not deceitfully made, and of a knowne goodnesse: That such of them as are fully wrought are sealed with a Seale attesting their goodnesse: If upon Search any proove not so good, they are marked for such; so as the buyers both within the Realme and abroad, may bee ascertaind of the goodnesse of the Merchandize by view of the Seale, wherein (the Law requiring it) such great care hath beene had from time to time, that upon the credit of the Seale alone they were plentifully and readily vented in all places.[1]

The Restoration brought with it a confirmation of the ancient privileges of the Dutch Community of Colchester by an Act of Parliament,[2] which gave temporary relief and protection to the industry. The preamble to this statute recites that "slight and naughty Bays have been and daily are, by the secret and crafty practices of some men made in the said Towne," and, being inferior, are secretly carried out of the town unsealed and "transported beyond the Seas under the name and oftentimes with the Seal of Colchester Bayes whereby the Bayes there made are not of that credit and esteem as formerly."[3] Clause IV of the Act provides that, for counterfeiting any of the seals used by the Corporation or Congregation of the Dutch Bay Hall in Colchester, "the summe of 20 poundes to be recovered in any of His Majesty's Courts of Record or in the Towne Court of Colchester." Despite the drastic powers of search and the severe penalties of the pillory, confiscation and imprisonment for reported counterfeiting of the seals of Colchester, the decay of the trade was so rapid that in 1728 the Dutch Congregation was dissolved and by 1826 the trade was "at so low an ebb in Colchester that only a single establishment for the manufacture of the article now commonly called baize exists in the town or out-parishes."[4] The seal is thus, at present, solely of archæological interest.[5]

[1] *Infra*, pp. 98–99. [2] 12 Car. II (1660), c. 22, *Stat. of the Realm*, v, p. 253.
[3] *Ibid.*, ii, 254.
[4] Thomas Cromwell, *History and Description of the Ancient Town and Borough of Colchester*, 1826, ii, pp. 288–9.
[5] For information regarding the trade and seals of Colchester I am indebted to Mr. George Rickword, Librarian and Secretary of the Public Library at Colchester.

We have seen how, under the protection of the national government, the local or collective trademarks of such places as Colchester, Coventry, Guildford, Norwich, etc., were developed and protected, and the notion of a trade-mark as an asset, rather than a liability, was fostered. But, before leaving this phase of our subject, we must refer to a proclamation of Charles I "against frauds and deceits used in Draperie." [1] It refers to and evidently was designed to clarify much preceding legislation, reciting that the "frauds and deceits used in Drapery . . . in time, if prevention be not made, may bring dis-esteeme upon the Clothes of this Realme, and decay on Draperie, by which a great number of His Maiesties people haue their livelihood." [2]

Promulgated forty years after the action of the Privy Council in protecting the mark of John Godsall of Taunton referred to above,[3] this proclamation indicates, to even a greater degree than in *Godsall's* Case, an arrival of the notion among lawyers — though not yet among judges, of a trade-mark as a symbol of good-will, as an asset of value, instead of merely as a regulatory mark of origin, and consequently a liability.[4] These two functions of a mark upon goods are very clearly differentiated in the proclamation. "Every weauer

[1] Cited by W. Cunningham, *Growth of English Industry and Commerce*, ii, p. 311, n. 4. Through the courtesy of the British Museum the writer has obtained a photostat copy of the five pages of this proclamation.

[2] The discredit of English cloth in foreign parts or, as we should say today, the destruction of the national good-will abroad, and consequent loss to English subjects caused by the manufacture of defective cloth, is a constant theme of English legislation and official correspondence. See *Acts of the Privy Council*, New Ser., xxii, 1591–2, pp. 89–90 (concerning the weaving of Devonshire kersies); *ibid.*, xxx, 1599–60, pp. 481–2, 490–2, 602–4, 606–7; *ibid.*, xxxi, 1601–2, pp. 387–9; *ibid.*, xxxii, 1601–4, pp. 162–5 (concerning French embargo upon British goods alleged by the French to be defective). See also Petition of the Silk men, Silk dyers, Silk weavers and Silk dealers of London "for some remedy to the great abuse in dyeing silk, whereby English silk manufactures in foreign parts are greatly injured. . . ." (*Cal. State Papers*, Dom., Charles II, 1661–2, p. 395.)

[3] *Supra*, pp. 87–88.

[4] Royal patents and grants also indicate an appreciation of the value of a symbol of good-will. The patent granted in 13 Elizabeth (1371) to Richard Matthewe of London, "our cutler", for the manufacture "of haftes . . . for knyfes" states that "for his marke to have upon the blade . . . a half Moone." (Edmunds on *Patents* (2nd ed.), Appendix, p. 885) The patent to Jones and Palmer, for hard and soft soap, in 1623 (W. H. Price, *English Patents of Monopoly*, p. 210, and the charters of 2 James II to the White Paper Makers

shall to euery Cloth that hee shall weaue, set the first two letters of his name of Baptisme and Surname, or at the least the first letter of his Surname, and no other marke. . . ." [1] This requirement is evidently merely a police regulation such as in the case of the weavers of Norwich and Yarmouth prescribed by the statute of Henry VIII.[2] But the proclamation makes a clear distinction between these marks, which the modern manufacturer would call factory marks, and the marks of the clothier, which the same modern manufacturer would call trade-marks. In other words, the proclamation not merely conceives of a trade-mark as an asset, but also regards it as symbolizing the good-will, not of the actual maker or craftsman of the goods, but of the capitalist who furnishes the material or tools for the production of the article. "And whereas," states the proclamation,

> there is great abuse found to bee practised in the Markes of the Clothiers, some that make worse Cloth using the Markes of others that make best, or making of so slight a difference from it, as the buyer cannot easily discerne it: His Highness willeth and commandeth, that every Clothier shall have one seuerall marke for his Cloth, and shall use that one marke onelie for all the time of his Clothing, without altering or changing the same, and *no man shall give the same marke which another useth, though with addition or difference or change of the colour:* And where at present seuerall men use the same marke, such of them as haue longest used the same shall continue the use thereof, and the others shall betake themselues to the use of new markes not used by others . . . .[3]

The foregoing represents the contribution of the English cloth trade to the history of British trade-mark law up to the eighteenth century. This contribution still leaves us far from

and of 3 William and Mary to the Hollow Sword Blades Company (*Select Charters of Trading Companies*, Selden Soc. Pub., vol. 28, pp. 206 and 221 respectively) grant the right to use a distinguishing mark for products made under the royal authority.

[1] *Proclamation*, Charles I, April 13, 1633 (Brit. Mus. 506. h. 12 [19]), p. 2.

[2] *Supra*, p. 84, n. 2.

[3] *Proclamation*, Charles I, April 13, 1633, p. 3, (Italics, the writer's.)

the notion of "property in trademarks . . . as a legal possession, which may be bought and sold and transmitted." But at any rate it brings us to the point where trade-marks are regarded as identifying not merely the defects but also the good qualities of the source of production from which they emanate. In this light trade-marks are already being regarded by administrative courts, such as the King's Council and the Court of the Star Chamber, even though as yet not by the common law courts, as assets of value that are worthy of protection.

APPENDIX

DECREE OF THE STAR CHAMBER, OCTOBER 12TH, 1632, CONCERNING THE COUNTERFEITING OF SEALS TO COLCHESTER BAIZE BY THOMAS JUPP.

In Cam. Stell. coram Conc. ibid. xij° die Octobr.

Anno Octauo Caroli Regis.

This day one Thomas Iupp a Cloth-worker of the City of London, being at the Barre of this Court, His Maiesties Atturney Generall informed this Court, that hee had taken the Examinations of the said Thomas Iupp, concerning the counterfeiting of Seales usually affixed to the Bayes of Colchester, and fixing of them to other Bayes of meaner condition, and shewed foorth certaine Iron Stampes, and pieces of Bayes, sealed some with the true Seales of that Towne, attesting that some of them were truly wrought, and that others of them were deficient, and others of them sealed with counterfeit Seales, put to Bayes not of the making of Colchester, but of lesse estimation; which being shewne to the said Thomas Iupp, hee acknowledged his Confession made upon that Examination to be true, and that those Stampes and pieces of Bayes came from his hands to His Maiesties Atturney; which Confession followeth in these words:

The Examination of Thomas Iupp of Abbchurch Lane in the Citie of London Cloth-worker, taken before William Noy His Maiesties Atturney Generall, the fift day of September, in the eighth yeere of His Maiesties Reigne:

Hee saith that in July last he bought in Leaden hall Bay Market of John Bryant of Bocking, one hundred and ten Flemish ells of Munikin Bayes of Bocking making, at xxj^{d} ob. the ell, and three other pieces of about fiftie like ells, the piece at xxxiij^{d} ob. the ell.

He saith also that Colchester Bayes are commonly somewhat dearer than the Bayes of Bocking.

He taketh it that Colchester Bayes sell better beyond the Sea than other Bayes, and hath long beene of that opinion.

He saith, that he having long beene a Worke-man, is able to discerne a Colchester or Sandwich or Bocking Bay one from another, bot other men that are not Worke-men discerne them by their Seales.

He saith that he bought these Bayes for one Goddard a Seafaring man then abiding about Deptford, but what his Christian name is he knoweth not, but thinketh it is either George or William, and that he was allowed no more for those Bayes but as he paid for them, save for his labour in buying and Baling of them, and Canvase, hee had about xxv^{d} and for some other labour.

He confesseth that when the Bayes had been bought Goddard asked the Examinate how he should doe for Seales, and the Examinate told him he would doe his indeavour or the best he could to grace his commodity.

And further acknowledgeth, that when the Bayes were brought to the Examinates house he put Seales to them like the Colchester Seales used for Bayes, and saith that the Seales shewne to him by the Atturney Generall, in one side whereof is depicted a Griffin or a Dragon, and the other side three Crownes, which he takes to be the Armes of Colchester, and on another is written D.W.C. COLSEST. BAY. 1571. were stamped on by himselfe, but it is bungerly and not well done: And those Seales that hee put to one of those Bayes, is closed up in a paper sealed by the Atturney and the Examinate.

He saith that those depictures are graven in Iron, and that the Irons are in the Examinates keeping. And hee saith that he will deliver the Stampes to the Atturney Generall.

Being demanded who did grave those Irons, which he used for Seales, hee saith that hee knoweth not who did grave them, but sieth that some of them were graved in Foster Lane about halfe a yeere sithence, and the Examinate paid for the graving of them, for some of them more and for some lesse. Thomas Iupp. William Noye.

Upon Friday the seventh day of the same September, the said Thomas Iupp being againe examined, delivered to the Atturney Generall seven Iron Stampes, in one a Griffin, in another Three Crownes, another D.W.S. Colsest. Bay 1571. in the other foure severall numbers are graven. And then being told, that it appeareth by two of the Stampes that they had often been stamped, and demanded how long he hath had them, saith at one time, that he hath had them about halfe a yeere; at another time, about a yeere; he saith that one Thomas Downes who is in Ireland, as he hath heard, did deliver them unto him at his last being in England, but remembreth not the time.

Being demanded for whom hee hath stamped any Seales, besides Goddard, he refuseth to declare.

Hee saith that the buyers doe commonly buy Bayes for Colchester Bayes, without further enquiring then view of the Seales.

Hee saith that those Stampes doe differ from the Seale of Colchester.

Hee saith that the Seales of Lead shewne unto him sealed up in paper

by him and the Atturney Generall, were made of the Stampes now produced by him, by himselfe, without the helpe of any other, and fixed to one of the Bayes which the Examinate bought and delivered to Goddard, as he formerly declared.

Hee saith that the ordinary price of Baling of five Bayes in Canvase Ropes and labour, comes to about viij^{s}. and if in three Bales, it comes to about a Marke, and these Bayes were made up in three Bales.

The Iron Stampes are bound up in a piece of Canvase which hee hath sealed, and remaineth with the Atturney Generall. Thomas Iupp. William Noy.

Upon Friday the fourteenth of the same September, in presence of the Examinate and of the Atturney Generall and others, one piece of the Bayes which he sealed with the counterfeit Seales, was brought and shewne to the Examinate, which he confesseth to be the same which he sealed for Goddard, and saith that it is no Colchester Bay, and hee knoweth it by the Worke. At the same time two other pieces of Bayes were brought and shewne to him, which hee knew by the Worke (himselfe being a Workeman) to be Colchester Bayes, whereof one hath the whole Seale, and is not faulty, the other is marked as faultie, by cutting off a piece and fixing the Seale at the Angle; and he saith that the Bay marked as faultie, is better then the Bocking Bay which he sealed with the whole Seale.

The Examinate also saith that he hath often made the faultie Bayes have the whole Seale, by cutting off the Puckle of the Bay at the Angle, and drawing it, and fixing that Seale in another place, so as in view it is sealed with the whole Seale, which he did shew the manner in the presence of the Atturney and others; and saith that he hath so done above a hundred and a hundred times for Merchants, and many of them he hath done within this moneth. 1 Piece of each Bay remaineth with the Atturney marked by the Examinate. Thomas Iupp. William Noye.

Which being read, and view taken by their Lordships of those pieces of Bayes, and the Stampes and Seales, His Maiesties Atturney Generall humbly prayed their Lordships that some exemplary punishment might bee inflicted upon the said Thomas Iupp: Whereupon their Lordships taking into consideration the many Lawes that have provided for the true Draping of the Wooll of this Realme, by ordaining the Searching, Measuring, Marking, affixing Seales of Divers Places where they are Draped, and the publike Seale of the Aulnager unto the Clothes: That the people of this Towne of Colchester and of the parts adioyning, receive a great part of their sustenance by the making of Bayes: That for many yeeres past, by occasion of the carefull Search there made, they have beene truely and not deceitfully made, and of a knowne goodnesse: That such of them as are fully wrought are sealed with a Seale attesting their goodnesse: If upon Search any proove not so good, they are marked for such: so as the buyers both within the Realme and abroad, may bee ascertained of the goodnesse of the Merchandize by view of the Seale, wherein (the Law requiring it) such great care hath beene had

from time to time, that upon the credit of the Seale alone they were plentifully and readily vented in all places. And albeit there had not beene hitherto any discovery made of Delinquents in this kinde, yet their Lordships taking into their serious consideration, that the offense of the said Thomas is a false cousenage, by which the buyers being deceived, will not bee so ready to buy any other Clothes upon the credit or attestation of the Seales, so as the good and true Workers of Cloth will not receive the encouragement to make true Workemanship as they were wont, but be enforced for vent, to make their Clothes like unto those whereunto such counterfeit Seales shall be affixed, and in time produce a disaffiance to the attestations of the Seales, whereof will insue many inconveniences; And they can foresee that if this new falsitie should be unpunished, it will grow further abroad. And therefore their Lordships have thought fit, Ordered, Adiudged, and Decreed, that the said Delinquent, Thomas Iupp, shall stand and be committed to the Prison of the Fleete during his Maiesties pleasure, and not be then enlarged until he shall discover and make knowne the names of such Merchants for whom hee hath used and practised the said deceit: And if at any time His Maiestie shall be pleased to inlarge the said Iupp; It is then Ordered, that before his inlargement, hee shall finde good Sureties for his good behaviour.

And it is also Ordered and Decreed, that the said Delinquent shall pay a fine of one thousand pounds to His Maiesties use.

And the Court doth further declare, that if in case the said Iupp shall continue stubborne, and shall refuse to discover the names of such Merchants or other Tradesmen for whom he hath used and practised the aforesaid fraud and deceit, their Lordships doe reserve a power of inflicting some further compulsory meanes to cause him to confesse their names. And to the end the world may take notice how much this Court doth dislike and condemne such notorious cousenages and deceits, their Lordships have further Ordered, Adiudged, and Decreed, that the said Thomas Iupp shall on some market day be set upon the Pillarie in Cheapeside, with a Paper on his head, wherein shall be inscribed words declaring the nature of his offence. At which time it is also thought fit and ordered that this Decree shall be publikely read, and severall Copies be thereof Printed, and set up upon Postes and other eminent places about and neere the said Pillary, to remaine there, so as the cause of his punishment may be generally knowne, and other like lewd persons deterred from committing the like offences.

And it is also further Ordered and Decreed, that the said Iupp shall in like manner be set upon the Pillary in Cornehill over against the Exchange, at Blackwell Hall, Bocking and Colchester, upon severall Market dayes, with the like Paper on his head, inscribed as is aforesaid. At all which said severall times and places it is Ordered, that this Decree bee publikely read, and that severall Printed Copies of this Decree shall also be set up on severall eminent places, on, and about, and neere the said places and Pillaries, to remaine there for the purposes aforesaid; and specially at Blackwell Hall the officers there shall continue the

said Printed Copies upon Postes and open places, in, and about the said Hall so long that the Clothiers of all parts of the Kingdome comming thither may have notice thereof, whereby it may bee divulged to all the Clothing Townes and Countreys of the Kingdome, how unlawfull and how dangerous it is to use any falsities and deceits tending to the discredit of the Clothing of the Realme, and how carefull His Maiestie, and the State, and all his Courts of Justice will be to see the same severely punished.

And lastly, to the end such Merchants and other Tradesmen as have set this Delinquent or any other Cloth-worker at worke, to practise this deceitfull Sealing of Bayes, may bee knowne and discovered, The Court doth hereby publish and declare, that such person or persons as shall make such discovery, and bring the Delinquents to receive the Sentence of this Court, shall for their reward have halfe the Fine or Fines which shall by this Court be imposed upon them. And any Cloth-worker who have used and practised such deceit shall discover their Procurers and Encouragers, such persons so confessing, shall receive the mercy and favour of this Court.

CHAPTER V

THE DEVELOPMENT OF TRADE-MARK LAW IN THE CUTLERY TRADES

THE upshot of our investigation of the history of trade-marks in the cloth trades was our arrival at a point where, in the fifteenth and sixteenth centuries, and more especially in the seventeenth century, the modern concept of a trade-mark as an asset of value begins to appear. But, as indicated above,[1] we have so far seen no evidence of "property in trade-marks . . . as a legal possession, which may be bought and sold and transmitted." Furthermore, aside from sporadic administrative action, there are no indications of any sort of protection being afforded to these marks. For the link between the typical regulatory and liability mark of the Middle Ages and the modern asset mark, and for the immediate foundations of the systematic legal protection of trade-marks as property, we must go to the cutlery trades. As will presently appear, the trade-marks in these industries, just as in all other industries, were in their origin essentially compulsory police marks, but in no other phase in the history of British trade can we so clearly discern the evolution of marks from liability to asset marks as in the case of the cutlers' marks. We shall see in the records of the cutlers of London and, later, of Sheffield of what great value these marks became to those who used them and how there developed, within the tribunals having jurisdiction over these craftsmen, the doctrine of at least a qualified legal ownership in marks, with certain corollaries, such as the individual's right to the protection of his mark and damages for its infringement, his right to sell or lease his mark and, notably, his widow's right to a life estate in his mark and his son's claim to a reversion in his mark. These

[1] *Supra*, p. 96.

concepts are practically exclusive to the cutlery trades although, occasionally and at a much later date, the records in some other phase of industry may possibly give evidence of the germination of similar principles of trade-mark law.[1]

The cutlers' trades were among the most ancient and widely dispersed in the history of British industry.[2] Not only London but Sheffield, Birmingham, York,[3] Salisbury, Thaxted[4] and Derby contained powerful cutlers' gilds or other organizations before the end of the Middle Ages. As in all other phases of medieval industry,[5] so in the cutlers' trades there was

[1] In all the writer's investigation of the various trades in London and the provinces he has come across only one instance containing any such suggestion, namely, in the case of the pewterers of London. Pewterers' marks were in their origin compulsory. The Act of 19 Hen. VII, c. 6, recited the stealing of pewter vessels and the sale of defective goods and required the marking of such wares "to the entent that the [markers] of such wares shall avowe the same Wares, . . ." (Welch, *Pewterers*, i, 94 *et seq.*) The first ordinance of the Pewterers Company, dated 1522, making marking compulsory, enacted "pursuant to y^e^ Statute of 19 H. 7" (*ibid.*, i, 106), prescribed "that the said vessell and stuff shall be marked with the mark of the workman therof to thentente it may be knowen of whoos makynge the seide vessell or stuff is . . ." (*ibid.*, i, 107). See also similar provision of 8 June, 1552–3 (*ibid.*, i, 174–5), of 13 December, 1574–5 (*ibid.*, i, 280), of 20 March, 1592–3, concerning re-registration of "tuches" (*ibid.*, ii, 11), of 19 July, 1637–8 (*ibid.*, ii, 98). For reproductions of "touch-plates" see *ibid.*, ii, Appendix III.

However, there are certain indications in the records of the Pewterers' Company that these compulsory marks gradually acquired a secondary significance as symbols of their user's good-will. See entry for 21 July, 1566–7, concerning the "privilege of Assistants to have their 'marks' set up in the Hall (*ibid.*, i, 255), also the following entries:

[3 July, 1622] "'Thomas Hall maketh request to the Court that hee may vse or strike Mr. Sheppards touch which was graunted.' 'The same touch was at the next court (24th July) granted to John Netherwood 'in regard that Thomas Hall hath le oft it f.'" (*ibid.*, ii, 81).

Reference has already been made (ch. iii, p. 45) to the efforts of the Pewterers' Company in the sixteenth and following centuries to repress the development of an individual good-will among its members. While there was actually such a development, it cannot be said that there was a corresponding development to any marked degree of any system of protection of the individual's mark.

[2] See G. I. H. Lloyd, *The Cutlery Trades*, ch. iv, "The Rise and Localization of the Industry."

