

Schechter: Historical
Foundations of
Trade-Mark Law



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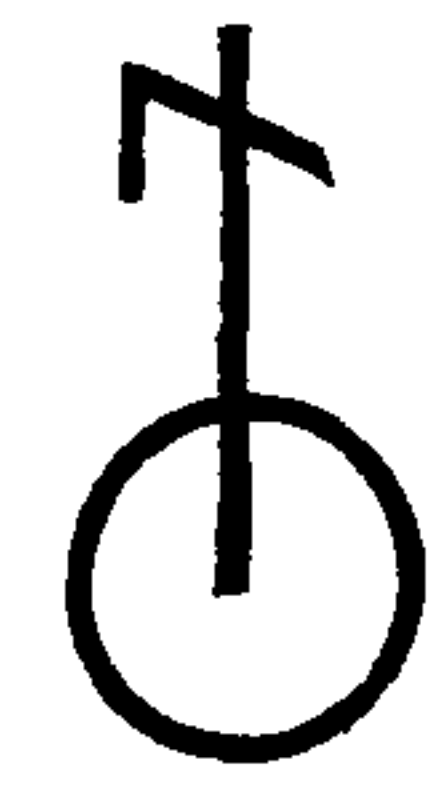



COLUMBIA LEGAL STUDIES

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I

**THE HISTORICAL FOUNDATIONS OF THE
LAW RELATING TO TRADE-MARKS**

<p><i>Johann Gelonge</i> " " "</p>		<p><i>Johann Booke</i> " " "</p>	
<p><i>Johann Alchon</i> " " "</p>		<p><i>William Wist</i> " " "</p>	
<p><i>Johann Eweler</i> " " "</p>		<p><i>Johann Eberman</i> " " "</p>	
<p><i>Thomas Alfred</i> " " "</p>		<p><i>Johann here</i> " " "</p>	

COOPERS' MARKS ENROLLED AT THE GUILD HALL, LONDON, IN 1420.

THE
HISTORICAL FOUNDATIONS OF
THE LAW RELATING TO
TRADE-MARKS

BY
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TO THE MEMORY
OF
My Mother

COLUMBIA LEGAL STUDIES
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I.] THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS. BY FRANK I. SCHECHTER, A.M., LL.B., J.D., of the New York Bar. With Foreword by MUNROE SMITH, J.U.D., LL.D., J.D., Bryce Professor Emeritus of European Legal History, Columbia University. 1925.

FOREWORD

THE establishment of a doctorate in law, obtainable in course, has been under consideration in Columbia University for almost half a century. In 1880, when a Faculty of Political Science was established, and when it was provided that students completing a course of graduate study under this Faculty and presenting an acceptable printed dissertation should receive the degree of doctor of philosophy, Professor John W. Burgess proposed that students who had previously obtained the bachelor's degree in law and had also fulfilled the requirements for the doctor's degree under the Faculty of Political Science, should receive, in lieu of a doctorate of philosophy, a doctorate in law. This recommendation was not accepted. In 1905 a plan was formulated by the Faculty of Political Science for the establishment of a doctorate in law under the joint control of the Faculties of Law and of Political Science. This plan was accepted by the University Council but rejected by the Faculty of Law. Five years later it was proposed by a committee representing both Faculties, that such a degree should be established in the School of Law and under the primary jurisdiction of the Law Faculty. This degree was to be awarded only to students who had obtained the LL.B. degree and only after one year's further study of law and the presentation of an acceptable printed dissertation. This plan was unanimously accepted by both Faculties and by the University Council but failed to secure the assent of the Board of Trustees. A similar plan presented in 1922 was accepted by the Trustees.

In the Faculty of Political Science, from its establishment in 1880, provision was made for instruction in every branch of public law and in legal history and comparative jurisprudence — subjects at that time not included, or not ade-

quately presented, in the School of Law. It was therefore possible for students of law to obtain the Ph.D. degree on work essentially legal in character. Between 1883 and 1910 fifty-two students received this degree on the presentation of strictly juristic dissertations. Of these students twenty-six had previously obtained the degree of LL.D. Of the fifty-two legal dissertations only eleven dealt with private-law topics. After 1910 the number of legal dissertations presented by students in political science and also the proportion of such dissertations dealing with private-law topics showed a slight decrease. These results show clearly that a doctorate of philosophy did not appeal to law students as an appropriate degree, and was in fact not an appropriate degree, for advanced work and research in those fields of law which are of special professional interest. It is perhaps significant that the dissertation here presented, which is the first accepted for the Columbia doctorate in law, represents research in such a field and in a subject of a highly technical character.

In all the plans for a doctorate in law formulated at Columbia since 1880, as also in the plans now in operation, stress has been and is laid on the presentation of an acceptable dissertation. In the final successful appeal for the establishment of the degree, it was stated that it was not expected that an accepted dissertation would often be an important contribution to legal science, but that it was believed that the preparation of a dissertation under the guidance of competent instructors was the best possible training in investigation and that it was confidently hoped that some of the students thus trained would eventually, in their maturer years, do much to raise the standard of American legal literature.

In the various plans presented since 1880 the degree proposed was that of *Juris Doctor*. In consequence of the fact that since 1902 this degree had been awarded by the University of Chicago on a strictly professional course of study, replacing the traditional degree of LL.B., and that this innovation had been accepted by several other American universities, the question naturally arose, in Columbia as elsewhere,

whether it were not desirable to award some other degree for advanced work and research in law. At Yale University the D.C.L. degree has been awarded since 1880 for advanced work and investigation in law. In Harvard University, when provision was made, some fifteen years ago, for a four-year course in law, a wholly new degree, that of S.J.D. was established. At Yale University a J.S.D. degree is awarded on the same basis. At Columbia the D.C.L. and the LL.D. degrees were rejected, because these degrees had so long been granted both in England and in the United States largely *honoris causa*. After long consideration Columbia decided to award the J.D. degree for advanced work and research in law, in spite of the fact that this degree has, perhaps over hastily, been recognized by the Association of American Law Schools and by the Association of American Universities as a purely professional degree. This decision was based upon the fact that outside of English-speaking countries this degree has been awarded for centuries and is still awarded not as a professional degree, nor to any considerable proportion of university students who have pursued the studies required for admission to the bar, but on the same condition of demonstrated capacity for research which is required by Columbia. Columbia has chosen to follow the tradition and practice of the civilized world at large rather than the different and somewhat discordant policies adopted by a limited number of American universities. As the value of a trade-mark depends upon the quality of the product, so also, it is believed, will the worth of an academic degree granted by any university be estimated, in the long run, by the amount and character of the work for which it is awarded.

In the study of the development of the law of trade-marks here presented, the author notes, at the outset, the tardy recognition by the English royal courts of the rules established centuries earlier by guilds and by towns and applied in the customary courts. This, as every student of English legal history knows, was the attitude of the royal common-

law courts towards the entire body of commercial law when they drew under their jurisdiction those commercial cases which had previously been decided in the communal courts. The customs of merchants, however uniformly administered, were not recognized as English common law. Even less was it recognized that the commercial rules applied for centuries in the English common-law courts were in reality European law. It seemed incompatible with the independence of England and the sovereignty of its crown that foreign law should have any force save in so far as it was accepted by Parliament or by the royal courts.

In tracing the development of the law of trade-marks the author is therefore obliged to use "unorthodox" sources of information. Distinctive marks upon chattels were, as he points out, originally *indicia* of ownership — a purpose still subserved on our western cattle ranches by the distinctive brand of each ranch. Throughout the middle ages, the marks placed by merchants upon goods which they had bought for shipment served the same purpose. Quite a different purpose was subserved by marks placed upon wares by their makers. These, as the author shows, were not at first generally adopted by the makers in their own interest but were imposed upon them in the interest of the public, in order to locate responsibility for short weight, inferior material or poor workmanship. Like the finger prints taken today by the police, they established a liability rather than a right. But since this liability tended to secure honest and efficient workmanship, the trade-mark came to be regarded as an assurance of quality, and the confidence of the public in the quality of wares bearing a trade-mark of good repute became an asset. This asset grew in value when wares, at first produced only for local consumption, gained wider markets.

This gradual development was only tardily recognized in the law. To the liability imposed upon the maker of inferior goods was added, at an early period, the liability of the maker who used without right or who deceptively imitated a reputable trade-mark. This later liability, like the earlier, was at

first imposed in the interest of the public and was based upon fraud committed against purchasers. The value of a trade-mark to its rightful user was more tardily protected. The development of remedies of which he might avail himself was impeded by prejudice against "monopoly." Even the remedies ultimately provided were colored by the earlier notion of deceit practiced upon purchasers. They were largely based upon "disloyal competition." And even when a trade-mark came to be recognized as an interest that could be transferred *inter vivos* or might pass to a widow or a child *mortis causa*, courts and writers hesitated, and still hesitate, to describe trade-marks as property rights, since their protection is still based on the ground of actual or constructive fraud.

This entire development finds many parallels in the history of other branches of private law. Interests rarely receive legal protection until they become of substantial economic value. Private rights have always been developed by the establishment of increasingly adequate remedies, and not only is the extent of a right measured by the remedies available for its protection, but also the conception of the nature of the right is colored by the character of the remedies.

