

**THE LAW OF TRADE-MARKS**  
**AND**  
**UNFAIR TRADE**

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A DIGEST  
OF THE  
LAW OF TRADE-MARKS  
AND  
UNFAIR TRADE

BY  
NORMAN E. HESSELTINE  
OF THE SUFFOLK BAR

BOSTON  
LITTLE, BROWN, AND COMPANY  
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TO THE  
**HONORABLE WILLIAM L. PUTNAM**

JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE FIRST CIRCUIT

WHOSE KNOWLEDGE OF LAW AND SENSE OF EQUITY HAVE  
GREATLY INFLUENCED THE DEVELOPMENT OF  
THE PRINCIPLES OF THIS SUBJECT

THE AUTHOR RESPECTFULLY DEDICATES  
THIS VOLUME.

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 Young v. Jones, 3 Hughes, 274 . . . . . 135, 136  
     v. Macrae, 9 Jur. N. S. 322 . . . . . 46

Z.

Zwack & Co., *ex parte*, 76 O. G. 1855 . . . . . 17, 123

## INTRODUCTION

THIS book states concisely the principles of the law of trade-marks and unfair trade, for ready application by the lawyer. The legal profession now wants the law and cases, not pages of text-book discussion. The digest of cases in the book shows the basis for the rule preceding. The rule is stated from a study of the cases according to the inductive method.

The digest includes all cases on this subject in the United States Courts, the decisions on trade-marks of the Commissioner of Patents, and the important State and English decisions.

It has been impossible for even the Federal Courts to reconcile all their cases. "Pocahontas" has, for instance, by *Atwater v. Castner*, 88 Fed. R. 642, been declared a valid trade-mark, and by *Coffman v. Castner*, 178 U. S. 168, declared invalid. So far as possible, however, I have sought to evolve a consistent statement of rules of law. Where certain cases could not be harmonized with rules which I believed to be supported by the weight of decisions, I put them under *Contra*.

It is difficult to readily distinguish between strictly trade-mark cases and unfair-trade cases. Sometimes one of the latter class will be decided as one of the former, especially in the earlier years of the law. To this day, after several readings, I have not fully decided if in the Anatolia licorice case "Anatolia" was properly a trade-mark. *McAndrew v. Bassett*, 4 De G. J. & S. 380.

It is rarely that one life sees the genesis and maturity of law. Yet it has almost seen them of Trade-mark law. In the eighteenth century there were a few scattered decisions which turned almost wholly on the question of fraud. With the rise and growth of machine-made merchandise in the earlier part of the last century the matter of private marks of merchants to dis-

tinguish wares going out into the public markets of the world assumed importance and cases multiplied. Trade-mark law is one of the results of machinery. It is safe to say that the great mass of trade-mark and unfair-trade law is the development of the last forty years. But much was still nebulous. There appeared to be no distinction between trade-marks proper and unfair trade. Singularly enough, the courts seemed to think that they were bound to find a trade-mark in order to grant relief.

In 1868, in *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, the court granted an injunction against the fraudulent use of sets of thirty-two different numbers, such as "2340," arbitrarily chosen to designate grades of silverware on the ground that these numbers were trade-marks. In 1876 *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. Pr. n. cas. 17, decided similarly in cases of numbers 1 to 50 to designate styles of cards. In 1882 the Circuit Court of United States decided that series of numbers, 1 to 35, to designate various kinds of medicine, were trade-marks and infringed by a similar use. *Humphrey's Specific Homeopathic Med. Co. v. Wenz*, 14 Fed. R. 250. In 1886 the court in *American Solid Leather Button Co. v. Anthony Lovell Co.*, 15 R. I. 338, gave a similar decision in cases of numbers applied to grades of nails, basing it largely on a Massachusetts case which declared in 1880, *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, that a number "523," to designate a grade of hosiery was a valid trade-mark. The case of *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707 (1882), was similar. In all of these cases it was evident that relief should have been granted, not on the ground of trade-marks, but of unfair trade. The reasoning was wrong, but the conclusion was right.

During the same period there was another line of cases refusing relief (where it might have been granted) on the ground that the marks were not strictly trade-marks, but used to distinguish grade and quality. Such was *Stokes v. Landgraff*, 17 Barb. 608 (1853), where arbitrary words "Galen," "Lake," "Cylinder," etc., were applied to grades of glass. In 1870 *Candee v. Decre*, 54 Ill. 439, decided that series of letters and numbers to designate parts and kinds of ploughs were not trade-marks, and refused relief against imitation. The law was finally ably stated

and the doctrine of unfair trade given a sound basis in *Avery v. Meikle*, 81 Ky. 73, in 1883. Although this was only twenty-three years ago, there were few, almost no, decisions to guide the court. Yet for breadth of judicial reasoning and soundness of views it is surpassed by few cases, and is one of the most important opinions in the whole subject. The whole case occupied forty-three pages, the opinion of the court thirty-five pages. A rival manufacturer had adopted the same series of letters and numbers for ploughs and parts thereof, under which another had gained a reputation, and defended on the ground that they were not trade-marks. The court held that it was a fraud, and that it was not necessary to find infringement of a strict trade-mark to grant relief. The case is based on the authority of *McLean v. Fleming*, 96 U. S. 245, decided in 1877, and the court quoted those famous words which have in their way become historic: "Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist." It was *McLean v. Fleming*, in the United States Supreme Court, which laid the foundation for the law of unfair trade, and to this day is one of the most important cases on the subject. Applying the principles in this Kentucky case, the court said, —

"You cannot, under pretence of exercising common right of use, and by reason of the fact that the means represent the quality and size of your goods, so use them that while they perform this simple and innocent purpose, apparently, of representing quality and size, caution and description, you cause them to do more, to represent your goods as those of another, and, by the seeming fairness which follows the selection of a legal or innocent instrument or means, escape the consequences of an illegal use thereof. This would be stealing the livery of heaven to serve the devil in." Since that period, on the same subject of infringement of series of descriptive marks, we have had in the Federal Courts *Humphrey's Homoeopathic Medicine Co. v. Hilton*, 60 Fed. R. 756; *Deering Harvester Co. v. Whitman & Barnes Mfg.*



*Co.*, 91 Fed. R. 376, and *Dennison Mnfq. Co. v. Thomas Mnfq. Co.*, 94 Fed. R. 651, which have settled the question of series of descriptive marks.

Trade-mark law is being gradually merged into that of unfair trade. Except where the jurisdiction is to be determined, the courts do not consider so much whether there is a valid trade-mark as whether one who has built up a valuable business under some sign is being defrauded by another in the use of a similar sign. If such is the fact, relief is granted without any decision as to the question of trade-mark. *Colgate v. Adams*, 88 Fed. R. 899. Formerly courts waded through pages of reasoning as to what a trade-mark was and whether there was one in the case before them; now the court seeks to learn if there is fraud. And even if there is a trade-mark or one claimed, all the attendant circumstances as bearing on the equity of the case are carefully considered, such as the length of use, reputation acquired, amount of money spent in building up the reputation, etc. This is seen especially in two cases in the last published report, 139 Federal Reporter, which illustrate the latest development of trade-mark law. *Walter Baker & Co. Ltd. v. Puritan Pure Food Co.*, 139 Fed. R. 680; *Siegert v. Gandolfi*, 139 Fed. R. 917.

Yet, rapid as has been the growth of law in the past, so that it may be said to have arrived at a certain stage of maturity, it has still an age of great expansion before it. For that reason there has been great difficulty in framing general abstract rules which will stand future test. I believe that there is yet much to be modified, enlarged, and re-cast in trade-mark law. It has been stated that a descriptive mark, a geographical mark, and a person's name could not be a valid trade-mark, and yet all three may be and frequently are valid trade-marks in the strict sense of the term. In the future the strict essentials of trade-marks will be lost sight of in the effort to do equity according to certain defined equitable principles in the individual instances before the court. The decision that the geographical name "Waltham" on watches was to be protected as against another dealer in watches at Waltham is difficult to justify by any sound American case of twenty years ago, and it is now difficult to see how on nearly the same principles "Elgin" is refused protection to an

old established watch company in that city. Yet the principle laid down both in the Massachusetts state court and in the Federal Court on the Waltham watch case is very narrow, and its application to future circumstances should be made with extreme care. See *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85; *American Waltham Watch Co. v. Sandman*, 96 Fed. R. 330; *Ill. Watch-case Co. v. Elgin Natl. Watch Co.*, 94 Fed. R. 667.

The rule regarding ownership in several trade-marks in the same line of goods in the same market stated in IV, 11, points a new development of the law justified by the decisions. Yet here we should be careful in our application, and while it might invalidate a trade-mark the result might be no more than to bring the relief prayed for under the rules of unfair trade.

New questions are continually arising, as how far a mark used by a manufacturer on a certain integral part of a machine, which integral part is never sold separately, may be under certain circumstances a valid trade-mark.<sup>1</sup>

What are the respective rights of parties who have concurrently in good faith built up a valuable interest in the same mark in the same line of business in different parts of the United States? This situation may cause a good deal of litigation in the future.

Courts may also refuse protection in undoubted cases of infringement on drugs claiming through secret formulas of alcohol and opium to perform wonderful cures, and on food composed of cheap adulterants and substitutes. The case of the Dr. Miles Drug Company, of Elkhart, Indiana, in which the court refused relief because their business "is contrary to public policy" in the Court of Common Pleas, No. 1 of Alleghany County, Pennsylvania, is the last case on that line.

When a lawyer has a case on this general subject he should *first* ascertain if the issue is one of a trade-mark or of unfair

<sup>1</sup> This question has just arisen as I am writing these pages. *Richards v. Williamson*, 30 L. T. s. s. 746, may be in point. A party who used a certain trade-mark on lock-plates and levers which he embodied in rifles from assembled parts which were by the said mark known as his make was protected against a party who bought discarded rifles and made them over, preserving the old marks to the deceit of the public.

trade. This can be done by observing the principles and cases in sections II and III. A registered mark is *prima facie* evidence of a valid trade-mark, but not conclusive. When that matter has been decided,

Second, the fact of the infringement should be ascertained. That would appear under section XI. In case of evident copying of a trade-mark it is not *necessary* to prove the fact that persons have been deceived or that reputation has been acquired, other than a user of the trade-mark in question. But it is advisable to show, if it can be done, special instances of deceit, especially where there is doubt about the fact of imitation. This evidence may be obtained in several ways, as by inquiry among customers, or in certain cases by sending to stores and calling for goods by the alleged infringing mark, as was done in one instance in New York hotels in a case on infringement of a mark on champagne. As to acquisition of a reputation under a trade-mark, courts have on a number of occasions considered as material the length of use, the extent and value of the business, and the amount of money spent in advertising and building it up. This is stated in IV, 6, and the case of Walter Baker & Co., in 139 Federal Reporter substantiates it.

Third, if the case is one of unfair trade, an acquired reputation is essential, and where the general appearance of the goods is likely to be imitated more than particular features of a trade-mark the proof of actual deceit is of especial importance. But even here the two branches of law merge in holding that imitation with knowledge is fraud.

Fourth, consider the rights of the opponent. Has he a trade-mark, or only rights claimed under the principle of unfair trade? In either case, what is the extent of the reputation acquired, and how far will the public recognize, especially in the locality of the suit, the mark or *indicium* as signifying the goods of the plaintiff or of the defendant? On this line see VIII.

Fifth, a point which is important to consider, and this may be for either the plaintiff or defendant, is that of abandonment. Many cases of infringement arise where one has revived an old mark under which another has acquired or is acquiring a new reputation. The rules applicable to such cases are laid down in

XIV, and here there has been difficulty in stating rules, for it is on this branch that there is some conflict of cases. But I deem the true test to be as stated in *Royal Baking Powder Co. v. Raymond*, 70 Fed. R. 376. Has the mark lost its former signification of a certain specific good-will? The matter of intention should have really little to do with it. As there can be no abstract right of property in a trade-mark apart from good-will, intention to maintain the use of a discontinued mark as applied to an existing good-will is material, but when that good-will has vanished, intention to maintain a property right in a meaningless mark is of no consequence. Good-will is the recognition of the public; intention is the mental attitude of an individual. Intention to claim a mark for a trade or good-will which does not exist to be marked is immaterial.

Sixth, the question of laches is also important. This is covered in XIII. Has the alleged infringement been continued for such a length of time that the real owner is debarred from objecting? And here the general rule is that while a party does not lose his rights by submitting to numerous acts of infringement, yet there comes a period when the court will say that a party has slept on his rights. The vital question here would seem to be, Has one allowed another, acting in good faith without knowledge of the other use or on the assumption that an owner did not claim exclusive right to a mark, to build up a valuable business under that mark to the extent of its being a vested right against which no injunction will lie?

Seventh, consider the honesty and truth of a trade-mark on the familiar principle that he who comes into equity must have clean hands. This subject appears in V. For although a trade-mark bearing a valid face may undoubtedly be infringed so as to deceive the public, yet if itself deceives the public equity will not grant relief.

Eighth, the title to the mark may be defective, especially if the proprietor claims under an assignment which does not in fact convey any business or else conveys a business which is so personal to the former owner that its continued use by another is deceptive.

Ninth, the jurisdiction of the court is an important matter.

That is stated in XV, 1 and 2. It is generally advisable to bring cases in the Federal Courts.

Tenth, the form of pleadings and the method of practice are according to the general principles of equity.

In England for many years trade-marks have been regulated by statute to such an extent that many decisions turn on the construction of the Act. In our country they have had a more natural growth at common law and developed largely the doctrine of unfair trade.

The subject has within the last few years in this country become so important that it has led to the passage of the Act of 1905 which affords valuable protection to proprietors of trade-marks and shapes future litigation. It is not yet safe to say that even that Act marks the end of legislation, for there are now amendments pending in Congress which the student would do well to watch.

Attention is called to the numerous cross references, and to the table of cases which discloses the various points involved in several digests of the same case.

# THE LAW OF TRADE-MARKS

## I. DEFINITIONS.

“What is a trade-mark? A ‘mark’ means to make a visible sign upon something; to affix a significant mark to; to draw, cut, fasten, brand; a token upon, indicating or intimating something; to affix an indication to; to attach one’s name or initials to. A trade-mark, therefore, consists of the use in trade of such a mark, placed upon goods manufactured by a particular person and placed in market with such marks, for sale and trade.” *Adams v. Heisel*, 31 Fed. R. 279.

“Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer.” *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51 (Field, J.).

“Symbols or devices used by a manufacturer or merchant to distinguish the products, manufactures, or merchandise which he produces, manufactures, or sells, from that of others, are called and known by the name of trade-marks.” *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51-56.

“Words or devices, or even a name in certain cases, may be adopted as a trade-mark which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale.” *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51 (Clifford, J.).

“It is a mode of designating goods as being the goods which have been, in some way or other, dealt with by A. B., the person

who owns the trade-mark." *Australian Wine Importers (In re)*, 41 Ch. D. 278-281.

"A trade-mark is a sign or symbol primarily confined exclusively to the indication of the origin or ownership of the goods to which it may be attached, and it may be composed of any name, device, line, figure, mark, word, letter, numeral, or combination, or arrangement of any or all of these which would serve the sole purpose of a trade-mark, and which no other person can adopt or use with equal truth." *Acery v. Meikle*, 81 Ky. 73.

"The office of a trade-mark is to designate the true origin or ownership of the article or fabric to which it is affixed." *Boardman v. Meriden Britannia Co.*, 35 Conn. 402.

"A trade-mark is a word, symbol, figure, form, or device, or a combination thereof, adopted or devised and used by a manufacturer or vendor of goods, to designate the origin or ownership of his goods, and is used by him to distinguish his goods from those which are manufactured or sold by others." *Burke v. Cassin*, 45 Calif. 478.

"A trade-mark is a symbol arbitrarily selected by a manufacturer or dealer, and attached to his wares to indicate that they are his wares." *Cady v. Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

"A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article." *Cigar-makers' Protective Union v. Conhain*, 40 Minn. 243.

"A trade-mark is some arbitrary or representative device attached to or sold with merchandise and serving to designate the origin or manufacture of that merchandise." *Davis v. Davis*, 27 Fed. R. 490-491.

"The office of a trade-mark is to point out distinctively the origin, or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known but not previously applied to the same article." *Del. & H. Canal Co. v. Clark*, 13 Wall. 311.

"Any name, symbol, letter, figure, or device adopted by the persons manufacturing or selling goods, and used to put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time, as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manu-

facturing or selling them, constitutes his trade-mark." *Derringer v. Plate*, 29 Calif. 292.

"The books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it—that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers." *Filley v. Fussett*, 44 Mo. 168; 100 Am. Dec. 275.

"A trade-mark is an arbitrary character or characters without special meaning, adopted by persons, firms, or corporations for the purpose of identifying the goods manufactured by them or of which they have the sale." *Frieberg, ex parte*, 20 O. G. 1164.

"A trade-mark may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use." *Gilman v. Hunnewell*, 122 Mass. 139.

"They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in." *Hier v. Abrahams*, 82 N. Y. 519.

"A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his product from other products of the same article." *Hostetter v. Fries*, 17 Fed. R. 620.

"It is a sign or mark by which the manufactured articles produced by one person, or firm, or maker, are distinguishable from those produced by rival manufacturers." *Hoyt v. Hoyt*, 143 Penn. St. 623.

"A trade-mark is any proper mark by which goods and wares of the owner or manufacturer are known in the trade." *Humphreys' Specific Med. Co. v. Wenz*, 14 Fed. R. 250-252.

"A trade-mark is . . . the name, symbol, figure, letter, form, or device used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result



from a reputation for superior skill, industry, or enterprise." *Larrabee v. Lewis*, 67 Ga. 561.

"A trade-mark properly so called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority, or that he carries on business at a particular place." *Leather Cloth Co. v. American Leather Cloth Co.*, 35 L. J. Ch. 61.

"A trade-mark has been very well defined as one's commercial signature to his goods. It may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity." *Leidersdorf v. Flint*, 8 Biss. 327.

"It seems to be the office of a trade-mark to point out the true source, origin or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers." *Marshall v. Pinkham*, 52 Wis. 572.

"The trade-mark must be used to indicate not the quality, but the origin or ownership of the article to which it is attached. It may be any sign, mark, symbol, word, or words, which others have not an equal right to employ for the same purpose." *Newman v. Alford*, 51 N. Y. 189-193.

"Our word 'trade-mark' comprehends both the *marque de fabrique* and *marque de commerce* of France." *République Française v. Schultz*, 57 Fed. R. 37.

"A trade-mark is a peculiar name or device by which a person dealing in an article designates it as an article of a peculiar kind, character, or quality, or as manufactured by or for him." *Rogers v. Taintor*, 97 Mass. 291.

"A trade-mark is a mere notice, an arbitrary mark or sign put on an artificial product, whereby any person interested in the information may be assured as to the origin of said product." *Royal Baking Powder Co. v. Raymond*, 70 Fed. R. 376-380.

"A trade-mark is a name, sign, symbol, mark, brand, or device of any kind, used to designate the goods manufactured or sold, or the place of business of the manufacturer or dealer in such goods." *Shaver v. Shaver*, 54 Ia. 208.

“Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Its object is two-fold: First, to protect the party using it from competition with inferior articles; and second, to protect the public from imposition. . . . Anything which can serve to distinguish one man’s productions from those of another may be used. The trade-marks brand the goods as genuine, just as the signature to a letter stamps it as authentic.” *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707-710.

“A trade-mark is a peculiar name or device, by which a person dealing in an article designates it as of a peculiar kind, character, or quality, or as manufactured by or for him, or dealt in by him, and of which he is entitled to the exclusive use.” *Weener v. Brayton*, 152 Mass. 101-102.

## II. WHAT IS A VALID TRADE-MARK.

A trade-mark is (1) an arbitrary sign (2) affixed (3) by a proprietor (4) to his goods (5) with the intention of designating their origin (6) by a use thereon.

1. An arbitrary sign is (A) a word, (B) a combination of words, (C) letters, (D) a name, (E) a number, (F) a figure or symbol, (G) not necessarily disclosing on its face the origin of the goods, affording by association a ready means of recognition of their origin.

### A. A word.

“Eureka Ammoniated Bone Superphosphate of Lime,” on fertilizer, good only for the word “Eureka.” *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

“Eureka,” good trade-mark in “Eureka Ammoniated Bone Superphosphate of Lime,” but not the five following words.

“The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. . . . But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark.” *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

“Bromidia,” on medicine containing bromide of potassium, arbitrary.

“The word is an arbitrary word, descriptive of nothing, unless it is of the complainants’ goods, and that only for the reason that the complainants have introduced them to the public under such arbitrary name.” *Bottle v. Finlay*, 45 Fed. R. 796.

“Excelsior White Soft Soap,” protected on account of word “Excelsior.” *Braham v. Bustard*, 1 H. & M. 447; 11 W. R. 1061; 9 L. T. s. s. 199.

If the trade-mark consists of words they must indicate ownership and origin, and not merely other attributes, such as quality, kind, texture, composition, utility, destined use, or class of consumers.” *Corwin v. Daly*, 7 Bos. 222.

“The word ‘quality’ is used in different senses in the cases. It is employed in some to denote the grade, ingredients or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trade-mark on denoting quality when used merely in the former sense, there may be a valid trade-mark as indicating quality when used in the latter sense.” *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651.

“It is not necessary to deny that a name may in some cases be rightfully used and protected as a trade-mark, but this is only true when the name is used merely as indicating the true origin and ownership of the article offered for sale—never where it is used to designate the article itself, and has become by adoption and use its proper appellation.” *Petridge v. Wells*, 4 Abb. Pr. 144; 13 How. Pr. 385.

“A trade-mark must, in a case like this, as the term imports, be one consisting of a word, an expression, a device, or a mark invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article, and it cannot be the appropriation of words belonging to the general public which describe truly a known product.” *Helmbold v. Helmbold*, 53 How. Pr. 453.

“When a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of such name and mark, which becomes what is usually called his trade-mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance.” *Hirst v. Denham*, L. R. 14 Eq. Cas. 542.

“A trade-mark which designates the true origin or ownership of the article manufactured or sold, will be protected, but words which have no other relation to the origin or ownership of the goods than merely to indicate the name or quality, will not be protected.” *Larrabee v. Lewis*, 67 Ga. 561; 44 Am. Rep. 735.

“It may properly be conceded that words of common use may be so employed as to acquire a limited additional significance by way of designating a particular article of manufacture or production, and in that sense be entitled to the protection of the court by way of injunction against infringement by another person or persons.” *Stokes v. Allen*, 56 Hun, 526.

**(1) Examples.**

"Alderney," oleomargarine. *Lauferty v. Wheeler*, 11 Abb. N. Cas. 220; 63 How. 488; 11 Daly, 194.

"Anchor Brand," wire. *Edelsten v. Edelsten*, 1 De G. J. & S. 185.

"Antiphlogisten," chemical preparation. *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed. R. 468.

"Anti-washboard," soap. *O'Rourke v. Central City Soap Co.*, 26 Fed. R. 576.

"Baffle," safes. *Talbot's Trade Mark*, 3 R. P. C. 276.

"Boss," washers. *Greacen v. Bell*, 115 Fed. R. 553.

"Bovilene," pomade. *Lockwood v. Bostwick*, 2 Daly, 521.

"Bovril," beef extract. *Bovril Trade Mark, in re*, 65 L. J. Ch. 715.

"Brittlenut," sugar, syrup, and peanuts. *Lion Fig & Date Co., ex parte*, 102 O. G. 823.

"Bromidia," medicine containing bromide of potassium. *Battle v. Finlay*, 50 Fed. R. 106; affirming 45 Fed. R. 796.

"Bromo-caffeine," drug. *Keasbey v. Brooklyn Chemical Works*, 142 N. Y. 467; reversing 21 N. Y. Supp. 696, and 16 N. Y. Supp. 318.

"Candy Cathartic," laxative drug. *Sterling Remedy Co. v. Gorey*, 110 Fed. R. 372.

"Carrom," game board. *Williams v. Mitchell, Mitchell v. Williams*, 106 Fed. R. 168.

"Carroms," game board. *Ludington Novelty Co. v. Leonard*, 127 Fed. R. 155; affirming 119 Fed. R. 937.

"Celery Compound," medicine. *Wells & Richardson Co. v. Siegel*, 106 Fed. R. 77.

"Celluloid," compound of pyroxyline. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. R. 94.

"Centennial," wines. *Boehm & Co.*, 8 O. G. 319.

"Charter Oak," on stoves. *Filley v. Fassett*, 44 Mo. 168.

"Chicken Cock," whiskey. *G. G. White Co. v. Miller*, 50 Fed. R. 277.

"Clipper," canned peas. *Manitowoc Pea-Packing Co. v. Nu-meen*, 93 Fed. R. 196.

"Club," cocktails. *Heublein v. Adams*, 125 Fed. R. 782.

"Club soda," carbonated water. *Cochrane v. McNish*, 74 L. T. R. n. s. 109; 65 L. J. P. C. n. s. 20.

"Coal Oil Johnny," soap. *Petrolia Mfg. Co. v. Bell & Bogart Soap Co.*, 97 Fed. R. 781.

"Cocaine," hair wash. *Burnett v. Phalon*, 3 Keyes, 594; 5 Abb. Pr. n. s. 212.

"Cottolene," substitute for lard. *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. R. 133.

"Cough Cherries," confectionery. *Stoughton v. Woodard*, 39 Fed. R. 902.

"Cream," baking powder. *Price Baking Powder Co. v. Fyfe*, 45 Fed. R. 799.

"Cuticura," medicated toilet soap. *Potter Drug & Chemical Co. v. Miller*, 75 Fed. R. 656.

"Dyspepticure," medical preparation. *Ex parte Foley & Co.*, 87 O. G. 1957.

"Elastic," sectional bookcases. *Globe Wernicke Co. v. Brown*, 121 Fed. R. 185.

"Electro-Silicon," white powder for polishing metals. *Electro-Silicon Co. v. Hazard*, 29 Hun, 369; *Electro-Silicon Co. v. Trask*, 59 How. Pr. 189. See II. 1, A (2).

"Elk," cigars. *Lichtenstein v. Goldsmith*, 37 Fed. R. 359.

"Epicure," canned salmon. *George v. Smith*, 52 Fed. R. 830.

"Eureka," steam packing. *Symonds v. Greene*, 28 Fed. R. 834.

"Eureka," fertilizer compound. *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

"Eureka," shirts. *Ford v. Foster*, 7 Ch. App. 611.

"Excelsior," soap. *Braham v. Bustard*, 9 L. T. n. s. 199; 1 H. & M. 447.

"Express, American," sealing wax. *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651.

"Family salve," medical preparation. *Reinhart v. Spaulding*, 49 L. J. Ch. 57; 28 W. R. 300.

"Favorita, La," specially selected flour. *Menendez v. Holt*, 128 N. S. 514.

"Fibre Chamois," interlining fabric. *American Fibre Chamois Co. v. De Lee*, 67 Fed. R. 329.

"Filo-Floss," silk manufacture, *filo* being arbitrary and never having been used with floss. *Rawlinson v. Brainard & Armstrong Co.*, 59 N. Y. Supp. 880.

"Flinch," a game of cards. *H. B. Chaffee Mfg. Co. v. Selchow*, 131 Fed. R. 543.

"Fruit salt," powder for effervescent drink. *Eno v. Dunn*, L. R. 41 Ch. D. 439; 63 L. T. n. s. 6; L. R. 15 App. Cas. 252.

"Galena," antifriction metal. *Magnus Metal Co., ex parte*, 100 O. G. 451.

"Golden Wedding," whiskey. *Pontefract v. Isenberger*, 106 Fed. R. 499.

"Grand Master," on cigars. *C. A. Yale Cigar Mfg. Co. v. Yale*, 30 O. G. 1183.

"Grenadine," "Grenade," syrup. *Rillet v. Carlier*, 61 Barb. 435.

"Heliotype," prints of a certain kind. *Osgood v. Rockwood*, 11 Blatch. 310.

"Hero," "Heroine," glass jars. *Rowley v. Houghton*, 2 Brew. 303.

"Home," sewing machines. *New Home Sewing Mch. Co. v. Bloomington*, 59 Fed. R. 284.

"Hygeia," mineral water. *Waukesha H. M. S. Co. v. Hygeia S. D. W. Co.*, 63 Fed. R. 438. *Hygeia S. D. W. Co. v. Waukesha, H. M. S. Co.*, 63 Fed. R. 445. *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516.

"Hygieniques," suspenders: suggestive of the good quality of the suspenders, . . . but does not directly characterize the article. *Bailey v. Nashawannuck Mfg. Co.* 10 N. Y. Supp. 224.

"Ideal," fountain pen. *Waterman v. Shipman*. 130 N. Y. 301.

"Indian Root," pills. *Comstock v. Moore*, 18 How. Pr. 421.

"Insectine," liquid preparation to kill insects. *Arthur v. Howard*, 19 Penn. Co. Ct. 81.

"Insurance," oil. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946.

"Invigorator," spring bed bottoms. *Heyman, ex parte*, 18 O. G. 922.

"Junket," rennet tablets. *Hansen v. Siegel-Cooper Co.*, 106 Fed. R. 691.

"Kaiser," beer. *Kaiserbrauerie v. Blatz Brewing Co.*, 71 Fed. R. 695; Aff'd 74 Fed. R. 222.

"King Bee," tobacco. *Sarrasin v. W. R. Irby Cigar & Tob. Co.*, 93 Fed. R. 624.

"Koffio," cereal coffee. *Sleepy Eye Milling Co. v. C. F. Blanke Tea & Coffee Co.*, 85 O. G. 1905.

"Lacto-Peptine," medicinal preparation. *Carrick v. Morson*, Cox Man. Tr. Mk. Cas. 543.

"Leopold," woollen cloth. *Hirst v. Denham*, L. R. 14 Eq. 542; 27 L. T. n. s. 56; 41 L. J. Ch. 752.

"Lightning," hay knives. *Hiram Holt Co. v. Wadsworth*, 41 Fed. R. 34.

"Lion," medicines. *Wearer, in re*, 10 O. G. 1.

"Lone Jack," smoking tobacco. *Carroll v. Ertheiler*, 1 Fed. R. 688.

"Magico," cleaning compound. *American Chemical Co., ex parte*, 62 O. G. 588.

"Magnetic Balm," liquid preparation, not magnetic. *Ransom v. Ball*, 7 N. Y. Supp. 238; *Smith v. Sixbury*, 25 Hun, 232.

"Maizena," corn-flour. *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. R. 823.

"Marvel," flour. *Listman Mill Co. v. Williams Listman Milling Co.*, 88 Wis. 334.

"Mufflet," neck scarf. *Hygienic Fleece Underwear Co. v. Way*, 137 Fed. R. 595.

"Naphthol-Methane," carbon black. *Castle Brook Carbon Co., ex parte*, 100 O. G. 683.

"Nickel," soap. *Butler, ex parte*, 87 O. G. 1781.

"Nickel-In," cigars. *Schendel v. Silver*, 63 Hun, 330.

"Non-Tox," carbonated root and herb extract. *MacDonald, ex parte*, 85 O. G. 150.

"Norma," cigarettes. *Egyptian Tobacco Co., ex parte*, 85 O. G. 1905.

"No-To-Bac," medicine to cure tobacco habit. *Sterling Remedy Co. v. Eureka Chem. Mfg. Co.*, 80 Fed. R. 105; 70 Fed. R. 104.

"Old Crow," whiskey. *Guines v. Leslie*, 54 N. Y. Supp. 421.

"Osman," towels. *Barlow v. Johnson*, 7 R. P. C. 395.

"Otaka," biscuits. *Lorenz, ex parte*, 89 O. G. 2067.

"Pain Killer," medicine. *Davis v. Kendall*, 2 R. I. 566; *Davis v. Kennedy*, 13 Grant Ch. U. C. 523. *Contra: Davis v. Harborl*, 63 L. T. n. s. 389; 60 L. J. Ch. 16; L. R. 15 App. Cases, 316.

"Parabola," needles. Although eye had a parabolic curve. *Roberts v. Sheldon*, 20 Fed. Cas. 930; App. 8 Biss. 398.

"Pepto-Mangan," medicinal preparation. *M. J. Breitenbach Co. v. Spangenberg*, 131 Fed. R. 160.

"Pharaoh's serpents," firework toy. *Barnett v. Leuchars*, 13 L. T. n. s. 495; 14 W. R. 166.

"Pigs in Clover," puzzle. *Lyman v. Burns*, 47 O. G. 660.

"Pride," cigars. *Hier v. Abrahams*, 82 N. Y. 519.

"Puck," cigars, cigarettes, etc. *Jacoby v. Lopez*, 23 O. G. 342.

"Queen," shoes. *Thos. G. Plant Co. v. May Co.*, 105 Fed. R. 375.

"Red Cross," absorbent cotton. *Johnson v. Brunor*, 107 Fed. R. 466.



"Roachsault," insecticide. *Stern v. Barrett Chemical Co.*, 61 N. Y. Supp. 221; 29 Misc. 609.

"Royal," total product of factory of baking powder. *Royal Baking Powder Co. v. Raymond*, 70 Fed. R. 376; '85 Fed. R. 231. But see *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331.

"Royal Blue," not descriptive of color, carpet sweep. *Grand Rapids School Furniture Co., ex parte*, 87 O. G. 1957.

"Saponifier," soap, suggestive through Latin meaning, but not descriptive. *Penn. Salt Mfg. Co. v. Myers*, 79 Fed. R. 87. Aff'd 82 Fed. R. 1003.

"Sefton," woollen cloth. *Hirst v. Denham*, L. R. 14 Eq. 542; 27 L. T. n. s. 56; 41 L. J. Ch. 752.

"Shawknit," stockings. *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707.

"Sliced Animals," "sliced birds," "sliced objects," picture puzzles. *Selchow v. Baker*, 93 N. Y. 59.

"Solid-Comfort," furnaces. *Fieberger, ex parte*, 99 O. G. 2101.

"Solio," photographic materials registrable. App. Cas. 571 (1881); *Farbenfabriken Application, in re*, 1 Ch. 645, overruled; 76 L. T. n. s. 730.

"Star," oil. *American Lubricating Oil Co., in re*, 9 O. G. 687.

"Star," shirts. *Hutchinson v. Blumberg*, 51 Fed. R. 829; *Hutchinson v. Covert*, 51 Fed. R. 832; *Morrison v. Case*, 9 Blatch. 548.

"Star," soap. *Cornwall, in re*, 12 O. G. 138.

"Star," tobacco. *Liggett & Myer Tob. Co. v. Hynes*, 20 Fed. R. 883.

"Success," stoves and ranges. *Huenefeld, ex parte*, 100 O. G. 1329.

"Sunlight," soap. *Lerer v. Pasfield*, 88 Fed. R. 484.

"Swan Down," complexion powder. *Tetlow v. Tappan*, 85 Fed. R. 774.

"Sweet Caporal," cigarettes. *Kinney Tobacco Co. v. Maller*, 53 Hun. 340; 6 N. Y. Supp. 389.

"Tabloid," drug compressed into small biconvex disc. *Wellcome v. Thompson*, L. R. 1 Ch. 736 (1904).

"Tidal Wave," tobacco. *Sorg v. Welsh*, 16 O. G. 910.

"Tin Tag" or "Wood Tag," on tobacco, but not exclusive use of tin or wood to designate goods. *Lorillard v. Pride*, 28 Fed. R. 434.

"Triumphant," flour. *Lyon, Dupuy & Co., ex parte*, 28 O. G. 191.

"Twin Brothers," yeast. *Burton v. Stratton*, 12 Fed. R. 696.

“Uneeda,” biscuits. *National Biscuit Co. v. Baker*, 95 Fed. R. 135.

“Valvoline,” lubricating oil. *Leonard v. White's Golden Lubricator Co.*, 38 Fed. R. 922. *Contra*: *Leonard v. Wells*, 53 L. J. Ch. 233; *Leonard, in re*, 26 Ch. D. 288; *Horsburgh, in re*, 53 L. J. Ch. 233.

“Vanity Fair,” cigarettes. *Kimball, in re*, 11 O. G. 1109.

“Vitrified,” asbestos. *Chicago Fire Proof Covering Co., ex parte*, 104 O. G. 852.

“Vulcan,” matches. *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364.

“Warren Hose Supporter,” hose supporter, perhaps not alone, but with cut. *Frost v. Rindskopf*, 42 Fed. R. 408.

“Waukeasy,” corn cure. *Peck, ex parte*, 96 O. G. 425.

“Waukwell,” shoes. *Parker Holmes & Co., ex parte*, 100 O. G. 1111.

“Waverly,” good on bicycles, it not appearing that it has a clearly recognized geographical meaning; its romantic signification from the novels is more important. *Indiana Bicycle Co., ex parte*, 72 O. G. 654.

“Weck,” sterilizing and preserving apparatus. *Van Eyck, ex parte*, 107 O. G. 542.

“Welcome,” soap. *Lever Bros. Ltd. Boston Works v. Smith*, 112 Fed. R. 998.

“Yusea,” incandescent gas mantles. *Welsbach Light Co. v. Adam*, 107 Fed. R. 463.

## (2) A compound word.

“Momaja,” on coffee, a word compounded from Mocha, Maracaibo, and Java, a valid trade-mark. *American Grocery Co. v. Sloan*, 68 Fed. R. 539.

“Mazawattee,” a compound of Hindustani “mazadhar,” luscious, and Cingalese “wattee,” growth or garden, as applied to tea or coffee, not descriptive, as it conveys no meaning to an Englishman, Hindoo, or Cingalese. *Densham's Trade Mark*, [1895] 2 Ch. 176.

“Electro-silicon,” polishing powder; “silicon” descriptive, but “electro-silicon” good. *Electro-Silicon Co. v. Levy*, 59 How. 469; *Electro-Silicon Co. v. Trask*, 59 How. Pr. 189; *Electro-Silicon Co. v. Hazard*, 29 Hun, 369.

**B. A combination of words.**

"Superphosphate of Lime," chemical compound. *Bradley v. Norton*, 33 Conn. 157.

"Dr. Morse's Indian Root" Pills, valid. *Comstock v. White*, 18 How. Pr. 421.

"Samaritan's Gift," medicine; but word "Samaritan" cannot be exclusively appropriated. *Desmond's Appeal*, 103 Pa. St. 126.

"The name 'Charter Oak,' with the combined device, in no possible view or application of them, are either descriptions or suggestive of the style, character, or qualities of a cast-iron cooking stove. The name and device selected by the plaintiff were adapted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark." *Filley v. Fasset*, 44 Mo. 168.

"American Volunteer," shoes, valid. *Joseph Banigan Rubber Co. v. Bloomington*, 89 O. G. 1670.

"Lady & the Bear," fur goods. *Jay v. Ludler*, 40 Ch. D. 649.

"Syrup of Red Spruce Gum," medicine. *Kerry v. Toupin*, 60 Fed. R. 272.

"Medicated Mexican Balm," hair tonic. *Perry v. Truefit*, 6 Beav. 66.

"Coal Oil Johnny," soap. *Petrolia Mfg. Co. v. Bell & Bogart Soap Co.*, 97 Fed. R. 781.

"Universal Magnetic Balm," medicine. *Ransom v. Ball*, 7 N. Y. Supp. 238.

"American Cold Japan," paint, good. *Reeder v. Brodt*, 6 Oh. Dec. 248.

"The words 'Cough Cherries' are not properly merely descriptive of the qualities of the thing manufactured and sold, but are to a large extent arbitrary and fanciful. . . . If the label adopted had been 'Cough Candy,' 'Cough Remedy,' or 'Cough Confection,' or if the article sold had been cherries in fact, and labeled as these goods were, the case would come within the ordinary rule." *Stoughton v. Woodard*, 39 Fed. R. 902.

**C. Letters or initials.**

See II. 2 B. 21. *Moet v. Pickering*, L. R. 6 Ch. D. 770.

See X. 1 A. (1). 219. *Frank v. Sleeper*, 150 Mass. 583.

"There can be no reasonable doubt that the letters 'G. E.' might constitute a valid trade-mark." They were initials affixed

to electric lamps. *General Electric Co. v. Re-New Lamp Co.*, 121 Fed. R. 164; 128 Fed. R. 154.

Complainant's trade-mark "G. F." on velvet ribbons infringed by that of respondent's "G. & F." so arranged in reference to ampersand as to be greatly similar to complainant's. *Giron v. Gartner*, 47 Fed. R. 467.

The initials "A. G." standing for Alexis Godillot, Jr., protected as a trade-mark in the grocery business. *Godillot v. American Grocery Co.*, 71 Fed. R. 873.

The initials "B. B. H." surmounted by crown, good trade-mark on iron; the initials standing for former proprietors, Bradley, Barrows, & Hall. *Hall v. Barrows*, 4 De G. J. & S. 150, etc.

"A-V-H," initials of complainant blown into glass bottles for gin, good trade-mark. *Van Hoboken v. Mohns*, 112 Fed. R. 528.

#### D. A name.

**(1) The proper name of a distinguished historical personage may be a valid trade-mark.**

See XV. 3 C. (1). 309. *Goldstein v. Whelan*, 62 Fed. R. 124.