[3] See *York Memorandum Book* i, (Surtees Soc. Pub., vol. cxx), p. 136. The Ordinances of the Cutlers and Bladesmiths of York (1479–80) provide "that every bladesmith of this city shall cut and use his own marks on his knives that he will make, different to the mark of every other man of the same trade, under pain of 40^d^ to the Chamber and the bladesmiths in equal portions." See also *ibid.*, ii (Surtees Soc. Pub., vol. cxxv), Introd. p. xli.

[4] R. W. Dixon, "Thaxted," in *The Antiquary*, vol. xvii, pp. 10 *et seq.*, 57 *et seq.*, G. E. Symonds, "Thaxted and its Cutlers' Guild," in *Trans. Essex Archæol. Soc.*, N. S., vol. iii, p. 254.

[5] W. J. Ashley, *Economic History*, i, pt. i, p. 95.

at first a separate organization of different branches of the same industry.[1] "Every knife," recites the Ordinance between the Cutlers and Sheathers of London in 1408,

> is prepared separately by three different crafts, viz.: first, the blade by the smiths called "Bladsmythes," the handle and the other fitting work by the cutlers, and the sheath by the sheathers; and that if the articles are good, commendation is the result, but if bad, then blame and scandal falls and is charged upon the said trade of the Cutlers.[2]

Under this system of minute sectional organization the cutlery trades of London before their amalgamation into the Cutlers' Company in the middle of the fifteenth century consisted of independent gilds of sheathers, bladesmiths and cutlers.[3] A similar differentiation and ultimate amalgamation occurred in York and other English communities of cutlers and also on the continent, as, for instance, in Paris, Solingen and Ruhla (Thüringen).[4]

At the present time the most,—if not the only,—famous center of British cutlery manufacture is Sheffield. Its reputation has existed since the days of Chaucer who, in "the Reve's Tale," wrote

> A Shefeld thwytel[5] bare he in his hose,
> Ronde was his face and camysed was his nose.[6]

Similarly, until recently, Sheffield cutlery marks were considered to be the most important marks in the kingdom from the standpoint of their contribution to the history of comparative trade-mark law. Writing forty years ago concerning the Sheffield registry of trade-marks, Joseph Kohler said:

> So bietet uns das Recht der Sheffielder Messerschmiedmarken das interessante Beispiel einer Markenentwickelung,

[1] G. I. H. Lloyd, *op. cit.*, pp. 81 *et seq.*
[2] C. Welch, *History of the Cutlers' Company of London*, i, p. 283.
[3] *Ibid.*, i, p. 24.
[4] G. I. H. Lloyd, *op. cit.*, p. 81.
[5] A knife carried by those not entitled to wear a sword.
[6] Joseph Hunter, *History and Topography of the Parish of Sheffield* (ed. A. Gatty), p. 59. For a collection of literary allusions to Sheffield cutlery in the reign of Elizabeth see G. I. H. Lloyd, *op. cit.*, p. 95.

welche von den mittelalterlichen Zunftwesen bis in die heutigen Verkehrsverhältnisse hineinreicht, und es wäre vielleicht zweckmässig gewesen, wenn das deutsche Gesetz der rheinischen Eisenindustrie in gleicher Weise ihre altbewährte Einrichtung neben dem allgemeinen Rechte belassen hätte.[1]

It must, however, be remembered that the history of the London cutlers is almost two centuries older than that of Sheffield. The first regulations concerning London cutlers' marks occurred as early as 1365,[2] while "the first known holder of a Sheffield trade-mark" occurs in 1565.[3] Very recently there has been published an admirable history of the Cutlers' Company of London,[4] the records of which have not only thrown an entirely new light upon the relation of cutlers' marks to the whole history of trade-marks but have also, as far as English cutlers are concerned, antedated the prior records, namely, those of Sheffield, by almost two centuries. Our study of cutlers' marks will therefore largely be drawn from London rather than from Sheffield sources, despite the fact that, at any rate since the eighteenth century, Sheffield has predominated the British cutlery trade and that, since that time, the manufacture of cutlery in London has been steadily dwindling away.[5]

The origins of the London cutlery trade somewhere in the thirteenth century[6] are obscure, but the regulations concerning their marks in 1365 above referred to indicate that by that time they were sufficiently powerful to seek and obtain protection for their monopoly and for their marks. This was, of course, especially so in the case of those engaged in making weapons, armor and other war *materiel*, regarded as essentiai

[1] *Das Recht des Markenschutzes*, p. 66.

[2] *Cal. Close Rolls*, Edw. III, 1364–8, p. 182. Robert Leader, in his *History of the Company of Cutlers in Hallamshire* (Sheffield 1905), which will often be referred to in this chapter, is incorrect in his supposition (i, p. 12, asterisk note) that the Ordinance of 1408 may be "the earliest reference to the impression of distinctive marks on cutlery."

[3] R. E. Leader, *op. cit.*, i, p. 7.

[4] Charles Welch, *History of the Cutlers' Company of London*, vol. i, 1916, vol. ii, 1923, cited hereafter merely as "Welch, *Cutlers*."

[5] G. I. H. Lloyd, *op. cit.*, pp. 98–9.

[6] Welch, *Cutlers*, i, p. 2.

for the national defense and common weal.[1] The order of 1365 reads as follows:

To the Mayor and Sheriffs of London. Order to cause proclamation to be made that smiths who make swords, knives and other weapons in the city of London shall put particular marks upon their handiwork (*certa signa sua super omnibus operacionibus suis ponant*), that the same being so marked (*dictis signis signata*) shall be shown before the Mayor, sheriffs and aldermen of London in the Gildehall of the city so that every man's work may be known by his mark (*per ejus signum*), and that they shall forfeit any works sold without such mark (*dictis signis suis non consignatas*) or the price thereof, causing the premises to be observed and any works found to have been sold or exposed for sale in the City and suburbs of London without marks (*dictis signis suis non consignatas*) to be seized as forfeit into the king's hand and answer to be made to him for them.[2]

[1] In the "Articles of the Heaumers" (Makers of Helmets) dated 1347, already cited above (p. 61), it was provided that "each one of the makers aforesaid shall have his own sign and mark, and that no one of them shall counterfeit the sign or mark of another; on pain of losing his freedom, until he shall have bought the same back again, and made satisfaction to him whose sign he shall have so counterfeited; and further, he shall pay to the Chamber 40 shillings." (H. T. Riley, *Memorials of London*, p. 238.) *Cf.* statute of 7 Hen. IV, c. 7, concerning Arrow-Heads: "Because the Arrow-smiths do make many faulty Heads for Arrows and Quarels, defective, not well, nor lawful, nor defensible, to the great Jeopardy and Deceit of the People, and of the whole Realm; It is ordained and established, That all the Heads for Arrows and Quarels after this Time to be made shall be well boiled . . .; And that every Arrowhead and Quarel be marked with the Mark of him that made the same; and that the Justices of Peace in every County of England . . . shall have the power to enquire of all such deceitful Makers of Heads and Quarels, and to punish them as afore is said." (*Stat. of the Realm*, ii, p. 153.)

In Lambard's *Eirenarcha*, published 1581, a treatise on the duties of Justices of the Peace, among "Articles of the Charge Given by Justices of the Peace" are "If any Arrowhead Smith have not wel boiled, brased and hardened at the appoint with steel, and marked with his mark, such heads of Arrowes and quarels, as he hath made. 7 Hen. IV, cap. 7." (See W. S. Holdsworth, *op. cit.*, iv, p. 561.)

[2] *Cal. Close Rolls*, Edw. III, 1364–8, p. 182, 39 Edw. III, June 26, 1365. This order was enrolled in *Letter Book G* of the City of London and is reprinted in the Latin original from that source in Welch, *Cutlers*, i, pp. 248–9. *Cf.* the statute of Parma, 1262, prohibiting the counterfeiting of marks upon knives and swords and further providing: ". . . if any person in such guild has continuously used a mark upon knives, swords or other steel or iron articles for ten years, and any other person is found to have used, within one or two years, the same mark or an imitation thereof, whether stamped or formed in any other way, the latter shall not in the future be allowed to use such marks upon knives, swords or other steel or iron articles, under penalty of ten pounds of Parma for each and every offense, and that regardless of any compromise or award of arbitrators which may have been made." (Quoted by E. S. Rogers,

In 1408 complaint was made by the bladesmiths and cutlers that

"foreign" cutlers from various parts of England brought for sale to London knives and blades bearing forged marks of London bladesmiths, and that the sale of such "faulty and defective" goods tended to the discredit of the two Misteries and to the public loss. They therefore prayed that London

9 *Michigan Law Review* at p. 37, from J. Kohler, *Das Recht des Markenschutzes*, p. 46). Mr. Rogers (*op. cit.*, p. 37) calls attention to the resemblance between the ten-year user feature of the Parma statute and the "old mark" section of the English Trade-Mark Act of 1875 and also Sec. 5 of the U. S. Trade-Mark Act of 1905 (since amended by the Act of March 19, 1920), pointing out that both in England and America the protection of "old marks" was regarded as "a dangerous innovation." For elaborate Florentine legislation concerning armorers' marks, 1355, see G. Lastig, *Markenrecht und Zeichenregister*, pp. 26–8. G. F. Laking, in his monumental *European Arms and Armor* (vol. i, p. lix) discusses the statutes of the *Universitas* of armorers of Milan enacted in 1587, providing for the compulsory registration of marks, and forbidding the changing of a mark, once it had been registered. See also "Statutes des Armuriers Fourbisseurs d'Angers" and other provisions in Appendices to C. Ffoulkes, *The Armourer and His Craft*.

However, despite the abundance of continental legislation prohibiting the counterfeiting of armorers' marks, the appropriation of such marks, both collective or geographical as well as individual, appears to have been almost as frequent and as lightly regarded as was the imitation of the early printers' and publishers' devices discussed at length in a previous chapter (*supra*, pp. 67–70, 72). There was very much less counterfeiting of the marks on defensive armor than of those on sword-blades, "and where it exists it is obviously done for ulterior reasons." (C. Ffoulkes, *The Armourer and His Craft*, pp. 70–71). Sword-blade makers often used not only the marks of competitors, but the names of competitors' localities or the marks of their gilds. "Toledo, Passau, Ferara, Solingen are . . . very often stamped upon the blades of an entirely different nationality." (*ibid.*, p. 70). For counterfeiting of Spanish cutlers' marks in England, see *infra*, p. 107, n. 1. The effect of such legislation as that above quoted would appear to have been to prevent *intra-gild* competition only.

But in the study of armorers' marks it should be remembered that famous armorers and bladesmiths, like the early printers, wandered all over Europe from the original centers of their art, — often at the summons of some particular prince or noble. According to Froissart, armorers were sent over with armor made for the Earl of Derby in Milan when the Earl-Marshal proposed a duel against him in 1398 (C. Ffoulkes, *The Connoisseur*, vol. xxv, p. 29); English armorers were not good enough for Henry VIII, who imported not only German armor, but also "Almayne" armorers to teach the English armorers their craft (C. Ffoulkes, *ibid.*, vol. xxiv, pp. 99, 101). "Italian armourers worked in Germany, France and Spain, and German and French armourers were also liable to roam abroad in large numbers" (G. F. Laking, *op. cit.*, i, 204). As among the early printers and publishers, there appears to have been considerable indifference to any consistent use of marks upon the part of continental armorers, both itinerant and stationary. Laking speaks of Milanese armorers of the fifteenth and sixteenth centuries, borrowed from the Duke of Milan by the King of France, working at Tours, Lyons and Bordeaux and using their Italian stamps (*ibid.*, i, pp. 201, 204–5). Boeheim also points out that an armorer in adopting another's mark, might do so in conjunction with his own name, — sometimes also with the actual place of production (*Handbuch der Waffenkunde*, p. 643).

cutlers should be forbidden to purchase knives and blades bearing such forged marks.[1]

The language of the joint petitions of the cutlers and blade-smiths of 1408 resembles the complaints as to the injury of the collective good-will of the gild, to which we have referred above,[2] and also indicates the monopolistic usage of craftsmen's marks during the Middle Ages.

Unto the honourable Lords, the Mayor and Aldermen of the City of London, shew all the good folks of the misteries of the Cutlers and Bladesmythes, free of the said City, how that foreign folks, from divers parts of England, do sell unto the cutlers and others of the said City as well knives as blades, marked with marks resembling the marks of the bladesmythes free of the said City; the which knives and blades are faulty and defective, to the very great scandal of the said misteries

Ffoulkes mentions a suit in the Royal Armoury at Turin ascribed to Antonio Missaglia but bearing *no* mark (*The Connoisseur*, vol. xxv, p. 31).

For reproductions of marks on armor, see C. Ffoulkes, *The Armourer and His Craft*, pp. 147–52; W. Boeheim, *op. cit.*, pp. 648–80; B. Dean, *The Collection of Arms and Armor of Rutherford Stuyvesant*, pp. 11, 17, 21, 63, 95; C. J. Ffoulkes, *Inventories and Survey of the Armouries of the Tower of London*, ii, pp. 221, 406 *et seq.*; H. I. Gilchrist, *Catalogue of Arms and Armor Presented to the Cleveland Museum of Art . . .*, pp. 265 *et seq.*; also articles cited *supra* p. 24, n. 3.

[1] Welch, *Cutlers*, i, p. 110. Leader points out (*op. cit.*, i, p. 6) that "it is simply guess work to conjecture that it may have been the Hallamshire competition" which provoked this petition. However, reference will not be made in the text of this chapter to the constant charges and countercharges by London and provincial — and later continental cutlers — as to the infringement of trade-marks, which make interesting though unedifying reading for the student of the so-called "evolution of trade morality." The London cutlers were loud in their outcry against the Sheffield and Birmingham rivals who put the London mark, — the mark of the dagger — upon their wares, and in 1610 "It is agreed that the Mr & his Wardeins by advice of counsell shall prefer a bill into the Star Chamber against such obstinat persons. . . ." (Welch, *Cutlers*, ii, p. 339.)

On the other hand, shortly thereafter the London cutlers were in their turn accused of stamping Spanish and other marks on their goods (Petition of Benjamin Stone in *Cal. State Papers*, Dom., Charles I, 1638–9, p. 237, No. 62), and in the nineteenth century were "convicted of making up provincial blades and forging London marks on them" (Lloyd, *op. cit.*, p. 98), while the Sheffield manufacturers, bitterly complaining of the misuse of their marks by German rivals, were forced to admit that they themselves were appropriating each other's marks. (See *Report from the Committee on Trade-Marks Bill* in *Reports of Committees, 1862*, Session Papers xii, Question No. 661.) And, to complete the unsavory record, twice within the last five years, the Federal Trade Commission of the United States has been compelled to issue orders requiring respondents to desist from using labels containing the word "Sheffield" upon inferior American-made cutlery (See *Federal Trade Commission* v. *Bernstein*, 4 F. T. C. D. 114; *Federal Trade Commission* v. *Sheffield Razor Co.*, *ibid.*, 373.)

[2] *Supra*, pp. 46–47.

of the Cutlers and Bladesmythes, and to the common hurt. May it therefore please your very wise discreetness to ordain, that no one of the said mistery of Cutlers shall buy of any other person from henceforth any such knives or blades made in the country with marks forged in resemblance [of such], as well for the honour of the said misteries, as for the common profit of the City.[1]

Among the Articles of the Mistery of Bladesmiths in the same year occurs the following:

Also, that every master of the said mistery shall put his own mark upon his work, such as heads of lances, knives and axes, and other large work, that it may be known who made the same, if default be found therein; on the pain aforesaid. Also, that no one of the said mistery shall counterfeit the mark of another maker upon his own work; but let him use and put his own mark upon his own work, on the pain aforesaid.[2]

So far we have found nothing in the London cutlers' records to differentiate their marks from the ordinary regulatory marks of the Middle Ages. But in 1452 a case arising before the Mayor and Aldermen of London, who at that time appear to have had jurisdiction over such matters,[3] puts an entirely different aspect on these marks. The issue in that case was the right to use the mark of the Double Crescent which, until his death in 1450 had been used by Robert Hynkeley, citizen and bladesmith of London.[4]

On that day it was granted and agreed by the Mayor and Aldermen abovesaid that John Leylond, citizen and skinner of London and Agnes his wife who was the wife of Robert Hynkeley late citizen and bladesmith of London should be restored and have again their old mark of the double crescent notwithstanding the petition to the contrary presented by the Mistery of Bladesmiths. And that John Morth bladesmith shall not further use that mark but shall be altogether forbidden under the penalty attaching, etc.[5]

[1] Welch, *Cutlers*, i, p. 284. The petition was granted (*ibid.*, i, p. 285.)
[2] *Ibid.*, i, p. 287.
[3] See Unwin, *Gilds and Companies of London*, pp. 235 *et seq.*
[4] *Ibid.*, i, p. 201.
[5] *Ibid.*, i, p. 329. *Cf.* Kohler, *op. cit.*, pp. 51–2, citing an interesting case of the sale in 1515 by a German widow of a cutler's mark inherited with her husband's business in 1485, "*weil sie Alters halber vom Handwerk abstehen müsse.*"

The importance of the case of the mark of the Double Crescent is twofold in that it shows (1) that by 1452 the cutler's mark had become of sufficient value to be the subject of litigation for its restoration and (2) that the notion of property in a mark had developed so far that the widow of the owner of a mark, as long as she remained in business, was entitled to retain the use of the mark (*marquam suam pristinam*), even subsequent to her remarriage.[1]

[1] Reference should be made to the subsequent ordinances concerning cutlers' marks throughout the 15th and 16th centuries. Most of this legislation emphasizes the regulatory and monopolistic aspects of these marks and does not contribute much to the development of a law of property in trade-marks. The Ordinances of the Bladesmiths in 1463 prescribed: "And ouer that forasmoche as diuers fforeyns dwellyng in ferre contrees of this Reaume conterfeten the markes of Bladesmythes of this Citee and sellen theire blades to diuers persones of this Citee and by the same persones aren solde ayen for london blades to grete disclaunder of the seide Craft and disceyte of the kyngs people." (Welch, *Cutlers*, i, pp. 334–5.) "Noo personne of the seide Crafte shall not bere nor sende his marke to eny foreyn to be sette vpon eny werke by the foreyn to be made without that there be noo man enfraunchesed of the seide Crafte of sufficient konnyng to make the same . . ." (*Ibid.*, i, p. 336.) The Bladesmiths' Ordinances of 1501 provided for registration of bladesmiths' marks as follows: "And that they nor any of theym shalle haue nor stryke any marke vpon any bladys or tolys by them or any of theym hereafter to be made but such marke or markes as shalbe yeven to theym by the Wardeyns of the same Crafte of Bladesmythes for the tyme beyng and the same marke or markes firste to be enrolled in the yeldhalle afore it be sette or stryken vpon any suche blade or tole. . . ." (*Ibid.*, i, p. 344.) The "Ordinance Concerning the Bladesmiths and Armourers," giving the bladesmiths the right to enroll the armourers' marks, *does* contain an intimation as to the value of marks to their owners: "Also yt is agreed bytwene the seyd Wardens that all persones of the seyd Craft of Armurers occupying the seid Craft of Bladsmythes shall haue a marke by the seyd Wardens of Bladsmythes to theym assigned as euery ffreman of the seyd Craft of Bladsmythes haven. And the seyd marke to be enrolled in theldhall as all other vsing the occupacion of Bladsmythes don according to an acte made in the seyd Craft of Bladsmythes so that all suche ware by theym made may be knowen for good able and profitable for the kings liege people. . . . (*Ibid.*, i, p. 346.) The Petition of the Bladesmiths for Union with the Armourers in 1515 is followed by a set of Ordinances for the government of the Armourers' Company containing the following provisions concerning the Bladesmiths' Marks: "And that euery maister of the seid Craft sette his owne proper marke vpon his owne worke as vpon heeds of speres knyves & axes & vpon other groose workes that it may be knowen whoo made the same bicause of defawts that perhaps may be found in the makyng of theym. . . . And that if any foreyn counterfeite the marke of eny ffreeman & sell eny-maner blades so marked w^t a ffreemans marke to eny ffreeman w^tyn this Citie of eny other Craft, that than it shalbe liefull to the seid wardeyns w^t other certyn honest persones of the seid Craft accompanyed w^t an officer of the Chambre of london for the tyme, to make due serche in all places of the Citie where eny such wares be to be sold, or if that eny such seid wares be wrought deceivably either by ffreeman or fforeyn, the same wares by theym w^tyn the Citie so founden in whose hands so euer they be, to be brought to the Guyhall & vtterly to be forfeited. . . . And that no persone enfraunchised of the seid Craft shall goo oute of his hous to pray desyre nor fetche eny ware or

It is perhaps surprising that there are no further entries for the fifteenth and sixteenth centuries of a similar nature. But, at any rate, when we arrive at the seventeenth century, we find entry after entry in the records of the company court indicating the great importance of marks to their owners and the methods of protecting and transmitting these marks. The regulatory antecedents of the mark appear in the still surviving objection of the Company to the use by its members of more than a single mark:[1]

(23rd May, 1620) William Sherebrook is warned not to strick the Crowne but onlie his marke w^ch^ is the falchon w^ch^ was formerlie by his owne Consent graunted to him and is enrolled to him in the howse. And if he do not reforme himself w^th^in xiiij daeis and betake him to his olde mark Then the howse do give him notic they will according to the rules of the howse lay such penaltie vppon him as by lawe they may.[2]

Chaffer to make or grynde, nor that eny persone of the seid Craft shall bere or sende his marke .o eny fforeyn to be sette vpon eny worke by the seid foreyn to be made w^t^oute there be noman of the seid Craft that hath sufficient connyng to make the same vpon peyne to pay at euery tyme so offendyng xxd. to be employed in maner and fourme aboueseid. . . . And that nomaner persone enfraunchised in the seid Craft make eny maner wares of blades Excepte that he have a mark propre to hymself And the same his marke to be shewed in presence of the Wardeyns and by the same Wardeyns the seid marke to be entred in theldehall of Record in eschewyng further preiudice vpon peyne of forfaiture of xiijs. iiijd. at euery tyme so offendyng to be employed in maner & fourme as is aforeseid." (*Ibid.*, i, pp. 347–8.)

