) 68.

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*,¹ the same rule was referred to as being settled beyond question in suits in equity.²

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 Cottonham in *Millington v. Fox*,³ 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.⁴ No similar step was taken by the common law courts, and in them fraud remained an essential ingredient of a cause of action for the infringement of a trade mark down to the date of the amalgamation effected by the Judicature Acts.

2. Registration of Trade Marks.

Development of the specialised action of infringement.

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,

¹ 1 Do G. J. & S. 185.

² See per Lord Blackburn in *Singer Manufacturing Co. v. Looy*, 8 App. Cas. p. 30; 62 L. J. Ch. 481, at p. 489 (1896).

³ 3 My. & Cr. 338 (1838).

⁴ *Edelsten v. Edelsten*, 1 Do G. J. & S. 185; *Hall v. Barrows*, 4 Do G. & S. 160; 32 L. J. Ch. 648; 33 L. J. Ch. 204; *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271, 4 Do G. J. & S. 137; 11 H. L. C. 623, 32 L. J. Ch. 721; 83 L. J. Ch. 129; 35 L. J. Ch. 63

(all in 1863) and decisions of Lord Westbury, L.C. And see *Day v. Hiley 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.

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 specialised and distinct form of the more general action to restrain, or to obtain damages for "passing-off."

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 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. Nowell*¹ 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.²

Difficulty and cost of the old trade mark suits.

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

The Committee of 1862.

¹ 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*, 525; 6 *C. B.* 109; 17 *L. J. C.* P. 52; 3 *Do G. M. &*

G. 614; 22 *L. J. Ch.* 404 (1846).

² See below, p. 16, and per Mellish, *L.J.*, in *Fisher v. Apollinaris Co.*, *L. R.* 10 *Ch.* p. 303; 41 *L. J. Ch.* p. 202 (1876).

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.¹ And Mr. Leonard Edmunds, then Clerk of the Patents, explained to the Committee a scheme which he had drawn up for registering and indexing trade marks in the manner at that time adopted for patents, many of the features of which were embodied in the Registration Acts subsequently passed. The proposals were, however, strenuously opposed by Mr. Hindmarch, Q.C., the leading patent and trade mark lawyer of the day, and by the Attorney-General, and they were not endorsed by the Committee. Registration of trade marks was, in consequence, postponed for some years; but the Bill upon which the Merchandise Marks Act of 1862² was founded was amended and favourably reported upon by the Committee, and was forthwith passed into law.

The Merchandise Marks Act of 1862.

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.³ 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,⁴ and empowered the Court to order the destruction of goods marked with spurious trade marks.⁵ It also authorised Courts of Law to grant injunctions in trade mark cases.⁶ 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.

The Registration Act of 1875.

Thirteen years later the Trade Marks Registration Act, 1875,⁶ which came into operation on August 13th, 1875, established the present Register of Trade Marks. The object of this Act was twofold: it was directed, on the one hand, to diminish

¹ See "Sheffield Marks," below, p. 120.

² 25 & 26 Vict. c. 38.

³ Sec. 19, see now M. M. A. 1887, s. 17; Chap. XVII., p. 616.

⁴ Sec. 22.

⁵ Sec. 21.

⁶ 38 & 39 Vict. c. 91. See the chapter on "The Register," below, p. 62.

the difficulty and cost of, or to remove altogether the necessity for the proof of title by use and reputation, which had cast so great a burden upon the owners of trade marks in proceedings to restrain infringement; and, on the other, to secure the publication of marks which had been appropriated as trade marks, and to define the rights of their proprietors, for the information of traders, and, further, to limit the classes of marks which should be capable of being so appropriated.¹ 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 mark² in connection with goods of the class for which it was registered and used,³ and should, after the expiration of five years, be conclusive evidence of such right, so long as the trade mark remained upon the Register;⁴ 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 July 1st, 1876 (a date which was extended by the amending Acts⁵), 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.⁶

The marks admitted to registration as trade marks under the first Registration Act were required⁷ 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

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

¹ Per Fry, L.J., in the *Apollinaris Co.'s Tm.*, [1891] 2 Ch. p. 245; 8 R. P. C. 137, and Cotton, L.J., in *Van Duzer's Tm.*, 31 C. D. p. 631; 4 R. P. C. 31 (1897).

² Sec. 3.

³ *Edwards v. Dennis*, 30 C. D. 451 (1885), C. A.; below, p. 365.

⁴ *Palmer's Tm.*, 21 C. D. 17, 21 C. D. 601 (1882), C. A.; below, pp. 368 and 369.

⁵ 39 & 40 Vict. c. 33, and 40 & 41 Vict. c. 37.

⁶ 39 & 40 Vict. c. 33, s. 1. See now sec. 42 of the Act of 1905, below, p. 373, replacing sec. 77 of the Act of 1883.

⁷ Sec. 10.

and distinctive word or words, or combination of figures or letters, used as a trade mark before the passing of the Act might be registered as such under the Act.

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 marks¹ 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.² This was effected by the Patents, Designs, and Trade Marks Act, 1883,³ which came into operation on the 1st of January, 1884. It 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 was to be deemed to be a part,⁴ should be kept at the Patent Office established by the Act,⁵ and should be under the control of the Comptroller-General of Patents, Designs, and Trade Marks, acting under the superintendence and direction of the Board of Trade.⁶ 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,⁷ which the older Act had, substantially, left untouched.

The Registration Act of 1893.

"Fancy words" allowed to be registered.

The most material alteration introduced by the Act of 1883 was the power it conferred to register a mark of which the essential particular should be a "fancy word or fancy words not in common use." What was intended by a "fancy word not in common use" the Act did not define, and the omission was the cause of a great deal of litigation; but a fairly definite meaning was at length put upon the phrase by the Court of Appeal, in the *Melrose* hair restorer, and the *Electric* velveteen cases.⁸ To fall within the meaning, a word must, the Lord 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

¹ *Ex p. Stephens*, 3 C. D. 659 (1876).
Jessel, M.R. (*Acilyton*).

² See the Comptroller's second report for 1884.

³ 46 & 47 Vict. c. 57.

⁴ Sec. 114 (2).

⁵ Sec. 78.

⁶ Sec. 82.

⁷ Sec. 81, see below, p. 120.

⁸ *Van Duser's and Leaf's Tms.*, 84 C. D. 623; 4 R. P. C. 81 (1887). See, however, *Re Berril Tm.*, [1896] 2 Ch. 600; 13 R. P. C. 342; and below, p. 154.

"so obviously and notoriously inappropriate as neither to be deceptive or descriptive, nor calculated to suggest deception or description."

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, organisation, 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,¹ 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,"² 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.³ The alterations and some minor changes were passed into law by the amending Act of 1888,⁴ which came into operation on the 1st of January, 1889.

Lord Herschell's Committee, 1887.

Invented word or words.

The Committee further reported, as principles which ought to govern the Comptroller in the acceptance for registration or the rejection of marks: that "inasmuch as the object of registration is to secure a distinctive mark, and the registration of a mark which may conflict with a mark already registered would not only be to the detriment of the owner of such prior mark, but of the applicant himself, we think that in cases where it is doubtful whether the mark ought to be accepted or not, the safer and more beneficial course would be to reject it";⁴ 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

Doubtful marks to be rejected.

¹ 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 Material Co.'s Application*, [1898] A. C.

571; 15 R. P. C. 470.

² Act of 1888, s. 10.

³ 51 & 52 Vict. c. 50.

⁴ Interim Report, par. (2).

loading 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 August 18th, 1875 ;¹ and this discretion, exercised in the light of the recommendations of the Committee, 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.² In the year 1898, however, in *The Solio* case,³ 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 trade mark, or may be the essential particular of a trade mark, unless it is objectionable on other grounds. This decision greatly increased the usefulness of the Register, by enlarging the area from which new marks might be chosen as well as by admitting to registration large numbers of word marks already in use.

The Trade
Marks Act,
1905.

In the year 1905, practically the whole of the statutory civil law of trade marks⁴ was repealed by the Trade Marks Act, 1905,

¹ *Eno v. Dunn*, 15 App. Ca. 253; 7 R. P. C. 311 (*Fruit-Salt Baking Powder*) (1890).

² See Chap. VIII, pp. 163 and 172.

³ See Chap. VIII, p. 162.

⁴ The exceptions are secs. 103 and 104 of the Act of 1883 relating to International and Colonial arrangements, and sec. 106 relating to the unauthorised assumption of the Royal Arms. Secs.

103 and 104 have been repealed by the Patents and Designs Act, 1907, and are replaced by sec. 91 of that Act; whilst sec. 106 has also been repealed and is replaced by sec. 90 of the same Act. Sec. 98 of the Act of 1907 contains a saving of conventions and Orders in Council having effect under the enactments repealed by that Act.

intituled "An Act to consolidate and amend the law relating to Trade Marks."¹ This Act came into force, except as regards one or two minor matters, on April 1st, 1906. With the exceptions mentioned in the note, the trade mark law is now separated from the law of patents and designs. Although different departments of the same office, namely, the Patent Office, administer all these subjects, the separation is an advantage, as the principles underlying trade mark law are entirely different from those on which the patent and design laws are founded.

The new Act, whilst re-enacting a considerable part of the previous law in a much improved form, also introduced many new provisions. For the first time in Registration Acts a definition of a trade mark is given.² Moreover the end aimed at by the framers of the Act was to enable all marks which are in fact trade marks to be registered, and this was effected or sought to be effected by retaining with some modifications the classes of trade marks which were registrable under the existing law, and adding as a fifth and general class "any other distinctive mark" and by providing that the extent to which user has in fact rendered a trade mark distinctive may be considered. Although these changes have enabled many marks to be registered which were not previously capable of registration, the recent decisions of the courts have resulted in the administration of the Act being more strict than it was at first and in the exclusion from registration of marks which in use distinguish the goods of the owner of the marks.³

The Act adopts the policy, which had broken down under the old Acts owing to their wording, of making registration after a given period conclusive of validity, subject to certain stated exceptions, for instance, that of fraud, the period chosen being seven years from the passing of the Act (which period has now expired), or from registration, whichever shall last happen.⁴ It also contains an elastic provision for disclaimer of the exclusive user of matter included in a trade mark to which the proprietor has no exclusive right, and for any other disclaimer necessary for defining his rights.⁵

The important Manchester Branch for the registration of cotton marks has obtained statutory recognition, and the Act

¹ 5 Edw. VII. c. 15.

² See below, p. 25.

³ See Chap. VIII., p. 185.

⁴ Sec. 41. See Chap. XII., p. 368, Effect of Registration.

⁵ See Chap. IX., p. 236, Disclaimers.

contains special provisions suited to the requirements of the cotton trade.¹

Numerous minor changes are also effected in the law, among which those relating to associated trade marks, and standardisation marks, non-user of trade marks, and concurrent registration in certain cases of honest concurrent user, may be mentioned. All matters of mere procedure were left to be dealt with by rules made under the Act.²

Some nine or ten thousand applications are annually made for registration³ and the total number of trade marks on the Register is very large; but at the commencement of the Act of 1905 a large number of trade marks in actual use in the country still remained unregistered, either because they were not capable of registration for the reason that they did not fall within the definition clause of the former Act,⁴ or because their proprietors did not think it worth while to seek to register them. A considerable number of such marks have been registered under the Act of 1905, but some are still unregistered. These unregistered trade marks, notwithstanding the prohibitory sections of the Acts⁵ already mentioned, which purport to make registration, in general, a condition precedent to litigation to restrain or to obtain damages for infringement, are in many cases protected by the Courts in the "passing-off" actions, next to be referred to. For it is 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,⁶ and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive, or not.⁷

Unregistered
trade marks
practically
protected.

¹ Sec. 64, Chap. VII., p. 129.

² Trade Mark Rules, 1906, which came into operation on April 1st, 1906. See below, p. 719.

³ Comptroller's Report for 1911; 5,722 marks were registered in 1910, 4,868 in 1911, and 4,942 in 1912.

⁴ Act of 1888, s. 10.

⁵ Act of 1875, s. 1; Act of 1883, s. 77; Act of 1905, s. 42.

⁶ *Montgomery v. Thompson*, 41 C. D.

85; [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. See also sec. 45 of the Trade Marks Act, 1905, below, p. 15.

⁷ *Reddaway & Co. v. Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639; 9 R. P. C. 503; C. A., see below, pp. 532 and 583.

3. Passing-off and Trade Name Actions.

By the judgments in *Millington v. Fox*¹ and later cases in equity,² and by the Acts referred to above and the decisions upon them, the conditions under which a right of property in a trade mark may be acquired, and the manner and degree in which it 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 specialised, 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*.³ "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
contrasted.

¹ 3 My. & Cr. 838 (1838), Cottenham, L.C.

² 2 C. D. 434; 45 L. J. Ch. 490 (1871).

³ See the next chapter.

“The second class¹ 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.² In the House of Lords, however, this distinction between the two classes of cases was not accepted.

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

Lord Cairns said there was no such difference in point of principle,³ and that since the decision in *Millington v. Fox*⁴ 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 in an unwary purchaser of the machines?” The question came up again in *Singer Manufacturing Co. v. Looy*,⁵ and although the case was decided on the ground that the evidence showed that the conduct of the defendant in question was not in fact calculated to deceive, several of the judgments delivered contain passages which are in accordance with Lord Cairns' opinion. James, L.J., summed up the law in the words quoted at the beginning of this chapter; and Lord Selborne used language to the same effect. “It was contended,”⁶ 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

¹ 2 C. D. p. 443.

² 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.

³ 3 App. Ca. p. 391; 47 L. J. Ch.

p. 487 (1877).

⁴ Above, p. 4.

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

⁶ 8 App. Ca. p. 21; 52 L. J. Ch. p. 484.

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."

Section 40 of the Trade Marks Act, 1905, expressly provides that nothing in the Act shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof, and it is and has long been settled that,¹ 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.² He does, in fact, commit a fraud when he continues his conduct after discovering its dangerous character.³

"No man," said Cotton, L.J., in the case of *Turton v. Turton*,² "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, 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

¹ See Chap. XII., p. 377, and 693 *et seq.*
Chap. XVI., p. 691.

² See below, p. 146.

³ 42 C. D. 128; and see below, pp.

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."¹

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;² and in connection with them, an exception is stated in some judgments 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, and it has been said that a man may honestly trade under his own name, and describe his goods by it, whatever the consequences may be.³ But recent cases seem to show that the exception does not exist; or at all events 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 cited⁴ 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.⁵

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 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,⁶ or the mere impression or use of a false mark, was not criminally punishable. The Committee of 1862, whose report has been already referred to,⁷ were assured by the

¹ Report of 1888, p. xii.

² See below, Chap. XVI., p. 543.

³ See below, pp. 593 *et seq.*

⁴ See *Cash v. Cash*, cited below, p. 600, and the judgment of Vaughan Williams, L.J., in *Jamieson v. Jamieson*, 15 R. P. C. p. 192.

⁵ This part of the law of trade marks

is fully treated in Kerly on Merchandise Marks, 3rd edition, 1909. Although the present edition of this book treats only of the civil law of trade marks, the general summary of the criminal law has been retained.

⁶ See below, p. 655.

⁷ Above, p. 5.

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 descriptions¹—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 summarise 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,² or the false application of a trade mark to goods,² or to the envelope of goods,³ 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, and it was, moreover, a monument of complicated and redundant drafting.

In 1884 Great Britain acceded to the International Convention For The Protection of Industrial Property, to which all

The Merchandise Marks Act of 1862.

The International Convention.

¹ Merchandise Marks Act, 1887, s. 3.

² Sec. 2.

³ Sec. 5.

⁴ The Customs Act of 1876, s. 42,

T.M.

forbade the importation of articles of foreign manufacture bearing the names, marks, or brands of manufacturers resident in the United Kingdom, &c.

important civilised States, except Russia, now belong,¹ and thereby formally engaged to co-operate in the execution of the stipulations contained in the convention and protocol,² agreed upon between the original parties thereto, at Paris, in the previous year. And by Article IX. of the convention,³ 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 Mer-
chandise
Marks Act of
1887.

The last-mentioned Act⁴ provides that any person shall be guilty of an offence, punishable on indictment or on summary conviction by fine or imprisonment, who either (1) forges a trade mark by making or imitating it without the consent of the proprietor, or by falsifying any genuine mark; or (2) falsely applies any trade mark to goods, by applying it, or an imitation of it, without the consent of the proprietor; or (3) applies to goods any false trade description, that is, a description or indication as to the number, quantity, measure, &c., or the place or country of origin of the goods, or the mode of manufacturing them, or their material, or as to their being the subject of an existing patent, privilege, or copyright, which is false in a material respect; or (4) sells or exposes, or has in his possession for sale or any purpose of sale or manufacture, any goods to which a forged trade mark or false trade description is applied, or to which any trade mark, or imitation of a trade mark, is falsely applied.⁵ A criminal intention on the part of the person charged is a necessary element of each of the above mentioned offences; ⁶ but the burden of proving that he has acted with the

¹ See lists, Appendix, pp. 811 and 829.

² See Appendix, p. 817.

³ The convention has been revised at Washington in 1911, subject to ratification. The Article is given in the text as it stood before such revision. The Revised Convention appears in the Appendix, p. 829.

⁴ Appendix XIX., p. 686.

⁵ Subsidiary offences, such as making dies for forging trade marks, are here passed over.

⁶ *Oridley v. Swinburne*, 62 J. P. 739, 791; 6 T. L. R. 71 (1898), Coleridge, L.C.J., and Grantham, J.; and see Kerly on Merchandise Marks, p. 67.

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, forbids¹ 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 compulsory, and it does not extend to cases of verbal false descriptions.²

The Act is directed only against false marking.

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 report³ 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 Merchandise Marks Act Committee of 1890.

The Custom House authorities, however, by the Consolidated Instructions of 1900, gave directions under which goods in

¹ See 16, Appendix XIX., p. 892.

² *Coppen v. Moore* (No. 1), [1898] 2 Q. B. 400; 67 L. J. Q. B. 689, Wright and Darling, JJ.; *Longley v. Bombay Tea Co., Ltd.*, [1900] 2 Q. B. 460,

Grantham and Channell, JJ.; and see *Cameron v. Wiggins*, [1901] 1 Q. B. 1, Lawrence and Kennedy, JJ.

³ M. M. A. Report, 1890.

transit, in the absence of information calling for their examination, will generally be allowed to pass without scrutiny.

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. 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," in which both the description of goods imported and the port from which they come must be stated, should be made a "trade description" within the Act, and that, in cases affecting the general interest of the country, or of a section of the community, or of a trade, prosecutions under the Act should be undertaken by the State. The Merchandise Marks Act of 1891 was passed to carry these proposals into effect. By the Merchandise Marks (Prosecutions) Act of 1894 the Board of Agriculture was authorised to undertake prosecutions. Similar powers were conferred on the Department of Agriculture and Technical Instruction for Ireland by the Merchandise Marks (Ireland) Act, 1909.

By the Merchandise Marks Act, 1911, important powers are conferred on the Commissioners of Customs of requiring from the importer of goods bearing a fraudulent mark information as to the name and address of the person by whom the goods were consigned to the United Kingdom and production of documents relating to the goods.

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 Kingdom¹ (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

¹ *The Collins Co. v Reeves*, 29 L. J. Ch. 60 (1859), Stuart, V.-C.

same right of protection in respect of their trade marks as were enjoyed by its own subjects.¹ On the other hand, when registration of the trade mark concerned became, in general, a condition precedent to the bringing of an action of infringement, as such,² 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,³ 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,⁴ sec. 103⁵ was inserted, with the view, apparently, of fulfilling the obligations entered into by the United Kingdom with the other contracting States. The section, however, met those obligations but very imperfectly⁶ and the bulk of its provisions were inapplicable to trade marks. Its only substantial operation in regard to them, indeed, was 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.⁷ The Convention was modified to a considerable extent at Washington in 1911, subject to ratification, and the provisions of the Convention as to trade marks capable of registration and the law of the United Kingdom on this point now approximate very closely. The full text of the revised Convention and a list of the countries which have ratified it are set out in the Appendix.⁸

Her Majesty was empowered by sec. 101 of the Act of 1883, by Order in Council,⁹ to apply the provisions of the above-mentioned section, with such variations or additions as might seem fit, to any British possession.¹⁰

¹ See a paper presented to Parliament, 1872, C. 633.

² Act of 1905, sec. 42, replacing sec. 77 of the Act of 1883, Chap. XII., p. 373.

³ See Appendix, p. 813.

⁴ 17 March, 1884.

⁵ See Chap. XX., p. 640.

⁶ See per Stirling, J., in *The Coliforman Fig Syrup Tm.*, 10 C. D. 620,

6 R. P. C. 126 (1888).

⁷ See last case, and *Carter Medicine Co's Tm.*, [1892] 3 Ch. 472, 9 R. P. C. 101, North, J.

⁸ Pages 823, 829.

⁹ See the list, Appendix, p. 811.

¹⁰ See the definition in sec. 117 of the Act of 1883. And see now sec. 19 of the Interpretation Act, 1889, and sec. 91 of the Patents and Designs Act, 1907.

Secs. 103 and 104 of the Act of 1888 have been repealed and re-enacted with some changes of form by the Patents and Designs Act, 1907.¹ It is expressly provided by sec. 98 of that Act that the repeal shall not affect any convention or Order in Council having effect under any enactment repealed by that section, but any such convention or Order in Council in force at the commencement of that Act shall continue in force, and may be repealed, altered or amended as if it had been made under that Act.

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 or foreign State to which the provisions of the above-mentioned section (sec. 103) are, under Order in Council, for the time being applicable.²

¹ Secs. 91 and 98.

² M. M. A., 1887, s. 3 (1).

CHAPTER II.

THE DEFINITION OF A TRADE MARK.

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Definition of
a common
law trade
mark.

THE following definition of a trade mark was given in earlier editions of this work :—

A trade mark is a symbol¹ which is applied or attached to goods² offered for sale in the market,³ so as to distinguish them from similar goods, and to identify them with a particular trader⁴ or with his successors as the owners of a particular business,⁵ as being made, worked upon, imported, selected, certified or sold⁶ by him or them, or which has been properly registered under the Acts as the trade mark of a particular trader.⁷

The definition might be stated 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 was by the Acts of 1875 and 1883 to be deemed equivalent, with the addition of 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.

No statutory
definition
before 1905.