"Roger Williams," on cotton cloth, valid trade-mark. "'Roger Williams,' though the name of a famous person, long since dead, is, as applied to cotton cloth, a fancy name, as would be so applied, the names of Washington, Greene, Perry, or of any other heroes, living or dead." *Barrows v. Knight*, 6 R. I. 434.

"Delsarte," as applied to shoes, may be a fancy name, and a valid trade-mark, although it may also be applied descriptively to shoes made on certain hygienic principles. *Medlar & Holmes Shoe Co. v. Delsarte Mufg. Co.*, 46 Atl. R. 1089.

"Bismarck," on collars, good trade-mark. *Messerole v. Tynberg*, 4 Abb. Pr. 410; 36 How. Pr. 14.

*Contra*: "Shakespeare" not a fancy word. "The word 'Shakespeare' is well-known in the English language and in common use." *Banks & James's Trade Mark*, 44 Wk. R. 32.

**(2) A fictitious name, if not calculated to deceive, may be a valid trade-mark.**

See V. 5. 127.

**(3) The name of a flower is a valid trade-mark only when used arbitrarily and not deceptively.**

"Edelweiss," on perfume, good trade-mark, there being no scent from the flower. *Rosing v. Atkinson*, 27 Sol. Jr. 534.

**(4) The name or figure of an animal used in an arbitrary sense, especially if with some unique feature, may be a valid trade-mark.**

See XVI. 2. 337. *Taylor, ex parte*, 93 O. G. 2531.

Figure of an ox on mustard, which from the figure had come to be called "ox mustard," protected as a trade-mark. *Harrison v. Taylor*, 11 Jur. n. s. 408; 12 L. T. n. s. 339.

"I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pig-skin into leather, I do not know why a pig should not be a good trade-mark for tanned pigs' hide. I am not inclined to apply to English Acts of Parliament the American cases which have been cited." *James's Trade Mark, in re*, 33 Ch. D. 392. *Contra: Pratt, in re*, 10 O. G. 866 III. 1, 3.

The word "Elk" with the figure of the head of an elk, good trade-mark on cigars. *Lichtenstein v. Goldsmith*, 37 Fed. R. 359.

Figures of two elephants used on a label for yarn exported to India, which had come to be known as "Elephant Yarn," protected as trade-mark. *Orr-Ewing v. Johnston*, 13 Ch. D. 434, etc.

Both the word "Lion" and the pictorial representation of a lion are good trade-marks for medicines. *Weaver, in re*, 10 O. G. 1.

#### **E. A number.**

"140," allowed registration as trade-mark on umbrellas. *Daves & Hanning, ex parte*, 1 O. G. 27.

"It may be that numerals, which are arbitrarily selected, without any purpose of identifying the article to which they are affixed from other articles of a similar class, may become the subject of a trade-mark." *Humphrey's Homeopathic Medicine Co. v. Hilton*, 60 Fed. R. 756.

#### **F. A figure or symbol.**

See XIII. 2. 289. *Virginia Hot Springs Co v. Hegeman*, 138 Fed. R. 855.

See XI. 15. 276. *Johnson & Johnson v. Bauer & Black*, 82 Fed. R. 662.

Words "Twin Brothers," with portraits of the twins, a good trade-mark on yeast. *Burton v. Stratton*, 12 Fed. R. 696.

A cross with letters "C. B." with words "à Broder à la Croix" on cotton, under which mark cotton had come to be known as cross cotton, good trade-mark. *Cartier v. Carlile*, 8 Jur. n. s. 183.

"Red Cross" and a symbol of a Greek cross allowed to be registered as trade-mark for elastic fabrics. The Greek cross has attained such a wide-spread use in history that it is not against public policy to register it. *E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583. *Contra: Chichester Chemical Co., ex parte*, 52 O. G. 1061; *Zwack & Co., ex parte*, 76 O. G. 1855. V. 1 C. 123.

An emblem of an anchor on wire good trade-mark; wire had come to be designated "anchor brand." *Edelsten v. Edelsten*, 7 L. T. n. s. 768; 1 De G. J. & S. 185.

"A device consisting chiefly of a letter of the alphabet nine times repeated, the repetitions being arranged in three vertical columns, separated by lines or bars, so as to form three groups of three B's (B B B), and when applied to the goods, each of three sides of the package presents to the eye one of these triple combinations of B in conspicuous type." *Foster v. Blood Balm Co.*, 77 Ga. 216.

"Perhaps, as argued for the defendants, the words 'Warren Hose Supporter' alone would not constitute a valid trade-mark; but, in connection with the cut (hose supporter engaged with stocking), they appear to be more than merely descriptive, and sufficiently arbitrary to denote fairly the origin of the goods when used to that purpose." *Frost v. Rindskopf*, 42 Fed. R. 408.

Eagle with outstretched wings on mortar and pestle, good trade-mark on labels of medicinal preparations. *Hegeman v. O'Byrne*, 9 Daly, 264.

"Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in." *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589.

Word "Star," with symbol of star on shirts and underwear, valid trade-mark. *Hutchinson v. Blumberg*, 51 Fed. R. 829.

A dome affixed to black lead which may be sold in different shapes can be registered as a trade-mark, but not the shape of a dome. *James's Trade Mark*, L. R. 33 Ch. D. 392.

Preliminary injunction against use of packages of cotton bearing the representation of a red cross or the designation "Red Cross" see *E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583. *Johnson v. Brunor*, 107 Fed. R. 466.

A design consisting essentially of the letters "G. A. R." and the representation of an eagle, a flag, and a star, being an exact representation of the well-known badge of the Grand Army of the Republic, can be registered as a trade-mark for writing paper, there being no sacredness or exclusive right in the abstract symbol. "As to mere emblems which have been used by societies, it seems to be settled by the decisions of the Office that there is no sanctity or sacredness about them which precludes their being used and applied as trade-marks." *King, ex parte*, 46 O. G. 119, 120.

Figure  $\frac{1}{2}$  in large, bold, red characters in a certain form and style, and used four years as trade-mark on cigarettes, and registered in Patent Office at Washington indicating that goods were composed of two kinds of tobacco, good trade-mark in particular form, size, color, and style in which it had been registered and used, but not otherwise. *Kinney v. Allen*, 1 Hughes 106.

NOTE. — This should properly be a case for unfair trade.

"The illustration of a boy in a position indicating suffering from cramps," good trade-mark for cramp-cure medicine. *L. H. Harris Drug Co. v. Stucky*, 46 Fed. R. 624.

Tin tags of peculiar shape, form, and size to mark tobacco long used by plaintiff before any one else adopted that style, held to be trade-marks, not as to the material tin alone, but as to the peculiar style adopted. *Lorillard v. Wight*, 15 Fed. R. 383.

Figure of a crown a valid trade-mark for paints. *Smith v. Reynolds*, 10 Blatchf. 100.

"There is nothing in the law or in public policy opposed to the registration of Masonic or other society symbols as trade-marks," overruling *Tolle's appeal*, 2 O. G. 415. *Thomas' appeal*, 14 O. G. 821.

**G. Not necessarily disclosing on its face the origin of the goods, affording by association a ready means of recognition of their origin.**

"The trade-mark must therefore be distinctive in its original signification pointing to the origin of the article, or it must have become such by association." *D. & H. Canal Co. v. Clark*, 13 Wall. 311.

“The position taken by Upton in his work on trade-marks, that the trade-mark must show either the owner’s name or place of business, or both, I believe, is sustained neither by reason nor by the decisions of the courts.” *Dawes & Farning*, 1 O. G. 27.

“It is of course no fatal objection to the validity of a trade-mark that it does not include the name of the manufacturer or producer.” *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 91 Fed. R. 376.

“It is not necessary that a trade-mark should on its face show the origin, manufacture, or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin, etc.” *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651.

“Eureka” good trade-mark in “Eureka Ammoniated Bone Superphosphate of Lime,” but not the five following words. “But it was argued the name adopted by the complainants did not sufficiently indicate origin and ownership to be regarded as a trade-mark. This was a mistake. It served to distinguish the complainants’ manufacture quite as effectively as names ever serve to distinguish things. *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

It is not essential that a trade-mark should indicate name and address of the manufacturer and seller of articles. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946.

“La Favorita,” on flour. “The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification.” *Menendez v. Holt*, 128 U. S. 514.

“When the mark has become recognized by purchasers as a distinctive designation of a particular maker, manufacturer, or seller of a certain quality of goods, it will be sufficient indication of the origin or ownership, within the rule requisite to its protection as such, although purchasers may not, from the work or otherwise, be able to tell who is the particular maker or seller of the article.” *People v. Fisher*, 3 N. Y. Supp. 786; 50 Hun, 552.

“A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied.” *Stachelberg v. Ponce*, 23 Fed. R. 430.



**G. (1) A word in a foreign language may be a valid trade-mark.**  
 "La Favorita," good trade-mark on flour. *Menendez v. Holt*,  
 128 U. S. 514.

## **2. Affixed.**

**A. To be protected in the courts as a trade-mark, a sign should be affixed by imprint on the merchandise which it serves to designate.**

See I. 1.

"That it must be attached to the article manufactured, in such a way as to be reasonably durable and visible, is also conceded. It must have a practical existence, not resting in the thought of the owner, but stamped or impressed, or attached in some way to the article itself." *Candee v. Deere*, 54 Ill. 439.

Advertising embroidery work under name "Priscilla" does not give a party a right to that name as a trade-mark, where it is not affixed to the goods. *Hartshorn v. Philbrick*, 101 O. G. 2077.

The designation of boilers as "Hazelton" in circulars and advertisements was not such a use as would constitute a trade-mark. "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity." *Hazelton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494.

"What is it," used in advertising certain candy, not a trade-mark because not affixed. "A trade-mark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself." *Oakes v. St. Louis Candy Co.*, 146 Mo. 391.

The use of words "Yorkshire Relish" on packing cases was not such a use as would indicate a trade-mark or other than as a description of the contents. *Powell v. Birmingham Vinegar Brewery Co.*, 66 L. J. Ch. 763.

"Hero" and "Heroine" stamped on glass jars, good affixation. *Rowley v. Houghton*, 2 Brew. 303.

Trade-marks, properly so called, consist of some description or device in some way or other affixed to the article sold, and that description or device may be either affixed to, or impressed upon the goods themselves by means of a stamp, or an adhesive label or ticket, or it may be made to adhere to an envelope or case containing them. *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 434.

“Bell Treble” would have been good trade-mark on pianos if affixed, and not simply used in advertisements. *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305.

“From this it will be seen that it is of no consequence whatever who was first to suggest and urge the adoption of the trade-mark; but the point is who was first to actually adopt and use the same for the purpose of indicating the ownership or proprietorship of the articles to which the mark is applied.” *Swift v. Peters*, 11 O. G. 1110.

**B. Or, if that is not feasible, on the boxes, bags, or receptacles.**

Where a standing female figure clothed in a tight-fitting garment with uplifted arms holding aloft a scroll, had been shown on pictures and catalogues, placed in boxes of knit goods, and used on posters and in advertisements during several years, there was a sufficient association of the mark claimed as a trade-mark, although it was not actually affixed. *Hay & Todd Mfg. Co. v. Querns Bros.*, 86 O. G. 1323.

Dome printed on boxes or impressed on blocks of lead, sufficiently affixed. *In re James's Trade Mark*, L. R. 33 Ch. D. 392; L. R. 31 Ch. D. 340.

The use of trade-mark of figure of a lady and a bear as applied to furs on wrapping paper or boxes containing the goods, a sufficient affixation. *Jay v. Ludler*, 40 Ch. D. 649.

“M. & C.” with figure of a star, all inclosed in a ring on the bottom of a champagne cork, is a good trade-mark; and the affixation is sufficient, although the mark is not seen till the cork is withdrawn. *Moet v. Pickering*, L. R. 6 Ch. D. 770.

The stamping of a trade-mark on the inside of a cork of wine bottle sufficient affixation. *Richards v. Butcher*, L. R. 2 Ch. D. (1891) 522.

“Parabola,” a valid trade-mark on needles, affixed by printing on the package. *Roberts v. Sheldon*, 8 Biss. 398.

“Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, where there are liquids, upon which of course you cannot put a mark, and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade-marks, whether affixed in the shape of a label on a bottle of liquid or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars or

the string which encircles them, they are in some way or other attached to the goods, and go along with the goods on sale." *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. D. 434.

"Of course, in some cases, the work of manufacture itself which is to be thus distinguished cannot receive the mark, as would be the case in respect of a powder or liquid which is advertised or offered for sale. But, in such instances, the package or bottle containing the article can receive, and, as far as we are able to see, always has received, the mark in which a property is claimed." *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305.

"It is essential that the trade-mark the use of which is claimed by any party shall be connected with the articles of sale; of course not necessarily connected by its own nature with the articles, but connected by the act of the party, as, for instance, placing it as a label on his goods which are sold, or advertising his goods in connection with it." *Wheeler v. Johnston*, L. R., 3 Ir. 284.

### 3. By a proprietor.

**A. A manufacturer, a middleman, or dealer may have a trade-mark to designate his merchandise.**

"The meaning and use of a trade-mark is, that some person dealing in goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that." *Ford v. Foster*, L. R. 7 Ch. App. 611, note; 27 L. T. S. 219; 20 W. R. 311; 41 L. J. Ch. 682.

A dealer in soup preparations which were made up for him in Paris protected in use of a label. "It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached." *Godillot v. Harris*, 81 N. Y. 263.

"La Favorita," good trade-mark of dealers in flour.

"There is no merit in the proposition that the complainants' trade-mark cannot be sustained for the reason that the flour is not manufactured by them. The proof is uncontradicted that selection and classification require skill, judgment, and expert knowledge, and add value and reputation to the flour when made by those in whom purchasers have confidence. The case of

*Godillot v. Harris*, 81 N. Y. 267, seems conclusive upon this point," *Holt v. Menendez*, 23 Fed. R. 869. Aff'd 128 U. S. 514.

"A corporation is entitled to have its trade-mark as well as a private individual, and may sue for its infringement." *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946.

"Such a proprietor, if he owns or controls the goods which he exposes to sale, is entitled to the exclusive use of any trade-mark adopted and applied by him to the goods, to distinguish them as being of a particular manufacture and quality, even though he is not the manufacturer, and the name of the real manufacturer is used as part of the device." *McLean v. Fleming*, 96 U. S. 245.

A party may be entitled to a trade-mark in a name which he uses arbitrarily either on articles which he manufactures or has manufactured for him. *Selchow v. Baker*, 93 N. Y. 59.

"The party, then, whose interests are directly affected by the wrong, is entitled to proceed in his own name to secure its suppression; and the person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark, as the manufacturer himself." *Walton v. Crowley*, 3 Blatchf. 440.

But see following cases.

A carpet cleaner is not such a trade or manufacture as to be entitled to a trade-mark, as there are no goods to which it could be affixed. *Hankinson*, 8 O. G. 89.

A trade-mark cannot be registered for the real estate business, and printing the mark on cards and business stationery is not affixation within the meaning of the law. *Roy & Nourse, ex parte*, 54 O. G. 1267.

"The proposition that an author can protect his writings by a trade-mark is unique and, at first blush, seems somewhat startling. It is certainly offensive to the æsthetic and poetic taste to place such poems as the 'Recessional' and 'The Last Chantey' in the same category with pills and soap, to be dealt in as so much merchandise. We do not intend to decide that such a trade-mark is sanctioned by the law, but even if it were, it is manifest that the mark does not lose its characteristics because used to designate an unusual variety of 'goods.' In other words, the author, assuming that he may have such protection, must comply with the law if he would have a valid trade-mark." *Kipling v. G. P. Putnam's Sons*, 120 Fed. R. 631, 635.

(But see: XI. 12.) 267.

**B. A voluntary association of laborers, or of manufacturers, having no property interest as an association in goods of their manufacture is not entitled to a trade-mark on such goods.**

Letters "A.-A. L." standing for Anti-Adulteration League, a voluntary association of several manufacturers using said mark on wheat flour, each on its own product and not as an association making, dealing in, or selling wheat flour, cannot be granted registration to such voluntary association, as it is not an "owner" within the meaning of the statute. *Anti-Adulteration League, ex parte*, 86 O. G. 1803.

A symbol adopted by an association of local unions of cigar-makers to show that the person or persons who use it are members of that union is not a trade-mark in the legal sense of the word. *Cigar-makers' Protective Union v. Conhaim*, 40 Minn. 243.

"The organization that devised, registered, and owns the label is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used. The second question would seem to go with the first. Trade-marks are provided for by the Act of Congress of July 8th, 1870. . . . This provision of the act clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business, and its appropriation to a particular 'class of merchandise' produced or sold by the parties making the registration." *McVey v. Brendel*, 144 Pa. St. 235.

A label used by parties to indicate membership in a voluntary association lacks the essential characteristics of a trade-mark. It does not indicate origin and there is no exclusive right to its use. It indicates membership, and is used by many persons unknown to each other. *Weener v. Brayton*, 152 Mass. 101.

*Contra*: "The fact that their work is not performed under a single employment, but under many different employers in as many widely separated shops, may go to the value of the mark in its application to the cigars made by them, rather than to the right to its protection as such. *People v. Fisher*, 50 Hun, 552.

*But see*: "The case at bar differs from those cases [*Cigar-makers Protective Union v. Conhaim*, 40 Minn. 246, and *Schneider v. Williams*, 44 N. J. Eq. 391], however, in the respect before mentioned, that complainant is himself the manufacturer of cigars, and, according to the averments of the bill, has built up a profitable trade by the use of the union label, which trade has

been . . . damaged by the fraudulent acts of the defendants." *Carson v. Ury*, 39 Fed. R. 777.

Complainant was a member of an unincorporated voluntary association of cigar-makers. As a manufacturer he had used labels of the association, and he averred in his bill that his trade was injured by the fraudulent use of labels by the defendant. On the ground, not of trade-marks, but of fraud in unfair trade, he had stated a-ground for relief. Demurrer overruled. *Carson v. Ury*, 39 Fed. R. 777.

*But see*: An association of manufacturers using in common a name as a trade designation, as "California," entitled to be protected in the name on ground of fraud. *California Fruit Cannery Ass'n v. Myer*, 104 Fed. R. 82.

(1) *Except it may be given by statute.*

Protection may be afforded the label of an unincorporated trade union of voluntary members under c. 462 of 1895, which extends protection to label of "any person, association, or union." *Tracy v. Banker*, 170 Mass. 266.

**C.** The right to affix or to use a distinguishing mark on merchandise which may be handled by a public official or dealt in by a merchant, does not thereby necessarily give to such a party a right to use such a mark as his own trade-mark.

See XVI. 2. 337. *Stewart v. Einstein*, 64 O. G. 1533.

An official inspector of fish, packed by him in his business, with his official brand, does not thereby gain a private right in the brand as a trade-mark. *Chase v. Mayo*, 121 Mass. 343.

A dealer furnishing a label for a cigar manufacturer to put on boxes of cigars for him, with manufacturer's name on the label, as a trade-mark, in the absence of special agreement which will enable him to enjoin use by manufacturer on other cigars, has no right in label as a trade-mark. *Hirsch v. Jonas*, 3 Ch. D. 584.

"The defendants were simply the servants of the company during the period covered by the agreement. The transfer of the wood-cuts to the latter was simply to enable them to place the labels upon the pomade manufactured by them under the company's supervision, and was not intended to, and did not have the effect of transferring to the defendants any property in the trade-mark. In fact, the defendants by their own acts after-

ward acknowledged the company's continuing ownership and right to use the trade-mark." *Lockwood v. Bostwick*, 2 Daly, 521.

A party who has merely an interest in certain sewing machines which bear the trade-mark "National" does not by proof of that fact alone establish an interest in the trade-mark. *New Home Sewing Machine Co., ex parte*, 107 O. G. 2529.

#### 4. To his goods.

**Goods may be (A) a manufactured product, or it may be (B) a natural product of a certain locality limited by nature, or by monopoly.**

##### A. A manufactured product.

###### (1) Goods, wares, and merchandise.

See II. 1 A (1). S.

##### B. Or it may be a natural product of a certain locality.

###### (1) Mineral springs.

See III. 2 D., 68. VIII. 1 B. (2). 157. II. 1 A. (1) S, "Hygeia." City of Carlsbad had long prepared, from a spring in that city of which it had exclusive right, a product called "Carlsbad Sprudel Salts;" held that respondent without the authority of complainant could not label a preparation not derived from the genuine springs "Improved Effervescent Carlsbad Powder." (The court, without specifically deciding on question of trade-mark or trade name in Carlsbad, held that complainant had exclusive right to name "Carlsbad" as applied to mineral waters there drawn.) *City of Carlsbad v. Kutnow*, 71 Fed. R. 167. Affirming 68 Fed. R. 794.

Complainant for many years sole owner of a mineral spring from which it made salts called "Carlsbad Sprudel," entitled to injunction restraining respondent, a corporation in Chicago, from using on salts chemically similar, the name "Carlsbad Sprudel," or "Carlsbad Salts," and using name "Carlsbad" as designation of respondent's salts. *City of Carlsbad v. W. T. Thacker & Co.*, 57 Fed. R. 18.

"Congress Water," and "Congress Spring Water," valid trade-marks as applied to water from spring discovered 1792 and

named by a member of Congress "Congress Spring"; and since 1825 the name applied to water; and from 1865 for about five years applied by parties who bought the spring without special mention of good-will or trade-mark. Protected against parties who applied name to water from High Rock Spring. *Congress & Empire Spring Co. v. The High Rock Congress Spring Co.*, 45 N. Y. 291, reversing 57 Barb. 526.

Plaintiff owner of mineral spring whose water was sold as "Clysmic Water," contracted with defendant that he was to have sole right during a series of years to sell that water. Although defendant had been the first to use the name, held, that during the contract he could not use the name "Clysmic," on mineral waters except from the spring of the plaintiff. *Hill v. Lockwood*, 32 Fed. R. 389.

"Limiting this decision, as we do, to an adjudication of the rights of the complainant and the defendant Lockwood during the continuance of the contract relations subsisting between them, we must hold that the name 'Clysmic,' became affixed and appurtenant to the complainant's spring, as indicating the source of the water known to the public as 'Clysmic Water,' and that the complainant cannot be deprived, in the manner attempted by the defendant, of the advantage which has accrued to her, as the purchaser of the spring, from such designation." *Hill v. Lockwood*, 32 Fed. R. 389.

"It may seem hard to deprive a man of the right to use a picture or an engraving of a natural object on his own premises as he sees fit in advertising spring water coming from a spring on the same premises; but if the owner of springs on lands formerly constituting part of the same premises has appropriated such picture as his trade-mark and uses it without objection, it may be he is to be protected, even as against the owner of the object itself." *Virginia Hot Springs Co. v. Hegeman*, 138 Fed. R. 855, 859.

"Cromac Springs," held good trade-mark on mineral water from springs in Cromac District. *Wheeler v. Johnston*, L. R. 3 Ir. 284.

NOTE. — The later tendency has been to consider the geographical names of mineral spring waters as trade names or as deserving protection on the ground of unfair trade. See "Carlsbad" and "Vichy" cases in VIII. 1 B. (2). 157.



**(2) There can be no valid trade-mark on natural products whose cultivation is open to all the world, deriving their value from innate qualities and not from the skill or ingenuity of man.**

There can be no trade-mark or trade name on a grape vine. Sale of seeds, plants, or vines carries with it right to the natural increase. "Neither the common law nor the statutes relating to trade-mark extend the protection of trade names to things which are valued more for their natural powers of reproduction and increase than for any other qualities." *Hoyt v. J. T. Lovett Co.*, 71 Fed R. 173.

#### **5. With the intention of designating their origin.**

**A sign, in order to become a valid trade-mark, should be used with the intention and for the purpose of designating the origin of goods; if used for another purpose it cannot be a valid trade-mark.**

See IV. 6. 100.

See I. 1.

"Stamps or trade-marks of the kind are employed to point to the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased." *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51.

"The object of the trade-mark is to indicate, either by its own meaning, or by association, the origin or ownership of the article to which it is applied." *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51.

"These cases [cited] establish the following general propositions: (1) that to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others." *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

"The function of a trade-mark is to indicate to the public the

origin, manufacturer or ownership of articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with articles bearing it." *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R., 651.

"A trade-mark is defined to be the name, symbol, figure, letter, form, or device, used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry, or enterprise." *Larrabee v. Lewis*, 67 Ga. 561.

"Stamps or trade-marks of the kind are employed to point out the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or give notice to the public who is the producer, or where it may be purchased." *McLean v. Fleming*, 96 U. S. 245-254.

"Royal" would not be a good trade-mark if used to designate grade or quality, but would if used to designate entire output of a factory and had come to designate origin. *Raymond v. Royal Baking Powder Co.*, 85 Fed. R. 231.

**A. The registration of a sign affixed to merchandise is good evidence of intention to claim it as a trade-mark.**

See XVI. 2. 336. *Richter v. Reynolds*, 59 Fed. 577.

Registration of word "celluloid" as a trade-mark, evidence of intention to use it as a trade-mark. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. R. 94.

Registration of "Puck" for cigars under law of 1874 subsequently declared unconstitutional. Evidence that at that time registrants claimed said word as a trade-mark. *Jacoby v. Lopez*, 23 O. G. 342.

The registration of a sign at the U. S. Patent Office and its use thereafter for four years considered as evidence of acquisition of trade-mark and right to protection. *Kinney v. Allen*, 1 Hughes, 106.

Registration is best evidence of intention to adopt trade-mark.

Parties who employ word in an experimental way and do not actually adopt it as a trade-mark cannot claim it against one who actually adopts and uses it. *Sternberger v. Thalheimer*, 3 O. G. 120.

**6. By a use thereon.**

**A sign, in order to become a legal trade-mark at common law, should be actually used on merchandise for such time and in such manner as would show an intention to acquire a trade-mark.**

See IV. 6 A. 100; IV. 2. 89. *Filkins v. Blackman*, 13 Blatchf. 440, and other cases there cited; II. 2. 20.

“Any name, symbol, letter, figure, or device adopted by the persons manufacturing or selling goods, and used or put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade-mark.” *Derringer v. Plute*, 29 Calif. 292.

“It goes without saying that a trade-mark or trade-name can be acquired only by adoption accompanied with actual use.” *Kathreiner's Malz Kaffee Fab. v. Pastor Kneipp Med. Co.*, 82 Fed. R. 321.

### III. WHAT IS NOT A VALID TRADE-MARK.

(1) A descriptive sign, (2) a geographical sign, (3) the proper name of a private party, (4) a form or material substance, or shape, (5) a color, (6) a style of dressing goods, (7 A) a label, (B) advertisement, (C) or mark for a useful or ornamental purpose and not distinctive, is not the subject of a valid trade-mark.

#### 1. A descriptive sign.

A. A sign describing the purposes of the article to which it is applied, the grade or quality of the manufacture, its essential characteristics, or the ingredients of which it is composed is not a valid trade-mark.

“The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article to which they are affixed; but he has no right to an exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality.” *Amoskeag Mfgy. Co. v. Spear*, 2 Sandf. 599.

“But this is certain, that names, whether they of themselves do or do not indicate grade or quality, cannot be employed to designate grade or quality of goods, or be exclusively appropriated as valid trade-marks.” *Beadleston v. Cooke Brewing Co.*, 74 Fed. R. 229.

“No principle of the law of trade-marks is more familiar than that which denies protection to any word or name which is descriptive of the qualities, ingredients, or characteristics of the article to which it is applied. An exclusive right to the use of such a word as a trade-mark, when applied to a particular article or class of articles, cannot be acquired by the prior appropriation of it, because all persons who are entitled to produce and vend similar articles are entitled to describe them, and to employ any appropriate terms for that purpose.” *Bennett v. McKinley*, 65 Fed. R. 505.

“If the law permitted words which are essentially descriptive of kind, quality, or properties to be appropriated by a merchant or manufacturer to advance the sale of his own goods, the English language would be speedily impoverished in these days when competition in all lines of trade and manufacture is both selfish and keen.” *Brennan v. Emery-Bird-Thayer Dry Goods Co.*, 108 Fed. R. 624.

The test as to whether a mark is descriptive or not “is to consider whether the public will on the whole regard the mark as an arbitrary symbol denoting only the origin and ownership of the goods, or as an advertisement of some desirable quality of the goods themselves.” *Brigham, ex parte*, 20 O. G. 891.

“The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark.” *Brown Chemical Co. v. Myer*, 139 U. S. 540; Affirming 31 Fed. R. 453.

“No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection.” *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311.

“Nor is the question, whether the name used as a trade-mark will convey an exact notion of how to compound an article, so that one reading it will be able to make a like article. If the necessary effect is to inform the reader or hearer of the general characteristics and composition of the thing, it is a name which may be used, with equal truth, by any one who has made and offers for sale a thing compounded of the same ingredients, and who desires to express to the public the same facts.” *Caswell v. Davis*, 58 N. Y. 223.

“Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word ‘flour’ as his trade-mark, and prevent others from applying it to their packages of flour.” *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. R. 94.

“The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be

merely descriptive of the style, quality, or character of the goods themselves." *Pilley v. Passett*, 44 Mo. 168; 100 Am. Dec. 275.

"A word that is well known in the language and which is the name of an article, or words that merely indicate the quality of an article, cannot, it seems, be so exclusively appropriated as a trade-mark." *Gillott v. Esterbrook*, 47 Barb. 455; 48 N. Y. 374.

A mere general description, by words in common use, of a kind of article, or of its nature or qualities cannot of itself be the subject of a trade-mark. *Gilman v. Hunnewell*, 122 Mass. 139.

"No one has the right to appropriate to his own exclusive use a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. It is because of this principle that a trade-mark cannot be acquired by the adoption of a word which is merely descriptive of the quality, ingredients, or characteristics of a commodity." *Humphreys Homeopathic Medicine Co. v. Hilton*, 60 Fed. R. 756.

"No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself." *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. R. 175.

"Nothing is better settled than that an exclusive right to the use of the words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired." *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537.

"Words and names having a known or established signification cannot within the limits of such specification be exclusively appropriated to the advancement of the business purposes of any particular individual, firm or country." *Newman v. Alvord*, 49 Barb. 588.

"It will not do to say that any one manufacturer may exclude all others in the use of labels or marks which, differing in terms and characteristics, are honestly designed and used to obtain the same advantages. In other words, one cannot make an exclusive appropriation of words or marks which he puts upon his goods, and which simply indicate their superiority or popularity, or universality in use, and no more." *Proctor & Gamble Co. v. Globe Refining Co.*, 92 Fed. R. 357.

"Acid phosphate," descriptive.

"It is not to be gainsaid that as a complete and exhaustive indication of all that the preparation contains the phrase 'acid

phosphate' is inexact. It does not indicate that it is a solution, which it is, while a proper acid phosphate is a solid until it is dissolved. It does not indicate the character of the acid, and it does not indicate what base or bases have been used. But this criticism is true of most words or phrases in common use. . . . The true test, it appears to me, must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended. If they are thus reasonably descriptive, and not arbitrary, they cannot be appropriated from general use, and become the exclusive property of any one." *Rumford Chemical Works v. Muth*, 35 Fed. R. 524, 526, 527.

(1) *A descriptive word.*

"Imperial," one of several names to designate grades of beer, descriptive and not good trade-mark. *Beadleston v. Cooke Brewing Co.*, 74 Fed. R. 229.

"It goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark." *Brown Chemical Co. v. Myer*, 31 Fed. R. 453; Aff'd 139 U. S. 540.

"The word 'cresylic,' when applied to distinguish an ointment made of soap and the article known in commerce as cresylic acid, is descriptive of the nature and quality of the compound." *Carbolic Soap Co. v. Thompson*, 25 Fed. R. 625.

(a) *Examples.*

See also cases under III. 2 A. 61.

"Absorbine," a preparation for absorbing swellings. *Christy v. Tipper*, L. R. 1 Ch. 1 (1905).

"Acid Phosphate," drug. *Rumford Chemical Works v. Muth*, 35 Fed. R. 524.

"Air brush," machine for distributing pigments. *Air Brush Mfg. Co. v. Thayer*, 84 Fed. R. 640.

"Air Cell," fireproofing material. *N. Y. Asbestos Mfg. Co. v. N. Y. Fire Proof Covering Co.*, 62 N. Y. Supp. 339; *N. Y. Asbestos Mfg. Co. v. Ambler Asbestos Air Cell Covering Co.*, 99 Fed. R. 85.

"Aluminum," washboard, etc. *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. R. 281.

"Apple and Honey," medicine. *Heublein, ex parte*, 87 O. G. 179.

"Bank," paper. *Pirie v. Goodall*, L. R. 1 Ch. D. 35 (1892).

"Barber's Model," razors. *Krusius, ex parte*, 82 O. G. 1687.

"Beaver Brand," cutlery and edge tools (but "Beaver" alone would be good). *F. P. May & Co., ex parte*, 111 O. G. 2223.

"Best Soap," soap. *Babbitt v. Brown*, 23 N. Y. Supp. 25.

"Best" flour. *Guenther Milling Co., ex parte*, 86 O. G. 1986.

"Blue Label," canned soups. *Curtice Bros., ex parte*, 85 O. G. 610.

"Borax," soap. *Dreydoppel v. Young*, 14 Phil. 226.

"Bourbon," whiskey. *Hardy v. Cutter*, 3 O. G. 468.

"Bromo-quinine," drug. *Grove, ex parte*, 67 O. G. 1447.

"Bromo Soda Mint" drug. *Spayd, ex parte*, 86 O. G. 631.

"Cachemire Milano," black silk. *Warburg, in re*, 13 O. G. 44.

"Cantripum," clothing. *Hooker, Corser and Mitchell Co., ex parte*, 108 O. G. 289.

"Casceara," drug. *Sterling Remedy Co. v. Gorey*, 110 Fed. R. 372.

"Catarrhal Jelly," jelly-like remedy for catarrh. *Kenyon, ex parte*, 100 O. G. 2383.

"Centennial" medals. *Hentell v. Viney*, Fed. Cas. 6158.

"Chill Stop," chills and fever medicine. *Hance Bros., ex parte*, 87 O. G. 698.

"Cherry Pectoral," medicine. *Ayers v. Rushton*, 7 Daly, 9.

"Cellular," clothing of cellular construction. *Cellular Clothing Co. v. Maxton*, 68 L. J. P. C. n. s. 72.

"Clinton Hematite Red," paint. *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.*, 50 N. Y. Supp. 437.

"Computing" scales. *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. R. 965.

"Crack proof," rubber goods. *Goodyear Rubber Co., in re*, 11 O. G. 1062.

"Cresylic" from cresylic acid. *Carbolic Soap Co. v. Thompson*, 25 Fed. R. 625.

"Croup Tincture," medicine. *Roach, in re*, 10 O. G. 333.

"Crystalline" artificial stones. *Kipling, ex parte*, 24 O. G. 899.

"Crystallized Eggs," egg meat preserved by secret process. *Lamont v. Leedy*, 88 Fed. R. 72.

"Desiccated," codfish. *Town v. Stetson*, 3 Daly 53; 5 Abb. Pr. n. s. 218.

"Druggists Sundries," cigars. *Cohn, ex parte*, 16 O. G. 680.



"Dry Monopole," champagne. *Richards v. Butcher*, L. R. 2 Ch. D. 522 (1891).

"Egg," macaroni. *Dole Brothers, in re*, 12 O. G. 939.

"Elastic Seam" drawers, having elastic material at seams. *Scriven v. North*, 124 Fed. R. 894.

"Electric velveteen," cloth. *Leaf, in re*, 34 Ch. D. 623.

"Emolliolorum" preparation for softening leather. *Talbot, in re*, 63 L. J. Ch. 264.

"Essence of Anchovies," sauce. *Burgess v. Burgess*, 3 De G. M. & G. 896; 17 Jur. 292; 22 L. J. Ch. 675; 21 L. T. 53.

"Evaporated," food products. *Alden, ex parte*, 15 O. G. 389.

"Ever-ready" coffee mills. *The Bronson Co., ex parte*, 87 O. G. 1782; *Bronson Co. v. Duell*, 93 O. G. 1491.

"Everybody's Soap," soap. *Proctor & Gumble Co. v. Globe Refining Co.*, 92 Fed. R. 357.

"Famous," cooking stoves. *Brand Store Co., ex parte*, 62 O. G. 588.

"Favorite," stationery. *Cooke & Cobb Co. v. Miller*, 65 N. Y. Supp. 730; 53 App. D. 120.

"Felt-loss," sweat pads for horses. *McClain, ex parte*, 99 O. G. 2101.

"Elixir of Calisaya Bark," drugs. *Caswell v. Davis*, 58 N. Y. 223.

"Fire-board," fire-proofing material. *New York Asbestos Mfg. Co. v. Ambler Asbestos Air-cell Covering Co.*, 99 Fed. R. 85.

"Fire Proof Oil," oil. *Scott v. Standard Oil Co.*, 106 Ala. 475.

"Fitmeeasy," corsets, waists and underwear. *Miller, ex parte*, 95 O. G. 1452.

"Fruit," vinegar. *Alden v. Gross*, 25 Mo. App. 123.

"Fulleut," clothing. *Miami Clothing Mfg. Co., ex parte*, 100 O. G. 1975.

"Gem," air gun. *Arbenz Application, in re*, 35 Ch. D. 248.

"Gold Label," bread. *Stuhmer, ex parte*, 86 O. G. 181.

"Gold Leaf," flour. *Partlo v. Todd*, 17 Can. Sup. Ct. 196.

"Gold Medal," saleratus. The term indicates that at some exhibition a gold medal has been awarded proprietor. *Taylor v. Gillies*, 59 N. Y. 331.

"Guaranteed," corsets. *Symington v. Footman*, 56 L. T. N. S. 696.

"Gyrator," bolting machine having gyratory motion. *Wolf, ex parte*, 80 O. G. 1271.

"Health," candy. *Geron, ex parte*, 108 O. G. 288.

"Holophane," pressed glass ware for illuminating purposes. *Holophane Glass Co., ex parte*, 100 O. G. 450.

"Homeopathic Specifics," medicines. *Humphrey's Specific Homeopathic Med. Co. v. Wenz*, 14 Fed. R. 250.

"Hygienic," underwear. *Juros Hygienic Underwear Co. v. Fleece Hygienic Under. Co.*, 65 Fed. R. 424.

"Imperial," beer (dissenting opinion). *Beadleston v. Cooke Brewing Co.*, 74 Fed. R. 229.

"Imperial," oysters. *Whistable Oyster Fishery Co. v. Hayling Fisheries*, 17 R. P. C. 461.

"Indurated Fiber" wood pulp wares. *Indurated Fiber Co. v. Amoskeag Indurated Fiber Ware Co.*, 37 Fed. R. 695.

"Instantaneous," tapioca. *Bennett v. McKinley*, 65 Fed. R. 505.

"Iron Bitters," medicine. *Brown Chemical Co. v. Myer*, 31 Fed. R. 453; 139 U. S. 540; *Brown Chemical Co. v. Sterns*, 37 Fed. R. 360.

"Iron Stone," drain pipes. *Ruder, in re*, 13 O. G. 596.

"Jubilee," paper made about jubilee year. *Towgood v. Pirie*, 56 L. T. 394.

"Just Right," overcoats. *F. B. Q. Clothing Co., ex parte*, 119 O. G. 2236.

"Kas-K-Rilla," medicine. *Seager, ex parte*, 97 O. G. 749.

"Kid Nee Kure," kidney and liver medicine. *Henderson, ex parte*, 85 O. G. 453.

"Kidney & Liver Bitters," medicine. *Spicker v. Losh*, 102 Calif. 38.

"Kleanwell," massage sponges. *Smith, ex parte*, 110 O. G. 601.

"Lotion," lotion. *Star Lotion Remedy Co., ex parte*, 100 O. G. 2603.

"Malted Milk," infant food preparation. *Horlick's Food Co., ex parte*, 84 O. G. 1870.

"Malt Myrrh," malt liquors. *Barrett & Barrett, ex parte*, 100 O. G. 1976.

"Masonic," cigars. *Smith, ex parte*, 16 O. G. 764.

"Metallic Clinton," paint. *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.*, 50 N. Y. Supp. 437.

"Microbe Killer," medicine. *Alff v. Radam*, 77 Tex. 530; *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122.

"Minute," coffee. *Whitman Grocery Co., ex parte*, 100 O. G. 1763.

"Monobrut," champagne. *Vignier's Trade Mark*, 61 L. T. N. s. 495.

"National," newspaper. *Snowden v. Noah*, Hopkins' Ch. R. 347.

"National Sperm," candles. *Price's Patent Candle Co.*, 51 L. T. N. S. 653.

"Native Guano," fertilizer. *Native Guano Co. v. Sewage Manure Co.*, 8 R. P. C. 125.

"Nevers-Tick," lubricants. *Woolworth, ex parte*, 100 O. G. 1976.

"Nickel Soap," soap, the word "soap" being an essential part of the mark; but "nickel" alone is registrable. *Butler, ex parte*, 87 O. G. 1781.

"Nourishing London," stout. *Ruggett v. Findlater*, L. R. 17 Eq. 29.

"Night Blooming Cereus," perfume. *Phalon v. Wright*, 5 Phil. 464.

"No-Rip," harness pad. *Crescent Mfg. Co., ex parte*, 97 O. G. 750.