Upon the dissolution of the Bladesmiths as a separate "mistery", their authority over the craft passed to the Armourers, including the power to grant and oversee the makers' marks (*ibid.*, i, p. 118). To procure the necessary power to control the marks in use among the Bladesmiths attached to their "mistery," the Cutlers in 1519 obtained from the Court of Aldermen a grant providing: "It may therefor pleas the same to licence yor seid Oratours and to graunt to theym power that they & their Successours beying Maister & Wardens of the same Craft as oft as nede shall be may appoynt & assign to euery Brother & freman of the seid Craft of Cutlers occupying makyng blads a Certen marke to be sett vppon their seuerall Blades which they shall make to thentent yt may be knowen who makyth good & perfite blads and who makyth disceytfull blads ffurthermore that when such marks be appoynted to suche makers of Blads their names w^t^ the same marks to euerye of them assigned may be wretten Regestred & noted in the boks of this honorable Courte here to Remayne of Recorde to thentent aforeseid." (*Ibid.*, i, p. 350–1.) For facsimiles of eight cutlers' marks "entered of record" in *Letter Book N* of the City of London, F. 17th, 1519–20, see *ibid.*, i, opposite p. 118.

[1] *Ibid.*, ii, 342. *Cf.* R. Leader, *op. cit.*, ii, p. 3, Ordinances of the Sheffield Cutlers, 1590, No. 7; *ibid.*, ii, p. 5, "fine of 10^s^ for striking two marks". *Cf.* similar pewterers' provisions, C. Welch, *Pewterers*, ii, pp. 75, 121, 162; also provision as to clothiers' marks in proclamation of Charles I quoted above, p. 95.

[2] Welch, *Cutlers*, ii, p. 342.

On the other hand, there is also the ordinance enacted in 1624 and repeatedly enforced that,

no man from hensforth shall have a proper marcke vnlesse he be a forger and be able of him self to fforge & temper his stuf as a worckman sholde do.[1]

This requirement not only prevented members from acquiring rights in gross in their trade-marks,[2] but compelled them to maintain a high standard of workmanship in order to be able to retain their marks:

(10th April, 1621) At this Court was graunted to . . . Raphe Leachwoorth the letter R for his marck if it shall appeare to the Court by the report of a worckinge forger that the said Raphe Leachewoorth can forge.[3]

(5th August, 1634) Jacob Ashe made sute to haue the A for a marke graunted vnto him to strike vppon Blades w^ch^ he intendeth God willing to forge the Answere of this Court is that first the Master w^th^ Two or three worckmen shall make tryall of the sufficiencie of his worckmanship in forging by seeing the sayd Jacob forge a blade hymself and vppon his sufficiencie he shall haue the same graunted.[4]

Registration of marks was twofold, viz.: upon a plate kept at the Company Hall and in the official book kept by the Clerk of the Company.[5] Registration appears to have been at the risk of the applicant; that is to say, surety might be asked of him, holding the company harmless by reason of such registration.[6] Erroneous registration was corrected with much ceremony:

(24th June, 1681) Upon the Complaint of Mr. Garner who strikes the Flameing Sword That seuerall persons in and about the Cittie of London strucke his marke in whole the

[1] *Ibid.*, ii, p. 344.

[2] *Cf.* the decision of the Supreme Court of the United States in *United Drug Co.* v. *Rectanus Co.* (1918) 248 U. S. 90, at p. 97, where, referring to "the fundamental error of supposing that a trade-mark right is a right in gross or at large," the Court says: "There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed." See also *Everett O. Fisk & Co.* v. *Fisk Teachers' Agency* (1924) 3 F. (2d) 7, at p. 8.

[3] Welch, *Cutlers*, ii, p. 343.

[4] *Ibid.*, ii, p. 348.

[5] *Ibid.*, ii, p. 9.

[6] *Ibid.*, ii, p. 346, 6 October 1629; p. 352, 12 May 1669.

Master and Wardens were pleased to sumone before them att this Court who there appeared Thomas Walsingham who strikes the fflameing sword & starre Richard Piggott the fflameing sword and Ball Glemham Wheetcroft the fflameing sword & halfe moone Anthony Watson the fflameing sword & Diamond & Mr. Tindall the fflameing (sword & heart) whom the Court informed the said Mr. Garner haueing struck the said mark for 20 yeares and although some of their markes were enrolled in this Company's Bookes Yett they neither could nor would vindicate the said Enrollments thereof But were Resolved to deface them upon their plate being sensible (in case Mr. Garner can make his Enrollm[t] good to anticipate the others) that both by Law and the Orders of this Company their strikeing their markes is illegall And thereupon forewarned them for euer hereafter of strikeing the said markes upon their perills.[1]

The widow's life estate in her husband's mark appears to have been firmly established, even as against her husband's surviving partner:

(5th May, 1612) It is ordered that where as Awsten Johnson & John Wesell were partners in the trade of knyf makynge which Awsten Johnson it hath pleased God to take to his mercy who in his leiftyme did betwene them stricke the Crosse & the said Wesell did to give more Cowntenaunce & trad to the same marcke discontynewe his owne proper marck beinge the flower de luce If the widow of the said Awsten shall or will hereafter vse the same trade of knyf makinge then the same widowe shall have it properlie for her self duringe her leif but if the said widowe shall clerelie discontynewe Then the Court hold it fitt & so do order that the said John Wesell shall have the same marke as survivor to the Said Awsten deceassed.[2]

(27th August, 1607) Widdow Harblet was admonished from hensforth not to strick or cause to be strucken the marke of the shepherds hooke but libertie is given her to make the best of her marcke by sellinge it to any person so it be don by consent of this howse . . . (1st December, 1607.) Widowe Harblet brought in her marck being the Sheppards hooke & dagger.[3]

(28th September, 1650) Elizabeth Robinson widowe

[1] Welch, *Cutlers*, ii, pp. 353–4. [2] *Ibid.*, ii, p. 340. [3] *Ibid.*, ii, p. 338.

surrendred her Marke Called the B and Crowne and att her request It was granted and enrolled to Clement Bell.[1]

(9th June, 1677) Elizabeth wife of Daniel Tredwell deceased surrendered the Bunch of Grapes his mark, which was enrolled in her presence to Peter Perkins.[2]

However, the records make it perfectly clear that at least at one time it was the Court's opinion that the widow's estate was solely a life estate and that, at any rate in the early seventeenth century, she had no right to dispose of the mark by will. The following entry involved a nice question concerning the innocent purchaser for value from the widow, as against one to whom the widow subsequently bequeathed the same mark:

(6th January 1622–3) One Lambert Williams formerly had grant of the Bunch of Grapes. After his death his widow continued to strike it by her servants & journeymen "bye the tolleracon of this howse." The widow in her life time did take upon her to sell the mark (which was out of her power to do) to John Hubberd free brother of this Mistery. Nevertheless on her death bed she again disposed of the mark by her will to one William Balser her man contrary to the orders of this house, for "the disposinge & allowing of all marcks to any person or persons vsinge the same mysterie of Cutlers is in the said Mr & Wardeins & Assistaunts. Now for so muche as the said John Hubberd is not capable of him self beinge no worckman to stricke or have the same marck allowed vnto him And yet to give the same John Hubberd some Content for the money he paid in his owne wronge for the same marke the Court" have at his request reserved the Bunch of Grapes for the use of the eldest son of John Jencks when he shall be capable so to strike the same. Meanwhile the said mark is "to lye dead & not to be struck by the allowaunce of this howse by any person or persons."[3]

It is difficult to reconcile this declaration of the Court as to its ultimate control or disposition of marks with the memoranda dated March 6th, 1627–8 and October 9th, 1628

[1] *Ibid.*, ii, p. 350.
[2] *Ibid.*, ii, p. 353. See also The Falchion Mark, "surrendered by Elizabeth, relict of Zachariah Sellers," *ibid.*, ii, p. 27.
[3] *Ibid.*, ii, p. 343 (long minute abridged).

concerning the purchase by William Bales of the Bunch of Grapes mark "for euer" and the enrollment of that mark "to him & his heires for euer in this Court."[1] Furthermore, a prior entry shows the Court "entreating" the owner of a mark to transfer it to another:

> (2nd December, 1613) It is agreed that whereas the marke of the morryon head was formerlie graunted to Mr. Olliver Plucket the Court vppon entreatie to him made to passe the same over to Little Haunce Smyth wold not be perswaded but he was Contented to give the same over to the hands of Mr Addams (the Master) for him to dispose of the same at his pleasure So as if he did dispose it to the said Haunce it maie if it please God the same Olliver Plucket shall over live the said Haunce the same maie then be in the right agayne of the said Olliver to dispose at his pleasure The said Mr Addams excepting of the said grant of the said Olliver Plucket hath vppon the Condicons aforesaid granted the said Morrian head to the said Haunc in manner & forme aforesaid w^ch^ the said Haunc hath enrolled & paid for & also at this Court he hath brought in the kingshead.[2]

This qualified system of trade-mark ownership worked out by the cutlers of London involved not only a life estate for the widow, as indicated in the litigation of January 6th, 1622–3, concerning the Bunch of Grapes mark quoted above, but also very often a reservation of the mark for the son:

> (20th May, 1623) The Spur, his father's mark, granted to Abraham Brock. He delivered up his own mark, the Spread Eagle, which the Court promise shall not be granted to any others without his consent.[3]
>
> (28th February, 1642–3) Flower de luce and crown enrolled to George Spencer duringe and vntill George Knolles, sonne of Jeremy Knolles, shall atteyne the Age of xxj^o^ yeares And that hee bee mad a free brother of this Company.[4]

Several curious entries concerning the mark of the Cross Keys indicate not only the prospective value of a mark in the estimation of the family of its deceased owner, but also the system of reservations:

[1] Welch, *Cutlers*, ii, p. 345.
[2] *Ibid.*, ii, p. 341.
[3] *Ibid.*, ii, p. 343.
[4] *Ibid.*, ii, p. 349.

(5th August, 1630) Whereas John Bushell a free brother of this howse made sute to haue the marke of the Crossekeys enrowled vnto him for seaven yeares to come vntill the sonne of his late deceased vncle shall come to the Age of Twentye and one yeares To hould vp the reputacon of the same this Court ordered that the Master in being and Mr Tuck shall come some tymes before the next Court ouerlooke and sprooue of the worckmanship of the sayd John Busshell in the forging & finishing of a knyfe or knyves and accordingly proseed the next Court.

(10th August, 1630) The marke of the Crosskeyes was surrendred to the Mr Wardeins & Assistants of this Company to be disposed of according to their discretion & good likeing. Vppon the humble sute of John Busshell a free brother of this howse to haue the sayd marke of the Crossekeyes enrouled to him for the terme of Seaven yeares to come to maynteyne the reputacon of the sayd marke for the benefitt of the sonne of John Bushell late one of the Assistants of this Companie deceassed The sayd Mr Wardens & assistants & the rather at the request of Elizabeth the late weif & executrix of the said John Busshell by letter directed to the Mr & Wardens the Coopie shereof doth hereafter more playnely appeare doth referr the enrowling thereof vntill the next Court of assistants.

To our loueing frendes the Master and Wardens of the Companie of Cutlers giue theis

Gents I haue receaved a letter from my Cosen John Busshell wherein he intreats mee either be present w^th^ you to morrow morning or write to Certifie my intention and my weifes that our desier is that my Cossen John Busshell should inioye and make vse of the marke for Seaven yeares to the end that it might be of the more vse and advantadg to my wifes sonne John Busshell when he shall Come of Age whome wee intende betweene this and Michaellmas to bynd to the trad And wee are boath verie confident (howsoeuer the malice of some Ill disposed men haue indeavored to prevent itt) that you are soe Just and honest to whome the Cheif Gouerment of that societie is Committed That noe indirect way nor perswation shall leade you to Iniure the memory of soe honest a man and sometymes a good member of that Company by giueing assent to any that may preiudice his posteritie especially when you shall Consider that what is his Case nowe may in tyme by some of yo If therefore out of your loue to Justice and

willingnesse to satisfye our request you shall Confer it vppon my Cossen John Busshell for this Seaven yeares you shall doe yourselves much right and oblidge me and my weif to remayne

Your affectionat frendes
FRA CONNINESBYE
ELIZABETH CONNIGSBYE

Detford the 9th of August, 1630.

At this meeting the marke of the Croskeyes was enrowled to John Busshell according to the request of Mr Connigesby and his weif to the Company by their letter to haue and to hould from this Tenth daye of August 1630 for Seaven yeares to come.[1]

Conditional transfers and registrations are frequent. In the following entry one receiving a mark upon a condition subsequent gives a bond to secure his performance of his agreement to return the mark upon the occurrence of the condition in question:

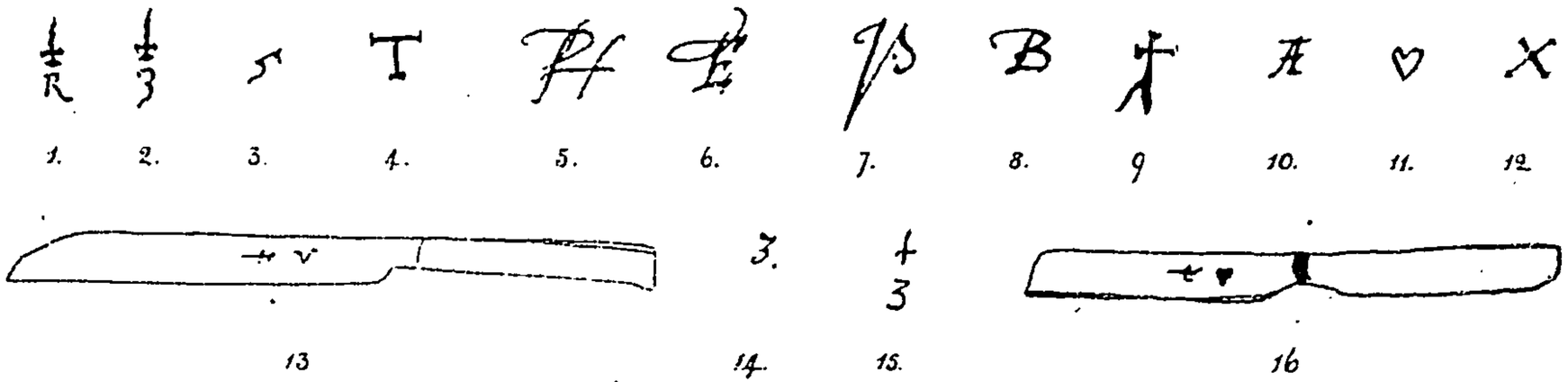
(17th April, 1610) At this Court Thomas Browne of the parish of Clarckenwell in St Johns Street London came in Court and was a suter to have the letter B graunted to him for his marke w^ch^ said Romaine B was formerlie graunted to John Branckston who nowe is gone to dwell in Barwick w^ch^ said Romaine B the court agree the said Tho. Browne shall strick vppon this condic̃on that if the said John Branckston shall at any time hereafter retorne for London and shall requir that the said Tho. Browne shall surceasse to strick his marke then the said Tho. Browne shall forthwith give over stricking the same mark & to take him self to some other marke by the appointment of this howse. And herevppon the said Tho. Browne did faithfully assure & promise to John Johnson (the Junior Warden) to performe the said promise and took of the said John Johnson a penny to give to the said John Johnson ffortie pounds if he do not performe this assumption vppon request to him mad in forme aforesaid.[2]

Other conditions imposed are difficult to reconcile with the rule that a mark must be used in connection with a business:[3]

[1] Welch, *Cutlers*, ii, pp. 346–8. *Cf.* reservation of the Murrion's Head, 20 Jan. 1611–12 (*ibid.*, ii, p. 340).

[2] *Ibid.*, ii, p. 339.

[3] *Cf. United Drug Co.* v. *Rectanus*, *supra*, at p. 97: "The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly."



Reproduced from C. Welch's History of the Cutlers' Company of London

DRAWING OF LONDON CUTLERS' MARKS IN THE COURT MINUTE BOOKS OF THE COMPANY, 1656–1676

KEY TO MARKS

1. John Browne.
2. Peter Cornelius.
3. John Phillips.
4. Henry Stanus.
5. Robert Hobs.
6. Richard Ellarie.
7. William Hanwick.
8. John Branckston.
9. John Almond.
10. Sebright Orrenge.
11. Frederick Cheretree.
12. Gregorie Edwards.
13. Arnold Cornelius.
14. Peter and Arnold Cornelius.
15. Lawrence Sheppard.
16. Nathaniel Swayne.
17. John Wellam.
18. Samuel Swallow.
19. Joseph Surbut.
20. William Preston.
21. Jacob Ashe.
22. Philip Bowen.
23. Jeremy Knowles.
24. Henry King.
25. Robert Preston.
26. Robert Lister.
27. Enoch Taylor.
28. Daniel Treadwell.
29. Henry Letherland.
30. Zechariah Sellers.
31. William Laughton.
32. Jeremiah Holcroft.
33. Stephen Price.
34. Timothy Tindall.

(18th March, 1650–1) In regard Walter Powell Cutler hath purchased of George (Spencer) the flower de luce and Crowne It^e his desire neither to strike it himselfe nor that any other maie bee allowed to strike the same hereafter w^ch this Co^rt consented vnto.[1]

The ceremony surrounding the transfer of a mark is illustrated by the case of the mark of the Three Leaved Grass:

(24th February, 1606–7) At this Court Andrewe Roffe brought in his marke w^ch was allowed him by full consent of Court as that he also had & bought of Robert South being formerlie the marke of Wicker Bunt called the three leaved grasse. To the bargayne whereof came Wilson the Queens shoemaker and one other m(an) knowen to the Wardeins of this Company who was a goldsmith who testified that the said Andrewe Roffe did buy the same mark of the said South ffor the enrollinge of w^ch mark the said Andrewe paid ij^s vj^d.[2]

As may be seen from the illustration facing this page, cutlers' marks were small and easily mistaken for one another. That they were a constant source of litigation before the Court of the Company, is evidenced by the great number of cases cited by the historian of the Company:

The Broad Arrows were forbidden (February, 1609–10) for resembling the Cross Keys; the Helmet (August, 1610) for resembling the "murryonhead"; the Mulberry (October, 1612) which "on parte doth Counterfeyct other mens marks"; the Snuffers were altered (23rd May, 1620), and the Cross Arrows prohibited (August, 1622) for resembling the Cross Keys; the Pine Apple of John Knowlls was refused (August, 1624), being too much like the Pomegranate; The Pomegranate must adhere to the "stamp on the lead" (October, 1638), being too much like the Thistle; the Sceptre and O were prohibited (March, 1685–6), having too much resemblance to the Sceptre and Half Moon.[3]

Two entries will suffice to show the anxiety with which by this time owners of marks regarded the infringement thereof

[1] Welch, *Cutlers*, ii, p. 350. *Cf.* 4 June, 1664, *ibid.*, ii, p. 351. [2] *Ibid.*, ii, p. 337.
[3] *Ibid.*, ii, pp. 15–16. For reproductions of Sheffield cutlers' marks, see R. Leader, *op. cit.*, i, pp. 107, 112.

and the method of the Court in dealing with such infringement:

(15th March, 1613–14) George Lomely did deliver vp an old marke was formerlie graunted him beinge the G wth promise never to strick the same agayne w^{ch} he did give & surrender vp in regard as he saeith it hath ben Counterfeycted & discreadited by bad worcken vppon w^{ch} Consideracon The Company were Contented he shold stricke an other marck w^{ch} no man doth strick w^{ch} is the snuffers w^{ch} marke of the snuffers as this daie he brought in w^{ch} was graunted to him & inrolled in the hall.[1]

(23rd May, 1620) At this Court appeared George Lomely who Contrarie to the orders of this howse wthout warraunt hath struck the crose arrowes whereas formerlie his marck allowed vnto him by this howse by his owne Consent were the snuffers as by the lead in the howse where they are struck appearethe And now sithenc he hath mad a marke w^{ch} he termeth the snuffers w^{ch} by the opinion of this Court resembleth the Croskeys The Court therefore do enioyne the said Lomeley that from hensforth he do strick onlie his former marck beinge the snuffers in the manner he presented them w^{ch} if he do not The Court do signifie to him that they will according to the kings graunt pattent & rules of this howse graunted vnto him (them) laie the penalties vppon him for his Contempt & offenc that is for everie knyf he shall Conterfeyct & strick to forfeyct & paie xiijs. iiijd.[2]

Trade-mark infringement might involve the offender not merely in litigation before the Court of the Company, but even in criminal proceedings:

(6th October, 1612) Tho. Hydden is enjoined to leave the stricking of his marke called the Mulberie vntill this Court shall give order therefore to allow him a mark w^{ch} as yet they can see no cause or allowe him any.

(10th November, 1612) Tho. Hidden was Committed to prison vppon my Lord Maiors Commaundement for that he wold strick a marke not allowed him w^{ch} on parte doth Counterfeyct other mens marks.

(10th December, 1612) Tho. Hedden brought in his marke beinge a Hammer w^{ch} is allowed vnto him.[3]

[1] Welch, Cutlers, ii, p. 341. [2] *Ibid.*, ii, p. 342. [3] *Ibid.*, ii, pp. 340-1.