The author apparently holds, and the data he gives will probably convince most readers, that trade-marks are today property rights. Whether they should be so classed, however, he regards as an academic rather than a practical question, since the rightful possessor of a trade-mark may claim protection in equity.

In the projected series of "Columbia Legal Studies," of which this dissertation is presented as the first volume, it is not intended to include all dissertations accepted for the doctorate, but, as in the Columbia "Studies in History, Economics and Public Law," only those that are regarded as valuable contributions to legal science. Nor is it expected or desired that the dissertations included should each form a volume. Shorter contributions will be issued as pamphlets and will later be included in bound volumes.

It is not intended that the "Columbia Legal Studies" shall consist wholly of doctor dissertations. It is expected, on the contrary, that they will include books and pamphlets written by members of the Columbia Faculty of Law and by alumni of the Columbia School of Law, and contributions from law teachers in other universities and from members of the bar will be welcomed. It is believed that this series will afford a convenient and desirable medium for the publication of studies that cannot well be compressed to the degree necessary for acceptance by law journals but do not need to be expanded into volumes.

MUNROE SMITH

PREFACE

THIS volume is not an attempt to add to the many manuals of current trade-mark law that are now available to the Bench and Bar. Its aim is to illumine the hitherto "dim historic trails" to the sources of trade-mark law and to analyze critically the present state and tendencies of trade-mark law in the light of its history. Bearing in mind Mr. Justice Holmes' warning against the enchanting "pitfall of antiquarianism," I have endeavored to present historical material solely for the purpose of seeing whence the present law has come and what should be the basis of its development in the future. If at times I may have been tempted from the main highway by the fascination of a particularly attractive by-path, as in the case of printers' and publishers' devices, my researches have been incorporated in a note or appendix in such a way as not to break the thread of the primary line of investigation. In the course of a survey of six centuries of the uses and piracy of trade symbols, I have necessarily been led into all sorts of byways in medieval law and in gild life and discipline from which has been extracted material that may, I venture to think, prove of interest not only to the legal profession, but to the economic historian and also to those concerned in a non-legal capacity with trade-marks and trade-marked articles.

In the preparation of a work of this kind, touching as it must upon so many phases and ages of law, economics and social history, the roll of those to whom I am indebted for assistance is necessarily exceedingly lengthy. Librarians, scholars, archivists and officials of archæological societies in England, who have been most courteous and helpful in answering inquiries, are too numerous for mention by name in this preface. As typical instances of their kindness I may

cite that of Mr. A. E. Stamp, Secretary of the Public Record Office, and Mr. A. H. Thomas, Clerk of the Records, Guild Hall, London, who transcribed for me many passages from records in their respective archives. Acknowledgments for assistance in particular phases of my subject are made at the appropriate places in the work. However, certain indebtedness should be recorded here. On the very threshold of my researches I was led out of the impasse of purely legal records such as the Year Books, to the literature of the guilds and other archæological material by Dean Orrin K. McMurray of the Law School of the University of California during his year of residence at Columbia University. While I do not wish to appear to offer this work under the august ægis of Sir Paul Vinogradoff, it would, on the other hand, be improper for me to fail to mention that it was he who, during his visit to Columbia University in 1923, first pointed out to me the great significance for my subject of the administrative records of the Privy Council and of the Star Chamber of the sixteenth and seventeenth centuries.

For encouragement and for the suggestion that my work be submitted for inclusion in the series of Columbia Legal Studies, I am indebted to Associate Justice (formerly Dean) Harlan F. Stone. During the progress of this work I have had the privilege of consultation with Professors H. E. Yntema, H. Oliphant, N. Dowling and A. P. Evans of Columbia University. I am under special obligation to Professor Yntema, not only for valuable suggestions during the writing of this book, but also for his reading of the proofs. From Miss I. Mudge, the Reference Librarian of Columbia University, and from my friend, Professor Alexander Marx, I have received guidance and references in my study of printers' and publishers' devices which was submitted as a paper at the 1924 meeting of the American Bibliographical Society. To the officials of the Columbia University Library, and particularly to Mr. Frederic C. Erb, the Supervisor of the Loan Division, as well as to Professor Frederick C. Hicks, the Librarian of the School of Law, Columbia University, and

to Mr. Lawrence H. Schmehl, the genial Assistant Librarian, I am deeply indebted for their unfailing liberality in the loan of books. I should also mention here the courtesies of the Library of Congress, Harvard Law Library, the Free Library of Philadelphia, the Library of the United States Trade-Mark Association of New York City and the Library of the Bar Association of the City of New York.

Mr. Edward S. Rogers of the Chicago Bar, and Mr. Hans v. Briesen, of the New York Bar, have aided me by their stimulating discussions of various problems of trademark law and by helpful citations. The latter has also kindly read the proofs. To my wife I am indebted for assistance during the writing of this volume and in the preparation of the bibliography and index. My thanks are due to Miss Belle de Costa Greene, the Librarian of the J. Pierpont Morgan Library, for the reproduction, in Chapter III, of the printers' device of Peter Short, from the 1609 edition of Spenser's *Faerie Queene*, to the Duke of Northumberland for a photograph of the imprint of the proceedings of the Privy Council against Thomas Jupp, reproduced in the appendix to Chapter IV, and to the Worshipful Company of the Cutlers of London for permission to reproduce the plate of cutlers' marks in Chapter V. Finally, there should be recorded here my appreciation of the courteous co-operation and interest of Mr. Sidney C. Erlanger which greatly facilitated the writing of this volume.

FRANK I. SCHECHTER

March 30, 1925

CONTENTS

	PAGES
FOREWORD	vii-xii
PREFACE	xiii-xv
TABLE OF CASES	xxi-xxvi
TABLE OF STATUTES	xxvii-xxviii
CHAPTER	
I. INTRODUCTION — THE PROBLEM AND THE SOURCES	3- 18
II. MERCHANTS' PERSONAL AND PROPRIETARY MARKS IN THE MIDDLE AGES	19- 37
A NOTE ON SWAN MARKS	35- 37
III. PRODUCTION MARKS IN THE REGULATION OF TRADE BY THE GILDS AND COMPANIES	38- 77
A NOTE ON EARLY PRINTERS' AND PUBLISHERS' DEVICES	63- 77
IV. TRADE-MARKS AND THE NATIONAL REGULATION OF INDUSTRY — THE CLOTH TRADE	78-100
APPENDIX — DECREE OF THE STAR CHAMBER, OCTOBER 12TH, 1632, CONCERNING THE COUN- TERFEITING OF SEALS TO COLCHESTER BAIZE BY THOMAS JUPP	96-100
V. THE DEVELOPMENT OF TRADE-MARK LAW IN THE CUTLERY TRADES	101-121
VI. THE GENESIS OF THE MODERN LAW RELATING TO TRADE-MARKS.	122-145
VII. THE PROBLEMS OF THE MODERN LAW HISTORICALLY CONSIDERED.	146-171
BIBLIOGRAPHIES	173-192
A. LEGAL SOURCES	173-178
B. SOCIAL AND ECONOMIC HISTORY, INCLUDING GILD AND MUNICIPAL RECORDS	179-184

	PAGES
C. ART, ARCHEOLOGY AND NUMISMATICS	184-187
D. EARLY PRINTERS' AND PUBLISHERS' DEVICES	188-191
E. LITERARY, BIOGRAPHICAL AND MISCELLANEOUS	191-192
INDEX	193-211

LIST OF ILLUSTRATIONS

	FACING PAGE
COOPERS' MARKS ENROLLED AT THE GUILD HALL, LONDON, 1420	<i>frontispiece</i>
MONUMENTAL BRASS OF THOMAS POWNDER, MERCHANT OF IPSWICH, 1525, BEARING HIS MERCHANT'S MARK.	24
PRINTER'S DEVICE OF PETER SHORT IN THE 1609 EDITION OF SPENSER'S <i>Faerie Queene</i>	70
LONDON CUTLERS' MARKS IN THE COURT MINUTE BOOK, 1606-1676	117