"Old London Dock," gin. *Binninger v. Wattles*, 28 How. Pr. 206.

"Ox Blood," paints. *Jewell & Vinson*, 106 O. G. 1242.

"Pain-Ease," medicine. *Evans & Shepard, ex parte*, 96 O. G. 425.

"Pain-Killer," medicine. *Davis v. Harbord*, 63 L. T. N. S. 389; 60 L. J. Ch. 16; 15 App. Cas. 316. *Contra: Davis v. Kendall*, 2 R. I. 566; *Davis v. Kennedy*, 13 Grant Ch. U. C. 523.

"Pancreopepsine," compound of pancreatin and pepsin. *Searle & Hereth Co. v. Warner*, 112 Fed. R. 674.

"Parchment," paper. *Pirie v. Goodall*, L. R. 1 Ch. D. 35 (1892).

"Pastry," baking powder. *A. B. Barnum Co., ex parte*, 102 O. G. 227.

"Pepsin-Punch," non alcoholic beverage. *Birkhead, ex parte*, 97 O. G. 749.

"Perfect Face Paste," medicinal compound. *Rull, ex parte*, 85 O. G. 453.

"Pictorial," almanac. *Spottiswoode v. Clark*, 10 Jur. 1043.

"Pony," plows. *Avery v. Meikle*, 81 Ken. 73.

"Prize Medal 1862," pickles. *Batty v. Hill*, 1 H. & M. 264; 8 L. T. N. S. 791; 11 W. R. 745.

"Puddine," ingredients for pudding. *Clotworthy v. Schepp*, 42 Fed. R. 62.

"Prime Leaf," lard. *Popham v. Cole*, 66 N. Y. 69.

"Perfection," candy. *St. Louis Candy Co., ex parte*, 101 O. G. 220.

"Purity," oleomargarine. *Capital City Dairy Co., ex parte*, 83 O. G. 295.

"Purity," peanuts. *C. M. Taylor & Co., ex parte*, 114 O. G. 972.

"Radium radia," liniment. *Mitchell, ex parte*, 113 O. G. 1970.

"Reversi," a game involving the principles of reversing. *Waterman v. Ayres*, 39 Ch. D. 29.

"Rose," ingredients for pudding. *Clotworthy v. Schepp*, 42 Fed. R. 62.

"Royal," best grade of baking powder. *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331; but see *Royal Baking Powder Co. v. Raymond*, 70 Fed. R. 376. Aff'd, 85 Fed. R. 231.

"Rubberback," billiard-cloth. *Goodman-Leuvitt-Yatter Co., ex parte*, 107 O. G. 834.

"Rye & Rock," mixture of rock candy and whiskey. *Van Beil v. Prescott*, 82 N. Y. 630.

"Safety," explosive caps. *Safety Powder Co., ex parte*, 16 O. G. 136.

"Sanitary," water filter. *Atkins, in re*, 3 R. P. C. 164.

"Sarsaparilla & Iron," medicine. *Schmidt v. Brieg*, 100 Calif. 672.

"Satin," shoe polish. *Brigham, ex parte*, 20 O. G. 891.

"Silicon," powder. *Electro-Silicon Co. v. Levy*, 59 How. Pr. 469.

"Smith's Medicated Prunes," drugs. *Smith, ex parte*, 16 O. G. 679.

"Snowflake," biscuits or crackers, indicating that they are white, light, and pure. *Larrabee v. Lewis*, 67 Ga. 561.

"Somatose," meat extract. *Farbenfabriken's Trade-Mark*, 70 L. T. N. s. 186.

"Special," base ball. *Kiffe, ex parte*, 110 O. G. 604.

"Splendid," flour. *Stokes, ex parte*, 64 O. G. 437.

"Standard," scales. *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. R. 965.

"Standard A," cigars. *Cohn, ex parte*, 16 O. G. 680.

"Steel shod," shoes. *Brennan v. Emery-Bird Thayer Dry-goods Co.*, 99 Fed. R. 971; 108 Fed. R. 624.

"Sterling," wagon. *Abingdon Wagon Co., ex parte*, 102 O. G. 230.

"Sterling Nickel," nickel culinary ware. *Sternan, ex parte*, 112 O. G. 252.

“Straight cut,” cigarettes. *Ginter v. Kinney Tobacco Co.*, 12 Fed. R. 782.

“Sweet Opoponax of Mexico,” perfumery. *Smith v. Woodruff*, 48 Barb. 438.

“Swing,” swing socket of scythe-snath. *Thompson, ex parte*, 16 O. G. 136.

“Taffy Tolu,” chewing gum. *Colgan v. Danheiser*, 35 Fed. R. 150.

“Tasteless,” drugs. *Dick, in re*, 9 O. G. 538.

“Telegraphone,” telegraphophone. *Hutchins, ex parte*, 100 O. G. 1330.

“Timekeeper,” watches. *Strasburger, ex parte*, 20 O. G. 155.

“Toothache Gum,” medicinal preparation. *Devlin v. McLeod*, 135 Fed. R. 164.

“Trade Mark,” soap. *Babbitt v. Brown*, 23 N. Y. Supp. 25.

“Valvoline,” lubricating oil. *Leonard, in re*, 26 Ch. D. 288; *Leonard v. Wells*, 53 L. J. Ch. 233. *Contra*: *Leonard v. White’s Golden Lubricating Co.*, 38 Fed. R. 922.

“Vanilla,” ingredients for pudding. *Clotworthy v. Schepp*, 42 Fed. R. 62.

“Valvoline,” lubricating oil. *Horsburgh, in re*, 53 L. J. Ch. 237.

“Vogue,” boots and shoes. *P. W. Minor, ex parte*, 101 O. G. 2079.

“Washing Powder,” washing powder. *Falkinburg v. Lucy*, 35 Calif. 52.

“Whirling Spray,” or “Whirlspray,” syringe. *Marvel Co. v. Pearl*, 133 Fed. R. 160.

“Wine,” wine. *Brandsville Fruit Farm Co., ex parte*, 103 O. G. 660.

“1904,” coffee. *Schotten & Co., ex parte*, 105 O. G. 1532.

**(b) A compound word.**

See *ante* for examples of compound words.

**(2) A descriptive combination of words.**

“Trade-Mark Best Soap,” soap. *Babbitt v. Brown*, 23 N. Y. Supp. 25.

“Old London Dock,” gin. *Binninger v. Wattles*, 28 How. Pr. 206.

“Brooklyn White Lead,” lead, invalid trade-mark; geograph-

ical and descriptive. *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416.

“Brown’s Iron Bitters,” medicine. *Brown Chemical Co. v. Myer*, 31 Fed. R. 453.

“Complainant’s counsel does not, in express terms, assert that the words ‘Brown’s Iron Bitters,’ either singly or collectively, constitute a trade-mark. Such a proposition, if asserted, could not be maintained, as it goes without saying that the words ‘Iron Bitters’ are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark.” *Brown Chemical Co. v. Myer*, 31 Fed. R. 453. Aff’d 139 U. S. 540.

“Buffalo Pitts,” on agricultural machinery not registrable. Pitts being a surname, and Buffalo being a geographical name and part of applicant’s name. *Buffalo Pitts Co., ex parte*, 89 O. G. 2069.

“Aromatic Schiedam Schnapps,” liquor (Schiedam being place, and schnapps a kind of liquor). *Burke v. Cassin*, 45 Calif. 467; *Wolfe v. Hart*, 4 V. L. R. Eq. 125; *Wolfe v. Alsop*, 10 V. L. R. Eq. 40; 12 V. L. R. Eq. 421; *Wolfe v. Lung*, 13 V. L. R. 752. *Contra: Wolfe v. Barnett*, 24 La. Ann. 97.

“Ferro-Phosphorated Elixir of Calisaya Bark,” chemical compound. *Caswell v. Davis*, 58 N. Y. 223.

“Nor does the coupling together, in a new combination, of words which before that had been used apart, and had entered into the common or scientific vocabulary, give a right to the exclusive use of such combination, where it is indicative not of origin, maker, use and ownership alone, but also of quality and other characteristics.” *Caswell v. Davis*, 58 N. Y. 223.

A combination of words must express only origin of the article to which they are affixed, not the description, in order to be good trade-mark. *Caswell v. Davis*, 58 N. Y. 223.

“Improved Patent Gold Medal Self-Cleaning Rapid Water Filters,” water filters. *Chearin v. Walker*, 5 Ch. D. 850.

“Better than Mother’s,” mince meat. “The words clearly import that the article so marked is to be compared with some other known article, and that when so compared will be found of superior quality.” *Ervin A. Rice Co., ex parte*, 83 O. G. 1207.

“Black Package Tea,” not a distinctive appellation. *Fischer v. Blank*, 138 N. Y. 244.

“Headache Wafers,” as applied to medicine, descriptive. *Gesler v. Grieb*, 80 Wis. 21.

"The plaintiffs cannot have a trade-mark in the descriptive words 'Cough Remedy,' or in the more extended description, 'A sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption.'" *Gilman v. Hunnewell*, 122 Mass. 139.

"Chill Stop," medicine for chills and fevers.

"It is doubtless true that the arrangement of the words is somewhat different from the ordinary, and they do not express the quality in the most grammatical form. They are 'catchy' and 'slangy.' The usual order in which they would naturally be used is transposed and the phraseology is abbreviated. Still they remain descriptive as well as advertising." *Hance Bros., ex parte*, 87 O. G. 698.

"Hand Grenade Fire Extinguisher," glass vessels of fire extinguishing fluid. *Harden Star Hand Grenade Co., In re*, 55 L. J. Ch. 596; 54 L. T. N. S. 834.

"Ferrated Elixir of Bark," or "Elixir of Calisaya Bark," "Celebrated Remedy for Diarrhoea," medicine. *Hegeman v. Hegeman*, 8 Daly, 1.

"Highly Concentrated Compound Fluid Extract of Buchu," invalid. *Helmbold v. Henry T. Helmbold Mfg. Co.*, 53 How. Pr. 453.

"Celebrated Stomach Bitters," medicine.

When a new article is made, a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. *Hostetter v. Adams*, 20 Blatch. 326.

"It cannot be successfully maintained that the words 'Homeopathic Specifics,' standing alone, can be appropriated by any one as a trade-mark; they are too broad, and if allowed, would give the taker a monopoly in a school of medicine, which Hahnemann, its founder, threw open to all disciples." *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. R. 250.

"The words 'Cramp Cure' are therefore descriptive of the purpose and character of the medicine, and cannot, under the rulings, be exclusively appropriated by the manufacturer of a remedy for the disease." *L. H. Harris Drug Co. v. Stucky*, 46 Fed. R. 625.

"Parson's Purgative Pills, P. P. P.," "Johnson's American Anodyne Liniment, Established A. D. 1810," medicine. *Johnson, in re*, 2 O. G. 315.

"Braided Fixed Stars," on a particular kind of matches, descriptive.

"I understand 'fixed stars' to mean cigar lights, and the word 'braided' to indicate their having been prepared in a particular way." *Palmer's Trade-Mark*, 24 Ch. D. 504.

"Greatest value for the Money," footwear, invalid. *Parker Holmes & Co., ex parte*, 85 O. G. 287.

"Hydro-Bromo Soda Mint," medicine, invalid. *Spayd, ex parte*, 86 O. G. 631.

"No manufacturer can acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound." *Town v. Stetson*, 5 Abb. Pr. n. s. 218; 3 Daly, 53.

"Selected Shore Mackerel," as applied to fish, descriptive.

"A man cannot adopt any set of words that may happen to suit his fancy, without any reference to their purport or meaning, and then, by simply branding or otherwise placing them on every package of a commodity sold by him, acquire an exclusive right to their use as a trade-mark." *Trask Fish Co. v. Wooster*, 28 Mo. App. 408.

"Granulated Dirt Killer," soap. *Waeferling, ex parte*, 16 O. G. 764.

"Schiedam Schnapps," descriptive; Schiedam, a town in Holland, and Schnapps, German for dram.

"When a person forms a new word to designate an article made by him which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article, but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles." *Wolfe v. Goulard*, 18 How. Pr. 64.

### (3) *Descriptive letters or figures.*

See III. 1 J. 52.

Numbers "60" and "70" used by manufacturers to designate grade of nails, descriptive and not trade-marks. *American Solid Leather Button Co. v. Anthony Lovell & Co.*, 15 R. I. 338.

"A C A," on cotton tickings, "A C" standing for "Amoskeag Co." and "A" for first quality, held not a valid trade-mark. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599.

"It is immaterial whether words, or letters, or figures, or any other signs are used, if the single fact which they are used to indicate or declare, is a truth that other manufacturers or dealers



have an equal right to express and communicate." *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599.

"A. C. A.," on cotton goods representing first quality, not good trade-mark. "As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the Company. And if they do not read the name as printed, the letters are unintelligible." *Amoskeag Co. v. Trainer*, 101 U. S. 51.

Letters "A. O.," "B. O.," and "C. O.," to designate steel series, and numbers " $\frac{1}{2}$ ," "1," "2," "3," and "8," to designate cast series branded on ploughs, although known and recognized by the public are not good trade-marks. *Avery v. Meikle*, 81 Ky. 73.

The word and letter "Standard A," not registrable as a trade-mark for cigars, it indicating highest standard of quality. *Cohn, ex parte*, 16 O. G. 680.

It being customary to adopt letters and numerals on lead pencils to signify quality, numbers with fractions, as  $1\frac{1}{2}$ ,  $2\frac{1}{2}$ ,  $3\frac{1}{2}$ , cannot be registered as trade-marks. *Eagle Pencil Co., in re*, 10 O. G. 981.

Letters "L. L.," on sheetings, indicating quality, are descriptive and not a trade-mark.

"The letters have for years been understood generally as signifying grade or quality, and have been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or deception practised on the plaintiff or on the public." *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537.

Where number "27" originally used by a manufacturer to designate a certain wire mattress made according to a specification of a patent, the patent was held void, and manufacturers began to use the number so that it became descriptive of a mattress of a certain grade and style: *held*, that the number could not properly be a trade-mark. *Smith & Davis Mfg. Co. v. Smith*, 89 Fed. R. 486.

After figures "600" have been long used by manufacturers to indicate quality of oil by denoting numbers of degrees of heat for fire test, a manufacturer has no right to appropriate 600 as a trade-mark. *Vacuum Oil Co. v. Climax Refining Co.*, 129 Fed. R. 254.

*Contra*: "303," one of several marks used to designate grades of pens, protected as a legal trade-mark. *Gillett v. Esterbrook*, 47 Barb. 455. *Aff'd* 48 N. Y. 374.

*Contra*: "523," stamped on hosiery for many years to indicate a certain grade, constitutes part of a trade-mark which would be protected by injunction from infringement. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325.

*Contra*: "830," to distinguish a certain line of hosiery, protected as a trade-mark. *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707.

**(4) Descriptive symbols.**

The figure of a star and the word "star" are *publici juris* and not good trade-marks. *Dexter's Application, in re*, 2 Ch. D. (1893) 262.

On sapolio package plaintiff had picture of a human face reflected in bright pan; defendants on similar soap had figure of monkey looking at what was apparently mirror in his hand; no infringement.

"The mere idea represented by some figure, on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated in a trade-mark." *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292; reversing 23 Hun, 632; 57 How. Pr. 121.

A "representation of a barrel consisting of light and dark wood, the staves being alternately composed of each color," is not registrable as a trade-mark for flour, as it is descriptive of such a barrel of flour, but when applied to sacks of flour or barrels with staves of one color it may be arbitrary. *Halliday Bros., ex parte*, 16 O. G. 500.

A "picture of a bag having the open end thereof held closed by a tie" is not registrable as a trade-mark for powdered soap, it being descriptive. *Martin, ex parte*, 89 O. G. 2258.

"The next matter to be considered is the charge that defendant uses the device of a book, with the words 'Webster's Dictionary' printed thereon, on its circulars, bill-heads, etc., in imitation of a like practice pursued by the complainants. In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark. When so used by a publisher or book-seller, such a device serves to indicate the kind of business in which a party is engaged, or it is descriptive of the contents of particular packages." *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. R. 411.

A picture of a corn plaster is not registrable as a trade-mark for corn plasters, although not a representation of the applicant's particular plaster. *Spoov, ex parte*, 101 O. G. 661.

**B. An arbitrary name or sign which may have been applied with the intention of describing a product can never become a valid trade-mark or be protected as such, although it may have come to indicate origin, against those rightfully making that product.**

“As to the numerals ‘ $\frac{1}{2}$ ,’ etc., they were used by appellants to denote the size and quality of their cast series. This is the evidence, and although the letters and numerals on both sides may have come to indicate to the public the origin or ownership of appellants' ploughs, as they did not appropriate them by adoption, use or claim, as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose.” *Avery v. Meikle*, 81 Ky. 73.

The word “Disque” applied by inventor in France to denote form of a battery patented by him, and the word “Pile-Leclanche” (“Pile” being French for battery) not protected as against those having right to manufacture under patent, as the words were used descriptively.

“When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable.” *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. R. 276, 277.

“Valvoline,” held descriptive of a new kind of oil. *Leonard's Trade-Mark, in re*, L. R. 26 Ch. D. 288.

“Linoleum,” applied to new product derived by oxidizing linseed oil, held to have been applied as descriptive of that product and on expiration of the patent open to the world. *Linoleum Mfg. Co. v. Nairn*, 38 L. T. N. s. 448; 47 L. J. Ch. 430; 26 W. R. 463.

Plaintiff invented method of extracting oil from bituminous coal and called it “Paraffine Oil” and manufactured it under that name; defendant, who invented another way of extracting same oil, allowed to use same name, as it was descriptive. *Young v. Macrae*, 9 Jur. N. s. 322.

C. A sign primarily arbitrary may become, by long use and association by the general public, descriptive of merchandise and cannot be protected as a valid trade-mark.

See IV. 9 A. 111. *Bissell Chilled Plow Works v. T. M. Bissell*. III. 1 A. (3) 44. *Smith & Davis Mfg. Co. v. Smith*, 89 Fed R. 486. XIV. 1 A. 292. *Ford v. Foster*, L. R. 7 Ch. App. 611. IV. 8. 110. *Corbin v. Gould*, 133 U. S. 308.

"Albany Beef," having become a descriptive term for canned sturgeon, cannot be registered as a trade-mark. *Ams, ex parte*, 23 O. G. 344.

"Gem," applied to air gun held to have become descriptive after 3 years' use. "I think, whatever it may have been originally, it is not now a fancy word. I think it indicates commendation of the article, and is therefore descriptive, and not a fancy word within this section." *Arbenz Appeal*, 35 Ch. D. 248.

"New Manny," as applied to a harvesting machine, descriptive. The word "*Manny*" had become descriptive, having been applied for a number of years to a large class of machines throughout the country. *Graham, in re*, 2 O. G. 618.

"Calhoun," having become descriptive of ploughs and having been so used during many years by different parties, cannot be registered as a trade-mark. *Hull and Atkinson*, 13 O. G. 229.

The word "*Holophane*" for prismatic glass, having been long used as descriptive of a patented article, is not registrable. *Holophane Glass Co.*, 100 O. G. 450.

"Magnolia," having become descriptive of a metal, is not entitled to registration as a trade-mark for metals. *Magnolia Metal Co.'s Trade-Marks*, 76 L. T. N. s. 672.

An oil-burning lamp called the "*Astral Lamp*," having been long well known and in common use, without the range of lawful appropriation for trade-mark. *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. R. 492.

Bitters made by secret process at town formerly named Angostura in Venezuela, had come to be known as "*Angostura Bitters*" and therefore descriptive; proprietor was entitled, however, to injunction against one using the name on a spurious article, while the name could be used by one rightfully in possession of the secret. *Siegert v. Findlater*, L. R. 7 Ch. D. 801.

"*La Normanda*," had become descriptive of a particular kind of cigars and could not be appropriated as a trade-mark.

“The adoption by Bijur of the words ‘La Normandi,’ as part of his trade-mark, could not take away the right previously acquired by the public in the use of the words ‘La Normanda,’ as indicating a particular kind of cigars.” *Stachelberg v. Ponce*, 128 U. S. 686.

“Old Innishower,” as applied to whiskey, descriptive, it having been formerly used in Ulster to designate a class of illicit whiskey. *Watt v. O’Hanlon*, 4 R. P. C. 1.

**D. A name employed by a proprietor which might designate the origin of his merchandise may by his subsequent conduct be allowed to become descriptive of his merchandise and *publici juris* so that he will not be protected in its exclusive use.**

See XIII. 2. 287; XIV. 1 A. 292. *Ford v. Foster*, 7 Ch. D. 611. XIV. 1 A. (1) 299. *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19. XV. 3 A. 303. *Hostetter v. Fries*, 17 Fed. R. 620.

An arbitrary name may be protected as a trade-mark on goods if it has become descriptive of those goods of the proprietor alone. “But if the name be suffered to come into general use without objection from the original proprietor, it becomes merely generic, or indicative of quality.” *Burton v. Stratton*, 12 Fed. R. 696.

Cocks invented and sold sauce which he called “Reading” from the town. Other persons used the same name, and he then called his “Original Reading Sauce,” which name was protected; and if he had not acquiesced in use of “Reading” by others he might have been entitled to injunction on that word. *Cocks v. Chandler*, L. R. 11 Eq. Cas. 446.

In 1837 Baron von Liebig discovered and published a process for making an extract of meat. It became popular and was known as “Liebig’s.” Held, that it had become descriptive and the original inventor could not grant to a company exclusive right to use the name. *Liebig’s Extract of Meat Co. v. Hunbury*, 17 L. T. N. S. 298.

The name “Liebig” having been used in Germany many years to designate an extract of beef and having become descriptive, the assent of the originator Liebig to the use of his name by complainant corporation does not confer any exclusive right in the name in the United States; but injunction might issue against simulation of class of goods by the respondent. *Liebig’s Extract of Meat Co. v. Libby*, 103 Fed. R. 87.

Liebig in Germany invented a process for extracting juices from meat; he made public the process and allowed the preparation to be called after him "Liebig's Extract of Meat." Held, that the name had become generic and that the name "Liebig" used in that connection was not a valid trade-mark, or entitled to protection. *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. R. 822.

**(1) Or it may become descriptive by death of original proprietor without successors.**

See X. 1 B. 225. *Emerson v. Badger*, 101 Mass. 82.

"It would also seem to follow, from the cases cited, that on the death of old Samuel Marshall (assuming that no one succeeded to the good-will of his business), any citizen would have the legal right to manufacture liniment composed of the same ingredients and made in the same way as he manufactured that sold by him, and also, in making sales, to describe it as such. Upon that assumption the words, 'Old Dr. S. Marshall's Celebrated Liniment' were merely descriptive of the compound, and, if truthfully applied by the defendant in making sales, no one could rightfully complain, as no one had any patent upon it or exclusive right to the use of any words which aptly described it. Upon his death, with no successor to the good-will of his business, those words would cease to indicate origin or ownership, and hence cease to be a trade-mark." *Marshall v. Pinkham*, 52 Wis. 572.

**E. A name in a foreign language descriptive of a certain product is not a valid trade-mark on that product in this country and can be used by all rightfully dealing in that product.**

See III. 2 A. 67. *Wolfe v. Goulard*, 18 How. Pr. 64; *Wolfe v. Hart*, 4 V. L. R. Eq. 125; *Wolfe v. Alsop*, 10 V. L. R. Eq. 40, 12 V. L. R. Eq. 421; *Wolfe v. Lang*, 13 V. L. R. Eq. 752; *Burke v. Cassin*, 45 Calif. 467. *Contra*: *Wolfe v. Barnett*, 24 La. Ann. 97.

"Matzoon," meaning in Armenian "fermented milk," is descriptive and cannot be protected as a valid trade-mark, and the party who introduced the beverage into this country is not entitled to the exclusive use of the name. *Dadlirian v. Yacubian*, 72 Fed. R. 1010. *Aff'd* 98 Fed. R. 872; 90 Fed. R. 812.

*Contra*: "Matzoon," an adaptation of an Armenian word mean-

ing "fermented milk," a good trade-mark of one who had used it for many years in this country. "It would be absolutely meaningless to all but a little group of Armenians in the millions of inhabitants of the United States." *Dadirrian v. Theodorian*, 37 N. Y. Sup. 611.

"Bokol," being the Norwegian word for beer, is descriptive, and not a good trade-mark in England.

"I am of the opinion that, in reference to an article produced in a foreign country and imported into England where it was previously unknown and without a name, the word used in that foreign country as the common term to describe or denote the article is not a fancy name within the meaning of the Act." *Davis v. Stribolt*, 59 L. T. N. S. 854.

The name "Parcheesi" as applied to a game well known in India and similarly designated cannot be a trade-mark in this country; *but* where it had been used by complainant for 35 years and so that he had acquired a reputation under it, the use by another, especially connected with the name "Selchow," for purposes of fraud, is unfair trade which would be enjoined. *Selchow v. Chaffee & Selchow Mfg. Co.*, 132 Fed. R. 997.

"Schiedam Schnapps," descriptive; Schiedam, a town in Holland, and Schnapps, German for dram.

"When a person forms a new word to designate an article made by him which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article, but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles." *Wolfe v. Goulard*, 18 How. Pr. 64.

**F. A descriptive word in a well-known foreign language should not be upheld as a valid trade-mark in this country.**

"Le Bon," meaning "the good" in French, not registrable as trade-mark for baking powder. *Grocers Specialty Mfg. Co., ex parte*, 102 O. G. 465.

"Für Familien Gebrauch," signifying "For Family Use," and "L. wrence Feiner Familien Flannel" applied to flannel goods not lawful trade-marks, as descriptive. *Lawrence & Co.*, 10 O. G. 163.

"Filtre Rapide," on water filters, descriptive. *Maigen's Application, in re*, 28 W. R. 759.

The English words "Gold Label," which are descriptive, do not become registrable by being reproduced in Hebrew characters, although unintelligible to most people. *Stuhmer, ex parte*, 86 O. G. 181.

*(1) But a descriptive word in an uncommon foreign language or used only in a limited area may be protected as a valid trade-mark in this country.*

See III. I. E. 49. *Dadirrian v. Theodorian*, 37 N. Y. Sup. 611.

"Oomoo," for wines, in Australia among aborigines meaning "choice," good trade-mark in England. *Burgoyne's Trade Mark*, 61 L. T. N. S. 39.

*But see:* Figure of owl and word "kokoko" not a good trade-mark on cotton goods, first, because owl had been a common symbol in Manchester cotton trade, and, second, because the word among Chippeway Indians of North America meant an owl whose cry resembled it, and it was possible that trade might be extended to those Indians. *Jackson & Co.'s Application*, 60 L. T. N. S. 93.

**G. No rule can be given for the use of descriptive words in a dead language. Each case must be decided on its merits. A good test is whether the word has been used descriptively, or whether it would convey a descriptive meaning to the public.**

"Emollio," on perfumed toilet cream, meaning in Latin "I soften," descriptive and not registrable. *Grossmith's Trade-Mark*, 60 L. T. N. S. 612.

"Ore of Life," on medicinal preparation would be descriptive, but the Latin words "Vitae-Ore" are arbitrary. *Noel v. Ellis*, 89 Fed. R. 978.

"Coming to the case before the court, the question is, has the complainant a valid trade-mark in the words 'Vitae-Ore'? If he had used the words 'Ore of Life,' and applied them to his product, they perhaps might not have been a valid trade-mark, inasmuch as it might be a generic term, and descriptive. But he does not do so, and instead uses the word 'Vitae,' which, even though it is the Latin of 'Life,' is still a fanciful word; and he couples the word 'Vitae' with the word 'Ore' and calls it 'Vitae-Ore,' bringing in another word which had not been heretofore connected with the word 'Ore,' or applied to a medicine or a preparation of a medicinal nature, so far as the court is advised



or has been able to discover; so that the complainant has proprietary rights in the name, inasmuch as he has been the first person to thus apply the words 'Vitae Ore' to a medicine." *Noel v. Ellis*, 89 Fed. R. 978, 980.

Property may exist in the word of a dead language though the English translation would be descriptive. *Partlo v. Todd*, 17 Can. S. C. R. 196.

"Sanitas," as applied to medicines, refused registration as descriptive. "The truth is, that if this word were applied to medicines, it would mean to any ordinary person that the medicines were health medicines — that is to say, health-giving medicines; and that is descriptive of the quality or of the effect of the use of these medicines. How is it possible that it is not descriptive?" *Sanitas Co., in re*, 58 L. T. N. S. 166.

**H. The name of a flower used in a descriptive sense cannot be a valid trade-mark.**

"Night Blooming Cereus," on perfumery, descriptive. The name of a flower cannot be protected as a valid trade-mark, as it is descriptive. *Phalon v. Wright*, 5 Phila. 464.

*Contra*: "Sweet Opoponax of Mexico," on perfumery made from the flower, good trade-mark. *Smith v. Woodruff*, 48 Barb. 438.

(NOTE. — This should be unfair trade case.)

**I. The name or figure of an animal used in a descriptive sense is not a valid trade-mark.**

See III. 1 F. (1). 51. *Jackson & Co.'s Application*, 60 L. T. N. S. 93.

Figure of a fish refused registration as trade-mark for fishing-lines, being descriptive. *Pratt, in re*, 10 O. G. 866.

**J. Several marks or a series of marks used by a proprietor with or without a common symbol to designate the different grades, styles, or qualities of a class of his merchandise are not trade-marks.**

See III. 1 A. (1). 31. *Beadleston v. Cooke Brewing Co.*, 74, F. R. 229.

Note references under VIII. 1 A. 2. 153.

Letters designating steel series of ploughs "AO," "BO," and "CO," with numerals of cast series "1," "2," etc., and with trade-mark a Maltese cross, etc., besides words of caution, the

brands of letters and numerals indicating grade of ploughs not good trade-marks, but were protected on the ground of unfair trade, proof of fraud in imitation being clear. *Avery v. Meikle*, 81 Ken. 73.

Letters and figures "A No. 1," "A X No. 1," "No. 1," "X No. 1," "No. 3," and "B No. 1" used by manufacturer to designate size, shape, and quality of his different ploughs not good trade-marks, and could be used by other manufacturers to indicate like varieties of same article. *Candee v. Deere*, 54 Ill. 439.

Numbers and letters of a system to designate style and parts of mowers and reapers, for convenience of identification in ordering, does not give right to party to claim them as trade-marks.

"Any office which these marks perform as designations of origin is purely accidental. The fact that no two distinct parts in the same machine bear the same numerals is altogether persuasive of the fact that their purpose is not that of indicating the producer." *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 91 Fed. R. 376; affirming 86 Fed. R. 764.

"Without explanation, such a multitude of different marks would convey no meaning. When explained, as they always have been and always must be, the explanation is that they are intended to designate size, shape, and place in the machine, and are to be used to distinguish one piece or part from another having a different function. This purpose does not tend, in any but the most remote way, to indicate the producer or maker." *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 91 Fed. R. 376.

"While letters or figures arbitrarily chosen may not, and often do not, of themselves indicate shape, size, style, grade or quality, yet, if they be attached to articles to distinguish different shapes, sizes, styles, grades or quality, they may become by association just as descriptive as words expressly defining the same." *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651.

A series of numbers from 1 to 35 to designate certain kinds of medicines not valid trade-marks. *Humphrey's Homeopathic Medicine Co. v. Hilton*, 60 Fed. R. 756.

"But the use of numerals as a short method of identifying the several members of a class, and distinguishing one of them from another, is as old as the use of written words. When so used, they are, in substance and effect, descriptive terms,—the number conveys to the reader details which otherwise would have to

be amplified in words." *Humphrey's Homeopathic Medicine Co. v. Hilton*, 60 Fed. R. 756.

"Royal," "English," and "London" to designate grades of baking powder, not good trade-marks. *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331.

Letters of the alphabet used to distinguish various grades of crash towels, not valid trade-marks. *Stevens Linen Works v. William & John Don & Co.*, 121 Fed. R. 171. Aff'd 127 Fed. R. 950.

"Cylinder," "Lake," "New York" used to designate various qualities of glass, according to practice of manufacturers in using similar names, not good trade-marks. *Stokes v. Landgraff*, 17 Barb. 608.

*Contra*: Numbers "30," "40," "111," etc., used on nails with leather heads to designate grade, protected as legal trade-marks. *American Solid Leather Button Co. v. Anthony Lovell & Co.*, 15 R. I. 338.

*Contra*: Numbers arbitrarily selected, as "2340," 32 in all, to designate different grades of spoons, by which numbers they were known and ordered, held to be trade-marks and protected. *Boardman v. Meriden Britannia Co.*, 35 Conn. 402.

NOTE.—They were not trade-marks, but relief should have been granted on ground of unfair trade.

*Contra*: An extra fine quality had become known by number "303;" defendant imitated labels and used number "303"; the number held to be a trade-mark and protected. *Gillott v. Esterbrook*, 47 Barb. 445; 48 N. Y. 374.

NOTE.—Dissenting opinion sound law. See VIII. 1 G. 182. *Gillott v. Kettle*, 3 Duer, 624.

*Contra*: Numbers 1 to 35 as applied to certain kinds of medicines in conjunction with words "Humphrey's Specifics," by which numbers the medicines had become known to the public, protected as trade-marks. Protection might have been granted on ground of unfair trade. *Humphrey's Specific Homeopathic Med. Co. v. Wenz*, 14 Fed. R. 250.

*Contra*: Number "523" used with eagle and wreath, being one of several numbers to designate grade, a valid trade-mark on hosiery, and protected. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325.

NOTE.—In all foregoing cases marked contra, an injunction might have been issued on the ground of unfair trade.

**K. The name of a proprietor or his established trade-mark plainly appearing is considered evidence that an accompanying mark is not used to denote origin, but description.**

Where the name of the complainant plainly appeared on a label it was considered that the accompanying letters "A C A" were intended for description.

"It was doubtless of importance to the plaintiffs to make known to the public by a declaration in their label, that they are the manufacturers of the excellent tickings which they send into the market, and for this reason the name of their corporation, 'Amoskeag Manufacturing Company' appears in full upon their label." *Amoskeag Mnfq. Co. v. Spear*, 2 Sandf. 599.

"As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company. And if they do not read the name as printed, the letters are unintelligible." *Amoskeag Mnfq. Co. v. Trainer*, 101 U. S. 51.

Trade-mark Maltese cross with name of proprietor, "Avery," marked on ploughs considered as evidence that letters and numbers used in addition to designate grades had no signification of origin. *Avery v. Meikle*, 81 Ky. 73.

"The upper part of the brand or label of the trade-mark discloses the full name of the complainant as the manufacturer of the article, and is in no way supplemented or made clearer by the word 'Columbia.' It can no more be said that it was intended to designate origin or ownership than to denote the quality of the flour on which the brand was placed, and the proof tends strongly to show that the whole label was intended to indicate the quality, or class, or character of the flour, as being made of spring wheat instead of winter wheat." *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

"Where origin and ownership is otherwise indicated, as by the use of the manufacturer's name, then the symbol, mark, or device which is intended to designate grade, class, or quality cannot properly be also employed to denote origin or manufacture, and thus confer exclusive right to its use." *Lawrence Mnfq. Co. v. Tennessee Mnfq. Co.*, 31 Fed. R. 776.

Where a party used letters of the alphabet on various grades of towels, such as by universal custom were used to designate

grade, the use with such letters on all grades of the registered trade-mark "Stevens Crash" was evidence that such letters were used to designate grade. *Stevens Linen Works v. William & John Don & Co.*, 127 Fed. R. 950; affirming 121 Fed. R. 171.

*Contra*: Numbers to designate grade of hosiery held to be part of a general trade-mark, although numbers appeared underneath words "trade-mark" applying to eagle and wreath above, which had been long used as a trade-mark. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325.

NOTE.—The above should be considered a case of unfair trade.

*Contra*: "830" designating a certain grade of hosiery, held valid trade-mark, although in conjunction with word "Shawknit" under which party had built up reputation. *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707.

NOTE.—Case of unfair trade.

### EXCEPTIONS

**L.** A sign affixed primarily for the purpose of denoting origin but incidentally indicating the character or quality of merchandise may be protected as a valid trade-mark.

See II. 1 A. (1), S, "Celery Compound." *Wells & Richardson Co. v. Siegel*, 106 Fed. R. 77. II. 1 A. (1), 10, "Junket." *Hansen v. Siegel Cooper Co.*, 106 Fed. R. 691.

"Fibre Chamois," good trade-mark for interlining for women's dresses.

If the words were descriptive it was not so pronounced, obvious, and usual as to render them invalid as a trade-mark. *American Fibre Chamois Co. v. De Lee*, 67 Fed. R. 329.

"Whether a word claimed as a trade-mark is available because it is a fanciful or arbitrary name, or whether it is obnoxious to the objection of being descriptive, must depend upon the circumstances of each case. The word which would be fanciful or arbitrary when applied to one article may be descriptive when applied to another. If it is so apt, and legitimately significant of some quality of the article to which it is sought to be applied, that its exclusive concession to one person would tend to restrict others from properly describing their own similar articles, it cannot be the subject of a monopoly. On the other hand, if it is merely suggestive, or is figurative only, it may be a good trade-mark, notwithstanding it is also indirectly or remotely descriptive." *Bennett v. McKinley*, 65 Fed. R. 505, 506.

“Pain Killer,” as applied to medicine, good trade-mark.

“I take the word to fall within the class of trade-marks usually called fancy names or ‘trade-marks,’ which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public and to distinguish his article from others of the like nature. It is true that the term ‘painkiller’ is suggestive of the use of medicine, but it is not an adjective nor is it used adjectively.” *Davis v. Kennedy*, 13 Grant Ch. (U. C.), 523.

“The word quality is used in different senses in the cases. It is employed in some to denote the grade, ingredients, or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trade-mark as denoting quality when used merely in the former sense, there may be a valid trade-mark as indicating quality when used in the latter sense.” *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651.

“Slate Roof Paint,” as trade-mark for roof paint not containing over two per cent of slate, not descriptive, registrable.

“Upon careful consideration, I am inclined to think that they are not in any sense such terms as would naturally be employed in the ordinary use of the language to describe any composition of this general description, and that therefore the words are arbitrarily chosen and sufficiently out of the ordinary signification to constitute a peculiar mark.” *Glines, ex parte*, 8 O. G. 435.

“Invigorator,” good trade-mark on spring-bed bottoms.

“A distinction should be made between words which are the legitimate accepted terms in describing ‘the qualities, ingredients, or characteristics of an article,’ and words which are but inferentially or remotely descriptive.” *Heyman, ex parte*, 18 O. G. 922.

“Insurance,” good trade-mark on oil.

“While the word *insurance* may, by some process of association of ideas, suggest the notion of safety, it is not synonymous with *safe*, nor can it be said to describe any possible quality of oil.” *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946.

“Bromo-Caffeine,” good trade-mark on a drug.

“In this case the term perhaps suggests that some one among the hundreds of substances that bromine may combine with has been used in such combination together with caffeine. There are, however, some seven different ingredients in the plaintiffs’ preparation, and there is no free bromine among them, and there is no evidence as to what the substance is which the bromine (if any)

had combined with before being used in the preparation, and so it is plain that the words 'Bromo-Caffeine' do not in fact describe the ingredients or even give any clear general idea as to what they are." *Keasbey v. Brooklyn Chemical Works*, 142 N. Y. 467.

Figure  $\frac{1}{2}$  on cigarettes in large bold, red characters in certain form and style, was used originally to indicate the idea that the goods were composed of two kinds of tobacco in proportions of half and half, but except so far as it *indicates* this idea which it does not *express* it is merely an arbitrary device. *Kinney v. Allen*, 1 Hughes, 106.

"Saponifier," good trade-mark for soap.

"To a student who is familiar with the Latin language and the rules of etymology, it may be true that the word 'Saponifier,' made up of words 'sapo' (soap) and 'facere' (to make), would suggest some of the characteristics and qualities of the article to which it referred." But by itself it imparts no information as to what it is. *Penn. Salt Mfg. Co. v. Myers*, 79 Fed. R. 87.

"Parabola," on needles, valid trade-mark.

"In answer to the first point, namely, that the eye of the needle has a parabolic form, it perhaps would be enough to say that there is nothing upon the package tending to show that the word 'Parabola' has any reference to the eye of the needle." *Roberts v. Sheldon*, 8 Biss. 398.

"Queen," for shoes, good trade-mark.

If the general purpose of the word be to denote origin or ownership, it will not be affected by the fact that it incidentally has the effect to denote quality, and it made no legal difference if the word "Quality," was sometimes added, so as to read "Queen Quality." *Thos. G. Plant Co. v. May Co.*, 105 Fed. R. 375; affirming 100 Fed. R. 72.

**M.** A word descriptive of some articles may be protected as a valid trade-mark on other articles of which it is not descriptive if it is not thereby misleading or deceptive.

See III. 1 L. 56. *Bennett v. McKinley*, 65 Fed. R. 505.

"Naphthol Methane," registrable for carbon black, because it is well known that such substance does not contain the chemicals indicated by the trade-mark, and it is not deceptive. *Castle Brook Carbon Black Co., ex parte*, 100 O. G. 683.