In concluding this study of the Cutlers of London it is interesting to note that one of their number appears to have been one of the first owners of a trade-mark to engage in newspaper advertising specifically in order to repress the piracy of his mark. Ephraim How, against whom complaints were made by his fellow-cutlers, had grievances of his own which he set forth in the *London Gazette*, May 24th–27th, 1703, as follows:

> Whereas several Cutlers, in the disuse of their own Marks, do imitate the mark of Ephraim HOW, of Saffron-hill, which is the Heart and Crown, by stamping a playing Spade and a Crown, and also in Imitation of his Sirname they stamp NOW: Many having been deceived by this undermining Invention, all Persons who would buy Knives of his making, are desired to observe his Name and Mark narrowly, that they may not be imposed upon; for there is no Cutler whose name is NOW.[1]

In 1712 How again advertised in the *Daily Courant:*

> Whereas several persons who sell knives, for the better vending their bad wares spread reports that Ephraim How, Cutler of London is deceased. This is to certify that he is living, and keeps his business as formerly, with his son in partnership, at the Heart and Crown on Saffron Hill; there being divers imitations, you are desired to observe the mark, which is the Heart, Crown and Dagger, with HOW under it.[2]

Having dealt with the London cutlers' marks at so great length it would be quite supererogatory to cover the same ground with regard to the Sheffield marks, the law of which developed substantially along the same lines, starting very much later than that in London. The cutlers of Hallamshire obtained their initial protection, not as in the case of London, from the municipal authorities and the Crown, but from the Lord of the Manor of Hallamshire. The granting of marks was part of the function of the jurors of the court of frank-pledge, the administrators of the local law of the community. Although, early in the reign of Queen Elizabeth, cutlers,

[1] *Ibid.*, ii, p. 357.
[2] H. Sampson, *The History of Advertising from the Earliest Times*, p. 160.

customs in Hallamshire were spoken of as "ancient" and the trade described as subject to "ordinances made aforetime by men of the cutler's occupation," [1] the first recorded grant of a mark occurs on November 7th, 1564 when "to this court . . . came Robert Boure, and took of the Lord a separate mark (*sepalem signum*) for himself for marking (*signandum*) iron knives, to wit, such a mark ƆH to have and to employ (*occupandum*) by himself. And if any other strike this mark and be convicted thereof by verdict, he shall forefeit to the Lord xx^{s} and make amends to the offended party, and he gives to the Lord one penny of rent each year." [2]

This method of granting marks through the Lord's court and of paying "mark rent" to the Lord probably continued until the incorporation of the Company in 1624,[3] when the Company itself assumed the functions of the registration of marks and the supervision of the industry within a radius of six miles from the city of Sheffield. The Sheffield marks, in common with other production marks, were in their origin compulsory police marks and, as in the case of the London cutlers' marks, the "elevation of many marks into a valuable property was incidental, rather than designed . . . What as aimed at was not the protection of purchasers but a mutually understood trade indication, for the guidance of those exercising control or working in rivalry." [4] The Sheffield cutlers' records of the eighteenth century show much the same conceptions of the nature and legal implications of marks as do the London records of the seventeenth century. There is the same system of reservation of marks for the son of a deceased cutler and of a life estate in the mark for his widow.[5] In one case, where rival applicants for a dead freeman's mark were his son and the man who had married his widow, the Com-

[1] R. Leader, *op. cit.*, i, p. 6.

[2] *Ibid.*, i, p. 7. The 7th Article of the Orders for the Company in 1590 provided that "noe person usinge the said mysterye or crafte of Cutlers within the said Lordshippe shall stryke any marke upon his knyves except the marke be assyned to him before in the lordes Courte nor shall strike anye other marke butt his owne accustomed marke upon payne of forfayture for everye tyme doinge contrarye to this article tenne shillings to the said Erle and his heires. . . ." (*ibid.*, ii, p. 3).

[3] *Ibid.*, i, p. 18. [4] *Ibid.*, i, p. 106. [5] *Ibid.*, i, p. 110.

pany decided in favor of the latter, on condition that he give "for the benefit of the poor of the Corporation" the sum of three pounds.[1] There was the same insistence that, once a mark was granted by the Company, the grantee might use no other mark,[2] but, at the end of the century, there was a conspicuous "weakening of the old insistence on one man, one mark."[3]

An entry in the records of the Sheffield Cutlers' Company in 1749 indicates a tacit acknowledgment of the power of a mark-holder to transmit his mark on his death to another.[4] However, it was not until 1801 that for the first time this right of transmission was definitely recognized or at any rate confirmed by statute. Under the Act of 1801 [5] any freeman of the Cutlers' Company was empowered "to bequeath his mark, as his other personalty, by his will, his widow thereby not to be thereby prevented from carrying on the trade, or selling the right to the mark, for her lifetime, to any other person carrying on the trade." [6]

To recapitulate, the history of cutlers' marks shows the evolution of a mark from a typical regulatory compulsory mark of the Middle Ages to the modern trade-mark. The records of the cutlers show as early as the fifteenth century a sense of property in and the value of a mark, and by the seventeenth century we see the actual working of at least a qualified system of ownership in trade-marks, which may, to at any rate a limited extent — be "bought and sold and transmitted," and which are the subject of rigorous protection. The Act of 1801 crystallizes the development of the law of cutlers' marks and completes the process which had already commenced long before the case of the mark of the "Double Crescent" in 1452.

[1] *Ibid.*, i, p. 109.
[2] See entries 27 November 1731 and 29 January 1731, *Ibid.*, i, p. 108.
[3] *Ibid.*, i, p. 113. [4] *Ibid.*, i, p. 114. [5] 41 Geo. III, c. 97, local.
[6] Kerly on *Trademarks*, (5th ed.), p. 127; R. Leader, *op. cit.*, i, p. 114. For the history of Sheffield marks and the Cutlers' Company from the Cutlers' Company Act of 1801 until the present Trademark Act, see Kerly on *Trademarks* (5th ed. by F. G. Underhay), p. 126. See also references to this subject, *infra*, ch. vi.

CHAPTER VI

THE GENESIS OF THE MODERN LAW RELATING TO TRADE-MARKS

THREADING our way through the "dim, historic trails" from the Middle Ages we have arrived at the threshold of modern trade-mark law. We have found the starting points of these "trails" to be two in number, viz.: the proprietary mark or "merchant's mark," as it was known, indicating ownership of the goods to which it was affixed, and the regulatory or production mark indicating the source or origin of manufacture. We have seen that this classification of medieval marks into proprietary and regulatory marks was often one of function rather than of form or nature. The same mark might be used simultaneously by the gildsman on the one hand, voluntarily, as his "merchant's mark" and on the other, compulsorily, as his craftsman's or production mark, or two different marks might serve these purposes. Furthermore, especially in the cloth and cutlery trades, we have observed the evolution of the production mark from what we have termed a "liability mark" to an "asset mark," and we have noted the difficulty, during the process of transformation, of any rigid classification of production marks from the standpoint of their asset or liability nature. The modern manufacturer may use a mark or several marks or no mark just as he pleases; his forerunner, even as late as in the seventeenth century, was compelled to use a mark, and no more than a single mark. Nevertheless, as has appeared in the preceding pages, while the affixing of that mark may have worked to the detriment of its user, since thereby defective workmanship could be traced and punished, long before the use of marks ceased to be compulsory, their users began to

realize the possibility of those marks as an asset, *i.e.*, as a symbol of good-will.

At the beginning of this essay we have noted that the case of *Southern* v. *How* is almost invariably regarded as the starting point of our present law of trade-marks. We have seen to what extent learned judges and writers have relied on *Southern* v. *How* to establish the antiquity of protection of trade-marks by English law. In this connection it is interesting to find that even Holdsworth, in demonstrating that in the early seventeenth century "the common law and the common lawyers were beginning to acquire some knowledge of the law applied by the merchants to regulate their commercial relations" has recently cited *Southern* v. *How*, — and, incidentally, the version of that case as given in *Croke's Reports*, — as an instance of "cases turning on such topics as . . . merchants' marks." [1] But in our analysis of *Southern* v. *How* and of the subsequent history of that case,[2] it was demonstrated that the sole contribution of that case was at best an irrelevant dictum of a reminiscent judge that he remembered an action in 22 Elizabeth by one clothier against another for the mis-use of the former's trade-mark.

It is possible that some day in some moldering mass of unpublished records of the common law may be found a report of a case in the reign of Elizabeth by a clothier for infringement of his trade-mark that will justify the authority with which *Southern* v. *How* has been so unanimously endowed. Until that day, however, *Southern* v. *How* will give no slight support to Dean Pound's complaint against courts and text-writers by whom "a principle was found latent in some meagrely reported, ambiguous and fragmentary pronouncement of a mediæval court which had culminated in the latest decisions of English and American courts." [3]

Southern v. *How* will then at best prove a most fragile link between the Middle Ages and the modern commercial

[1] W. S. Holdsworth, *op. cit.*, v, p. 144 and n. 8 thereto.
[2] See *supra*, pp. 6–10.
[3] R. Pound, *Interpretations of Legal History*, p. 28.

law of trade-marks. At any rate a careful investigation has not disclosed any contemporary reliance thereon or indeed any reference thereto. Only four years after the utterance of Dodderidge's dictum there appeared (1622) the first edition of Gerard Malynes' *Consvetvdo vel Lex Mercatoria*, Chapter 38 of which treats "Of Merchants Markes set upon Commodities." That chapter deals with the merchants' marks solely from the proprietary standpoint.

> The marking of Merchants Commodities, either packt vp in Bundles, Trusses, Cafes, Coffers or Packes, is of great importance; for not onely by the Custome of Merchants, but also by the Civil Law, the propertie of the goods and Merchandises is adjudged to him, by whose marke they are marked or sealed. It is dangerous therefore to vse another mans marke, as many times Merchants doe in time of war, when they lend their names and markes for the preservation of their goods, betweene two or more contending Princes, both by Sea and Land. Every Merchant is to set downe his marke vpon his Bookes of account, wherewith his commodities are marked. . . . For even as Merchants doe saile betweene the two dangerous rockes of Scylla and Charibdis in their course of trafficke, when Princes are at variance; So is the danger to vse another Merchants marke without leaue; because the partie owner of the said marke is to defend the said goods, if they bee taken, or to countenance the persuers of the sute in Law for them, as farre as they in reason may require, otherwise the said goods may be lost as soone as taken. For as Ships are knowne by their Flags, and so taken to be at the Seas; so are Merchants goods marked with another mans marke, to bee that mans goods, although it were not, and will be so adjudged in the Courts of any Admirall of the Seas; . . . [1]

In the course of our investigation we have watched the development of sporadic doctrines and even systems of trade-mark law in the regulations promulgated by or for the gilds and in the adjudication by gild officials and gild courts or assemblies of questions arising in the course of the administration of these regulations. Although by the middle of the fifteenth century the disintegration of the gilds had begun,[2]

[1] pp. 190–200.

[2] See *supra*, p. 81.

and while the common law in the sixteenth and seventeenth centuries was beginning to take cognizance of many cases of a commercial nature,[1] the administration of such laws and regulations as then existed with regard to trade-marks, was a matter that still vitally affected the discipline and monopolistic aims of the gilds and companies. Trade-mark law consequently remained to a great degree the concern of the gilds and companies rather than of the common law courts. Furthermore, as part of the scheme of the national control of industry the gilds and companies were still useful "as the local agents for carrying out a national industrial policy." [2]

In addition to the law developed by the gilds and companies or, as Stubbs has aptly termed such law, "gild jurisprudence," [3] we have seen germs of modern trade-mark law in statute law and also in the conciliar law, i.e. the law developed by the King's Council and the Star Chamber. All three of these sources of modern trade-mark law, and especially "gild jurisprudence," had by the seventeenth century, made contributions to trade-mark law of much greater significance than that of the common law itself.

What, then, is the connecting link in the development of trade-mark jurisprudence between gild, statute and conciliar law on the one hand and the common law on the other? Of course the simpiest solution of this problem is to adopt Seligman's theory that "the gild rules were . . . only part and parcel of the common laws, and not merely the independent work of the crafts themselves." [4] However, the question as to the extent of the autonomy and separate judicial authority of the gilds is still a mooted one,[5] upon which no theory of the continuity of trade-mark law can safely be predicated. More-

[1] See W. S. Holdsworth, *op. cit.*, v, pp. 143 *et seq.*

[2] W. Cunningham, *op. cit.*, ii, p. 36, quoted by W. S. Holdsworth, *op. cit.*, iv, p. 322, n. 4. See *ibid.*, iv, p. 360.

[3] W. Stubbs, *Constitutional History of England* (4th ed.) iii, p. 592.

[4] E. R. A. Seligman, *Two Chapters on the Mediaeval Guilds of England*, p. 76. *Cf.* W. S. Holdsworth, *op. cit.*, iv, p. 311.

[5] For a summary of the conflicting views on this point, see A. P. Evans, *op. cit.*, pp. 612–615.

over, even if gild law should be regarded as a form or phase of common law, there still remains to be determined the actual point of contact between the fragmentary law of trade-marks as developed in the gilds and the modern common law and equitable doctrines of trade-mark law.

Further researches into the history of the clothier's case mentioned in *Southern* v. *How* on the one hand, and into the contemporaneous activity of the conciliar courts in the protection of trade-marks on the other, may possibly ultimately furnish a satisfactory solution of our problem. Such researches may indicate that the very judge or judges who sat in the clothier's case in the reign of Elizabeth were either identical or at any rate closely associated with the royal officials charged, in an administrative capacity, as members of the Council or Star Chamber, with the repression of commercial fraud. The Justices of "the clothing counties" were, in their administrative capacity, directly concerned with the clothing industry; they not merely obtained information,[1] but personally investigated conditions of the industry.[2] However, in the absence of specific evidence on the precise point in question, all that can be said is that from the standpoint of the crystallization and unification of theories and doctrines of trade-mark law, the activities and decisions of the Star Chamber and King's Council in the repression of the piracy of collective or geographical as well as of individual trade-marks, — especially in the cloth-making industry — in the sixteenth and seventeenth centuries, were in marked accord with the result that may have been reached, in the reign of Elizabeth, by a common-law court in a case involving the infringement of a mark upon cloth.

With the endeavors of the Tudors and the Stuarts to organize both external and internal trade came also the effort by the Crown to repress, through the Privy Council and the Star Chamber, various forms of commercial fraud including

[1] For an instance of the use by the Privy Council of the Justices of Assize to obtain information as to the cloth industry, see *Acts of the Privy Council, 1613-1614*, pp. 35, 191, 310, 351 *et seq.*

[2] See *History of Gloucestershire* (Victoria County Histories), ii, p. 159.

the infringement of trade-marks.[1] As we have seen in our study of the clothing and cutlery trades, the Star Chamber and Privy Council as well as the Crown itself by royal proclamation repeatedly intervened in the sixteenth and seventeenth centuries, to protect individual and collective marks.

However, despite the various tendencies towards the crystallization of the modern concepts of trade-marks and of trade-mark law indicated above, it was not until the beginning of the eighteenth century that the lawyers or at any rate law-writers and lexicographers were evidently beginning to think at all in general terms of trade-marks and when they did so, their definitions of trade-marks indicated a still very considerable uncertainty on their part as to the exact function of a mark and as to the basis of complaint for the mis-use of a mark. For instance, John Kersey in his *Dictionarium Anglo-Britannicum* of 1715 still regarded a trade-mark from the same proprietary standpoint as had Gerard Malynes almost a century before. Kersey defines "mark of goods" as a "distinguishing mark whereby every Merchant or Trader knows his own goods." On the other hand, the early law lexicographer, Giles Jacob in his *Lex Mercatoria or Merchant's Companion* published in 1718, says of marks:

> If one Man shall set the Mark of another upon his Goods, to the Intent to bring him into any Trouble or Damage, or to put him to any Expence, by the Common Law, an Action of the Case will lye; for both the Common Law and the Civil Law hath great Respect to the marking of Goods, in relation to the settling the Property of the Merchandise under the right Owners and the *Cutlers* of *London* give to each Member a particular Mark, which cannot be appropriated without a particular Order and Leave of the Company and Party, and so other Companies. 2 *Cro. fol.* 471.[2]

Jacob's definition is an interesting fusion or rather confusion of all the prior and contemporaneous notions of trade-marks and of trade-mark rights and liabilities. It commences with

[1] See W. S. Holdsworth, *op. cit.*, iv, p. 360.
[2] *Lex Mercatoria or The Merchants Companion* (London 1718), pp. 26–27.

the regulatory mark, the infringement of which would bring "Trouble or Damage" to the owner of the mark; it next mentions the proprietary mark for which "both the Common Law and the Civil Law hath great Respect," after which it reverts to the regulatory mark of the cutlers of London, subject to the control of the Company, and winds up with a citation of *Southern* v. *How* in Croke's version of that case. In 1732 Jacob, in his *New Law Dictionary*, again says that a "mark of goods" "is what ascertains the Property or Goodness thereof &c. And if one Man shall use the Mark of another, to the intent to do him Damage, Action upon the Case lieth. 2 *Cro.* 471."

A statute of this period (13 George I, c. 26, 1726), enacted to protect the Scottish marks on linen, indicates that Parliament had by this time [1] arrived at the notion that the affixing of a mark to goods was a privilege rather than a duty and that, for the infringement of such a mark, reparation should be made to the owner thereof:

> That it shall and may be lawful to and for every trader, dealer and weaver of linen manufacture, to weave his name, or fix some known mark in any piece of linen manufacture by him made, if he shall so think fit; and if any other person or persons shall counterfeit such mark or name, being thereof lawfully convicted upon the oath of one or more credible witness or witnesses before any two or more justices of the peace, or magistrates within any borough, he shall forfeit the sum of one hundred pounds, for the use of the person, whose mark shall be so counterfeited, to be raised, levied and paid in such manner as is hereinafter mentioned.[2]

The paucity of references to trade-marks in the legal literature of the seventeenth and eighteenth centuries has of course an economic aspect, that may perhaps also throw some light

[1] *Cf.* the language of the "Acte for the true . . . working of Waxe," 23 Eliz. c. 8, 1581, (*Stat. of the Realm*, iv., pt. 1, p. 670) requiring the marking of wax "to the intent that yf any deceipte bee used or done, it may be known who were the workers thereof. . . ." This statute was probably enacted to prevent the frauds indicated by the entry in *Cal. State Papers*, Dom., 1547–80, p. 635, No. 45, Oct. 18, 1579, "touching the sale of counterfeit and false wax."

[2] Clause XXX, 5 *Stat. at Large*, 634.

on the first trade-mark case in equity, *Blanchard* v. *Hill*, which we are about to consider. The slight degree of national economic significance acquired by trade-marks prior to the middle of the nineteenth century accounts for much of the tardiness in the growth of modern trade-mark law both in England and in the United States. As we have several times observed,[1] trade-marks did not develop as valuable symbols of good-will so long as producer and consumer were in close contact. Describing the economic situation in England at the beginning of the Industrial Revolution, Cunningham says:

> . . . the whole face of the country was changed by the Industrial Revolution. In 1770 there was no Black Country, blighted by the conjunction of coal and iron trades; there were no canals, or railways, and no factory towns with their masses of population . . . All the familiar features of our modern life and of its most pressing problems have come to the front within the last century and a quarter.[2]

It is worthy of note that the second volume of *Blackstone's Commentaries*, which appeared in 1766, contains no reference whatsoever to the subject of trade-marks in his discussion (Bk. II, Chap. XXVI) of "Titles to Things Personal by Occupancy," although among the "things personal" there enumerated are patents and copyrights.[3] Close upon the

[1] See *supra*, pp. 41, 48, 63, 78.

[2] W. Cunningham, *The Growth of English Industry and Commerce*, iii, p. 613.

[3] See Cooley's *Blackstone* (4th ed., by Andrews, Chicago 1899), i, p. 754, n. 1. In striking contrast is the *corpus* of commercial law, *Systema Jurisprudentiae Opificiariae*, published by F. G. Struve (or *Struvius*) at Lemgo in 1738, based largely upon the unpublished works of Adrian Beier. Book ii of Volume III of this work contains three chapters devoted to trade-marks and trade-mark law, — chapters viii, ix and x, entitled respectively "*De signaturis & marchis mechanicis atque signis*," "*De signis collegiorum opificalium universalibus*," and "*De marchis singulorum.*" These chapters are based mainly upon the edicts and decisions of various German ducal and other tribunals and authorities of the sixteenth, seventeenth and early eighteenth centuries. They represent, not a mere antiquarian interest in trade-marks or fragmentary references to the legal aspect of such marks, but an attempt at a systematic presentation of what were evidently then currently accepted and operative principles of trade-mark law in Germany. The "Introduction Historique" to Braune and Capitaine, *Les marques de fabriques*, pp. xxvi–xxvii, contains an analysis of these chapters; J. Kohler, *Das Recht des Markenschutzes* (p. 53), quotes from *Struvius* (p. 127): "*recte jus prohibendi competit contra illum, qui nostro signo utitur.*"

Industrial Revolution came a tremendous expansion not only in the means of production and distribution but, proportionately, in the advertising of goods, in which process trade-marks for the first time acquired a national and not merely local significance. Despite Dr. Johnson's observation in 1759 that "the trade of advertising is now so near to perfection that it is not easy to propose any improvement,"[1] it was not until late in the eighteenth century that newspaper advertising began to be fairly common,[2] nor was it until 1871 that the pictorial poster was first used with great success in England.[3]

In the United States, just as in England, trade-marks did not begin to acquire importance as assets of value in the commerce of the nation in contra-distinction to local trade until the second half of the nineteenth century. The origin of the movement for trade-mark protection in America would appear to have had some connection with the sail cloth or duck industry in Massachusetts. As early as 1788 the General Court of Massachusetts offered a bounty of "eight shillings for every piece of Top Sail Duck and other stouter sail cloth manufactured within this Commonwealth,"[4] and this subsidy, accompanied by governmental relation of standards of workmanship, was several times renewed.[5]

That competition in the manufacture of sail cloth was accompanied by the infringement of trade-marks is evident from an Act of the General Court (February 3, 1789) incorporating "The Beverly Cotton Manufactory," Sec. 5 of which provided:[6]

[1] Quoted by G. W. Goodall, *Advertising: A Study of a Modern Business Power* (London School of Economics Monographs, No. 41), p. 1.