TABLE OF CASES

	PAGE
A. Bourjois & Co., Inc. v. Katzel (275 Fed. 539)	5, 6
A. Bourjois & Co., Inc. v. Katzel (260 U.S. 689)	6, 149, 167
Addley Bourne v. Swan & Edgar, Ld. (20 Rep. Pat. Cas. 105)	143
American Fibre Chamois Co. v. de Lee (67 Fed. 329)	162
American Washboard Co. v. Saginaw Mfg. Co. (103 Fed. 281)	163
Amoskeag Mfg. Co. v. Spear (2 Sandf. 599) 12, 19, 137, 144-145	
Anheuser-Busch v. Budweiser Malt Products Corp. (287 Fed. 243)	167
Apollo Bros. v. Perkins (207 Fed. 530)	154
Attorney-General v. Jupp (3 Rushworth Hist. Coll. 102)	91-93, 96-100
Aunt Jemima Mills Co. v. Rigney & Co. (234 Fed. 804)	163
Aunt Jemima Mills Co. v. Rigney & Co. (247 Fed. 407)	169, 170
B.V.D. Co. v. Kaufmann & Baer Co. (272 Pa. 240)	162
Baily v. Merrell (3 Bulstr. 95)	143
Barton v. Rex-Oil Co. (2 F. (2d) 402)	158, 166
Bayer Co., Inc. v. United Drug Co. (272 Fed. 505)	168
Blanchard v. Hill (2 Atkyns 484) 9, 10, 129, 134, 135, 136, 137, 138	
Blofeld v. Payne (4 B. & Ad. 410)	142
Boardman v. Meriden Britannia Co. (35 Conn. 402)	19
Booth & Brother v. Burgess (72 N. J. Eq. 181)	157
Burgess v. Burgess (3 De G. M. & G. 896)	9
Burroughs, Wellcome & Co. v. Thompson & Capper (21 Rep. Pat. Cas. 69)	162
Burton v. Stratton (12 Fed. 696)	166
Cabrier v. Anderson (Atkyns & Overall, Clock-Makers of London, 259)	137
Canal Company v. Clark (13 Wall. 311)	19
Candee Swan & Co. v. Deere & Co. (54 Ill. 439)	145, 147
Chadwick v. Covell (151 Mass. 190)	153, 155
Charles Goddall & Son Ld. v. John Waddington Ld. (41 Rep. Pat. Cas. 658)	137

	PAGE
Coca-Cola Co. v. J. G. Butler & Sons (229 Fed. 224)	162
Coca-Cola Co. v. Koke Co. of America (254 U.S. 143)	148, 167
Coca-Cola Co. v. Old Dominion Beverage Corporation (271 Fed. 600)	160, 167
Coca-Cola Co. v. Stevenson (276 Fed. 1010)	154, 156, 167
Collins Co. v. Brown (3 K. & J. 423)	136, 153
Coty, Inc. v. Parfums de Grand Luxe, Inc. (298 Fed. 865)	4
Crawshay v. Thompson (4 Man. & G. 357)	9, 142, 143
Darcy v. Allen (11 Co. Rep. 84b)	136
Day v. Ward (2 Arber's Transcripts of the Registers of the Stationers' Company 758)	75-76
Derringer v. Plate (29 Cal. 292)	153
Dixon Crucible Co. v. Guggenheim (2 Brewster [Pa.] 321)	137, 145
Eastman Photographic Materials Co., Ltd. v. John Griffiths Cycle Corporation, Ltd. (15 Rep. Pat. Cas. 105)	108
Edelsten v. Edelsten (1 De G. J. & S. 185)	143, 152
Elgin National Watch Co. v. Illinois Watch Case Co. (179 U.S. 685)	161
Everett O. Fisk & Co. v. Fisk Teachers Agency (3F. (2d.) 7)	111
Falkinburg v. Lucy (35 Cal. 52)	145
Farina v. Silverlock (24 L. J. Ch. N. S. 632)	136
Farina v. Silverlock (39 L. & Eq. 514)	152
Federal Trade Commission v. Bernstein (4 F. T. C. D. 114)	107
Federal Trade Commission v. Pure Silk Hosiery Mills, Inc. (15 T. M. Rep. 63)	165
Federal Trade Commission v. Sheffield Razor Co. (4 F. T. D. C. 373)	107
Federal Trade Commission v. Winsted Hosiery Co. (258 U.S. 483)	165
Fishel & Sons, Inc. v. Distinctive Jewelry Co., Inc. (196 App. Div. [N. Y.] 779)	167
Fisher v. Star Co. (231 N. Y. 414)	158
Florence Mfg. Co. v. J. C. Dowd & Co. (178 Fed. 73)	5, 163
France Milling Co. v. Washburn-Crosby Co. (3F. (2d) 321)	167
France Milling Co. v. Washburn Crosby Co. (U.S.C.C.A., 2d Cir., April 6, 1925, not yet reported)	169, 170
George G. Fox Co. v. Hathaway (199 Mass. 99)	167

TABLE OF CASES

xxiii

	PAGE
Gibblett v. Read (9 Mod. 459)	136
Godillot v. Harris (81 N. Y. 263)	149
Goldwyn Pictures Corporation v. Goldwyn (296 Fed. 391)	162
Gorham Mfg. Co., <i>Re</i> Application of (41 App. D. C. 263)	154
Hall v. Barrows (32 L. J. Ch. N. S. 548)	9, 137
Hall v. Barrows (4 De G. J. & S. 150)	163
Hamilton & Smyth v. Davis (5 Burr. 2732)	31
Hanover Milling Co. v. Metcalf (240 U.S. 403)	19, 146, 153, 154
Hanover Star Milling Co. v. Allen & Wheeler Co. (208 Fed. 513)	155-156
Harkert Cigar Co. v. Herman (196 N. W. [Sup. Ct. Ia.] 986)	167
Harrod's Limited v. R. Harrod Limited (41 Rep. Pat. Cas. 74)	158
Havana Cigar & Tobacco Factories, Ld. v. Oddenino (41 Rep. Pat. Cas. 47)	160, 168
Havana Cigar & Tobacco Factories, Ld. v. Tiffin (26 Rep. Pat. Cas. 473)	162
Hennessy v. Braunschweiger & Co. (89 Fed. 664) . . .	154
Hebe Co. v. Shaw (248 U.S. 297)	164
Henry Mfg. Co., Inc. v. Henry Screen Mfg. Co., Inc. (204 App. Div. [N. Y.] 27)	167
Hercules Powder Co. v. Newton (266 Fed. 169)	156
Higgins Co. v. Higgins Soap Co. (144 N. Y. 462) . . .	161
Hilson Co. v. Foster (80 Fed. 896)	167
Hirst v. Denham (L. R., 14 Eq. 542)	9
Howard v. Henriques (3 Sandf. [N. Y.] 725)	135
Hughes v. Alfred H. Smith Co. (205 Fed. 302)	149
Hygrade Provision Co. v. Sherman (U.S. Sup. Ct. Adv. Ops., Feb. 2, 1925, p. 169)	164
Imperial Cotte Sales Co. v. N. K. Fairbanks Co. (276 Fed. 686)	162
Imperial Tobacco Company of India, Ltd. v. Bonnan (41 Rep. Pat. Cas. 441)	149
Industrial Finance Corporation v. Community Finance Co. (294 Fed. 870)	162
International News Service v. Associated Press (248 U.S. 215)	158, 160, 161
Jacob Ruppert v. Knickerbocker Food Specialty Co. (295 Fed. 381)	167

	PAGE
Jamieson & Co. v. Jamieson (15 Rep. Pat. Cas. 169)	143
Jersey City Printing Co. v. Cassidy (63 N. J. Eq. 759)	157
John Bene & Sons v. Federal Trade Commission (299 Fed. 468)	165
Joseph Farrow & Co., Ltd. v. John F. Seyfried & Sons, Ltd. (38 Rep. Pat. Cas. 114)	162
Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co. (241 Fed. 817)	163
Juvenile Shoe Co., Inc. v. Federal Trade Commission (289 Fed. 57)	165
Juvenile Shoe Co., Inc. v. Federal Trade Commission (263 U.S. 706)	165
Kayser & Co. v. Italian Silk Underwear Co. (160 App. Div. [N. Y.] 607).	154
Knott v. Morgan (2 Keen 213)	12
Kodak, Ltd., In the Matter of the Trade-Marks of (20 Rep. Pat. Cas. 337)	167
L. B. Silver Co. v. Federal Trade Commission (289 Fed. 985)	165
Leather Cloth Company Limited v. American Leather Cloth Company Limited (4 De G. J. & S. 137)	143, 152
London General Omnibus Co. v. Lavell (70 L. J. Ch. 17)	143
Loughran v. Quaker City Chocolate & Confectionery Co. (286 Fed. 694)	158
Louis Bergdoll Brewing Co. v. Bergdoll Brewing Co. (218 Fed. 131)	154, 156
Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd. (17 Rep. Pat. Cas. 477)	9, 10
Margarete Steiff, Inc. v. Bing (215 Fed. 204).	160
Marsh v. Billings (61 Mass. 322)	145
Menendez v. Holt (128 U.S. 514)	167
Michell v. Wines in the Hands of Taylour (2 Select Pleas in Admiralty [Selden Soc. vol. xi] 13)	32
Miller Tobacco Manufactory v. Commerce (45 N. J. L. 18)	145
Millington v. Fox (33 Myl. & Cr. 338)	138, 142, 161
Montgomery v. Thompson (1891 A. C. 217)	148
Motley v. Downman (3 Myl. & Cr. 1).	152
Munn & Co. v. The Americana Co. (83 N. J. Eq. 308).	163
N. K. Fairbank Co. v. Central Lard Company (64 Fed. 133)	167