"Galena," as applied arbitrarily to an antifriction metal al-

lowed registration, although it is the name of one of the principal of lead ores — viz. lead sulfid; and although some antifriction metal contains some lead in composition. *Magnus Metal Co., ex parte*, 100 O. G. 451.

“Magnetic,” as applied to medicine in “Miller’s Universal Magnetic Balm,” arbitrary and not descriptive or deceptive.

“It is not pretended that the liquid possessed any of the properties of magnetism in the scientific sense of the word; nor do we think it clear that the use of the word ‘Magnetic’ in its title was intended to deceive the public in that respect. The word, so far as any meaning was attached to it, was probably used rather in a figurative, than in a literal or scientific, sense; and there was but little danger of its being misunderstood.” *Ransom v. Ball*, 7 N. Y. Supp. 238.

“Magnetic Balm,” as applied to liquid medicine *not magnetic*, valid trade-mark. *Smith v. Sixbury*, 25 Hun, 232.

**N.** A sign affixed to merchandise and used by the proprietor with the intention of designating origin will be protected as a valid trade-mark although it may have subsequently become descriptive, and a proprietor does not thereby lose his trade-mark except by laches on his part.

See IV. 7. 106.

“Twin Brothers,” on yeast, valid.

“But if the primary object of the trade-mark be to indicate the origin or ownership, 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 to him and stood most in need of protection.” *Burton v. Stratton*, 12 Fed. R. 696.

“Celluloid,” having been used for many years as a trade-mark, retained its character although stamped on a new compound described by that name. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. R. 94.

“When the word (Celluloid) was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant’s right.



It seems to me that it cannot. As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one, — it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the article." *Celluloid Mnfg. Co. v. Cello-nite Mnfg. Co.*, 32 Fed. R. 94.

"While the fact that the term has become generic would be fatal to its subsequent adoption by these or any other applicants, it certainly is not fatal to its continued use or to its registration by the lawful assignees of those whose use rendered it generic, any more than to its continued use or registration by the assignors themselves. Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire." *Consolidated Fruit Jar Co., ex parte*, 16 O. G. 679.

"And while if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade, (*Burton v. Stratton*, 12 Fed. R. 696,) yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark." *Lawrence Mnfg. Co. v. Tennessee Mnfg. Co.*, 138 U. S. 537, 547-548.

"I do not at all mean to say that it is impossible that a word which is used to describe an article, may also, if the proper means are taken at the proper time, be used as a trade-mark; but when any such double use takes place, it is most important to remember the difference between the use of a name as a trade-mark and the use of it as a descriptive term." *Leonard's Trade-Mark, in re*, 26 Ch. D. 288.

"The fact that flour so marked acquired an extensive sale, because the public had discovered that it might be relied on as of a uniformly meritorious quality, demonstrates that the brand deserves protection rather than that it should be debarred therefrom, on the ground, as argued, of being indicative of quality alone." *Menendez v. Holt*, 128 U. S. 514, 520-521.

A manufacturer of steel stamped his product "Crowley Millington," protected from infringement although words had acquired descriptive meaning having reference to the quality of the steel (Crowley Millington name of manufacturer, case of unfair trade). *Millington v. Fox*, 3 Myl. & Cr. 338.

“Our conclusion is, that where a manufacturer has invented a new name (as ‘Sliced Animals,’ ‘Sliced Birds,’ ‘Sliced Objects’) consisting either of a new word or a word or words in common use which he has applied for the first time to his own manufacture or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article.” *Selchow v. Baker*, 93 N. Y. 59.

## 2. A geographical sign.

**A. A geographical name applied in its ordinary signification to merchandise is not a valid trade-mark.**

“York,” as applied to stoves and ranges, geographical and not registrable. *Abendroth Brothers, ex parte*, 104 O. G. 1119.

“Clinton,” as a trade-mark for wagons, refused registration as geographical. *Abingdon Wagon Co., ex parte*, 102 O. G. 229.

“Alabamatube,” refused registration for iron and steel tubes, as it meant a tube manufactured in Alabama. *Alabama Tube & Iron Co., ex parte*, 99 O. G. 2321.

“Old Country,” on soap is a geographical mark. *Allen B. Wrisley Co. v. Iowa Soap Co.*, 122 Fed. R. 796.

“Trenton,” on tools having a positive geographical meaning cannot be registered. *American Saw Co., ex parte*, 58 O. G. 521.

The name “Budweis” designating a place in Bohemia, Austria, being a geographical name, the word “Budweise” cannot be a valid trade-mark for beer, and its use will not be restrained unless there is also fraudulent imitation of labels. *Anheuser Busch Brewing Ass’n v. Fred Miller Brewing Co.*, 87 Fed. R. 864.

“London Dock (Old)” gin, invalid. *Binniger v. Wattles*, 28 How. Pr. 206.

“Durham,” on tobacco, not valid trade-mark as against one who manufactures in the same town. *Blackwell v. Wright*, 73 N. C. 310.

“Brooklyn White Lead,” lead, invalid trade-mark. Geographical and descriptive. *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416.

"Buffalo Pitts," on agricultural machinery not registrable, Pitts being a surname and Buffalo being a geographical name and part of applicant's name. *Buffalo Pitts Co., ex parte*, 89 O. G. 2069.

"Loch Katrine," on whiskey is descriptive of water used in distillery. *Bulloch v. Gray*, Seb. 452.

"Moline, Ill.," branded on ploughs made at Moline, not a trade-mark. *Candee v. Deere*, 54 Ill. 439.

"Is it possible, can it be tolerated for a single moment, that a maker of ploughs at Moline shall not be permitted to sell his work as a Moline plough — to advertise them in every form as the Moline plough? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world where his wares are made? . . . Any number of plough-makers can go with impunity to Moline and establish there plough factories, and brand on their ploughs their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers, and to the common benefit of all." *Candee v. Deere*, 54 Ill. 439.

Clinton, being a geographical location, not protected as a valid trade-mark for paint (Clinton Hematite Red). *Clinton Metallic P. Co. v. N. Y. Met. Paint Co.*, 50 N. Y. Supp. 437; 23 Misc. 66.

"Pocahontas," valley in coal fields of Virginia, cannot be exclusively appropriated by any one party for coal mined there. *Coffman v. Castner*, 87 Fed. R. 457. Aff'd 178 U. S. 168. *Contra: Atwater v. Castner*, 88 Fed. R. 642.

"Columbia," on incandescent lamps not registrable, geographical. *Columbia Incandescent Lamp Co., ex parte*, 96 O. G. 1036.

"Columbia," on flour, geographical and invalid. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460. Aff'ng 40 Fed. R. 676. *See also Morgan Envelope Co. v. Walton*, 86 Fed. R. 605; 171 U. S. 686. *But see: Whitfield v. Loveless*, 64 O. G. 442. III, 2 E. 73.

"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture or ownership." *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

"St. Johnsbury," geographical, registration not allowed for crackers. *Cross, ex parte*, 96 O. G. 643.

"Manhattan," as a trade-mark for sewing-machines, held to be geographical. *Davis Sewing Machine Co., ex parte*, 112 O. G. 1752.

A party who early and long had mined coal in a valley in Pennsylvania called Lackawanna and called it "Lackawanna coal," under which name it had achieved a reputation, cannot claim the exclusive right to that geographical name as against others who subsequently mine coal in the same valley. *Delaware & H. Canal Co. v. Clark*, 13 Wall 311.

"Elgin," cannot be protected as against parties who may be lawfully carrying on butter and creamery business there. *Elgin Butter Co. v. Elgin Creamery Co.*, 51 Ill. App. 231; 155 Ill. 127.

"Amherst," is geographical and not a trade-mark for cotton and worsted dress goods. *Elmira Cotton Mills Co., ex parte*, 111 O. G. 2493.

"Monsterrat," on lime juice not protected as a valid trade-mark as against its use on lime juice coming from there, although defendant's article may be far inferior to that of plaintiff's which has acquired a reputation. *Evans v. Von Laer*, 32 Fed. R. 153.

"Mattawan" refused registration as a trade-mark for shirts as it is a geographical name of a village in Michigan and in New Jersey. Its Indian meaning is comparatively unknown. *Falkenberg, ex parte*, 115 O. G. 1065.

"Havana," may have become descriptive of tobacco grown in America from Cuban seed. *Feder v. Brudno*, 5 Oh. N. P. 275.

"Lancaster," on ticking, refused registration, it being a geographical name. *Farnum, ex parte*, 18 O. G. 412.

"Hamburg," on tea, not valid trade-mark. *Frese v. Bachof*, 13 Blatchf. 234; 14 Blatchf. 432.

"Genesee," on salt made in that valley, cannot be a valid trade-mark. *Genesee Salt Co. v. Burnap*, 73 Fed. R. 818; affirming 67 Fed. R. 534.

"Glendon," name of a borough, on iron work.

A corporation adopted the mark "Glendon" on their iron; the place where their furnaces were was afterwards made a borough named Glendon. Another company afterwards used the mark "Glendon." Held, that the second company could lawfully have use of the mark while manufacturing there as the name was geographical. *Glendon Iron Co. v. Uhler*, 75 Penn. St. 467.

"Caledonia" being the name of a township and used by complainant on his mineral water there, "Caledonia Water," respondents had right to use it as "from new springs at Caledonia" on

newly discovered springs there. *Grand Hotel Co. v. Wilson*, L. R. 1 App. Cas. (1904) 103.

“Green Mountain,” applied to grape-vine discovered in Green Mountains, geographical. *Hoyt v. J. T. Lovett Co.*, 71 Fed. R. 173.

“Elgin,” on watches not protected as against resident manufacturer, although complainant had acquired reputation under name. *Ill. Watch Case Co. v. Elgin Nat. Watch Co.*, 94 Fed. R. 667; reversing 89 Fed. R. 487. *But see Elgin Nat. Watch Co. v. Loveland*, 132 Fed. R. 41. VIII, 1 B. (3). 161.

“The word ‘Elgin’ was not, and could not be, made a trade-mark. The fact that the word had acquired that signification might be forceful if the word was shown to be used to palm off the goods of one as the goods of another, which, coupled with other evidence evincing intent to mislead and to defraud, would be operative to move a court of equity to prevent the wrong.” But United States Court has no jurisdiction in cases of unfair trade between courts of same state. *Illinois Watch Case Co., Elgin Nat. Watch Co.*, 94 Fed. R. 667; reversing 89 Fed. R. 487.

“Ozark” refused registration as trade-mark for shirts, etc., as it is geographical and its Indian meaning comparatively unknown. *Kee v. Rountree Dry Goods Co.*, 115 O. G. 1849.

“London,” on animal food, refused registration; name of noted city. *Knapp, ex parte*, 16 O. G. 318.

“Cloverdale,” for canned fruits and vegetables, not registrable, being geographical. *Hendley, ex parte*, 72 O. G. 1654.

“Worcestershire Sauce,” had become generic—plaintiff resided in England and defendant in Wisconsin. *Lea v. Deakin*, 11 Biss. 23. *But see: Lea v. Wolf*, 15 Abb. Pr. n. s. 1. VIII, 1 B. (1). 156.

“Sonman,” denoting specific territory of considerable extent, geographical and not good trade-mark on coal. *Laughman's Appeal*, 128 Penn. St. 1.

“Aurora,” on shoes, name of geographical locality in at least twenty states of the Union not registrable. *Little & Co., ex parte*, 85 O. G. 1221. *Contra: Aspegren & Co.*, 100 O. G. 684. III, 2 E. 69.

“I do not think that merely because a word appears in the Postal Guide as the name of a post-office it acquires such a geographical meaning as to prevent its adoption as a trade-mark when it has a primary significance not geographical; but reference is not necessary to the Postal Guide in the present case to show the geographical character of the word ‘Aurora.’ In at least

twenty of the States of the Union there are villages, towns, and cities bearing the name 'Aurora.' The principal one of these is a city which in 1890 had a population of over 19,000." In this instance it was not the size of the place but the number of places that was especially significant. And the fact that to the mythological student it would have another meaning did not alter the opinion. A manufacturer starting in any one of these towns could not be enjoined from using the name. "It being once admitted that a word sought to be registered as a trade-mark has a geographical meaning, it should be the rule of the Office not to register such word unless it appears beyond a shadow of a doubt not only that its fanciful or arbitrary meaning is so generally known and understood that the meaning of the name would be at once recognized, but, furthermore, that the name could not be rightfully used upon the same class of goods by any one making them in the locality bearing the name." *Little & Co., ex parte*, 85 O. G. 1221.

"Yale," as applied to hosiery, not registrable, as it is geographical. *Masters & Co., ex parte*, 109 O. G. 1069.

"Lexington," mustard, invalid. *Metcalf v. Brand*, 86 Ken. 331.

"Columbia," on stationery, not good trade-mark. *Morgan Envelope Co. v. Walton*, 86 Fed. R. 605; 171 U. S. 686; reversing 82 Fed. R. 469. See also *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

"Gibraltar," on lamp chimneys, while having certain arbitrary meaning, is yet geographical. The fact that no one carries on the manufacture of lamp chimneys there not controlling. *Nave & McCord Mercantile Co., ex parte*, 86 O. G. 1985.

"Red River Special," on agricultural machinery, geographical, although not the name of the locality in which the machines are made, and claimed to be used in an arbitrary sense.

The test as to the registrability of a mark which has geographical significance is whether the arbitrary or fanciful meaning of the mark so overcomes its geographical meaning that the mark would ordinarily be accepted in its arbitrary or fanciful sense and not as designating locality. In order, therefore, to warrant the refusal of registration the geographical meaning of the mark must be predominant. In the case of the words "Red River" the geographical meaning is predominant. *Nichols & Shepard Co., ex parte*, 99 O. G. 1623.

"Raleigh," refused registration, it appearing that it was name

of city in large tobacco-growing region. *Oliver, ex parte*, 18 O. G. 923.

"Yale," not allowed as trade-mark for belt-supporters, it being a geographical name. *Peats, ex parte*, 96 O. G. 1649.

"Mexican Balm, (medicated)" hair tonic, invalid. *Perry v. Truefit*, 6 Beav. 66.

"P-I-T-T-S-B-U-R-G-H P-U-M-P," on pumps, geographical and descriptive, and merely hyphenating the letters does not make the words less so. *Pittsburgh Pump Co.*, 84 O. G. 309.

"Yorkshire Relish," held to have been used descriptively on packing-cases of bottles of sauce. *Powell v. Birmingham Vinegar Brewing Co.*, L. R. (1894) 3 Ch. D. 449.

The word "Cromarty," being the name of a town in Scotland famous for its herring fisheries, is not registrable as a trade-mark for cured fish. Others with at least equal truth might use it upon packages containing the same article of merchandise. *Proctor, Jr., ex parte*, 51 O. G. 1785.

"Vichy," not infringed by "Lithia-Vichy," upon artificial distilled waters. *République Française v. Schultz*, 115 Fed. R. 196.

"Vichy," as applied to still mineral waters from Vichy, France, is not a trade-mark, and where respondent has for thirty years manufactured a product of mineral water in this country, selling it under entirely dissimilar labels, and achieving a reputation, he cannot be enjoined on the theory of unfair trade. *République Française v. Schultz*, 94 Fed. R. 500; reversing 57 Fed. R. 37.

"Eboli" being a geographical name, "Eboline" was considered geographical. The word formed by adding a common adjectival suffix is still geographical. *Salt & Co.'s Application, in re*, 63 L. J. Ch. 756; 3 Ch. 166 [1894]; 71 L. T. 386.

"Angostura," descriptive of a certain kind of bitters made at Angostura, Venezuela. *Siegert v. Findlater*, 7 Ch. Div. 801; *Siegert v. Abbott*, 72 Hun, 243.

"Ozark," for mineral water, held to be geographical. *Siloam Spring Water Co., ex parte*, 113 O. G. 1420.

"New Orleans Mead," on mead manufactured and sold in St. Louis, the name having been used a long time before appropriated by plaintiff. *St. Louis Carbonating & Mfg. Co. v. Eclipse Carbonating Co.*, 58 Mo. App. 411.

"Mobile," for playing cards, geographical and invalid. *United States Playing Card Co., ex parte*, 96 O. G. 1855.

"Melrose," on hair restorer, not entitled to registration.

"In my opinion it suggests a description as to the place of

origin of the hair restorer, and if it does not, in my opinion it is calculated to mislead the minds of the ignorant, and lead them to think so." *Van Duzer's Trade-Mark, in re*, L. R. 34 Ch. D. 623.

"Milano (cachemire)," black silks. If not geographical it is descriptive. *Warburg, in re*, 13 O. G. 44.

"Yucatan," on leather is geographical. *Weil, ex parte*, 83 O. G. 1802.

"Copenhagen," on snuff, not a good trade-mark. Moreover, such dissimilarity between jars and labels of complainant and those of respondent that there was no infringement on ground of unfair trade. *Weyman v. Soderberg*, 108 Fed. R. 63.

"Schiedam Schnapps," liquor (Schiedam being place, and schnapps a kind of liquor in Holland, not a valid trade-mark. *Wolfe v. Goulard*, 18 How. Pr. 64; *Wolfe v. Hart*, 4 V. L. R. Eq. 125; *Wolfe v. Alsorpe*, 10 V. L. R. Eq. 41; 12 V. L. R. Eq. 421; *Wolfe v. Lang*, 13 V. L. R. 752; *Burke v. Cassin*, 45 Calif. 478; *Contra: Wolfe v. Barnett*, 24 La. Ann. 97.

**B. The name of a people is a geographical name which cannot be legally appropriated as a trade-mark.**

"Grecian," should not be registered as a trade-mark for bust girdles, and athletic and negligé corsets. *Classic Corset Co., ex parte*, 100 O. G. 1329.

"French Tissue," on paper dressing for corns, not good trade-mark, the first word being geographical, the second descriptive. *Draper v. Skerrett*, 116 Fed. R. 206.

"French," not a proper subject of trade-mark for paints, it being a geographic name. *Marsching & Co.*, 15 O. G. 294.

"Modoc," associated with portrait of an Indian, as trade-mark for a liquid car cleaner, not registrable, as it is name of an Indian tribe and therefore geographical. *Modoc Soap Co., ex parte*, 104 O. G. 2150.

"Roman," for knit underwear refused registration. *Rome Textile Co., ex parte*, 91 O. G. 820.

**(1) But the nickname of a people in certain localities has been upheld as a valid trade-mark.**

"Hoosier," on machinery, good trade-mark. *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

"Yankee," applied to label of soap, valid trade-mark.

"It is not a geographical term, nor a proper name, but a designation applied by the dwellers in one locality, to the dwellers in



another place. It was not the name of any certain locality, and it seems to me complainants had the right to adopt it as their trade-mark." *Williams v. Adams*, 8 Biss. 452.

Whether party has exclusive right to use of word "Yankee" as applied to soap, *quaere*; but protection extended to labels as a whole. *Williams v. Johnson*, 2 Bosw. 1.

"Yankee," as applied to soap, good trade-mark. *Williams v. Spence*, 25 How. Pr. 366.

*Contra*: "John Bull," on beer not good trade-mark, since it means an Englishman, and on beer would signify English beer. *Paine's Trade-Mark, in re*, 61 L. J. Ch. 365; 66 L. T. N. s. 642.

**C. A geographical name may become descriptive of a certain class of merchandise produced in that locality and be open to use by all parties anywhere making similar goods.**

"Worcestershire Sauce," had become a generic term, and complainants at Worcestershire, England, could not restrain respondent residing in Wisconsin and preparing sauce in London called "Improved Worcestershire Sauce." *Leu v. Deakin*, 11 Biss. 23.

#### EXCEPTIONS

**D. A geographical name of a certain locality in which the proprietor has the exclusive right or privilege to produce a certain class of merchandise may become a valid trade-mark when applied thereto.**

See II. 4 B. (1). 26; VIII. 1 B. (2). 157.

Plaintiff owned and mined practically all collieries of parish of Radstock, and in addition to regular trade-name added "Radstock Collieries"; defendants had used at Radstock trade-name "Radstock Coal Company" and mined in neighborhood coal known as Radstock coal. Later they established themselves in Surrey and used trade-name "The Radstock Colliery Proprietors;" held, that plaintiff could enjoin them until such time as they acquired right to sell coal from Radstock collieries. *Braham v. Beachin*, 47 L. J. Ch. 348; 7 Ch. D. 848; 38 L. T. 640.

Where a party has been established in business at Number 10 South Water Street, and for many years his establishment has been known as "Number 10 South Water Street" he is entitled to protection against a party who fraudulently establishes himself on said street and assumes the "Number 10." *G. & H. Mfg. Co. v. Hall*, 61 N. Y. 226.

"I can perceive no reason why it may not be the name of a place. Suppose one owns the only coal mine situated in a town or near a city, and he names his coal after the town or city, and it becomes known as such in the market, why may not such name become his trade-mark? The same name could not be truly applied to coal obtained from any other place."

(Parties resident in Akron, N. Y., held to have rights of trade-mark in "Akron" as applied to cement as against non-residents). *Newman v. Alvord*, 51 N. Y. 189.

The word "Leopoldshall," being a place in the Duchy of Anhalt where a special kind of salt was mined, the exclusive exportation of which beyond the sea was given to plaintiff, after several years became a trade-mark of the plaintiff, the plaintiff thereby establishing a title to the exclusive use of a particular word as a trade-mark; injunction granted against defendant, who attempted to use the word fraudulently on salt not imported from there. *Rudde v. Norman*, L. R. 14 Eq. Cas. 348.

"I shall restrain the defendant from using the words 'Cromac Springs' in connection with his trade or business as a manufacturer or seller of mineral waters, so as to represent that his said waters are so manufactured or sold by the plaintiffs at their works in the bill mentioned, called 'The Cromac Springs,' or from using the words 'Cromac Springs' as the name of defendant's place of business, so as to represent as aforesaid." *Wheeler v. Johnston*, L. R. 3 Ir. 284.

**E. A geographical name applied to articles of merchandise in an arbitrary sense in a locality where it conveys no reference to the geographical designation of the articles may be protected as a valid trade-mark.**

"The word 'Alpine' is not of itself a fancy word, but the application of it to cotton embroidery is shown by the evidence to be novel and fanciful, and I hold that it ought to be registered." *Alpine Trade-Mark*, 53 L. T. N. S. 79.

"Aurora," as trade-mark for oils, lard, syrup, and honey on appeal allowed registration, not geographical. *Aspegren & Co., ex parte*, 100 O. G. 684. *Contra: Little & Co., ex parte*, 85 O. G. 1221. III, 2 A. 65.

"The fanciful meaning of the word 'Aurora' has undoubtedly led to its adoption as a name of locality in various parts of the country. . . . It is true that by this use the word has acquired

a geographical significance of considerable extent; but it cannot be said that this geographical significance has divested it in any degree of its mythological or arbitrary meaning. On the contrary, this meaning is understood by a large part of the persons to whom its geographical significance is best known, while by a majority of the people in this country it is understood only in its arbitrary sense." *Aspegren & Co., ex parte*, 100 O. G. 684.

"Pocahontas" valley in coal fields of Virginia, renowned through complainant's industry, protected as a trade-mark. *Atwater v. Castner*, 88 Fed. R. 642. *Contra: Coffman v. Castner*, 87 Fed. R. 457. *Aff'd* 178 U. S. 168.

"Angostura," for bitters, formerly a name of a town, but upward of half a century since change of name no town having existed of that name, good trade-mark. *Bauer v. Siegert*, 120 Fed. R. 81.

"Defiance," good trade-mark for writing papers, made at Dalton, Mass., although there is a town in Ohio named Defiance. *Byron Weston Co., ex parte*, 99 O. G. 861.

"Cashmere Bouquet" soap infringed by "Violets of Cashmere." Complainant had built up large business and acquired great reputation under that name. Court did not explicitly decide that "Cashmere" was valid trade-mark. "I doubt, however, if the word carries to the senses any conception of place or geography. It was adopted, probably, because of its familiar sound to the public ear in connection with shawls, and conveys, if anything, an impression rather of fineness and softness than of place." Case decided on ground of unfair competition. *Colgate v. Adams*, 88 Fed. R. 899.

The word "Dublin," admitted to registry for soap, on the ground that a general practice existed throughout the country of designating soap by similar words, such as "Irish," "Scotch," "Limerick," and the public, being fully aware that such terms were fanciful, could not be deceived.

"It is thus found impossible to lay down a rule that would cover all cases of this kind. Each case must stand upon its own ground. A certain geographical name applied to an article might be either descriptive or deceptive. Another geographical name applied to the same article might be neither." *Cornwall & Bros., ex parte*, 12 O. G. 312.

"Brazilian Silver," forks and spoons, valid. *Daniel v. Whitehouse*, (1898) 1 Ch. 685.

"Dover," on household articles made in Cambridge and Boston

and having nothing to do with Dover, and used continuously last eighteen years, allowed registration. *Dover Stamping Co., ex parte*, 51 O. G. 1784.

“Vienna,” as applied to bread made in New York, arbitrary and fanciful. *Fleischmann v. Schuckmann*, 62 How. Pr. 92.

“German,” admitted to registration as applied to Syrup. “German Syrup,” not being a German product and not made in Germany, fanciful name. *Green, ex parte*, 8 O. G. 729.

“Menlo Park,” although name of small town in New Jersey and California (but not where watches are made), valid trade-mark for watches. *Hampden Watch Co., ex parte*, 81 O. G. 1282.

“Liverpool,” or “Turin,” woolen cloths, valid. *Hirst v. Denham*, L. R. 14 Eq. Cas. 542; 27 L. T. n. s. 56; 41 L. J. Ch. 752.

“Selma,” on washing machines, although name of town in Alabama, registrable in view of its classic origin and use as a Christian name, having no geographical significance. *Huenefeld, ex parte*, 98 O. G. 1968.

“Ethiopian,” on black cotton stockings in England, good trade-mark. *Hine v. Lart*, 10 Jur. 106.

“Waverly,” although in use to designate localities, yet has a private significance not geographical, and can be registered as a trade-mark for bicycles. *Indiana Bicycle Co., ex parte*, 72 O. G. 654.

“Vienna,” arbitrarily applied to flour, allowed registration. It appeared that applicant had used it extensively and had expended large sums under it in his business. “It also appears from affidavits of experts that no flour made in any town called ‘Vienna’ in this country has been placed upon the market under the name ‘Vienna;’ that no flour is upon this market coming from Vienna, Austria; that the word was arbitrarily selected by the petitioner, and that it is the custom in the flour trade to use fanciful names to designate flour, rather than the names of places of production.” *Jenkins, ex parte*, 53 O. G. 759.

“Gibraltar,” registered as trade-mark for belting.

“It undoubtedly has a geographical meaning; but when seen upon goods one of the essential characteristics of which is strength it is believed that the arbitrary meaning of the word would so far transcend its geographical meaning in the mind of the ordinary purchaser as to render the geographical meaning of comparative insignificance” (overruling *Nave & McCord Mercantile Co., ex parte*, 86 O. G. 1985). *Jewell Belting Co., ex parte*, 110 O. G. 309.

“Magnolia,” whiskey, valid. *Kidd v. Johnson*, 100 U. S. 617; *Kidd v. Mills*, 5 O. G. 337.

“Blackstone,” on cigars, good trade-mark, although name of river and town in Mass. *Levy v. Waitt*, 56 Fed. R. 1016; 61 Fed. R. 1008.

“Magnolia,” on metals, not geographical.

“The objection to the word ‘Magnolia,’ as being a geographical name within the section, in our opinion fails as to both the marks (2) and (3). It is no doubt shown by the evidence that there are places in the United States called by the name ‘Magnolia.’ . . . It must, we think, in the absence of special circumstances, be interpreted so as to be in accordance in some degree with the general and popular meaning of the words, and a word does not become a geographical name simply because some place upon the earth’s surface has been called by it.” *Magnolia Metal Co’s Trade-Mark*, [1897] 2 Ch. 371; 76 L. T. 672.

“Galena,” on an antifriction metal not geographical, especially in view of fact that applicants do not carry on business at Galena, but at Buffalo. *Magnus Metal Co., ex parte*, 100 O. G. 451.

“Delta,” as a trade-mark for hardware, allowed registration; although there are numerous instances of its use as geographical locations yet its significance as a Greek letter is far more important. *Manogue-Pidgeon Iron Co.*, 97 O. G. 2084.

“Florentine,” on glass allowed registration, Florence not being noted for glass manufacture and applicants’ factory not being located at Florence. *Mississippi Glass Co., ex parte*, 64 O. G. 713.

“Germania,” allowed registration by a German citizen for Portland cement. *Portland-Cement-Fabrik Co., ex parte*, 64 O. G. 858.

“Persian,” applied to thread made in England, valid trade-mark. *Taylor v. Taylor*, 23 L. J. Ch. 255; 2 Eq. R. 290; 22 L. T. 271.

“Persian,” as applied to thread in England, good in this country. *Taylor v. Carpenter*, 2 Sand. 603.

“Hansa,” name formerly applied to league of German cities dissolved in 1630, valid trade-mark on lard, sausages, and bacon. *Tietgens & Robertson, ex parte*, 87 O. G. 2117.

“Portland,” applied to stoves in Newark, N. J., exclusively by plaintiff who had achieved great reputation, protected. *Van Horn v. Coogan*, 52 N. J. Eq. 380.

“Columbia,” as applied to hotel, not geographical name.

“In the selection of the word ‘Columbia’ the complainant chose merely a fanciful name. It indicates no people, no locality, no particular service which his hotel will render. It does not hold out the idea that people patronizing his hotel will have any accommodations or advantages different from those offered by any other hotel. So that, in the case cited, in the selection of this name, it is not such as to indicate the composition or quality of the article to which it is applied or the particular country or district where produced or manufactured, or to indicate the particular manner in which the business is there carried on.” *Whitfield v. Loveless*, 64 O. G. 442. *But see: Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Morgan Envelope Co. v. Walton*, 86 Fed. R. 605; 171 U. S. 686.

### 3. The proper name of a private party.

“Adriance,” not allowed registration as a trade-mark for reaping and mowing machines, it being name of a member of the firm. *Adriance, Platt & Co.*, 20 O. G. 1820.

“Engelhard,” an ordinary surname, not registrable as trade-mark for tea. *A. Engelhard & Sons Co., ex parte*, 109 O. G. 1886.

“W. H. Baker & Co.,” having acquired reputation in chocolate under that name and having enjoined respondent from using the same name or a similar name without plainly indicating a difference, is not injured by the respondent using the name “William H. Baker, Syracuse, N. Y.,” on his wares. *Baker v. Baker*, 115 Fed. R. 297.

“Gibson Girl,” refused registration as a trade-mark for shoes, as it refers to Charles Dana Gibson, the artist, and his name cannot be used without his consent. *Bishop, ex parte*, 107 O. G. 1973.

“Brown’s Iron Bitters,” on drugs, not infringed by “Brown’s Iron Tonic,” the name being descriptive, Brown having given his name in good faith, and bottles, labels, etc., not being imitated. *Brown Chemical Co. v. Myer*, 139 U. S. 540; affirming 31 Fed. R. 453.

“It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use of one’s own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his

rights to use it." *Brown Chemical Co. v. Myer*, 139 U. S. 540; affirming 31 Fed. R. 453.

"A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria*." *Brown Chemical Co. v. Myer*, 31 Fed. R. 453; 139 U. S. 540.

"Sandow," name of noted athlete, not allowed registration for paper. Nor would registration be allowed a symbol of a muscular arm supporting a weight together with the word "Sandow," without his consent. *Capital Paper Co., ex parte*, 91 O. G. 1616.

The word "Cobb's," extending across a pair of corn cobs, for baking materials, etc., not registrable as a trade-mark, as the salient feature is a surname. *Cobb, ex parte*, 103 O. G. 1913.

The mere name of a corporation will not be registered as a trade-mark, in conformity with well known principles of law. *Creedmore Cartridge Company*, 56 O. G. 1333.

"Dalsimer," ordinary surname, not registrable as a trade-mark on bicycles. *Dalsimer, ex parte*, 85 O. G. 149.

"Burt," ordinary surname, although used by applicant and predecessors for nearly 60 years on boots and shoes and having achieved great reputation, not registrable, being surname. *Edwin C. Burt Co., ex parte*, 96 O. G. 1430.

"R. Esterbrook & Co," title of old and extinct firm, refused registration as trade-mark for pens. Applicant might have the right to protection in case of unfair trade. *Esterbrook Steel Pen Mfg. Co., ex parte*, 97 O. G. 1597.

Respondent Faber had right to use his own name on pencils manufactured by him. It was unfortunate for complainant that both parties had the same name. *Faber v. Faber*, 49 Barb 357; 3 Abb Pr. N. S. 115.

"Fairchild," name of the applicant, not allowed registration as a trade-mark for pens. *Fairchild, ex parte*, 21 O. G. 789.

The word "Featherstone," in script letters in a diagonal line and with a forwardly extending understroke or flourish, being merely the name of the applicant, not registrable. *Featherstone, ex parte*, 86 O. G. 1497.

“Gilson,” ordinary surname refused registration for photograph albums. *F. H. Gilson Co., ex parte*, 83 O. G. 1992.

“Gale,” surname, not allowed registration on agricultural implements. *Gale Mfng. Co., ex parte*, 85 O. G. 1907.

“Guenther,” being ordinary surname, not registrable as trade-mark, nor the words “Gueather’s Best.” *Guenther Milling Co., ex parte*, 86 O. G. 1986.

“But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it; and as the name “Remington” is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such could not in itself give it validity.”

“In our opinion the Remingtons and Sholes made a reasonable and fair use of their names in adopting the name ‘Remington Sholes’ for their machine, and in giving that name to the corporation formed for its manufacture and sale.”

“The name ‘Remington Sholes Company,’ is not identical with, or an imitation of ‘Remington Standard Typewriter Company,’ or ‘Remington Typewriter Company,’ or ‘E. Remington and Sons.’ Defendants’ marks ‘Rem-Sho,’ ‘Remington-Sholes Co., Mfrs., Chicago,’ are not identical with, or an imitation of, complainants’ marks ‘Remington’; Large Red Seal; ‘Remington Standard Typewriter, manufactured by Wyckoff, Seamans and Benedict, Ilion, N. Y., U. S. A.’; ‘Remington Standard Typewriter.’”

Injunction refused, bill dismissed. *Howe Scale Co. v. Wyckoff Seamans & Benedict*, 198 U. S. 118, 134, 135, 138, 139; reversing 110 Fed. R. 520 and 122 Fed. R. 348.

“Wedgewood,” as trade-mark for stoves, refused registration, as it is an ordinary surname. *James Graham Mfng. Co., ex parte*, 104 O. G. 2149.

“Hoxie,” as a trade mark for non-alcoholic brewed beer not registrable, being a surname. *Maloney & Caldwell, ex parte*, 97 O. G. 2084.

“Cross,” not registrable as a trade-mark, being a surname, although the letters are peculiarly arranged, the peculiarities not dominating the name.

“The peculiarities must dominate the mere name and reduce it to a position of relative obscurity.” *Mark Cross Co., ex parte*, 102 O. G. 622.

Defendant was allowed to use his own name in the bell busi-



ness, but not so as to deceive people into thinking that he was the other Meneely.

“The manner of using the name is all that would be enjoined, not the simple use of it; for every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person having the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead.” *Meneely v. Meneely*, 62 N. Y. 427.

“A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good-will of a business already established by others of the name.” *Russia Cement Co. v. Le Page*, 147 Mass. 206.

The name “Tabor,” on the cross arm of a Latin cross, with “B” in the centre and on the upright arm, so that the letter serves for both, is not registrable as trade-mark for washing solutions; the cross might be, but not the whole with the proper name. *Tabor, ex parte*, 96 O. G. 1036.

“Dr. Hoffman’s Drops,” refused registration as trade-mark for medicines, “Hoffman” being a surname and “Drops” descriptive. *Traudt, ex parte*, 100 O. G. 2383.

The word “Van Horn,” associated with a ram’s forehead with horns, held not registrable as a trade-mark for surgical dressings since the salient feature of the mark is the surname. *Van Horn, ex parte*, 109 O. G. 1069.

A party having the right to use the name EBERHARD FABER on his goods is entitled to use E. FABER. *Von Faber-Castell v. Faber*, 139 Fed. R. 257.

“Vassar,” on corsets, refused registration, as it is an ordinary surname, and the use in connection with a locality does not change that character of it. *Weingarten Brothers, ex parte*, 101 O. G. 3108.

Party had the right to use the ordinary abbreviation of his name “Wm. A. Rogers,” and although it might cause some confusion with complainant’s goods he would not be enjoined. *Wm. Rogers Mfg. Co. v. Rogers*, 84 Fed. R. 639.

William Rogers with his two brothers acquired during many years considerable reputation in the silverware business so that the name became known to the public. A company succeeded to the business and stamped its product “(Anchor) Wm. Rogers

& Son," etc. The son, also named William Rogers, formed a partnership and used mark, "(Eagle) Wm. Rogers (Star)." The accompanying marks were held to sufficiently differentiate the product, although there might be to some purchasers a confusion in similarity of names. In this case the son had skill and knowledge in the silverware business. *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 527.

*Contra*: "A person may have a right in his own name as a trade-mark as against a person of a different name." *Gilman v. Hunnewell*, 122 Mass. 139.

*But see*: "Parker Holmes & Co., Boston," allowed registration with figure of a shoe as a trade-mark for boots and shoes.

"In including the firm name as a part of the essential features of the mark I do not lose sight of the well-settled general rule that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name who are using it for a legitimate purpose. The courts would not hesitate to enjoin a firm of the same name carrying on the same business from placing upon the market shoes bearing as a mark the name of the firm arranged as shown in the mark now sought to be registered when used in connection with the shoes placed as shown in the applicant's mark." *Parker Holmes & Co., ex parte*, 85 O. G. 287.

*See also*: The words "J. A. Bowen," and the arbitrary symbols of a shield on which is emblazoned the arms of the United States may be registered as a trade-mark for whiskey by the successors of Bowen.

"It may be true in this case, as it is in many cases, that the name of the person associated with a particular trade or business carries with it the good-will of the establishment with which he was connected. If it is the good-will simply that is sought, then it should not be registered as a trade-mark; but if the name of a person possessing the characteristics of a trade-mark in itself, not an applicant, is adopted by any person, firm, or corporation to identify their particular goods, I see no good reason why it may not be used as a trade-mark and be registered as such." *Frieberg & Workum, ex parte*, 20 O. G. 1164.

**A.** But if the letters of the name are arranged in a fancy and distinguishing style. and if the name be combined with a portrait by consent of the owner, the Commissioner may allow registration.

See III. 3. 75. *Mark Cross Co., ex parte*, 102 O. G. 622. 77. *Parker Holmes & Co., ex parte*, 85 O. G. 287.

A party cannot register a portrait of another without his consent or some contractual right which would debar the other from asserting his exclusive right to it in a business. *Richmond v. Dr. S. A. Richmond Nervine Co.*, 52 O. G. 307.

Name "Bob Ingersoll," associated with representation of bust and head of a man, good trade-mark for cigars, Mr. Ingersoll having filed his consent in writing. *Sullivan & Burke, ex parte*, 16 O. G. 765.

The name "Bayard," and portrait of the United States Senator by that name, proper trade-mark for chewing tobacco. *Pace, Talbott & Co.*, 16 O. G. 909.

**B. The name of a living celebrity without his consent will not be allowed registration as a trade-mark on the ground of public policy.**

"King Edward VII," refused registration as trade-mark for whiskey.

A public man's name cannot be used without his consent for the purposes of private gain of another. *John Dewar & Sons, Limited*, 98 O. G. 1037.

"Dewey," refused registration as trade-mark for candy.

"A living celebrity is entitled to protection from the ordinary trader." *McInnerney, ex parte*, 85 O. G. 148.

"Roosevelt Rose," refused registration as a trade-mark for groceries, partly on account of prior use of "Rose," but particularly on account of fact that Roosevelt is a living personage, and that it is against public policy to allow registration of name of President of the United States. *R. I. Sherman Mfg. Co., ex parte*, 101 O. G. 3105.

**C. A name which is used arbitrarily and is not calculated to lead the public to believe that it signifies the name of a private party, although it is in fact a surname, may be a good trade-mark.**

See III. 3. 77. *Frieberg & Workum, ex parte*, 20 O. G. 1164.

"Weck," is abbreviation of German word "wecken," meaning to awaken, and it is sometimes in Germany used as a surname; but it is arbitrary as applied to sterilizing apparatus, and a good trade-mark. *Van Eyck, ex parte*, 107 O. G. 542.

#### 4. A form, shape, or material substance.

“It is well settled that a person cannot obtain the monopoly incident to a trade-mark by the mere form of a vendible commodity that may be adopted. In this case the complainants could not obtain a trade-mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar, without injury to others who may use the same forms.” *Adams v. Heisel*, 31 Fed. R. 279.

“The shape and construction of the ploughs do not form any part of the trade-mark of the appellants.” *Avery v. Meikle*, 81 Ky. 73.

“I do not think that the merchandise itself, or any method of arranging the various packages, can be registered as a trade-mark. In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise.” *Davis v. Davis*, 27 Fed. R. 490.

A square bottle cannot be registered as a trade-mark for celery compounds, as a form cannot constitute a trade-mark. *Dunkley Celery & Preserving Co., ex parte*, 84 O. G. 310.