The Registration Acts, prior to the Act of 1905, contained no definition of a trade mark, although they contained enumerations of the classes of symbols capable of registration under them as trade marks. Trade marks could prior to the Act of 1905, and can still, be acquired by user independently of registration,⁸

¹ Below, p. 30.

² Page 30.

³ Page 35.

⁴ Page 36.

⁵ See Chap. XIII., Assignment and Devolution of Trade Marks, p. 384; and *Pinto v. Hadman*, 9 R. P. C. 181 (1891).

per Fry, L.J.

⁶ Page 58.

⁷ Page 60; and see Chap. XII., Effect of Registration, p. 359. As to Cutlers' corporate marks, see Chap. VI., p. 120.

⁸ See below, p. 376.

and, although, with certain exceptions, the technical action for infringement cannot be maintained in respect of an unregistered trade mark,¹ yet protection can be secured for such marks by "passing off" actions;² moreover, preferential claims to registration or objections to registration of newer marks resembling them may arise from use of such marks.³ Furthermore, among the symbols admitted to registration are "any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before August 13th, 1875," which has continued to be so used,⁴ and questions may still arise whether old marks registered or tendered for registration under this provision were used as trade marks or not. Therefore, although the Act of 1905 defines a trade mark for the purpose of that Act, it is useful to consider also what constituted a symbol to be a trade mark apart from the Acts. The definition in the Act of 1905 will, however, first be considered.

By sec. 3 of the Act of 1905 "mark" in and for the purpose of that Act includes "a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof," and

The statutory definition of a trade mark.

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

The above definition of a "mark" enters not only into the definition of a trade mark quoted above, but also into the fifth class of essential particulars mentioned in sec. 9, namely, "any other distinctive mark." Practically all symbols of a permanent nature are covered by "mark" as defined in the Act. "Device," "brand," "heading," "label," and "ticket," if distinctive, all formed essential particulars under sec. 61 (1) (c) of the Act of 1883. Their meanings are considered in Chapter VIII, under paragraph (5) of sec. 9.⁵ Names, signatures, and words were only registrable as essential

Mark.

¹ Sec. 42, sec. 77 of the Act of 1883.

² See sec. 45, and below, p. 531.

³ A trade mark so acquired may under some circumstances be properly described as such without necessarily implying that it is registered: See-See

Co. v. Britten, [1899] 1 Ch. 692; 16 R. P. C. 137, Stirling, J.

⁴ See 9, proviso; see also Act of 1889, sec. 10, Act of 1883, sec. 61; and Act of 1875, sec. 10.

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particulars under the Acts of 1883 and 1888, if they possessed certain qualifications. They are now, if distinctive, all admitted to registration, but unless they fall within one of the paragraphs (1), (2), (3) and (4) of sec. 9, an order of the Board of Trade or the Court is necessary.¹ Except in the case of old marks, letters and numerals did not form essential particulars under the earlier Acts, and it was held that neither a single letter nor a collection of English letters constituted a device.² Now a letter or numeral or a combination of letters or numerals can be registered if distinctive.³ It is not a fatal objection to the registration of a mark that it is capable of registration as a design.⁴

Combination
trade marks.

The words "or any combination thereof" are useful as enabling a mark composed of two or more of the enumerated elements to be registered, whether they are separately distinctive or not, provided that the combination is distinctive. It is customary in the Manchester trade to use marks in combination for piece goods.

Actual user
not necessary.

Actual user is not necessary before registration; this was decided under the Act of 1875 in *Hudson's Trade Mark*.⁵ Apart from the Acts user was necessary to constitute a mark to be a trade mark. The definition of "trade mark" quoted above includes a mark "proposed to be used"; this is much simpler than the earlier and somewhat clumsy provision that registration, or, in the Act of 1888, application for registration, should be deemed equivalent to public use.⁶ But the intended user must be in this country⁷ and for the purpose mentioned in the definition clause and not as the mere name of the article.⁸ Non-user of a trade mark may, after a certain time, render it liable to be removed from the Register.⁹

Use in con-
nection with
the goods.

The definition includes marks used in connection with goods as well as marks used upon them. As will be seen from the

¹ Below, pp. 137, 178.

² *Ex p. Stephens*, 3 C. D. 659 (1876); *Mitchell's Tm.*, 7 C. D. 36 (1877). In *Du Cros' Applications*, [1912] 1 Ch. 644; 29 R. P. C. 65; the Court of Appeal expressed the opinion that the mark "W. & G." in special script might be supported as a device, if not otherwise.

³ As to letters, see below, p. 220.

⁴ *United States Playing Card Co.'s Application*, [1908] 1 Ch. 197, Swinfen Lady, J.

⁵ 32 C. D. 311; 3 R. P. C. 155 (1886), C. A.

⁶ Act of 1875, sec. 2; Act of 1883, sec. 74; Act of 1888, sec. 17.

⁷ *Neuchatel Asphalte Co.'s Application*, 30 R. P. C. 349 (1913). Owing to the existence of a contract, it was held that the applicants had no present intention to use the mark in this country.

⁸ *Philippart v. Whiteley*, [1908] 2 Ch. 272; 25 R. P. C. 565.

⁹ Sec. 37, below, p. 327.

discussion of the earlier law in a later portion of this chapter, the decisions before the Act were to the effect that there must be some physical connection between the mark and the goods, or, as it has been expressed, "the mark must sell the goods, otherwise there was no use as a trade mark."¹ The definition contained in the Act would probably be construed to cover use in connection, but not in physical connection, with goods, and thus to enable the registration of trade names used for goods, or used in advertisements of the goods, as on placards or in circulars.²

It has always been essential to the existence of a trade mark that it should indicate the origin of the goods,³ and this idea is incorporated in the statutory definition by the words "for the purpose of indicating that they" (the goods) "are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification dealing with, or offering for sale." The proprietor of a trade mark must, subject to an exception to be mentioned, have, or intend to have, a business concerned in the goods for which it is registered,⁴ or, putting it in other words, he must have a trade connection with the goods as manufacturer, merchant, or selector.⁵ The only exception is in the case of standardisation marks, that is to say, marks indicating examination and certification of the goods, registered under the special provisions of sec. 62; the word "certification" in the definition of a trade mark is specially appropriate to such marks. A trade mark may be registered for use in connection with a natural product.⁶

A trade mark is indicative of origin.

A "registrable trade mark" is defined as a trade mark which is capable of registration under the provisions of the Act;⁷ and a "registered trade mark" as one which is actually on the Register.⁷

"Registrable trade mark."

"Registered trade mark."

It may be useful to refer to the definitions of "mark" and "trade mark" under the Merchandise Marks Act.

The Merchandise Marks Act, 1862,⁸ enacted that for the purpose

Definitions in the Merchandise Marks Act, 1862.

¹ *Powell's Tm.*, [1893] 2 Ch. 388; [1894] A. C. 8; 10 R. P. C. 63, 195; 11 R. P. C. 4; and below, pp. 30, *et seq.*

² See below, pp. 366, 440.

³ See below, p. 36.

⁴ Cf. sec. 22.

⁵ The vendors of vegetables on commission, who had the right of rejecting them, if not of good quality, were held to have, by virtue of "dealing with, or

offering for sale," a property in the goods in connection with which they used their trade mark sufficient for the purposes of the Act: *Major Bros. v. Franklin*, [1908] 1 K. B. 712; 25 R. P. C. 406, Jelf, J.

⁶ *Major Bros. v. Franklin*, note (5).

⁷ Sec. 3.

⁸ 25 & 26 Vict. c. 88, s. 1.

of that Act "The word 'mark' shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket or other mark of any other description; and the expression 'trade mark' shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket or other mark as aforesaid, lawfully used by any person to denote any chattel, or (in Scotland) any article of trade, manufacture or merchandise, to be an article or thing of the manufacture, workmanship, production or merchandise of such 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.¹ From the commencement of the Act of 1905 the definition must be read as referring to the Register kept under that Act.²

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.

In *The Leather Cloth Co. v. The American Leather Cloth Co.*³

¹ See 3 (1), below, Appendix, p. 289.

² 4 De G. J. & S. p. 142, 33 L. J. Ch.

³ Act of 1905, sec. 6, and Interpretation Act, 1889, sec. 38.

199 (1863).

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 use or application is rightly called property." Lord Westbury.

And in *Ford v. Foster*,¹ Bacon, V.-C., described a trade mark in the following terms: "The meaning and use of a trade mark is that some 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, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that." Bacon, V.-C.

"Use as a trade mark," Kay, J., said, in *Richards v. Butcher*,² "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 use as a trade mark means, and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade mark of the person who uses them." And in the same case, on appeal, Lord Esher said: "You use the thing as a trade mark if you use it in business, or, as is often said, in the market, as a mark to denote your goods, and to distinguish them from the goods of anyone else."³ Kay, J., and Esher, M.R.

In *The Magnolia Metal Company's Trade Marks*,⁴ 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." Rigby, L.J.

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 Object of trade marks to protect trade.

¹ 7 Ch. p. 616 (1872).

² [1891] 2 Ch. p. 513.

³ [1891] 2 Ch. p. 533; 8 R. P. C. 249 (Monopolies).

⁴ [1897] 2 Ch. p. 390; 14 R. P. C. p. 626.

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."¹

A Symbol.

What symbols may be trade marks.

Before the Trade Marks Registration Act, 1875,² 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,³ 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.⁴ Under the Act of 1905 "mark" includes device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof.⁵ This appears to cover all symbols.

Applied or attached to Goods.⁶

The phrase in the Act of 1905 is "used upon or in connection with" goods.

It is immaterial whether the mark is attached to the goods or to the covering in which they are sold.⁷ It may be impressed, stamped, cut, drawn, painted or stained on the goods themselves, as the words *Sykes' Patent* were in *Sykes v. Sykes*,⁸ 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 tallies⁹ tied on to them, or upon reels upon which the

¹ 16 R. P. C. p. 418 (1899).

² Sec. 10, replaced by sec. 64 of the Act of 1883, by sec. 10 of the Act of 1888, and now by sec. 9 of the Act of 1905.

³ See below, pp. 472, *et seq.*

⁴ See below, p. 86.

⁵ See above, p. 25.

⁶ See the *dicta* quoted above, pp. 29 and 30, and below, p. 227.

⁷ *Singer Manufacturing Co. v. Wilson*, 2 C. D. p. 441, Jessel, M.R., and pp. 451, 455, James and Mellish, L.JJ.; 45 L. J. Ch. pp. 491, 496, 497 (1876).

⁸ 8 B. & C. 541; 8 L. J. K. B. (O. S.) 46 (1824).

⁹ *Edelsten v. Edelsten*, 1 De G. J. & S. 185 (1863), Westbury, L.C.

goods are wound, or on a card to which the goods are fastened.¹ All that was necessary was that there should be some physical connection between the goods and the mark, so that the mark should go with the goods into market.² Before the Act of 1905, a device was not "used as a trade mark" unless it was applied or attached to the goods in such manner, although it might 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.

The mark must go to market with the goods

Thus, in *Thompson v. Montgomery*,³ 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*⁴ 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,⁵ "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

¹ Cf. *Chameleon Patents Manufacturing Co. v. Marshalls, Ltd.*, 17 R. P. O. 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.

² See *Powell's Tm.*, [1893] 2 Ch. 888, [1894] A. C. 8; 10 R. P. O. 63, 195; 11 R. P. O. 4. (*Yorkshire Relish*.)

³ 41 O. D. 45; 6 R. P. O. 404 (1889). There was no appeal upon this point to the House of Lords. An injunction was

granted notwithstanding the removal of the mark. See also *Verity's Tm.*, 19 R. P. O. 58 (1902), Buckley, J., use in price list only.

⁴ Note (2); cf. *Richards v. Butcher*, [1891] 2 Ch. 522; 8 R. P. O. 249, Kay, J., and C. A., *Monopole* used on packing cases and wine corks, and *Day v. Riley and Whittaker*, 17 R. P. O. 517, Buckley, J., *Day & Sons' Black Drink* stencilled on packing cases.

⁵ [1893] 2 Ch. p. 404.

upon the vehicle as distinct from a mark upon the goods, you must ask yourself carefully, Is this mark used as a trade mark?"

and must sell
the goods.

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?

Used in con-
nection with.

The statutory definition now extends to marks used or proposed to be used in connection with goods as well as to marks used upon them. Apparently this is intended to bring trade names of goods, such as are above referred to, under the category of trade marks and to admit them to the advantages of trade marks, although they may never have been attached or applied to the goods themselves. And the corresponding section dealing with the infringement of a trade mark is framed to correspond with this view.¹ It was to some extent an open question before the Act whether there could be an infringement of a registered trade mark by the use of a mark which was not applied or attached to the defendant's goods, although used in connection with them and as a mark of origin. Probably if the matter had been argued out such a use would have been held to fall within sec. 76 of the Act of 1888 and to be an infringement.²

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 discussed³ 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. In a case in which three labels were registered as one trade mark, two of them being used outside the packet of goods and the third inside, it was held that, notwithstanding this, the mark was properly registered, being a combination trade mark.⁴

Trade mark
rights are
restricted to

The exclusive rights existing in respect of a trade mark are restricted to the class of goods to which it has been attached or

¹ Sec. 89, below, p. 363.

² See below, "Infringement," p. 438, where this question is further discussed. Under the Merchandise Marks Act a description in an invoice sent with the goods has been held to be "applied" within sec. 5 (1) (d). *Budd v. Lucas*, [1891] 1 Q. B. 408.

³ *Kinahan & Co.'s Application*, 10 R. P. O. 898 (1898), *Ohlty, J.*; *Richards v. Butcher*, [1891] 2 Ch. 522; 8 R. P. O.

249, *Kay, J.*, and *O.A.* Marks so used were protected in *Moet v. Clybourn*, Seb. Dig. p. 816 (1877), *Jessel, M.R.*; and *Moet v. Pickering*, 8 C. D. 872; 47 L. J. Ch. 527 (1878), *C. A.* See also *Findlater, Muckie, Todd & Co. v. Newman & Co.*, 19 R. P. O. 235 (1902). *Kekewich, J. (F. M. T. & Co. on corks, a passing-off case).*

⁴ *Crompton's Tm.*, [1902] 1 Ch. 758; 19 R. P. O. 265, *Swinsin Eady, J.*

applied.¹ 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."² Thus, a trade mark used for flour and bread may be adopted as a trade mark for carriages.³

the class of goods for which the mark is used.

So no one can acquire an exclusive right to affix the trade mark to goods which do not fall within the class indicated by the mark, or, in other words, to goods which do not possess the attribute the mark is understood and intended to connote. Thus, in *Cotton v. Gillard*,⁴ the defendant had invented a sauce which was prepared from a secret recipe not known to the plaintiff, and was called the *Licensed Victuallers' Relish*. The plaintiff had purchased from the assignee in bankruptcy of the defendant's son all his interest in the sauce, and this, he contended, included the right to the trade mark used with the business. Jessel, M.R., however, held that this right could not exist or be transferred without the goods with which the mark was connected, and that the plaintiff could have no assistance from the Court to enable him to pass off under the mark, as the original sauce, an imitation of his own.⁵

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

¹ *Somerville v. Schembri*, 12 App. Ca. 453; 4 R. P. C. 179 (1887), on appeal from Malta; and see *Coleman v. Brown*, 16 R. P. C. 619 (1899). As to registered trade marks, see below, pp. 365 and 435.

² 4 De G. J. & S. 187; L. J. Ch. p. 201 (1803).

³ *Lake and Elliott's Application*, 20 R. P. C. 605 (1903), Kekewich, J., and see Jessel, M.R., in *Singer Manufacturing Co. v. Wilson*, 2 Q. D. p. 448; 45 L. J. Ch. 494 (1876); and Chap. XV.

on Infringement, below, p. 435. Cf. *The Australian Wine Importer's Trm.*, 41 C. D. 278; 6 R. P. C. 811 (1889), cited p. 252.

⁴ 44 L. J. Ch. 90 (1874). So a trade mark cannot be separated from the goodwill of the business to which it has been attached; see below, pp. 384 and 409.

⁵ Cf. *Birmingham Vinegar Brewery Co., Ltd. v. Powell*, [1897] A. C. 710; 14 R. P. C. 720; and Rule 16, p. 722.

commenced to deal as a merchant in the same goods.¹ 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.² The principle is illustrated by a recent case in which a name had long been used by a shipper in connection with port wine made from the grapes of a particular vineyard, and it was held that, after he had ceased to be supplied from the vineyard, he could not properly apply the name to wine made from other grapes.³

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 sec. 42 limited to the goods for which the mark is registered, but, subject to that limitation, the extent of the class of 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.⁴

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*,⁵ 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.⁶ 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;⁷ and that is all that an ordinary form of the injunction granted in trade mark cases restrains.⁸

¹ See below, p. 58.

² Below, p. 58; and see Chap. XII., p. 859, Effect of Registration.

³ *Van Zeller v. Mason, Cattley & Co.*, 25 R. P. O. 87 (1906), Joyce, J.

⁴ *Australian Wine Importers' Tm.*, 41 C. D. 278; 6 R. P. O. 811 (1889), C. J. A.; and *Eastman Photographic Materials Co., Ltd. v. John Griffiths Cycle Corporation, Ltd.*, 15 R. P. O. 106 (1898), Romer, J.; and see below, Chap. X., p. 274.

⁵ 1 K. & J. 509; 6 De G. M. & G. 214; 24 L. J. Ch. 682; 26 L. J. Ch. 11 (1855).

⁶ The plaintiff was given liberty to try this question at law, and the bill was retained for a year. He succeeded in his action at law, and was subsequently granted an injunction in equity, 4 K. & J. 650, Wood, V.-C.; 30 L. T. 242; 81 L. T. 99.

⁷ See below, p. 444.

⁸ See per Cotton, L.J., in *Thompson*

Offered for Sale in the Market.

An allegation that the plaintiff's goods were sold with the trade mark attached, and that they enjoyed a great reputation, was regularly inserted in the declaration in the old common law action for infringement.¹ And in *Lawson v. The Bank of London*,² an action to restrain the defendants from usurping the name of the plaintiff's bank, a demurrer was allowed because the declaration did not allege that the plaintiff had carried on business as a banker, but only that he had expended money in advertisements. "No action could, I apprehend," said Willes, J., in that case, "be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forward to the world by the party complaining of the misuser of it."

The mark must be applied to goods offered for sale.

This dictum was cited with approval by Lord Cairns, in *Maxwell v. Hogg*.³ 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,⁴ 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,

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.

¹ See *Sykes v. Sykes*, 3 B. & C. 541;

8 L. J. K. B. (O. S.) 46 (1824); above, p. 8.

² 18 C. B. 84; 25 L. J. C. P. 189 (1856).

³ 2 Ch. 307; 30 L. J. Ch. 488 (1867).

⁴ 2 Ch. p. 314; 30 L. J. Ch. p. 430.

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*¹ was that the article marked with the mark in question was actually a vendible article in the market.²

Long user of
mark or proof
of actual
reputation
unnecessary.

It is not, however, necessary that the goods should be in the market with the mark affixed for any definite or any considerable time. Thus it was no objection to the defendant's counterclaim in *Maxwell v. Hogg*,³ 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.⁴ The statutory definition extends to new trade marks provided that they are proposed to be used upon or in connection with goods.

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 Act 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*,⁵ 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 shall have this distinguishing character, is fully established by the state-

¹ 4 De G. J. & S. 880; 83 L. J. Ch. 561 (1864), (*Anatolia liquorice*).

² See also *Powell's Tm.*, [1898] 2 Ch. 888; 10 R. P. C. 63, 195, cited above, p. 81; and the observations of Halsbury, L.C., in *Batt & Co. v. Dunnett* (1899), 16 R.P.C. p. 413, cited above, pp. 29 and 80.

³ 2 Ch. 807 (1867); 86 L. J. Ch. 483.

⁴ 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 (1838); *Edelsten v. Edelsten*, 1 De G. J. & S. 185 (1868), Ld. Westbury, L.C.

⁵ 32 L. J. Ch. p. 551 (1863); and see per Wood, V.-C., in *McAndrew v. Bassett*, 83 L. J. Ch. 561 (1864).

ments of the principles upon which the law of trade marks rests, stated in the last chapter, and the *dicta* quoted in an earlier part of this chapter.¹ 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?²

"The right which a manufacturer has in his trade mark," Lord Cranworth said, in *The Leather Cloth* case,³ "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*,⁴ after distinguishing copyright from the right to a trade mark, added, "any one 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.*,⁵ 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."⁶

The statutory definition requires that the mark shall be used or proposed to be used for the purpose of indicating that the goods are the goods of the proprietor of the trade mark, and the definition of "distinctive" in sec. 9 is "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons."⁷

But it is not necessary that the public should know the name of the proprietor of the trade mark. In *Powell v. The Birmingham*

Not necessary
that public
should know

¹ Pages 1 to 4, see also the statutory definition, above, p. 25.

² See per Ld. Westbury in *Hall v. Barrows*, 4 De G. J. & S. 150; 38 L. J. Ch. p. 208 (1868); and in *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 187; 38 L. J. Ch. 199 (1868), and per Ld. Blackburn in *Orr-Ewing v. The Registrar of Trade Marks*, 4 App. Ca. p. 494; 48 L. J. Ch. 715 (1879).

³ 11 H. L. C. 528; 35 L. J. Ch. p. 57 (1865).

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

⁵ 14 C. D. 748; 42 L. T. (N. S.) 851 (1880).

⁶ See also the passage from the judgment of Rigby, L.J., in *Magnolia Metal Co's Tms.*, [1897] 2 Ch. p. 890; 14 R. P. O. p. 626, cited *supra*, p. 29.

⁷ See *Apollinaris Application*, [1907] 2 Ch. 178; 24 R. P. O. 436, Kekewich, J., and below, pp. 114 and 139.

the name of
the owner
of the mark.

Vinegar Brewery Co., Ltd., there was evidence that many purchasers of "Yorkshire Relish" knew nothing of the plaintiff; 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.'"¹

So also in *Edge v. Nicolls*,² it was found that many of the purchasers of the plaintiffs' laundry blue did not know their name, which was not on the goods and relied entirely on the peculiar get-up of the goods, consisting partly of a stick of special form enabling the user to handle the goods in a convenient way.

A provision in the Act of 1905 allows any "special or distinctive³ word or words, letter, numeral, or combination of letters or numerals, used as a trade mark" before the commencement of the Act of 1875, to be registered as a trade mark;⁴ and it was held that the qualification as it stood in the earlier Acts, namely, "special and distinctive," did no more than embody the requirements of the existing law in regard to what were or might be trade marks.⁵

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,⁶ 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.