TABLE OF CASES

xxv

	PAGE
National Picture Theatres v. Foundation Film Corp. (266 Fed. 209)	156
Nelson v. Winchell & Co. (203 Mass. 75)	149
Oppenheim, Oberndorf & Co., Inc. v. President Sus- pender Co. (3F. (2d) 88).	167
Pasley v. Freeman (3 T. R. [D. & E.] 51)	143
Patton Paint Co. v. Sunset Paint Co. (290 Fed. 323).	19
Peekskill Theatre, Inc. v. Advance Theatrical Co. (206 App. Div. [N. Y.] 138)	158
Pennsylvania Central Brewing Co. v. Anthracite Beer Co. (258 Pa. 45)	161
Perry v. Truefitt (6 Beavan 66)	144, 146
Potter-Wrightington v. Ward Baking Co. (288 Fed. 597)	167
Powell v. The Birmingham Vinegar Brewery Co. Ltd. (13 Rep. Pat. Cas. 235)	148
Prestonettes, Inc. v. Coty (264 U.S. 359)	155
Reddaway v. Bernham ([1896] A. C. 199)	153
Rodgers v. Nowill (5 C. B. 109)	143
Rolls-Royce of America, Inc. v. Howard Wall, Inc. (15 Trade Mark Rep. 12)	170
Rosenberg Bros. & Co. v. John F. Elliott 3 F. (2d) 682.	170
Royal Baking Powder Co. v. Federal Trade Commission (281 Fed. 744)	165
Saxlehner v. Siegel Cooper Company (179 U.S. 42)	161
Scandinavia Belting Co. v. Asbestos & Rubber Works of America, Inc. (257 Fed. 937).	12, 137
Schendel v. Silver (63 Hun [N. Y.] 330).	167
Selchow v. Baker (93 N. Y. 59).	167
Shredded Wheat Co. v. Humphrey Cornell Co. (250 Fed. 960)	148
Siegert v. Findlater (L. R. 7. Ch. Div. 801)	148
Singelton v. Bolton (3 Doug. 293)	137
Smail v. Sanders (118 Ind. 105)	154
Smith v. Walker (57 Mich. 456)	145
Southern v. How (Popham 143; J. Bridgeman 125; Cro. Jac. 469; 2 Rolle 5; <i>ibid.</i> , 29) 6, 7, 8, 9, 10, 12, 126, 134, 141, 164	134, 141, 164
Standard Oil Co. v. Federal Trade Commission (282 Fed. 81)	5
Stonebraker v. Stonebraker (33 Md. 252)	145
Summerfield Co. v. Prime Furniture Co. (242 Mass. 149)	161

	PAGE
Sykes v. Sykes (3 B. & C. 541)	137, 142
Taylor v. Carpenter (3 Story 458)	134
Thomas G. Carroll & Son Co. v. M'Ilvaine & Baldwin (171 Fed. 125)	154
Thompson v. Winchester (19 Pick. [Mass.] 214)	134
Trade-Mark Cases, The (100 U.S. 82)	140, 141, 153, 154
Traiser v. J. W. Doty Cigar Co. (198 Mass. 327)	154
Truax v. Corrigan (257 U.S. 312)	156
Ugiera Salvagina, Case of The (Acts of Privy Council, N.S., 1590-94, <i>passim</i>)	33-34
Union Fishermen's Coöperative Packing Co. v. Point Adams Packing Co. (108 Ore. 535)	5
United Drug Company v. Rectanus Company (248 U.S. 90)	4, 154
Vogue Co. v. Thompson-Hudson Co. (300 Fed. 509)	169-170
Walter v. Ashton (1902 2 Ch. 282)	169
Walter Baker & Co. v. Slack (130 Fed. 514)	148
Weston v. Ketcham (51 How. Prac. [N. Y.] 455)	102
Wisconsin White Lily Butter Co. v. Safer (182 Wis. 71)	126
Witte v. Bauderer (225 S. W. [Tex.] 1016)	161

TABLE OF STATUTES

BRITISH STATUTES		PAGE
1266 (?) ¹	51 Hen. III (Bakers' marks)	49-50
1353	27 Edw. III, Stat. 1, c. 4 (Aulnager's seals on cloth)	86
	27 Edw. III, Stat. 2, c. 13 (Ordinance of the Staples: Merchants' marks as proof of ownership)	29, 31, 34
1363	37 Edw. III, c. 8 (Goldsmiths' marks)	59
1391	15 Ric. II, c. 10 (Guildford cloth)	82
1399	1 Hen. IV, c. 19 (Inferior cloths exempt from sealing)	82
1405-6	7 Hen. IV, c. 7 (Arrow-head makers' marks)	105
1423	2 Hen. VI, c. 17 (Goldsmiths' marks)	59
1464-5	4 Edw. IV, c. 1 (Governmental sealing of cloth)	81
1467	7 Edw. IV, c. 1 (Clothiers' marks)	84
1477-8	17 Edw. IV, c. 1 (Goldsmiths' marks)	59
1482-3	23 Edw. IV, c. 6, clause VI (Swan marks)	35
1483-4	1 Ric. III, c. 8 (Town seals on cloth)	84
1503-4	19 Hen. VII, c. 6, clause III (Pewterers' marks)	61, 102
	19 Hen. VII, c. 7, clause II (Anti-Litigation gild ordinances)	18
1523	14 and 15 Hen. VIII, c. 3 (Weavers' marks)	84
1531-2	23 Hen. VIII, c. 4, clause XI (Coopers' marks)	57
1534	26 Hen. VIII, c. 16 (Weavers' marks)	84
1535-6	27 Hen. VIII, c. 12 (Clothiers' marks and governmental seals on cloth)	86
1581	23 Eliz., c. 8 (Wax-workers' marks)	128
1660	12 Car. II, c. 22 (Colchester cloth seals)	93
1662	14 Car. II, c. 33 (Printers' and stationers' marks)	76-7
1698	9 and 10 Wm. III, c. 28 (Clockmakers'	

¹ Attributed in some MSS. to 13 Edw. I (see *Stat. of the Realm*, i, 202, asterisked note).

		PAGE
	names)	137
1726	13 Geo. I, c. 26, clause XXX (Marks on Scottish linen).	128
1801	41 Geo. III, c. 97, Local (Sheffield cutlers' marks)	121
1862	25 and 26 Vict., c. 88 (Counterfeiting of trade-marks)	139-40
1875	38 and 39 Vict., c. 91 (Trade-mark registra- tion)	140

AMERICAN STATUTES

1787	Mass. Laws and Resolves, 1787, c. 102 (Sail-cloth bounty)	130
1788	Mass. Laws and Resolves, 1788, c. 80 (Sail-cloth bounty)	130
1789	Mass. Private and Special Laws, 1789, c. 43, sec. 5 ("Beverly Cotton Manufactory" seals and labels)	130-131
1791	Mass. Laws and Resolves, 1791, c. 91 (Sail-cloth bounty)	130
1870	41st Congress, Sess. II, c. 230, 16 Stat. at L. 198 (Trade-Mark Act)	140
1876	44th Congress, Sess. I, c. 274, 19 Stat. at L. 141 (Trade-Mark Act)	140
1905	58th Congress, Sess. III, c. 592, sec. 5, 33 Stat. at L. (Pt. 1) 725 (Ten-year-mark clause)	106
1920	66th Congress, Sess. II, c. 104, sec. 9, 41 Stat. at L. (Pt. 1) 535 (Ten-year-mark clause, amended)	106

CHAPTER I

INTRODUCTION

THE PROBLEM AND THE SOURCES

“THERE is, upon some subjects, a touching absence of curiosity among English lawyers. Institutions which are the very heart of modern business life, the fountain-heads of not ungrateful streams of litigation, are accepted as though, like the image of Ephesus, they fell direct from heaven for the benefit of a deserving profession. The legal questions to which they give rise are studied with minute care, the legal relationships which they create are made the occasion of microscopic analysis. But the subject itself, the really interesting and important matter, is left untouched.” These words of the English legal historian, Edward Jenks, writing of the early history of negotiable instruments,¹ apply with equal force to practically all phases of commercial law. The lawyer who, for some unusual reason, has found it necessary to probe for origins in the particular field of law wherein his problem lies has, in more or less desultory fashion, scanned such early common law sources as may have been at hand. Finding nothing there, he has been quite content to cease his quest and to report the roots of the law in question as lying very near the surface. In the history of promissory notes, of bills of lading, of charter parties and of policies of insurance, their appearance in the development of the common law is uniformly of comparatively recent date, and the realization that, as a matter of fact, these commercial institutions have an ancient and complicated history of their own and a law that developed quite independently and outside of the sphere of influence of the common law is still “new learning” to many of those who, in their daily practice,

¹ *Select Essays in Anglo-American Legal History*, iii, 51.

are confronted with problems involving promissory notes, bills of lading, charter parties and insurance.¹

But nowhere is the obscurity of the origins and at the same time the "touching absence of curiosity" concerning these origins more apparent than in the field of the law of trade-marks. When we consider how great a factor trade-marks and good-will represent in commercial life today and when we remember that out of the so-called law of technical trade-marks has grown the law of unfair competition or *concurrence déloyale*,² circumscribing at a hundred different points the predatory and overreaching instincts of the mercantile mind, the comparative brevity of the history of that law in the royal courts is remarkable indeed.