[2] H. Sampson, *History of Advertising*, pp. 204 *et seq.*

[3] This was a design in black and white, originated by Frederick Walker to advertise a dramatic representation of Wilkie Collins' novel, *The Woman in White*. See G. W. Goodall, *op. cit.*, p. 22; S. R. Jones, *Posters*, pp. 2–3.

[4] *Mass. Laws & Resolves* 1787, c. 102, March 28, 1788 (ed. 1893, pp. 880–1).

[5] See J. L. Bishop, *History of American Manufacturers*, i, p. 419–20; Justin Winsor, *Memorial History of Boston*, iv, 78 for further information concerning Governmental relations with the sail-cloth industry, also *Resolves* of 1788, c. 80, pp. 333–4; *Resolves* of 1791, c. 91, p.483. For many of these references, I am indebted to Mr. Edward H. Redstone, State Librarian of the Commonwealth of Massachusetts.

[6] *Mass. Private and Special Laws*, 1789, c. 43 (ed. 1805, i, p. 226). Con-

That all goods which may be manufactured by the said Corporation, shall have a label of lead affixed to the one end thereof, which shall have the same impression with the seal of the said Corporation and that if any person shall knowingly use a like seal or label with that used by said Corporation, with a view of vending or disposing thereof, every person so offending shall forfeit and pay treble the value of such goods, to be used for and recovered for the use of the said Corporation, by action of debt, in any court of record proper to try the same.

By 1791 an echo of the need for the protection of trade-marks on sail-cloth is to be found in a petition by Samuel Breck [1] and other Boston sail-makers to the Second Congress asking that they be given the exclusive right to use certain marks for designating the sail-cloth of their manufacture, on which petition Thomas Jefferson, then Secretary of State, made the following report:[2]

December 9, 1791.

The Secretary of State, to whom was referred by the House of Representatives the petition of Samuel Breck and others, proprietors of a sail-cloth manufactory in Boston, praying that they may have the exclusive privilege of using particular marks for designating the sail-cloth of their manufactory, has had the same under consideration, and thereupon

Reports, That it would, in his opinion, contribute to fidelity in the execution of manufacturers to secure to every manufactory, an exclusive right to some mark on its wares proper to itself.

That this should be done by general laws, extending equal

cerning this cotton mill, see E. M. Stone, *History of Beverly*, pp. 85–6 and references in preceding note.

[1] Samuel Breck was an eminent merchant of Boston and agent of the army and fleets of Louis XVI. Investigation thus far has not disclosed the exact nature of his trade-mark difficulties. According to his son, he removed to Philadelphia in 1792 "in consequence of excessive and unequal taxation." (See Samuel Breck, *Genealogy of the Breck Family* (Omaha 1889) p. 40 and Appendix, pp. 205 *et seq.*, *Recollections of Samuel Breck*, ed. H. E. Scudder, p. 186.)

[2] T. Jefferson, *Complete Works* (Washington 1854), vii, 563; *Am. State Papers*, xiv, p. 48. (*Report of The Commissioners Appointed to Revise the Statutes Relating to Patents, Trades and Other Marks, and Trade and Commercial Names*, Senate Documents, vol. 3, No. 20, Washington, 1902, [hereinafter cited as *Report of United States Commissioners*], p. 92, quoted by E. S. Rogers, "Some Historical Matter Concerning Trade-Marks," 9 *Michigan Law Review*, 41.)

right to every case to which the authority of the Legislature should be competent.

That these cases are of divided jurisdiction: Manufactures made and consumed within a State being subject to State legislation, while those which are exported to foreign nations, or to another State, or into the Indian Territory, are alone within the legislation of the General Government.

That it will, therefore be reasonable for the General Government to provide in this behalf by law for those cases of manufacture generally, and those only which relate to commerce with foreign nations, and among the several States, and within the Indian Tribes.

And that this may be done by permitting the owner of every manufactory to enter in the records of the court of the district wherein his manufactory is, the name with which he chooses to mark or designate his wares, and rendering it penal in others to put the same mark to any other wares.

The references in contemporary newspapers to Breck's petition and Jefferson's report would indicate much interest in the commercial centers of the United States in the subject of trade-mark protection.[1] A letter from a Philadelphia manufacturer printed in the *Columbian Centinel* of Boston on December 24, 1791, is worthy of quotation at length:

It is with real pleasure and satisfaction that I behold the application of the proprietors of the sail cloth manufactory in the town of Boston to the Congress of the United States, for an act to secure them against the losses they are likely to sustain by persons counterfeiting their marks on sail cloth of an inferior quality. It is a subject which materially concerns every friend to the real prosperity and advancement of his country; and I entirely agree with those gentlemen in opinion, that it is a subject which loudly calls for the immediate interposition of the legislatures of these states. For it is of the greatest importance to the rising prosperity, commerce, opulency, and of course greatness of this country, that the manufacturer should be secured in the benefit and profit of his ingenuity, labour and industry, being an incitement to that industrious, enterprising, and useful set of

[1] E.g.: *Boston Gazette*, December 26, 1791, under "Report of the Proceedings of Congress" for December 9th; *Dunlap's American Daily Advertiser* (Philadelphia), December 12, 1791.

men, to carry on, persevere in, and bring to the greatest possible perfection the various goods and articles by them undertaken and manufactured.

There is no greater check to this laudable spirit of enterprise, industry and home manufacture, than that of imposters fraudulently counterfeiting of marks, and imposing and selling bad and spurious articles for good, real and genuine. It effectually cools the ambition of excelling and becoming serviceable to one's country, and is highly prejudicial to the good repute of our manufactures in foreign parts, consequently has a tendency to lessen instead of to increase our commerce. I might enumerate many of its baneful tendencies and effects, were it necessary, but it is a subject which needs no comment. And although this offence is one of the most heinous against the manufactures and commerce of this country, being absolutely a species of forgery, and meriting condign punishment, yet there is not one of the states in which impositions and frauds of this nature are properly guarded against, as much as is necessary, and the publick good requires. Hence when a person thus injured, discovers and brings to publick notice the aggressor, he can obtain no redress adequate to the magnitude of the injury he has sustained, although he may go to an enormous expense and deal of trouble in the business, as well as a waste of time, and after all is perhaps allowed by a jury, moderate damages by no means equivalent to the loss sustained, much less does it prove a salutary remedy against future offences of the like nature.

A general act of Congress obviating these difficulties, and providing for the prevention of offences of this kind, and for the due punishment of the perpetrators of such infamy and baseness, experience daily convinces me would be of universal utility, and is a very desirable thing in this country.

The statement of the Philadelphia manufacturer just quoted to the effect that statutory provision for trade-mark protection was necessary because the remedy of damages, which was the only remedy then afforded by the common law, was ineffective, indicates that there must have been a certain amount of litigation in the state courts in the early nineteenth century. It is therefore somewhat surprising that the first reported case of trade-mark infringement did not

come before a state court of record until 1837 [1] and that it was not until 1844 that the first case was brought before a United States court.[2] It is interesting to note that in that first federal decision, Judge Story, in granting an injunction, said: "I do not quote cases to establish the principles above stated. They are very familiar to the profession; and are not now susceptible to any judicial doubt." [3] Up to 1870 only sixty-two trade-mark cases in all were decided by American courts.[4] An idea of the growth of the importance of trade-marks to their owners may be gathered from the fact that in 1870 only one hundred and twenty-one trade-marks were registered under the Trademark Act, to which we shall again refer later on in connection with the subject of trade-mark registration, while in 1923 almost fifteen thousand were registered.[5]

From a brief digression into the economic background of the genesis of modern trade-mark law, we return to a consideration of the reasons impelling Lord Hardwicke to deny emphatically, — indeed almost indignantly, — in *Blanchard* v. *Hill* the first recorded request for injunctive relief against trade-mark piracy. Even the citation by the Attorney-General of *Southern* v. *How*, which appears to have impressed so many of the later judges, failed to move the Lord Chancellor who declared: "The objection has been made, that the defendant in using this mark prejudices the plaintiff, by taking away his customers. But there is no more weight in this, than there would be in an objection to one innkeeper setting up the same sign with another." [6]

[1] *Thompson* v. *Winchester*, Sup. Ct. Mass. 1837, 19 Pick. 214; *Report of United States Commissioners*, p. 93.

[2] *Taylor* v. *Carpenter*, U. S. Cir. Ct., Dist. of Mass., 3 Story, 458; *Report of United States Commissioners*, p. 93.

[3] 3 Story 464.

[4] *Report of United States Commissioners*, p. 93.

[5] See "Report of Commissioner of Patents, 1923," in *U. S. Official Gazette* (1924), vol. 319, p. 231.

[6] 2 Atkyns p. 487. The infringement of signs or signboards appears, as a matter of fact, to have been quite common and unrepressed even in the early 18th century. In their *History of Signboards* (3rd ed., 12th impression, 1908, pp. 31–2) Larwood and Hotten, quoting from *Memorials of Nature and Art Collected on a Journey in Great Britain during the Years 1802 and 1803* by an observant foreigner, C. A. G. Goede (vol. i., London 1808, p. 68), give the follow-

Even in the light of the relative economic unimportance of trade-marks touched upon above, the decision in *Blanchard* v. *Hill* is especially difficult to understand when one remembers that Lord Hardwicke showed himself otherwise particularly keen to utilize the weapons of equity for the repression of new forms of commercial fraud. Writing a few years later to Lord Kames, he said:

> As to relief against fraud, no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would continue. To this fertility of invention and the luxuriant growth of fraud is owing the increase of causes in courts of equity, and not to that encroachment upon the law, which my Lord Bacon in his forty-third aphorism, calls an over-flowing of the bank of Pretorian Courts.[1]

ing interesting picture of the "appropriation of trade values" at the beginning of the 19th century: "As it is one of the principal secrets of the trade to attract the attention of that tide of people which is constantly ebbing and flowing in the streets, it may easily be conceived that great pains are taken to give a striking form to the signs and devices hanging out before their shops. The whole front of a house is frequently employed for this purpose. Thus, in the vicinity of Ludgate Hill, the house of S——, who has amassed a fortune of £40,000 by selling razors, is daubed with large capitals three feet high, acquainting the public that 'the most excellent and superb patent razors are sold here.' As soon, therefore, as a shop has acquired some degree of reputation, the younger brethren of the trade copy its device. A grocer in the city who had a large *Beehive* for his sign hanging out before his shop, had allured a great many customers. No sooner were the people seen swarming about this hive than the old signs suddenly disappeared, and Beehives, elegantly gilt, were substituted in their places. Hence the grocer was obliged to insert an advertisement in the newspapers, importing 'that he was the sole proprietor of the original and celebrated *Beehive*.' A similar accident befell the shop of one E—— in Cheapside, who has a considerable demand for his goods on account of their cheapness and excellence. The sign of this gentleman consists in a prodigious *Grasshopper*, and as this insect had quickly propagated its species through every part of the city, Mr. E—— has in his advertisements repeatedly requested the public to observe that 'the genuine Grasshopper is only to be found before his warehouse.' He has, however, been so successful as to persuade several young beginners to enter into engagements with him, on conditions very advantageous to himself, by which they have obtained a licence for hanging out the sign of a Grasshopper before their shops, expressly adding this clause in large capitals, that 'they are genuine descendants of the renowned and matchless Grasshopper of Mr. E—— in Cheapside.'" For an early New York case on this point see *Howard* v. *Henriques* 3 Sandf. (N. Y.) Super. 725; Cox, *Manual of Trademark Cases*, 2nd ed., No. 108, p. 60.

[1] P. C. Yorke, *Life and Correspondence of Philip Yorke, Earl of Hardwicke*, ii, p. 554.

Furthermore, Lord Hardwicke, one year after his denial of equitable protection to trade-marks—the symbol of good-will—handed down the first decision in the books protecting good-will itself as an asset of value in the hands of an administrator.[1]

The true *ratio decidendi* in *Blanchard* v. *Hill* is to be found in the emphasis placed by Lord Hardwicke upon the claim of the plaintiff to an exclusive right to the use of the "Great Mogul" as a stamp upon his cards in a charter granted to the Card-makers' Company of Charles I. It should be remembered that not only was the thought of monopoly at that time still abhorrent to English law and business, but that a monopoly on playing cards was the classic example of a monopoly and had been the subject of the famous "Case of Monopolies," *Darcy* v. *Allen*.[2] While the particular charter mentioned in *Blanchard* v. *Hill* was not identical with that which had been the subject of the litigation of 1603,[3] "Lord Hardwicke seems to have thought it impossible to grant an injunction without incurring the risk of countenancing the old system which had been condemned and declared illegal."[4]

Blanchard v. *Hill*, though described a century later by an English judge "as a leading case on the subject,"[5] appears to

[1] *Gibblett* v. *Reed* 9 Mod. 459; Cox, *Manual of Trade-Mark Cases* (2nd ed.), p. 2; also C. E. Allan, *The Law Relating to Good-Will*, p. 56.

[2] 11 Co. Rep. 84 b; for a full account of this case, see J. W. Gordon, *Monopolies by Patents*, appendix II, pp. 193 *et seq.* For a thorough analysis of the case, see W. S. Holdsworth, *op. cit.*, iv, pp. 349 *et seq.*

[3] W. H. Price, *The English Patents of Monopoly*, pp. 22–24. How great was the resentment then at the enforcement of playing card monopolies appears in the recently published *Journal of Sir Simonds D'Ewes*, containing the following entry of an occurrence in the "Starre-Chamber" Nov. 25, 1604; "After wee weere risen I went into the Howse where sate the grand Committee for Grievances, and there weere diverse witnesses in examination about Mr. Squibs patent for cardes, being a monopolie how he had violentlie brooken into ther howses taken away cardes readie made, and ther stampes to make them by: and raised the price of cards from 3d. a packe to 9d. a packe. Then was Mr. Squibb and one Mr. Thomas May a messenger whome Squibb had imploied called in: and ordered that they should noe further prosecute." (*Journal of Sir Simonds D'Ewes* [D'Ewes' second "Journal," — of the Long Parliament], ed. by W. Notenstein, 1923, p. 68).

[4] F. M. Adams, *Treatise on the Law of Trade-Marks*, p. 7.

[5] Wood, V. C., in *Farina* v. *Silverlock* (1855) 24 Law Journal, Ch., N.S. 632. Again in *Collins Co.* v. *Brown* (1857) 3 K. & J. 423, 428, Wood, V.C., cited the reasoning of Lord Hardwicke in *Blanchard* v. *Hill* as "the true foundation of the jurisdiction in these cases."

have created no contemporary comment, adverse or otherwise, and later on was either ignored or repudiated by courts of law and equity both in England and in this country.[1] In 1777 there was tried before Lord Mansfield in the Court of King's Bench a case then recorded as "remarkable . . . and the first of its kind,"[2] *Cabrier* v. *Anderson*, in which a verdict of £100 was awarded to the plaintiff under a statute of William III for defendant's putting his (Cabrier's) name to five watches made by the defendant.[3] It is not surprising, therefore, that in 1783, when, in the case of *Singelton* v. *Bolton*, the issue of trade-mark piracy at common law was touched upon before Lord Mansfield, he, with his great sense of commercial necessities and equities, held that "if the defendant had sold a medicine of his own under the plaintiff's name or mark, there would be a fraud for which an action would lie.[4]

The first reported case squarely involving the protection of trade-marks by an English common law court did not come until 1824 when Abbott, C.J., in *Sykes* v. *Sykes*[5] appears

[1] In 1883 Romilly, M. R., declared: "I doubt very much, notwithstanding the high authority of Lord Hardwicke's name, whether this case would be followed at this day to the extent to which it is there carried and on the grounds it is there recited." (*Hall* v. *Barrows* 32 Law Journal, N.S. Equity, p. 550.)

In this connection, see *Charles Goodall & Son Ld.* v. *John Waddington Ld.*, 41 Rep. Pat. Cas. 658, decided by the Court of Appeal in October, 1924. The trade-mark there involved was on playing cards. The court took cognizance of the division of the entire playing card manufacturing industry between plaintiff, defendant and one other firm (p. 655, lines 36 *et seq.*); nevertheless, the court based its denial of an injunction solely on the ground of the absence of the probability of deception. *Blanchard* v. *Hill* was cited neither by counsel nor by the court.

In the leading American case of *Dixon Crucible Co.* v. *Guggenheim* 2 Brewster (Phila.) 321, 327, the Court, criticizing the fears of monopoly expressed in *Blanchard* v. *Hill*, said: "The modern, if not the more enlightened opinion, would seem to be, that the protection of a trademark by a court of equity has just the opposite tendency, as it is an encouragement to men to embark in manufacturing." See also *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf. (N. Y.) Super. 599, 605, and the recent case of *Scandinavia Belting Co.* v. *Asbestos Rubber Works* 257 Fed. 937, 941; also *Monthly Law Magazine* for December 1840, article on "Trademarks," reprinted in 25 *American Jurist* (1841), p. 269, 277.

[2] *St. James Chronicle*, Dec. 4, 1777.

[3] Atkyns and Overall, *Some Account of the Worshipful Company of Clockmakers of the City of London*, p. 259. The statute (9 & 10 Wm. III, c. 28, *Stat. at Large* iii, 713) prohibited the export of empty watchcases engraved with counterfeit names (to be filled abroad with inferior movements) "to the great prejudice of the buyers and the disreputation of the art at home and abroad."

[4] 3 Doug. 293; Cox, *Manual of Trade-Mark Cases*, No. 4, p. 3.

[5] 3 B. & C. 541.

to have regarded the law as settled and the citation of authorities as consequently unnecessary. The declaration in that case alleged that the plaintiff

made and sold for profit a large quantity of shot-belts and powder-flasks &c, which he was accustomed to mark "Sykes Patent," in order to denote that they were manufactured by him, the plaintiff, and to distinguish them from articles of the same description manufactured by other persons. That plaintiff enjoyed great reputation with the public on account of the good quality of the such articles and made great gains by the sale of them, and that defendant, knowing the premises, and contriving, &c., did wrongfully, knowing (*sic*), and fraudulently, against the will and without licence and consent of the plaintiff, make a great quantity of shot-belts and powder-flasks and caused them to be marked with the words of "*Sykes Patent,*" in imitation of the said mark so made by the plaintiff . . .; and did knowingly and deceitfully sell for their own lucre and gain the said articles so made and marked as aforesaid, *as and for* shot-belts and powder flasks, &c. of the manufacture of the plaintiff; whereby plaintiff was prevented from selling a great quantity of shot-belts and powder flasks &c. and greatly injured in reputation, the articles so manufactured and sold by the defendant being greatly inferior to those manufactured by the plaintiff.[1]

We shall have occasion to refer to this pleading again when discussing the basis of the modern action for trade-mark infringement.[2]

It is unfortunate that in the first instance of the issuance of an injunction restraining trade-mark infringement, *Day* v. *Day*, there appears to be no record of the reasoning of the Lord Chancellor Lord Eldon, the case being merely noted by Eden in the 1821 edition of his work on *Injunctions*.[3]

In the great case of *Millington* v. *Fox*[4] (1838) the Lord Chancellor, Lord Cottenham, without citing any authorities and ignoring *Blanchard* v. *Hill*, held that equity would enjoin trade-mark infringement even though such infringement was without intent to defraud and in ignorance of the plain-

[1] 3 B. & C., pp. 451–2.
[2] See *infra*, ch. vii, p. 142.
[3] P. 314. See Kerly, *op. cit.*, p. 2, n. 8.
[4] 3 Myl. & Cr. 338.

tiff's ownership of the trade-mark involved. Plaintiff's bill in equity after setting forth long user of the trade-marks in question by plaintiff and their predecessors without pleading any fraud on the part of defendants, merely alleged that the latter "had manufactured considerable quantities of steel which they had marked with the plaintiff's beforementioned marks; in order that it might be sold in the market as steel manufactured by the plaintiffs." Lord Cottenham while differentiating this case from one in which fraud was involved, held "that there was sufficient in the case to show that the Plaintiffs had a title to the marks in question; and they undoubtedly had a right to the assistance of a Court of Equity to enforce that title . . . That circumstance [defendant's innocence] however, does not deprive the Plaintiffs of their exclusive use of those names . . ." [1]

We shall glance but cursorily at the history of the development of trade-mark law subsequent to the initial instances of the protection of trade-marks by both law and equity. We shall rather endeavor to indicate in what way the historical origins indicated in the foregoing chapters have influenced and are still influencing the development of the law. But in order that we may appreciate the historical preconceptions and difficulties with which the courts and text-writers both in this country and in England are still wrestling, we must refer briefly to certain phases of legislative and judicial trade-mark protection in both countries.

The tardiness with which the law has given adequate protection to trade-marks and the lack of general legislative recognition of the beneficial effects of such protection are indicated by the fact that in England no parliamentary consideration of a broad and general nature was given to the matter until 1862. At that time the necessity for a trade-mark registration act was urged [2] but for reasons referred to hereafter the only statute then enacted [3] did not provide for

[1] *Ibid.*, p. 352.

[2] See *Report from the Select Committee on Trade-Marks Bill* in *Reports of Committees*, 1862, Session Papers xii, Index, p. 178, *s.v.* "Registration", No. 1.