¹ [1897] A. C. p. 715; 14 R. P. C. p. 780. See also the judgment of Neville, J., in *Warwick Tyre Co., Ltd. v. New Motor and General Rubber Co., Ltd.*, 27 R. P. C. 161 at p. 171 (1910). In that case the plaintiffs neither manufactured nor sold "Warwick Tyres," but had entered into a special arrangement with another company conferring on it the right to carry on business in "Warwick Tyres" for a period of years, but Neville, J., held that the property in the trade name remained in the plaintiffs, and that they were entitled

to sue, and that it was immaterial whether the reputation of the name "Warwick Tyres" was identified with the plaintiffs or not.

² [1911] A. C. 603; 28 R. P. C. 582 (H. of L.).

³ Sec. 9. In the earlier Acts "special and distinctive."

⁴ As to what marks come within the proviso, see Chap. VIII., p. 185, below.

⁵ *Hopkinson's Tm.*, [1892] 2 Ch. 116; 9 R. P. C. 102, Kekewich, J.

⁶ As to marks common to the trade, see below, pp. 199 and 239.

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;¹ 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.

What are distinctive marks.

The question whether a mark is merely descriptive can hardly arise except with regard to word marks.² It may be stated in either of the following forms: Do the words which are claimed as a trade mark (or trade name of the goods, 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?

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

The question arose as early as the case of *Millington v. Fox*.³ 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*⁴ 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

The name of new pattern. *Ford v. Foster*.

¹ Chap. VIII., p. 185.

² As to pictures of the goods, see *James' Tm.*, 83 O. D. 892; 8 R. P. O. 340 (1886), O. A. (*Dome Black Lead*); *Bowden Wire, Ltd. v. Bowden Brake Co., Ltd.*, 80 R. P. O. 45 (1918), Swin-

sen Eady, J., at p. 61; and below, p. 209.

³ 3 My. & Cr. 838 (1838), Cottenham, L.C.

⁴ L. R. 7 Ch. 611 (1872); 41 L. J. Ch. 682.

Test whether
a trade mark
has become
publici juris.

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*, said¹ 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 mark *Eureka* to any shirts not manufactured by the plaintiff;² 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

¹ At page 628. See also *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.*, 17 R. P. C. 461; 18 R. P. C. 434; (1901), Buckley, J., and C. A.

² For form of injunction, see L. R. 7 Ch. p. 634; Appendix, p. 709. Cf. *Gramophone Co.'s Application*, [1910]

² Ch. 423; 27 R. P. C. 689, where the word "gramophone" was found to connote to the trade the source of manufacture, but to denote to the public merely a talking machine of a particular type.

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 case¹ 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."² The case took a somewhat unusual course. It was dismissed by Jessel, M.R., without the defendant having been called upon, and this decision was upheld by the Court of Appeal, but reversed by the House of Lords, the House deciding that, upon the evidence of the plaintiffs, an answer was called for, and that, therefore, the defendant ought to be required to prove the allegation on which he relied.³

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.⁴ 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

¹ *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. 42, note 5.

² Per Ld. Cairns, 3 App. Ca. p. 385; 47 L. J. Ch. p. 485.

³ The case does not appear to have been carried any further.

⁴ See above, pp. 18 and 14, where the judgment is quoted at length.

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.¹ The other law lords agreed that the plaintiffs had made out a case to show that the defendant's advertisements might lead to his goods being bought as and for theirs, and that, therefore, the defendant ought to have been called upon to displace this case, or to establish by evidence his own contention as to the meaning of *Singer*. The case was sent down for a new trial, but there is no further report of it.

*Singer v.
Loog.*

Many of the same questions were discussed again in the case of *The Singer Manufacturing Co. v. Loog*.² There the 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;³ 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.⁴ Lord Selborne, however, found as a fact that the term *Singer* did signify a system of construction for sewing machines known to the trade.⁵

¹ 3 App. Ca. p. 391; 47 L. J. Ch. p. 488; and see above, p. 14.

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

³ 18 C. D. p. 419.

⁴ 18 C. D. p. 398.

⁵ 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. And in *The Singer Manufacturing Co. v. British Empire Manufacturing Co.*, 20 R. P. C. 818 (1903), Kekewich, J., found that to ordinary purchasers there was nothing

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

"The reputation acquired by machines of a particular form or construction," said Lord Selborne,¹ "is one thing; the reputation of the plaintiffs is another. If the defendant has no right under colour of the former to invade the latter, neither have the plaintiffs any right under colour of the latter to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common to the trade, provided always that he does this in a fair, distinct, and unequivocal way.

The Liebig's Extract case² 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.³

The meaning of a word may, of course, undergo changes from time to time, thus a name which in one case was held to indicate a system or type of motor, was in a later case held to have lost that meaning.⁴ Change of meaning of word.

known as the *Singer* system. Other cases in which such words as "system" "pattern" "type" "quality" "model" have been used by defendants in conjunction with words claimed by plaintiffs as denoting their goods will be found referred to below, p. 503.

¹ 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 (1884), C. A.

bury, 17 L. T. (N. S.) 298 (1867), Wood, V.-C.; *Id. v. Anderson*, 55 L. T. 206 (1884), Chitty, J.

² In *Liebig's Extract of Meat Co., Ltd. v. Chemists' Co-operative Society, Ltd.* (1896), 18 R. P. C. 685, 786, 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."

⁴ *Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.*, 18

³ *Liebig's Extract of Meat Co. v. Han-*

Secondary
meaning of
words origin-
ally common.

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*.¹ 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 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."² 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

R. P. C. 465 (1901), *Buckley, J., and Daimler Motor Co. (1904), Ltd. v. London Daimler Co., Ltd.*, 23 R. P. C. 718; 21 R. P. C. 379 (1907), C. A.

¹ [1896] A. C. 199; 18 R. P. C. 218.

² [1896] A. C. p. 210; 18 R. P. C. 228.

intended to understand it, in its secondary sense, it will none the less be a falsehood that in its primary sense, it may be true."¹

In *The Cellular Clothing Company v. Maxton & Murray*,² 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'.³

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.

On this subject, Lord Herschell's Committee said in their report:⁴ "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

Name of goods made under an expired patent.

¹ [1896] A. C. p. 212; 18 R. P. C. p. 229. A recent case, illustrating the rights of plaintiffs who prove that an ordinary English word has acquired a secondary meaning and become associated with their goods as indicating their manufacture, and the limits of such rights, is *Kinnell & Co., Ltd. v. Ballantine & Sons*, 27 R. P. C. 185 (1911), Ct. of Sess., where the Court discharged an interlocutor declaring that the plaintiffs had the exclusive right to the use of the name "Horse-Shoe" for

boilers, but granted an interdict against the use of that name by the defendants without clearly distinguishing their boilers from those of the plaintiffs.

² [1899] A. C. 826; 16 R. P. C. 897. See also *Parsons v. Gillespie*, [1898] A. C. 239; 15 R. P. C. 57.

³ The decision in this case has been followed in several subsequent cases, see Chap XVI., pp. 565, *et seq.* As to names obtaining a secondary meaning, see pp. 593, *et seq.*

⁴ Report of 1888, p. xiv.

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*¹ and *The Linoleum Manufacturing Co. v. Nairn*² are the leading authorities on this head. In the former case, the plaintiffs were manufacturers of sewing machines made according to an expired patent, and in the manufacture, therefore, they had no monopoly. The defendant advertised himself as the "agent for the sale of the Wheeler-Wilson machine" in Birmingham, although he was not the plaintiffs' agent, and was not selling machines made by them. He alleged that his advertisement meant only that he sold the machines. The Court, while restraining him from advertising himself as agent, refused to restrain him from describing the machines he sold as *Wheeler and Wilson's*. It was not, said James, V.-C., the name of the makers but of the thing itself, and the monopoly under the expired patent could not be prolonged by granting a monopoly in the name.

The Linoleum case.

In *The Linoleum case*,³ 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,⁴ "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

¹ 39 L. J. Ch. 86 (1870), James, V.-C.

² 7 C. D. 834; 47 L. J. Ch. 480 (1878), Fry, J.

³ *Linoleum Co. v. Nairn*, 7 C. D. 834;

47 L. J. Ch. 480 (1878); cf. *Young v. Macrae*, 9 Jur. (N. S.) 832 (1862), Wood, V.-C., *paraffin* not a trade mark.

⁴ 7 C. D. p. 837; 47 L. J. Ch. p. 482.

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."¹

The principle thus laid down has been approved and adopted in more recent cases.² Thus, Lord Herschell, in *Reddaway v. Banham*,³ says: "Where a patentee attaches 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 production of a particular manufacturer, but of the article itself, by whomsoever it is manufactured."

In *The Magnolia Metal Co.'s Trade Marks*,⁴ 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 manufacture of it is protected by a patent, the manufacturer or patentee cannot by any means entitle himself to a monopoly in the use,⁵ 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

¹ See below, p. 280.

² Besides the cases noticed in the text, the following are cases in which the principle has been followed or recognised: *Formalin Hygienic Co., Ltd.'s Application*, 17 R. P. C. 486 (1900), Farwell, J.; *Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd.*, 20 R. P. C. 397 (1903); *Chesebrough Co.'s Tm.*, [1902] 2 Ch. 1; 18 R. P. C. 191; 19 R. P. C. 842, in which, however, the Court of Appeal held that vasoline was not the name of a patented article. See also the judgment of Lord Kyllachy in *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor Co., Ltd.*, 28 R. P. C. 761, at p. 770; *Gestetner's Tm.*, [1907] 2 Ch. 478; [1908] 1 Ch. 513; 24 R. P. C.

545; 25 R. P. C. 156; *Bowden's Patent Syndicate's Application*, 26 R. P. C. 205 (1909), Neville, J. (*Bowden Wire*); *Bowden Wire, Ltd. v. Bowden Brake Co., Ltd.*, Times, June 25th, 1919, Warrington, J. (*Bowden Control*); cf. *Whitfield's Bedsteads, Ltd.'s Application*, 26 R. P. C. 657 (1909), Eve, J., where, however, the patents that had existed did not relate to the "Lawson Tait" bedstead, but to improvements which had been applied both to it and other bedsteads.

³ [1896] A. C. p. 214; and 18 R. P. C. p. 230.

⁴ [1897] 2 Ch. 371; and 14 R. P. C. 621.

⁵ That is for the invention or article.

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.

In a more recent case¹ *Neville, J.*, held that *Cyclostyle* was the name of a patented invention, and was not a fancy word registrable under the Act of 1883, nor an inverted word registrable under the Act of 1905, and the decision was affirmed in the Court of Appeal.

The fact that the patent for the goods is bad is immaterial, for a practical monopoly may be obtained by a bad patent;² 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.³ 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.⁴

¹ *Gestelner's Tm.*, [1907] 2 Ch. 478; [1908] 1 Ch. 513; 24 R. P. C. 545; 25 R. P. C. 156.

² *Formalin Hygienic Co., Ltd.'s Application*, 17 R. P. C. 486 (1900), *Farwell, J.*; see also *Magnolia Metal Co.'s Tms.*, supra, and *Winser & Co. v. Armstrong & Co.*, 16 R. P. C. 167 (1900), *Byrne, J.* The *Magnolia* patent was subsequently revoked: *Miller's Patent*, 15 R. P. C. 205. The decision in *Edge v. Nicolls* cited below does not appear to overrule the decisions in those cases which were not cited. But it does tend to show that it may be open to the patentee after the lapse of many years

from the expiration of the patent to claim that the name has come to mean goods of his manufacture. *Edge v. Nicolls* related to the get-up of the article.

³ *Meaby & Co., Ltd. v. Triticine, Ltd.*, 15 R. P. C. 1 (1898), *North, J.*; and see below, p. 476, as to misrepresentation respecting patents.

⁴ *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.

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.¹

It would seem that 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 ceased to be the name of the article and has come to denote his manufacture only.

In the case of *Boake Roberts & Co. v. Wayland*² the plaintiffs had registered in 1906 a trade mark consisting of the letters K. M. S., being the initial letters of Kalium Meta Sulphite (potassium meta sulphite). They had had a patent for the manufacture of this substance, but the patent had expired in 1899. The defendants contended that "K.M.S." was merely descriptive of the article, and moreover was the name given to the patented article.³ It was proved, however, that since the expiration of the patent, the article had been manufactured and sold by various firms, but under names other than "K.M.S." Neville, J., held that whatever the decision on the facts as they stood in 1899 might have been, it was established that at the date of the commencement of action, "K.M.S." was understood in the trade to indicate the preservative manufactured by the plaintiffs, and the registration was held to be valid. A somewhat similar point arose in a curious way in the case of *Edge v. Nicolls*,⁴ which however related not to the name but to the get-up of an article formerly patented. The article in question was laundry blue and this was put up by the plaintiffs in a bag with no printing on it, but with a stick attached thereto for the purpose of enabling the laundress to handle the blue conveniently especially when putting it into water. In 1884 the predecessor of the plaintiff company had taken out a patent of which the use of a stick was the principal feature, but this patent was clearly invalid and was revoked in the year 1891. Since 1884 the plaintiffs or their predecessor had sold the blue with a stick of

¹ *Young v. Macz*, 9 Jur. (N. S.) 822. With respect to this case, the subsequent comments of Wood, V.-C., on his decision contained in *Braham v. Bustard*, 1 H. & M. 447 (1863), should be borne in mind; see Ld. Macnaghten's judgment in *Reddaway v. Banham*, [1896] A. C. at p. 220; 18 R. P. C. 284.

² 20 R. P. C. 251 (1909).

T.M.

³ Another point raised by the defendants at the trial was that the plaintiffs had represented that the article was still a patented article, but this was not pleaded, and cross-examination of the plaintiffs on this point was accordingly disallowed.

⁴ [1911] 1 Ch. 5; [1911] A. C. 603; 27 R. P. C. 671; 28 R. P. C. 53 and 582.

the form shown in the drawing to the specification of the patent, but the patent was not confined to a particular form of stick. The defendants got up their goods in a similar manner but had a label on the bag with their name prominently on it. It was held by the Court of Appeal that the plaintiffs could not claim a monopoly in the use of a stick, which being a useful part of the article, could not be considered as part of the get-up, and further that they could not claim a monopoly of what had formerly been protected by the patent, and an injunction which had been granted by Swinfen Eady, J., was dissolved. The Court treated the plaintiffs as claiming a monopoly in the use of a stick of any form, but on appeal to the House of Lords the plaintiffs disclaimed any such claim, and it was held that the particular get-up including the stick of a particular form had become associated with the plaintiffs and that there was nothing in the fact of the previous existence of the invalid patent which prevented the plaintiffs from protecting that get-up.¹

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,² 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 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.³

Whether the name given to a new article can be monopolised.

The judgment of Fry, J., in *The Linoleum* case⁴ supports the proposition that the principle is not confined to an article protected by patent, or by a secret or otherwise, but is wide enough to cover the case of a new name applied to a new article. And in *The Valvoline* case⁵ the same Judge, when a

¹ See also *Daimler Motor Co. (1904) Ltd. v. London Daimler Co., Ltd.*, 24 R. P. C. 879 (1907), C. A.

² 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.

³ 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; 18 R. P. C. at p. 252; and approved by Ld. 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. 47, and Chap. XIX., p. 639.

⁴ Above, p. 40.

⁵ *Leonard and Ellis' Tm.*, 26 C. D. 288 at p. 804.

Lord Justice, said, in considering whether *Valvoline* was a special and distinctive word: "When a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section.¹ It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker. I am inclined to think that the words 'special and distinctive' import the specialising 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." In the same case Cotton, L.J., said: "In my opinion when a man invents a new article, and invents a word as descriptive of that article, then, if all the world are at liberty to make that article, he stands in a very great difficulty as regards claiming to himself the exclusive use of that name which he has invented to describe the article." And Lord Davoy, in *Cellular Clothing Company v. Maxton*,² after stating the principle in the case of a patented article, said: "But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article: all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *prima facie* use the name by which the article is known in the market." The question was discussed again in *The Vaseline* case,³ in which, however, the majority in the Court of Appeal held that the word *Vaseline* indicated not an article made by a particular process, but an article made by a particular manufacturer; and Stirling, L.J., in his judgment expressly reserved the question. Cozens-Hardy, L.J., dissenting on the facts from the other members of the Court, referred to *The Linoleum* case, and to the fact that linoleum had been a patented article, but said that he thought that the principle could not be limited to the case of a patented article, and he

¹ Sec. 10 of the Act of 1875.

² [1899] A. C. p. 844.

³ *Chesebrough Co.'s Tm.*, [1902] 2 Ch.

1; 18 R. P. C. 101; 19 R. P. C. 842, Buckley, J., and C. A.

adopted the language of Fry, L.J., in *The Valvoline* case in the passage quoted above.¹

The Diabolo case.

In *The Diabolo* case² the plaintiffs had revived an old game, played with a top and two sticks. The game had formerly been called in France "Lo Diable," and in England "Devil on Two Sticks." The plaintiffs had registered the word "Diabolo" as a trade mark for tops, and the question before the Court was whether this registration was valid. The plaintiffs advertised and sold the game as "Diabolo." It was held by Parker, J., that the words had a direct reference to the character or quality of the goods, and was no more registrable for a top than the word "cricket" was for a set of stumps.

The Gramophone case.

The Gramophone case³ well illustrates the difficulty of acquiring rights in a word which has been used as the name of a new article. In that case the applicants for registration of the word "gramophone" had used that word in connection with talking machines which they or their predecessors had introduced, and they had very extensively advertised and sold the machine for many years under that name. Such machines had disc records, as opposed to cylindrical records, machines with cylindrical records being known as phonographs. No other makers sold their machines as "gramophones." It was held on the evidence that to the trade generally the word, whilst denoting a machine of a particular type, connoted also the source of manufacture; but that to the public it denoted the type of machine without any such connotation, and registration was refused.

In a recent case⁴ it was attempted to extend the principle of *The Linoleum* case in a manner which the Court of Appeal held to be quite unwarranted. The owners of the trade mark "Crystal Palace" had had by contract a monopoly of supplying and exhibiting fireworks at the Crystal Palace, but at the date of the action no longer held the contract. It was argued their rights in the mark had determined with the contract, on the ground that the mark indicated some continuing connection with the

¹ In *Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd.*, 20 R. P. C. 837 (1908), it was contended for the defendants that "Kodak" as applied to films was a new name for a new article, and meant a film for a Kodak camera; but Swinfen Eady, J., found that the word indicated the

plaintiffs' goods only.

² *Philippart v. Whiteley, Ltd.*, [1908] 2 Ch. 274; 25 R. P. C. 565.

³ *Gramophones Co.'s Application*, [1910] 2 Ch. 428; 27 R. P. C. 689.

⁴ *Brock & Co.'s Crystal Palace Fireworks, Ltd. v. Pain*, 28 R. P. C. 461 and 697 (1911).

Crystal Palace. The plaintiffs had used the mark for the fireworks in general. It was held by the Court of Appeal, affirming Warrington, J., that the words "Crystal Palace" in connection with fireworks meant the plaintiffs' fireworks, and that the principle of *The Linoleum* case had no application to the case before the Court.

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.¹ 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,² 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 recognised." Original.

The name of the place of origin of the goods would, on the principles discussed above, in general, be bad as a trade mark, for any importer from the same place would be at liberty to use it; but where a geographical 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. In cases where this secondary meaning has been acquired, following the rule adopted in the analogous case of a trader using his own name,³ the Courts would not interfere to restrain altogether the use of the name in question by a second trader who is honestly using the name 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.⁴ Name of the place of origin.

¹ *Winer & Co. v. Armstrong & Co.*, 18 R. P. C. 107 (1899), Byrne, J. (*Winer interceptors*).

² *Cocks v. Chandler*, L. R. 11 Eq. p. 447; 40 L. J. Ch. p. 575 (1871); see also *Browne v. Freeman* (1), 12 W. R. 305 (1864), Wood, V.-C.; S. C. (2), W. N. (1878), 178 (*Chlorodyne*), L.J.J.;

Lazenby v. White, 41 L. J. Ch. 354, n. (1870) (*Harvey's Sauce*).

³ See below, pp. 593, *et seq.*

⁴ 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:

*Anatolia
liquorice.*

In *McAndrew v. Bassett*¹ the word *Anatolia* stamped upon liquorice was held to be a good trade mark. The plaintiff made his goods of a mixture of juices obtained partly from Spain and partly from the district of Andoli; and he chose *Anatolia*, which was one form of the latter name, as his mark. The defendant, having seen the plaintiff's mark in the market, caused it to be applied to goods of his own made solely from Spanish juice. If the name had had a known meaning indicating the origin of the goods, it is clear that the plaintiff could not have monopolised it; but as it had, when he assumed it, and at the time of the infringement, no such meaning, the Court decided that it was a good trade mark. "It is not," said Wood, V.-C., "like the case . . . of there being some district from which a well-known wine, such as Burgundy, is imported, and the first importer calls it *Burgundy*; although he may have stamped *Burgundy* on his corks for twenty years, he could not prevent anybody else from calling a wine produced in Burgundy by the name of the place from which it was imported."

*Seixo v.
Provezende.*

In *Seixo v. Provezende*,² 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 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,³ and, on appeal,

Thompson v. Montgomery, [1891] A. C. 217; 8 R. P. C. 365; above, p. 81. The case was one of deliberate fraud; but, in view of the *Valentine* case, cited below, p. 598, it would seem that the same result could have been reached without proof of fraud. See also *Price's Patent Candles Co., Ltd. v. Ogston and Tennant*, 26 R. P. C. 797 (1909), L. O. Scotland, where an injunction was granted against the use of London candles without distinguishing.

See also p. 575. The case of *Cash v. Cash*, 18 R. P. C. 218; 19 R. P. C. 181 (1902), seems to show that the Court will not absolutely restrain a person from using his own name in trade. See below, p. 600.

¹ 4 De G. J. & S. 380; 83 L. J. Ch. 561 (1864), Wood, V.-C., and Westbury, L. C.

² L. R. 1 Ch. 192; 14 L. T. (N. S.) 814 (1865).

³ See form of injunction which was approved by the H.L. in *Montgomery*

Cranworth, L.C., upheld this decision. "Assuming the truth of what is contended for by the defendants," the Lord Chancellor said,¹ "that is, that parts of their vineyards are known by the name *Scixo*, 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 plaintiff."