A cigar band of paper, brown in color, wider at one end than the other, is not a good trade-mark. *E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co.*, 136 Fed. R. 866.

“Stress is laid upon the fact that the bottles are alike, but, bearing in mind that the evidence discloses that most lime-juice bottles are quite similar in size and design, I do not deem this very important.” *Evans v. Von Laer*, 32 Fed. R. 153.

“An invention of structure a patent for the invention secures; a design is secured by a patent for that. Apart from these, anyone may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person.” *Fairbanks v. Jacobus*, 14 Blatchf. 337.

“The box, barrel, or wrapper, containing merchandise, whatever its form, cannot, per se, be the trade-mark.”

A narrow strip of leaf-tobacco placed in a wrapper around the

mouth-piece of a cigarette varying in size of the cigarette, which performs a useful function, not subject of a trade-mark. *Gordon, in re*, 12 O. G. 517.

Tin pail with handle to it, the tin ornamented with geometrical pattern and used to contain paper collars for sale cannot be used as a trade-mark.

“It will be observed, that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by an ornamental pattern.” *Harrington v. Libby*, 14 Blatchf. 128.

Complainant not entitled to monopoly of form of selling drawing paper in rolls, it being a convenient and usual form. *Heuffel & Esser Co. v. H. S. Crocker Co.*, 118 Fed. R. 187.

The size or shape, or mode of construction of a box, barrel, bottle or package, in which goods may be put is not a trade-mark. *Hoyt v. Hoyt*, 143 Penn. St. 623.

A dome affixed to black lead which may be sold in different shapes can be registered as a trade-mark, but not the shape of a dome.

“A mark must be something distinct from the thing marked. The thing itself cannot be a mark of itself.” *James's Trade-Mark*, L. R. 33 Ch. D. 392; L. R. 31 Ch. D. 340.

“Galvanized iron hoops for barrels have so long been used that their use on whiskey-barrels can hardly be regarded at this time as an original appropriation by petitioners. But, if now first adopted for liquor barrels, it is not sufficiently distinguishable from the same mark on similar barrels to either protect the applicant in the sale of his goods, or to afford notice to the public of original ownership.” *Kane, in re*, 9 O. G. 105.

“Tin Tag,” or “Wood Tag,” good trade-marks on tobacco; but the person so using them would have no right to the exclusive use of tin or other well-known material substance to designate the goods. *Lorillard v. Pride*, 28 Fed. R. 434.

“A person may appropriate any word, figure, or emblem as a trade-mark, but that does not give an exclusive right to the use of the well-known material substances upon which the word, figure, or emblem may be impressed or engraved.”

The plaintiffs claim “that the defendants have produced and sold labels bearing the words ‘Henry Lee,’ in violation of their rights. . . . It is apparent from an inspection of both labels that they are designed to be used by cigar-box makers and the manufacturers of cigars, and that they are valueless for any other

purpose and could not be used by or sold to the public generally. Plaintiffs do not seek to stop a cigar dealer or the public from using the name 'Henry Lee,' but ask that they be protected against interference with their trade by rival manufacturers of labels, and claim that labels are an article of merchandise." *Schumacher v. Schwenke*, 36 O. G. 457.

Where frames for sewing machines in the form of the letter G. had been so extensively manufactured and sold under a patent that they came to be known thereby, the patentee cannot restrain such manufacture and sale after expiration of the patent under a claim that the form is a trade-mark. *Wilcox & Gibbs Sewing Machine Co. v. The Gibbens Frame*, 17 Fed. R. 623.

*But see*: "A waved band of ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar-box, and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars," allowed registration as trade-mark. *Straiton & Storm*, 18 O. G. 923.

## 5. A color.

See III. 6. 83. But see VIII. 1 E. 171.

Registration of orange-colored strand in rope conflicts with red-colored strand. A difference in color does not make a mark registrable. *Broderick & Bascom Rope Co. v. Leschen & Sons Rope Co.*, 96 O. G. 1647.

"There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the centre of the label, etc. Having done this, we think they are relieved from further responsibility." *Coats v. Merrick Thread Co.*, 149 U. S. 562. Aff'd 36 Fed. R. 324.

A party has no exclusive right to a certain kind or color of paper to put up his wares. *Faber v. Faber*, 49 Barb. 357; 3 Abb. Pr. n. s. 115.

“The manufacture of this article is open to all competitors, and they cannot be held liable in any action to restrain them where they plainly put their name upon the label, even though they do happen to use light yellow for the background of the paper upon which the description of the commodity is given.” *Fleischmann v. Newman*, 4 N. Y. Supp. 642.

“The position is taken by the complainants that the essential part of their trade-mark consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade-marks. . . . The color of a label, apart from a name or device, can hardly be the subject-matter of a trade-mark.” *Fleischmann v. Starkey*, 25 Fed. R. 127.

Red, white, and blue label for coffee with words “Red, White, & Blue” is not entitled to registration, it not being distinctive. *Hanson's Trade-Mark, in re*, 37 Ch. D. 112.

A red bag for seed peas with no limitation as to the bag in shape or size or material, only as to the color, is not a device to be registered, as color alone cannot constitute a trade-mark. *Landreth, ex parte*, 31 O. G. 1441.

“The complainants use a rose-colored capsule upon bottles containing wine made by them known as ‘Extra Dry.’ They seek by this suit to prevent the defendant from using a capsule of similar color. . . . It was necessary for him to use a capsule of some kind. Almost all colors harmonious for this use, such as gold, silver, and white, had previously been appropriated by other dealers in champagne. He could hardly select a capsule without coming in contact with some of them. He chose rose color, as he had a right to do. If he had simulated the complainants’ labels in other respects, a different proposition would have been presented.” *Mumm v. Kirk*, 40 Fed. R. 589.

Word “olive,” refused registration as trade-mark for bicycle, it merely indicating the color of the machines. *Olive Wheel Co., ex parte*, 84 O. G. 1871.

The word “red,” for snuff, refused registration. *Pearson Tobacco Co.*, 85 O. G. 287.

## 6. A style of dressing goods.

But see VIII. 1 F. 173.

Plaintiff sold soap marked "B. T. Babbitt Trade-Mark Best Soap." Defendant's soap was sold in cakes of a somewhat different size and shape from those of plaintiff. The wrappers were of same color and about the same size, but different in general appearance. Held no infringement since no trade-mark could be acquired in size and color of the packages or in the words "Trade-Mark" and "Best Soap." *Babbitt v. Brown*, 23 N. Y. Supp. 25.

"The boxes in which appellees' corsets are placed to be sold, are of the same shape, size, and general color as those in which appellants' corsets are placed to be sold. It does not appear, however, that there is anything unusual in the shape or structure or color of these boxes, and, so far as we perceive, this similarity may result from the use required, and the convenience of the makers of the boxes — at all events, it does not appear that this may not be so, and we regard it a reasonable inference in the absence of all proof as to the purpose or motive." *Ball v. Siegel*, 116 Ill. 137.

Peculiar method of packing not trade-mark. Relief not granted because it did not appear that complainant had established a reputation in the market before defendants, and that he was the first to introduce the goods in that peculiar way. *Colgan v. Danheiser*, 35 Fed. R. 150.

Soap packed in a box, with alternate red and yellow wrappers, so as to produce a representation of a trade-mark of the same combination of colors, is not an infringement of that trade-mark. A peculiar method of arranging soap in a box is not a trade-mark which can be legally registered. *Davis v. Davis*, 27 Fed. R. 490.

Form of package of cleaning and polishing soap and arrangement of labels not subject of trade-mark. *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292; reversing 23 Hun, 632; 57 How. Pr. 121.

"It has been too often reiterated to be now questioned, that under ordinary circumstances the adoption of packages of a peculiar form and color alone, having no distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade-mark." *Fischer v. Blank*, 138 N. Y. 244.

"I am by no means clear, that, as the case stands, the plaintiffs



have made out any appropriation of their own exclusive use of the colored wrappers and form of packages employed. On the contrary, in these particulars, I am inclined, upon the proofs, to the conclusion that both plaintiffs and defendants have employed the common method used in Germany for putting up medicinal teas." *Prese v. Buchof*, 13 Blatchf. 234; 13 O. G. 635.

There is no trade-mark in the size, shape, and arrangement of bottles and labels. *Hoyt v. Hoyt*, 143 Penn. St. 623.

"After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks, or symbols, is not, and that it cannot become, a lawful trade-mark or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive right to its use as such." *Moorman v. Hoge*, 2 Sawyer, 78; 4 Am. L. T. 217.

### **7. Or a label, or advertisement, or marks serving merely some useful or ornamental purpose.**

**A. A label containing ornamental or advertising features beyond an arbitrary sign intended to designate origin of the goods is not a valid trade-mark.**

(N. B. This does not mean that a trade-mark on a label may not be protected.)

See VIII. 1 F. 173 & G. 181, where protection is granted not on ground of infringement of trade-mark but of unfair trade.

A colored streak in a wire rope not restricted to any particular color is not a good trade-mark, or not distinctive, since the color might be varied at pleasure, and the streak might be either a straight, circular, or spiral line. *A. Leschen & Sons Rope Co. v. Broderick*, 134 Fed. R. 571; affirming 123 Fed. R. 149.

Cautionary words on ploughs, "Keep all taps screwed up," are not the subject of a trade-mark. *Avery v. Meikle*, 81 Ky. 73.

"It is well settled, moreover, that directions, advertisements, notices, etc., constitute no part of a trade-mark, and that no one can obtain a trade-mark in the form, appearance, or finish of his goods, so that another cannot lawfully make his goods like them." *Ball v. Siegel*, 116 Ill. 137; 56 Am. R. 766.

"Any manufacturer of goods which are sold by the piece, such as cloths, for instance, must have the right by marks or lines to indicate where to cut, in order to remove each yard, or part of a yard, or other specific quantity." *Dausmann & Drummond Tobacco Co. v. Ruffner*, 15 O. G. 559.

“The plaintiffs cannot have a trade-mark in the descriptive words, ‘Cough Remedy,’ or in the more extended description, ‘A sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption.’” *Gilman v. Hunnewell*, 122 Mass. 139.

A representation of a hand with eyelets therein, and cross lacings connecting the eyelets, not registrable as a trade-mark for gloves, as it is purely decorative. *Peyser & Co., ex parte*, 62 O. G. 588.

#### IV. PROPERTY RIGHTS IN TRADE-MARKS.

1. A proprietor has in his trade-mark a right of property which the courts will protect from infringement.

See X. 1 A. (1) 218; XI. 7 A. 258.

“Judicial protection is granted in such a case upon the ground that the honest, skilful, industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption that has found favor with the public, and who by affixing to it some name, mark, device, or symbol which serves to distinguish it as his and from that of all others, shall receive the first reward of his honesty, skill, or enterprise, and shall in no manner and to no extent be deprived of the same by another who to that end appropriates the same or a colorable imitation of the same to his production, so that the public are or may be deceived or misled.” *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51.

“Courts of equity proceed ‘on the principle of protecting property alone’ and the promotion of honesty and fair dealing. The protection of the public alone is not sufficient ground for the jurisdiction. However, it is an element which enters, and ought to enter, into every case.” *Avery v. Meikle*, 81 Ky. 73.

“The dealer has property in his trade-mark. This is allowed him because of the right which every man has to the rewards of his industry and the fruits of his discovery, and because of the wrong of permitting one man to use as his own that which belongs to another. *Blackwell v. Armistead*, 3 Hughes. 163.

“His right to the trade-mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade-mark is property, and the owner’s right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other.” *Derringer v. Plate*, 29 Calif. 292.

“It is plain, therefore, that in the trade-mark the plaintiff has all the essentials of a right of property claimed by him, and that

this right extends to two things, — first, — the device or emblem of an anchor attached to the wire; and, secondly, the name, ‘anchor brand wire’ or ‘anchor wire’ which has resulted from the use of the device, and has become the distinctive appellation in the market of the wire manufactured by the plaintiff.” *Edelsten v. Edelsten*, 9 Jur. n. s. 479; 7 L. T. n. s. 768.

“The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property.” *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. Cas. 523.

An element of the right to the property in a trade-mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. *McAndrew v. Bassett*, 33 L. J. Ch. 561; 10 Jur. n. s. 550; 10 L. T. n. s. 442; 4 De G. J. & S. 380; 12 W. R. 777.

“Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it.” *McLean v. Fleming*, 96 U. S. 245.

“But the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business; and that having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good-will of the complainant’s friends, or customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent.” *Partridge v. Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281.

The value of a trade-mark may be considered in fixing franchise tax of a corporation. *People v. Kelsey*, 105 N. Y. App. Div. 132.

“By the law of this country, and the like law prevails in most other civilized countries, he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners.” *Ransome v. Graham*, 47 L. T. n. s. 218; 51 L. J. Ch. 897.

“It is now settled that the jurisdiction of this court as to trade-marks is not confined to cases of fraud, but extends to property, and that when the right to property can be acquired the Court may be called on to interfere.” *Wheeler v. Johnston*, L. R. 3 Ir. 284.

**2. A trade-mark is the sign of the good-will or reputation of a business, and it is not an abstract property right apart from its use in that business.**

See X. 1 A. (1). 220. *Morgan v. Rogers*, 26 O. G. 1113. II. 6. 30; II. 2. 20; IV. 6. 100; X. 3. 229; X. 5. 233; X. 6 A. 234; XII. 1 D. 281; V. 3. 123.

“He has no property in that mark *per se* any more than in any other fanciful domination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with his mark upon them, the court has said no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark.” *Ainsworth v. Walsley*, 1 L. R. Eq. Cas. 518.

“There is no exclusive right to the use of a name or symbol or emblematic device except to denote the authenticity of the article with which it has become identified by association. The name has no office except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked.” *Apollinaris Co. v. Scherer*, 27 Fed. R. 18.

“There is no abstract right in a trade-mark. It is property only when appropriated *and* used to indicate the origin or ownership of an article on goods.” *Avery v. Meikle*, 81 Ky. 73.

“On the contrary, it is distinctly laid down by the authorities that it is only *the actual use* of the mark, device, or symbol by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it.” *Blackwell v. Dibrell*, 3 Hughes, 151.

“It is the *actual use* of the trade-mark affixed to the merchandise of the manufacturer, and this alone which can impart to it the element of property. The mere declaration of a person,

however long, and however extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property." *Candee v. Deere*, 54 Ill. 439.

"Property in trade-marks, is not property in the words, letters, marks or symbols as things, or as signs of thought, or as products of the mind, like that of patent or copyright; but simply, and solely property as a means of designating things — the things thus designated being the production of human skill, or industry, whether of the mind, or the hands, or a combination of both; and this property has no existence apart from the thing designated, or separable from its actual use in accomplishing the present and immediate purpose of its being." *Congress & Empire Spring Co. v. The High Rock Congress Spring Co.*, 57 Barb. 526.

If a trade-mark is put on the registry, and there is no business in which it is used, it cannot be assigned. *Cotton v. Gilliard*, 44 L. J. Ch. 90.

"It is also to be noticed, that an assignee of a trade-mark does not obtain a right to restrain copyists of his mark, merely by virtue of his assignment, but he must also show that it has actually been used and applied upon an article, so that the public have come to understand that 'the article to which it is attached is the manufacture or production which is generally known in market under that denomination.'" *Filkins v. Blackman*, 13 Blatchf. 440.

A party named Marler wrongfully obtained registration of a trade-mark belonging to petitioners. The court held that he could not assign the trade-mark to the petitioners, because he had no good-will or business and the assignment would convey nothing. *Lawrence Bros., ex parte*, 44 L. T. N. S. 98.

"I fully concur in the observations on both sides, not only that the good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew the case in which it has been so treated." *Robertson v. Quidington*, 28 Beav. 529.

Actual use of a mark upon goods put on the market and sold by the adopter is necessary to create ownership. Three things are necessary :

*First.* — Adoption of a mark not used by another to designate goods of the same kind on market.

*Second.* — Application of a mark to an article of traffic.

*Third.*— Article bearing trade-mark must be put on market by owner. *Schneider v. Williams*, 44 O. G. 1400.

The widow of Capt. Simeon Pepper who had been in the oil business and used the trade-mark "Capt. S. Pepper's Signal Oil," or "Pepper's Signal Oil," had no right, he having no such business and the widow succeeding to none, to assign the trade-mark to another, and an assignment of the trade-mark in gross gave the assignee no rights under it to maintain a bill against its use by a third party. "There is no such thing as a trade-mark in 'gross,' to use that term by analogy." *Weston v. Ketcham*, 51 How. Pr. 455.

"There is no exclusive ownership of the names, devices, symbols, or marks which constitute a trade-mark apart from the use or application of them when applied to a vendible commodity." *Weener v. Brayton*, 152 Mass. 101.

*But see:* Where complainant who had acquired a trade-mark in his own initials "A. C." on groceries had sold the right and on bankruptcy of owner the receiver had reconveyed right to him, and the stock of goods to respondent, he was entitled to maintain his right against respondent, as the trade-mark did not go with the goods. *Godillot v. American Grocery Co.* 71 Fed. R. 873.

**A. Good-will is the reputation of a business in addition to the material assets and is the subject of property.**

"But the term good-will seems wholly inapplicable to the business of a solicitor, which has no legal existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs." *Auten v. Boys*, 2 De G. & J. 626.

"The good-will of an established business, which is a common subject of contract, is nothing but the chance of being able to keep the business which has been established." *Barber v. Connecticut Mutual Life Ins. Co.*, 15 Fed. R. 312.

"It is difficult to see how the good-will, consisting in the habit of the trade being carried on in the same place, can be distinguished; and separated from the lease of the house." *Crawshay v. Collins*, 15 Ves. 224.

"The good-will, which has been the subject of sale, is nothing more than the probability, that the old customers will resort to the old place." *Cruttwell v. Lye*, 17 Ves. 346.

“The good-will of an inn or tavern is local, and does not exist independent of the house in which it is kept.” *Ellicott's Appeal*, 60 Pa. St. 161.

“The case at bar, properly considered, is a species of ‘good-will,’ analogous to a trade-mark. . . It does not mean simply the advantage of occupying particular premises which have been occupied by a manufacturer, etc. It means every advantage, every positive advantage that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business.” *Glen & Hall Mufg. Co. v. Hall*, 61 N. Y. 226; 19 Am. R. 278.

“Good-will resolves itself into reputation.” *Howe v. Searing*, 19 How.Pr. 14.

“The good-will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor.” *Knoedler v. Boussod*, 47 Fed. R. 465.

“It is property of a very peculiar and exceptional character. It is intangible property which, in the nature of things, can have no existence apart from a business of some sort that has been established and carried on at a particular place.” *Metropolitan Bank v. St. Louis Dispatch Co.*, 36 Fed. R. 722.

“Nor can I comprehend how it existed independently of the property.” *Musselman's Appeal*, 62 Pa. St. 81.

“The good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated.” *Robertson v. Quid-dington*, 28 Beav. 529.

“Good-will has been defined as ‘all that good disposition which customers entertain toward the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it.’ There is nothing marvelous or mysterious about it. When an individual or a firm or a corporation has gone on for an unbroken series of years conducting a particular business, and has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of goods dealt in, so absolutely honest and fair in all business dealings that customers of the concern have become convinced that



their experience in the future will be as satisfactory as it has been in the past, while such customers' good report of their own experience tends continually to bring new customers to the same concern, there has been produced an element of value quite as important—in some cases, perhaps, far more important—than the plant or machinery with which the business is carried on. That it is property is abundantly settled by authority, and, indeed, is not disputed. That in some cases it may be very valuable property is manifest." *Washburn v. National Wall-Paper Co.*, 81 Fed. R. 17, 20.

"There is considerable difficulty in defining, accurately, what is included under this term *good-will*; it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable, which may be preserved (at least to some extent), if the business be sold as a going concern, but which is wholly lost, if the concern is wound up, its liabilities discharged, and its assets got in and distributed." *Wedderburn v. Wedderburn*, 22 Beav. 84.

"Good-will has been defined by this court to be 'the favor which the management of a business has won from the public, and the probability that old customers will continue their patronage.'" *Williams v. Farrand*, 88 Mich. 473.

**3. The right of property in a trade-mark will be protected from infringement by the courts, irrespective of fraud or the intent of the infringer.**

See XI. 7 A. 258.

**4. The property rights in a certain trade-mark do not extend beyond the exclusive right to that mark as applied to that class of goods for which it has been appropriated.**

See IV. 5. 95.

Plaintiff had for a number of years used its corporate name on cotton goods, but not on prints and calicoes. Defendant used word "Amoskeag" on prints and calicoes. Held that the goods were in the same class and public was liable to be deceived. Injunction. *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297; reversing 55 Barb. 151.

"While the revenue laws, for purposes of taxation, distin-

guished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco, similar in all material respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term 'smoking tobacco.' We do not believe the public or the trade draw such a distinction as the defendant sets up." *Carroll v. Ertheiler*, 1 Fed. R. 688; 21 Alb. L. J. 503.

Complainant had trade-mark in word "Celluloid" used in compound of pyroxyline in giving glossy surface to collars and cuffs. Respondent used the word as applied to starch which complainant had never made or undertook to make. The prospect that the complainant would in the future want to manufacture starch or some article which has the use of and simulates starch, was too shadowy to base an injunction upon. *Celluloid Mfg. Co. v. Read*, 47 Fed. R. 712.

Sheet iron is not in the same class as wire, and a trade-mark on wire is not likely to deceive the public if the same as one used on sheet iron.

"In the course of the argument it was asked, what is to be done if a man extends his business? . . . In my opinion, if a man wishes to extend his business to a new description of goods and to use his trade-mark in connection with the goods, he ought to register it in respect of those goods." *Edwards v. Dennis*, 30 Ch. D. 454.

"La Norma," having been registered as trade-mark for cigar boxes, does not preclude registration of "Norma" for cigarettes the two goods not being in the same class. *Egyptian Tobacco Co., ex parte*, S5 O. G. 1905.

"Carmencita," had been registered as trade-mark for cigarettes. "Carmen" allowed as trade-mark on cigarettes. The goods belonged to the same general class of merchandise, but not to the same particular class. *Egyptian Tobacco Co., ex parte*, S5 O. G. 1741.

"The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached." *Filkins v. Blackman*, 13 Blatchf. 440.

"The reasoning of some of the authorities would indicate that

the defendants had a right to use the brand in connection with other fruits and vegetables, analogous to tomatoes and peaches, but to assert that they have the right to use it on all canned goods is carrying the doctrine far beyond any reported case. . . . The fact that the defendants have subsequently extended their business so as to include fish and other like articles of food does not avail them, neither would the fact, if it existed, that, at the time they adopted the word 'Epicure' they intended in the future to embrace these articles. . . . It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it."

Coinplainants, by first using the word "Epicure" on canned salmon, acquired right to so use it, although respondents had previously used it on canned fruit and vegetables. *George v. Smith*, 52 Fed. 830.

There may be several classes of goods under the general designation of iron.

"Although the applicants contend that they have used this mark for twenty-five years in the market, these particular goods have not been known by it. That point was argued by a man who had used a mark for whiskey which he thought he could extend to beer, though it was very like Allsopp's mark, but I did not think so. . . . The applicants say that, if they are allowed to use this mark in respect to certain goods, it is hard upon them that they should not be allowed to use it for the whole of their trade; but if they are going to sell goods which they never sold before, the answer is that they can adopt a new mark upon them." *Jelley, in re*, 51 L. J. Ch. 639.

A party could not register mark "Ironclad" on drawers and pantaloons when it had already been registered by a prior party for overalls. *Kyle, ex parte*, 57 O. G. 274.

"Heliotype," good trade-mark on prints of a certain kind protected by a patent, but good only on prints of that process and no other; hence one could use word on prints of another kind. *Osgood v. Rockwood*, 11 Blatchf. 310.

Registration of a symbol of a crown for a trade-mark for "paints" by A, who had previously acquired the exclusive use of such trade-mark for only particular kinds of paints, does not enable A to restrain B from using such trade-mark upon other kinds of paint to which B had been in the habit of fixing such trade-mark prior to registration.

Plaintiff had right to use mark upon Paris white, Venetian red, drop black, Indian reds, Tuscan reds, patent drier, oak stain, dry ochres, ochres in oil, and various other colors. Defendant had meanwhile acquired right to use mark on white lead, and *blanc de zinc*. The white lead of plaintiff bore another mark. The rule was that both parties had acquired limited rights at common law. *Smith v. Reynolds*, 13 Blatchf. 458.

See XVI. 2. 336. *Smith v. Reynolds*, 10 Blatchf. 100.

Trade-mark on dry white oxide of zinc not infringed by use of same mark on white oxide of zinc ground in oils, the first mark never having been applied to the latter class of goods. *Société Anonyme v. Baxter*, 14 Blatchf. 261.

“The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trade-mark of the plaintiffs. . . . So, flour is intended to be made into bread. But, if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trade-mark therefor, could not claim that the baker had violated his trade-mark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture.” *Société Anonyme v. Baxter*, 14 Blatchf. 261.

“Different persons may apply the same mark to different sorts of goods in the same class, provided the nature and resemblance of the goods are not so nearly the same as that the identity of the trade-mark would deceive the public as to their origin or ownership.” *Sorg v. Welsh*, 16 O. G. 910.

Garters included in the same class of goods as “all kinds of wearing apparel for men and boys.” *Stein & Co., ex parte*, 85 O. G. 147.

Complainant using word “Swift,” on “stock food,” and “poultry food,” entitled to injunction against its use by respondent on similar articles; but not against its use on lemon juice. *Swift & Co. v. Groff*, 114 Fed. R. 605.

**5. Goods are considered to be of the same class if they are of the same character, serve the same general purpose, and might reasonably be expected to be the product of the same business.**

See IV. 4. 92; IV. 6 B. 105. *Macmahan Pharmacal Co. v. Denver Chemical Mnfg. Co.*, 113 Fed. R. 468.

One trade-mark cannot be registered for "implements, apparatus, and goods used in athletic games and sports." There is not stated the "particular description" required by statute. *A. G. Spalding & Bros., ex parte*, 120 O. G. 325.

The word "Aladdin," having been registered for bicycle lamps, its subsequent registration was refused for gas or vaporizing lamps generally, excepting bicycle lamps, as they were all of the same class. *Aladdin Gas Light Co., ex parte*, 100 O. G. 450.

"Pale ale and half-and-half must, as against an infringer of a trade-mark for the former, be treated as malt liquors, substantially similar to each other and belonging to the same class. Courts should not be astute to recognize in favor of an infringer fine distinctions between different articles of merchandise of the same general nature, and should resolve against the wrong-doer any fair doubt whether the public may or may not be deceived through the application of the spurious symbol." *Bass, Ratcliffe & Gretton (Ltd.) v. Feigenspan*, 96 Fed. R. 206.

Application to register a trade-mark for the general class of "alcoholic spirits" allowed. "I know of no decision of the courts, nor does the Examiner cite any in support of his position, that the law contemplates that different descriptions of the same class of goods should be made the subjects of separate applications. On the contrary, the most recently published decision which has come to my notice gives the clause of the statute under consideration (sec. 4937 U. S. R. S.) quite a different interpretation. *Smith v. Reynolds*, 3 O. G. 214. . . . It is true that the use of such comprehensive terms is a very bad practice, but the evil results appear to fall on those applicants alone who take the risk. . . . This danger of including within the terms of a registration more than applicants can maintain, will probably serve to restrict the practice of making the descriptions too comprehensive." *Boehm, in re*, 8 O. G. 319.

One trade-mark "Centennial," can be registered for Bourbon, wheat and rye whiskies, wines, brandies, gins, and bitters. *Boehm, in re*, 8 O. G. 319.

Bush & Co. sought to register "Centennial," as a trade-mark for "Sparkling Wines," but were rejected upon the registration by F. Boehm & Co. of said word for "wines of which alcoholic spirits is an ingredient." "It is denied, however, by the applicants that the word 'Centennial,' as registered by Frank Boehm & Co., covers the class of merchandise to which they claim the

right to apply it, *i. e.*, sparkling wines, but is confined to those wines of which alcoholic spirits is an ingredient. Frank Boehm & Co. set forth that their trade-mark is applied to that class of merchandise containing alcoholic spirits, and they include wines in the enumeration of the particular goods comprising such class. All wines contain alcohol, and as they have not expressly limited themselves to such as are compounded with alcoholic spirits, it seems not inconsistent with their registration to say that they really include all such wines as contain alcohol." *Bush, in re*, 10 O. G. 164.

An applicant for trade-mark for "railway supplies" such as "car-doors, their trimmings and journal-bearings," required to state more particularly the goods, as "car doors" and "journal-bearings," are not of the same "particular description." *Camel Co., ex parte*, 108 O. G. 288.

"Goods are in the same class whenever the use of a given trade-mark or symbol on both would enable an unscrupulous dealer readily to palm off on the unsuspecting purchaser the goods of the infringer as the goods made by the owner of the trade-mark, or with his authority and consent."

Baking powder in same class with baking soda and saleratus, the powder containing a large proportion of soda. *Church & Dwight Co. v. Russ*, 99 Fed. R. 276.

One trade-mark may be registered in application for trade-mark for groceries under designation of particular goods, "canned goods, flour, tobacco, cigars, dried fruit, condiments, farinaceous goods, flavoring extracts, coffee, lard, hams, bacon, and canned beef." It would be an onerous requirement to require five separate registrations. *Clark-Jewell-Wells Co., ex parte*, 83 O. G. 915. *But see: Faxon, ex parte*, 103 O. G. 891, 98, and *Silvers, ex parte*, 67 O. G. 811. 99.

Since 1834 plaintiff and its predecessors, under whom it claimed, had manufactured edge tools of steel, stamping thereon "Collins & Co.," under which it had obtained great reputation in United States and in Australia. Defendant in 1856 began to stamp shovels "Collins & Co.," and sell them in Australia where plaintiff had never sold shovels, but where the mark was highly respected on edge tools and picks. The purpose of defendant was to avail himself of reputation of plaintiff. Held a fraud; and injunction issued. *Collins & Co. v. Oliver Ames & Sons Corp.* 18 Fed. R. 561; 20 Blatch. 542.

"Old Government," refused registration as a trade-mark for

fruit brandy, in view of its prior registration for whiskey, the two goods being in the same class.

“The essential thing to be determined now is the proper scope of the word ‘class’ as it is used in the statute, and it must be held that in contradistinction to the ‘particular description of goods’ mentioned in the statute, the ‘class’ of goods means that genus which includes as species such goods as if exposed to the purchasing public side by side with the ‘particular’ goods to which the trade-mark has been applied will result in the ‘deception’ mentioned in section eight of the statute, whereby the purchasing public, misled by the application of the single title to the various ‘particular’ goods comprised within the class, will conclude that they have originated from the same source and will purchase one under the impression that it was made by the maker of the other.” *Crown Distilleries Co., ex parte*, 89 O. G. 2590.

Application for registration of trade-mark should not be for more than one class of goods, and a trade-mark for “grocers’ supplies,” cannot include butter, eggs, dried beef in packages, coffee, oat-meal wafers, cracker meal, butters, saltines, gems, banquets, grahams, sodas, ginger snaps, teas, and ale.” *Faxon, ex parte*, 103 O. G. 891. *But see: Clark-Jewell-Wells Co., ex parte*, 83 O. G. 915; and *Silvers, ex parte*, 67 O. G. 811, and cases in IV. 5. 95.

Suspenders for trousers are not in the same particular class of goods as garters for half hose, as the latter are not considered suspenders. *Frank v. Macwilliam*, 117 O. G. 1165.

“Between glazed kid and chamois skins there are many intrinsic distinctions, and although both are leather goods I do not think they are of ‘substantially the same descriptive properties.’” *Keystone Chamois Co., ex parte*, 101 O. G. 3109.

“Knives, forks, scissors, razors, shears, chisels, augers, drills, taps, dies, adzes, sickles, scythes, saws, files, and rasps” cannot all be included under one trade-mark.

Scissors and shears might be classed together; so taps and dies; axes and adzes; scythes and sickles; files and rasps; but not all together. *Marsh Brothers Co.*, 108 O. G. 288.

“Plumbers’ supplies,” comprising pipes, pipe fittings, valves, tanks, basins, closet-bowls, urinals, bath tubs, faucets, cocks, and nozzles used to convey and contain water are not all of the same class.

“The words ‘substantially the same,’ do not mean exactly the same; but they do mean that the articles are so nearly alike in

characteristics and use that the purchasing public seeing them sold under the same mark would naturally suppose that they were made by the same manufacturer." *Peck Brothers Company, ex parte*, 106 O. G. 764.

Registration of trade-mark allowed in one application for grocers' drugs, flavoring extracts, coffee "and the particular description of goods comprised in said class on which it is used by us is extracts of essences of vanilla, lemon, peppermint, and Jamaica Ginger, Bateman's drops, paregoric, castor oil, sweet oil, sewing-machine oil, glycerin, sirup of ipecac, sirup of squills, spirits of nitre, and coffee." "There is no authority for requiring the subdivision of applications to accord with the Office classification of trades. The registration can be limited by nothing narrower than the actual and lawful use of the mark in the place where the business is located." *Silvers, ex parte*, 67 O. G. 811. *But see: Clark-Jewel-Wells' Co.*, 63 O. G. 915, 97, and in IV. 5. 95.

A large number of goods of different purposes and uses cannot all be included under registration of word "Banner," as a trade-mark, merely because are all made of rubber.

"The question whether goods are of substantially the same descriptive properties depends not merely upon the substance of which they are made, but also upon the character and use of the articles themselves. For instance bath tubs and dolls cannot be said to be of the same descriptive properties because made of the same material. The use of a particular mark upon one would certainly not infringe the right to use it upon the other." *Tallmadge, ex parte*, 104 O. G. 2443.

Gin considered to be substantially the same as geneva (the latter a corruption of genever). *Vanden Bergh v. Blankenheym*, 108 O. G. 563.

Toilet soap and laundry soap are of substantially the same descriptive properties. *Willard Chemical Co., ex parte*, 107 O. G. 1972.

The same mark cannot be registered for "ready-mixed paints, driers, white lead, stove-polish, stove and furnace cement, and roofing-cement." *William Connors Paint Mfg. Co., ex parte*, 119 O. G. 2522.



6. A. Although no specified length of time may be necessary for a party to acquire a trade-mark at common law, yet the duration, manner, and extent of use of a sign are material in determining whether a party has acquired the rights of a trade-mark under it.

See IV. 8 A. 111.

See II. 5. 28. III. 2 E. 70. *Colgate v. Adams*, 88 Fed. R. 899. XIV. 1 A. 291. *Brower v. Boulton*, 53 Fed. R. 389. XI. 15. 279. *Walter Baker & Co. Ltd. v. Puritan Pure Food Co.*, 139 Fed. R. 680.

“A purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation and subsequent use, become a trade-mark. . . . The same might be said of a symbol or sign, such as a cross, a star, or lion, which, when stamped upon a particular article, may become its distinctive mark, and will be upheld as such as soon as the article becomes known and distinguished by that mark.” *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

Use two years of “cocaine,” on hair oil and expenditure of \$10,000 in advertising evidence of acquisition of rights of trade-mark in the word. *Burnett v. Phulon*, 9 Bosw. 193. Aff’d 5 Abb. Pr. n. s. 212; 3 Keyes, 594.

The complainant was incorporated under the laws of New York in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline; in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word ‘celluloid’ . . . and used the word as a trade-mark. In 1873 complainant caused said word ‘celluloid’ to be registered, and again in 1883, under the subsequent act. Word protected as a trade-mark. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. R. 94.

“No definite length of time is requisite to confer this right of property, provided the injured party has, by priority of adoption, appropriated the name or symbol as peculiar to his merchandise, and indicative of its place of manufacture.” *Cleveland Stone Co. v. Wallace*, 52 Fed. R. 431, 436.

Where parties had used term “Club Soda,” on carbonated

water from 1877 to 1896, held that they had acquired a trade-mark in it, it having come to designate their product. *Cochrane v. McNish*, 74 L. T. n. s. 109; 65 L. J. P. C. n. s. 20.

“It appears from the evidence that at the time of the adoption of the words, ‘Kentucky Club Bourbon,’ as a trade-mark by defendant, the complainant was selling very little, if any, of its ‘Kentucky Club,’ whiskey in this city and county, and that even at the time this suit was brought the complainant’s product was not known to many of the largest liquor dealers there. They testified that they had never come in contact with it, and their only acquaintance with it was in the printed lists or quotations of some liquor publications. The complainant itself does not show that it has lost any sales by reason of defendant’s product.” Injunction refused. *Daviess County Distilling Co. v. Martinoni*, 117 Fed. R. 186, 188.

Use of mark “Old Crow” on whiskey by plaintiff and predecessors for sixty years sufficient to establish right, although mark is not registered. *Guines v. Leslie*, 54 N. Y. Supp. 421.

“But if the word ‘elastic,’ were deemed to be so descriptive of these articles as to be inadmissible as a technical trade-mark, still, under the proofs, the word has acquired such a secondary signification, denoting sectional book-cases and like furniture of the plaintiff’s manufacture, that the plaintiff should be protected in its use.” *Globe Wernicke Co. v. Brown*, 121 Fed. R. 185, 187.

“The interference of a Court of equity cannot depend on the length of time a manufacturer has used it. If the mark or brand be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but provided it has been originally adopted by a manufacturer, and continuously and still used by him to denote his own goods when brought into the market and offered for sale, then I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbors cannot use that mark. Were it otherwise, and were the question to depend entirely upon the time the mark had been used or the reputation of it had been acquired, a very difficult, if not insoluble inquiry would have to be opened in every case; namely, whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it.” *Hall v. Barrows*, 32 L. J. Ch. n. s. 548.

“It is not sufficient in the case of a trade-mark, as in the case of an invention, to show that it has once been recognized and used, but the right thereto can only be maintained by constant use of the same upon a particular class of goods. The owner of a trade-mark may forfeit or abandon his right by discontinuing its use and it may then fall into the public domain, or be appropriated by another manufacturer as his trade-mark.” *Jacoby v. Lopez*, 23 O. G. 342.

“It is enough, we think, if the article with the adopted brand upon it is actually a vendible article in the market, with intent by the proprietor to continue its production and sale. It is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the user of the trade-mark.” *Kathreiner's Malz Kaffee Fab. v. Pastor Kneipp Med. Co.* 82 Fed. R. 321, 326.

Fact that plaintiff had built up an extensive business and expended \$400,000 in nine years under word “bromo-caffeine,” on a drug material in determining plaintiff's right to the name as a trade-mark. *Kensley v. Brooklyn Chemical Works*, 142 N. Y. 467, reversing 21 N. Y. Supp. 696.

The registration of a sign at the United States Patent Office and its use thereafter for four years considered as evidence of acquisition of trade-mark and right to protection. *Kinney v. Allen*, 1 Hughes, 106.

Where parties have expended large sums of money in building up soap business under a certain mark, “Welcome,” their right to relief is clearer. *Lever Bros. Ltd. Boston Works v. Smith*, 112 Fed. R. 998.

Fact that complainant and predecessors used word “Home,” on sewing machines for twenty-five years and during that time have acquired great reputation, material in granting injunction against use of “Home Delight.” *New Home Sewing Machine Co. v. Bloomington*, 59 Fed. R. 284.

“It seems to be the law that when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that

name." *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. R. 133.

Period of more than forty years considered material in determining acquisition of trade-mark. *Penn. Salt Mfg. Co. v. Myers*, 79 Fed. R. 87. Aff'd 82 Fed. R. 1003.

"Cuticura," on medicated toilet soap used continuously 1878-1896, good. *Potter Drug & Chemical Co. v. Miller*, 75 Fed. R. 656.

"If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device." *Seixo v. Provezende*, L. R.; 1 Ch. 192; 12 Jur. n. s. 215; 14 L. T. n. s. 314; 14 W. R. 357.

"The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than a sudden invention. It is often the result of accident rather than design." *Trade-Mark Cases*, 100 U. S. 82.

A party who uses the word "Centennial," on shirts in an experimental way and then abandons it, is not entitled to the mark as against another who in the meanwhile has adopted it and put it into use as a trade-mark. *Sternberger v. Thalheimer*, 3 O. G. 120.

**B. A casual, intermittent, and limited use of a sign subsequently discontinued will not create the rights of a trade-mark against one who has adopted such sign as a trade-mark.**

See XIV. 1 A. 293. *Menendez v. Holt*, 128 U. S. 514.

Complainant's predecessor in 1873 on a special order and at request, put brand "La Venezolana," on flour sent to La Guaira. After that it was not used. Held, that he could not enjoin respondents who had begun to use it in 1884 and used it extensively till 1892 at bringing of bill. *Brower v. Boulton*, 58 Fed. R. 888; affirming 53 Fed. R. 389.

Complainant's assignor in 1866 originated the word "Chatterbox," as applied to an annual series of juvenile books; held, that it was not defeated on the ground of a prior application on a publication in 1852 for two successive months of a monthly newspaper called "Chatterri's Chatterbox," not intended for young people; nor by publication in 1807 in a volume of poems

of a poem called "The Chatterbox;" nor by publication in 1861 of a book called "The Favorite Scholar," containing a prose story "Little Chatterbox." *Estes v. Worthington*, 31 Fed. R. 154.