It may perhaps be not amiss to point out at this juncture that the investigation of the historical development of our trade-mark law is not merely of academic interest. Two problems of trade-mark law and of the law of unfair competition, which has been developed largely by analogies to the law involving cases of technical trade-marks, perplex the minds of both British and American courts, and conflicting theories with regard to these problems are materially affecting the decisions of these courts in cases that are constantly being presented to them. In the first place, in both British and American courts, the very nature of the right in a trade-mark is still unfixed. Sir Frederick Pollock has pointed out³ that

the protection of trademarks and trade names was originally undertaken by the courts on the ground of preventing fraud. The right to a trademark, after being more and more assimilated to proprietary rights, has become a statutory franchise analogous to patent rights and copyright, and the wrong to

¹ See for this whole subject: Holdsworth, *History of English Law*, i (3rd ed.), 544; v. 144; and the following essays in *Select Essays in Anglo-American Legal History*, volume iii: T. E. Scrutton, "General Survey of the History of the Law Merchant"; W. R. Vance, "The Early History of Insurance"; S. Brodhurst, "The Merchants of the Staple"; W. Mitchell, *The Law Merchant*, pp. 77-78.

² See *Coty, Inc. v. Parfums de Grande Luxe, Inc.* (U.S. C.C.A., 2nd Cir.), 298 Fed. 865, 877; *United Drug Company v. Reckon Company* 248 U.S. 90, 97; Rogers, *Good Will, Trade Marks and Unfair Trading*, p. 127.

³ Pollock on *Torts* (12th ed., 1923) 312-313.

be redressed is now, in cases within the statute, conceived no longer as a species of fraud, but as being to an incorporeal franchise what trespass is to the possession, or right to possession, of the corporeal subjects of property. . . .

In the second place, aside from the determination of the somewhat metaphysical question as to the exact nature of a right in a trade-mark and of injury to trade-marks, there is the very practical consideration as to the basis of relief in trade-mark cases and, more particularly, in cases of unfair competition. "There was no property in any trademark or trade name which the (common) law recognized. . . . The ground of the court's interference to prevent such fraudulent use was to save the public from a fraud."¹ In England and, to a much greater degree, in this country² courts are endeavoring to reach a conclusion as to whether, in such cases, the true basis of relief is the deception of the public or whether, on the other hand, it is the injury to the owner of the trade-mark involved. This precise issue was recently considered by the United States Circuit Court of Appeals for the Second Circuit, which said, "In cases of trade names and the like, outside the law of trade-marks proper, there has been a kind of oscillation between the notions of quasi-proprietary right and of the personal right not to be injured by fraudulent competition. But the latest decisions have come back to the ground of the earlier ones."³ Furthermore, the tendency to insist upon deception of the public as not merely a *test* of a violation of a trade-mark right but as the *basis* of relief against such violation is still discernible in the opinions of the courts of this country.⁴ Judge Hough, in dissenting from the opinion of the court just quoted, viz. that, because the plaintiff had not proven deception of the public, hence he

¹ Stephens, *Commentaries on the Laws of England* (16th ed. 1914) ii, 58.

² C. G. Haines, "Efforts to Define Unfair Competition," 29 *Yale Law Journal* 27.

³ *A. Bourjois & Co., Inc. v. Katzel* 275 Fed. 539. Cf. *Standard Oil Co. v. Federal Trade Commission* 282 Fed. 82, 85.

⁴ See *Florence Mfg. Co. v. J. C. Dowd & Co.* 178 Fed. 73; *Union Fishermen's Cooperative Packing Co. v. Point Adams Packing Co.* 108 Ore. 535, 548, and cases cited *infra*, pp. 162-163.

was not entitled to protection, pointed out that "it is not yet settled whether a trade-mark is to be primarily regarded as protecting the trade-mark owner's business from a species of unfair competition or protecting the public from imitations."¹ When this case came before the Supreme Court of the United States, however, that court, reversing the opinion of the Circuit Court, emphasized the investment by the plaintiff and the injury to the plaintiff's property right, disregarding entirely the lower court's emphasis on the absence of deception of the public.²

The hope is ventured that this study of the origins of trade-mark law may throw some light on the reason for the existence of this difference of opinion as to the basis of relief that should be applied and may aid in clarifying the confusion still admittedly prevailing in many jurisdictions as to the proper basis of relief.³ This difference of opinion and confusion amid which courts are admittedly groping towards an adequate theory of relief are attributable not only to their failure to keep pace with the functional evolution of trade-marks, of which we shall see repeated evidences in later phases of this study, but to the mystery and uncertainty surrounding the initial entry of the common law courts into the fray against trade-mark piracy.

The first reference to trade-marks in the king's courts is an irrelevant reminiscent dictum first reported in 1656 to have been dropped, in the case of *Southern v. How*, by a Common Pleas judge, Dodderidge, in 1618, concerning the infringement of a clothier's mark in the reign of Elizabeth. The authority and longevity of Justice Dodderidge's dictum have been so extraordinary and unwarranted and they present so interesting a manifestation of "the judicial process" that we shall be obliged to dwell upon the many reports of *Southern*

¹ 275 Fed. at p. 543.

² 260 U. S. 689, Mr. Justice Holmes writing the opinion for the Court.

³ See J. L. Gold, "Equity: Trademarks: Nature of Infringement" in 7 *Cornell Law Quarterly* 373. Cf. note to the decision by the Circuit Court of Appeals, 35 *Harvard Law Review* 624, concurring with the majority view that "safeguarding the public from deception" is "the primary purpose of trade-marks." See also *infra*, ch. vii.

v. *How* and the various versions of the dictum itself at some length, — even at the risk of repeating what may be partly old learning to the practitioner of trade-mark law. The reasons for the utterance of the dictum are obscure and the very fact of its utterance is barely established by but one out of five extant reports of the case. *Southern v. How* was a King's Bench action on the case for the sale of counterfeit jewels to plaintiff by defendant through the latter's servant. The case, which is first reported in *Popham's Reports*, published in 1656, and stated therein as having been decided at the Trinity Term, 15 Jac. I, had no relation whatsoever to trade-mark law, but the report nevertheless states:¹

Doderidge (*sic*) said, that 22 Eliz. the action upon the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth by reason whereof he had great utterance to his benefit and profit, and that he used to set his mark on his cloth whereby it should be known to be his cloth: and another clothier, observing it, used the same mark to his ill-made cloth on purpose to deceive him, and it was resolved that the action did well lie.

It should be noted that *Southern v. How*, while appearing in *Popham's Reports*, was not actually reported by Popham himself, but was included in the volume among "Some Remarkable Cases Reported by other learned Pens since his death." There are four later reports of *Southern v. How*: — *J. Bridgeman's Reports* (1659)² ascribes *Southern v. How* to the Hilary Term, 13 Jac. I, and does not mention Dodderidge's dictum. *Croke's Reports*³ (also 1659) sets the Hilary Term, 15 Jac. I, as the date of the case, and contains an entirely different version of Dodderidge's dictum concerning the case of the clothier, squarely stating the action to have been brought not by the clothier whose mark had been misused, but by the defrauded purchaser:

Dodderidge cited a case to be adjudged 33 Eliz. in the Common Pleas: a clothier of Gloucestershire sold very good

¹ p. 144.

² p. 125.

³ Cro. Jac. 469.

cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another who made ill cloth put his mark upon it without his privity; and an action upon the case was brought by him who bought the cloth, for this deceit; and adjudged maintainable.

Volume 2 of *Rolle's Reports*, published in 1676, contains two conflicting accounts of *Southern v. How*. The first of these¹ reports the case as having been decided 15 Jac. I, Hilary Term, and, like *Bridgeman's Reports* above referred to, makes no mention of Dodderidge's dictum concerning the clothier's case. The second report,² ascribing the case to 16 Jac. I, Trinity Term, states,

Dodridge (*sic*) Justice in 23 Eliz. in le Common Banke le case fuit, que un cloathier de Gloucester fait cloathes queux fueront pluis deere, & pluis vendable que les cloathes d'ascun auter, & il mist special marke sur eux que null auter cloathier avoit devant, & apres un cloathier avoir counterfeit le dit marke, & mitte ceo sur ces cloathes, queux ne fueront cy-bien, mes uncore il vend eux cy chare come lauter per cest deceipt fuit adjudge que action sur le case gist vers luy, mes Mr. Justice Dodridge ne dit per quel deux ceo gist lou per le cloathier que primerment avoit le dit marke, ou pur le vendee, mais semble que gist pur le vendee. . . .

To sum up the remarkable discrepancies occurring in the reports of this case: (1) Three of the five reports contain no reference whatsoever to the clothier's case in Elizabeth. (2) Of these three reports only one (*Popham*) definitely states the action to have been by the clothier whose mark had been infringed. Of the two others, one (*Croke*) is equally definite that the action was by the defrauded purchaser, and the other (*2 Rolle 26*), while not perhaps so positive in this regard, likewise believes that the action was by the vendee. (3) *Popham* reports Dodderidge to have remembered that the clothier's action occurred in 22 Elizabeth, *2 Rolle* says 23 Elizabeth, while *Croke's* report states 33 Elizabeth. (4) Only two of the five reports (*Popham* and *2 Rolle 5*) agree that *Southern*

¹ *2 Rolle 5*.

² *Ibid.*, p. 28.

v. How was decided in 15 Jac. I, the other three reports giving other and different dates for the decision.