In *The Glenfield Starch* case,² the defendant was restrained from using the word *Glenfield* on the labels attached to starch made by him, and from calling such starch *Glenfield Starch*, although his starch was actually made, and that of the plaintiffs was not made, at the place of that name. The plaintiffs had formerly manufactured their goods at Glenfield, and had adopted the name *Glenfield Starch* and a label comprising the words to describe them; and the defendant, as the House of Lords found, set up a factory at Glenfield—an open place with a few cottages—for the express purpose of securing the name, and of profiting by the plaintiffs' reputation. He called his starch *Royal Palace Starch*, but placed the name *Glenfield* in large letters on his labels, and his agents sold his goods as *Glenfield Starch*.

*Glenfield
starch.*

"I take it to be clear from the evidence," Lord Westbury said,³ "that, long antecedently to the operations of the respondent, the word *Glenfield* had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellants. It 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 Ale* case⁴ in the year 1891, which was a very similar case.⁵

v. *Thompson* (p. 81, note (8)), L. R. 1 Ch. p. 194; Appendix, p. 802.

¹ L. R. 1 Ch. p. 198; 14 L. T. (N. S.), p. 816.

² *Wotherspoon v. Currie*, L. R. 5 H. L. 608; 42 L. J. Ch. 180 (1872).

³ L. R. 5 H. L. p. 521.

⁴ *Montgomery v. Thompson*, [1891]

A. C. p. 217; 8 R. P. C. 861; above, p. 81; see also *Huntley and Palmer v. The Reading Biscuit Co.*, 10 R. P. C. 277 (1899), Chitty, J. (*Reading biscuits*); and *Worcester Royal Porcelain Co., Ltd. v. Locke & Co.*, 19 R. P. C. 479 (1902), Byrno, J. (*Worcester china*).

⁵ See also *Bewlay & Co., Ltd. v.*

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;¹ and where the article is not a manufactured article but a product of the soil, e.g. the water from a spring, and the name in question is the name of the locality and necessarily enters into the description of the article, persons cannot be prevented from fairly using it to describe the article.²

Geographical names are expressly excepted from the list of essential particulars for registered trade marks contained in the present Act,³ but in some cases words having a primary geographical meaning have been allowed to be registered as distinctive words.⁴

Advertisement of the goods not a trade mark.

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.⁵

Leather Cloth case.

The trade mark of the plaintiffs in that case consisted of a circle formed by the words *Crocketts' International Leather Cloth Company, Newark, N.Y., U.S.A., West Ham, England*, inside of which in the upper half was an eagle, with the word *Excelsior* over it, and the words *Crocketts & Co., tanned leather cloth*, below it, and in the lower half the words *Patented, January 24, 56, I. R. and C. P. Crockett, Manufacturers, 12 yards*. The defendants had a trade mark containing features similar to some of these. Wood, V.-C., granted an injunction,⁶ but on appeal⁷ 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

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 plaintiffs' 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.

¹ Per Cozens-Hardy, J., in *Wolff v. Nopitsch*, 17 R. P. C. 321, at p. 330 (1900).

² *Grand Hotel Co. of Caledonian Springs, Ltd. v. Wilson* (*Caledonia water*), [1904] A. C. 103; 21 R. P. C. 117.

³ Act of 1905, s. 9 (4), below, p. 175.

⁴ See below, p. 104.

⁵ *The Leather Cloth Co. v. The American Leather Cloth Co.*, 11 H. L. C. 523; 85 L. J. Ch. 58 (1865).

⁶ 1 H. & M. 271; 82 L. J. Ch. 721.

⁷ 4 De G. J. & S. 187; 83 L. J. Ch. 199.

said: ¹ "I am satisfied that I ought to have regarded this affix to the plaintiffs' goods, which is here denominated a trade mark, as something which, according to the anterior usage and application of the words trade mark, by no means resembles or comes within the description of anything that has hitherto been properly designated by that name." It was, he added, "in reality, an advertisement of the character and quality of their goods."

So the words *Nourishing Stout* were refused protection ² by Malins, V.-C., who distinguished the case before him from two earlier cases, in one of which ³ words meaning *exactly 12 yards* printed in three foreign languages, and placed upon long cloth, and in the other ⁴ the words *Excelsior White Soap*, had been accepted as trade marks.

And in *Cheavin v. Walker*,⁵ a tablet bearing the words *G. Cheavin's Improved Patent Gold Medal Self-Cleaning Rapid Water Filter, Boston, England*, with the Royal Arms and the words *By Her Majesty's Royal Letters Patent*, was held by Jessel, M.R., in the Court of Appeal, not to be a trade mark. "What (the plaintiff) uses," he said,⁶ "is an inscription which he chooses to place or bake on his filters, and which tells its own story. The inscription is not in distinctive characters, but in ordinary type. There is nothing in it to show that it was made by any particular manufacturer. It is not possible to say that such an inscription is a trade mark." The action failed also on the ground that the tablet falsely represented that the goods were made under an existing patent, whereas, in fact, the patent had expired.

Cheavin v. Walker.

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.⁷

¹ 85 L. J. Ch., p. 66.

² *Raggett v. Findlater*, L. R. 17 Eq. p. 29; 48 L. J. Ch. 64 (1879). This case and the others here cited must be taken subject to the law established by *Reddaway v. Banham* (supra, p. 44), 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.

³ *Broadhurst v. Barlow* (1872), W. N. 212; and see L. R. 17 Eq. p. 88.

⁴ *Braham v. Bustard*, 1 H. & M. 447; 9 E. T. (N. S.) 199 (1863), Wood, V.-C.

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

⁶ 5 C. D. p. 862.

⁷ Chap. VIII., What may be Registered, p. 135.

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

The words in the statutory definition are "manufacture, selection, certification, dealing with or offering for sale."

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;¹ 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.² 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.³

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 *The Yorkshire Relish* case,⁴ that the function of a trade mark is to give an indication of "the trade source from which the goods come, or the trade hands through which they pass on their way to the market."

Trade mark
of selector
of goods.

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*.⁵ 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,

*Hirsch v.
Jonas.*

¹ See the *dicta* cited above, p. 29.

² See *Powell v. Birmingham Vinegar Brewery Co.*, [1897] A. C. 710, and 14 R. P. C. 720; and *supra*, p. 87.

³ The deception may constitute the offence of applying a false trade description. See *Starey v. Chilworth Gunpowder Co.*, 24 Q. B. D. 90; 59 L. J.

M. C. 13 (1890), Ld. 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, Appendix, p. 886.

⁴ *Powell's Tm.*, [1893] 2 Ch. p. 404; 10 R. P. C. 195.

⁵ 3 C. D. 584; 45 L. J. Ch. 864 (1876).

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 Jossel, M.R.,¹ "means, I suppose, that the goods are manufactured by the person whose trade mark it purports to be. I can understand a man saying, 'I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to show that they have been selected and approved of by me will fetch a higher price in the market.' If Hirsch had put on the box '*Gloria de Inglaterra Havannah Cigars selected by Hirsch*,' he might have had a case to prevent other people imitating that. It would show that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him. That is not his case. There is nothing on the boxes to show anything about Hirsch at all. All he says is that the trade knows this mark as denoting cigars sold by him, which I dare say it does."²

In *Robinson v. Finlay*³ 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.

Joint trade marks.

In a recent case the mark in question belonged to a salesman dealing on commission in Covent Garden, and its office was to indicate that the goods had been consigned to and sold by him.⁴

Where a trade mark has been adopted exclusively for the purpose of a joint adventure under an arrangement to that effect, when the joint adventure has come to an end, neither party will be entitled to assert an exclusive right to the trade mark. Where an Italian Company and an English Company

¹ 3 C. D. p. 586; 45 L. J. Ch. p. 865.

² 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.

³ 9 C. D. 487; 39 L. T. (N. S.) 898 (1877), Bacon, V.-C., and C. A.; *Jones' Tm.*, 53 L. T. (N. S.) 1 (1885), C. A. Cf. *Van Zeller v. Mason, Cattley & Co.*, 25 R. P. C. 87 (1908), Joyce, J., cited p. 84.

⁴ *Major v. Franklin*, 25 R. P. C. 408 (1908), Joff, J.

were concerned under an agreement between them in a joint adventure, consisting in the export from Italy and the sale in England of tinned fruit and vegetables, and the English firm had registered trade marks in England which were used solely for the goods supplied by the Italian Company, and the registration had been effected for the purpose of the joint adventure and under the terms of agreement between the companies, and the Italian Company claimed that the joint adventure had been determined and that they had become solely entitled under the terms of agreement, whilst the Court held they had not become so entitled, it held that the trade marks belonged jointly to the companies and rectified the register by including the Italian Company as joint owners.¹

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.²

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,³ or in the case of a Cutlers' Corporate Mark, for use by a cutler resident in or within six miles of

¹ *Re Tarantella Tms.*, 27 R. P. C. 573 (1910), Eve, J., and see *Thorne & Sons, Ltd. v. Pimms, Ltd.*, 26 R. P. C. 222 (1909), Neville, J., where the defendants during a period in which they were selling the plaintiffs' "Thorne's Whisky" and none other, had registered a label containing the words "Glen Thorne," "sole proprietors, Pimms & Co.," and claimed the right after they had ceased to deal in the plaintiffs' whisky, to use this label, but it was held to have been registered under an arrangement between the parties, and that the defendants were not entitled to use the label on other whisky and that, when so used, it was calculated to deceive, and the registration was expunged. In a recent case, the defendant had been the patentee of an absorbent cartridge for a tobacco pipe, but he had granted an exclusive

licence to the plaintiffs for the term of the patent, and they adopted a certain get-up for their goods, employing the defendant to make them up and pack them; some years after the patent had expired the defendant sold such cartridges under a get-up, which was held to be so similar to the plaintiffs as to be calculated to deceive, and he attempted to justify the use of his get-up, on the ground that he invented it, or that it meant his manufacture or that he had a joint interest in it, but all those defences failed, *Adolph Frankau & Co., Ltd. v. Pflueger*, 26 R. P. C. 741, 28 R. P. C. 131 (1911), Eve, J., and Joyce, J.

² *Roger's Tm.*, 12 R. P. C. at p. 156 (1895), North, J.

³ *Hudson's Tm.*, 82 C. D. 811; 3 R. P. C. 155 (1886), C. A.

Hallamshire, by assignment from the Cutlors' Company.¹ The repealed Acts contained provisions that registration, or the application for registration, should be deemed equivalent to the public use of the registered trade mark,² and, although no such provision is contained in the Act of 1905, it expressly authorises the registration of a trade mark proposed to be used,³ and, subject to certain provisions in the Act and to limitations and conditions entered on the Register, the registration of a person as proprietor of a trade mark is, if valid, to give to such person the exclusive right to the use of the trade mark upon, or in connection with the goods in respect of which it is registered.⁴

And registration is *prima facie* evidence of validity,⁵ and, subject to certain qualifications, the original registration is to be taken as valid in all respects after seven years from such registration, or from the passing of the Act, whichever should last happen.⁶ The construction and effect of the sections are discussed in a later chapter.⁷ It was decided that the corresponding sections of the Acts of 1875 and 1883⁸ created a new method of acquiring trade mark rights.⁹

¹ See Chap. VI., Sheffield Marks, below, p. 120.

² Act of 1888, s. 17, replacing sec. 75 of the Act of 1883, and sec. 2 of the Act of 1875; below, p. 361.

³ See above, p. 25.

⁴ Sec. 39.

⁵ Sec. 40.

⁶ Sec. 41. See Sec. 76 of the Act of 1883. The corresponding section of

the Act of 1875 was sec. 8. The Act was passed on August 11th, 1905.

⁷ Chap. VIII., What may be Registered, p. 185. Chap. XII., Effect of Registration, p. 359.

⁸ Secs. 75 and 76 of the Act of 1883; sec. 8 of the Act of 1875.

⁹ *Hudson's Tm.*, 32 C. D. 311; 3 R. P. C. 155 (1886), C. A., below, p. 361.

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 1875,¹ and it is now continued under sec. 4 of the Act of 1905,² which provides that there shall be kept at the Patent Office³ a book called the Register of Trade Marks, wherein shall be entered all registered trade marks with the names and addresses of their proprietors, notifications of assignments and transmissions, disclaimers, conditions, limitations, and such other matters relating to such trade marks as may from time to time be prescribed. And the books of the original Register and those

¹ Secs. 1 and 7.

² Replacing with amendments sec. 78 of the Patents, &c., Act, 1888. The words "disclaimers, conditions, limitations,"

are new. See below, pp. 62 and 294.

³ 25, Southampton Buildings, Chancery Lane, London, W.C.

under the Act of 1883 are treated as part of the present Register.¹

There are also Registers at Manchester and Sheffield. The former, kept at the Manchester Branch Office, is a duplicate of the Register at the Patent Office, so far as it relates to goods in Classes 23, 24, and 25² (*i.e.*, cotton goods); the latter is a branch Register for trade marks for metal goods registered by residents in Hallamshire, or within six miles of it.³

The Manchester Branch Office and the Sheffield Register.

By sec. 60 of the Act of 1905,⁴ the Board of Trade may from time to time make general rules, subject to the provisions of the Act, for regulating the practice under the Act, for classifying goods and for certain other purposes. The trade mark rules, forms, and classification at present in force under this section are those of 1906, which came into operation on April 1st, 1906,⁵ and those of 1912.⁶

The Register was formerly under the control of the Registrar appointed in pursuance of the Act of 1875, but it, as well as the whole of the Patent Office, of the business of which it forms part, has since the Act of 1883 been under the immediate control of the Comptroller-General of Patents, Designs, and Trade Marks, who is, however, in the Act of 1905 referred to as the Registrar.⁷ He is appointed by, and acts under the superintendence and direction of, the Board of Trade.⁷ He 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.⁸ The Registrar's address is, the Registrar, Patent Office, Trade Marks Branch, 25, Southampton Buildings, London.

The Comptroller or Registrar.

Any act or thing directed by the Acts to be done by or to the Comptroller may be done by or to any officer authorised by the Board of Trade.⁷

¹ Act of 1905, sec. 6, replacing sec. 114 of the Act of 1883.

² Below, pp. 129 and 763.

³ As to the Manchester Branch Office, see below, p. 181, and as to the Sheffield registry, p. 125.

⁴ Replacing sec. 101 of the Act of 1883.

⁵ See Appendix, pp. 710 *et seq.* The Rules replaced the Rules of 1890, as amended by those of 1897 and 1898. The Rules of 1912 (p. 766) make slight amendments as to cotton marks only.

⁶ Sec. 4.

⁷ See sec. 74, and Patents and Designs Act, 1907, s. 62. 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.

⁸ Sec. 56. See below, p. 89.

Entries on
the Register.

In addition to the matters directed by sec. 4, quoted above, to be entered upon the Register, there are under Rule 64 to be entered also the date of the application for registration, which is treated for the purposes of the Act as the date of registration,¹ a statement of the goods for which the mark is registered,² particulars of the trade, business, profession or occupation, if any, of the proprietor, and such other particulars as the Registrar may deem necessary. In conformity with some early decisions under the Registration Acts, notes were entered on the Register 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,³ and in regard to other restrictions on the full rights ordinarily conferred by a simple registration.⁴ It was decided however in a later case⁵ 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. The Act of 1905 expressly authorises registration subject to conditions⁶ and limitations.⁷ In a case under that Act in which Kekowich, J., upon an undertaking being given by the applicants, declared the mark to be distinctive within sec. 9, he directed the undertaking to be given to the Court in the usual way.⁸ Disclaimers are authorised by sec. 15.⁹

No trusts to
be entered.

No notice of any trust may be entered upon the Register or is receivable by the Registrar, whether the trust be express, implied, or constructive,¹⁰ but equities may be enforced.¹¹ The entry of a reference to an agreement limiting the rights of the proprietor of the mark and not stating its terms, was under the former Acts held to be irregular.¹²

¹ Sec. 16.

² Sec. 8. See form of application, Form TM No. 2, Appendix, p. 742.

³ See below, pp. 255 and 333; and *Re Rabone & Co.*, Seb. Dig. p. 305 (1879), Jessel, M.R.; *De Otaduy's Tm.* (1885), W. N. p. 177, Pearson, J.; *Mitchell & Co.'s Tm.* (2), 28 C. D. 666 (1885), Chitty, J.; *Keep's Tm.*, 26 C. D. 187 (1884), Pearson, J.

⁴ In the case of *Verschure and Zoon's Application*, 22 R. P. C. 568 (1905), Warrington, J., registration was allowed subject to a condition.

⁵ *Dewhurst's Tm.*, [1896] 2 Ch. 187; 13 R. P. C. 288, C. A.; and see below,

p. 259.

⁶ Secs. 12 (2) and (4), 13, 14 (4) and (6), 21, 23, 24. See below, p. 82.

⁷ Secs. 10 (colour), 21. See below, pp. 238 and 294.

⁸ *Apollinaris Application*, [1907] 2 Ch. 178; 24 R. P. C. 436. See also *City of Karlsbad's Application*, 23 R. P. C. 162; *Eve, J.* (1911).

⁹ See below, Chap. IX., p. 236.

¹⁰ Sec. 5. Cf. Companies (Consolidation) Act, 1908, s. 27.

¹¹ Sec. 88, replacing a similar provision in sec. 87 of the Act of 1889.

¹² *De Otaduy's Tm.* and *Mitchell & Co.'s Tm.*, above, note (3).

There is no patent or other document issued by the Registrar conferring a title to a trade mark, but on the registration of a trade mark the proprietor, according to the Act of 1905, receives a certificate of registration.¹ Under the Act of 1883, as amended by that of 1888, it was expressly provided that the application, followed by the registration of the trade mark, should be equivalent to the public user,² by which, and by which alone, title to a trade mark was acquired before the Acts.³ But this provision has now been dropped, being deemed unnecessary.⁴ Registration itself, if valid, confers the exclusive right to the use of the mark,⁵ and, except in the case of an old mark of which registration has been refused, it is a condition precedent to any proceedings for the infringement of the trade mark.⁶ The fact of registration is also *prima facie* evidence of validity, and after a certain period and subject to certain exceptions, a registration cannot be impugned.⁷ The person registered as proprietor has power to assign the trade mark.⁸

Title conferred by registration.

Provision is made for the rectification of the Register,⁹ and also for the correction of clerical errors, for the entry of a change of name or address, for cancellation of the mark or of some of the goods for which it is registered, and for the entry of a disclaimer or memorandum not extending the rights given by the registration. These last-mentioned matters may be done by the Registrar at the instance of the proprietor.¹⁰

Alterations of the Register.

Alterations of the mark itself, not substantially affecting its identity, may also be made by the Registrar on the application of the proprietor.¹¹

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.¹²

Falsification of the Register.

¹ Sec. 17, Rule 67, and Form O, No. 2, below, p. 747.

² Act of 1888, s. 17.

³ See the last Chapter.

⁴ See Chap. XII., p. 361.

⁵ Sec. 39, replacing sec. 76 of the Act of 1883. See Chap. XII.; below, p. 803, Effect of Registration.

⁶ Sec. 42, replacing sec. 77 of the Act of 1883. See Chap. XII.; below, p. 878.

⁷ Secs. 40 and 41. See Chap. XII.; below, pp. 867 *et seq.*

⁸ Sec. 38, replacing sec. 87 of the Act of 1883. See Chap. XIII., p. 881.

⁹ Sec. 85, replacing sec. 90 of the Act of 1883. See Chap. XI.; below, p. 809, Rectification of the Register.

¹⁰ Sec. 82. Cf. sec. 91 of the Act of 1883. See Chap. XI.; below, p. 851.

¹¹ Sec. 84. Cf. sec. 92 of the Act of 1883.

¹² Sec. 66, replacing sec. 93 of the Act of 1883; below, p. 650.

Devolution
of title.

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 Registrar at the request of the person becoming entitled, and upon proof to the satisfaction of the Registrar of the title of the applicant.¹

Period of
registration.
Removal of
entries.

Registration is for a period of fourteen years, but is renewable.²

A trade mark may be removed from the Register on the ground that at the time of registration the applicant had no *bonâ fide* intention of using it, and that there has been no *bonâ fide* user in fact, or on the ground of non-user for five years before the application to remove it, subject to a qualification in the case of special circumstances,³ or it may be removed whenever the mark is on the Register without sufficient cause.⁴ A trade mark can also be removed for non-payment of a renewal fee.⁵ In all cases of removal a record of the removal and of the cause thereof is entered on the Register.⁶

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 and days of which due notice is given at the Patent Office.⁷

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,⁸ and it is often necessary for other purposes. Under the present rules an official search may be obtained as to the marks in any class on record (not merely registered marks) resembling a mark sent in to the Registrar.⁹ 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.

¹ Sec. 33, replacing sec. 87 of the Act of 1888. See Chap. XIII.; below, p. 384, Assignment and Devolution of Trade Marks. Rules 76 to 81.

² Secs. 28 and 29.

³ Sec. 87. See Chap. XI., Rectification, p. 327. As to the law under the previous Acts, see *Ball's Tm.*, [1898] 2 Ch. 482; 15 R. P. C. 262, 584, Romer, J., and C. A.; and in House of Lords,

sub nom. *Ball v. Dunnell*, [1899] A. C. 428; 16 R. P. C. 411; and Chap. XIV., below, p. 404.

⁴ Sec. 85.

⁵ Sec. 80; and below, p. 414.

⁶ Rule 74. Cf. Rule 47 of 1890.

⁷ Sec. 7. Rule 96.

⁸ Chap. X., p. 246.

⁹ Rule 95. Form TM No. 28, below, p. 755.

- I. An index of marks arranged in each class in the order of advertisement;
- II. An index of devices arranged in each class under the following heads:
- (1) Animals, including insects and reptiles.
 - (2) Birds.
 - (3) Buildings and landscapes.
 - (4) Crests, including crowns, coats of arms, and heraldic symbols.
 - (5) Fish.
 - (6) Geometrical forms, including suns, moons, stars, &c.
 - (7) Human figures.
 - (8) Miscellaneous.
 - (9) Monograms.
 - (10) Shipping, including anchors and flags.
 - (11) Trees, flowers, fruit, &c.
- (and warning is given that, in using this index, it is often necessary to look under several heads in order to 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,¹ 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.² And printed or written copies of or extracts from the Register, purporting to be certified by the Registrar and sealed with the Patent Office seal, are receivable in evidence without proof or production of the originals.³ And a certificate, purporting to be under the hand of the Registrar, of any entry, matter, or thing, which he is authorised 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 not

Certified copies of the Register to be evidence.