Complainants adopted and used word "Club," as applied to cocktails from 1892 to 1903, spending large sums in advertising, and acquiring by an uninterrupted, uniform, and notorious use great reputation. Respondents for a while used "Outing Club Cocktails," in 1892, but discontinued use; held, that they did not have a right in 1898 and later to resume the name where it has previously had a transitory, spasmodic, and inconsiderable use as contrasted with use of word "Club" by complainants. *Heublein v. Adams*, 125 Fed. R. 782.

A stamp of an elephant's head on the binding of a single edition of the author's works without any registration or any claim to the public that it was a trade-mark, and which might have been an ornamental stamp of the publisher, is not such use as would entitle an author to claim it as a trade-mark, even admitting that an author could have a trade-mark on his writings. *Kipling v. G. P. Putnam's Sons*, 120 Fed. R. 631.

The occasional use in this country by a foreign manufacturer of the words "One Night Cough Cure," on a medical preparation of a few dozen bottles upon special order, is not sufficient to create rights in the collocation of words of a trade-mark. "The occasional use of the written label prior to the fall of 1891 was unimportant. It was insufficient to make any public impression; and the period between the fall of 1891 and February following, when suit was commenced, was too short, in the most favorable view of the evidence, to have established or fixed the label (whatever it was) in the public mind as a known sign or indicia of the plaintiff's manufacture of cough medicine." *Kohler Mfg. Co. v. Beshore*, 53 Fed. R. 262.

"Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in such circumstances as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." *Kohler Mfg. Co. v. Beshore*, 59 Fed. R. 572; affirming 53 Fed. R. 262.

Complainants applied name "Blackstone," widely known by reason of local geographical uses, to small lots of cigars manufactured and sold by them, — one in 1878 on a special order; one in 1884, in competition with a trade-mark for a limited market; one in 1885; and no more till 1889. Before the sale in 1885, defendants, without knowledge of what had been done by complainants, and in good faith, began the sale of cigars of their own manufacture under the same name, and continued extensive sales and advertisements thereof for five years without question. Held, that there was no such appropriation or actual occupation of the market by complainants as to entitle them to assert a right to a trade-mark, as against defendants. *Lery v. Waitt*, 61 Fed. R. 1008; affirming 56 Fed. R. 1016.

"We believe no case can be found where, with intermittent offers of merchandise bearing a certain name, with such long lapses on the one side, and on the other the uninterrupted and innocent use of the same name for five years without question, and a consequent growth of an extensive and valuable business, the equity courts have interfered in favor of the former against the latter." *Lery v. Waitt*, 61 Fed. R. 1008.

"The right to a trade-mark at common law, independent of the registration statutes, is not created by invention or priority of adoption alone. A word, symbol, or device, to be a valid trade-mark constituting a right of property, must have been used by the owner in connection with the sale of his goods for such length of time, and under such circumstances, as indicates to the trade that the goods in connection with which it appears are his goods, as distinguished from those of other manufacturers or dealers. The mere adoption of such word, symbol, or service, unaccompanied by such a use, is not sufficient to create our exclusive right thereto." *Macmahan Pharmaceutical Co. v. Denver Chemical Mfg. Co.*, 113 Fed. R. 468.

A pharmacist in New York for twenty years made and sold a liquid preparation for use by dentists under name "Macmahan's concentrated (or saturated) Tincture, Aconite with Iodine." After that time he was succeeded by a corporation which made the preparation, using also name, "Antiphlogistine." On cards and circulars it was described as "Macmahan's Antiphlogistine," but such cards and circulars were not used to any great extent and it was not advertised in any other manner. In ten years the company made only 362 sales, to ninety-eight different customers, almost exclusively dentists purchasing for their own

use. The article was not known in the market generally, even in the city. Held, that the company did not have exclusive right to word "antiphlogistine" as a trade-mark, and especially as another company which had adopted it, without knowledge of such use as a trade-mark, to designate a plastic preparation, not for dentists but for external application, and which during a number of years it had advertised extensively and in which it had built up an extensive trade. Macmahan Company was in New York; the Denver Company was in Denver. *Macmahan Pharmacol Co. v. Denver Chemical Mfgy. Co.*, 113 Fed. R. 468.

Sales of medicines under a certain mark of an anchor to a limited extent upon special orders to supply particular customers is not use "in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." *Richter v. Reynolds*, 59 Fed. R. 577; affirming 52 Fed. R. 455.

**7. Property right in a trade-mark or trade-name exists and will be protected so long as it is used or represents a live reputation and good-will, and is claimed exclusively by the original proprietor or his successors.**

See III. 1 N. 59.

See X. 1 A (1). 219. *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546.

See X. 1 B. 226. *Jennings v. Johnson*, 37 Fed. R. 364.

The trade-name "Day & Martin" in blacking business continued by executors of survivor and protected from infringement. *Croft v. Day*, 7 Beav. 84.

Joseph Hall established business at Number 10 South Water St., Rochester, N. Y. more than thirty years before trial and carried on business till death in 1865. His establishment was known as "Number 10 South Water Street." It passed by assignment and purchase from executors of Hall to Charles S. Hall who continued business using same designation. In 1874, held entitled to injunction against party fraudulently using "Number 10 South Water Street." *Glen & Hall Mfgy. Co. v. Hall*, 61 N. Y. 226.

Trade-mark on iron "B. B. II." surmounted by a crown used since 1836 by successive partnerships engaged in carrying on the iron business, good in 1863. "But it must be borne in mind that a name, though originally the name of the first maker, may in

time become a mere trade-mark or sign of quality, and cease to denote or be current as indicating that any particular person is the maker." *Hall v. Barrows*, 4 De G. J. & S. 150, etc.

"Thorley's Food for Cattle" was a condiment made according to a particular recipe (not invented by Thorley) first by Thorley and afterwards by his executors. Subsequently a company called "J. W. Thorley's Cattle Food Co.," was started, and made a condiment very nearly identical with that made at Thorley's Works, and sold it in packets closely resembling those of executors. Held that name assumed by company and imitation of packages showed intention to defraud and did in fact mislead, and injunction should issue. *James v. James* criticised. *J. W. Thorley's Cattle Food Co. v. Massam*, 42 L. T. N. S. 851.

"Suppose a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered without any doubt in the negative." *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137.

Complainants and predecessors had carried on business as brewers at town of Stowe for upwards of a century, and protected in use of "Stowe" which had come to designate their ales, the respondent having fraudulently established himself as brewer at Stowe for purpose of using that name to deceive. *Montgomery v. Thompson*, 60 L. J. Ch. N. S. 757.

Early in eighteenth century one Crowley invented a method of making steel and stamped his steel "Crowley." The business was continued till 1782 when plaintiff's grandfather became partner, and then steel was sometimes stamped "Crowley" and sometimes "Crowley Millington;" business descended to plaintiff, the marks still continuing to be used. Held that in 1838 plaintiff was entitled to injunction against defendant who used said marks. Steel had meanwhile come to be known as "Crowley" steel, or "Crowley Millington" steel. *Millington v. Fox*, 3 My. & Cr. 338.

William Rogers and his son William Rogers, Jr. had built up under their names, "Wm. Rogers & Son," with anchor and trade-



mark, "1865 Wm. Rogers Mfg. Co.," an extensive business and great reputation in silver plating of knives, forks, and spoons. The plaintiff corporation succeeded to their business and trade-marks. Lorenzo Spurr and George W. Spurr at Greenfield induced David C. Rogers and George E. Rogers, by payment of royalty to them, to use a mark registered at patent office without any business "Rogers & Son," on silver-plated ware. Held a fraudulent attempt to trade on the name Rogers. Injunction. *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. R. 495.

*Contra*: "When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like), may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by him." *James v. James*, L. R. 13 Eq. 421; 41 L. J. Ch. 353; 26 L. T. N. s. 568; 20 W. R. 434.

*Contra*: Plaintiff was the assignee of Lieutenant James who had invented a formula for horse blister: held that defendant who was rightfully in possession of secret had the right to call his product "Lieutenant James' Blister," because the name had become generic, but he would have to put on it his full name, "Robert James." *James v. James*, 26 L. T. N. s. 568. Criticised unfavorably in *J. W. Thorley's Cattle Food Co. v. Massam*, 42 L. T. N. s. 851.

*Contra*: Court held that without a patent a party did not have exclusive right to designate his medicines as "Thomsonian," if that name (apparently without any laches on his part) had acquired generic meaning; and that defendant had right to use the name. *Thomson v. Winchester*, 19 Pick. 214.

**A. But the name or sign may, by permission, laches, or lack of transmission, become *publici juris* and be used by others.**

See III. 1 C. 47.

Upon the death of old Samuel Marshall who compounded a liniment known by his name without any successors to his business any one who knew the secret was at liberty to compound the liniment and use that name. *Marshall v. Pinkham*, 52 Wis. 572.

The plaintiff's father made and sold a compound known as

“Dr. Johnson’s Yellow Ointment”; after his death plaintiff made the medicine marked in same way, also defendant; inasmuch as the defendant had not sold it as made by the plaintiff and only used name of original inventor, and the plaintiff not having shown property, as there were no letters of administration and no patent, held, no exclusive right in name by plaintiff. *Singleton v. Bolton*, 3 Dougl. 293.

A liniment had come to be known as “Ward’s Liniment,” and when neither of two parties could show exclusive title from the original “Dr. Ward” court refused to enjoin use of it. *Watkins v. Landon*, 52 Minn. 389.

**8. For a proprietor to acquire a trade-mark it is essential that no other party at the time has a prior right to use the sign in his business, and that the mark has not been previously in general use.**

Where it appears that at least fifteen years prior to the adoption in the flour business by complainant of a mark of a picture of a white swan on water, with the words “White Swan” those words had been generally used in the flour trade and the picture itself had been used by at least two other firms, it cannot be held that the complainant originated the design as a trade-mark. *Bulte v. Igleheart Bros.*, 137 Fed. R. 492.

“It is further shown by the proof that the word ‘Columbia,’ before its adoption by the complainant, was used by the Columbia Mill Company of Columbia, Brown County, Dakota; by the Columbia Elevator and Grain Mills, of Providence, Rhode Island; by the Columbia Mill Company of Oakland, Indiana; and by S. S. Sprague & Company, of Providence, Rhode Island. The word ‘Columbia’ having been thus previously appropriated and used upon barrels and sacks of flour, was not subject to exclusive appropriation thereafter by the complainant, so as to make it a valid trade-mark such as the law will recognize and protect.” *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

“With respect to the word ‘Tycoon,’ the evidence shows beyond question that it has been used as a name or brand for Japan tea for many years. Invoices of ‘Tycoon Tea’ were received at the custom house in San Francisco as early as May 15th, 1873, as shown by a copy of the official records of that office filed in this case; and the evidence of dealers and merchants of California is all to the effect that the word was in common use as a

brand for Japan tea for several years prior to that date." Its use was common and open to all. *Corbin v. Gould*, 133 U. S. 308.

"In order that the claimant of the trade-mark may primarily acquire the right of property in it, it must have been originally adopted and used by him — that is, the assumed name or designation must not be one that was then in actual use by others; and such adoption and use confer upon him the right of property in the trade-mark." *Derringer v. Plute*, 29 Cal. 292.

"Upon the first of these two points, the testimony establishes the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco, as described above; but that he was not the first person to use the design of a star upon plug tobacco. The priority of use, therefore, by the complainant extended only to the tin star, and not to the design of a star generally." *Liggett & Myer Tobacco Co. v. Finzer*, 128 U. S. 182.

The word, "Kaiser" could not be legally registered as a trade-mark for mineral water, it having been used as the name of several springs in Europe previous to its registration in 1883, and injunction against its use by others refused. *Luyties v. Hollender*, 24 Blatchf. 353; 30 Fed. R. 632.

The trade-mark "Triumphant" having been used a number of years by a party in the flour trade, a subsequent use by another party does not give him the right to register it, although the first may have registered his mark under the unconstitutional statute of 1870. *Lyon, Dupuy & Co., ex parte*, 28 O. G. 191.

"Phrases, or even words in common use, may be adopted for the purpose, if, at the time of their adoption, they were not employed by another to designate the same or similar articles of production or sale." *McLean v. Fleming*, 96 U. S. 245.

"Astral" as applied to petroleum in "Pratt's Astral Oil."

"In the first place, I strongly incline to the opinion that the word 'Astral' was without the range of lawful appropriation as a trade-mark for refined petroleum, by reason of the fact that long before it was employed by Charles Pratt, the appellation had been given to an oil-burning lamp well known and in common use." *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. R. 492.

**A. But a party must have clearly acquired a prior substantial right in a mark to prevail against one who has subsequently in good faith registered and used for a number of years such mark as a trade-mark, and under it built up a considerable business.**

See VIII. 7. 202.

See XVI. 2. 336. *Smith v. Reynolds*, 10 Blatchf. 100.

See XIV. 1. B. 293.

See IV. 6. B. 103.

See XVI. 2. 332. *Flint & Walling Mfg. Co., ex parte*, 55 O. G. 148.

Where a trade-mark is impeached after it has been on the register for ten years, and has been openly and largely used, and there is a doubt as to its validity, the registered proprietor is entitled to the benefit of the doubt. "Tabloid," on compressed drug, held valid although very near the line. *Wellcome v. Thompson*, L. R. 1 Ch. 736 (1904).

Complainant, owner of trade-mark "Yusea," registered Feb. 20, 1900, on gas mantles, allowed preliminary injunction against party who had adopted "U-C-A" December, 1899, and registered it Oct. 23, 1900; respondent's mark was so near as to deceive and when registered it was "six months after complainant had expended a large sum of money in advertising its trade-mark 'Yusea' and subsequently to the time that complainants' goods had become popularly known." *Welsbach Light Co. v. Adam*, 107 Fed. R. 463.

**9. A. The right of a trade-mark is co-extensive with the United States, and courts will protect it throughout the country.**

Right to protection from infringement of name "Bissell," as applied to ploughs may be granted as against a corporation in a distant city if the goods compete in the same market. *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. R. 357.

Right to use a trade-mark is not limited to territory or in point of time unless so stated; right to use is co-extensive with whole country and perpetual. *Kidd v. Johnson*, 100 U. S. 617, 619.

**B. But it has been sometimes held that a limited use in a small area does not give a party rights of a trade-mark as against other interests in sections of the country where no deception would be likely to result.**

See XIV. 1. A. 291. *Brouer v. Boulton*, 53 Fed. R. 389.

See IV. 6. B. 103.

“Moreover, the defendant’s wares are intended for, shipped to, and circulate in the California market alone, where only recently the plaintiffs have followed them. Of course the latter cannot claim their trade-mark to be prior in time there; they have not monopolized all the markets in the world, and cannot exclude the defendant’s ware.” *Corwin v. Daly*, 7 Bosw. 222.

A party having a good common law right in a trade-mark cannot be deprived of it by the prior use of the mark in foreign commerce. *Sleepy Eye Milling Co. v. C. F. Blanke Tea & Coffee Co.*, 85 O. G. 1905.

Previous use of mark by another at same place, or near enough to create a similar right would not prevent subsequent use from showing origin. “The other use might be so far away, or so small, as to have no effect upon the use in question to prevent it from becoming a representation of origin.” Plaintiff resided in Philadelphia. Use by another, in a small way, of name on complexion powder (Swan Down) being same kind of goods, in Providence before and at time of plaintiff’s use (to whom he subsequently assigned the right), did not defeat plaintiff’s right, as nobody would be likely to think that his goods were goods of the other party. *Tellow v. Tappan*, 85 Fed. R. 774.

**10. A trade-mark gives one no greater right over the goods to which it is affixed than he had at common law. It may be used by third parties rightfully dealing in the article to which it is affixed.**

Plaintiff purchased exclusive right to export water of mineral spring in Hungary to United States under name “Hunyadi Janos.” Defendant bought the genuine water in Europe, and sold it in the United States under name “Hunyadi Janos.” Held no infringement of name or label, as he was not a party to contract regarding exportation. *Apollinaris Co. v. Scherer*, 23 Blatchf. 459.

A contract between plaintiff proprietor of a registered trade-

mark and a vendee whereby goods stamped with the mark are not to be sold at less than a certain figure by vendee cannot in the absence of fraud be enforced in equity against a party who has purchased from vendee and is selling them at a price lower than that fixed in the contract. *Garst v. Hall & Lyon Co.*, 179 Mass. 588.

Auctioneers innocently sold eye-water bearing counterfeited trade-marks and signatures. Vendees refused to pay. Held original fraud in counterfeiting trade-marks does not attach itself to the goods in the hands of an owner ignorant of the offence and fasten upon him the qualities of a wrong of which he is innocent. *Rudderow v. Huntington*, 3 Sand. 252.

It is not unfair competition for the respondent to purchase in bulk glue from a third party, who in turn has purchased it from complainant under the trade-mark "Le Page," and to bottle it and sell it as "Le Page's Glue" bottled by the respondent. *Russia Cement Co. v. Frauenhar*, 133 Fed. R. 518; affirming 126 Fed. R. 228.

Where plaintiff has purchased exclusive right to the use of a trade-mark it was held that he could not enjoin the sale of goods to which the trade-mark had been attached by owner previous to assignment. *Samuel v. Berger*, 24 Barb. 163.

Parties contracted with Edison for him to make and them to buy machines invented by him which they designated "Vitascope," and by consent they were called "Edison Vitascope;" they did not take all the machines agreed, and Edison sold the balance to reimburse him. Held that purchasers of these machines could designate them "Edison Vitascope." *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. R. 30.

A contract between parties that one is to use word "Hygeia," and the other to use the same word in a certain combination is binding between parties and their assigns, and does not need to be recorded as against *bona fide* purchaser, as it is not an assignment of a right. *Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co.*, 63 Fed. R. 438.

*But see:* An innocent owner of matches made in London in boxes stamped "New Zealand" had to suffer forfeiture in New Zealand under act there against fraudulent trade-marks, etc. *Bell & Co., Ltd. v. Commissioner*, L. R. App. Cas. (1902) 563.

**11. A. A proprietor should not have more than one trade-mark in the same line of goods in the same market, so as to confuse the public by indiscriminate use of signs.**

See III. 1 A. (1). 34. *Beadleston v. Cooke Brewing Co.*, 74 Fed. R. 229.

See III. 1 J. 54. *Royal Baking Co. v. Sherrell*, 93 N. Y. 331.

See IV. 4. 94. *Jelley, in re*, 51 L. J. Ch. 639.

Complainant filed bill to restrain respondent from suing 13 different brands on toilet paper, "Pacific," "Clover Leaf," "Club," "Standard," "Cabinet," etc., all with one exception apparently used to designate size or quality. Held that such a use of trade-marks was not justified, and that the marks would not be considered as trade-marks. *Albany Perforated Wrapping-Paper Co. v. John Hoberg Co.*, 102 Fed. R. 157.

"The principal question which is suggested by the bill and the evidence is whether the manufacturer of a single article has the right to use, and to be protected in the use of, more than one trade-mark for that article. I find little authority upon the subject, and have given to the question much consideration. Upon principle, I think that he cannot. A trade-mark must denote origin. . . . How can that purpose be accomplished, if a manufacturer dealing in a single article used a thousand different trade-marks to designate the article and its origin? Such use necessarily produces confusion, and fails of the single purpose of the trade-mark, — to designate with certainty the origin of the product. *Albany Perforated Wrapping-Paper Co. v. John Hoberg Co.*, 102 Fed. R. 157.

"No man can have more than one mark or brand. . . . 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." *Candee v. Deere*, 54 Ill. 439, 457.

"It is further shown by the proof that for the particular grade of flour on which the brand, including the alleged trade-mark 'Columbia' was used, the complainant had at least three other trade-names, such as 'Golden Rod,' 'Best' and 'Superlative,' which were used indiscriminately, and for different sections of the country, with the word 'Columbia.' The quality and process of manufacture were identically the same, and all made from spring wheat, whether one trade-name or the other was used

thereon." This was evidence, that "Columbia" was not used as a trade-mark. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 467.

"As to whether one person or firm can appropriate two or more trade-marks for the same goods in the same commerce, one registered and the other not, we are not prepared to say. The books, so far as we are acquainted with them, furnish no instance of such double marks; and if there can be two, we see no reason why there may not be twenty." *Foster Millburn & Co. v. The Blood Balm Co.*, 77 Ga. 216.

*Contra*: "It is not inconsistent with this that they have also another trade-mark, for a man may have two or three or more trade-marks, which he may put on his goods as he likes. Therefore, the fact that the plaintiffs have a trade-mark consisting of the figure of a wheel and the letters "E. R.", does not militate against their right to the trade-mark in controversy." *Wheeler v. Johnston*, L. R. 3 Ir. 284, 295.

(Case of unfair trade.)

**B. But where a party uses more than one mark on goods sold in different markets, if not done to deceive, such use is not fraudulent.**

"The proof shows that the practice is quite general among stove manufacturers to make a stove for a single dealer in one market by a certain name, and to make the same stove for another dealer in another market, by a different name." Such custom is not fraudulent. *Van Horn v. Coogan*, 52 N. J. Eq. 380, 386.



## V. GOOD FAITH IN TRADE-MARKS.

1. A sign or label must be used by a proprietor in good faith, so as not to deceive the public, in order to receive protection from the courts; and if it is calculated to deceive the public as to the (A) character, (B) geographical locality, (C) or origin of the goods, the courts will not protect a party seeking relief against infringement.

### A. Character.

See III. 1 A. (1), (a). 38. *Birkhead, ex parte*, 97 O. G. 749. XI. 4 A. 251. *Siegert v. Gandolfi*, 139 Fed. R. 917. VII. 5, 146, and 6. 147.

“Fruit,” on vinegar, deceptive as well as descriptive.

“But whether the word ‘fruit,’ in this connection is purely indicative of the character or quality of the article or not, the plaintiff’s exclusive claim to it must fail on the further ground that the use of the word in that connection is clearly deceptive.” *Alden v. Gross*, 25 Mo. App. 123, 130.

“American Sardines,” on fish which are not sardines, deceptive mark, and not allowed registration. *American Sardine Co.*, 3 O. G. 495.

“This is upon the ancient and familiar principles that those who do iniquity must not ask nor expect equity. It is worthy of all acceptance; it is a hoary maxim hallowed by its age, and unlike some other sacred antiquities, as yet unassailed by the spirit of change or reckless progress. I adhere to it.” *Blackwell v. Armistead*, 3 Hughes, 163, 169.

“Malt Myrrh,” not registrable as a trade-mark for malt liquors which do not in fact contain myrrh. *Barrett & Barrett, ex parte*, 100 O. G. 1976.

“Syrup of Figs,” applied to a laxative preparation which contains only a suspicion of fig syrup and which by advertisements and labels represents it to be what the name proclaims it is, deceitful and will not be protected as against another who for the purpose of getting advantage of advertisements uses that name. *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. R. 812; affirming 67 Fed. R. 1008.

The complainant not entitled to relief, the alleged trade-mark being deceptive. *California Fig Syrup Co. v. Putnam*, 69 Fed. R. 740; affirming 66 Fed. R. 750.

"We cease to smile when we remember that the plaintiff, who boldly claims the aid of a court of equity, is filling his pockets by abusing the credulity of the young, the inexperienced, the weak and the ignorant, and that he resorts to misrepresentation and falsehood to induce those to purchase who would not otherwise buy, and those who buy to give a higher price than they would otherwise pay. If this is not deceiving and defrauding the public, what is?"

"Balm of Thousand Flowers," on ordinary soap, deceitful. *Fetridge v. Wells*, 13 How. Pr. 385.

*Contra*: (Same name might be held arbitrary and protected. *Fetridge v. Merchant*, 4 Abb. Pr. 156.)

"Balm of Thousand Flowers," a fancy name, and not a false representation.

"'Medicated Mexican Balm,' had nothing in its composition peculiar to the land of Montezuma, 6 Beav. 66; and 'Chinese Liniment,' was, in all its ingredients, a stranger to the Celestial Empire, 4 McLean 516." *Fetridge v. Merchant*, 4 Abb. Pr. 156.

No principles are better settled in the law of trade-marks than that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied, will not be tolerated. *Ginter v. Kinney Tobacco Co.*, 12 Fed. R. 782.

A party who uses on cigarettes a label on which was printed "guaranteed hand made," when in fact they were not hand made, but were machine made, is, although the tobacco is not inferior and the goods were of as good quality as hand made, guilty of an offence toward the act against "false trade description." *Kirshenboim v. Salmon*, L. R. 2 Q. B. (1898) 19.

A false representation on a trade-mark that article is patented when it is not, and that the article is tanned leather cloth when it is untanned, is sufficient to justify denial of injunction. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. n. s. 513, etc.

"Bromo," used on a drug in conjunction with "Quinine," so as to read "Bromo Quinine," with the intention of leading the public to believe that there was bromine in the preparation, when there was not, fraudulent and will not justify injunction against use of "Bromide Quinine," by respondent. *Paris Medicine Co. v. W. H. Hill Co.*, 102 Fed. R. 148.

“One defence set up by the defendants is, in fact, a *quasi* admission that they were simulating the trade-mark of the plaintiffs, but that the plaintiffs were simulating the trade-mark of Palmer, and therefore could not complain of them. It is a plea of confession and avoidance, but it still would be a good plea if sustained by the proof; for if the evidence does show that the plaintiffs were committing, by the use of their trade-mark, a fraud on Palmer, they are in no condition to complain of the defendants’ fraud on them.” *Parlett v. Guggenheimer*, 67 Md. 542.

“The rule is well settled that the party claiming protection against the fraudulent conduct of another, must himself be free from the imputation of fraud. There is a third reason why this motion should not be granted. A comparison of plaintiffs’ label with that used on the brand of cigars known as the ‘Henry Clay,’ cigar, will make it plain that the plaintiffs’ label is as close an imitation of the ‘Henry Clay,’ label as the defendants’ is of the plaintiffs’.” *Schumacher v. Schwenke*, 36 O. G. 457.

Representations in circulars that plasters were of a certain vegetable compound of great value discovered by celebrated chemist and that remedy was called *capcine* when in fact there was no such article in chemistry or medicine, are false, and there can be no trade-mark in word “Capcine” in “Benson’s Capcine Plasters,” prepared by complainant. *Seabury v. Grosvenor*, 14 Blatchf. 262.

“Angostura bitters,” put up in bottles so labelled and the labels representing that it was prepared by Dr. Siegert, formerly of Angostura, then at Port of Spain, whereas Dr. Siegert had been dead some years and had never lived in Port of Spain, false representations and did not entitle plaintiffs to decree against infringers. Court did not agree with English court that it did not find false representations. *Siegert v. Abbott*, 61 Md. 276. *Contra*: *Siegert v. Finllater*, 7 Ch. D. 801; V. 7. 132.

“The only plausible defence arises from the allegation of the defendant, that the plaintiffs are as wicked as he is, in that they attempt to impose upon and defraud the public, while he attempts only to defraud the plaintiffs. The justice and morality of this defence is not very high, in the present instance; but this rule of law or equity has been recognized in several cases, and must be followed if the case is brought within its application.” *Smith v. Woodruff*, 48 Barb. 438.

“Syrup of Figs,” used on a medicinal compound of which the

laxative ingredient is senna, with only a suspicion of fig juice to give a weak support to the statement that it is syrup of figs, deceptive, and the proprietors being engaged in a fraud on the public are not entitled to injunction against infringement. *Worden v. California Fig Syrup Co.*, 187 U. S. 516; reversing 86 Fed. R. 212; 95 Fed. R. 132, 102 Fed. R. 334.

*Contra*: "Syrup of Figs," on a medicinal preparation, is not descriptive, and while not strictly correct in its application there being no attempt to practise fraud or impose on the public, it is not deceitful so far as to justify refusal of injunction against infringement. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. R. 175; affirming 51 Fed. R. 296.

### B. Geographical locality.

See V. C. 122. *Perry v. Truefit*, 6 Beav. 66. V. C. 122. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

"Old Country Soap," used on soap and set out in advertisements so as to lead people to believe that it is made in the old country when it is made in Chicago, deceptive. *Allen B. Wrisley Co. v. Iowa Soap Co.*, 104 Fed. R. 548.

"This is a bill in equity to restrain the defendant from infringing upon an exclusive right claimed by the plaintiffs in the words 'East Indian,' used, together with the word 'remedy' or 'remedies,' as a trade-mark upon bottles of medicine. . . . But the conclusive answer to this suit is, that the Master has found, upon evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote and to indicate to the public that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public." *Connell v. Reed*, 128 Mass. 477; 35 Am. R. 397.

"Were I to admit the word 'Lancaster,' to be an essential feature of the mark, the case would then seem to be open to the further objection that the use of such word would convey a false impression to the public—viz: that the goods were manufactured in Lancaster, when, in fact, they were made in Philadelphia, and that any one making like goods in Lancaster might obtain an injunction against the use of such word by parties manufacturing elsewhere. . . . Words calculated to deceive the public as to the place of manufacture should not be allowed registration." *Farnum & Co., ex parte*, 18 O. G. 412.

Plaintiff made what he called on labels "The Celebrated Chinese Skin Powder"; labels also said it was "Patronized by her Majesty the Queen," and that proprietor was sole agent in United States. It was in fact put up in New York. Injunction refused. *Hobbs v. Francais*, 19 How. Pr. 567.

"The plaintiff is seeking to enjoin the defendant from using a trade-mark which he himself is not, in equity or good conscience, entitled to use, because it is a fraud upon the public. The evident purpose of the defendant's [plaintiff's, probably] stamp upon the razor and his advertisement and label, as the court below said, were 'to cause the purchasing public to believe that these razors are manufactured by a firm known as the "Queen's Own Co.," and in Sheffield, England,' when in point of fact he did not know where they were manufactured, nor by whom. The positive assertion of a thing not known to be true is as reprehensible as the assertion of a thing which is known to be untrue." *Joseph v. Macowsky*, 96 Calif. 518.

"From these statements the casual reader of them would certainly understand that there was a kind of tea in *China* called 'He-No Tea,' and that this tea was the kind the Chinese drank, and that this very tea the appellees imported direct from China, and was by them guaranteed to be the pure and genuine article. We were so impressed and believed, until we knew the contrary; and we do not think the most scrutinizing reader would ever imagine it to be a tea compounded of several varieties in the City of Baltimore, as the evidence clearly and undeniably shows it to be prepared in the house of the appellees, and that it was not imported, as sold, from China." Protection refused. *Kenney v. Gillet*, 70 Md. 574.

Label bearing name "Golden Crown," and underneath "L. P." and under that "Habana," representing that cigars were product of Cuban factory in Havana, false, and not entitled to protection as trade-mark. *Palmer v. Harris*, 60 Penn. 156.

"The whole purpose of the manufacturer was evidently to lead the public to believe that the cigar was made of that tobacco which is so much sought after and preferred by the smoking public. Yet it was not wholly true. The plaintiff admitted that the cigars sold under that brand were made of Havana filler, seed binder and Sumatra wrapper. Nothing but the filler came legitimately within the definition of Havana tobacco. . . . Such a course is in contravention of the principles observed by courts of equity in the administration of this branch of the law.

. . . Judged by these rules, as they have been communicated and applied, this case had no standing in court, and the bill was properly dismissed." *Solis Cigar Co. v. Pozo*, 16 Colo. 388.

A proprietor who fraudulently represents by plates, circulars, and booklets that his whiskey, under the name of "Parker Bourbon," "Old Parker Rye," etc., is manufactured in Nelson County, Kentucky, when it is not, will not be entitled to protection in a court of equity. *Uri v. Hirsch*, 123 Fed. R. 568.

### C. Origin.

See cases X. 5. 233. See cases X. 6 A. 234.

"Knights of Labor," as a trade-mark on whiskey, held to be deceitful, as it was intended and designed to lead people to believe that it was a mark of a product of the labor organization. *Bloch & Co., ex parte*, 40 O. G. 443.

Registration of red cross on black ground in diamond-shaped border and accompanied by words "Red Cross" for medicinal compound refused, since it might lead the public to believe that the goods had the sanction or endorsement of the Red Cross Society. *Chichester Chemical Co., ex parte*, 52 O. G. 1061. *Contra: E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583; II. 1 F. 17.

"If what the plaintiff states upon the wrappers of his bottles containing the medicine, and which has been hereinbefore set forth is remembered, it will appear, as has also been stated, that he undertakes to sell his compound, not only under the name and alleged trade-marks which Henry T. Helmbold formerly used, and which he still claims to use under and through the corporation with which he is now connected, but upon a representation that said Helmbold superintends, personally, its manufacture, and by his own signature certifies to the genuineness of each bottle. This clearly and confessedly is false, and the plaintiff is entitled to no protection in a business carried on by means of untrue representations and statements." *Helmbold v. Henry T. Helmbold Mfg. Co.*, 53 How. Pr. 453, 457.

Fac-simile of certificate issued by State Board of Pharmacy to registered pharmacists not registrable as a trade-mark for cigars. Registered pharmacists might desire to use them, or the use by applicant might lead purchaser to believe that cigars were approved or guaranteed by the Board of Pharmacy. *Kuppenheimer Brothers, ex parte*, 60 O. G. 439.

"A court of equity will extend no aid to sustain a claim to a

trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were original circumstances to guide the purchaser of the medicine. . . . It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company of New York." *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 222.

"I do not think it is a favorable case for the interposition of this Court, to say the least of it, when a party, having bought a secret invented by a Mr. Lenthart, represents to his customers and the world that his 'admirable composition is made from an original recipe of the learned Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist.' The Plaintiff states also a circumstance, not in the least degree supported by evidence, that the composition is formed of a vegetable balsamic production from Mexico." Protection refused. "Medicated Mexican Balm," for hair oil claimed as trade-mark. *Perry v. Truefit*, 6 Beav. 66.

"Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. . . . And although the false article is as good as the true one, 'the privilege of deceiving the public, even for its own benefit, is not a legitimate subject of commerce.'" *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 38, 39.

Labels representing that baking powder was prepared only by "Austin, Marshall, Hall & Co., Purveyors by appointment to Her Majesty, 181 Tottenham Court Road, London, & New Cross, Surrey," when it was made by a different firm, in New York, a falsehood which the courts would not sustain. "It was adapted and intended to deceive the public. Under such circumstances, no right arises which the law will countenance. Courts will not lend their aid to protect imposition and falsehood." *Raymond v. Royal Baking Powder Co.*, 85 Fed. R. 231.

"Masonic" not registrable as a trade-mark for cigars, as it would connect them with the order. "The words 'Presbyterian,' 'Methodist,' or 'Roman Catholic,' used as trade-marks for cigars, would stand on the same footing. Such words are not registrable as trade-marks." *Smith, ex parte*, 16 O. G. 764.

Symbol of a red Greek cross refused registration for bitters, as it would be liable to create impression that the article marked was manufactured or its use sanctioned by the Red Cross Society. *Zwack & Co., ex parte*, 76 O. G. 1855. *Contra: E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583; II. 1 F. 17.

**2. A trade-mark should be a certificate of genuineness of the goods to which it is affixed.**

See IV. 2. 88. *Apollinaris Co. v. Scherer*, 27 Fed. R. 18.

"The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer." *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 53.

"It must not be overlooked, however, in these exclusions, that a trade-mark is indirectly the guaranty of the quality of an article to which it is attached, as well as of its origin and ownership, for in all cases the trade-mark, in indicating the origin, by necessary implication represents the quality of the article which is the true source of its reputation in the market." *Avery v. Meikle*, 81 Ky. 73, 86.

"It has, indeed, been likened to his business autograph." *Cigar Makers' Protective Union v. Conhuim*, 40 Minn. 243, 245.

"A trade-mark has been very well defined as one's commercial signature to his goods." *Leidersdorf v. Flint*, 8 Biss. 327, 330.

"La Favorita," on flour. "It was equivalent to the signature of Holt & Co., to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence." *Menendez v. Holt*, 128 U. S. 514, 520.

"The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic." *Shaw Stocking Co. v. Muck*, 12 Fed. R. 707, 711.

**3. The use of a trade-mark by a proprietor on goods of a different origin from what it has formerly designated is a fraud on the public, and the courts will treat it as a deceptive mark.**

See IV. 2. 88; XI. 10. 264.

Where complainant alleges that the public are deceived by use of name Pettijohn, which has become associated with product of mill in Minneapolis, injunction would not be granted where



it appears that said mill has been burnt down, and customers are supplied with product from Akron, Ohio, although that product may be just as good. *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. R. 903. Aff'd 76 Fed. R. 372.

A contract between plaintiff and defendant for the sale and purchase of a quantity of empty papers or bags for seeds, with the plaintiff's labels thereon, to be filled with seeds by the purchaser, and the seeds thus put up to be offered for sale by the purchaser of such papers where such sale would amount to infringement, held to be void. *Bloss v. Bloomer*, 23 Barb. 604.

"But if it be a crime to counterfeit labels, words or devices previously appropriated to distinguish property, or to vend goods thus stamped, without disclosing the fact to the purchaser, it is equally an offence against the spirit of the law, equally injurious to trade or commerce, and equally an imposition upon the public to palm off spurious goods under cover of genuine labels and devices." *Bloss v. Bloomer*, 23 Barb. 604, 610.

When party sells oil not made for him under his regular trade-mark "Insurance Oil," which he has used on oils made for him, and under his directions it is reprehensible; but if done in only a few instances and then when delay in shipments had arisen it is not sufficient to invalidate the mark. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946.

Protection refused a trade-mark of a shield on a label accompanied by the words "Old Pepper Whiskey," and "Consumers should satisfy themselves that the whiskey is distilled by Jas. E. Pepper & Co.," "This whiskey is distilled under the same formula and process used by the grandfather and father of our Mr. Jas. E. Pepper more than one hundred years ago," when such statements were false, in that 35 per cent of the whiskey was foreign and not Pepper whiskey. *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. R. 585.

Complainant who in good faith had built up business in manufacture and sale of shoes under trade-mark "Delsarte," entitled to protection against party who after using it for several years as applied to especially selected shoes gave an order for general manufacture and thus changed its original signification. *Medlar & Holmes Shoe Co. v. Delsarte Mfgy. Co.*, 46 Atl. 1089.

Plaintiff's acquiescence in defendant's use of name "Nolan Bros." for 10 years in a wholesale shoe business does not preclude him from objecting to its use in a retail shoe business, since mere use of trade-name in one business does not give the

right to use it in another business. *Nolan Bros. Shoe Co. v. Nolan*, 63 Pacif. 480; 131 Calif. 271.

Plaintiff had adopted mark "Prince's Metallic Paint" on paint manufactured from iron of a certain mine. Later he applied it to paint from a different ore. Held, a fraud which prevented him from obtaining relief against infringement. *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24.

The government contracted with the Gun Powder Company to furnish a certain amount of gunpowder. The factory blew up and the company imported as good powder from Germany and put it in barrels with its own label and trade-mark. There was no contract that the gunpowder should be of its own manufacture. The government accepted it and did not complain of the quality. It was held to be a false trade description. The trade-mark had come to mean that the goods were manufactured by the company. It had no right to misapply it to the goods manufactured by others, and was liable to conviction for false trade description. *Starey v. Chillworth Gun Powder Co.*, L. R. 24 Q. B. D. 90.

Party should not apply the same trade-mark to different kinds and qualities of goods, nor should he apply different names to the same kind or quality of goods. "Portland" stove different from "Canopy" stove. *Van Horn v. Coogan*, 52 N. J. Eq. 380.

*But see:* Complainant had for several years been engaged in a pool of companies supplying scythe-stones under names "Quinnbog," "Star," "Western Red End," etc., but subsequently acquired sole right to the use of the names, and for two or three years had been the only party using the names. Held, that there had not been such a confusion or indiscriminate use of the names as to deprive complainant of right to injunction. *Cleveland Stone Co. v. Wallace*, 52 Fed. R. 431.

**A.** But it has been held that misuse may not entitle another party having an interest in the same mark to an injunction against the wrongdoer, as it is a public wrong for which no private suit will lie.

See VIII. 1 A. (3). 154 (A.).

"The court, however, cannot compel such nicety or fulness of expression or go into the business of arranging the language in which merchants shall place their goods upon the market. An absolutely false statement may, in certain circumstances, be restrained, but it is beyond the power of a court of equity to

compel commercial men to tell all they know about their goods. There is not the slightest proof that the defendant has tried to deceive the public or palm off its goods as those of the complainant. . . . In controversies like the present it is much wiser to leave the decision to the sure and just arbitrament of public opinion. No man who unfairly describes his goods can long succeed. He cannot advertise one article and sell another and an inferior article without being detected. The public will surely find him out. Confidence in the man is gone, and loss of business is sure to follow. This record shows that both parties were ascribing to their own manufactures unusual and peculiar merits, but I cannot think that in this competition the defendant has been guilty of fraudulent and dishonest practices." Both advertised their nails as "hammer-pointed," when strictly they were not. *Putnam Nail Co. v. Ausable Horsenail Co.*, 53 Fed. R. 390, 392, 394.

If a party has a right to use a trade name or trade-mark in his business to designate machines made by him as it is so known and understood, he has a right so far as others claiming same trade-name or trade-mark to use it on machines made by others and bought by him. *Rogers v. Taintor*, 97 Mass. 291.