Despite the fact that Dodderidge's reminiscence, — whatever it was — was pure dictum, and despite the conflict of evidence as to what that dictum was, *Southern v. How* appears to have acquired considerable weight as authority for the proposition that the unauthorized use of a trade-mark is unlawful and may be the subject of an action in deceit. It is so classified in the abridgements and digests.¹ Chancellor Kent also states that *Southern v. How* was an "action against a clothier by another clothier."²

The English Courts have unequivocally relied upon the authority of *Southern v. How* to establish the antiquity of their jurisdiction to prevent trade-mark piracy. In *Blanchard v. Hill* (1742)³ Lord Hardwicke appears to have assumed on the authority of "Popham 151" that an action at law would lie by a clothier against another for the misuse of trade-marks. In *Crawshay v. Thompson* (1842)⁴ Maule, J., cited *Southern v. How* as reported in both *Popham* and *Cro. Jac.* without committing himself to either version of the case. In *Burgess v. Burgess* (1853)⁵ Knight Bruce, L.J., interrupted the argument of counsel to remark that "the law on the subject is as old as *Southern v. How* in *Popham's Reports*." In *Hall v. Barrows* (1863)⁶ Romilly, M.R., stated that "it was established as early as *Popham's Reports* that an action at law would lie for the piracy of a trade-mark." In *Hirst v. Denham* (1872)⁷ Bacon, V.C., expressed his doubts as to *Southern v. How*, — not whether that case was an action of the owner of a trade-mark for its infringement, but whether it was the *first* such action.

Finally, only a quarter of a century ago, in *Magnolia Metal*

¹ See 1 Nelson's *Abr.* 38, §17; 3 Bacon's *Abr.* (3d ed.) 560 (K); 1 Viner's *Abr.* (2nd ed., London 1791) 574; 1 Comyn's *Dig.* (London 1780), 166: "Action Upon the Case for a Deceit" (A9).

² See 2 *Kent's Commentaries*, 7th ed., p. 446, note b.

³ 2 *Atkyns* 484, at p. 485.

⁴ 4 *Man. & G.* 357, at pp. 385-6.

⁵ 3 *De. G. M. & G.* 896, at p. 902.

⁶ 32 *L.J.N.S., Equity*, 548, at p. 551.

⁷ *L.R.*, 14 *Eq.* 542, at p. 549.

- *Company v. Tandem Smelting Syndicate, Ltd.*, (1900),¹ Lord Chancellor Halsbury, in analyzing the plaintiff's pleadings in a "passing-off" action, stated that such an action "has been a well recognized cause of action, certainly for the last two hundred and fifty years."

"My Lords," [continued Lord Halsbury²] "that cause of action is, as I have said, a very old and a very familiar one . . .

[After quoting Dodderidge J. in *Southern v. How*] Going back, therefore, as far as the reign of Elizabeth the form of action which the Statement of Claim adopts has undoubtedly been a form of action in which if the right of a man to have the reputation of selling that which is his manufacture as his manufacture, the right to prevent other people fraudulently stating that it is their manufacture when it is not — if that right is infringed there is a remedy. That has, as I have said, ever since the reign of Elizabeth, been established in our Courts as being a right of action upon which anybody may sue who has a ground for doing so."

From Lord Halsbury's opinion there was no dissent.

Our somewhat lengthy excursus into the history of Justice Dodderidge's dictum in *Southern v. How* has enabled us to see in its true light the actual validity and subsequent authority of that dictum which may or may not have been uttered in 1618 as to an action which may or may not have been given by a royal court somewhere in the middle or later years of the reign of Queen Elizabeth. After *Southern v. How* there appears to have been absolute silence in the king's courts on the subject of trade-mark protection for over a century, — until 1742 — when for the first time injunctive relief against trade-mark infringement was sought from a very learned Lord Chancellor, — who, in *Blanchard v. Hill*,³ denied that relief on the ground that the protection of trade-marks would create or protect monopolies. In no branch of the law can we conceive a more striking example of what Sir Paul Vinogradoff has recently termed "the fictitious character of the latent completeness of the law."⁴

¹ 17 Rep. Pat. Cas. 477, at p. 483. ² *Ibid.*, at p. 484. ³ 2 Atkyns 484.

⁴ P. Vinogradoff, *Introduction to Historical Jurisprudence*, p. 27.

Nevertheless, those who have attained pre-eminence either as practitioners or as text-writers of trade-mark law have with few exceptions been quite content to regard that law as practically the creation of the nineteenth century, without attempting in any way to ascertain the extent to which trade-marks had been used prior to the nineteenth century, the functions or purposes which these trade-marks had served and the methods, if any, by which they came under any form of legal protection or surveillance. Thus it is stated in the most recent edition of Kerly's *Treatise on the Law of Trade-marks*,¹ "The law on this subject cannot be traced back further than the nineteenth century." Sebastian, another English authority on trade-marks, likewise states with regard to the protection of trade-marks: "It is possible that this right was recognized as early as the reign of Queen Elizabeth; it was at any rate established in 1833. . . ."² American writers are equally uninquisitive. Hopkins, in his otherwise comprehensive treatise on *Trademarks, Trade Names and Unfair Competition*, referring to the origin of trade-marks and trade-mark law, says with an eloquent "carelessness of exactitudes":

We walk in almost absolute darkness along these dim historic trails. On every hand are signs that show the coming importance of trademarks. But Rome is to reach her zenith and her debacle, the Middle Ages are to intervene, the new world beyond the Atlantic is to be discovered, modern Europe is to be reorganized by states and peoples, before we again reach traces of the use of identifying marks in trade. Even then, the laws of trademarks will not come into existence until generations of traders have come and gone. The history of the law of trademarks is pretty accurately at our service. The history of the early use of trademarks has never been written and most of its evidences have crumbled into dust. For those illuminating examples of ancient marks preserved to us, the labor of the archæologist alone is responsible and to him our appreciation is due.³

¹ 5th ed. (1923) p. 2.

² Sebastian, *Trade Mark Registration* (2nd ed. 1922) p. 3.

³ 4th ed., (1924) p. 2.

The courts have been no less vague and uncertain in their discussion of this subject than the textwriters, but, as shown above with regard to *Southern v. How*, their natural tendency has been to extend their own jurisdiction over trade-marks retrospectively as far as possible, preferably, it would seem, even to the Year Books.¹ As recently as 1919 it was stated by the United States Circuit Court of Appeals for the Second Circuit:²

It has been said frequently that the doctrine of exclusive property in trademarks has prevailed from the time of the Year Books. But an examination of the record hardly justifies the statement in the opinion of Mr. Upton, who nevertheless declares that — “Property in trademarks, exclusive and absolute, has existed and been recognized as a legal possession, which may be bought and sold and transmitted, from the earliest days of our recorded jurisprudence.”³

Our recital of the adventures of Dodderidge’s dictum may perhaps have raised some doubts as to the accuracy of Mr. Hopkin’s statement that “the history of the law of trademarks is pretty accurately at our service.”⁴ Furthermore, whatever we know of the history of trade-mark law is largely due not so much to Englishmen or to Americans but, as in so many other fields of legal history, to foreign scholars. Joseph Kohler’s *Das Recht des Markenschutzes* must be the foundation and starting point of our researches. Gustav Lastig’s *Markenrecht und Zeichenregister*, Alexandre Braun’s “Introduction Historique” to Braun and Capitaine’s *Les marques de fabrique et de commerce* and Philippe Dunant’s *Traité des marques de fabrique et de commerce en Suisse* contain further contributions to the subject. These writers have laboriously

¹ In *Knott v. Morgan* (1836) 2 Keen 218, counsel, *arguendo*, declared the law of passing-off to have “been settled, from the Year Books downwards.” In *Amoskeag Mfg. Co. v. Spear* (1849) 2 Sandf. 599 at p. 604, Judge Duer cites “2 Keen 218” as stating that “the doctrine of exclusive property in trade-marks has prevailed from the time of the Year Books, implying the antiquity of the legal, in contradistinction to the equitable protection of marks.”

² *Scandinavia Belting Co. v. Asbestos Rubber Works of America Inc.*, 257 Fed., pp. 937, 941, per Rogers, Cir. J.

³ Citing Upton on *Trademarks*, p. 10. (Italics the writer’s.)

⁴ Hopkins, *op. cit.*, p. 2.

explored the "dim historic trails" and brought back with them a wealth of material that throws much light not only upon the early history of trade-marks and trade-mark law in their own countries, but upon the universal tendencies of the development of that law. An indication of the neglect of this subject by English and American writers may be found in the fact that the *Select Essays in Anglo-American Legal History*, intended by the Editors to constitute "a mosaic showing the general pattern of our law for the last six centuries"¹ contains no reference to the subject of trade-marks and unfair competition, although dealing with such equally isolated and specialized topics as the early history of patent law and insurance law and the carrier's liability. American writers on trade-mark law, drawing more or less upon the researches of European scholars, have only nibbled at the historical problem from time to time.² There has been hitherto no systematic endeavor to trace the history of trade-mark law in England up to the time of its administration by the King's Courts or to consider modern trade-mark law in the light of its history.