Registrar's certificate to be evidence.

¹ Report of 1888, p. ix. All applications to the Manchester Branch, whether resulting in registration or not, may be inspected; sec. 64 (11), below, p. 133.

² Sec. 7, replacing a similar provision in sec. 88 of the Act of 1883. For fees, see Appendix, p. 787.

³ Sec. 50. Cf. sec. 89 of the Act of 1883.

done.¹ As already noticed,² a certificate of the fact of registration is now given on registration of a trade mark. This is given without fee.

Purpose of certificate of registration to be stated.

Rule 102 requires that every certificate of registration, other than such as last mentioned, 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 abroad, or for other purposes; and the fees payable for the certificates vary according to the uses which they are to serve.³

Patent Office seal.

The seal of the Patent Office and impressions thereof are to be judicially noticed and admitted in evidence.⁴

Notices and documents may be sent by post.

Any application, statement, notice, or other document, authorised or required to be left, made, or given at the Patent Office or to or with the Registrar, or with or to any other person, may be sent through the post by a prepaid or official-paid letter; and if so sent, is to be deemed to have been delivered at the time when the letter containing the same would be delivered in the ordinary course of post; and in proving such service or sending, it is sufficient to prove that the letter was properly addressed and put into the post.⁵ The Rules contain provisions as to the addresses of registered proprietors, and for addresses to be furnished to the Registrar,⁶ and as to addresses for service of applicants, opponents, agents and proprietors not residing or carrying on business in the United Kingdom.⁷

Addresses.

Excluded days in computing time.

Where the last day fixed by the Act or Rules for leaving any document or paying any fee at the office falls on a public holiday, Saturday, or Sunday, such day is not counted.⁸

Agency.

Section 55 of the Act of 1905 provides that where by the Act any act has to be done by or to any person in connection with a trade mark or proposed trade mark, or any procedure relating thereto, such act may, under and in accordance with rules made

¹ Sec. 51, replacing sec. 96 of the Act of 1883.

² *Supra*, p. 65.

³ For fees, see the Forms and the Table of Fees, Appendix, pp. 740 and 787, and for form of request for certificates, Forms TM Nos. 81 to 84; below, pp. 760 *et seq.*; and as to Cotton Marks, Form, Cotton, No. 4, below, p. 758. A special certificate of an application for registration of a cotton mark is provided for by sec. 64 (12). See Chap. VII.,

p. 183.

⁴ Sec. 64 of the Patents and Designs Act, 1907, replacing sec. 84 of the Act of 1883.

⁵ Rule 7. Cf. sec. 97 of the Act of 1883.

⁶ End of Rule 7 and Rule 8, below, p. 720.

⁷ Rule 9, below, p. 720.

⁸ Rule 100, below, p. 782. Formerly provided for by sec. 98 of the Act of 1883.

under the Act, or in particular cases by special leave of the Board of Trade, be done by or to an agent of such party duly authorised in the prescribed manner.¹

By Rule 10 of the Rules of 1906,² an application for registration and an opposition to registration and all other communications between an applicant, an opponent and the Registrar, or the Board of Trade, and between the proprietor of a registered trade mark and the Registrar, or the Board of Trade, or any other person, may be made by or through an agent. The agent's authority is to be in Form TM No. 1,³ or in such other form as the Registrar may deem sufficient.⁴ Service upon the agent of any document relating to the trade mark is to be deemed to be service upon the person so appointing him, and all communications directed to be made to such person in respect of the trade mark may be addressed to the agent. The Registrar is not to be bound to recognise as such agent any person who has been convicted criminally or struck off the Roll of Solicitors, or whose name, by reason of his having been adjudged guilty of disgraceful professional conduct, has been erased from the Register of Patent Agents, kept under the provisions of the Patents, Designs, and Trade Marks Act, 1888, relating to the registration of patent agents,⁵ and not since restored.

When any discretionary or other power is given to the Registrar by the Act or Rules made thereunder he is not to exercise that power adversely to the applicant for registration or the registered proprietor of the trade mark in question without (if duly required so to do within the prescribed time) giving such applicant or registered proprietor an opportunity of being heard.⁶

Exercise of
discretionary
power by
Registrar.

¹ The matter was previously one dealt with by the Rules. See Rule 2 of 1898.

² Below, p. 720, where the Rule is fully set out, and see Rule 2.

³ Below, p. 741.

⁴ As to the signature of the authority, where the principal is a firm, partnership or body corporate, see Official

Instructions, below, p. 774.

⁵ Now replaced by secs. 84 and 85 of the Patents and Designs Act, 1907. See the Registrar of Patent Agents Rules, 1908.

⁶ Sec. 53. The prescribed time is one month from the date when the matter has arisen: Rules 83 to 86, Appendix, p. 730.

CHAPTER IV.

REGISTRATION OF TRADE MARKS.

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REGISTRATION of trade marks is now governed by secs. 8 to 21, 24, 25, 26, 62, 63 and 64 of the Act of 1905;¹ and, subject to the provisions of the Act, the practice of registration is regulated by the Trade Mark Rules, 1906. Of the sections mentioned, secs. 9, 10, and 62, relating to what may be registered;² sec. 11 and secs. 19 to 21, imposing certain restrictions on registration;³ sec. 15, providing for disclaimers;⁴ secs. 24 to 26, relating to associated trade marks;⁵ sec. 63, relating to Sheffield marks;⁶ and sec. 64, relating to cotton marks,⁷ are dealt with in other chapters of this book. The present chapter deals with the application for registration and the procedure consequent on it, contained in secs. 12 to 14 and 16 to 18 and in the Rules. From the Act of 1905, many provisions contained in the Acts of 1883 and 1888 are omitted, as being mere matters of procedure to be dealt within the Rules.

By sec. 12:—

Sec. 12.
Application
for Registra-
tion.

(1) Any person claiming to be the proprietor of a trade mark who is desirous of registering the same must apply in writing to the Registrar in the prescribed manner.

(2) Subject to the provisions of this Act the Registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications.

(3) In case of any such refusal or conditional acceptance the

¹ For the sections of the repealed Acts which regulated registration, see the comparative tables showing the corresponding sections, below, pp. 658, 661.

² Chap. VIII., p. 185.

³ Chap. X., p. 246.

⁴ Chap. IX., p. 236.

⁵ Chap. V., p. 112.

⁶ Chap. VI., p. 120.

⁷ Chap. VII., p. 129.

Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving at the same, and such decision shall be subject to appeal to the Board of Trade or to the Court at the option of the applicant.

(4) An appeal under this section shall be made in the prescribed manner, and on such appeal the Board of Trade or the Court, as the case may be, shall, if required, hear the applicant and the Registrar, and shall make an order determining whether, and subject to what conditions, amendments, or modifications, if any, the application is to be accepted.

(5) Appeals under this section shall be heard on the materials so stated by the Registrar to have been used by him in arriving at his decision, and no further grounds of objection to the acceptance of the application shall be allowed to be taken by the Registrar, other than those stated by him, except by leave of the tribunal hearing the appeal. Where any further grounds of objection are taken the applicant shall be entitled to withdraw his application without payment of costs on giving notice as prescribed.

(6) The Registrar or the Board of Trade or the Court, as the case may be, may at any time, whether before or after acceptance, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such terms as they may think fit.

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 sec. 85, unless protected by sec. 41.¹

Person includes any body of persons corporate or unincorporate,² and the Rules provide for the mode of execution of the application in the case of a firm or partnership, and in the case of a body corporate.³

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

The proprietor.

¹ See Chap. XI., p. 810, Rectification of the Register. 1889.

² Sec. 19 of the Interpretation Act,

³ Rule 17, and see Official Instructions, below, p. 774.

connection with which it is used,¹ or also the person who has invented² or selected, or caused to be invented or selected,³ a mark which is new in respect of the class of goods for which registration is sought. The definition of a trade mark for the purpose of the Act of 1905 includes a mark proposed to be used, as well as a mark actually used.⁴

An importer of goods produced abroad, whether by manu-
 An importer.
 facture, or by a process of nature—as, for instance, mineral waters—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.⁵ “The registration by the importer was wrong,” says 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 ;⁶ 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,

¹ See Chap. II., p. 24. Where a person has become the absolute owner in equity of a business and a trade mark used in it, an application by him to register the trade mark will be entertained by the office, although he has not the legal title, but the application must be in the name of the real person applying, and not in the name of a predecessor no longer entitled to registration: *Hedde & Co.’s Application*, 20 R. P. C. 599 (1903), Byrne, J.

² *Hudson’s Tm.*, 82 C. D. 811; 8 R. P. C. 155 (1886), C. A.; cf. *Munch’s Application*, 50 L. T. 12 (1884), Chitty, J.

³ I.e., for himself. See *Roger’s Tm.*,

12 R. P. C., at p. 156 (1895), North, J.

⁴ Sec. 3.

⁵ *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). Cf. *Defries & Sons, Ltd. v. Electric and Ordnance Accessories Co., Ltd.*, 23 R. P. C. 841 (1906), Joyce, J., where the vendor of goods made to his order abroad was held entitled to a name associated with the goods (*Stewart Arc Lamps*).

⁶ Cf. the judgment of Jessel, M.R., in *Hirsch v. Jonas*, 8 C. D. 584; 45 L. J. Ch. 364 (1876), cited p. 59.

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 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.¹

So 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.²

On the other hand, in a case before the Privy Council, where the plaintiffs were manufacturers in Switzerland of watches sold by them, as the Court held, to a single customer in Hong Kong, and by her there sold under certain trade marks which had long been used for the watches manufactured by the plaintiffs and their predecessors in title, it was held that the plaintiffs could

¹ See *Hirsch v. Jonas*, p. 73, note (6), and the *European Blair Camera Co.'s Tm.*, 18 R. P. C. 600 (1896), and *Defries & Sons, Ltd. v. Electric and Ordnance Accessories Co., Ltd.*, supra, p. 73, note (5); and Chap. II., p. 59. *Goodfellow v. Prince*, 85 O. D. 9; 56 L. J. Ch. 545 (1887), C. A.; *Robinson v. Finlay*, 9 O. D. 487; 39 L. T. (N. S.) 398 (1877), C. A.; *Jones' Tm.*, 53 L. T. 1 (1885), C. A., and *Tarantella Tms.*, 27 R. P. C. 578 (1910), Eve, J., were cases of joint ownership of trade marks. A sole importer cannot maintain an action for passing-off by means of get-up where the get-up is not in any way associated with the importer but only with the foreign manufacturer, *Richards v. Butcher*, 7 R. P. C. 288 (1890), Kay, J.; *Dental Manufacturing*

Co., Ltd. v. De Trey, [1912] 3 K. B. 77; 29 R. P. C. 617, C. A. 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.

² *European Blair Camera Co.'s Tm.*, 13 R. P. C. 600 (1896), Stirling, J.

not identify themselves with the trade which belonged to the importer, and that they could not sue for infringement in Hong Kong of the trade marks, of which they were assignees, for they had no interest, by assignment or otherwise, in the trade in such watches in Hong Kong beyond their sales to the one importer.¹

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*,² 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 of the defendants in the article had determined. Both the action and the motion to rectify failed, the Court finding that the name indicated goods manufactured and sold by the defendants in the action.

Registration
by licensee
under patent.

The application for registration may be made by or through an agent duly authorised to the satisfaction of the Registrar.³ 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.⁴

Application
through
agent.

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.⁵ In some cases, where there has been no wrongful intention on

Registration
in the agent's
name.

¹ *Ullmann v. Leuba*, [1908] A. C. 443; 25 R. P. C. 678; the plaintiffs claimed to be assignees of a business in Hong Kong, but it was held that they had failed in establishing a title by assignment.

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

³ See above, p. 18.

⁴ *Jackson & Co. v. Napper*, 85 C. D. 162; 4 R. P. C. 45 (1887), Stirling, J. *Loftus' Tm.*, [1894] 1 Ch. 103; 11

R. P. C. 29, North, J. As to the practice under the present Act, see below, p. 87.

⁵ *Marler's Tm.*, 44 L. T. 98, n. (1878), Jessel, M.R. In *Casson's Tm.*, 27 R. P. C. 65 (1910), Eve, J., the registration was expunged on the application of the employers of the registered proprietor, it being held that the registration was inconsistent with the good faith which ought to obtain between employee and employer.

the part of the agent, an assignment to the principal,¹ or to his successor in business,² has been permitted, or a rectification of the Register effected;³ but the authorities are conflicting upon the question whether either of these courses ought to be allowed.⁴ 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.⁵

2. The Registrar's Discretion.

The Registrar 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 the Act, and which is not debarred from registration by some provision of the Act. The following table shows the reasons for refusal which arise under the Act 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.⁶
- (2) It is not made in proper form.⁷
- (3) It is deemed to be abandoned.⁸
- (4) The mark tendered does not consist of or contain any of the essential particulars of a registrable trade mark.⁹
- (5) The application is successfully opposed.¹⁰ 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,¹¹ or he may show that it is a common mark.¹²

¹ *Farina's Tm.*, 44 L. T. 99, n. (1881), Jessel, M.R.

² *Welcome's Tm.*, 82 C. D. 218; 8 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.

³ *Rust's Tm.*, 44 L. T. 98, n. (1880), Jessel, M.R.

⁴ See *Rivière's Tm.*, 55 L. J. Ch. 545 (1886), C. A., and note (5); and cf. *Grocott's Design*, 17 R. P. C. 189 (1900). See also Chap. XI., p. 886.

⁵ *Kingsford & Son's Application*, 6 R. P. C. 418; 61 L. T. 426 (1889), Kay, J.

⁶ Sec. 12 (1); above, p. 71.

⁷ See Procedure on Application to Register; below, p. 84. "Prescribed" means prescribed by the Act or the rules thereunder, sec. 8. See also *Wright, Crossley & Co.'s Application*, [1900] 2 Ch. 218; 17 R. P. C. 886.

⁸ Sec. 18, p. 87.

⁹ Sec. 9, Chap. VIII., p. 187.

¹⁰ Sec. 14, pp. 98, 94, *et seq.*

¹¹ See *pe. Cotton, L.J.*, in *Hudson's Tm.*, 82 C. D. p. 820; 8 R. P. C. 155 (1886); *Roger's Tm.*, 12 R. P. C. 149 (1895), North, J. And see Chap. X., p. 246.

¹² Chap. VIII., p. 199. Of course a

- (6) Where there are conflicting claims to registration, the Registrar may refuse to register upon any of them until the rights have been determined by the Court or have been settled by agreement in a manner approved by him or (on appeal) by the Board of Trade.¹
- (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.²
- (8) It contains matter the use of which, by reason of its being calculated to deceive or otherwise, would be disentitled to protection in a Court of Justice.³
- (9) Its use would be contrary to law or morality.³
- (10) It comprises a scandalous design.³
- (11) It contains the name or a description of goods other than those in respect of which the application is made.⁴
- (12) It contains one or more of the things which, according to the rules⁵ or special statutes,⁶ cannot be registered as marks or parts of new marks.

common mark is not distinctive, and therefore falls under the fourth objection.

¹ Sec. 20, p. 248.

² Sec. 10, p. 247.

³ Sec. 11, p. 297.

⁴ Rule 10, p. 722.

⁵ These are (Rule 11) the words "patent," "patented," "by royal letters patent," "registered," "registered design," "copyright," "entered at Stationers' Hall," "to counterfeit this is forgery," or words to like effect; also representations of their Majesties, or of any member of the Royal Family. The Royal arms, the British Royal crowns, the British national flags, and certain other devices as well as the word "Royal" are by Rule 12 prohibited from registration, see Appendix, p. 721. As to the word "Royal," see *Carron Company's Trade Mark*, 27 R. P. C. 412 (1910), Swinfen Eady, J. (Incorporated by Royal Charter); and *Royal Worcester Corset Co.'s Application* (1909), 1 Ch. 459; 26 R. P. C. 185, Parker, J. An official notice contained in the Trade Marks' Journal, Feb. 23rd, 1910, p. 272, states that in future

the words "Imperial," "King's," "Queen's," or "Crown," may not appear on Trade Marks, the registration of which is applied for. Further, the use of the words in question in trading styles (other than the names of registered corporate bodies) will not be permitted in connection with applications for registration, unless it be shown that the sanction of the Secretary of State, Home Office, has been obtained. Although an official notice of this nature, or the Official Instructions printed below, p. 769, may not if they go beyond the provisions of the Act and Rules be binding on the Court, the Court will be slow to depart from a practice long established by them, *König and Ebhardt's Tm.*, 13 R. P. C. 449 (1896), Stirling, J. In *Hubbuck 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.

⁶ *E.g.* The Geneva Convention Act, 1911. See Appendix, p. 898.

Nature of the Registrar's discretion.

The discretion to refuse to register which is vested in the Registrar 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, or are founded on general principles of law.¹ In some of the cases cited in the next paragraphs, however, the Comptroller's discretion has been referred to in very general terms; but those references ought, probably, to be understood as directed to cases of suggested deceptive marks, such as those in which the several *dieta* were spoken.²

"The Comptroller," Kay, J., said, in *The Emollio* case,³ "when he is asked to register a trade mark, is bound to consider whether, looking to all the circumstances of the case, he can exercise his discretion by permitting the trade mark to be registered." And in *The Australian Wine Importers'* case,⁴ 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 wise⁵ and comprehensive way."

Eno v. Dunn.

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.⁶ There, Lord Herschell said: "The case was argued on behalf of the

¹ In *Players' Application*, [1901] 1 Ch. 882; 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'. See now associated marks, p. 116. The use of the word "registered" before registration may be a ground for refusal, if not explained as a *bona fide* mistake or if no other satisfactory explanation is given: *Altman's Application*, 21 R. P. C. 753 (1904), Kekewich, J.; *Lyle and Kinahan's Application*, 24 R. P. C. 87 and 249 (1907), C. A.

² And for instance, *Dewhurst's Appli-*

cation, [1896] 2 Ch. 187; 13 R. P. C. 288, C.A.

³ *Grossmith's Tm.*, 6 R. P. C. 180; 60 L. T. 612 (1889).

⁴ 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.

⁵ *Quere wido.*

⁶ *Eno v. Dunn*, 15 App. Ca. 252; 7 R. P. C. 311 (1890), Lds. Watson, Horsboll, and Macnaghten. Lds. Halsbury and Morris dissented from the decision arrived at, which was that the mark in question was calculated to deceive. See also *Du Cros' Application* in the House of Lords, noted in Addenda.

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 78rd section of the Act.¹ Those sections prohibit the registration of a trade mark in certain specified cases, but there is no duty cast upon the Comptroller of registering every other trade mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all other cases plainly conferred. Of course, this discretion must be reasonably and not capriciously exercised; but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it." And Lord Watson said that in cases where it is doubtful whether a trade mark tendered for registration is calculated to deceive or not, the application ought to be disallowed. Lord Halsbury, who dissented from the conclusion arrived at in the case, treated the Comptroller's discretion as more closely limited. "While I agree," he said, "that no absolute right to the registration of a trade mark is given to an applicant for registration, the meaning and intent of the statute itself is that, unless for some of the reasons contemplated by the statute, there is an objection to the registration, the trade mark ought to be registered. 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 1875.² "I cannot construe this section,"³ 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, *cæ debito justitiæ*, to rectify the register,⁴ just as it would, before the Act of 1875,

The Orr-Ewing case.

¹ For these sections see Appendix, p. 627.

² *Orr-Ewing v. The Registrar of Tms.*, 4 App. Ca. 479; 48 L. J. Ch. p. 717 (1879). Ld. Cairns held the same opinion, for he speaks of the appellant's right to be registered. Ld. Gordon, the remaining judge, concurred in Ld.

Blackburn's judgment.

³ Sec. 5 of the Act of 1875, corresponding to sec. 85 of the present Act.

⁴ Upon the refusal of the Registrar to register a mark under the 1875 Act, the procedure by way of appeal was to move to rectify.

have been bound *ex debito justitiæ* on similar proof, to prevent anyone infringing the trade mark shown to be his property. The burden of proof lies upon the person making the application to amend the register; but if he does produce such proof as would, in the opinion of the Court, entitle him to an injunction, I do not think the words 'if satisfied of the justice of the case' can, or ought to be, construed as meaning to give the Court a discretion to consider whether the nature of the trade mark is such as to make it inconvenient that he should exercise the right of property which it is proved he actually has."

The opinion last cited was delivered in a case where the marks concerned were old marks, and the apparent conflict between it and the opinions of the majority of the Law Lords in *The Fruit Salt* case may probably be reconciled by treating the doctrine of a right *ex debito justitiæ* to register as applicable only to marks used as trade marks before August 18th, 1875. The Act of 1875 excepted from the prohibition of actions for the infringement of unregistered trade marks the cases of such old marks as should be refused registration under it.¹ The 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,² Lindley, L.J., said: "The sections (*i.e.*, secs. 70, 72 and 73) and the discretion given by sec. 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 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 sec. 10 of the Act of 1888, I am aware of no legal

¹ Sec. 1. Sec. 42 of the Act of 1905 contains a similar exception, as did sec. 77 of the Act of 1883.

² *Farbenfabriken Vormals Fried. Bayer & Co.'s Tm.*, 11 R. P. C. p. 88; [1894] 1 Ch. 645. Kay and Smith, L.JJ., did not discuss this point. In *Verschure and Zoon's Application*, 22

R. P. C. 568 (1905), Warrington, J., referred to the passage quoted above, and said that it amounted to this, that when the Comptroller is dealing with any particular mark, he must find some legal principle which would justify the refusal to direct registration.

principle which would justify the Court in refusing to direct its registration."

In *The Solio* case, Kekewich, J.,¹ 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,² and also in the House of Lords,³ where the registration was allowed, the question was treated as being purely whether the word fell within one of the essential particulars defined in the Act.⁴

In a later case,⁵ Fletcher Moulton, L.J., after referring to the rights of the registered proprietor of a trade mark to protect it against infringement and to object to the registration of conflicting marks, said: "These are two rights which, although they are not *ex debito justitiæ*, give to an applicant the rights which the Legislature means a trader to possess in defence of those things which he uses as marks of origin in a lawful trade."