[3] 25 & 26 Vict., c. 88.

the registration of trade-marks but merely made a counterfeiting of these marks a penal offence. It was not until 1875 that the ignorance or indifference of Parliament [1] in this matter of registration was finally overcome and that the first British trade-mark registration statute [2] was enacted. In 1870 the first United States statute providing for the registration of marks was passed [3] and, this statute being held unconstitutional,[4] a similar one was re-enacted with the objectionable features eliminated in 1876.[5]

A perusual of the report of the British Parliamentary Committee on Trade-marks of 1862 and of the various early debates in the Congress of the United States on the subject of trade-marks [6] will be disappointing reading to the student of comparative jurisprudence with preconceptions as to the superiority and rapidity of progress of Anglo-Saxon law, for they clearly indicate that both here and in England registration statutes were enacted, not so much for the protection of manufacturers at home, but in order to enable these manufacturers to obtain the advantages of reciprocal statutes in foreign countries.[7]

[1] See James Bryce, Introd. to Suppl. to Ludlow and Jenkyns *Treatise on the Law of Trademarks* (2nd. ed. London 1877) p. vii. Also Hansard, *Parliamentary Debates* 3rd Series, Vol. 217, 1874, column 702; *ibid.*, 3rd Series, vol. 223, 1875, column 139.

[2] 38 & 39 Vict., c. 91. [3] 16 *Stat. L.* 198.

[4] *Trade-Mark Cases*, 100 U. S. 82.

[5] 19 *Stat. L.* 141. See *Report of United States Commissioners*, pp. 105 *et seq.*

[6] See *Report of United States Commissioners*, Chapter XXV, pp. 380 *et seq.*

[7] See remarks of Mr. Jenckes in United States Congress, April 14, 1870, in part as follows: "Concerning trademarks, we are at present in an anomalous condition, which perhaps is not understood by the House generally. By certain treaties or conventions with Belgium, France, and Russia, we have agreed to recognize the validity of the trademarks of those countries upon their being registered in the Patent Office of the United States, and to give them the same effect throughout the United States that they have in the country where they originated; and trademarks recognized by the law of this country have the same effect throughout those European countries as the trademarks secured by the citizens or subjects of those countries. Thus by treaties, which are a part of the supreme law of the land, we have secured to subjects of those three nations rights which are not by national law secured to citizens of the United States. The rights which it is proposed to protect by registration of trademarks are not greater in any sense than those which are secured to citizens of foreign countries. In fact, these provisions are substantially those of the continental nations, and also those of the trademarks statute of Great Britain, with which country I believe we are also engaged in negotiations for a similar treaty." (*Report of United States Commissioners*, p. 392). See also *ibid.*, pp. 100, 383, 421, 441, of *Report from the Select Committee on Trade-Marks Bill*, Q. Nos. 1142,

The report of the Parliamentary Committee of 1862 and the debates of Congress in 1870 throw an interesting light on the then current conceptions of the nature of a trade-mark and the purpose of and necessity for a national trade-mark law. In England the main difficulty seems to have been in a refusal or inability of legislators, lawyers and merchants to regard a trade-mark as a normal and ordinary asset or subject of property. The most dire consequences, such as fraudulent uses and sales of trade-marks and the creation of monopolies, it was prophesied, must ensue from the recognition of trade-marks as property.[1] In the American Congress the objections to federal trade-mark legislation appear to have been based partly on considerations of "States' Rights,"[2] partly upon a feeling that the subject was of trivial importance.[3]

The extreme reluctance of the witnesses before the Parliamentary Committee of 1862 to interpret trade-mark rights in terms of property has been shared both by English and American Courts. We have seen that, in the abridgments and digests, as well as in decisions citing *Southern* v. *How*, the clothier's action for the misuse of his mark referred to by Justice Dodderidge, has been uniformly classified as an action in deceit.[4] But quite apart from *Southern* v. *How*, there is a steady stream of substantial English authority holding the common law action for trade-mark infringement to be one of deceit, although the plaintiff in such cases is as

1143, 2461: "We have obtained legal opinions in Germany and are told that the law with respect to . . . trademarks . . . only protects manufacturers of such countries as have reciprocal treaties or laws to protect German manufacturers, and that as no such law exists in our case, we can do nothing." (Q. No. 2461.) See also *Trade-Mark Cases*, 100 U. S. 82, 88.

[1] See *Report from the Select Committee on Trade Marks Bill* (1862) Questions Nos. 206, 224, 620, 2825, 2826.

[2] Mr. Hammond of Georgia: "It is claimed that the States cannot adequately protect trademarks. Why not? Their judges are as honest and as learned in law as those upon the United States benches. The jurors, if different in the two courts, are not better in those of the Federal Courts; in some parts of the country they are much below the State standard of intelligence and virtue. States' officers are more numerous, and equally faithful; their courts more numerous and more accessible; justice can be had cheaper and quicker in the State courts." (*Report of United States Commissioners*, p. 446.) See also *ibid.*, pp. 474 *et seq.*

[3] *Ibid.*, pp. 436, 447.

[4] See *supra*. ch. i, p. 9 and n. 1 thereto.

a matter of fact never deceived, but defrauded. In *Blofeld* v. *Payne*[1] (1833), just as in *Sykes* v. *Sykes* and *Millington* v. *Fox*, an important advance in trade-mark law was effected without any extended reasoning or citation of prior authorities. In *Blofeld* v. *Payne*, an action in King's Bench, the declaration stated:

> that the plaintiff enjoyed a great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendant wrongfully and without his consent caused . . . hones to be . . . wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendant so wrapped up as aforesaid *as and for* the plaintiff's for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones and they were depreciated in value and injured in reputation, those sold by the defendant being greatly inferior.[2]

The jury found for the plaintiff with one farthing damages, but stated that they thought the defendant's hones were not inferior to his. The four judges unanimously upheld the verdict, Littledale, J., holding that the act of the defendant was a fraud against the plaintiff, and that, if it occasioned him no substantial damage, it was still, to a certain extent, an injury of his right.

In *Crawshay* v. *Thompson*[3] (1842), also an action on the case for "wrongfully, knowingly and fraudulently" stamping bars of iron made by defendant with a stamp resembling one used by the plaintiff, it was held:[4]

> this is in the nature of an action for deceit; and it is laid down in Com. Dig., tit. Action upon the case for a deceipt (F3), that "the declaration regularly ought to charge that the defendant was *sciens* of the matter by which he deceived; and that he did it *falsò et fraudulenter*."

In subsequent English decisions at common law the courts, while continuing to describe the action for trade-mark in-

[1] 4 B. & Ad. 410.
[2] *Ibid.*, p. 410. (Italics, the writer's.)
[3] 4 Man. & G. 357.
[4] *Ibid.*, p. 385, per Cresswell, J.

fringement as being an action in deceit or "action on the case in the nature of a writ of deceit," have from time to time let fall expressions of doubt as to the propriety of this classification.[1] In 1902 in *Addley Bourne* v. *Swan & Edgar, Ld.*[2] the leading authorities on this point were reviewed by Farwell, J., who concluded that, although in cases of trade-mark infringement no fraudulent misrepresentation had been made to the *plaintiff*, nevertheless, whether correctly or not, the law was definitely settled that the proper common law action for trade-mark infringement is an action in deceit.[3]

The American courts in approaching the question of redress for trade-mark infringements did not proceed upon

[1] In *Crawshay* v. *Thompson* 4 Man. & G 357 (1842) Maule J. said of such an action at p. 385: "This is in the nature of an action for deceit." In *Rodgers* v. *Nowill* 5 C.B. 109 (1847), described in the report as an "action on the case, for an alleged piracy by the defendants, of a certain mark," the same judge asked (at p. 116): "Is this an action on the case for a deceit?" Counsel, insisting that "there is no other title under which such an action can be classed," and arguing that intent to deceive as well as damage must be proven to sustain plaintiff's case, cited *Baily* v. *Merrell* 3 Bulstr. 95 and *Pasley* v. *Freeman* 3 T.R. 51. It must be noted that both cases cited by plaintiff involved direct misrepresentation to the plaintiff and not to the third party, as is the case in trade-mark piracy. The four judges appear to have avoided an exact definition of the nature of the action, though they emphatically permitted recovery. In *Edelsten* v. *Edelsten* (1863) 1 De G. J. & S. 185, 199 Lord Westbury, L.C., held that in actions for trademark infringement "at law the proper remedy is by an action on the case for deceit; and proof of fraud on the part of the defendant is of the essence of the action. . . ." In *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865) 4 De G. J. & S. 137 (1863) at pp. 139–140, Lord Westbury, L.C., likewise said again: "At law, the remedy for the piracy of a trademark is by an action on the case in the nature of a writ of deceit. This remedy is founded on fraud, and originally it seems that an action was given not only to the trader whose mark has been pirated but also to the buyer in the market if he had been induced by the fraud to buy goods of an inferior quality." In *Jamieson & Co.* v. *Jamieson* (1898) 15 Rep. Pat. Cas. 169, C.A., Vaughan Williams, L.J., said at p. 191: "This is an action for a wrong. It is an action for deceit; for fraudulently pretending that the Defendant's goods were the Plaintiff's goods and so trying to pass them off. That is not a breach of any right of property in the Plaintiffs. It is merely an exercise by the Plaintiff of a right that he has that he should not be injured by the fraud of the Defendant in pretending that the goods manufactured by him, the Defendant, are of Plaintiff's manufacture." In *London, General Omnibus Co.* v. *Lavell* (1899) 70 L.J. Ch. 17, Alverstone, L.J., stated that "the action is for deceit upon the ground that the defendant has run an omnibus which is likely to divert the passengers from the plaintiffs' omnibuses." Furthermore, Vaughan Williams, L.J., said (at p. 20): "These actions, which in their origin undoubtedly are actions of deceit, actions based upon an allegation of deceit by the defendants, have in course of time come to be treated very much as actions brought against defendants for having trenched upon the private rights of the plaintiffs."

[2] 20 Rep. Pat. Cas. 105.

[3] See also Pollock on *Torts* (12th ed.) p. 314 n. Z; Kerly on *Trademarks* (5th ed.), p. 567.

the English common law theory of deceit but gave their protection upon substantially the same equitable grounds that had been thus expressed in England in 1842 in the oft quoted dictum of Lord Langdale, M.R.,:

> A man is not to sell his goods under the pretense that they are the goods of another man . . . He cannot therefore be allowed to use names, marks, letters or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. . . . I have no doubt that another person has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or alone was in the habit of using the trade name or mark.[1]

A typical statement of the early reaction of the American courts towards trade-mark piracy is contained in the authoritative opinion of Justice Duer of the Superior Court of New York in *Amoskeag Mfg. Co.* v. *Spear* decided in 1849. Justice Duer said:

> When we consider the nature of the wrong that is committed when the right of an owner of a trade-mark is invaded, the necessity for the interposition of a court of equity becomes still more apparent. He who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and owned, seeks, by deceiving the public, to divert and appropriate to his own use, the profits to which the superior skill and enterprise of the other had given him a prior and exclusive title. He *endeavors*, by a false representation, to effect a dishonest purpose; he commits a fraud upon the public and upon the true owner of the trade-mark. The purchaser has imposed upon him an article that he never meant to buy, and the owner is robbed of the fruits of the reputation that he had successfully labored to earn. In his case there is a fraud coupled with damage, and a court of equity in refusing to restrain the wrongdoer by an injunction, would violate the principles upon which a large portion of its jurisdiction is founded and abjure the exercise of its most important functions, the suppression of fraud and the preven-

[1] *Perry* v. *Truefitt* (1842), 6 Beavan 66, 73.

tion of the mischief that otherwise may prove to be irreparable.[1]

With the merger of law and equity both in this country and in England, and also in view of the fact that injunctive relief is more effective than pecuniary reparation, the repression of trade-mark infringement has in recent years fallen more and more within the scope of equity and the principles governing relief in such cases have accordingly been those of equity rather than of law. What those principles are and to what extent they have been shaped and are still being influenced by historical antecedents will form the subject of our concluding chapter.

[1] *Amoskeag Mfg. Co.* v. *Spear* 2 Sandf. (N.Y.) Super. 599, 605–6. See also *Marsh* v. *Billings* (1851) 61 Mass. 322, 330; *Miller Tobacco Manufactory* v. *Commerce* (1883) 45 N.J.L. 18; *Smith* v. *Walker* (1865) 57 Mich. 456, 474; *Falkinburg* v. *Lucy* (1868) 35 Cal. 52, 64; *Dixon Crucible Co.* v. *Guggenheim* (1870) 2 Brewster, Phila., 321, 333; *Stonebraker* v. *Stonebraker* (1870) 35 Md. 252, 268; *Candee, Swan & Co.* v. *Deere & Co.* (1870) 54 Ill. 439, 457.

CHAPTER VII

THE PROBLEMS OF THE MODERN LAW HISTORICALLY CONSIDERED

At the beginning of this essay we have referred [1] to the difficulties experienced by courts both in this country and in England in determining those principles by which they should be governed in the adjudication of cases involving trade-mark infringement and unfair competition. The problem seems simple enough. "The redress that is accorded in trade-mark cases," says a leading decision of the Supreme Court of the U. ' ed States in 1915,

> is based upon the party's right to be protected in the good-will of a trade or business. The primary and proper function of a trade-mark is to identify the origin or ownership of the article to which it is affixed. . . . Courts afford redress or relief upon the ground that a party has valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.[2]

This statement of "general principles" does not differ materially from that made in England three-quarters of a century previously in *Perry* v. *Truefitt* quoted at the end of the preceding chapter [3] to the effect that "the principle on which the courts both of law and of equity proceed" is that "a man is not to sell his own goods under the pretense that they are the goods of another man." But in the application of this principle the courts have encountered a number of difficulties which to a considerable extent are traceable to the historical background described in the preceding chapters.

[1] See *supra*, ch. i, pp. 4–6.
[2] *Hanover Milling Co.* v. *Metcalf* 240 U. S. 403, 412–413, per Pitney, J.
[3] See *supra*, p. 144.

In the first place many courts appear to have been unable to free themselves from certain historical preconceptions as to the functions of trade-marks. Legal evolution has not kept pace with functional change. "Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds — which have taken form and shape from life."[1] As recently as 1870, the Supreme Court of Illinois, treating the subject of trade-mark protection as "*novus hospes*,"[2] described the nature of a trade-mark in language as confused as that of Giles Jacob, the lexicographer, and that might even well have come from the fifteenth century:

> A trade-mark is similar in some respects to the marks or brands owners of live stock which run at large put upon each one of them. The object of the one is to distinguish the property bearing it from another. . . . A trade-mark denotes the origin of the article. *No one man can have more than one mark or brand, and it is required to be recorded. If the owner could have more than one mark by which to distinguish his property, great confusion and uncertainty would be produced to such an extent as to defeat the object in view. We have found no case where a proprietor has claimed more than one trade-mark . . .*[3]

To say, as courts frequently do,[4] that a trade-mark indicates either origin or ownership may have been an adequate explanation of its function to Gerard Malynes and his contemporaries, but today only by ignoring realities can one say that to the consuming public a trade-mark actually indicates the specific ownership or origin of goods to which such trade-mark is affixed. Given a popular product with an international or at any rate a consumption through the complicated channels of modern distribution, a knowledge of its specific source can by no means generally be attributed to those who purchase it. The very courts that still describe trade-marks as symbols indicating "origin or ownership" at the same

[1] B. Cardozo, *The Nature of the Judicial Process*, p. 64.
[2] *Candee, Swan & Co.* v. *Deere & Co.*, 54 Ill. 439, 453.
[3] *Ibid.*, pp. 456–7. (Italics, the writer's.)
[4] See *supra*, p. 19 and n. 2 thereto.

time concede the indifference of the public to the actual physical origin or ownership of the goods in question. Twenty years ago it was pointed out by the Circuit Court of Appeals for the Seventh Circuit, that "we may safely take it for granted that not one in a thousand knowing of or desiring to purchase 'Baker's Cocoa' or 'Baker's Chocolate,' know of Walter Baker & Co., Limited. The name 'Baker' is identified with the product, and known, in connection with the product of the appellant, as a badge and guaranty of excellence." [1] And, as was recently remarked by Mr. Justice Holmes with regard to the trade-mark "Coca Cola," " . . . it would hardly be too much to say that the drink characterizes the name as much as the name the drink." [2]

The same thought has been frequently expressed by the English Courts. "Persons," they say,

> may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known but whose mark is imitated, is just as much injured in his trade as if his name was known as well as his mark. His mark, as used by him, has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods.[3]

> "The reference to the maker only arises when there is superadded to the thought of the thing the thought of the person who makes it; a thought which seldom arises in the mind of the purchaser, who cares nothing about the maker, but only about the thing which he is buying." [4] "Thirsty folk want beer, not explanations. If the public get the thing they want, or something near it, and get it under the old name — the name with which they are familiar — they are likely to be supremely indifferent to the character and conduct of the brewer, and the equitable rights of rival traders." [5]

[1] *Walter Baker & Co.* v. *Slack* 130 Fed. 514, 518. See also *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960, 963.

[2] *Coca Cola Co.* v. *Koke Co.* 254 U. S. 143, 146.

[3] *Powell* v. *The Birmingham Vinegar Brewery Company, Ld.* 13 Rep. Pat. Cas. 235, 250, per Lindley, L.J.

[4] *Siegert* v. *Findlater* L.R., 7 Ch. Div. 801, 813, per Fry, J.

[5] *Montgomery* v. *Thompson* 1891 A.C. 217, 225, per Lord Macnaghten.

The Courts, in their desire to preserve historical definitions intact while keeping pace with the exigencies of the modern mechanism of trade, have been compelled to strain to the utmost their interpretations of "origin and ownership." "It is not essential to property in a trade-mark," said the New York Court of Appeals,

that it should indicate any particular person as the maker of the article to which it is attached. It may represent to the purchaser the quality of the thing offered for sale, and in that case is of value to any person interested in putting the commodity to which it is applied upon the market.[1]

"The use of a trade-mark," likewise held the Massachusetts Supreme Court,

does not necessarily and as a matter of law import that the articles upon which it is used are manufactured by its user. It may be enough that they are manufactured for him, that he controls their production, *or even that they pass through his hands in the course of trade and that he gives to them the benefit of his reputation, or of his name and business style.*[2]

In a recent case before the Judicial Committee of the Privy Council involving the famous "Gold Flake" trade-mark on cigarettes, Lord Phillimore said:

It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such as that the article acquires a value by his testimony to its genuineness; and if therefore goods, though of the same make are passed off by competitors as being imported by him, he will have a right of action.[3]

What then does a trade-mark indicate? Not that the article in question comes from any definite or particular source, the

[1] *Godillot* v. *Harris* 81 N. Y. 265, 266, per Danforth, J.

[2] *Nelson* v. *Winchell & Co.*, 203 Mass. 75, 82, per Sheldon, J., citing decisions of the United States Supreme Court, New York Court of Appeals and English courts. (Italics, the writer's.) *Cf. A. Bourjois* v. *Katzel* 260 U. S. 689, 692 (trade-mark rights in United States purchased from foreign manufacturer by American distributor); *Hughes* v. *Alfred H. Smith Co.* 205 Fed. 302, 311 (trade-mark affixed by English manufacturer for American dealer).

[3] *Imperial Tobacco Company of India, Ltd.* v. *Bonman* (May 1924) 41 Rep. Pat. Cas. 441, 446, lines 36–41.

characteristics of which or personalities connected with which are favorably known to the purchaser. A trade-mark merely guarantees to the consumer that the goods in connection with which it is used emanate from the same source or have reached the consumer through the same channels of trade as certain other goods that have given the consumer satisfaction and that bore the same trade-mark. The distinction between saying that the consumer knows the specific source of a trade-marked article, and saying that he knows that two articles emanate from a single source may appear to be an exceedingly tenuous and insubstantial one until we consider that in the *Coca Cola* and *Baker's Chocolate* cases, as well as many others, infringers have sought to defend their acts on the ground that the consuming public did not know the specific source from which the article of the plaintiff emanated and that consequently the public was not deceived into buying the defendant's instead of the plaintiff's product. As stated above, from the standpoint of realities, the consumer does not regard the trade-mark as an indication of origin but rather as a guaranty that the goods purchased under the trade-mark will have the same meritorious qualities as those previously noted by him in his purchases of other goods bearing the same mark. The mark "sells the goods."

But the main difficulties of the courts and also of text-writers has been not so much with the nature of a trade-mark as with the nature of trade-mark rights and the proper bases for the protection of these rights. The principal obstruction to the development of the law in accordance with the necessities of business has been the uncertainty of those administering or commenting upon the law as to whether or not trade-marks are what they term "property."[1] This uncertainty, it will be recalled, was very noticeable in the deliberations of both the British Parliament and the Congress

[1] In this connection a similar difficulty is encountered by French courts and text-writers. For a discussion of the various views, see Etienne Arnal, *De la propriété des marques de fabrique* (Montpellier, 1909), pp. 28–42. For medieval and modern German and Italian views, see G. Lastig, *Markenrecht und Zeichenregister*, ch. ix.

of the United States concerning legislation providing for trade-mark registration,[1] and while a great deal of law has been made in the last half century and much commentary has been written in recent years upon that law, there still appears to be much confusion on the point.