**4. A sign contrary to good morals and public policy is not a valid trade-mark.**

See XVI. 2. 337. *Standard Fashion Co., ex parte*, 89 O. G. 189.

See XVI. 2. 330. *Ball, ex parte*, 98 O. G. 2366. II. 1 F. 18. *King, ex parte*, 46 O. G. 119. III. 3 B. 78.

The coat of arms of the United States is not registrable as a trade-mark even under the "ten year" clause. *American Glue Co., ex parte*, 120 O. G. 324.

A simulation of the shield of the United States with alternate red and white stripes, not registrable as trade-mark, it being contrary to public policy. *Brandsville Fruit Farm Co., ex parte*, 103 O. G. 660.

The coat of arms of Maryland not registrable as a trade-mark even under the "ten year" clause. *Cahn, Belt & Co., ex parte*, 118 O. G. 1936.

Applicant sought to register two trade-marks for flour, one for each of his two establishments, combined with a masonic emblem, square and compass; held, against public policy to allow the emblem as a trade-mark. *Tolle's Appeal*, 2 O. G. 415.

A simulation of the coat of arms of the United States cannot be registered as a trade-mark. *William Conners Paint Mfg. Co., ex parte*, 119 O. G. 2522.

*But see*: "There is nothing in law or in public policy opposed to the registration of Masonic or other society symbols as trade-marks." *Thomas Appeal*, 14 O. G. 821; overruling *Tolle's Appeal*.

**5. But the use of a fictitious name as a trade-mark may not be such a deception as would disentitle the proprietor to relief in case of infringement.**

Fact that fictitious person's name is on trade-mark no defence to infringer, the trade-mark not used with fraudulent intent and not in fact deceptive.

Thomas Nelson Dale protected in use of label "Courtria Flax, Thomas Nelson & Co., warranted. Fast colors and sixteen ounces." *Dale v. Smithson*, 12 Abb. Pr. 237.

Representation that name of manufacturers on thread trade-marks is fictitious no defence in an application for injunction against infringement. *Stewart v. Smithson*, 1 Hilt. 119.

**6. A. A collateral false representation not on the face of a trade-mark, but embodied in circulars, labels, or advertisements, may be considered so far material as to disentitle the party to relief.**

See V. 1 B. 121. *Uri v. Hirsch*, 123 Fed. R. 568. VII. 5. 146.

"Puddine," name for pudding represented on packages as being "fruit" puddine, and a picture of pears, grapes, etc., prominently displayed, when it did not contain any fruit, but only corn starch, saccharine matter, flavoring extract, and coloring matter, refused protection by preliminary injunctions. *Clotworthy v. Schepp*, 42 Fed. R. 62.

Complainant brought bill against respondent to restrain him from unfair competition in use of name Hoffman, and in advertisements and labels on cigars. Held, that while there would have been unfair competition, yet the complainant lost right to injunction by placing an advertisement in boxes saying, "We use only the very best grades of Havana tobacco. . . . We manufacture only genuine Havana cigars. . . . Our cigars are guaranteed only choice Havana tobacco, and not American tobaccos raised from

Spanish seed," when in fact inferior grades of tobacco were used, and not all Havana tobacco. *Hilson v. Foster*, 80 Fed. R. 896.

"It is, indeed, said that the court cannot take notice of the contents or statements of the complainant's statement in the patent office, because it was neither set up in the bill, nor put in evidence. However, it seems to have come into the case as an exhibit attached to one of the complainant's affidavits used on a motion for a preliminary injunction; and, as the correctness of the copy is not denied, we think that the court below, where it had been read on the preliminary argument, might legitimately refer to it at the final hearing." *Kohler Mfg. Co. v. Beshore*, 59 Fed. R. 572, 576.

"If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public, and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance." *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 223.

Plaintiff brought tea from China and compounded it in England, representing it to be very fine tea even in China, grown in a certain province and not purchasable in England, and made especially for Howqua, a Chinese merchant. It was, in fact, a cheap imitation. Court refused injunction on ground of false representation till title had been tried at law. *Pidding v. How*, 8 Sim. 477.

"The evidence is clear that the plaintiffs were systematically and knowingly carrying on a fraudulent trade. Although they may have omitted the fraudulent and deceptive and untrue language from their circulars before this suit was commenced, yet if they have any property in the trade-mark which they claim the title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect of which the trade-mark is claimed. . . . Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, ac-

quired by advertising their wares under such representations as those cited, if they are false. It is shown that there is no such article as Capcine known in chemistry, or medicine, or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity." *Seabury v. Grosvenor*, 14 Blatchf. 262.

"Angostura Bitters," put up in bottles so labelled and the labels representing that the contents were prepared by Dr. Siegert, formerly at Angostura, then at Port of Spain, when Dr. Siegert had been dead some years and had never lived in Port of Spain, false representations disentitling plaintiffs to decree against infringement. *Siegert v. Abbott*, 61 Md. 276. *Contra: Siegert v. Findlater*, 7 Ch. D. 801.

**B. And the court may not consider the character of the goods sold if they are not against public policy, as in the case of medicines and drugs.**

Defendant claimed that plaintiff's "Mrs. Winslow's Soothing Syrup," was injurious; court held that defence could not be made after twenty-five years of success by plaintiff, and attempt to imitate was not consistent. *Curtis v. Bryan*, 36 How. Pr. 33.

"Balm of Thousand Flowers," on a cosmetic, although it may be intended to impose on the credulity of the public, may still be entitled to relief if another attempts to pirate good-will by adopting same name. *Fetridge v. Merchant*, 4 Abb. Pr. 156.

"I do not mean to say that I have any sort of respect for this sort of medicines. I have none; but the law protects persons from fraudulent misrepresentations; and this is a species of property which the law does allow; and, so long as the law recognizes it, it must be protected, and persons in the situation of the defendant will not be allowed to practise a fraud like that here complained of." *Holloway v. Holloway*, 13 Beav. 209, 213.

"It does not appear that the supreme court of the United States has, in any reported case, expressed an opinion on the right of owners of so-called patent medicines to protection by injunction. The reports do show that that court has dealt with trade-mark cases, in which proprietary medicines, whose composition was not disclosed, were involved, without condemning them as unfit to receive the protection of courts of equity." *Kohler Mfg. Co. v. Beshore*, 59 Fed. R. 572.

"Much of the evidence in the case taken on behalf of the

appellant was for the purpose of showing that the appellee's preparation is a quack medicine and an alcoholic stimulant, and therefore not entitled to the protection of a court of equity. . . . It is one upon which the experts differ. It is enough to advert to the fact that the preparation purports to be a general tonic, and as such efficacious in restoring strength to those weakened by various ailments, and that it has become widely known and largely manufactured and used, and that it has a commercial value." *Samuel Bros. & Co. v. Hostetter Co.*, 118 Fed. R. 257, 260.

Where there are no laws making it unlawful for the public to deal in medicinal preparations, courts will not refuse to protect parties in such property. *Worden v. California Fig Syrup Co.*, 187 U. S. 516.

**7. The court takes a liberal view of the construction of representations regarding the goods, and is not disposed to give them the strictest interpretation.**

Complainants as partners used the name Standard Distilling Company; not such a fraud as to debar them of protection in case of infringement. *Block v. Standard Distilling and Distributing Co.*, 95 Fed. R. 978.

Representation that an article is "pure old rye whiskey," bearing one stamp, not false, although it is diluted, the undiluted bearing two stamps. *Cahn v. Gottschalk*, 2 N. Y. Supp. 13.

A representation on a box cover for spools of thread, "Manufactory Established in 1812," although not strictly true, is not fraudulent; or the word "Paisley," where only a small shipment came from "Paisley, Scotland;" or a statement that the thread was "sold everywhere," since the last was only trade-talk. Such representations were made in a limited space and were not calculated to deceive the public, which would be likely to understand them. *Clark Thread Co. v. Armitage*, 67 Fed. R. 896.

Complainant represented scythe-stones to be from "Willow Creek Quarry," "Green Farm Quarry," "Pt. au Barques Quarry," etc., and "from selected Huron Grit," and "from the best Blue Huron Grit." Although they came from the same quarry, yet there was no deceit, as the quality of the stone was not misrepresented and the complainant had a right to apply arbitrary names to subdivisions of the same quarry. *Cleveland Stone Co. v. Wallace*, 52 Fed. R. 431.

"It is contended that the law can afford no protection to

plaintiff, because his so-called trade-mark or label was in itself a misrepresentation. This beer, it is said, was not Budweiser beer. That it was not Budweiser beer, in the sense that it was not made in Budweis, is true. Neither was it imported beer. But it does not appear that it was held out to the public, either as actually made in Budweis or as a foreign article. The statement on the label explains that it was not made at Budweis, but by the Budweiser process. . . . If this was not literally true, the testimony is that it was a distinction without a difference. . . . There was no testimony tending to show any imposition upon the public by plaintiff." *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277, 283.

Where there is a statement that "Castoria," is a purely vegetable compound, and it is not, and an accompanying formula clearly shows that it has chemical ingredients, it is not such a fraud as will disentitle a party to relief on ground of unfair trade. *Centaur Co. v. Robinson*, 91 Fed. R. 889.

The fact that the complainant manufactures a preparation called "Carlsbad Sprudel Lozenges," containing only ten per cent of Carlsbad mineral water and ninety per cent cane sugar not a deceit disentitling it to relief, as a lozenge is a confection. *City of Carlsbad v. Kutnow*, 71 Fed. R. 167; affirming 68 Fed. R. 794.

Where label stated article was prepared by "Jos. Dixon & Co.," and it was in fact prepared by Jos. Dixon Crucible Co., there was no false representation, the former having for many years prepared it, and the latter being his successor. *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321.

Where one manufactured asphalt in New York using eighty per cent of material quarried in the Duchy of Brunswick, Germany, he was entitled to sell it under the name of "Brunswick Rock Asphalt," as against one manufacturing same article in the Duchy.

A geographical name may be in good faith used in the sale of an article whose principal value consists of the name of the place from which its principal ingredient comes. *Gabriel v. Sicilian Asphalt Paving Co.*, 52 N. Y. Supp. 722. Aff'd 56 N. Y. Supp. 30.

A label on cigarette papers containing words "Gluckman & Son, Sole Manufacturers, Paris," when they did not have a factory there, but the paper was especially and exclusively made for them there, is not fraudulent, and infringement will be enjoined. *Gluckman v. Strauch*, 99 N. Y. App. Div. 361.



“It is not questioned that their brandy is a genuine article, just what it purports to be; and while in their complaint the bottles are described as quart and pint bottles, they appear to be of the ordinary sizes used in the liquor trade; and I think we may assume that the brandy in them is sold by the bottle, and not in reference to measure. Any one purchasing knows just what he is purchasing, and the price is regulated by the size of the bottles. . . . This is, therefore, not a case where it can be said that plaintiffs came into court with unclean hands and guilty consciences, and must therefore be denied equitable relief.” *Hennessey v. Wheeler*, 69 N. Y. 271; 25 Am. Rep. 188.

Complainant under a patent made and sold nails as “hot-forged and hammer-pointed.” Respondent, manufacturing under an expired patented process, made and sold nails as “hot-forged and hammer-pointed.” Respondent had long before complainant used the expression “hammer-pointed.” Held, that although the expression was not strictly correct, yet there was no apparent fraud; bill dismissed. *Putnam Nail Co. v. Ausable Horsenail Co.*, 53 Fed. R. 390.

English case showed that the representations were not considered material. The label was as follows:

AROMATIC BITTERS  
and  
ANGOSTURA BITTERS  
Prepared by Dr. Siegert at Angostura.  
(Now at Port of Spain, Trinidad.)

“I cannot see that there is in fact anything in that wrapper amounting to a fraudulent misrepresentation by reason of which I ought to debar the plaintiffs from any right they would otherwise have.” Court considered *Ford v. Foster*, L. R. 7 Ch. 611 applicable. Collateral misrepresentations. *Siegert v. Findlater*, 7 Ch. D. 801. *Contra: Siegert v. Abbott*, 61 Md. 276; V. 1 A.

“According to the view which the court takes of the case, the only question deserving of serious consideration is whether the complainant is not precluded from obtaining equitable relief by certain representations which it makes to the public concerning the manufacture of its own liquor. It is claimed by the defendant that the *société*, by its labels, seals, advertisements, etc., represents that the Benedictine by it sold is manufactured by Benedictine monks, and, if this contention is sustained by the evidence, it must be conceded that complainant is without right to equitable relief. . . . Evidently the phrase, ‘Liquor of the

Benedictine Monks,' etc., is one that may be interpreted in several ways without doing violence to the ordinary use of language; and I am of the opinion that people of ordinary intelligence would generally regard it as a representation that the liquor in question is compounded according to a formula invented or heretofore used by the monks of the abbey of Fecamp, rather than as a representation that the monks of that abbey are still engaged in the manufacture, and that the article is of their production." *Société Anonyme v. Western Distilling Co.*, 43 Fed. R. 416, 418.

"Nor do we find that complainant is disentitled to relief in equity by reason of any false representations in its own labels as to the place of origin of the extract it sells. Some of the statements they contain, survivals from the older labels, are not now strictly accurate, notably the words, 'Moritz Fisher, Sole Agent for United States of America,' but they are immaterial. The labels certainly contain no statement that the extract is made in Germany, while the record shows that complainant has been to no inconsiderable expense to advertise its new industry of manufacturing the Johann Hoff's Malt Extract in this country. The criticism that its label states that there is such a factory and brewery in New York when complainant's is at Newark, is too trivial to merit discussion." *Tarrant & Co. v. Johann Hoff*, 76 Fed. R. 959, 961.

**8. The use by a proprietor of the name of a jobber or dealer in connection with a trade-mark is not deceitful.**

"In doing this no real deceit was practised upon the public, because the purchaser obtained the same goods which he would have purchased if the name of the jobber had not been upon them."

Manufacturers of scythe-stones sometimes put on labels bearing their brands the names of jobbers to whom they sold stones. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. R. 896.

Where boxes of cigars are stamped as made at the Elk Factory, which is true, it is not fraud to put upon the box, in accordance with custom of the trade, an additional label of the dealer. *Lichtenstein v. Goldsmith*, 37 Fed. R. 359.

## VI. PARTNERSHIP.

1. A trade-mark of a partnership business is classed among the assets of the partnership, to be owned jointly by the partners, and subject to the same rules as other property.

See X. 1 A. (1). 220. *Morgan v. Rogers*, 26 O. G. 1113.

See X. 2 A. 227. *Edelsten v. Vick*, 23 Eng. L. & Eq. 51.

A member of a mutual partnership acting as superintendent, although he may have originated the words "Grand Master" applied to cigars and used by the company as a trade-mark, does not by the fact of such adoption, and use in their employ, and as a member of the partnership, derive such title to its mark as would enable him to register the mark and claim it as his own. *C. A. Yale Cigar Mfg. Co., Ltd., v. C. A. Yale*, 30 O. G. 1183.

"In holding that it is necessary to the validity of a trade-mark that the claimant of it must be entitled to an exclusive right to it, or property in it, we do not mean to say that it may not belong to more than one person, to be enjoyed jointly or severally. Copartners, upon a dissolution of partnership, may stipulate that each of them may use the trade-marks of the firm, and there may be many other cases of joint and several ownership; but such co-owners will together be entitled to the exclusive use of the trade-mark, and perhaps each of them will be entitled to such exclusive use as to all other persons except their associates in ownership." *N. Y. Cement Co. v. Coplay Cement Co.*, 45 Fed. R. 212.

### A. On dissolution of partnership by death or otherwise.

(1) *It may be sold with the other assets in winding up the business, it not passing to survivor.*

By partnership articles it was provided that, on the death of a partner, the survivor should have the option of taking the partnership stock on paying to the personal representatives of the deceased partner the value of his share. Held, that the good-will of the business, and also a trade-mark which had been used by the partnership, ought to be included in the valuation. *Hull v.*

*Barrows*, 9 L. T. N. s. 561; 33 L. J. Ch. N. s. 204; 10 Jur. N. s. 55; 4 De G. J. & S. 150.

“It is, I apprehend, a well-settled rule, that the good-will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm.” *Howe v. Searing*, 6 Bosw. 354; 10 Abb. Pr. 264; 19 How. Pr. 14.

“The good-will of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity.” *Wedderburn v. Wedderburn*, 22 Beav. 84; 25 L. J. Ch. 710; 2 Jur. N. s. 674; 28 L. T. 4.

“It has been a matter of some debate and contrariety of decision by the courts, whether one surviving partner, after the death of the other, succeeds to the good-will of the firm; the better opinion now being that he does not.” *Young v. Jones*, 3 Hughes, 274.

**(2) Or it may be used by all former partners equally.**

“Each of them had a right at the moment of the dissolution of the partnership to use the word; and no special right could accrue to the plaintiff, unless he could show that, after the partnership had been dissolved, after both of the former partners had set up their several manufactures, the world was deceived into supposing that the one-half which was represented by Mitchell was selling things made by the other half.” *Condy v. Mitchell*, 37 L. T. N. s. 268; 26 W. R. 269.

“At the dissolution of the partnership, the partners revert back to their individual rights and responsibilities, and each partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name.” *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 295.

“It being clear upon the evidence that the designs were designs in which three persons were interested, for the purpose of carrying on a business or adventure in which all three were interested, it follows that upon the termination of that adventure, none of the three could claim any title against the other.” *Robinson v. Findlay*, 9 Ch. D. 487.

“Upon the dissolution of a co-partnership terminable at the pleasure of either partner, neither is entitled to the exclusive

use or to the registration of its trade-mark, unless by virtue of special stipulations." *Wright v. Simpson*, 15 O. G. 968; reversing *Simpson v. Wright*, 15 O. G. 248.

"It is well-settled law that, upon the dissolution of a partnership, each partner has a right, in the absence of stipulation to the contrary, to use the name and style of the partnership in any way consistent with the facts of their business which does not have the effect of deceiving the public. He may say successor to the late firm and any like representations. In the absence of express stipulations, each partner may use the goodwill of the former partnership. It is also held that rights in the trade-mark are analogous to rights in the goodwill of a partnership. In the absence of express stipulation at the time of dissolution, each partner may go on and use the trade-mark of the firm." *Young v. Jones*, 3 Hughes, 274.

**B. It may be reached by creditors.**

See X. 2 A. 227. *Bury v. Bedford*, 33 L. J. N. S. Ch. 465; 4 De G. J. & S. 352.

**C. It may be sold and assigned.**

See cases under X. 1 A (2). 221.

**2. A. A trade-mark owned by one who enters into a partnership business may in the absence of agreement remain the property of a single partner so as to be resumed by him on retiring from the firm.**

A partner in Paris manufacturing corsets and owner of trade-mark "Corset Gants" allows a firm of which he is partner in the United States to use said trade-mark; that license does not render the trade-mark an asset of the firm in this country, and on dissolution of firm he can resume the title and assign his interest. *Batcheller v. Thomson*, 93 Fed. R. 660; reversing 86 Fed. R. 630.

A party having the right to the trade-mark "Boss" as applied to washers formed a partnership with another for the manufacture and sale of the washers without any mention of the trade-mark. On a dissolution of the partnership the original proprietor sold all his interest in personal property according to a schedule to the other partner with whom he made a contract to manufac-

ture washers for him according to mould bearing name "Boss Washer." Held, that these facts did not pass any title to the trade-mark to the other partner. *Greacen v. Bell*, 115 Fed. R. 553, 554.

"When a trade-mark or trade-name is owned by one who enters into a partnership with another for the manufacture of the article designated, the title of the trade-mark does not pass to the partnership except by express agreement." *Greacen v. Bell*, 115 Fed. R. 553.

Trade-mark of Pike remained his property after he had taken into partnership with him two clerks and formed the firm of "S. N. Pike & Co." in the whiskey business. "He did not place his interest in the trade-mark in the concern as a part of the capital stock. He allowed the use of it on packages containing the whiskey manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned and on which their business was conducted, and taking his clerks into partnership with him changed in no respect, by its terms, their relation to his individual property." *Kidd v. Johnson*, 100 U. S. 617, 619.

**B. But the court may consider from all the circumstances that it was the intention of the parties that it become partnership property.**

"This part of the case . . . rests, as it seems to me, upon the simple question whether, upon the formation of a partnership with a person entitled to the benefit of the trade-mark, the trade-mark does not, in the absence of express provisions in relation to it, become an asset of the partnership, and in my opinion it does, for the whole trade is carried into the partnership, and the trade-mark is but an element of the trade." *Bury v. Bedford*, 4 De G. J. & S. 352, 373.

"When a partnership is formed in regard to the manufacture of the article to which the trade-mark is properly applied, 'the trade-mark of one partner, in the absence of special regulations, becomes part of the partnership property.'" *Filkins v. Blackman*, 13 Blatchf. 440-446.

**3. A retiring partner, without claiming use of trade-mark, which is a firm asset, is held to have abandoned it to the partnership.**

“It may be that where a firm is dissolved and ceases to exist under the old name, each of the former partners would be allowed to obtain ‘his share’ in the good-will, so far as that might consist in the use of trade-marks, by continuing such use in the absence of stipulation to the contrary; but when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business, and the future conduct of the business by them under the old name, the good-will remains with the latter as of course.” *Menendez v. Holt*, 128 U. S. 514, 522. Aff’d 23 Fed. R. 869.

“La Favorita,” used by firm of dealers arbitrarily to indicate origin of flour selected by their skill and used continuously for more than 20 years protected against a former member of the firm who had retired and surrendered all rights in the brands thirteen years before. *Menendez v. Holt*, 128 U. S. 514.

An injunction will lie in favor of former copartner against another restraining the use of signs containing old firm name without sufficient alterations or additions to give distinct notice of change. But defendant is “at liberty to publish in any form that H. is one of the members of the late firm, and carries on the same kind of business as formerly.” *Peterson v. Humphrey*, 4 Abb. Pr. 394.

## VII. TRADE-MARKS IN THEIR RELATION TO PATENTS.

1. Trade-marks have no analogy to patents or copyrights. The former are rights acquired for an indefinite time by intention and use at common law; the latter are monopolies by statute of inventions for a limited time, irrespective of use.

See X. 1 A (1). 220. *Morgan v. Rogers*, 26 O. G. 1113.

“The right of property in trade-marks does not partake in any degree of the nature and character of invention or of copyright, to which it has sometimes been referred, nor is it safe to reason from any supposed analogies existing between them.

“Invention is some *creation* of the brain in the nature of an art (mechanical or chemical procedure), — a machine, a manufacture, or a composition of matter, or of a design for an article of manufacture, or the like, to give it a particular appearance. Trade-mark is mere adoption and use of a name or symbol.” *C. A. Yale Cigar Mfg. Co., Ltd., v. C. A. Yale*, 30 O. G. 1183, 1187.

“Property in a trade-mark, or rather in the use of a trade-mark or name has very little analogy to that which exists in copyrights, or in patents for inventions.” *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 322.

“A trade-mark is not an invention. It does not relate to or affect processes of manufacture or mechanical combinations.” *Hoyt v. Hoyt*, 143 Penn. St. 623, 638.

“Property in the use of a trade-mark, however, bears very little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve the least invention or skill in their discovery or application.” *McLean v. Fleming*, 96 U. S. 245, 254.

“Trade-marks are the property of their owners independently of statute, and are not the subject of patents. Inventions and discoveries are different. In those no property exists at common law, and they are protected only in consequence of the courts’ provision on the subject, which does not apply to trade-marks.” *Rodgers v. Solomon* (Suprm. Ct. of D. of C.), 1 O. G. 29.



Property rights in trade-marks distinct from those under copyrights and patents. *Sarrazin v. W. R. Irby Cigar Co.*, 93 Fed. R. 624.

“Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.” *Trade-Mark Cases*, 100 U. S. 82, 93.

**2. A. A word used to designate a patented article during the life of the patent is held to be descriptive of that article, and on expiration of the patent it becomes *publici juris* and may be used by any one rightfully making the article.**

Where manufacturer of a dating machine, patented, marked the machine with name of patentee and date, *but without giving the name of the manufacturer*, and gave the name “Centennial Dater” or “American Dater,” such terms are not trade-marks, and may be used by another manufacturer of the article after expiration of patent, and the use will not be restrained on ground of unfair trade if the respondents sufficiently identify their article by marking thereon their own name. *B. B. Hill Mfg. Co. v. Sawyer Bros. Mfg. Co.*, 112 Fed. R. 144.

“Descriptive as the name Singer is of machines of a really distinctive character in their construction and principle of operation, when the patents protecting them expired, the right to use that name accompanied the right to make and sell the machines. It would be a poor return for the exclusive privilege which the public gives for a long period to the patentee, if, after the expiration of his patent, he shall be allowed to virtually perpetuate his monopoly, in a measure, by preventing all others from using the name, which will describe and make known the invention that has become dedicated to the public.” *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, 135.

Where a medicine manufactured under a patent, has been designated “Castoria” and that is its descriptive name, the word is free to public use at the expiration of the patent. *Centaur Co. v. Heinsfurter*, 84 Fed. R. 955.

“Castoria” having been used on a preparation made under a patent, it will become *publici juris* on expiration of the patent, and former proprietor cannot perpetuate his property right by

claiming that new preparation is not made according to the patent. *Centaur Co. v. Marshall*, 92 Fed. R. 605.

The name of a patented article, "Improved Patent Gold Medal, Self Cleaning, Rapid Water Filters," cannot be protected as a trade-mark after expiration of patent. *Cheavin v. Walker*, 5 Ch. D. 850; 46 L. J. Ch. 686.

When letters patent to Hezekiah Conant, protecting "a new design for embossing the ends of sewing-thread spools," expired, the public became entitled to use them for the purpose for which the assignee of Conant used them. *Coats v. Merrick Thread Co.*, 149 U. S. 562.

Plaintiff obtained patent on egg beaters and applied thereto name "Dover." After expiration of patent it brought bill against defendant to restrain him from using name on egg beaters. Patent had expired and no trade-mark.

"A word which might become a valid trade-mark when applied to an unpatented article may not be so when applied to an article which has the protection of letters patent. In the latter case the letters patent indicate the ownership and origin of the article, and it is more readily to be inferred that the word is used with the name merely to identify the article."

"But where one who has a patented article gives to it and puts upon it a name, and calls it by that name and no other, and it becomes known to the trade and to the public exclusively by the name so given to it by the patentee or person controlling the patent, then certainly it may be said that, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the thing." Plaintiff before the patent was known as "Dover Stamping Company." It sold a number of goods after patent named *Dove*. *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 194, 196.

"Certainly, if the words, 'Fairbanks' patent' do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is, to pretend that a scale is made by one person, which is, in fact, made by another." Fairbanks' patent on scales had expired. *Fairbanks v. Jacobus*, 14 Blatchf. 337, 341.

Where the word "Gilson" has been used to describe an album, protected by patent known as "Gilson Album" it cannot be registered as trade-mark, as it would become free to the public on expiration of patent. *F. H. Gilson Co., ex parte*, 83 O. G. 1992.

“As the patent has expired, and the defendant has a right to sell cooking stoves embodying the patented improvements, the sole question is, whether the defendant has a right to sell them with the name ‘charter oak’ upon them. . . . Under such circumstances, the plaintiff cannot, after his patent has expired, and when M. L. Filley has the right to make stoves containing said improvements, prevent him from calling them by the name of ‘charter oak,’ so long as he does not represent them as being made by the plaintiff, or to induce others to believe that they are made by the plaintiff.” *Filley v. Child*, 16 Blatchf. 376, 377.

“The first question in this part of the case is whether the defendant corporation is to be enjoined against selling, in the market generally, Universal presses, which contain only the devices described in the expired patents. I see nothing . . . which forbids the Colt’s Company from selling, or which implies that it is not to sell to any person, the ‘Universal press’ after the patents therein have expired. . . . The name ‘Universal’ or ‘Universal printing press,’ was adopted, at the time the patents were issued, to designate the patented press. It was not a trade-mark of the plaintiff which became identified with his workmanship, and indicated that the press was of his manufacture, but was a name which characterized the press which he invented. Any manufacturer, who uses the name now, does so to show that he manufactures the Gally press which he may rightfully do, and does not represent to all the public that it is getting any skill or excellence of workmanship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff.” *Gally v. Colt’s Patent Fire-Arms Mfg. Co.*, 30 Fed. R. 118, 122.

Preliminary injunction against use of word “Goodyear,” the patent having expired, refused. *Goodyear Rubber Co. v. Day*, 22 Fed. R. 44.

“It is also held that the complainants have no exclusive right to use the words ‘Weymouth’s Patent’ as a trade-mark, because they are the name which was given to such hay-knives when they were first made and sold, and the name by which they have become recognized and dealt in by the public; and that after the patent expired all persons had the right to deal in the article by that name, and also to print the name upon the article. These conclusions are but the application of familiar law to the facts of the case, and it would be quite superfluous to indulge in any extended discussion of the authorities.” *Hiram Holt Co. v. Wadsworth*, 41 Fed. R. 31, 36.

“Rahtjen’s Composition,” used on paints for ships’ bottoms not a valid trade-mark after expiration of patent, as the name of inventor had during the life of the patent been used descriptively of the goods. *Holzappels Compositions Company v. Rahtjen’s American Composition Company*, 183 U. S. 1; reversing 101 Fed. R. 257; affirming 97 Fed. R. 949.

Complainant marked its product “malted milk,” as made under a patent of 5 June, 1883. While there was some resemblance to patented formula it was not exactly the same. Held, that having claimed the benefit of a monopoly, whether entitled to it or not, it lost exclusive right to the mark at its expiration. *Horlick’s Food Co. v. Elgin Milkine Co.*, 120 Fed. R. 264.

“Linoleum,” product from oxidized linseed oil, open to public use after expiration of patent. *Linoleum Mfg. Co. v. Nairn*, 38 L. T. N. S. 448.

“Patent,” and “A Richardson’s Union Leather-Splitting Machine” not entitled to registration as trade-marks on machine, a patent on them having expired, the first word being deceptive and the second having become descriptive. *Richardson’s Appeal*, 3 O. G. 120.

“When the patent expires, or in foreign countries where the patent has no force, there is no piracy in making or selling the article under the name by which it has become generally known.” *Selchow v. Baker*, 93 N. Y. 63, 66; 45 Am. R. 169.

“It would be a dangerous doctrine to concede that a patentee, who has invented a machine which has gone into extensive public use, can, after the patents have become public property, still prevent the public from having the benefit of the invention, until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine.” *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. R. 208, 213.

“If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine.” *Singer Mfg. Co. v. Larsen*, 8 Biss. 151, 152.

“It is the consideration now due to the public, when the patents have expired, that it shall have the unobstructed benefit of these inventions, and there is not the least foundation in principle or reason for allowing the patentees to continue to enjoy as much of

the monopoly as they can save by the claim to use exclusively the trade names and marks by which they identified and secured to themselves the reputation of their inventions." *Singer Mfg. Co. v. Riley*, 11 Fed. R. 706.

"Inasmuch as the word 'Singer' indicates a machine of peculiar mechanism, and every one has a right to make such a machine, the word 'Singer' attached to such machine is common property." After the expiration of the patent the word could not be protected as a trade-mark. *Singer Mfg. Co. v. Stanage*, 6 Fed. R. 279.

"It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of the patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented." *Wheeler & Wilson Mfg. Co. v. Shakespeare*, 39 L. J. Ch. 36, 40.

After expiration of letters patent on sewing machines of which the frame in the form of the letter G, was an essential part, any party had a right to make the machines and use that form of frame. *Wilcox & Gibbs Sewing Machine Co. v. Gibbens Frame*, 21 Blatchf. 431; 17 Fed. R. 623.

The word "Yale" refused registration as trade-mark for locks, on ground that it has become public property on expiration of patents. *Yale & Towne Mfg. Co., ex parte*, 81 O. G. 801.

**B. A word used in a descriptive sense on articles made under claim of an invalid patent can be used by the public rightfully making the articles when the patent has been declared void.**

"Having adopted this use of tin and given to their goods the name of 'Tin-Tag Tobacco' while they were claiming the rights given them by the patent, it seems to me they have no right now to perpetuate a monopoly which the courts decided they could not have, by falling back upon the popular name given their goods marked in pursuance of the patent. If their goods properly became known and designated in the market as 'Tin-Tag' goods, by virtue of their marking them or tagging them in pursuance of their patent, the right to so indicate or mark the goods became public when the patent expired or was declared void, and they cannot perpetuate or continue this right by claiming it as a trade-mark." *Lorillard v. Pride*, 36 O. G. 1150; 28 Fed. R. 434, 438.

**3. A sign may by use in an arbitrary sense denoting origin, and not description, be acquired as a trade-mark on a patented article, so that it will not be lost on the expiration of the patent.**

“Celluloid” protected as a trade-mark after expiration of patent for making compound, the complainant having had it registered. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. R. 94.

“Mason,” in collocation “Mason Fruit Jar,” allowed registration although article had previously been patented.

“While the fact that the term has become generic would be fatal to its subsequent adoption by these or any other applicants, it certainly is not fatal to its continued use or to its registration by the lawful assignees of those whose use rendered it generic, any more than to its continued use or registration by the assignors themselves. Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire” *Consolidated Fruit Jar Co.*, 16 O. G. 679, 680; reversing on rehearing 14 O. G. 269.

“But now the applicants assert that by assignment they have become the owners, not only of certain patents with which this trade-mark has been associated, but also of the trade-mark itself, and that it has been used by their assignors seventeen years; that it was used as a common-law trade-mark nearly eight years before 1870. This was a valid trade-mark at common law, subject, of course, to the rights of other persons of the same name whatever they might be. The fact that the owners of the trade mark also owned certain patents with which it was connected did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole, and not merely certain parts of it, have terminated the existence of the trade-mark which had been used during the life of the patent.” *Consolidated Fruit Jar Co., ex parte*, 16 O. G. 679, 680.

“The applicants allege that the term ‘braided fixed stars’ was used to describe the articles manufactured under this patent, and that Palmer & Son could not have any trade-mark in that term. Now, I consider it plain that a man can have a patent for a new manufacture, and at the same time a trade-mark in the name used to designate the goods, though they are made under the patent.” *Palmer’s Trade-Mark, in re*, 24 Ch. D. 504, 509.

“To this suggestion it may be proper to reply that the complainant had a patent for the article of bluing which he was prosecuting and endeavoring to substantiate, but in which he finally failed. His failure to establish his patent (which would have covered all his rights) ought not to preclude him from falling back on his right to the trade-mark.” *Sawyer v. Kellogg*, 7 Fed. R. 720, 723.

“Thus, as every one at the expiration of the patent had a clear right to manufacture and vend what was known as the ‘Singer’ sewing machine, the plaintiff could acquire no exclusive right to the name ‘Singer,’ but could by proper trade-mark appropriate to itself names or devices indicating its own manufacture of such machines.” *Singer Mfg. Co. v. Stanage*, 6 Fed. R. 279, 281.

**4. A sign on a patented article used as a trade-mark prior to the date of the patent, does not, on the expiration of the patent, cease to be a valid trade-mark on that article.**

A party who uses trade-mark “Gants” on corsets two and one half years before patent and continues thereafter to use it, it appearing that excellence of workmanship and skill made the mark valuable and not the patent, the expiration of the patent did not render the mark *publici juris*. *Batcheller v. Thomson*, 93 Fed. R. 660.

**5. A collateral false representation, even if not on the trade-mark, but on advertisements or labels used as advertisements, that there is a patent on the article to which a trade-mark is affixed, is so far material as to invalidate the trade-mark.**

See V. 6 A. 127.

Respondent guilty of simulation of complainant’s trade-mark, labels, and packages in selling its compound, but not enjoined by reason of the fact that complainant had falsely represented that its compound was protected by a patent after patent had expired, in circulars accompanying the packages, although no such representations were on the packages or trade-mark.

“The use of fraudulent matter in any considerable part of the advertising media tinges the whole with that fraud upon which equity looks with disfavor. The natural effect of the language used upon the five circulars attached to complainant’s bill is to mislead and deceive the public, and complainant cannot be heard

to deny the intention of so doing." *Preservaline Mnfg. Co. v. Heller Chemical Co.*, 118 Fed. R. 103, 105.

*Contra*: False representation that shirts with trade-mark "Eureka" were patented not sufficient to defeat right to protection. Where equitable relief is refused it is generally on ground of some false statement or fraud in trade-mark itself. *Ford v. Foster*, 7 Ch. App. 611.

**6. A. The intentional false use of the word "patented" on a trade-mark or label used as a trade-mark leading the public to believe that the goods to which it is affixed are patented when they are not is such a material deception as to justify refusal of court to grant relief against infringement. Such a use is contrary to U. S. Rev. Stats. sec. 4901.**

Use of word "patented" associated with a trade-mark on playing cards for which patent had expired a fraud which prevented relief. *N. Y. Consolidated Card Co. v. Union Playing Card Co.*, 39 Hun, 611.

Where a party intentionally uses the word "patent" in connection with a trade-mark so as to deceive the public into believing that goods are patented he cannot obtain protection for the trade-mark. *Cheavin v. Walker*, 5 Ch. D. 580; 46 L. R. Ch. 686; 36 L. T. 938.

"The complainants deduce their asserted right under Mason, who was the patentee of certain alleged improvements in fruit jars. There has been a judicial decision against the validity of his patent; and they do not now assert its validity. But they claim a trade-mark in what I think is not sufficiently distinguishable from a claim of exclusive right in the patented privilege. In other words, the alleged trade-mark is either deceptively obscure, or purports to be for the subject of the patent, or to include it." *Consolidated Fruit Jar Co. v. Darflinger*, Fed. Cas. No. 3129.

Protection refused to collocation "Flavel's Patent Kitchener," used on an article which was not patented, on the ground that it was fraudulent. *Flavel v. Harrison*, 10 Hare, 467.

"If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of a trade-mark



to relief in a court of equity against any one who pirated it." *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, 543.

"Patent Plumbago Crucibles," used on unpatented crucibles, fraudulent and not entitled to protection. *Morgan v. M'Adam*, 36 L. J. Ch. 228.

"Applicant petitions for the registration of the words 'A. Richardson's Patent Union Leather-Splitting Machine.' It appears that the leather-splitting machine he proposes to manufacture and place this alleged trade-mark upon, has been patented, manufactured, and put upon the market under the above caption during the last twenty years, and that the patent has expired. The examiner has therefore held that the word 'patent' cannot properly be sanctioned as part of this trade-mark, because it would tend to deceive the public." *Richardson's Appeal*, 3 O. G. 120.

**B.** (1) *But the use in good faith of the word "patented" or "copyrighted" on a trade-mark or label as a trade-mark in connection with goods which are not patented does not necessarily disentitle a party to relief if it may be held to refer to the registration of a trade-mark.*

Use of words "Pat. Aug. 13, 1872," on label for whiskey, that being date of registry of trade-mark not false, although whiskey is not patented. *Cahn v. Gottschalk*, 2 N. Y. Supp. 13.

If word "patented" is used on a registered trade-mark affixed to goods not patented it is no false representation, the word referring to the trade-mark. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946.

(2) *Or if there was originally a patent on the goods, or one believed to exist, or if its use was not such as to deceive the public.*

Labels which bore trade-mark on carbonated water had printed words "Manufactured in Ireland by Royal Letters Patent." The article was not subject to patent, but machinery was and appellant was sole licensee in Ireland; not fraudulent. *Cochrane v. McNish*, 74 L. T. n. s. 109.

"The word 'patent' means not necessarily that there is now current a patent of protection, but that the article in question is one of those articles which had the merits of utility and novelty, and therefore received the protection of the Crown by letters patent." *Adams' Trade-marks, in re*, R. P. C. 174; 66 L. T. 610.

The representation on back of a card bearing complainants'

goods, "De Long Patent Hook and Eye," when only a feature of the hook was patented, is not fraudulent, although not strictly correct. *De Long Hook and Eye Co. v. Francis Hook and Eye Fastener Co.*, 139 Fed. R. 146.

"It is no doubt to be much preferred, that no representation should be issued to the public which is not strictly true; but in a case in which the goods have become known by a description which was originally accurate in every part, if I were to hold that the continued use of this description disentitled the party to the assistance of the Court, it would be going much farther than I did in refusing to interfere by injunction where the plaintiff had adopted and used the word 'patent' untruly and without foundation." *Edelston v. Vick*, 11 Hare, 78.

It is not fraudulent to stamp with a trade-mark the words "patented Sept.," where it appears that a patent has been examined and allowed and will be issued in September. *Lauferty v. Wheeler*, 11 Abb. N. Cas. 220.

"The word 'patent' may be used in such a way as not to deceive the public. For instance, the term 'patent-leather boots' is in constant use, but no one supposes that it is thereby intended to convey the impression that the leather is protected by any patent. It is here stated in the bill, and verified by affidavit, that the term 'patent thread' has been used in the trade for many years past, and is the name by which thread of a certain class is known by manufacturers and in the trade. It has, in fact, become a word of art. I am, therefore, only following the principle of the decided cases, for here there has been no such misrepresentation, designed or undesigned, as to deprive the plaintiffs of their right to an injunction." *Marshall v. Ross*, L. R. 8 Eq. 651.