And in a recent case,⁶ in which the applicants sought to register the letters "W. & G." in ordinary type, the same Lord Justice, in delivering a dissenting judgment in favour of the applicants in the Court of Appeal, after saying that the decision of the Comptroller amounted to saying that no two letters could constitute a distinctive mark, said that it was not in his opinion open to the Patent Office to lay down as a rule that any particular type of mark which is in fact capable of distinguishing the goods of the person using it as a trade mark, should not be registered—provided always that the mark was proper on other grounds. After referring to an argument, based on the judgment of Lord Herschell in *The Fruit Salt* case,⁷ that the registration of a trade mark is not *ex debito justitiæ*, the Lord Justice continued: "That is true, but it does not mean that the Comptroller has a discretion to register a trade mark or not register

¹ *Eastman Photographic Materials Co.'s Application*, 18 R. P. C. at p. 709; 76 L. T. (N. S.) at p. 781 (1897).

² 14 R. P. C. 487; 76 L. T. (N. S.) 782.

³ [1898] A. C. 571; 15 R. P. C. 476.

⁴ And see *Linotype Co.'s Application*, 14 R. P. C. 900 (1897), Kekewich, J.

T.M.

⁵ *Lyle and Kinahan's Application*, 24 R. P. C. 249 (1907), at p. 261.

⁶ *Du Cros' Applications*, [1912] 2 Ch. 644; 29 R. P. C. 65. The appeal to the House of Lords is noticed in the Addenda.

⁷ Cited above, p. 79.

it, according as he thinks it is a desirable form of trade mark or not. Such limitations must be found in the Act if they are to be enforced by the Patent Office." And he said that the true doctrine was that enunciated by Lindley, L.J., in *The Somatose* case in the passage quoted above.¹

Discretion to be judicially exercised.

In another case,² Farwell, L.J. (then Farwell, J.), said: "The Comptroller undoubtedly has a discretion—a discretion, of course, to be exercised judicially, like all other judicial discretions. There is an appeal to this Court, but the Court ought not to overrule the judicial exercise of the Comptroller's discretion unless it is clearly of opinion that the discretion was wrongly exercised." And in an application under the Act of 1905, Kokewich, J., said in effect that although the discretion was open to review, it was exercised in a judicial manner, and, subject to the provisions of the Act, ought not to be readily upset.³

Consents.

Where the Registrar 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 improbability of deception. It does not bind the Registrar.⁴

Acceptance subject to conditions.

It is expressly enacted that the Registrar may accept a trade mark absolutely or subject to conditions, amendments, or modifications,⁵ and a like power is conferred on the Board of Trade or the Court on appeal from the Registrar.⁶ These provisions in the Act of 1905 are new, but in a few cases under the old law registration was allowed subject to a condition which was noted on the Register.⁷ But notes as to geographical limits of use were disapproved by the Court of Appeal.⁴ In cases of honest concurrent user they are, however, expressly authorised by sec. 21 of the Act of 1905. The words of sub-sec. (2) are probably wide

¹ Above, p. 80. Cozens-Hardy, M.R., and Farwell, L.J., hold that the mark in question was not distinctive, and did not consider that the Comptroller had laid down a general rule.

² *Booth Distillery Co.'s Applications*, 21 R. P. C. 18 (1904). See also *Application of Bens et Cie.*, 80 R. P. C. 177, O. A. (1918).

³ *Birmingham Small Arms Co.'s Application*, [1907] 2 Ch. 896; 24 R. P. C. 568.

⁴ *Dewhurst's Tm.*, [1896] 2 Ch. 187; 18 R. P. C. 288, C. A.

⁵ Sec. 12 (2), above, p. 71.

⁶ Sec. 12 (4), above, p. 72.

⁷ See above, p. 64. In *Verschure and Zoon's Application* (1905), 22 R. P. C. 568, registration of the word "Vezet" was allowed, subject to a condition that the applicants should not claim by virtue of the registration the right to restrain the use of the letters "V. Z."

enough to cover amendments or modifications in the trade mark itself, and not merely in the form of application, which matter is expressly provided for in sub-sec. (6). In two cases under the Act of 1905, the Court has, in making an order under paragraph 5 of sec. 9, required an undertaking to be given to it.¹

The Registrar 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 Registrar whether he intends to be so heard or not.²

The decision of the Registrar against an applicant for the registration of a mark is subject to appeal to the Board of Trade or to the Court.³ If required by the applicant, the Registrar is to state in writing the grounds of his decision.⁴ If an applicant contemplates appealing from the Registrar, he should be careful to bring all the materials on which he may wish to rely before the Registrar.⁵ An appeal is given against a conditional acceptance as well as against an absolute refusal.⁶ On an opposition, an appeal lies to the Court, or, with the consent of the parties, to the Board of Trade.⁷

The Registrar 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.⁸ It has been decided by the Court of Appeal in a patent case⁹ 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

Registrar to hear applicant before refusing the application.

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

¹ *In re Apollinaris Application*, [1907] 2 Ch: 178; 24 R. P. C. 486, Kekewich, J., and *City of Karlsbad's Application*, 29 R. P. C. 162 (1912), Eve, J.

² Sec. 53, and Rules 83 to 86.

³ Sec. 12 (3), below, p. 100, *Re Australian Wine Importers, Ltd.*, 41 C. D. p. 285; 6 R. P. C. p. 814.

⁴ Sec. 12 (3). Rule 83. Form TM No. 4.

⁵ See sec. 12 (5).

⁶ Sec. 12 (3). Rule 82.

⁷ Sec. 14 (5).

⁸ Sec. 56, replacing sec. 95 of the Act of 1883. *The Normal Co.'s Tm.*, 85 C. D. p. 245; 4 R. P. C. 123, per Lindley, L.J.

⁹ *R. v. The Comptroller-General of Patents, Ex parte Tomlinson*, [1899] 1 Q. B. 909; 16 R. P. C. 283, Grantham and Kennedy, JJ., and C. A.

the Comptroller where he has properly taken the direction of the law officer under the section.¹ But, of course, the direction of the law officer would not interfere with any right of appeal expressly conferred by the Act.

It was provided by sec. 82 (3) of the Act of 1883 that the Comptroller should act under the superintendence and direction of the Board of Trade, and this provision was continued by sec. 74 of the Act of 1905 with respect to registration of trade marks. It is now replaced by sec. 62 of the Patents and Designs Act, 1907.

Second
application
for same
mark.

In a case in which an application to re-register an old mark, the registration of which had lapsed, was refused on the ground of insufficient evidence of user as an old mark, and the proprietor made a second application, supported by fresh evidence, and that application was refused by the Registrar on the ground of *res judicata*, the Court, on appeal, directed the application to proceed.²

3. Procedure on application to Register.

The procedure on an application to register varies according as the application is (1) an ordinary one, (2) a special application under paragraph 5 of sec. 9, or is for (3) a standardisation mark under sec. 62, or (4) a Sheffield mark under sec. 63, or (5) a cotton mark under sec. 64, or (6) a series of trade marks. Applications for Sheffield marks and cotton marks, and for series of marks so far as they differ from ordinary applications, are considered in the chapters specially dealing with those subjects;³ the other modes of application are here dealt with.

A. Ordinary applications to Register.

Ordinary
applications.

The procedure is prescribed by Rules 17 to 34, 47 to 50, and 62 to 67; it is described in paragraphs 4 to 12 of the Official Instructions.⁴

Form of
application.

A printed form of application, Form TM No. 2, must be obtained and filled up, and a representation of the proposed

¹ See also the judgment of Lindley, L.J., in *The Normal Co.'s Tm.*, 85 C. D. p. 245; 4 R. P. C. p. 128 (1887), C. A.

² *Application of William Hunt & Sons, The Brades, Ltd.*, 28 R. P. C.

803 (1911), Parker, J.

³ Sheffield marks, Chap. VI., p. 120; Cotton marks, Chap. VII., p. 129. Series of marks, Chap. V., p. 118.

⁴ Printed in the Appendix, p. 769.

mark affixed to it, and four additional representations, each on Form TM No. 3, must also be sent in with it.¹ The application must be filled up and signed² in accordance with the rules and the directions given in the notes to the form. If the application is for an old mark, that is, one used before August 18th, 1875, it must contain a statement as to the time during which and the persons by whom it has been used.³ If registration in more than one class is required, a separate application must be made for each class.⁴

When a trade mark contains a word or words in other than Roman characters a sufficient transliteration and translation to the satisfaction of the Registrar 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 Registrar may require an exact translation thereof.⁵

Word in foreign language or characters.

The present rules and forms do not require the applicant to state in his application the essential particulars of the trade mark or to make any disclaimer; but the Registrar may call on an applicant to insert in his application such disclaimer as the Registrar may think fit in order that the public generally may understand what the applicant's rights, if his mark is registered, will be.⁶

Essential particulars and disclaimers.

The Registrar or the Board of Trade or the Court may require, as a condition of registration, any such disclaimer as they shall consider needful for the purpose of defining the rights of the applicant under the registration.⁷

What may be essential particulars of registered trade marks

¹ The Forms are set out in the 2nd Schedule to the Rules, below, p. 740. Stamped forms must be used; they are obtainable at certain post offices and at the Inland Revenue Office, in the Patent Office, Room 32; see Instructions, below, p. 772.

² Signature, Rule 17. As to applications by agents, see Rule 10, and above, p. 75.

³ Rule 20. It was held under Rule 11 of 1890 that where the user claimed has been by a firm, it is not necessary to state the names of the persons who were from time to time members of the firm, nor to insert the words "and their predecessors in business for the time

being": *Wright, Crossley & Co.'s Application*, [1900] 2 Ch. 218; 17 R. P. O. 386, Byrne, J. Stirling, J., had previously held (*Bryant & May's Tm.*, unreported, but cited 17 R. P. O. at p. 396) a statement of user by the applicants or their predecessors in title to be sufficient. An application by a limited company in the names of their predecessors, the late owners of the mark, was held not to be good: *Heddlé & Co.'s Application*, 20 R. P. O. 599 (1903), Byrne, J.

⁴ Rule 21.

⁵ Rule 23.

⁶ Rule 34; cf. sec. 15.

⁷ Sec. 15, Chap. IX., below, p. 236.

is considered in Chapter VIII,¹ and disclaimers are dealt with in Chapter IX.²

The address and description of the applicant must in every case be stated in full in the form,³ and every applicant for the registration of any trade mark, and every opponent to such registration, and every agent who does not reside or carry on business in the United Kingdom, shall, if so required, give an address for service in the United Kingdom, and such address may be treated as the actual address of such applicant, opponent or agent for all purposes connected with such application or the opposition thereto.⁴

Procedure on receipt of application.

Upon receipt of an application for registration the Registrar causes a search to be made amongst the registered trade marks and pending applications for the purpose of ascertaining whether there are on record any marks for the same goods or description of goods identical with the mark applied for, or so nearly resembling it as to be calculated to deceive.⁵ If the Registrar thinks there is no objection to the mark being registered, he may register it absolutely, or subject to conditions, amendments, or modifications,⁶ which acceptance is to be communicated to the applicant in writing. On the other hand, if he objects to the registration, a statement in writing of his objections is sent to the applicant, and unless the applicant within one month applies for a hearing,⁷ the application is deemed to be withdrawn.⁸ Similarly, if conditions are attached to the acceptance, and the applicant objects to them, he must apply for a hearing within one month, otherwise his application is deemed to be withdrawn. If he does not object to them, he must so notify the Registrar in writing.⁹ After a hearing by the Registrar, he communicates his decision to the applicant in writing, and if the applicant objects to it, he may require the Registrar to state in writing the grounds of his decision, and the materials used by him in arriving at the same.¹⁰ The date of the sending by the Registrar of such statement is the date of the decision for the purpose of appeal.¹¹

Withdrawal of acceptance.

An acceptance by the Registrar may, if given by error, or if the

¹ Page 135.

² Page 230.

³ As to address, see Rule 8.

⁴ Rule 9.

⁵ Rule 29; cf. sec. 19.

⁶ Rule 30. As to conditions, see above, p. 82.

⁷ As to hearings, see sec. 58 and Rules 83 to 86.

⁸ Rule 31.

⁹ Rule 32.

¹⁰ Sec. 12, sub-sec. (8), and Rule 33, Form TM No. 4.

¹¹ Rule 83.

Board of Trade in special cases so directs, be withdrawn.¹ But the applicant has thereupon the same rights of being heard and of appealing as if the mark had been originally refused.¹ It may happen that in the course of an opposition new grounds for objection on the part of the Registrar may be disclosed, and in such cases the Board of Trade could, under its special power above referred to, direct that the mark should not be registered.

It is provided by sec. 18 that:—

“Where registration of a trade mark is not completed within twelve months from the date of the application, by reason of default on the part of the applicant, the Registrar may, after giving notice of the non-completion to the applicant in writing in the prescribed manner,² treat the application as abandoned, unless it is completed within the time specified in that behalf in such notice.”

Abandonment of the application.

Sec. 63 of the Act of 1883, to which sec. 18 corresponds, was held 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.³

The Registrar may accept the mark tendered, either absolutely or conditionally, or refuse it. When an application has been accepted, whether absolutely or subject to conditions, the Registrar is, as soon as may be after such acceptance, to cause it, as accepted, to be advertised in the official paper during such times and in such manner as he may direct.⁴ The advertisement sets forth all the conditions subject to which the application has been accepted,⁴ and comprises either a representation of the mark or a reference to the place where a specimen or representation is deposited for exhibition.⁴ The requisite blocks must be furnished by the applicant.⁵ It is open for any one who objects to the registration, within one month after the advertisement, to send in notice of opposition.⁶ The Registrar may enlarge the time for notice of opposition.⁷ If a modification of the trade mark is allowed in the course of an opposition the trade mark is to be re-advertised.⁸

Advertisement.

¹ Sec. 16 and Rule 63.

² Rule 62, and Form O, No. 1. Fourteen days is in general the length of notice.

³ *Jackson v. Napper*, 85 C. D. 162; 4 R. P. O. 45 (1886); *Loftus' Tm.*, [1894] 1 Ch. 193; 11 R. P. C. 29; see also

Hayward's Tm., 54 L. J. Ch. 1003; 53 L. T. (N.S.) 487 (1885), Kay, J.

⁴ Sec. 13 and Rules 47 to 49.

⁵ Rule 48.

⁶ Sec. 11. See below, p. 93.

⁷ Rule 99.

⁸ Sec. 14 (9).

If there is no opposition, or if the opposition is disallowed, and the Registrar is satisfied that the applicant is entitled to registration, the registration proceeds. This is provided by sec. 10, which is as follows:—

Date of registration.

“When an application for registration of a trade mark has been accepted and has not been opposed, and the time for notice of opposition has expired, or having been opposed the opposition has been decided in favour of the applicant, the Registrar shall, unless the Board of Trade otherwise direct, register the said trade mark, and the trade mark, when registered, shall be registered as of the date of the application for registration, and such date shall be deemed for the purposes of this Act to be the date of registration.”¹

The applicant must, before registration, pay the prescribed fee.² A special power to stop a registration is conferred on the Board of Trade by this section.³ The particulars to be entered on the Register have already been noticed.⁴

Death of the applicant before registration.

If the applicant have died before the registration, the Registrar 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 Registrar.⁵

Certificate of registration or of refusal to register an old mark.

Upon registration, the applicant becomes entitled to a certificate of registration without payment of a fee therefor.⁶ Where the Registrar refuses an old mark, that is, a mark used as a trade mark before August 18th, 1875, he may, on request, grant a certificate that registration has been refused.⁷

B. *Special Applications under Sec. 9 (5).*

If an application is made to register a distinctive name, signature, or word of words, other than such as fall within the descriptions in paragraphs (1), (2), (3), and (4) of sec. 9, an order of the Board of Trade or the Court must be obtained, that the mark is to be deemed a distinctive mark.⁸ The four paragraphs referred to are as follows:—(1) The name of a company, individual,

¹ As to date, see Chap. XII. ; below, p. 362.

² Rule 64, and Form TM No. 11, p. 747, and List of fees, p. 787.

³ See also Rule 63, and above, p. 60, Withdrawal of Acceptance.

⁴ Above pp. 62 and 64.

⁵ Rule 66.

⁶ Sec. 17 and Rule 67. Form of Certificate, Form O, No. 2, p. 747.

⁷ Sec. 42. Form TM No. 82. Fee £1. See Table of Fees, p. 787.

⁸ Sec. 9 (5). See also Chap. VIII., p. 135.

or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some predecessor in his business; (3) an invented word or invented words; (4) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname. In reference to all other names, signatures, or words, the following procedure is prescribed by Rules 35 to 41, and the ordinary procedure is varied to the extent required by them.¹ The application must be made on the Special Form TM No. 5, which includes a statement that the applicant desires an order of the Board of Trade or the Court directing registration.² Upon receipt of the application the Registrar causes a search to be made amongst the registered marks and pending applications for the purpose of ascertaining whether there are on record any marks for the same goods or description of goods identical with the mark applied for or so nearly resembling it as to be calculated to deceive,³ and he notifies to the applicant the result of such search.⁴ The applicant has one month from the receipt of such notification within which to send to the Registrar in writing a case⁵ in duplicate stating at length the grounds upon which he relies in support of his application, and whether he desires to be heard by the Board of Trade or by the Court; if he fails to do so, and does not obtain any extension of time under Rule 99, his application is deemed to be withdrawn.⁶ If he desires to be heard by the Board of Trade, he must fill up and send with his case Form TM No. 10.⁷ Thereupon the Registrar sends the case and a copy of all communications between himself and the applicant to the Board to Trade.⁸ If the applicant desires to be heard, the Board fixes a hearing, and the Registrar may attend and be heard, and the Board makes an order determining whether, and subject to what conditions, amendments, or modifications,⁹ if any, the application is to be accepted, or they may require the applicant to apply to

¹ In the year 1911 one hundred applications of this special nature were made, of these 60 were reported to the Board of Trade, Comptroller-General's Report for 1911. In the year 1912 there were 48 applications of which 34 were so reported. Report for 1912.

² Appendix, p. 744.

³ Rule 36.

⁴ Rule 37.

⁵ A form of case will be found in the Appendix, p. 786.

⁶ Rule 38.

⁷ Appendix, p. 746. The fee on such request is £1; see List of fees, p. 737.

⁸ Rule 38.

⁹ As to conditions, amendments and modifications, see p. 82.

the Court, and limit a time for that purpose.¹ In referring a case to the Court, the Board of Trade sometimes direct service on particular persons, and, in one case, where the Board did so, it was held that this was a convenient course, and that the persons served were entitled to appear and be heard.² If the applicant desires to obtain an order of the Court he must, within one month from sending to the Registrar his case as above stated, bring the matter before the Court by motion, and, if he does not do so, he is to be deemed to have withdrawn his application.³ If the application is accepted either by the Board of Trade or the Court, it is to be advertised, and proceedings thereafter are to be had in respect of it as if it had been accepted by the Registrar in the ordinary course.⁴ The usual form of an order made by the Court, in a case under paragraph (5) of sec. 9 in which the applicant is successful, is a declaration that for the purpose of the application the mark applied for is to be deemed a distinctive mark within the meaning of the section, and that the Registrar do accept the application and proceed with the same accordingly; but the question of the proper form of order has been very recently discussed in the Court of Appeal.⁵

In some special cases the Court has in making the order required the applicants to give undertakings to it.⁶ An order of the Board of Trade or the Court in the form above mentioned is not conclusive that the mark in question is distinctive; its distinctiveness may be challenged by an opponent;⁷ it can be challenged in rectification proceedings.⁸

With regard to the evidence required by the Board of Trade, in support of a special application as to the use and distinctive character of the word in question, this will, of course, vary according to the particular application, but there should generally be a statutory declaration by the applicant dealing fully with the reason for adopting the mark and the length

¹ Rule 89. The Act gives the Board of Trade power to refer any appeal under the Act to the Court, sec. 59, but this hardly appears to be an appeal. Cases have frequently been referred to the Court under Rule 89.

² *Royal Worcester Corset Co.'s Application*, [1909] 1 Ch. 459, 26 R. P. O. 185.

³ Rule 40.

⁴ See above, p. 84.

⁵ See below, p. 179.

⁶ See above, p. 83.

⁷ *Crosfield & Sons' Application*, [1910] 1 Ch. 118 at pp. 123 and 148, 26 R. P. O., pp. 584, 856 and 859; *California Fig Syrup Co.'s Application*, [1910] 1 Ch. 180, at pp. 148, 148.

⁸ *Henry Thorne & Co., Ltd. v. Sandow*, 29 R. P. O. 440, Neville, J.; *Teofani & Co., Ltd. v. Teofani, C. A.*, reversing Warrington, J., 80 R. P. O. 446.

and extent of the user, and exhibiting, if practicable, orders received from customers showing that the goods are commonly asked for by the distinctive mark applied for. The declaration should also state whether the goods have been advertised with the mark and, if so, the amount spent in advertising, the quantity and value of goods sold in respect of which the mark is used, and generally the grounds upon which it is claimed that the mark has become distinctive of the goods. There should also be at least one statutory declaration by a responsible official of some commercial organisation having cognisance of the trade and of the mark, and with a few declarations by responsible and commercially known people, actively engaged in the trade, who can declare that the mark denotes the goods of the applicant; if possible such declarations should be made by persons resident in each district of England, viz. north, south, east, west, and midland, and if the goods are well known in Scotland and Ireland in each of those divisions of the Kingdom also.

C. *Standardisation Marks under Sec. 62.*

Section 62 is as follows:—

“Where any association or person undertakes the examination of any goods in respect of origin, material, mode of manufacture, quality, accuracy, or other characteristic, and certifies the result of such examination by mark used upon or in connection with such goods, the Board of Trade may, if they shall judge it to be to the public advantage, permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader or possessed of a goodwill in connection with such examination and certifying. When so registered such trade mark shall be deemed in all respects to be a registered trade mark, and such association or person to be the proprietor thereof, save that such trade mark shall be transmissible or assignable only by permission by the Board of Trade.”

Standardisation, &c.,
trade marks.

An application under this section must be made in duplicate on Form TM No. 6,¹ and be accompanied by six copies of the mark,² and the procedure is prescribed by Rules 42 to 46. The Registrar reports on the application, and sends copies of his report to the

¹ Appendix, p. 745.

² Rules 42 and 43.

Board of Trade and the applicants, and the applicants must within one month from the receipt of such report send the Board in duplicate a case setting out the grounds upon which they rely in support of their application, and if they fail to do so, their application is to be deemed to be abandoned.¹ The Board of Trade may call for such evidence as they think fit, and are, if necessary, to hear the applicants and the Registrar, and to make an order determining whether and subject to what conditions, amendments or modifications,² if any, the application may be permitted to proceed. If it be permitted to proceed, it is treated in all respects as an ordinary application, and the mark is advertised.³

Sixty-three applications were made under sec. 62 in the year 1906, but fifty of these were made by one association; eleven such applications were made in the year 1907;⁴ and sixteen in the year 1911.