The text-writers on equity and on the general principles of the law of torts usually speak of trade-mark infringement as the violation of a property right of one kind or another. Langdell, for instance, describes trade-mark infringement as a tort "clearly to property," "yet," he continues, "it is not a tort to any particular thing, nor has it properly any relation to any particular thing. It is, therefore, a tort to the estate of the person injured in the aggregate, — to the *universitas* of his estate (as the Romans called it), consisting as it does, in making him so much poorer." [2] Pomeroy's *Treatise on Equitable Remedies* states that "the basis of the right is a property right in the manufacturer or vendor to have his trade protected."[3] Kerr on *Injunctions* states that the jurisdiction of equity in such cases "is in aid of the legal right and is founded on the equity of protecting property from irreparable damage." [4] Halsbury's *Laws of England* likewise finds that "the jurisdiction of the court in the protection given to trade-marks rests upon property, and the court interferes by injunction, because that is the only mode by which property of this kind can be effectually protected." [5] Judge Salmond in his work on *Torts* intimates on the other hand that it is only by registration that a trade-mark becomes thereby a species of incorporeal property." [6]

The courts, however, have not been so dogmatic as these text-writers but have wavered between the two horns of a dilemma. While desiring to afford protection to trade-marks, they have at various times manifested a very strong disin-

[1] See *supra*, p. 141.
[2] C. C. Langdell *A Brief Survey of Equity Jurisdiction* (2nd ed.), p. 250.
[3] Pomeroy, *Treatise on Equitable Remedies*, *Supplementary to Pomeroy's Equity Jurisprudence*, vol. 2, p. 4528.
[4] Kerr on *Injunctions* (5th ed.), p. 357.
[5] Halsbury's *Laws of England*, vol. 17, Article "Injunctions," p. 259.
[6] Salmond on *Torts* (6th ed.), pp. 565–6.

clination to base their relief in such cases upon a theory of the protection of property, although they have been able to discover no sound alternative ground for relief. It will be recalled that the pleadings in the early common law cases set forth a reputation of the plaintiff that had been damaged by the fraudulent act of the defendant.[1] The gist of the action was fraud, although the fraud was really committed against the purchaser and not against the owner of the trade-mark in question. Equity on the other hand set out to protect the plaintiff's "exclusive use" of marks, quite irrespective of the question of fraud and even in the absence of fraud.[2] Equity acted solely "in aid of" and "ancillary to" the legal right,[3] which it defined as "a right to have a particular trade-mark."[4] "At law" said Lord Westbury, L.C.,

> the proper remedy is by an action on the case for deceit: and proof of fraud on the part of the Defendant is of the essence of the action: but this Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendent, or that the credit of the Plaintiff is injured by the sale of an inferior article. The injury done to the Plaintiff in his trade by loss of custom is sufficient to support his title to relief.[5]

In the famous *American Leather Cloth Co.* case, decided in the same year (1863), it was again held by the Lord Chancellor, to the same effect, that:

> The true principle . . . would seem to be that the jurisdiction of the Court in the protection given to trade-marks rests upon property, and that the Court interferes by injunctions, because that is the only mode by which property of this description can be effectually protected.[6]

On the other hand it has been held by other English judges that "it is now settled law, that there is no property whatever

[1] See *supra*, pp. 137–138, 141–143.
[2] See *supra*, pp. 138–139.
[3] *Motley* v. *Downman*, 3 Myl. & Cr. 1, 14.
[4] *Farina* v. *Silverlock*, 39 Law & Eq. 514, 516.
[5] *Edelstein* v. *Edelsten*, 1 De G. J. & S. 185, 199–200.
[6] *The Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.* 4 De G. J. & S. 137, 142.

in a trade-mark,"[1] and that it is inaccurate to speak of there being property in a trade-mark.[2]

The American decisions as to the nature of trade-mark rights and of the remedy in cases of trade-mark infringement are as chaotic as those of England. The question was early presented to the courts of this country as a problem in constitutional law, *i.e.*, the jurisdiction of Congress and of the state legislatures to legislate concerning trade-marks and their registration. In a long line of decisions beginning even prior to the presentation of the issue to the Supreme Court of the United States it was held by a state court that

> the right of property [in trade-marks] does not in any manner depend for its inceptive existence or support upon statutory law, though its enjoyment may be better secured and guarded, and infringements upon the right of the proprietor may be more effectually prevented or redressed by the aid of the statute than at common law. Its exercise may be limited or controlled by statute, as in case of other property, but, like the title to the good-will of a trade, which it in some respects resembles, the right of property in a trade-mark accrues without the aid of the statute . . .; the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs.[3]

In the *Trade-Mark Cases*, the Supreme Court of the United States said that the right to adopt and use a trade-mark

> is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.[4]

[1] *Collins Company* v. *Brown*, 3 K. & J. 423, 6.

[2] See Lord Herschell in *Reddaway* v. *Banham* [1896] A.C. 199, 209, and other cases cited by the Supreme Court of the United States in *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413; also cases cited in *Chadwick* v. *Covell* 151 Mass. 190, 194.

[3] *Derringer* v. *Plate* (1865) 29 Cal. 292, 295.

[4] *Trade-Mark Cases*, (1879) 100 U. S. 82, 92.

In an Indiana decision a few years later, Chief Justice Elliott said: " . . . Congress has no more power to deprive the State Courts of jurisdiction in trade-mark cases than it would have to deprive them of power to decide controversies concerning any other species of property." [1]

From the constitutional phase of law we pass to the tort aspect and find there a contrariety of opinion on the question as to the basis of trade-mark rights and remedies. The cases appear to be in irreconcilable conflict not only with each other but occasionally even with themselves.[2] We have quoted the view of the Supreme Court as expressed in the *Trade-Mark Cases* in 1879. Compare the sweeping decision there as to "the whole system of trade-mark property" with the cautious and qualified statement of the same court in 1915, that "the trade-mark is treated as merely a protection for the good-will, and is not the subject of property except in connection with an existing business." [3]

An interesting indication of the shifts and shadings of judicial thought on this point is to be found in three decisions of Mr. Justice Holmes, whose opinions constitute so notable and voluminous a contribution to the law of trade-marks as developed in the last quarter of a century. Writing in 1890, while still a junior judge of the Supreme Court of Massachusetts, he said,

> When the common law developed the doctrine of trade-marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of "Paradise Lost"; but the meaning was to prevent one man

[1] *Smail* v. *Sanders* (1888) 118 Ind. 105, 106. See also annotations to *Trade-Mark Cases* in 10 *Rose's Notes of United States Reports* (Revised ed.), pp. 847–9, *United Drug Co.* v. *Reclamus Co.* 248 U. S. 90, 98–9; *Coca Cola Co.* v. *Stevenson* 276 Fed. 1010, 1016; *Louis Bergdoll Brewing Co.* v. *Bergdoll Brewing Co.* 218 Fed. 131, 132; *Apollo Bros.* v. *Perkins* 207 Fed. 530, 533; *Thomas G. Carroll & Son Co.* v. *M'Ilvaine & Baldwin*, 171 Fed. 125, 128; *Hennessy* v. *Braunschweiger & Co.* 89 Fed. 664, 667–8; *Re Gorham Mfg. Co.* 41 App. D.C. 263, 265; *Traiser* v. *J. W. Doty Cigar Co.* 198 Mass. 327, 328–9; *Kayser & Co.* v. *Italian Silk Underwear Co.* 160 N. Y. App. Div. 607, 610–12.

[2] E.g., *Thomas G. Carroll & Son Co.* v. *M'Ilvaine & Baldwin*, 171 Fed. 125. On page 128, Judge Hough states: "'Property right' in a trade-mark exists at common-law . . .", and in the next paragraph he states: "the owner of a trade-mark has no estate in the trade-mark as such . . ."

[3] *Hanover Milling Co.* v. *Metcalf* 240 U. S. 403, 414.

from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and, perhaps, from defrauding the public.[1]

However, in a case decided in 1923, Mr. Justice Holmes writes for the Supreme Court of the United States,

> The monopoly in that case [of a patent] is more extensive, but we see no sufficient reason for holding that the monopoly of trade-mark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care.[2]

Finally in an opinion written only a few months ago, Mr. Justice Holmes states,

> Then what new rights does the trade-mark confer? It does not confer the right to prohibit the use of the word or words. It is not a copyright . . . A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good-will against the sale of another's product as his . . . When the mark is used in the way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.[3]

The conflict of opinion on the question whether trade-marks are property and what is the proper basis of their protection was carefully considered about a decade ago by the Circuit Court of Appeals for the Seventh Circuit in a leading case, *Hanover Star Milling Company* v. *Allen & Wheeler Co.* Judge Baker there said:

> So it is evident that those who deny that trade-marks are property agree with the others that complainants are entitled to protection in the use of trade-marks. And both sides meet in finding that the cause of action in the injury done or threatened to a complainant's trade in which he has used the marks in question to designate the origin or ownership of his goods and that the appropriate relief is to enjoin the defendant

[1] *Chadwick* v. *Covell* 151 Mass. 190, 193-194.
[2] *A. Bourjois & Co., Inc.* v. *Katzel* 260 U. S. 689, 692.
[3] *Prestonettes, Inc.*, v. *Coty* 264 U. S. 359, 368.

from using the marks to divert trade that otherwise would have gone or would go to the complainant. Whether trade-marks are accurately called property or not, it is clear that some of the rights that are incident to property do attach to them; and therefore, just as courts sometimes state jurisdictional facts by describing corporation parties as "citizens," it may be convenient to speak of trade-marks as "property," as a short way of expressing a limited truth that requires ampler means for a complete and accurate statement, and that limited truth is as compactly defined as anywhere else in *Weston* v. *Ketcham* 51 How. Prac. (N. Y.) 455: "There is no such thing as a trade-mark 'in gross,' to use that term of analogy. It must be 'appendant' to some particular business in which it is actually used upon or in regard to specified articles." It is not the trade-mark, but the trade, the business reputation and good-will, that is injured; and the property and right in the trade is protected from injury by preventing a fraud-doer from stealing the complainant's trade by means of using the complainant's "commercial signature." [1]

Without doubt many of the judicial perplexities concerning the proper classification of trade-marks have been due to the failure of the courts to keep pace not only with the functional evolution of trade-marks, but also with the changing concepts of property. "Delusive exactness," writes Mr. Justice Holmes, "is a source of fallacy throughout the law. By calling a business 'property' you make it seem like land. . . ." [2] But is it essential that we associate property with the dimensional? Professor Chafee has recently said:

> The extension of equitable jurisdiction for the protection of human dignity and peace of mind has been made much

[1] *Hanover Star Milling Co.* v. *Allen & Wheeler Co.* 208 Fed. 513, 516.
In several recent cases Federal Courts have used the terminology of the law of real property in discussing questions involving trade-marks. They speak of trade-mark infringement as a "trespass" upon the rights of the plaintiff (*Louis Bergdoll Brewing Co.* v. *Bergdoll Brewing Co.*, 218 Fed. 131, 132), of "infringers as trespassers" (*Hercules Powder Co.* v. *Newton*, 266 Fed. 169, 171; *National Picture Theatres* v. *Foundation Film Corp.*, *ibid.*, 209, 211). In *Coca-Coca Co.* v. *Stevenson*, 276 Fed. 1010, 1013–14, Judge Fitzhenry held that a court of equity had jurisdiction to order the Secretary of the State of Illinois to cancel wrongful registrations of plaintiff's trade-mark by defendant "which constitute a cloud upon the plaintiff's title . . .", citing as his authorities decisions of the Illinois State Courts in cases of removal of cloud on title or of quieting title to real property.

[2] *Truax* v. *Corrigan* 257 U. S. 312, 342.

easier through the ever widening meaning attached to the conception of property. The gulf between an acre of land and the right of privacy may have been too broad for equity to bridge, but its jurisdiction over property has now extended from land and chattels to far more intangible human interests. . . . Equity has long safeguarded such state-recognized mental property as patent, copyrights and trade-marks.[1]

"A large part of what is most valuable in modern life," writes Vice Chancellor Stevenson, "seems to depend more or less directly upon 'probable expectancies' . . . It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies'"[2] Among those "probable expectancies" which courts of law are being called upon with every increasing frequency to define and protect is good-will, *i.e.*, the expectation of the trader or manufacturer that he will be undisturbed in the custom or trade which the merits of his wares or the ingenuity of his advertising have attracted from the consuming public. A trade-mark is a most important creative and also sustaining factor of that "probable expectancy" and, being "recognized by law and enforced by the power of a State,"[3] there appears to be no valid ground for excluding trade-mark rights from the category of property or property rights.

Reasoning along these lines, the New York Court of Appeals has recently said, speaking of trade-marks,

Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property

[1] Zechariah Chafee, "The Progress of the Law, 1919–1920," 34 *Harvard Law Review* 388, 407–8. *Cf.* Arnal, *op. cit.*, p. 29: "Que le droit à la marque soit un droit immatériel, rien de plus juste; mais pourquoi, parce qu'il est immatériel, lui refuser le nom de propriété, ce n'est point une raison valable." *Cf. Das Firmenrecht des Kaufmanns und der Schutz anderer Bezeichnungen des gewerblichen Verkehrs* (p. 83): "Welcher Art dieses Recht ist, ist bestritten. Die französische Literatur nennt das Recht 'une propriété non absolue, mais relative.' Unser Recht kennt jedoch nicht die Ausdehnung des Begriffes 'Eigentum' auf unkörperliche Sachen, wir nennen vielmehr derartige Rechte 'immaterielle Güterrechte.'" See also G. Lastig, *op. cit.*, p. 193.

[2] *Jersey City Printing Company* v. *Cassidy* 63 N. J. Eq. 759, 765. *Cf. Booth & Bro.* v. *Burgess* 72 *ibid.*, 181, 187.

[3] T. E. Holland, *Elements of Jurisprudence* (13th ed.) p. 83.

right that is entitled to protection as such. The courts have frequently exercised this right. They have never refused to do so when the facts show that the failure to exercise equitable jurisdiction would permit unfair competition in trade or in any matter pertaining to a property right.[1]

The Supreme Court of the United States has likewise recently stated in a case of unfair competition: "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. . . ."[2] The English Court of Appeals has likewise expressed the same thought within the last few months in a "passing-off" case, Lord Justice Sargant saying:

> It seems to me that it is essential for an action of that sort that there should be tangible probability of injury to the property of the Plaintiffs, but I think that under the word "property" may well be included the trade reputation of the Plaintiffs, and that, if tangible injury is shown to the trade reputation of the Plaintiffs, that is enough.[3]

An objection usually made to speaking of trade-marks in terms of property is based upon the fear that by so doing a monopoly in language or in design may be created. This point was recently considered by Judge Dickinson of the District Court for the Eastern District of Pennsylvania, who wrote:[4]

> Patents, copyrights, and trade-marks excite two deeply seated feelings. One is the feeling of any one who has originated anything of his right to claim an exclusive property in it and to the trade growing out of it. The other is a hatred of monopoly. The latter feeling gives way to the former so far as to grant limited monopolies through patents and copyrights. This is a concession made for the general good aptly expressed in the constitutional phrase. The purchasing public regards this as the concession of a privilege; inventors

[1] *Fisher* v. *Star Co.* (1921) 231 N. Y. 414, 428, per Chase, J.

[2] *International News Service* v. *Associated Press*, 248 U. S. 215, 236, per Pitney, J. See also *Peekskill Theatre, Inc.*, v. *Advance Theatrical Co.* 206 N. Y. App. Div. 138, 141.

[3] *Harrods Limited* v. *R. Harrod Limited*, 41 Rep. Pat. Cas. 74, 87.

[4] *Loughran* v. *Quaker City Chocolate & Confect. Co.* 286 Fed. 694, 697 (affirmed 296 Fed. 822). *Cf. Barton* v. *Rex-Oil Co.*, 2 F. (2d) 402, 3.

and authors look upon it as a right limited only as the price exacted for the aid of the law in enforcing it. Mere dealers in commodities are prone to think themselves entitled to a like monopoly unlimited in time. This is a mistake. The only right they have is their right to sell their goods as such and to protection against the goods of another being palmed off upon their customers as theirs. To aid them in the assertion of this right they are permitted to mark their goods so as to identify and designate them and to name them as their own.

The same thought has been thus tersely expressed in Mr. Rogers' work on trade-marks: [1]

Take, for example, the words "Gold Dust." If you should use these words in conversation with a friend on the street and a man should step up to you and say, "I own the words, 'Gold Dust' and I forbid you to use them," you and your friend would laugh at him and wonder when he escaped from the asylum. On the other hand, no one disputes the right of N. K. Fairbank Company to forbid the use of the words "Gold Dust" on a package of washing powder. What is the difference? They are ordinary English words. Why has the Fairbank Company any better right to them than the extraneous person you regarded as a lunatic? Simply this, that there is no property in a word or name as such. It is only when it symbolizes a business good-will that the attributes of property attach to it.

However, all that such a monopoly actually implies is the exclusive right of the owner of a going concern to sell goods under a valid trade-mark as long as and wherever he continues to sell goods under that mark. Without entering into any discussion as to the relative economic utility and value of trade-marks, which has no place in this essay,[2] it may be remarked that the dictionary is quite large enough to justify

[1] E. S. Rogers, *Good Will, Trade-Marks, and Unfair Trading*, pp. 99–100.

[2] For a discussion of the relation of trade-marks to the wealth of nations, see Thorstein Veblen, *The Theory of Business Enterprise*, pp. 139–140; Sidney Webb, *Industrial Democracy* (1920) p. 685, note i. Both of these references are cited in an interesting unpublished typewritten thesis in the library in the University of Chicago by Anna R. Van Meter, entitled *The Function of the Trade-Mark*. See also G. B. Hotchkiss, "An Economic Defence of Advertising" in *American Economic Review*, vol. xv (Supplement), 14, at p. 18, and discussion by M. A. Copeland, *ibid*, 38, at p. 40; G. W. Goodall, *Advertising*, p. 81.

such limited monopolies. As a Federal Court has recently said in enjoining infringement of a two-word mark, "Plaintiff's rights are limited at the most to two words. All the rest of infinity is open to the defendant." [1]

It may perhaps be thought that an over-emphasis has been placed upon the difficulties of the courts in classifying trade-mark rights as property rights. But, as intimated above,[2] the courts are confronted with this dilemma: on the one hand they are anxious to protect trade-marks for the simple reason that trade-mark piracy is repugnant to the judicial conscience;[3] on the other hand, they must feel their way to some legal theory of trade-mark protection which will avoid the necessity of invoking the only basis of equitable protection to which they have been accustomed to resort, viz., the protection of a property right. The problem is not solved by boldly describing trade-mark rights as property rights. To say that a trade-mark is property and therefore should be protected clarifies the situation no more than to say that a trade-mark is protected and is therefore property. A sounder basis of the repression of trade-mark infringement and of other forms of unfair competition is the protection of a merchant or a manufacturer from interference with "his

[1] *Coca Cola Co.* v. *Old Dominion Beverage Corp.* (C. C. A. 4th Cir.) 271 Fed. 600, 604, per Rose, D.J. See Hopkins, *op. cit.*, Sec. 24, pp. 56, 57.

[2] See *supra*, pp. 151–152.

[3] E.g.: "'Unfair Competition' consists in selling goods by means which shock judicial sensibilities; and the Second Circuit has long been very sensitive," — Hough, D. J., in *Margarete Steiff, Inc.* v. *Bing* (1914) 215 Fed. 204, 206. *Cf. International News Service* v. *Associated Press* 248 U. S. 215, 240.

"Mr. *Tucker* said, in answer to a question whether it would be fair, if he was asked for a 'Corona' cigar, to hand a cigar of the Partagas factory, that it would be improper to do this, for it would be giving a customer what he did not want. Mr. *Roberts* said an inquiry for a box of Coronas would be of misleading meaning to him, but that he could not deal fairly with such a customer until he had ascertained what he wanted. Mr. *Padro* said that, if a man asks for a 'Corona' cigar, it is doubtful without context what he wants. But he admitted that, as an honest man, he would inquire whether it was the brand or the size that was required." — Pollock, M.R., in *Havana Cigar & Tobacco Factories, Ld.* v. *Oddenino* (1923) 41 Rep. Pat. Cas. 47, 56.

"Such a practice is not merely inconsistent with that higher standard of honour or ethics which would be established by a specially conscientious trader, but directly violates those ordinary every-day principles of honest trading which the courts have consistently endeavored to enforce." — Sargent, L.J., in the same case at p. 60. See also E. S. Rogers, "Unfair Competition," 17 *Michigan Law Review*, 490, 494.

reasonable expectation of future patronage."[1] Assuming that it is undesirable or inaccurate that trade-mark rights be denominated property rights, there is no reason why on other equitable principles owners of trade-marks should not be fully protected by courts of equity. These courts are beginning to afford a greater degree of recognition and protection than formerly to personal rights,[2] and if historical antipathies or economic objections preclude their protecting trade-marks as property rights there is no reason they should not protect the owners of trade-marks in their personal right of freedom from or interference with their trade expectations.

The reluctance of the courts to regard trade-mark infringement purely and solely as a trespass upon a property right and at the same time their concurrently existing desire to do equity to the owner of trade-marks has led them into all sorts of subtleties and metaphysics. For instance, just as they have strained to the utmost the definition of the terms source and origin, so they have ceased to put upon the plaintiff seeking injunctive relief the well-nigh impossible burden of proving intent to defraud and *scienter* on the part of the defendant and, for such a personal intent, have substituted a so-called "constructive intent" which they describe as "inferable from the circumstances."[3] Practically the only way in which violations of trade-mark and trade name rights and other acts of unfair competition can be and almost invariably are established is by the evidence of detectives or other investigators, or by what are known in England as "trap orders." Of course those making such test purchases,

[1] E. S. Rogers, *Good-will, Trade-Marks, and Unfair Trading*, p. 13. See *International News Service* v. *Associated Press* 248 U. S. 215, 240; *Summerfield Co.* v. *Prime Furniture Co.* 242 Mass. 149, 155.

[2] See Joseph R. Long, "Equitable Jurisdiction to Protect Personal Rights," 32 *Yale Law Journal* 115; Roscoe Pound, "Equitable Relief against Defamation and Injury to Personalities," 29 *Harvard Law Review* 640; Note on *Wille* v. *Bauderer* (255 S.W. 1016), injunction restraining stranger from flirting with complainant's wife, in 24 *Columbia Law Review* 431.