Any approach to such a study must be through channels and from sources that will be regarded as most unorthodox from a legal standpoint. The Year Books, to which judicial commentators on the "antiquity" of trade-mark law have been apt to resort,³ are concerned mainly with land tenures, feudal dues, crimes of violence and defamation, — not with commerce — and do not aid us in our quest. The treatises of the medieval⁴ English jurists, Bracton, Glanvil, Britton and Fleta, in contrast with those of Continental Europe,⁵ display no interest in the subject.

¹ Preface to vol. ii, p. v.

² See W. H. Browne, *Treatise on the Law of Trademarks*, (2nd ed. 1898) Introd.: E. S. Rogers, "Some Historical Matter Concerning Trademarks," 9 *Michigan Law Review* 29; L. E. Daniels, "History of the Trademark," 7 *Bulletin U. S. Trademark Assn.*, New Ser., 239; E. S. Rogers, *Good Will, Trademarks and Unfair Trading* (1919 reprint) ch. iii.

³ See *supra*, p. 12.

⁴ In this essay the writer has used the terms "medieval" and "Middle Ages" to include a period extending into the seventeenth century. He has, however, sought to mitigate this freedom of phraseology by references to specific dates, wherever generalizations would be inaccurate.

⁵ See C. Dietzel, *Das Handelszeichen und die Firma*, in *Jahrbuch des Gemeinen*

Nor do the proceedings of the local Courts furnish us with any clues as to the beginning of trade-mark law. The Leet Courts were anxious — much to the disgust of the legal profession — to redress private grievances and to settle private disputes.¹ However, as far as their records thus far published indicate, until the sixteenth century, with a single exception, the interest of the Leet Courts in trade-marks was confined to a more or less feeble enforcement by periodic fines of the statutes providing for the compulsory affixing or imprinting of marks by bakers and coopers.² The single exception just referred to is that of the granting of marks to the cutlers of Hallamshire by the Manor Court of the Earl of Salop in 1564,³ which has a bearing upon the development of a unique system of trade-mark law by cutlery trades and which will be referred to in a later chapter dealing with those trades.⁴ The Borough Court records, though they note actions for deceit in the sale of cloth⁵ and food,⁶ will be searched in vain for cases of trade-mark infringement or of unfair competition.

The records of the fair and market courts and of the Borough Piepowder Courts, administering the Law Merchant, might reasonably be expected to make valuable contributions to the history of trade-mark law. But although these courts

Deutschen Rechts, iv, p. 230 *passim*; Albert Braun, *op. cit.*, pp. xxv *et seq.*; G. Lastig, *op. cit.*, pp. 185 *et seq.*; P. Dunant *op. cit.*, p. 31. Most medieval writers sought to trace the origin of trademark law to a provision of the *Lex Cornelia* concerning false seals, (*De falsis*, D. Book XLVIII, tit. X), but it is evident that the law in question referred to the forgery of seals on wills (see Kohler, *op. cit.*, p. 39; D. R. Pella, *Marcas de fábrica y de Comercio en España* (1911), p. 15. *Cf. infra*, p. 129.

¹ See F. J. C. Hearnshaw, *Leet Jurisdiction in England*, pp. 218-219; William Hudson, *Leet Jurisdiction in the City of Norwich* (Selden Soc., vol. 5) pp. xxxiv, 8.

² Under date of October 30, 1923, the writer was advised by Professor Hearnshaw that "there are not any cases in any of the Leet Court Records which I have examined that suggest any conflicts between merchants or craftsmen concerning the use of marks." But for instances of punishment by the Leet Court for failure to affix compulsory marks under police regulations, see *infra*, pp. 51-52 (bakers' marks), p. 59 (coopers' marks); *cf. infra*, pp. 82-83 (Coventry cloth seal).

³ R. E. Leader, *History of the Cutlers of Hallamshire*, i, p. 7.

⁴ See *infra*, p. 120.

⁵ W. H. Stevenson, *Records of the Borough of Nottingham*, ii, p. 71, No. XXXI.

⁶ *Ibid.*, p. 131.

dealt with a variety of commercial causes,¹ arising at the fair to which flocked merchants from all over England as well as from abroad, no case therein has thus far come to light involving the misuse of trade-marks.² The Maritime Courts, which concerned themselves with the causes and controversies of traders arising at the seaport towns and at London, frequently, as we shall see in a later chapter,³ especially in the sixteenth century, had occasion to decide cases involving merchants' marks, but such allusions in the records of these courts clearly refer to such marks as indicative of ownership of the goods to which they were affixed and have no relation to conflicts of interest in the merchants' marks themselves.⁴

We have referred above⁵ to the statutes requiring the coopers and bakers, in the interest of consumers, to set their marks upon their wares. We shall have occasion to refer to

¹ See *Select Cases on the Law Merchant*, i (Selden Soc. vol. 23) pp. 102 (breach of covenant for failure to deliver goods according to sample), 91 (forfeiture of goods not corresponding to sample), 110 (enforcement of girdlers' ordinance against garnishment of girdles with lead), 85 (defamation of credit), 97 (trespass for depriving a seller of his bargain for the sale of salmon, — "*de dicto barganio ejecit*"); see also W. S. Holdsworth, *History of English Law*, v, pp. 109-113.

² Vol. I of the "*Select Cases on the Law Merchant*," edited by Gross (Selden Soc. vol. 23), contains nothing on this subject, nor will Vol. II, the writer is informed by Mrs. E. E. Watkins, who is now editing it for the Selden Society. For a recent summary of the various matters of which the Law Merchant took cognizance, see W. A. Bewes, *The Romance of the Law Merchant*, pp. 19-25. It is difficult to find authority for the statement in the article on the Law Merchant in the *Encyclopædia Britannica* (11th ed., vol. xvi, p. 300) that "to the law merchant modern English law owes the fundamental principles in the law of trademarks."

³ See *infra*, pp. 31 *et seq.*

⁴ Until the fifteenth century, as pointed out by Gross (*Gild Merchant*, i, p. 107), "the line of demarcation between the merchant and craftsman was not yet sharply defined." However, from the subject matter of the branches of the law developed in the Admiralty Courts, — such as charter-parties, bills of lading, insurance, bills and notes, contracts made abroad, etc. — (See Reginald G. Marsden, *Select Pleas in the Court of Admiralty*, Vol. I (Selden Soc. vol. 6) Introd. p. lxxvii; *ibid.* Vol. II (Selden Soc. vol. 11) Introd. pp. lxxix-lxxx) it would appear that this law affected and concerned itinerant middlemen or traders rather than the actual producers or craftsmen who were required by law to affix production marks to their goods. Malynes in his *Lex Mercatoria* (1622, p. 5) defined a merchant as "he that continually dealeth in buying and selling of commodities, or by way of permutation of wares both at home and abroad in forreine parts." Molloy in his *De Jure Maritimo* (1676, Book iii, ch. xiii, p. 436) follows substantially the same definition of a merchant and states, "but those that buy Goods to reduce them by their own art or industry into other forms than formerly there were of, are properly called Artificers, not Merchants. . . ."

⁵ See *supra*, p. 14.

these statutes again,¹ and also to consider similar statutes compelling the affixing of marks identifying the producer of the wares of goldsmiths,² arrowhead-makers,³ clothiers,⁴ pewterers⁵ and wax-workers.⁶ However, while the preambles and recitals of these statutes throw considerable light upon the functions and uses of the individual marks involved, they will not in themselves indicate the evolution of a system of trade-mark law, but will rather record or confirm the especial necessity for the use of a mark for a particular purpose at the time of their enactment.

Where, then, shall we find the germs of our modern trade-mark? We shall find the answer in the great mass of records of the organizations of merchants and craftsmen themselves, supplemented by the researches of antiquarian and archaeological bodies, concerning these mercantile elements, wherein we shall see the first indications of the uses, abuses, and legal significance of the marks and symbols used in medieval commerce.

The first glance at the medieval economic structure and methods of production will furnish us with a very simple reason for the absence of any evidence of trade-mark litigation in the early records of the king's courts. Medieval trade was largely conducted through guilds or "misteries" and an integral part of the whole scheme of organization into guilds or "misteries" was the prevention of litigation among guildsmen in any tribunal save the court held by the guild officials or guild members themselves and the punishment of all efforts to seek redress "at law" for wrongs perpetrated by a guildsman against his fellow-guildsman, without the consent of the guilds. The nature and functions of the guilds will be discussed in a later chapter,⁷ but the point may be emphasized here that arbitration among guildsmen was a primary duty of the master and wardens of practically every British guild and livery company, and resort to litigation was the gravest

¹ See *infra*, pp. 57 (coopers), 51 *et seq.* (bakers).

² See *infra*, p. 59.

³ See *infra*, p. 105.

⁴ See *infra*, pp. 84, 86.

⁵ See *infra*, p. 102.

⁶ See *infra*, p. 128.