Amendments.

Amendment
of applica-
tion.

The Registrar or the Board of Trade or the Court may, at any time, whether before or after acceptance, correct any clerical error in, or in connection with, an application for registration of a trade mark, and may permit an applicant for registration of a trade mark to amend his application upon such terms as they may think fit.⁵ And a more general power of amendment is provided by Rule 98, by which "any document or drawing or other representation of a trade mark may be amended, and any irregularity in procedure, which in the opinion of the Registrar may be obviated without detriment to the interests of any person, may be corrected, if the Registrar think fit, and on such terms as he may direct."

Enlargement
of the pre-
scribed times.

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

¹ Rule 44.

² As to these words, see above, p. 82.

³ Rule 45. For fees relating to such application, see List of fees, below, p. 737.

⁴ Comptroller-General's Reports for 1906 and 1907.

⁵ Sec. 12, sub-sec. (6). This is wider than sec. 91 (a) and (d) of the Act of 1883, which it replaces. In *Albert Baker & Co.'s Application*, [1908] 2 Ch. 80 at p. 109, 25 R. P. C. 518, at p. 524, the Court allowed a correction to be made in the name of the applicants.

though the time has expired for doing such act or taking such proceeding.¹

4. Opposition to Registration.

When the mark has been accepted and advertised, any person—not merely any person who would be aggrieved by the registration²—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.³

The procedure by which an opposition is to be conducted is regulated by sec. 14 of the Act of 1905, and by Rules 51 to 61.⁴

Opposition to registration.

Section 14 is as follows:—

Section 14.

(1) Any person may, within the prescribed time from the date of the advertisement of an application for the registration of a trade mark, give notice to the Registrar of opposition to such registration.

(2) Such notice shall be given in writing in the prescribed manner, and shall include a statement of the grounds of opposition.

(3) The Registrar shall send a copy of such notice to the applicant, and within the prescribed time after the receipt of such notice, the applicant shall send to the Registrar, in the prescribed manner, a counter-statement of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(4) If the applicant sends such counter-statement, the Registrar shall furnish a copy thereof to the persons giving notice of opposition, and shall, after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions, registration is to be permitted.

(5) The decision of the Registrar shall be subject to appeal to the Court or, with the consent of the parties, to the Board of Trade.

(6) An appeal under this section shall be made in the prescribed manner, and on such appeal the Board of Trade or the Court, as the case may be, shall, if required, hear the parties

¹ Rule 99, and as to opposition proceedings, see Rule 60. As to excluded days, see Rule 100.

² Cf. sec. 85. But see *R. v. The Comptroller-General of Patents, Ex parte*

Tomlinson, [1899] 1 Q. B. 909; 16 R. P. C. 238, C. A.

³ Below, pp. 96 and 99.

⁴ These are summarised in par. 17 of the Instructions, Appendix, p. 779.

and the Registrar, and shall make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

(7) On the hearing of any such appeal any party may either in the manner prescribed or by special leave of the tribunal bring forward further material for the consideration of the tribunal.

(8) In proceedings under this section no further grounds of objection to the registration of a trade mark shall be allowed to be taken by the opponent or the Registrar other than those stated by the opponent as herein-above provided except by leave of the tribunal hearing the appeal. Where any further grounds of objection are taken the applicant shall be entitled to withdraw his application without payment of the costs of the opponent on giving notice as prescribed.

(9) In any appeal under this section, the tribunal may, after hearing the Registrar, permit the trade mark proposed to be registered to be modified in any manner not substantially affecting the identity of such trade mark, but in such case the trade mark as so modified shall be advertised in the prescribed manner before being registered.

(10) The Registrar, or, in the case of an appeal to the Board of Trade, the Board of Trade shall have power in proceedings under this section to award to any party such costs as they may consider reasonable, and to direct how and by what parties they are to be paid.

(11) If a party giving notice of opposition or of appeal neither resides nor carries on business in the United Kingdom, the tribunal may require such party to give security for costs of the proceedings before it relative to such opposition or appeal, and in default of such security being duly given may treat the opposition or appeal as abandoned.

Rules.

The more important Rules as to the procedure on opposition are as follows:—

Opposition.

51. Any person may within one month from the date of any advertisement in the Journal of an application for registration of a trade mark give notice in writing at the Office of opposition to the registration.

Notice of opposition.

52. Such notice shall be in Form TM No. 7,¹ and shall

¹ The Official Forms referred to in the text will be found in the Appendix, pp. 740, etc., which also contains precedents, pp. 785, etc.

contain a statement of the grounds upon which the opponent objects to the registration. If registration is opposed on the ground that the mark resembles marks already on the Register, the numbers of such marks and the numbers of the Journals in which they have been advertised shall be set out. Such notice shall be accompanied by a duplicate which the Registrar will forthwith send to the applicant.

53. Within one month from the receipt of such duplicate the applicant shall send to the Registrar a counter-statement (Form TM No. 8) in writing setting out the grounds on which he relies as supporting his application. The applicant shall also set out what facts, if any, alleged in the Notice of Opposition he admits. Such counter-statements shall be accompanied by a duplicate in writing. Counter-statement.

54. Upon receipt of such counter-statement and duplicate the Registrar will forthwith send the duplicate to the opponent, and within one month from the receipt of the duplicate the opponent shall leave at the Office such evidence by way of statutory declaration as he may desire to adduce in support of his opposition and shall deliver to the applicant copies thereof. Evidence in support of opposition.

55. If an opponent leaves no evidence, he shall be deemed to have abandoned his opposition, but if he does then, within one month from the receipt of the copies of declaration, the applicant shall leave at the Office such evidence by way of statutory declaration as he desires to adduce in support of his application and shall deliver to the opponent copies thereof. Evidence in support of application.

56. Within fourteen days from the receipt by the opponent of the copies of the applicant's declarations the opponent may leave at the Office evidence by statutory declaration in reply, and shall deliver to the applicant copies thereof. Such evidence shall be confined to matters strictly in reply. Evidence in reply by opponent.

59. Upon completion of the evidence the Registrar shall give notice to the parties of a date when he will hear the arguments in the case. Such appointment shall be for a date at least fourteen days after the date of the notice, unless the parties consent to a shorter notice. Within seven days from the receipt of such notice both parties shall file Form TM No. 9. A party who receives such notice and who does not, within seven days from the receipt thereof, give notice on Form TM No. 9, that he intends to appear, may be treated as not desiring to be heard, and the Registrar may act accordingly. Hearing.

Security for
costs.

61. Where a party giving notice of opposition neither resides nor carries on business in the United Kingdom, the Registrar may call upon him to give a security in such form as the Registrar may deem sufficient for the costs of the proceedings before the Registrar, for such amount as to the Registrar may seem fit, and at any stage in such opposition may require further security to be given at any time before giving his decision in the case.

There are also Rules empowering the Registrar to give leave to either party to file further evidence,¹ providing for the furnishing of copies of exhibits or for inspection of the exhibits,² and empowering the Registrar, where he has granted an extension of time to one party, to grant an extension to the other party for any subsequent step.³

Who may
oppose.

Any person, not merely any person who would be aggrieved by the registration,⁴ may oppose the registration, and an opponent is not confined to objections based on interference with his rights, but can set up any proper ground of opposition,⁵ *e.g.*, that the mark does not contain or consist of any of the essential particulars enumerated in sec. 9.

Statement of
grounds of
opposition.

The provision, confining an opponent to the grounds of opposition contained in his notice of opposition,⁶ is now contained in the Act itself instead of in rules, as was the case under the repealed Acts. The tribunal hearing an appeal can, however, give leave to an opponent to take a further objection.⁷ In a case in which no application had been made to the Registrar for leave to amend the notice of opposition, although the points which on appeal the opponents desired to raise had been known and referred to in the evidence, the Court refused leave to take the further objections on appeal.⁸ The Registrar can, whilst the opposition is before him, give leave to take a further objection, under the general power of allowing amendment of documents, conferred by Rule 98. Under the Acts of 1883 and 1888, it was open to the Registrar, on an appeal in an opposition, to take a new objection to the registration of

¹ Rule 57.

² Rule 58.

³ Rule 60. Rule 99 is the general rule as to enlargement of time.

⁴ Cf. Rectification of the Register, sec. 35.

⁵ Cf. Grounds of Opposition, below,

p. 99.

⁶ Sec. 14, sub-sec. (8), above, p. 94.

⁷ Sec. 14, sub-sec. (8).

⁸ *Kenrick and Jefferson's Application*, 26 R. P. C. 641 (1909), Swinfen Eady, J.

the mark,¹ but under the Act of 1905 the leave of the Court is required.² A special power is conferred on the Board of Trade by sec. 16 to stop registration notwithstanding that the mark has been accepted, and any opposition has failed.³

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

Summary of procedure on an opposed application.

- (1) Application.⁴
- [(2) Notice of objection of Registrar to entertain the application.⁵
- (3) Application by applicant to the Registrar for a hearing, within one month of (2).⁶
- (4) Hearing by Registrar.
- (5) Communication of Registrar's decision to applicant.⁷
- (6) Application by applicant to Registrar for statement of grounds of decision within one month of (5).⁸
- (7) Notice of appeal to Board of Trade or the Court, one month from decision of Registrar.⁹]
- (8) Advertisement of application.¹⁰
- (9) Notice of opposition, one month from advertisement. Notice to be in duplicate, with grounds of opposition, and address for service, and to be signed by opponent or his agent.¹¹
- (10) Counter-statement (in support of the application), one month from receipt of (9) from Registrar. To be in duplicate with grounds of application and admission, if any, of facts.¹²
- (11) Opponent's evidence, one month from receipt of counter-statement. To be by statutory declaration delivered at the Patent Office. Copies of the declarations to applicant.

¹ See below, Appeal, p. 100.

² Sec. 14, sub-sec. (8), above, p. 94.

³ See above, p. 88, and Rule 63.

⁴ Page 84. Form TM No. 2, p. 742.

⁵ Rule 31.

⁶ Pages 83 and 86. No fee appears to be payable, except in cases of opposition.

⁷ Rule 83.

⁸ Rule 83, p. 86. Form TM No. 4.

⁹ Page 100, Rules 121 and 122. The date of the sending by the Registrar of

T.M.

the statement of the grounds of his decision is the date of the decision for the purpose of appeal, Rule 83. If the applicant appeals to the Court he proceeds by notice of motion. Adapt form in Appendix, p. 790, Rule 122; if to the Board of Trade, Form TM No. 29, p. 759, must be used, and it must be accompanied as prescribed by Rule 123.

¹⁰ Page 87.

¹¹ Form TM No. 7, p. 745.

¹² Form TM No. 8, p. 746.

- (12) Applicant's evidence in answer, one month from receipt of (11). To be by statutory declarations and copies as (11).
- (13) Opponent's evidence in reply, fourteen days from receipt of (12). Statutory declarations and copies as (11).
- (14) Notice of appeal to the Court or, with the consent of the parties, to the Board of Trade, one month from decision of Registrar.¹

Forms of the several notices and other documents referred to in the above table are set out in the Appendix, pp. 785 to 790.

New power to award costs.

Both the Registrar and, on appeal, the Board of Trade, have now full power to award costs to either party to an opposition.² Under the repealed Acts there was no power to give an applicant the costs of an unsuccessful opposition, and the power to give costs to an opponent was confined to the case of an abandonment of the application by the applicant.³

Amendments and enlargement of times by the Registrar.

The Registrar's powers under sec. 12 (6) and Rules 98 and 99 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.⁴

Under the Acts of 1883 and 1888 the time for giving notice of opposition was prescribed by the Acts themselves, and the Registrar (sitting for the Comptroller) held that he had no jurisdiction to allow an amendment of a notice of opposition after the expiration of three months from the date of the advertisement, being the extreme limit for opposition allowed under the Act of 1888, or after the case had been heard and disposed of before the Comptroller. In the case in question,⁵ the opponent

¹ See above, p. 97, note (9).

² Sec. 14, sub-sec. (10), p. 94.

³ Sec. 69 of the Act of 1888, as amended by the Act of 1888. See below, Costs, p. 107.

⁴ Page 92, above; cf. also Rule 97 (power to dispense with evidence), Appendix, p. 782.

⁵ *Robertson, Sanderson & Co.'s Tm.*,

[1892] 2 Ch. 245; 9 R. P. C. 264. In a case which came under the old Rule 54, a Divisional Court directed a mandamus to the Comptroller to hear and determine an application to allow an amendment, which was directed to charge fraud against the applicant, *Mott's Tm.*, 7 R. P. C. 226 (1890).

in the course of an appeal to the Court 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. The Registrar can now, under his general power of enlarging time conferred by Rule 99, enlarge the time for giving notice of opposition, and can, it would seem, under Rule 98 allow an amendment of the notice of opposition, but subject to such powers and to the power of the tribunal hearing an appeal to give leave to take a further objection, sub-secs. (2) and (8) of sec. 14 of the Act of 1905 confine an opponent to the grounds of opposition stated in his notice of opposition.¹

Grounds of Opposition.

The reasons for refusing to register a mark which is propounded for registration are dealt with in detail elsewhere.² Those which are most commonly relied on by an opponent are the following:—

- (i.) That the mark propounded is identical with 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 or so nearly resembles such a mark as to be calculated to deceive.³ In this case the register number of the mark already on the Register, and the number of the Journal in which it has been advertised, must be stated in the notice of opposition.⁴
- (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,⁵ or as an advertisement,⁶ or as a mark common in the trade,⁷ and that, consequently, the applicant's mark is not distinctive.

¹ See above, p. 96.

⁴ Rule 52, above, p. 94.

² See above, p. 76, and the Chapter on Rectification of the Register, p. 809; Forms, Appendix, pp. 785 *et seq.*

⁵ Page 202.

⁶ Page 203.

³ Sec. 19, p. 247.

⁷ Page 199.

- (iii.) That the mark propounded is his mark, and not that of the applicant,¹ or that it has been acquired by the applicant in fraud of his rights.²

5. Appeal from the Registrar.

The tribunal of appeal.

An appeal from the refusal of the Registrar *proprio motu* to register a trade mark is by sec. 12 (3) given to the applicant, who has the option of appealing either to the Board of Trade or to the Court.³ But in an opposition an appeal from the decision of the Registrar must be to the Court, unless both parties consent that it should be to the Board of Trade.⁴ The Board of Trade may, however, refer an appeal to the Court,⁵ and, in fact, this course is often taken in cases of difficulty or of serious dispute between parties, or where some general question under the Act comes up for decision. It is open to the Registrar, after a successful appeal from his refusal to accept a mark, to refuse registration on notice of opposition.⁶

Appeal to Board of Trade.

The practice on appeal to the Board of Trade is governed by Rules 122 to 127 inclusive, which are as follows:—

122. When any person intends to appeal to the Board of Trade he shall, before doing so, apply to the Registrar for a hearing and obtain a decision from him upon the point raised. Within one month from the date of such decision he shall, if he is advised to appeal to the Board of Trade in any case in which an appeal is given by the said Act, leave at the Office a notice of such his intention, on Form TM No. 29.⁷

Such notice shall be accompanied—

- (1) In case the appeal concerns an application not yet advertised, by a copy of the form of application and six representations of the mark applied for and a copy of the grounds of the Registrar's decision.
- (2) In case of an opposition by a copy of the decision of the Registrar, and if the appeal is by the applicant also by a

¹ Sec. 20, p. 250, and see Proprietor, p. 100. The mark may be copyright. As to a copy of a foreign picture, see *Schauer v. Field*, [1893] 1 Ch. 85; 62 L. J. Ch. 72, O. A.

² *Heaton's Tm.*, 27 C. D. 670 (1884), *Kay, J. (Hoop L. Iron)*; *Mott's Tm.*, 7 R. P. C. 226 (1890), *Mathew and Grantham, JJ.*

³ A similar right of appeal is given in case of cotton marks, see sec. 64 (5). As to Sheffield marks, see sec. 63 (9).

⁴ Sec. 14 (5).

⁵ Sec. 59.

⁶ See *Orr-Ewing v. Registrar of Tms.*, 4 App. Ca. 479; 48 L. J. Ch. 707 (1879).

⁷ Appendix, p. 759.

copy of the form of application and six representations of the mark opposed.

(3) In other cases by a copy of the decision of the Registrar and a statement of the date of the hearing before him.

123. Such notice shall also be accompanied by a statement in writing of the grounds of appeal, and of the appellant's case in support thereof. **Grounds of appeal to be stated.**

124. A copy of the notice and all the accompanying documents shall also be forthwith sent by the appellant to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London; and where there has been an opposition before the Registrar to the opponent or applicant as the case may be. **Transmission of notice.**

125. The Board of Trade may thereupon give such directions (if any) as they may think fit with respect to parties and evidence, or otherwise, for the purpose of the hearing of the appeal by the Board of Trade, or for the purpose of their referring the appeal to the Court to hear and determine the same.¹ **Directions by Board.**

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

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

The fee payable on appeal is £1.²

The form of notice of appeal, TM No. 29, must be filled up in accordance with the marginal notes.

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. A form of notice is given in the Appendix.³ **Notice of and case on appeal.**

¹ 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: sec. 14 (7) and *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 pp. 780 and 789, the general form of the directions will be found set out.

² List of fees, Appendix, p. 787.

³ Page 789.

The Registrar is, by sec. 12 (3) of the Act of 1905, if required, to state in writing the grounds of his decision not to accept a trade mark, and the materials used by him in arriving at his decision.¹ This provision applies where the mark has not yet been advertised. In cases of opposition also the Registrar states his reasons in writing, and the Rules seem to contemplate this, although it is not expressly so provided.

Appeal to the Court.

An appeal to the Court is by notice of motion, which must be given within one month of the decision appealed against or within such further time as the Registrar shall allow.² If, as is generally the case, the motion is ordered to be set down in the non-witness list, no fee is payable on so setting it down.³

The Court.

The Court is the High Court of Justice⁴ in England,⁵ but in practice all the appeals are heard in the Chancery Division.

No appeal except that given by the Act.

There is no appeal other than that given by the Act open to an unsuccessful applicant, for he cannot apply to the Court under sec. 35 as a person aggrieved by the omission of his name from the Register;⁶ but the authority referred to⁶ 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 Registrar should be barred;⁷ and

¹ See also Rule 83, and above, p. 86.

² Rule 121. "Prescribed," however, by sec. 8 means in relation to proceedings before the Court, prescribed by Rules of Court. No special Rules of Court have been made in reference to procedure under the Act.

³ *Watson & Co.'s Application*, 28 R. P. C. 167, [1911] W. N. 56, Parker, J.

⁴ Sec. 8. As to cotton marks, the Lancashire Palatine Court has a concurrent jurisdiction. See sec. 71, and below, p. 184. An order of the House of Lords allowing an appeal from the Registrar 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 cause, which may be *ex parte*: Beton, 7th ed., 845, and *Dadische Anilin und Soda Fabrik v. Levinstein*, 4 R. P. C. at p. 470 (1887), Chitty, J.

⁵ Sec. 8. The provisions for Scotland, Ireland, and the Isle of Man do not seem to authorise an appeal to any of their Courts.

⁶ *Normal Co.'s Tm.*, 85 C. D. 231; 8 R. P. C. 269; 4 R. P. C. 123 (1887), C. A.; and cf. *Woolley v. Broad*, [1892] 1 Q. B. 806; 9 R. P. C. 208, Lawrence and Wright, JJ.

⁷ See, however, *Mott's Tm.*, 7 R. P. C. 226 (1890), Mathew and Grantham, JJ. See also *Kenrick and Jefferson's Tm.*, 28 R. P. C. 45 (1911), Warrington, J., where on an appeal in an opposition the Court on special grounds had refused leave to the opponents to take certain objections to the registration not in the notice of opposition, but in rectification proceedings by the opponents the Court held that it was not *res judicata* that the former opponents could not raise these objections, and a motion to strike out such grounds of objection failed.

sec. 54 expressly provides that in dealing with any question of rectification the Court may review any decision of the Registrar relating to the entry in question or the correction sought to be made. If the opposition had come before and been determined by the Court, the matter might be *res judicata* between the registered owner and the opponent.¹

The Registrar may, under sec. 20, in any case where each of several persons claims to be registered as proprietor of the same trade mark, and no such agreement is arrived at as the section authorises, refuse to register any of them until their rights have been determined by the Court. Under the former practice, unless the Court otherwise directed, the question was raised by a special case, which might be settled by the Comptroller in case of difference.² No special procedure is prescribed by the present Act or Rules, but sec. 20 is expressed differently from the former sec. 71, and it would seem that under it the application to the Court would be a motion or motions by one or more of the applicants asking that the Registrar should proceed with the application or respective applications.³

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

A motion by way of appeal should ask that the decision of the Registrar may be reversed and that he may be directed to proceed, or not to proceed, as the case may be, with the application in question.⁴

Notice of the motion must be served on the Registrar,⁵ so that he may appear if he thinks fit, and in an appeal in an opposition the opponent, or the applicant, as the case may be, should be made a respondent. And if there has been no opposition, but the Registrar has refused to register because of the presence of marks similar to the mark in question on the Register, the Court will in a proper case require notice of the appeal to be sent to the owners of such marks;⁶ and where an

¹ In *Re Arbens's Application*, 85 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. See also below, p. 822.

² Rules of 1890, 44, 45.

³ See, however, *In re Hudson's Application*, 24 R. P. C. 582 (1907), Joyce, J., and *Albert Baker & Co.'s Application*, 25 R. P. C. 518 (1908), Eve, J., oppositions,

and *Applications of Javal & Parquet and Piesse & Lubin*, 29 R. P. C. 627 (1912), Warrington, J.

⁴ Cf. Appendix, p. 790, and for the practice under the repealed Acts Daniell's *Chancery Practice*, p. 1251, *Chanc. Forms*, p. 802, and see *Simpson, Davies & Sons' Tm.*, 15 C. D. 525 (1880).

⁵ Rule 129.

⁶ See *Kenrick and Jefferson's Tm.*, 7 R. P. C. 321 (1890), Chitty, J. The

appeal is referred by the Board of Trade to the Court, the directions given on such a reference generally direct service on or notice to such owners.¹ The party in whose favour an order is made must forthwith leave an office copy of the order at the Trade Marks Branch of the Patent Office, and the Register may, if necessary, thereupon be rectified or altered by the Registrar.²

The Registrar may, if he thinks that an order should be made public, publish it in the Journal.³

Address for service where the applicant or opponent is abroad.