[3] Hopkins, *op. cit.*, Sec. 118; Nims on *Unfair Competition* (3rd ed.), Secs. 318, 358; Kerly, *op. cit.*, p. 472; *Elgin National Watch Co.* v. *Illinois Watch Case Co.* 179 U. S. 685; *Saxlehner* v. *Siegel Cooper Company, ibid.*, p. 42; *Higgins Co.* v. *Higgins Soap Co.* 144 N. Y. 462; *Pennsylvania Central Brewing Co.* v. *Anthracite Beer Co.* 258 Pa. 45; *Millington* v. *Fox* 3 My. & Cr. 358.

far from being deceived, actually expect to be defrauded; nevertheless their evidence is held by the courts to disclose the defendant's fraudulent "intent and purpose exactly the same as if the sales were made to purchasers not buying in order to obtain evidence against the seller." [1] One court, in order to justify the enjoining of substitution, where no technical infringement of trade-mark was involved, has gone so far as to speak of "a sort of constructive application by defendant of complainant's trade name or mark, to the goods of another manufacturer." [2]

A great many courts desiring to base their protection of trade-marks upon a more substantial foundation than the refinements and subtleties of reasoning just described, and at the same time reluctant to place their intervention squarely on the ground of the protection of property rights, have made the protection of the public not merely a *test* of unfair competition or of trade-mark infringement, but a *basis* of their jurisdiction. The Circuit Court of Appeals for the Second Circuit has recently said: "The court acts to promote the honesty and fair dealing, and because no one has the right to sell his own goods as the goods of another. The court seeks to protect the purchasing public from deception and also the property rights of the complainant." [3]

The view that equity should protect the public as well as the property rights of the complainant was early refuted by Lord Chancellor Westbury who said:

> Imposition on the public is indeed necessary for the Plaintiff's title, but in this way only, that it is a test of the invasion by the Defendant of the Plaintiff's right of property; . . . but the true ground of this Court's jurisdiction is property,

[1] See Nims, *op. cit.*, Sec. 337 and cases cited in note 45 thereto; *Burroughs Wellcome & Co.* v. *Thompson & Capper* 21 Rep. Pat. Cas. 69, 84; *Joseph Farrow & Co., Ld.* v. *J. F. Seyfried & Sons, Ld.*, 38 *ibid.* 114; *Havana Cigar & Tobacco Factories, Ld.* v. *Tiffin*, 26 *ibid.*, 473.

[2] *American Fibre Chamois Co.* v. *de Lee* 67 Fed. 329, 331.

[3] *Goldwyn Pictures Corporation* v. *Goldwyn* 296 Fed. 391, 401, per Rogers, Cir.J.; *Industrial Finance Corp.* v. *Community Finance Co.* 294 Fed. 870, 872; *Imperial Cotto Sales Co.* v. *N. K. Fairbanks Co.* 270 Fed. 686; *Coca Cola Co.* v. *J. G. Butler & Sons*, 229 Fed. 224, 229–230; *Wisconsin White Lily Paper Co.* v. *Safer* 182 Wis. 71; *B.V.D. Co.* v. *Kaufman & Baer* 272 Pa. 240, 242. Also cases cited *supra*, p. 5, n. 4.

and the necessity of interfering to protect it by reason of the inadequacy of the legal remedy.[1]

Many eminent American jurists have likewise rejected the idea of protection of the public as a basis of injunctive relief. "It is doubtless morally wrong and improper," said Mr. Justice Day, while still a Judge of the Circuit Court of Appeals for the Sixth Circuit,

> to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. . . . Courts of equity in granting relief by injunction are concerned with the property rights of the plaintiff.[2]

An illuminating discussion of this point by Judge Veeder vigorously presents the necessity for clear thinking on this question:

> The fundamental basis of the private remedy is, however, not the protection of the public from imposition, but injury to the complainant. That the public is deceived may be evidence of the fact that the original proprietor's rights are being invaded. If, however, the rights of the original proprietor are in no wise interfered with, the deception of the public is no concern of a court of chancery. So, although fraudulent conduct which is calculated to deceive the public is a necessary element, it is the private loss of the complainant that is to be prevented, not the public injury arising to others. This is in conformity with general principles. A court of equity cannot enforce as such the police power of the state.[3]

The stressing of the deception of the public as a ground for trade-mark protection undoubtedly has historical justification. The element of "the deceit of the people" as the basis

[1] *Hall* v. *Barrows* 4 De G. J. & S. 150, 159.

[2] *American Washboard Co.* v. *Saginaw Mfg. Co.* 103 Fed. 281, 285.

[3] *Aunt Jemima Mills Co.* v. *Rigney & Co.* 234 Fed. 804, 806. See also *Florence Mfg. Co.* v. *J. C. Dowd & Co.* 178 Fed. 73; *Joseph Schlitz Brewing Co.* v. *Houston Ice & B. Co.* 241 Fed. 817, 820; *Munn & Co.* v. *Americana Co.* 83 N. J. Eq. 308; Hopkins, *op. cit.*, p. 44. 2 Pomeroy, *Equitable Remedies* (2nd ed.), p. 4529; E. S. Rogers, "Predatory Price Cutting as Unfair Trade" in 27 *Harvard Law Review* 139, 147.

of trade-mark law still found running through decisions may be traced to a far earlier period than Dodderidge's dictum in *Southern* v. *How i.e.*, to the regulatory and compulsory nature of trade-marks in the early days of gild life. The medieval craftsman who appropriated his fellow-craftsman's mark and affixed it to "false" or "naughty" or "deceyptfull" wares was — from the standpoint of the community — guilty, not of a tort against the owner of the mark, but of a crime against the king's people.[1] The medieval gild law and statute law of trade-marks, — if so we may term the regulation of trade through the use of compulsory marks, — was essentially a "police" rather than a civil law, promulgated by or for and administered by the gilds and companies on the one hand and by Parliament on the other. Apart from monopolistic considerations, and, at any rate from the standpoint of the recitals of formal law, the regulation of such marks as those prescribed for bakers and coopers kept the people's food and drink of proper quality and of good measure; the protection of goldsmiths' marks involved the stability of the coinage; the defence of the realm necessitated the provisions for bladesmiths' and other armorers' marks. The misuse of such marks rendered the owner thereof liable to the hurdle and the pillory if thereby false wares were erroneously traced to his workshop, while the infringer, if discovered, was punished with equal or greater severity.

From the standpoint of the public interest itself, there is perhaps no longer a need for regarding deception of the public as one of the bases for trade-mark protection. A large number of Federal and State statutes for the repression of misbranding and other forms of commercial charlatanry may now be invoked,[2] — some at any rate with much success[3] —

[1] If the subject of trade-mark infringement had at all come within the jurisdiction of the Royal civil courts of the fourteenth and fifteenth centuries, relief would have been obtained by a writ of deceit on the case rather than in trespass. See W. Holdsworth, *History of English Law* ii, 3rd ed., pp. 407–8.

[2] For a collection of such statutes, see Hopkins on *Trade-Marks* (4th ed.), Part II; also *Hygrade Provision Co.* v. *Sherman*, U. S. Sup. Ct. Adv. Opinions, Feb. 2, 1925, p. 169, *Hebe Co.* v. *Shaw*, 248 U. S. 297.

[3] See 20 *Bulletin U. S. Trade Mark Assn.* 12 for a description of the work of the "Commercial Frauds Court" of New York City.

for the protection of the public interest. Furthermore the Federal Trade Commission, specifically charged with the prevention of unfair methods of competition as they affect the public welfare,[1] is gradually formulating and enforcing canons of commercial ethics, which are already having a marked influence in the direction of the protection of the public from unfair business methods, including the misbranding of goods.[2] The doubt that existed for some time as to the extent of the jurisdiction of the Federal Trade Commission over cases of trade-mark infringement has apparently been resolved in favor of the Commission,[3] and, whatever defects may exist in either the powers or the procedure of the Commission in such cases from the standpoint of the private litigant,[4] the public interest, whenever apparent, can doubtless in many instances be protected by the very fact of the publicity incidental to the intervention of the Commission.

However, the objection to holding deception of the public as not merely a test of unfair competition but in itself a basis of relief is stronger than the merely negative one that such protection of the public is supererogatory. The question as to whether the deception of the public should

[1] See statement of the Commission, March 17, 1925: "In all such cases there must be three parties involved, the respondent, the competitor injured and the public." (*Journal of Commerce*, March 18, 1925.)

[2] See *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Pure Silk Hosiery Mills, Inc.* 15 T. M. Rep. 63; *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744; W. Notz, "New Phases of Unfair Competition and Measures for Its Suppression," in 30 *Yale Law Journal* 384; J. L. Mechem, "Procedure and Practice Before the Federal Trade Commission," in 21 *Michigan Law Review* 125.

[3] Whatever may have been the "unfair methods of competition" that were originally intended by Congress to fall within the jurisdiction of the Federal Trade Commission (see dissenting opinion of Denison, Cir. J., in *L. B. Silver Co.* v. *Federal Trade Commission*, 289 Fed. 985, 992 *et seq.*; also H. P. Seligson, "The Extent of the Jurisdiction of the Federal Trade Commission Over Unfair Methods of Competition" in 9 *American Bar Assn. Journal* 698, in *Juvenile Shoe Co., Inc.* v. *Federal Trade Commission*, 289 Fed. 57, the Circuit Court of Appeals for the Ninth Circuit seems to have taken for granted the jurisdiction of the Federal Trade Commission to enjoin respondent from using petitioner's corporate name, — whether for the protection of petitioner rather than that of the public is not altogether clear. *Certiorari* was denied by the Supreme Court in 263 U. S. 706. *Cf. John Bene & Sons* v. *Federal Trade Commission*, 299 Fed. 468, 472.

[4] See G. C. Henderson, *The Federal Trade Commission* pp. 169 *et seq.*

be regarded as one of the bases of trade-mark infringement is of course closely connected with that of the actual significance of trade-marks to the public itself. As we have already indicated,[1] the public is concerned with the trade-mark not so much as an indication of origin but as a guaranty of quality. Any theory of trade-mark protection which overlooks this fact and which does not focus the protective functions of the court upon the good-will of the owner of the trade-mark, inevitably renders such owner dependent for protection, not so much upon the normal agencies for the creation of good-will, such as the excellence of his product and the appeal of his advertising, as upon the judicial estimate of the state of the public mind. This psychological element is in any event at best an uncertain factor, and "the so-called ordinary purchaser changes his mental qualities with every judge;"[2] furthermore it may easily be vitally affected by the dishonest acts of competitors. No sooner does a trade-mark become well known than a host of commercial buccaneers are ready to "reap the fruits of its celebrity."[3] It has been repeatedly held that "the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality is not of itself sufficient to debar the owner of protection or make it the common property of the trade. To hold otherwise would be to deprive the owner of the exclusive use of his trade-mark just at the time when it had become most valuable and stood most in need of pro-

[1] See *supra*, pp. 147–148.

[2] H. Münsterberg, "The Market and Psychology" in *American Problems*, p. 171. See also the entertaining and instructive article of E. S. Rogers, "The Unwary Purchaser" in 8 *Michigan Law Review* 613, pointing out the "irreconcilable conflict" between cases as to the test of the likelihood of deception in cases of unfair competition involving trade-marks and trade names. For interesting recent psychological studies showing the discrepancy between the actual and the judicially determined confusion of the public, see R. H. Paynter, *A Psychological Study of Trade-Mark Infringement* (Columbia University Archives of Psychology, 1920, No. 42) and H. E. Burtt, "Measurement of Confusion Between Similar Trade Names" in 19 *Illinois Law Review* (1925), 320.

[3] For a glaring example of such piracy, see *Barton* v. *Rex-Oil Co.*, 2 F. (2d) 402, which also illustrates the phenomenally rapid development of trade in trade-marked articles, — from a small stock of leather polish peddled at Camp MacArthur, Texas, in 1918, to almost four million bottles sold throughout the country in 1921.

tection."[1] Or, as the New York Court of Appeals has said, "The value of a trade-mark consists in its becoming known to the trade as the mark of the manufacturer who has invented or adopted it, and in being known to the public as the name of an article which has met with popular favor. It cannot be that the very circumstances which give it value, operate at the same time to destroy it."[2]

The decisions just quoted, broad in the scope of their protection of trade-marks as property, were rendered over forty years ago and before the courts had begun to take judicial notice of the large investments in advertising that were then only just beginning to be made by manufacturers and merchants. However, with the enormous development of large scale national advertising, have come intimations from the courts that the investment in advertising a trade-mark in itself creates a distinct equity in favor of the advertiser, supplementing or enlarging the previously existing equities protecting good-will.[3] The initial decision pointing out the equities arising from investment in trade-mark advertising was that of Judge Coxe who said:[4]

Where the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the

[1] *Burton* v. *Stratton* 12 Fed. 696, 702.

[2] *Selchow* v. *Baker* 93 N. Y. 59, 66. See also *Menendez* v. *Holt* 128 U. S. 514, 520; *N. K. Fairbank Co.* v. *Central Lard Company* 64 Fed. 133; *Schendel* v. *Silver* 63 Hun (N. Y.) 230; *In the Matter of Trademarks of Kodak, Ld.* 20 *Rep. Pat. Cas.* 337, 350.

[3] See *Coca Cola Co.* v. *Koke Co.* 254 U. S. 143; *A. Bourjois & Co.* v. *Katzel* 260 U. S. 689; *Coca Cola Co.* v. *Old Dominion Beverage Corporation* 271 Fed. 600, 602; *Coca-Cola Co.* v. *Stevenson* 267 Fed. 1010, 1018; *Anheuser Busch* v. *Budweiser Malt Products Corp.* 287 Fed. 243; *Jacob Ruppert* v. *Knickerbocker Food Specialty Co.* 295 Fed. 381, 383; *Potter-Wrightington* v. *Ward Baking Co.* 288 Fed. 597, 599–600; *Henry Mfg. Co.* v. *Henry Screen Mfg. Co.* 204 N. Y. App. Div. 27, 29; *Fishel & Sons Inc.* v. *Distinctive Jewelry Co. Inc.* 196 N. Y. App. Div. 779, 788; *George G. Fox Co.* v. *Hathaway* 199 Mass. 99, 101, *Harkert Cigar Co.* v. *Herman* 196 N.W. (Sup. Ct. Ia.) 986, 987; *France Milling Co.* v. *Washburn-Crosby Co.* 3 F. (2d) 321, 326; *Oppenheim, Obendorf & Co., Inc.*, v. *President Suspender Co.*, 3 F. (2d) 88, 89.

In administrative law, for the purpose of taxation, an investment in advertising a trade-mark is regarded as capital investment independent of, and often in excess of the actual fiscal assets of many a concern. (See *Treasury Dept. B.I.R. Cumulative Bulletin* No. 2, 1920, p. 292; Holmes on *Federal Taxes*, 6th ed., pp. 621 *et seq.*) For valuation placed upon the trade-marks of ten leading industrial concerns by the Bureau of Internal Revenue, see *Bulletin U. S. Trademark Association*, New Ser., vol. 16 (Feb. 1921) pp. 23 to 25.

[4] *Hilson Co.* v. *Foster* (1897) 80 Fed. 896, 897.

ingenious, attractive and persistent manner in which they have been advertised, the good-will thus acquired is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings, or machinery, and a rival in business has no more right to use the one than the other, — no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them. No one should be permitted to step in at the eleventh hour and appropriate advantages resulting from years of toil on the part of another.

The recent decision of the English Court of Appeals involving the famous "Corona" cigar trade-mark is worthy of careful study in connection with this subject.[1] In that case the owners of the "Corona" cigar brand sought to enjoin the delivery of cigars of other brands in response to requests for "a Corona." Defendant, whose defence was financed by the large cigar manufacturing interests of Havana, while admitting the validity of the "Corona" trade-mark and conceding plaintiff's title to that mark, claimed that in the course of time "Corona" had come to mean in the public mind not merely a brand but also — and to a greater extent — a size and shape of cigar. The Court of Appeals would appear to have based its decision sustaining plaintiff's right to an injunction on the ground that the trial court had found as a fact that to the *majority* of the public, "Corona" still meant a brand and not merely a size or shape of cigar.

This reasoning of the English Court of Appeals of course goes to the very root of the question as to the proper basis of trade-mark protection. There was in that case no claim such as was made recently in the "Asperin" case, *Bayer Co.* v. *United Drug Co.*,[2] of any abandonment of the word "Corona" to the public domain, nor was it shown that the plaintiff had ever acquiesced in the use of its mark "Corona" to designate a size or shape. Nevertheless, followed to its logical conclusion, the reasoning of the Court would imply

[1] *Havana Cigar & Tobacco Company, Ltd.* v. *Oddenino*, 41 Rep. Pat. Cas. 47. See especially portions of opinions of Pollock, M.R., at p. 55; of Warrington, L.J., at pp. 58–59 and of Sargent, L.J., at p. 60.

[2] 272 Fed. 505.

that if a sufficient number of infringers were able to becloud in the public mind, "Corona" would thereby become a size or shape and would cease to be a brand, and thus plaintiffs, without fault on their part, would, by this very fraud, ultimately be debarred from protection of their trade-mark. The American decisions, such as *Selchow* v. *Baker*, quoted above,[1] would appear to offer a greater degree of protection to trade-marks.

There are indications that the question as to the logical and effective basis of the law of trade-marks and unfair competition will have to be decided by the highest courts of both this country and England within the next few years in connection with the problem of the protection which is being sought against the use of infringing marks upon non-competing goods. In 1898 an English Court of Chancery took a radical step in the direction of the protection of symbols of good-will, in holding that the trade-mark "Kodak" on cameras was infringed by "Kodak" on bicycles, because "'Kodak cameras' are especially available for use on cycles" and "many shops sell . . . both bicycles and photographic cameras . . ."[2] Again in 1917 the United States Circuit Court of Appeals for the Second Circuit decided that the trade-mark "Aunt Jemima's" for flour was infringed by "Aunt Jemima's" for syrup because "syrup and flour are both food products, and good products commonly used together."[3] Within recent months the Circuit Court of Appeals for the Sixth Circuit has held that a trade-mark for a magazine might be infringed by a similar mark on hats, although there was no actual market competition between the product of the plaintiff and the defendants. Explaining the doctrine of unfair competition, Judge Denison said:

. . . there is no fetish in the word competition. The invocation of equity rests more vitally upon the unfairness. If

[1] *Supra*, p. 167.

[2] *Eastman Photographic Materials Co., Ld.* v. *John Griffiths Cycle Corporation, Ld.* (1898) 15 Rep. Pat. Cas. 105, 110. *Cf.* Walter v. Ashton [1902] 2 Ch. 282.

[3] *Aunt Jemima Mills Co.* v. *Rigney & Co.* (1917) 247 Fed. 407, 410. But *cf. France Milling Co.* v. *Washburn Crosby Co.* (U. S. C. C. A., 2nd Cir., April 6, 1925 not yet reported).

B. represents that his goods are made by A. and if damage therefrom to A. is to be seen, we are aware of no consideration which makes it controlling whether this damage to A. will come from market competition with some article which A. is then manufacturing or will come in some other way.[1]

Shortly after the filing of the decision just quoted a United States District Court held the use of the trade-mark "Rolls-Royce" for automobiles to be infringed by the use of the mark upon radio tubes. The Court brushed aside all citations of precedents, remarking,

I am more impressed with the broad equities in this matter as it is presented in this individual case than I am perhaps by certain collateral citations . . . I can't see, even in the citations that have been given that which leads me to determine otherwise than I am minded to determine.[2]

The *ratio decidendi* in such cases would appear to be simply a reluctance on the part of the Court to permit defendants "to get the benefit of complainant's reputation or of its advertisement or to forestall the extension of its trade."[3] It discards entirely the archaic theories of the Middle Ages and of "gild jurisprudence," predicated upon the proprietary, regulatory and monopolistic significance of trade symbols and is a salutary, if somewhat belated, recognition of the actual nature and function of the trade-mark under modern conditions of production and distribution. Such reasoning, unhampered by medieval preconceptions and present misconceptions, will give adequate protection to both existent and potential good-will, and will prove the most effective

[1] *Vogue Co.* v. *Thompson-Hudson Co.*, 300 Fed. 509, 512.

[2] Runyon, D. J., in *Rolls-Royce of America, Inc.* v. *Howard Wall, Inc.* (Oct., 1924) 15 T. M. Rep. 12, 13. See also, *contra*, the decision of Judge Dickinson U.S.D.C., E.D., Pa.) in *Rosenberg Brothers and Company* v. *John F. Elliott* (June 1924) 3 F. (2d) 682, that "Fashion-Park" as a trade-mark on "overcoats, coats, vests, trousers and the like kind of clothing," sold to the wholesale trade, was not infringed by "Fashion-Park" on men's hats sold only at retail. *Cf. France Milling Co.* v. *Washburn Crosby Co.*, *supra*, p. 169, n. 3.

[3] *Aunt Jemima Mills Co.* v. *Rigney & Co.*, *supra*, at p. 410. For a further discussion of the appropriation of trade symbols by non-competitors, see 25 *Columbia Law Review* (1925) 199; 23 *Michigan Law Review* (1925) 433.

means of combating trade-mark pirates who lurk ever-watchful on the fringes of the field of trade.

To summarize briefly the conclusions reached in this chapter:

(1) The development of the law of unfair competition with respect to trade-marks has been hampered by the failure of the law to keep pace with the functional evolution of trade-marks themselves.

(2) Using the term property in its modern legal sense, viz., as a right having a pecuniary value which will be protected by the legal agencies of society, rights in or pertaining to trade-marks may be classified as property.

(3) However, the classification of trade-marks as property is not essential to their protection since equity should, in any event, prevent the destruction or impairment of the probable expectancy of trade or custom, of which the trade-mark is a symbol as well as a creative factor.

(4) The owner of a trade-mark who expends large sums of money in making his mark known to the public as a symbol and guarantee of the excellence of the quality of his product should receive the same protection from the courts for his investment in advertising his trade-mark that he would undoubtedly be entitled to receive for investment in plant or materials.

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