Word "patent" stamped on ploughs not patented, although originally patented and the patent expired, when the parties in circulars and advertisements lay no claim to patent, not a fraudulent representation.

It is not fraud for a concern to use word 'patent' on ploughshares when a patent was obtained in 1803, by predecessors, the advertisements not claiming a patent, but plainly referring to a patent which had expired in 1817. *Ransome v. Graham*, 51 L. J. Ch. 897; 47 L. T. N. s. 218.

It is not fraud for a concern to use the words "special registered trade-mark" where an application had been pending for a trade-mark. *Read v. Richardson*, 45 L. T. N. s. 54.

“Below the picture of the tobacco plant, it will be remembered, were the words ‘Habana,’ ‘Copyrighted.’ . . . The word ‘Copyrighted’ meant the same to everybody. It implied that the protection of the statute applicable to such matters had been secured. This was probably believed to be true, but was without foundation. The misrepresentation, however, was unimportant.” *Solis Cigar Co. v. Pozo*, 16 Colo. 363, 395.

Representation that parties whose names appear as manufacturers on trade-marks of certain thread are fictitious, and fact that thread is not patented as represented on the thread trade-marks no defence in a court to enjoin infringement. Parties may be fictitious and thread may not be patented. *Stewart v. Smithson*, 1 Hilt. 119.

### VIII. UNFAIR TRADE.

1. (A) A descriptive sign, (B) a geographical sign, (C) the proper name of a private party, (D) a form or shape, (E) a color, (F) a style of dressing or marking goods, (G) or a label or advertisement, while not the subject of a trade-mark, will be protected in their distinguishing features on the ground of unfair trade.

A. A descriptive sign not in general use if used by a party with the intention of pirating on the good-will of another who has acquired a reputation under it and of palming off on the public his goods as those of another, may be protected on the ground of unfair trade.

“The tendency of the courts at the present time seems to be to restrict the scope of the law applicable to technical trade-marks, and to extend its scope in cases of unfair competition.” *Church & Dwight Co. v. Russ*, 99 Fed. R. 276.

“A man is not to sell the goods or manufactures of B., under the show or pretence that they are the goods or manufactures of A., who by superior skill or industry has established the reputation of his articles in the market. The law will permit no person to practise a deception of that kind, or to use the means which contribute to effect it. He has no right, and he will not be allowed, to use the names, letters, marks or other symbols by which he may palm off upon buyers as the manufactures of another, the article he is selling, and thereby attract to himself the patronage that, without such deceptive use of such names, etc., would have inured to the benefit of that other person who first got up, or was alone accustomed to use, such names, marks, letters, or symbols.” *Couts v. Holbrook*, 2 Sandf. Ch. 586, 594.

“Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of a word, mark, or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to public use ‘like the adjectives of the language,’ yet there may be unfair competition in trade by an improper use of such word,

mark, or symbol." *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651, 659.

A party having for eighteen years used the name "Health Food Company," and having built up a reputation under it, is entitled to an injunction against a party who fraudulently uses the name "Sanitarium Health Food Company," although "Health Food" is descriptive. *Fuller v. Huff*, 104 Fed. R. 141; reversing 99 Fed. R. 439.

Respondent, having procured from Dr. B. L. Bull right to use his name and formulas, made and sold a preparation with wrappers so like the complainant's as to deceive the public, using thereon the words "Dr. Bull's Cough Syrup." Held, that, although such words were descriptive, yet where the complainant had acquired a reputation under such name the respondent could not use it on wrappers like those of complainant's so as to deceive, but might use it on wrappers which were not an imitation. *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.*, 58 Fed. R. 884.

Complainant had acquired a reputation for its goods under name "Air Cushion Pads;" held, entitled to restrain respondent who had subsequently stamped on its goods of a similar nature the words "Air Cushion" and registered "A. C." as a trade-mark. *Revere Rubber Co. v. Consolidated Hoop Pad Co.*, 139 Fed. R. 151.

"It is not essential to the protection of a trader against a rival's fraudulent interference with his business, that he shall have a trade-mark to be pirated. . . . It is enough if the wrongdoing rival uses any letters, marks, shapes, devices, or symbols, so nearly like those previously employed by the complainant to distinguish his wares that purchasers from him may be likely to believe they are getting the goods of the complainant." *Trask Fish Co. v. Wooster*, 28 Mo. App. 408, 419.

Respondents enjoined from dressing up their bottles of champagne to resemble those of the complainant's under which they had gained an extensive reputation. "They should also be prohibited from placing the words 'Extra Dry' upon any bottles of their product, of the character that has been described, either in combination or otherwise. This upon the ground that the words 'Extra Dry,' as applied by them to the article they manufacture, constitute an untrue and deceptive reputation, made, not for the purpose of description, but for the purpose of fraud, and which are calculated to deceive, to the injury of the complainants." *Von Mumm v. Frash*, 57 Fed. R. 830.

“While a descriptive, or geographical or personal name cannot constitute a technical trade-mark, yet where, as here, an article has come to be known by the descriptive word, one may not use that word to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known. One may not use his own name for such purpose when it works a fraud. If he uses the descriptive word or a geographical name, or his own name, it must be so used as not to deprive others of their rights or to deceive the public, or the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact.” *Williams v. Mitchell*; *Mitchell v. Williams*, 106 Fed. R. 168.

**(1) Words, letters, or numbers chosen to designate the grade or quality of the product of a manufacturer, while not legal trade-marks, on proof of use with fraudulent intent on the part of another will be protected on the ground of unfair trade.**

See VIII. I G. 182. *Gillott v. Kettle*, 3 Duer, 624.

Numeral “303” impressed on a pen to denote a particular pattern manufactured by plaintiff, distinguished from other patterns, held to be a trade-mark and protected. It is properly a case of unfair trade. *Gillott v. Esterbrook*, 47 Barb. 455.

Plaintiff had been accustomed to mark his ploughs “H H” to denote that they were case hardened, and also certain numbers to denote size, as “6.” Defendant used “H H 6.” Injunction against him. *Ransome v. Bentall*, 3 L. J. Ch. n. s. 161.

**(2) Several marks or a series of marks used by a proprietor with or without a common symbol to designate the different grades, styles, or qualities of a class of his merchandise, while not trade-marks, may be protected on proof of fraud on the ground of unfair trade.**

Note reference under III. 1 J. 52.

The use of descriptive letters and numbers to designate series of ploughs while not trade-marks was enjoined on the ground that the public were deceived by the use of them by another, they having come to be recognized as the series of a certain manufacturer. *Avery v. Meikle*, 81 Ky. 73.

While a bill may not lie for unfair competition in use of scheme of numbers on labels to designate bottles and jars, as 3001 to 3007 for 1001 to 1007; nevertheless it might lie for use of identical

numbers and a dismissal of first bill is not *res judicata* as to second. *Dennison Mfg. Co. v. Scharf Tag, Label, and Box Co.*, 121 Fed. R. 313.

*But see*: A series of numbers used on tags or labels to designate size and not in fact designating origin are not trade-marks, and no injunction will lie against respondent for similar use on labels, especially if accompanied by its true corporate name and not used with fraudulent intent. *Dennison Mfg. Co. v. Scharf Tag, Label, and Box Co.*, 135 Fed. R. 625; second appeal; see 121 Fed. R. 313.

Complainant used a great many numbers arbitrarily chosen, as "223," "2004," "209," and "201," to designate grade and style of tags, paper, sealing wax, and stationers' supplies. Held, not trade-marks, but imitation was so exact as to lead to presumption of fraud, and relief granted on ground of unfair trade. *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. R. 651.

**(3) Although a name may have become descriptive so as to lose its character as a trade-mark, yet its use by others not rightfully making the product or possessed of the secret will be enjoined.**

The name "Angostura" being former name of town, was applied by plaintiff to bitters made there, and became descriptive of those bitters. Defendant who used name not possessed of secret process, although manufacturing there was restrained; if he ever knew the process he could use the name. *Siegert v. Findlater*, L. R. 7 Ch. D. 801.

**(a) But where the right and knowledge are open to all the world the court will not, at the instance of a particular party using the name, issue an injunction against one who fails to maintain the original standard.**

See V. 3 A. 125.

A party had manufactured washboards to which it applied the name "Aluminum," as the rubbing board was made of that metal. Another party began the manufacture, using the same name but instead of using that metal it used zinc. Held, that it did not entitle the first party to an injunction, since the word was descriptive and its misuse was a public wrong not entitling him to a private action. *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. R. 281.

Where party at expiration of patent has lost exclusive right to use the word "Castoria," he is not entitled to injunction against

another who uses the same name with "fake" testimonials. *Centaur Co. v. Marshall*, 92 Fed. R. 605; 97 Fed. R. 785.

The process for making an extract of meat termed "Liebig's Extract of Meat," not being a trade secret, a party who uses the name has no right to bring a bill to enjoin another who, under the same name, makes and sells a preparation not according to the original receipt. *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. R. 822.

### B. A geographical sign.

*(1) A geographical name used by a resident proprietor on his goods may be protected in cases of fraud as against non-residents on the ground of unfair trade.*

Complainant and its predecessors had for many years manufactured and sold scythe-stones under the trade-mark "Lamoille," "Green Mountain," "Black Diamond," "Indian Pond," "Magic," and "Willoughby Lake." Defendants having succeeded to a company which had contracted to purchase complainant's scythe-stones for a series of years, refused to carry out that contract, but having procured quarries 200 miles distant were manufacturing and selling scythe-stones under above names, except that they used in place of "Willoughby Lake," "Willoughby Ridge," and in place of "Black Diamond," "Diamond Gem," these names never having been used to designate stones taken from defendant's quarries. Held, that preliminary injunction should be granted restraining defendant's use of all names whatever; decision might be on "W. R." and "D. G." alone.

"Assuming that complainant cannot have a valid trade-mark in the names, which I do not decide, it seems to me well settled that a manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district so designated."

Lamoille was name of county, and the county and lake were 200 miles from defendants' quarries. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. R. 896.

Plaintiff was a brewing corporation at St. Louis and under name "St. Louis" on its labels had acquired a reputation for its beer at Panama. Defendant exported beer from New York to Panama in bottles with similar labels bearing name "St. Louis." Until plaintiff used name no one else had used it. Held, infringement to be enjoined. *Anheuser-Busch Brewing Ass'n v. Piza*, 24 Fed. R. 149. X



“Durham,” as applied to smoking tobacco by manufacturer in Durham, N. C., protected as against use on smoking tobacco in Richmond, Va. *Blackwell v. Dibrell*, 3 Hughes, 151.

Canning companies in California, who put up and sell fruits grown in that State, have the right to use thereon the name “California” as a trade designation; and when their products have become well and favorably known by such name, are entitled to protection by injunction against the fraudulent use on cans of the same kind of fruit, grown and put up elsewhere, of labels designating it as California fruit, and falsely stating that it is put up in that State. The complainants were a number of corporations of California engaged in that State in the business of canning pears grown there. Defendants were in Baltimore canning pears not of California. *California Fruit Cannery Ass’n v. Myer*, 104 Fed. R. 82.

Plaintiff established factory in Key West, and on boxes of cigars had “Key West” branded or on labels, with his name “E. H. Gato” and “Edward H. Gato;” defendant manufactured at Jacksonville and put on his boxes “Key West” and “G. H. Gato,” and people were deceived thereby. It was fraud and he was enjoined. *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886.

One making corset waists at Chicago and labelling them “Chicago Waists,” having acquired reputation under that name entitled to injunction vs. parties in California and Michigan making and selling corsets under that name. Chicago party one using that name in Chicago. *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. R. 213.

Where plaintiff has for 30 years manufactured at Worcestershire an article sold by them under name “Worcestershire Sauce,” held, that defendant should be enjoined from using words “Worcestershire Sauce” on labels on article not made in Worcestershire. Modifying 13 Abb. Pr. n. s. 389, which denied relief on ground that name was geographical. *Lea v. Wolff*, 15 Abb. Pr. n. s. 1. *But see: Lea v. Deakin*, 11 Biss. 23; III 2 A. 64.

Plaintiff manufactured cement from lime quarries near Akron, and called it Akron cement. Defendants started manufacturing near Syracuse and used word “Akron” on their cement, although adding “Syracuse, N. Y.” Injunction. *Newman v. Alvord*, 51 N. Y. 189; 49 Barb. 588; 35 How. Pr. 108.

Certain mills in Minneapolis, Minn., made high-grade flour and used thereon in different forms “Minnesota Patent,” “Minneapolis, Minnesota,” “Minneapolis, Minn.” etc. Defendant in

Chicago bought Wisconsin flour which he labelled "Best Minnesota Patent, Minneapolis, Minn." and advertised it as made in Minn. Held, Minn. mills could enjoin him. *Pillsbury Washburn Flour Mills Co. v. Eagle*, 86 Fed. R. 608; reversing 82 Fed. R. 816.

Respondents, manufacturers in Chicago, enjoined from using "St. Louis" on their cheap, inferior, and adulterated white lead by manufacturers of unadulterated white lead in St. Louis using the name of the city on their article. *Southern White Lead Co. v. Cury*, 25 Fed. R. 125.

A manufacturer of white lead in Chicago will be enjoined from the use of the words "White Lead; St. Louis," except as to preparations of white lead manufactured there, such use tending to deceive and defraud the public, and complainant a manufacturer of lead in St. Louis. *Southern White Lead Co. v. Coit*, 39 Fed. R. 492.

*Contra*: "Rosendale," used on cement, manufactured at Rosendale in New York not protected against name used on cement made in Lehigh County, Penn. If the respondent has fraudulently used the name it is a fraud on the public and is no special damage. *N. Y. Cement Co. v. Copley Cement Co.*, 44 Fed. R. 277. Aff'd on reargument, 45 Fed. R. 212.

**(2) A geographical name, even if used in a geographical sense, under which a party has acquired a reputation so that it has come arbitrarily to designate his goods may be protected as against a party who fraudulently imitates it for the purpose of pirating on the good-will of another.**

See II. 4 B (1). 26.

See III. 2 D. 68.

"Carlsbad," applied for many centuries to mineral water at Carlsbad, owned and controlled by the city. Twelve years before regular importation to this country respondent made an artificial water, which he called "Carlsbad," of merit and similar to the genuine water. Some years after importation this bill was brought. Held, that while not entitled to use "Carlsbad" alone, he could use on his waters "Artificial Carlsbad." *City of Carlsbad v. Schultz*, 78 Fed. R. 469.

"Keystone" the name of ten cities or towns in United States protected as applied to cigars in New England. *Cohen v. Nagle*, Mass. Feb. 1906.

Parties in this country enjoined from use of word "Plymouth" on labels for gin like labels of complainant, the geographical

word being used for purposes of fraud and the gin not being in fact made at Plymouth.

“Whatever may be the decisions in the state courts, it is abundantly settled by authority in the federal courts that they will not tolerate a false use of a geographical name when it is so used to promote unfair competition and to induce the sale of spurious goods.” *Collinsplatt v. Finlayson*, 88 Fed. R. 693.

“Anatolia,” name of Turkish province from which liquorice roots came, held arbitrarily applied to liquorice.

“But then you have the fact here, as I said before, that although the juice had come from Anatolia long before, yet until the plaintiffs set up this manufacture and thought fit to have a new name for the article they were thus introducing, nobody thought of using the name ‘Anatolia,’ and it was not wanted for the trade.” *McAndrew v. Bissett*, 10 L. T. n. s. 442; 33 L. J. n. s. 561. *Aff’d* 10 Jur. n. s. 550; 4 De G. J. & S. 380.

Plaintiffs had for a number of years been doing business and had acquired reputation at Cookston under firm name of “Cookston Marble & Granite Works.” Injunction against defendants in same town who formed a corporation and assumed the corporate name of “Cookston Marble Works,” as it would cause injury to plaintiffs’ trade. *Nesne v. Sundet*, 93 Minn. 299.

The Republic of France owned a mineral spring at Vichy whose water was known as Vichy water. It farmed the right to a company to deal in these waters. The respondent, after Vichy water had obtained a reputation in this country, designed a label by which its waters were designated “Saratoga Vichy,” with the first name in small print and the name “Vichy” so prominent as to attract attention. Held unfair competition, and injunction issued. *République Française v. Saratoga Vichy Spring Co.*, 191 U. S. 427; 107 Fed. R. 459; reversing 99 Fed. R. 733.

The defendant was allowed to use the word “Vichy,” but not so as to deceive.

“The defendant should be enjoined against the use of this neck label, or of any other label in which the place of the origin of its water is not as plainly and prominently made known as the fact that it is named Vichy.” *Idem*, 107 Fed. R. 462.

“As the waters of Vichy had been known for centuries under that name there is reason for saying the plaintiffs had in 1872 acquired an exclusive right to the use of the word ‘Vichy’ as against every one whose waters were not drawn from the springs of Vichy or at least, as observed by a French court, from the same

hydrographical region, which may be called generally the basin of Vichy.

“True, the name is geographical, but geographical names often acquire a secondary significance indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of passing off the productions of one person as those of another.” *Idem*, 191 U. S. 435.

The name “Vichy (Grand Grille)” had been used by respondent since 1862 on manufactured waters in this country for thirty years. The name *Vichy* was a geographical name applied to a town in France where there were mineral springs of considerable merit owned exclusively by the government and farmed to a private company. The waters had been sold since 1716. Held, that while the name *Vichy* was not a trade-mark, yet the label of respondent bearing the words *Grand Grille*, the name of a famous spring there, was a misrepresentation and did not disclose that the water was artificial water. No injunction issued, as Schultz had meantime died, and there was no evidence that the business was being continued; and no account could be had for profits, because of laches. *République Française v. Schultz*, 102 Fed. R. 153; affirming 94 Fed. R. 500; reversing 57 Fed. R. 37.

The use of the words “Lithia-Vichy” on artificial mineral water made in this country, with words on the label inconspicuously printed “Manufactured from Distilled Water,” held not to be a fraud, as customers would naturally expect that they were getting, not the natural Vichy, but an artificial product. *République Française v. Schultz*, 115 Fed. R. 196.

Complainant’s agent, the “Apollinaris Company,” had for many years sold Hunyadi Waters in the United States, being the exclusive agent for said water. It adopted and claimed as its trade-mark thereon a red diamond on a yellow ground. When the agency ceased and it began the sale of other waters it had the right to affix the trade-mark to the new waters if there was such a dissimilarity in the labels as not to lead to confusion in purchase of Hunyadi water. *Sarlechner v. Graef*, 81 Fed. R. 704.

“Seixo,” name of district in Portugal (meaning stony), ap-

plied on wine made in that district by which name it had become known in England, protected as against its use on wine of the defendant, although it may have been made in same district. *Seixo v. Provesende*, L. R. 1 Ch. D. 192.

Complainant had during many years built up a lucrative business in bluing under the name "American Ball Blue" and "American Wash Blue." Respondent began to use the same names on their product. Injunction on the ground that although "American" was a geographical name, yet one could not use it to perpetrate a fraud. Dissenting opinion. *Shaver v. Heller & Merz Co.*, 108 Fed. R. 821; affirming 102 Fed. R. 882.

A party at Boston who had acquired a valuable good-will under trade-name "Boston Peanut Roasting Company" is entitled to injunction against one who at same place to his injury assumes name "Boston Trade Peanut Roasting Co." *Viano v. Baccigalupo*, 183 Mass. 160.

**(3) A geographical name of a locality used exclusively by a resident on his goods so that it has come to denote origin may be protected against those who fraudulently, for the purpose of deception, assume the name of that locality.**

Plaintiff was the first manufacturer of watches in Waltham and had acquired great reputation before defendant began to do business. Plaintiff had used word "Waltham" on its watches originally in geographical sense, but by long association it had come to designate its watches. Held, that defendant could not use "Waltham" on its watches without some accompanying statement which should clearly distinguish its watches, and word "Waltham" upon dial should be enjoined. *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85.

"It was found at the hearing that the word 'Waltham,' which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name." *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85.

"Waltham," used on complainant's watches fifty years had come to indicate origin and protected as against its use on watches of defendant whose principal had established himself at Waltham for the purpose of pirating the name for watches.

Injunction and accounting. *American Waltham Watch Co. v. Sandman*, 96 Fed. R. 330.

A manufacturer or dealer who has built up extensive trade, and his trade-mark has given a designation to the locality of origin, and where for many years he has had unqualified and uninterrupted use of name, is not thereby prevented from having trade-mark right in name although it is geographical. "Pocahontas," therefore, having been used uninterruptedly twenty years protected as a trade-mark on coal mined there despite *Coffman v. Castner*, 87 Fed. R. 457. It is material whether or not plaintiff created name or adopted one already in public use. In this case it appears that it was not in common use, but that reputation had been gained by plaintiff's industry. Coal of defendants came from same general locality. *Atwater v. Castner*, 88 Fed. R. 642. *Contra: Coffman v. Castner*, 87 Fed. R. 457. Aff'd 178 U. S. 168.

Plaintiff at Reading manufactured a sauce called "Reading sauce," from the name of the town. Another at London adopted the name and then he called his sauce "Original Reading Sauce," in which name he was protected, and if he had objected earlier he might have been protected in name "Reading" alone. *Cocks v. Chandler*, L. R. 11 Eq. Cas. 446.

Complainant had manufactured its watches at Elgin for thirty years and used the name so continuously on its product that it had acquired a secondary meaning; held, that it was entitled to injunction against respondents who fraudulently assumed name "Elgin Jewelry Co.," as a corporation, had works at Iowa City, and only a mail order place of business at Elgin, and so used the name "Elgin" on clocks and watches as to deceive the public. *Elgin Natl. Watch Co. v. Loveland*, 132 Fed. R. 41. *But see: Ill. Watch-Case Co. v. Elgin Natl. Watch Co.*, 94 Fed. R. 667; III. 2. A. 64.

Plaintiff manufactured a fluid called "Aromatic Bitters," made by secret process at Angostura in Venezuela. Name was changed by government to Ciudad Bolivar. Defendant started to manufacture there and called product "Aromatic Bitters," but, restrained by court, he called it "Angostura Bitters." Plaintiff's product, meanwhile, had become known as "Angostura Bitters." Plaintiff was entitled to injunction, as defendant was guilty of fraud; he could, however, if possessed of secret, use name "Angostura Bitters." *Siegert v. Findlater*, L. R. 7 Ch. D. 801.

Complainants below had carried on business as brewers at town

of Stone, of six or seven thousand inhabitants, for upwards of a century, with no other breweries there. Their ale gained great reputation and was known as "Stone Ale" and so designated. Respondent owning public houses at Liverpool came to Stone and established a brewery for the purpose of using name "Stone" on his ale to obtain the advantage of the name and lead people to believe that his ale was that of the complainants.

"An injunction was accordingly granted on the application of the respondents, restraining the defendant from carrying on business of a brewer at Stone, under the style of 'Stone Brewery,' or 'Montgomery's Stone Brewery,' or under any other title, so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold any ale or beer not of the plaintiff's manufacture, under the term 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiff's manufacture, and from infringing the plaintiff's registered trade-mark, or any of them." *Montgomery v. Thompson*, 64 L. T. R. N. S. 48; affirming 41 Ch. D. 35.

Plaintiffs had one of the springs in the Cromac district of city of Belfast, and adopted term "Cromac Springs" as their trade address, and after using it as such for some years registered it as their trade-mark. The defendant also carried on business as a manufacturer of aerated water, and had a Cromac spring on his own premises. Held, that plaintiffs had acquired right to use the words "Cromac Springs" as a trade-mark, and were entitled to restrain infringement by defendant; but that the injunction should be limited to restraining the defendant from using the words "Cromac Springs" in connection with his trade, or as the name of his place of business, in such a manner as to represent the aerated waters sold by him as having been manufactured or sold by the plaintiffs, and should not extend to prevent the defendant from otherwise describing his aerated waters as manufactured from the water of the "Cromac Springs." In this case, although springs had been previously known as Cromac Springs, yet the use of the term by the plaintiffs had come to be so extensive that it was associated with their product. *Wheeler v. Johnston*, L. R. 3 Ir. 284.

**(4) A name of a village under which a non-resident has formerly as a resident built up an extensive business may be protected in cases of fraud, even as against residents, on the ground of unfair trade.**

“Deer River,” name of village and postoffice in New York, where plaintiff had long made ploughs marked “Deer River”; he sold his factory to defendant, who represented that he would turn it into a blacksmith’s shop, and moved elsewhere; the defendant started to manufacture ploughs with mark “Deer River”; plaintiff was entitled to injunction on ground of fraud. *Gibbie v. Still*, 82 Hun, 93.

Glenfield was an estate where there were a few houses and sixty inhabitants. Complainant had manufactured starch there many years called “Glenfield Starch,” and then removed. Respondent came there, got part of a factory, and started to manufacture starch called “Glenfield Starch.” He did it with fraudulent intent, and was enjoined, although he used also his own name. *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

“Injunction granted restraining the respondent, his servants, and agents, from using the word ‘Glenfield’ in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be ‘Glenfield Starch,’ and from selling or causing the same to be sold as ‘Glenfield Starch,’ and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is ‘Glenfield Starch,’ or starch manufactured by the appellants; the respondent to pay the costs of the appellants in the court below.” *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 523.

### C. The proper name of a private party.

**(1) While a proprietor’s proper name is not a technical trade-mark which will entitle him to the exclusive use of that name, he will be protected in its use as against all others not of the same name.**

See X. 1 A (2). 223. *Oakes v. Tonsmierre*, 49 Fed. R. 447.

See XI. 2. 242. *Singer Machine Manufacturers v. Wilson*, 3 App. Cas. 376.

Complainant was proprietor of a drug, “Brown’s Iron Bitters,” and respondent of another drug called “Iron Tonic Bit-



ters"; respondent should be enjoined from printing on his label the name of Brown & Co., of New York. *Brown Chemical Co. v. Stearns*, 37 Fed. R. 360.

Derringer thirty years before had invented a pistol and used his name on it as a trade-mark. Defendant had begun to use the name on pistols of his own make. Held, that he was entitled to injunction. *Derringer v. Plate*, 29 Calif. 292.

Plaintiff made a medical preparation which he designated by his own name "Franks' Specific Solution of Copaiba." Defendant started to sell medicine under same name. Held, that he could not use plaintiff's name. *Franks v. Weaver*, 10 Beav. 297.

Matthias Holmes at Würtemberg is maker of harmonicas well-known in this country under his own name. Ernest Leitend, for whom respondent is agent, makes harmonicas in Saxony, and on them places in large letters "Improved Holmes," accompanied with word "nach." Held, that use of word "nach" would not show that Holmes was not maker, and that name of Holmes should not be used. *Holmes v. Gratz*, 52 Fed. R. 871; 50 Fed. R. 369.

"That any name, symbol, or device, adopted by an individual, corporation, or business firm, for the purpose of designating the origin and ownership of goods manufactured by them, will be protected as a trade-mark, is well-settled law. The name of a corporation or partnership, accomplishing the same object, will be protected upon the same principle." *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278.

Complainant was owner of a medical preparation known and sold for many years as "Hostetter's Bitters." Respondent put up bitters very similar and labelled them "Hostetter's Bitters"; decree for injunction and accounting. *Hostetter Co. v. Sommers*, 84 Fed. R. 333.

Jules Jurgensen, who used his name as trade-mark on watches manufactured by him in Copenhagen and Switzerland, entitled to injunction against defendant who used it on watches not made by the plaintiff. *Jurgensen v. Alexander*, 24 How. Pr. 269.

A priest named Kneipp in Germany invented a malt substitute for coffee, which was improved upon by complainant's predecessors, and with his consent they established the business of selling the substitute, using his name and, with his consent, his picture and autograph signature. They assigned with Kneipp's consent all their right, title, and interest in the business to com-

plainant, which carried on an extensive trade in the product, and it became well known under the trade-mark. The respondent, with fraudulent intent, formed a corporation under the laws of Illinois, and under the protest of Kneipp began to use in a similar business his name, picture, and signature. Held, that although Kneipp himself was not appellant, yet having assigned all rights to the complainant, it was entitled to injunction. *Kathreiner's Malz Kaffee Fab. v. Pastor Kneipp Med. Co.*, 82 Fed. R. 321.

"Peck Brothers & Co., a Connecticut corporation for manufacture of brass and plumbers' goods, passed into the hands of a receiver on petition of creditors. By order of court all assets, good-will, trade-marks, etc., were sold to a committee representing all stockholders, who formed a new corporation called "The Peck Brothers & Company." A vice-president of old concern and parties connected with receivership, having charge of branch in Chicago, obtained charter from Illinois for a corporation called "Peck Bros. Co." There were no Peck Brothers or Peck in it. Held, that it was a fraud, as many experienced customers were confused, and the name of the company was assumed for the purposes of fraud, and it would be enjoined, the act of incorporation in Illinois being no defence. *Peck Brothers & Company v. Peck Bros. Co.*, 113 Fed. R. 291.

Complainant and his predecessors had acquired a reputation for meats, stock food, and poultry food, under proper name "Swift." Protection granted against a party who fraudulently assumed the name for articles of the same class. *Swift & Co. v. Groff*, 114 Fed. R. 605.

**(2) Every person is entitled to use his own name, but where another of the same name has built up under it a substantial business he must use his name in such a manner as not to deceive the ordinary purchaser in the belief that his goods are those of that other person.**

See XI. 4 B. 255. *Lever Bros. v. Smith*, 112 Fed. R. 998.

Preliminary injunction against defendant's selling candies unless there appears on packages, signs, or advertisements, the statement, "No connection with the original Allegretti of Chicago," since the younger Allegretti had attempted to create confusion with the elder. *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. R. 643.

Respondents composing a partnership, one member of which was Allegretti, used that name prominently on chocolates; held,

that manner of use was likely to deceive and a fraud. *Allegretti Chocolate Cream Co. v. Rubel*, 86 Ill. App. 600.

Where respondent may be a partner and not agent of respondent enjoined in another equity suit, a new preliminary injunction may issue against his use of the name "W. H. Baker," or "Wm. H. Baker," on his chocolates, compelling him to use name "William H. Baker" and "Syracuse" printed distinctly, and so as not to mislead. *Baker v. Sanders*, 97 Fed. R. 948.

Defendant of same name as plaintiff on King William Street, not allowed to put up sign with words "late of 107 Strand," the address of plaintiff; or "Burgess' Fish Sauce Warehouse, late of 107 Strand," plaintiff's sign having "John Burgess & Son," and engaged in dealing in same products, but both allowed to use "Burgess' Essence of Anchovies." *Burgess v. Burgess*, 17 Jur. 292.

Complainant was assignee of certain formulas and trade-marks in medicines; the respondent, by breach of trust, was making use of the said formulas and selling them under the name of "Simmons' Liver Medicine," and "Simmons' Stomach Compound," being the same names under which complainant's medicines had become known, and so dressing and advertising his wares as to cause confusion. Held, a fraud; injunction issued. *C. F. Simmons' Medicine Co. v. Simmons*, 81 Fed. R. 163.

Complainant and its predecessors had manufactured pianos at Boston since 1823. Since 1840 they had been marked Chickering, and for fifty years makers had been doing business as Chickering & Sons. Defendant, whose name was Chickering, organized a corporation under name "Chickering Bros.," and so marked their pianos in similar letters to those of complainant. The circulars of defendant, while not untruthful, were couched so as to convey impression that they were makers of celebrated "Chickering" pianos; preliminary injunction sustained by Circuit Court of Appeals against use of word "Chickering," or "Chickering Bros.," on pianos, and against use of certain pamphlets and circulars. *Chickering v. Chickering & Sons*, 120 Fed. R. 69.

Complainant had acquired great reputation after many years in the thread business, and its thread had become known as Clark's thread. Respondent corporation adopted name with its consent, "William Clark Company." Held, that the corporate name could not, after assent, be enjoined, but a studied imitation of complainant's well-known labels should be enjoined, also the

name "Clark" or "Clark's" in connection with thread. *Clark Thread Co. v. Armitage*, 67 Fed. R. 896.

Plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant commenced selling medicine as "H. Holloway's Pills" in boxes, labels, and wrappers copied from those of plaintiff. Injunction: he had a right to use his own name, but not to deceive. *Holloway v. Holloway*, 13 Beav. 209.

"It is a fundamental principle of law that one cannot make use of a reputation which another has acquired in a trade name or mark for the purpose of deriving such advantage in the manufacture and sale of the goods as arises from the good-will and reputation of the original manufacturer. Courts demand a high order of commercial integrity in the use by competitors of a name under which a rival has gained a business reputation, whether that name is strictly a trade-mark or is descriptive of quality merely, and frown upon all filching attempts to obtain the reputation of another." *Hostetter Co. v. Martinoni*, 110 Fed. R. 524.

Elias Howe, Jr., inventor of sewing-machine, granted license to brother, A. B. Howe, to make machines, and he accordingly spent large sums in building up a business, and stamped his machine "Howe, New York." Elias Howe, Jr., had no right afterwards to similarly stamp his machines and use his own name so as to deceive. *Howe v. Howe Machine Co.*, 50 Barb. 236.

Defendant Way, manager of a knitting company, invented a muffler which he patented and permitted the corporation to make and sell the article, which became known as "Way's Mufflet." The company registered the word "Mufflet" as a trade-mark. Later, Way severed his connection with the company, and, retaining his patent, began to make and sell the article as "Way's Muffler." Held, that both parties, or their lawful successors, could use the word "Way," provided that it was in such a manner as to indicate the manufacturer. *Hygienic Fleeced Underwear Co. v. Way*, 137 Fed. R. 592; reversing, in part, 133 Fed. R. 245.

Duryea was for many years extensively interested in a corporation manufacturing starch called "Duryea's Starch." The company sold all its property, good-will, and trade-marks, and Duryea made an agreement not to allow his name to be used in the starch business for five years. At the end of that time he re-entered the business by furnishing capital to his sons, who prepared an article sold with distinguishing labels, as "Starch Prepared by

Duryea & Co.” There was no doubt that he was entitled to the use of his own name, and held that there was no unfair trade, but he could not designate his starch as “Duryea’s Starch.” *National Starch Mfg. Co. v. Duryea*, 101 Fed. R. 117; affirming 79 Fed. R. 651.

Pillsbury & Co. were engaged many years in the flour business in Minneapolis, and stamped their flour conspicuously with their name. A corporation succeeded to their rights and brands. Later, a party by the name of Pillsbury began business in Illinois, and stamped his flour in such a manner as to deceive. Injunction against his use of the name so as to deceive. *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, 64 Fed. R. 841.

Complainant had for many years used the arbitrary word “Royal” on his baking powder as a trade-mark. Respondent began the manufacture of baking powder and used his name, “Royal,” on the front labels of cans so as to deceive the public. Held a fraud which should be enjoined. The respondent could use his own name, but should “present his own name in the least conspicuous manner possible consistent with the right to place his name and address upon the goods made by him.” In the absence of custom of trade he should not place it upon the front label. *Royal Baking Powder v. Royal*, 122 Fed. R. 337.

Every one has the right to honestly use his own name in business. “But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other, beyond that which results from the similarity of the name.” *Russia Cement Co. v. Le Page*, 147 Mass. 206.

Plaintiff was proprietor of dental rooms in St. Louis, and had out sign “New York Dental Rooms”; defendant opened office near by and called it “Newark Dental Rooms.” Injunction granted. *Sanders v. Jacob*, 20 Mo. App. 96.

“Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications.” *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 188.

A party had, during a number of years and at considerable expenditure of money, built up a business in manufacturing a medicine called “Stuart’s Dyspepsia Tablets.” Respondent

started into the business of manufacturing "Dr. Stewart's Dyspepsia Tablets." Held a fraudulent use of his own name. *Stuart v. F. G. Stewart Co.*, 91 Fed. R. 243; reversing 85 Fed. R. 778.

Complainant had for twenty years built up extensive trade in United States as exclusive agent of "Johann Hoff's Malt Extract," the product sometimes being known as "Hoff's Malt Extract." The respondent subsequently entered into the trade in selling extract of "Leopold Hoff." Held that he should be enjoined from designating it "Hoff's Malt Extract," and should plainly indicate that it was made by Leopold Hoff. *Tarrant v. Johann Hoff*, 76 Fed. R. 959; affirming 71 Fed. R. 163.

Defendant Van Stan, son of a man who had invented and made a cement and sold right to plaintiff who made and vended it as "Van Stan's Stratena Cement" under which name it became known, after working several years with plaintiff had no right to use his name "Van Stan's Cement," in his business, irrespective of question of fraudulent intent. *Van Stan's Stratena Cement Co., Ltd., v. Van Stan*, 209 Penn. St. 564.

Complainant was successor to original pencil business begun in Bavaria in 1761, and known under name of "A. W. Faber." Respondent, whose father was formerly an agent in United States, John Eberhard Faber, made and sold pencils in United States, marking them Faber. Held that it was an unfair attempt to use his own name, as pencils had acquired a reputation under that name, and while he could not be enjoined from using the family name, yet he must prefix to it "Eberhard," "John E.," or "J. Eberhard." *Von Faber v. Faber*, 124 Fed. R. 603.

Complainant and predecessors engaged in chocolate business since 1780 at Dorchester, Mass., and since 1845 business had been carried on substantially under present name, and chocolate had been sold under "W. Baker," "W. Baker & Co.," "Walter Baker," and "Walter Baker & Co.," and known as "Baker's Chocolate." Respondent purchased chocolate from a manufacturer, remoulded it in style of complainant's goods, and relabelled it, with intent to deceive, "W. P. Baker's," and "W. P. Baker, New York, U. S. A." Such chocolate had been sold as "Baker's." Held that he should so mark his chocolate as not to deceive, that he should not use word "Baker" or "Baker's" alone; that he should not use initial "W." with his name "Baker," but that he could use his full name as "William P.

Baker." *Walter Baker & Co. (Ltd.) v. Baker*, 87 Fed. R. 209; following *idem*, 77 Fed. R. 181.

Complainant and its predecessors had been doing business at Dorchester, Mass., since 1780 in manufacture of chocolate, and the chocolate had become known as "Baker's Chocolate." Held that respondent in New York should so distinguish his chocolate goods in New York as not to cause confusion, and not use the name "Baker" alone. *Walter Baker & Co. v. Sanders*, 80 Fed. R. 889.

"W. H. Baker's legitimate use of his own name is not interfered with so long as he is allowed to use it in connection with his chocolate goods, setting forth on labels or advertisements that the chocolate is 'made by' or 'for,' or 'prepared by' or 'for,' or 'sold by' 'W. H. Baker,' or even that it is made or prepared at W. H. Baker's factory." *Walter Baker & Co. (Ltd.) v. Sanders*, 80 Fed. R. 889.

The name "Baker" had so far become identified with chocolate and cocoa that such product made by them was known as "Baker's Chocolate," etc. In 1897, one W. H. Baker was enjoined from using his name on chocolate without clearly distinguishing it from complainant's. Defendant, a retail grocer, selling chocolate to customers who could not distinguish between the two products, was enjoined from using the name "Baker" on chocolate or cocoa not made by complainant. *Walter Baker & Co. (Ltd.) v. Slack*, 130 Fed. R. 514.

"One may not use his own name for such purpose when it works a fraud. If he uses the descriptive word or a geographical name, or his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact." *Williams v. Mitchell; Mitchell v. Williams*, 106 Fed. R. 168, 171.

**(3) But a name which has become descriptive of a mechanical mechanism, whether patented or not, is not protected as against a party rightfully dealing in such machine.**

*But see: XI. 2. 243. Singer Machine Manufacturers v. Wilson*, 3 App. Cas. 376.

VIII. 6. 201. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Idem v. Bent*, 163 U. S. 205.

See VII. 2 A. 140.

III. 1 D. 49. *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. R. 822.

IV. 10. 113. *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. R. 30.

Inventor held not to have such an interest in his name as to prevent its use on a sign in connection with his invention. *Edison v. Hawthorne*, 108 Fed. R. 839.

The word "Singer," having become descriptive of sewing-machines, its use cannot be enjoined where it is clearly specified that the manufacture is not that of the complainant, but where the name is used on machines which are not "Singer" it is a deceptive use and can be enjoined. *Singer Mfg. Co. v. Hipple*, 109 Fed. R. 152.

Plaintiff cannot enjoin the defendant from using the word "Singer" on its sewing-machines rightfully made under the Singer system, if it does so in such a way as not to lead the public otherwise to be deceived. *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15.

#### D. A form or shape.

See VIII. 1 F. 173, & G. 181.

Where complainant employed a bottle of peculiar shape to put up its root beer and under its use acquired a reputation, it is entitled to preliminary injunction against party who adopts same style of bottle for its root beer with fraudulent intention. *Charles E. Hires Co. v. Consumers Co.*, 100 Fed. R. 809.

Complainant had acquired reputation in sale of its whiskey in use of square-shaped, bulging-necked bottle, as a package for Mount Vernon Whiskey.

"Complainant, of course, has no exclusive right to the name 'Mount Vernon,' and the labels of the defendant are in no sense an imitation of the labels of the complainant. Complainant's case rests solely on the form of package, which it claims has been so imitated as to make out a case of unfair competition." *Cook & Bernheimer Co. v. Ross*, 73 Fed. R. 203.

#### E. A color.

"While it is true that no one has a monopoly of form, of color, or of the shape of letters, it has repeatedly been held that one