Scotch or Irish applicant or opponent.

Where the applicant or opponent does not reside or carry on business in the United Kingdom, he may be required to give an address for service;⁴ 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,⁵ for this is all that "natural justice" requires.⁶ 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.⁶

Evidence upon the appeal.

The evidence before the Registrar or the Board of Trade is given by statutory declarations in the absence of directions to the contrary, but in any case in which it shall think it right so to do, the tribunal may (with the consent of the parties) take evidence *vivâ voce* in lieu of or in addition to evidence by declaration.⁷

appeal may now be to the Court direct, but the practice is the same on this point. See also *Neuchatel Asphalt Co.'s Application*, 80 R. P. C. 349 (1918). In *Holdbrook's Application*, 26 R. P. C. 791 (1909), Joyce, J., refused to give such directions when ordering the motion to go into the non-witness list, but subsequently during the hearing Eve, J., adjourned it that notice might be so given.

¹ See *Dewhurst's Application*, [1896] 2 Ch. 187; 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 (1901). The Board of Trade may on a reference by them direct service on a person materially interested, although the refusal to register is not based on any similarity

to a mark owned by him: *Application of Extract of Meat (Baron Liebig) Photograph Brand, Ltd.*, 17 R. P. C. 161 (1900), Cozens-Hardy, J.

² Rule 129, p. 786. If required, Form TM No. 30 must also be left at the office.

³ Rule 130, p. 786.

⁴ Rule 9, p. 720. As to alteration of address, see Rule 82, p. 780.

⁵ *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.

⁶ *King & Co.'s Tm.*, [1892] 2 Ch. 462; 9 R. P. C. 850, Kekewich, J., and C. A.

⁷ Sec. 49. As to the manner of taking such declaration, see Rule 105.

In such case the Board of Trade or the Registrar are in respect of requiring the attendance of witnesses and taking evidence on oath in the same position as an Official Referee.¹ The Registrar has in proceedings at the Office a wide power of dispensing with evidence.² The declarations may be used upon an appeal to the Court with all the incidents and consequences of evidence by affidavit.³ If the Board of Trade refer an appeal to the Court, they generally give the appellant liberty to adduce such further evidence as the Court may see fit to direct or permit;⁴ and such evidence is usually given on affidavit.⁵ An appeal from the refusal of the Registrar before advertisement to accept the mark is required to be heard on the materials stated by the Registrar to have been used by him in arriving at his decision,⁶ and no new grounds of objection can be taken by the Registrar, except by leave of the appeal tribunal, and where further objections are admitted, the applicant may withdraw his application without payment of costs on giving the prescribed notice.⁷ On an appeal in an opposition, any party may in the manner prescribed or by special leave of the tribunal bring forward further material for the consideration of the tribunal.⁸ Except by Rule 125, empowering the Board of Trade to give directions as to evidence, the Rules do not contain any directions as to the manner of adducing further evidence on appeal. Fresh grounds of opposition can only be taken by leave

¹ Sec. 49. As to the powers of an Official Referee, see Order XXXVI., r. 49, and the Arbitration Act, 1889; as to the meaning of "oath" and "affidavit," see Interpretation Act, 1889, sec. 3.

² Rule 97.

³ Sec. 49. Formerly the declarations had to be verified by affidavit; *Farrow's Tm.*, 7 R. P. O. 260; 63 L. T. 233 (1890), Stirling, J.; and *Kingsford's Application*, 15 R. P. O. 197 (1898).

⁴ *Kingsford's Application*, supra, and *Application of Extract of Meat (Baron Liebig) Photograph Brand, Ltd.*, 17 R. P. O. 161 (1900), Cozens-Hardy, J.

⁵ 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. O. at p. 153 (1895), North, J.

⁶ An applicant may require a state-

ment in writing of the grounds of the Registrar's decision and the materials used by the Registrar; above, p. 86.

⁷ Sec. 12 (5) and Rule 128. Seven days after leave given is the prescribed time.

⁸ Sec. 14 (7). In *United Kingdom Tobacco Co.'s Application*, 29 R. P. O. 489 (1912), Parker, J., the opponents were allowed on appeal to adduce evidence to show that their "State Express Cigarettes" were asked for by the public as State cigarettes. Where an opponent brought forward in reply evidence as to the mark being deceptive in Morocco, on an appeal to the Court leave was given to the applicants to adduce further evidence from Morocco, with leave to the opponents to adduce further evidence in reply: *Ogston and Tennant's Application*, 26 R. P. O. 816 (1909), Joyce, J.

of the tribunal, and if any are allowed to be taken, the applicant has a like power of withdrawal as in the case of an appeal before advertisement.¹

Modification
of the applica-
tion on the
appeal.

Formerly the Court had no jurisdiction to amend the application² or notice of opposition on appeal.³ Now, however, as already stated, the Board of Trade or the Court, as well as the Registrar, have power to permit at any time an applicant to amend his application.⁴ And on an appeal from the Registrar before advertisement the Board of Trade or the Court may make an order in favour of the applicant subject to conditions,⁵ amendments, or modifications.⁶ The word amendment seems to be appropriate to alterations in the application, for instance, striking out certain of the goods in respect of which the application is made, while the word "modifications" seems to refer more especially to alterations in the proposed mark itself.⁷ On an appeal in an opposition the tribunal may impose conditions,⁸ and may, after hearing the Registrar, permit the trade mark proposed to be registered to be modified in any manner not substantially affecting the identity of the mark, but the mark as so modified must be re-advertised.⁹ Whether after an opposition has been entered the Registrar has power to permit a modification of the mark applied for seems to be at least doubtful.

Disclaimers.

The present Rules and Forms do not require an applicant to state in his application the essential particulars of his mark, or to make any disclaimer. But the Registrar or the Board of Trade or the Court may require as a condition of entry on the Register a disclaimer of common or non-distinctive matter, or

¹ Sec. 14 (8).

² *Players' Application*, [1901] 1 Ch. 382; 18 R. P. C. 65, Cozens-Hardy, J. See, however, *Swift Specific Co.'s Tm.*, 6 R. P. C. 352 (1889), Stirling, J.; *Kenrick and Jefferson's Tm.*, 7 R. P. C. 321 (1890), Chitty, J.; and *König and Ebhardt's Application*, [1896] 2 Ch. 286; 18 R. P. C. 449, Stirling, J.

³ *Robertson, Sanderson & Co.'s Tm.*, [1892] 2 Ch. 245; 9 R. P. C. 264, Stirling, J. See also above, note (1).

⁴ Sec. 12 (6), above, pp. 72 and 92.

⁵ See the undertaking required by the Court in *In re Apollinaris Application*, [1907] 2 Ch. 178; 24 R. P. C. 436, and

in *City of Karlsbad's Application*, 20 R. P. C. 162 (1912), and the condition imposed in *Verschure and Zoon's Application*, 22 R. P. C. 568 (1905). And for other cases in which, under the repealed Acts, conditions were imposed, see above, p. 64, note (3).

⁶ Sec. 12 (4), above, pp. 72 and 82.

⁷ Cf. sec. 14 (9). Under the Acts of 1883 and 1888 the Court could not direct registration of part of a mark: *Mecus' Application*, [1891] 1 Ch. 41; 8 R. P. C. 25, Chitty, J. (*Key Brand, Geneva*).

⁸ Sec. 14 (6), 93.

⁹ Sec. 14 (9), 94.

of parts not separately registered, or any other disclaimer needful for defining the rights of the applicant under the registration.¹ The Court cannot, of course, impose conditions as to disclaimers or otherwise, or require amendments or modifications, except as a term on which the registration of the mark can proceed, but if an applicant refuses to comply with the condition or accede to the requirement, his application would fail.

Under the Act of 1888 it was held that on appeal the Court had jurisdiction to enter into and determine all questions arising on the objections, including, of course, in a case where the Comptroller had already registered the mark, the question whether the mark had been rightly admitted to the Register.² Now, however, on an appeal in a registration case, whether in an opposition or before advertisement, the Registrar, as well as an opponent, is limited to the objections taken when the matter was before the Registrar, except by leave of the appeal tribunal.³

What objections the Court can consider.

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 registration to be proceeded with.⁴

The length of time for appealing to the Court of Appeal is, except by special leave of the Court of Appeal, fourteen days,⁵ and fourteen days' notice must be given.⁶

6. Costs.

In an opposition the Register has now power to award to any party such costs as he may consider reasonable, and to direct how and by what parties they are to be paid.⁷ He formerly had only a limited power to give costs, that is to

Costs before the Registrar.

¹ Sec. 15 and Rule 34. The section and Rule are fully set out, and discussed below, Chap. IX., p. 236.

² In *Re Arbens' Application*, 85 C. D. 248; 4 R. P. C. 143 (1886), Kay, J., and C. A.; *Sanitas Co.'s Tm.*, 4 R. P. C. 533; 58 L. T. 166 (1887), Kay, J.; and cf. *Paine v. Daniell & Sons' Breweries, Ltd.*, [1893] 2 Ch. 567; 10 R. P. C. 217, C. A.; and *Talbot's Tm.*, 11 R. P. C. 77 (1894), Stirling, J., rectification cases.

³ Sec. 12 (5), and sec. 14 (8). For an instance in which leave was refused, see p. 96, note (8). In an appeal from the Registrar, a company served was

allowed to take an objection not taken by the Registrar, the applicants consenting, *Neuchatel Asphalt Co.'s Application*, 30 R. P. C. 349 (1913).

⁴ *Crosfield & Sons' Application*, 15 R. P. C. 754 (1898), North, J., required a consent brief to the dismissal to be produced.

⁵ R. S. C. Order LVIII., rules 9 and 15, and *Arbens' Application*, 85 C. D. 248 at p. 257; 4 R. P. C. 143 at p. 145.

⁶ R. S. C. Order LVIII., rule 3.

⁷ Sec. 14 (10). The scale of costs adopted in opposition is set out in the Appendix, p. 783.

say, he could only give them to an opponent, and that only when the applicant abandoned his application.¹ In the absence of special circumstances, the costs generally follow the event.

Costs on
appeal to
the Court.

The Court has no jurisdiction to make the Registrar pay costs,² and the ordinary rule under the Acts of 1883 and 1888 was that even a successful appellant paid the costs of the Comptroller as well as his own. In *The Alpine* case³ Mr. Justice Chitty said that the Comptroller's costs were deemed to be costs incidental to registration.

Test case.
Now objec-
tion at the
hearing.

Subject as above stated, in all proceedings before the Court under the Act of 1905, the costs of the Registrar are in the discretion of the Court,⁴ and the costs of other parties are also in its discretion.⁵ The provision as to the costs of the Registrar is new, but under the Acts of 1883 and 1888 in a few special cases, an applicant for registration who successfully appealed from the refusal of the Comptroller to register was not ordered to pay costs. Thus where the case was argued as a test case, no costs were given, although the application failed,⁶ and in another case where the Comptroller took a new point in Court, after the objection upon which he had refused registration had been removed, and succeeded upon it, he did not press for costs.⁷ Where, on the hearing of an appeal from the Registrar, he by leave of the tribunal takes any new ground of objection, the

¹ Sec. 60 (5) of the Act of 1883, as amended by the Act of 1888.

² Sec. 48. This does not alter the previous rule of the Court: *Rotherham's Tm.*, 14 C. D. 585; 49 L. J. Ch. 511 (1880), C. A., unsuccessful appeal by Registrar: *Leaf's Tm.*, 83 C. D. 447; 8 R. P. C. 289 (1886), and *Van Duzer's Tm.*, 8 R. P. C. 248, both Bacon, V.-C.; *Colman's Tm.*, [1894] 2 Ch. 115; 11 R. P. C. 129, Stirling, J., all successful appeals by applicant from Comptroller; and *Eastman, &c. Co.'s Application*, [1896] A. C. p. 585; 15 R. P. C. p. 487, applicant successful in House of Lords. See below, Test Case.

³ 54 L. J. Ch. p. 780 (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. 848.

⁴ Sec. 48.

⁵ Order 65, r. 1.

⁶ *Van Duzer's Tm.*, 84 C. D. 628; 4 R. P. C. 81 (1887), C. A.; *Farbenfabriken Vormals Fried Bayer & Co.'s Tm.*, 11 R. P. C. p. 83; [1894] 1 Ch. 645, C. A. (*Somatose*). In *Pope's Electric Lamp Co.'s Application*, [1911] 2 Ch. 382, 28 R. P. C. 629, being the first case before the Court under sec. 9 (5) of the T. M. Act, 1905, for registration of a surname, the Registrar did not ask for costs.

⁷ *Thompson's Tm.*, 6 R. P. C. 213 (1888); but cf. *Sanitas Co.'s Tm.*, 4 R. P. C. 533; 58 L. T. 166 (1887), Kay, J. In *Lea's Application*, 80 R. P. C. 216 (1918), where the Court of Appeal upheld the decision of Joyce, J., although on a different ground, the majority of the Court decided that the usual rule should be applied, the decision of Joyce, J., having gone beyond the Registrar's contention.

applicant may withdraw his application without payment of costs on giving notice as prescribed.¹

In a case in which applicants 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.²

In appeals from the Registrar, which have come before the Court under the Act of 1905, in which an applicant has successfully appealed against his refusal to register, the applicant has on appeal generally been ordered to pay the Registrar's costs.³

On a special application under paragraph 5 of sec. 9 to register a distinctive word, which was referred to the Court, the Registrar was held to be entitled to the costs.⁴

Where applicants for registration under the same paragraph successfully appealed to the Court of Appeal against the refusal of the Registrar to allow the registration to proceed, the Court made no order as to the costs of the appeal, and did not vary the order below so far as it ordered the applicants to pay the costs of the Registrar.⁵

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;⁶ 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

Costs on
appeal to
Court in an
opposition.

¹ Sec. 12 (5), p. 72. The notice must be given within seven days after the leave has been given: Rule 128, p. 736.

² *Eastman, &c. Co.'s Application*, [1898] A. C. at p. 585; 15 R. P. C. p. 488.

³ *In re Birmingham Small Arms Co.'s Application*, [1907] 2 Ch. 896; 24 R. P. C. 568; *Shamrock & Co.'s Application*, 24 R. P. C. 569 (1907), Neville, J.; *Carborundum Co.'s Application*, 26 R. P. C. 504 [1909], Joyce, J., where the Registrar was right on the materials before him; *William Hunt & Sons, The Brades, Ltd.'s Application*, 28 R. P. C. 802.

⁴ *Apollinaris Application*, [1907] 2 Ch. 178; 24 R. P. C. 496. *National Starch Co.'s Application*, [1903] 2 Ch. 698, 25 R. P. C. 802.

⁵ *California Fig Syrup Co.'s Application*, [1910] 1 Ch. 180 at p. 156, 26 R. P. C. 846 at p. 864.

⁶ Thus in *Crosfield & Sons' Application*, 26 R. P. C. 837 at p. 864, where the opponents succeeded in the Court of Appeal as well as in the Court below, the appellants were ordered to pay the costs of the opponents and of the Registrar in both Courts. See also *Application of Itala Fabricca di Automobili*, 27 R. P. C. 493 (1910).

right to the use of certain words in their label, and they had no such right;¹ and where the judge thought that both appellant and respondent had behaved improperly, no costs were given.² 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.³ And where in an appeal from the Registrar's refusal to register a mark, given before advertisement, a company obtained leave to appear at its own expense, unless the Court saw fit to direct otherwise, no such direction was given, although the appeal was dismissed.⁴

Jurisdiction on appeal as to costs before the Registrar.

It was held under the Act of 1888 that no costs of the proceedings before the Comptroller, except so far as these might be allowed by the taxing master as costs of or occasioned by the proceedings in Court, could be given;⁵ and the same rule applied under the Act of 1875.⁶ The Act of 1905 confers no express power on the Court over such costs. It would seem, however, that, now that the Registrar has power to award costs, the Court on appeal could deal with the costs before the Registrar as well as the costs of the appeal.⁷

Costs on appeal to the Board of Trade.

The Board of Trade, on appeal to it in proceedings under sec. 14, that is in an opposition, have power to award to any party such costs as they may consider reasonable, and to direct how and by what parties they are to be paid.⁸ As between applicant and opponent, the Board of Trade will no doubt follow the same general rule as the Court, and give costs to the successful party. It is submitted that, on appeal, the Board of Trade can vary the order of the Registrar as to costs, and deal with the costs before him as well as upon appeal.⁹

Costs on withdrawal of application.

Where the tribunal hearing an appeal against a refusal to register, whether in an opposition or not, allows fresh grounds

¹ *Hudson's Tm.*, 82 C. D. 811; 8 R. P. C. 155 (1886) (*Carbolic Acid Soap Powder*), C. A.

² *Fuentes's Tm.*, [1891] 2 Ch. 166; 8 R. P. C. 214, Romer, J.

³ *Wright, Crossley & Co.'s Application*, [1900] 2 Ch. 218; 17 R. P. C. 886, Byrne, J.

⁴ *Applications by Georg Schicht Actiengesellschaft*, 29 R. P. C. 488

(1912), Warrington, J.

⁵ *Australian Wine Importers' Tm.*, 41 C. D. 278; 6 R. P. C. 811 (1889), C. A.

⁶ *Brandreth's Tm.*, 9 C. D. 618; 47 L. J. Ch. 816 (1878), Jessel, M.R.

⁷ See sec. 14 (5). See also sec. 14 (10), and below, as to the power of the Board of Trade over costs.

⁸ Sec. 14 (10), p. 94.

⁹ Sec. 14 (5), p. 93.

of objection to be taken, the applicant may on giving the prescribed notice¹ withdraw his application without payment of costs, or in the case of an opposition without payment of costs of the opponent.²

If a party giving notice of opposition, or of an appeal in an opposition, neither resides nor carries on business in the United Kingdom, the tribunal may require such party to give security for costs of the proceedings before it relative to such opposition or appeal, and in default of such security being duly given may treat the opposition or appeal as abandoned.³

On a summons to review taxation in an opposition case of considerable importance, in which the amount of evidence was very heavy, and the taxing master had disallowed the costs of a third counsel at the hearing and in the Court of Appeal, Swinfen Eady, J., reversed the decision of the taxing master in this respect, and allowed such costs.⁴

7. Renewal of Registration.

Registration is for a period of fourteen years, but may be renewed from time to time in accordance with the provisions of the Act.⁵ The subject is dealt with in Chapter XIV., under the heading of "Removal of Mark from the Register."⁶

¹ Notice must be given within seven days after leave to take fresh objections has been given: Rule 128.

² Secs. 12 (5) and 14 (8).

³ Sec. 14 (11).

⁴ *Crosfield & Sons, Ltd.'s Application*, 27 R. P. C. 433 (1910). The costs of the attendance of the country solicitor

at the trial, but not in the Appeal Court were under the circumstances allowed. Three counsel were also allowed in *Burroughs, Wellcome & Co.'s Tms.*, 22 R. P. C. 164 (1905).

⁵ Sec. 28.

⁶ Page 414.

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,¹ and this essential feature is retained by the Registration Acts. It is provided that—

“A trade mark must be registered in respect of particular goods or classes of goods”;²

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.”³

And the express restrictions on the registration of identical marks and marks so nearly resembling registered trade marks as to be calculated to deceive, which are contained in sec. 19, 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.⁴

¹ Ante, p. 80; and see *Somerville v. Schembri*, 12 App. Ca. 463; 4 R. P. C. 179 (1887).

² Sec. 8 of the Act of 1905, replacing sec. 65 of the Act of 1893.

³ Sec. 22 of the Act of 1905, replac-

ing sec. 70 of the Act of 1888. This is subject to the proviso contained in sec. 22, and to the provisions of secs. 28 and 62. As to assignments, see Chap. XIII., p. 884.

⁴ See below, p. 258.

Accordingly, goods have been divided by the Trade Mark Rules into forty-nine classes, and a miscellaneous and residuum class,¹ and Rule 5 provides that if any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the Registrar. For the convenience of applicants for registration an alphabetical guide to the classification of goods has also been drawn up and published,² and in case of uncertainty, upon application by letter to the Registrar, giving a full description of the goods and the purposes for which they are used, the Registrar will inform any intending applicant what class he should name in his application. Applications for the registration of the same mark in different classes are treated as separate and distinct applications.³

A trade mark may be registered for certain only of the goods comprised in a class, and it will then, of course, be protected as to those goods only.⁴ 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, included 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.⁵ In this case (*Edwards v. Dennis*⁶) the plaintiff claimed the mark as assignee of the goodwill of a business which dealt only in the iron sheets,

Registration and protection for part of a class.

¹ See Classification of Goods, below, p. 761. The classes are the same as under the Rules of 1890, except for a slight alteration in Class 23, as to which see below, p. 129.

² It can be procured at the Sales Department of the Patent Office.

³ Rule 24, p. 723.

⁴ Sec. 89, and see *Jay v. Ladler*, 40 C. D. 619; 6 R. P. O. 136 (1889), Kekewich, J.; *Hart v. Colley*, 44 C. D. 193;

7 R. P. O. 93 (1890), North, J.

⁵ *Edwards v. Dennis*, 80 C. D. 464; 55 L. J. Ch. 125, C. A. (1886). See also below, pp. 365, 428. For other cases in which orders have been made confining the goods to those in connection with which the registered trade mark has been used, or excluding particular goods for which it has not been used, see Chap. XI., Rectification of the Register, at p. 828.

and it was held that, as assignee, his trade mark rights under the Acts must, in any event, be restricted to the goods with which the business assigned to him was concerned;¹ 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,² 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.³

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

The question arose under the Act of 1883 whether registration could be properly made in respect of goods in which the applicant did not deal or intend to deal. In *Batt & Co.'s Trade Marks*⁴ 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 *bond 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*⁵ 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 intending to deal, having at the time of registration some definite and present intention to deal in certain goods or descriptions of goods, and not a mere general

¹ Act of 1875, s. 2; Act of 1883, s. 70; Act of 1905, s. 22.

² *Hargreaves v. Freeman*, [1891] 3 Ch. 39; 8 R. P. C. 287. The subject is further treated below, p. 115.

³ Cf. the present Rule 16, post, p. 722.

⁴ [1898] 2 Ch. 432; 15 R. P. C. 269 and 534, Romer, J., and C. A.; [1899] A. C. 428; 16 R. P. C. 411 (*sub nom. Batt v. Dunnett*).

⁵ See note (5), above, p. 113.