⁷ See *infra*, ch. iii.

kind of an offense. Among the early "Ordinances of the Brotherhood of Our Lady of Bethlehem" appears the following typical provision:

Also they are agreed that if any dispute arise between any of the said Brotherhood, that he who shall feel himself aggrieved shall complain to the said Brotherhood so that the trespass may be redressed between the parties without making a disturbance, and that no one shall complain in any other place nor in any other manner; and if any one be a rebel (*soit rebell*) and will not be reformed by the said Brotherhood, that he be ousted from the Company forever.¹

The records of the Grocers Company of London contain the following entry for the year 1379:

These are the tares of different wares ordained and assented to by the old company the eighteenth day of August, the year aforesaid, to stop and prevent all disputes which might arise between the mystery of Grocers in the case where the purchaser and vendor are of the same company or where the purchaser be of the company of Grocers and where no express agreement has been made in express terms at the time of the bargain.²

¹ A. H. Johnson, *History of the Worshipful Company of the Drapers of London* i, 200. This ordinance was evidently regarded as of sufficient importance to be marked "*lege*" (*ibid.* i, 262), *i.e.*, that it was to be read at certain stated, periodic "assemblies" of the Company.

² *Ms. Archives of the Company of Grocers of London* (ed. J. A. Kingdon), pt. i, p. 56. For similar ordinances punishing extra-gild litigation and providing methods of arbitration, and for illustration of gild arbitration and discipline, see *Cooper's Company, London* (ed. J. F. Firth), pp. 42, (1456) 85; *Goldsmiths' Records in Herbert, Livery Companies of London*, ii, p. 171 (1462); *Annals of the Barber-Surgeons of London* (ed. S. Young), pp. 33 (before 1388), 201 (1606); C. Welch, *History of the . . . Pavors of London*, p. 9 (1479) *History of the Saddlers of London* (ed. J. W. Sherwell), pp. 169-171 (*passim*) (1606-39); *Some Account of the Worshipful Company of Ironmongers of London* (ed. J. Nicholl), pp. 118, 120-21 (1504); *Annals of the Founders' Company of London* (ed. W. M. Williams), pp. 87-8; *Coventry Smith's Records in Coventry Leet Book* (ed. M. D. Harris, ii, p. 744 (1540); "Company of Stitchmen of Ludlow" (ed. G. M. Hills), in *Journ. Brit. Archaeol. Assn.*, vol. 24, p. 329 (1569); *Ordinances of Listers of York in York Memorandum Book* (Surtees Soc. Pub. vol. 125), pp. 211-12 (1472); "Shrewsbury Gild of Barber-Chirurgeons," in *Trans. Shropshire Archaeol. & Nat. Hist. Soc.*, vol. 5, p. 265 (1432); *Aberdeen Gildsmen in E. Bain, Merchant and Craft Gilds*, p. 129 (1599); *Dublin Carpenters, Millers, Masons, etc. in Journ. Royal Assn. of Antiquaries of Ireland*, vol. 35 (vol. XV, 5th Series), p. 321 (1537); *Dublin Merchants, ibid.*, vol. 30 (vol. X, 5th Series), p. 44 (1438).

In reading the above mentioned ordinances prescribing arbitration among gildsmen as well as all other gild ordinances it is well to remember that many

Despite an Act of Parliament in 1504¹ prohibiting non-litigation ordinances, they continued steadily to be enacted and enforced for over a century thereafter.² In the light of such ordinances the reason for the absence of cases involving commercial disputes in the early common-law reports becomes apparent. Before seeking, however, in the gild records for the genesis of our modern trade-mark law, it will be necessary to consider in our next chapter how it came about that merchants and craftsmen, aside from the requirements of their guilds and of statute law, began to use certain marks known and above referred to as "merchants' marks" and what were the legal implications of those marks.

such gild ordinances are "only a reiteration, not an innovation" (see Sellars, *Introd. to York Memorandum Book*, pt. ii, (Surtees Soc. Pub. vol. cxxv), p. li), — in other words, that these ordinances are merely a confirmation or evidence of the pre-existing trade regulation or custom, or a repetition or later version of an earlier ordinance. For instance, in Bristol in 1346, "all the ordinances of the trade guilds in use at that time were rehearsed before the Mayor, Recorder and forty-eight councillors and in some respects amended; they were then entered in the present volume [The Red Book of Bristol] to stand as of record . . ." (See Francis F. Bickley, *Introd. to The Little Red Book of Bristol*, i, p. xxi. For similar instances see Toulmin Smith, *English Guilds*, pp. 293 and 430 (Bristol guilds); *ibid.*, p. 363 (Usages of Winchester); *ibid.*, pp. 411-412 (Worcester); also L. Toulmin Smith "The Bakers of York and Their Ancient Ordinary," *Archaeol. Rev.*, vol. i at p. 125.

¹ 19 Hen. VII c. 7, *Stat. of the Realm*, ii, p. 653.

² E. Lipson, *Economic Hist. of England*, i, pp. 309-310, and *supra*, p. 17, n. 2.

CHAPTER II

MERCHANTS' PERSONAL AND PROPRIETARY MARKS IN THE MIDDLE AGES

A TRADE-MARK is frequently defined by the courts as a mark, sign or symbol, "the primary and proper function" of which is, as the Courts say, "to identify origin or ownership of the goods to which it is affixed."¹ This definition of the function of the trade-mark has been in use with almost unvarying uniformity throughout the formative period of trade-mark law up to the present day.² In the course of this essay, we shall have occasion to consider the present accuracy and propriety of this definition in the light of recent developments in the methods of production and distribution of goods;³ at present it is sufficient to note that from the standpoint of *historical* origins at any rate the definition is sound, describing as it does the two relations — "origin or ownership" — which, in the inception of trade-mark law, the mark implied.

The history of trade-mark law is of course inextricably associated with the history of the trade-marks themselves. Joseph Kohler, with his wide range of scholarship, utilized a great deal of the then available archæological material in his reconstruction of the early history of trade-marks and trade-mark law.⁴ The great achievements of archæology in the forty years that have elapsed since the publication of

¹ See *Hanover Milling Co. v. Metcalf* 240 U. S. 403, 412.

² Cf. *Hanover Milling Co. v. Metcalf supra*, a leading case decided in 1915, with the first trademark decision of the same court, *Canal Company v. Clark* (1871), 13 Wall. 311, 322. Likewise the early decisions in *Amoskeag Manufacturing Company v. Spear* (1849) 2 Sandf. (N. Y.) 599, 606, and in *Boardman v. Meriden Britannia Company* (1868) 35 Conn. 402, 413, should be compared with *Patton Paint Co. v. Sunset Paint Co.* (1923) 290 Fed. 323, 325. See also Hopkins, *op. cit.*, sec. 3, collating judicial definitions of a trade-mark.

³ See *infra*, pp. 147-150.

⁴ *Das Recht des Markenschutzes*, pp. 30-51.

Kohler's work have added much to our knowledge of the early use of trade-marks. The ruins of the prehistoric settlement at Korakou near Corinth have yielded up saucers and bowls bearing potters' marks at least four thousand years old;¹ the recently published catalogue of the Yale University collection of Greek and Italian vases reproduces potters' factory marks imprinted in the fifth² and fourth³ centuries B.C., and a Greek terracotta vase of the same period just acquired by the Metropolitan Museum of Art, New York City, is likewise reported to be marked with what is "probably the potter's stamp."⁴ However, in this present study of the history of trade-mark law no endeavor has been made to rewrite the history of trade-marks themselves prior to their appearance in England or to refer to their use either in England or contemporaneously on the continent, except in so far as such uses and parallels may serve to throw some light on the universality or development of some principle of trade-mark law.

The judicial conception of the alternative functions of a trade-mark, — the designation of "origin or ownership" of goods, — rests upon the uses to which marks were put in the Middle Ages. Strictly speaking, marks designating ownership are not trade-marks at all but merely proprietary marks, which may or may not incidentally serve to designate the origin or source of the goods to which they are affixed.⁵ However, the Courts of the twentieth century appear to be

¹ See C. W. Blegen, *Korakou, A Prehistoric Settlement Near Corinth* (American School of Classical Studies at Athens 1921) Fig. 3, No. 6, pp. 5, 11.

² See P. V. C. Baur, *Catalogue of the Rebecca Darlington Stoddard Collection . . .* (Yale Oriental Ser. Researches: vol. viii, 1922) No. 445, p. 225.

³ *Ibid.*, No. 468, p. 230; cf. Nos. 516, p. 243; 647, p. 286.

⁴ See *Bulletin of The Metropolitan Museum of Art*, vol. xix, No. 5, May 1924, p. 128. For marks on Roman lamps discovered subsequent to Kohler's researches, see H. B. Watters, *History of Ancient Pottery* (Based on the Work of Samuel Birch, 1905) vol. ii, p. 423 *et seq.* See also E. Hannover, *Pottery and Porcelain* (tr. Rackham, 1925) i, ch. I and II.

After this book had gone to press it was reported by the leader of the "De Prorok Exploration Expedition" that in pottery kilns on the site of ancient Utica, Tunis, "eighty potters' marks" had been discovered, "several of which were hitherto unknown in Punic North Africa. The oldest lamp so far found in the kilns is a lamp thought to be of the ninth century B.C." (*New York Times*, March 15, 1925).

⁵ W. H. Browne, *op. cit.*, p. 14, n. 1.

no more careful to observe the distinction between technical trade-marks and proprietary marks than were their predecessors of the nineteenth century or the commentators and lexicographers of the eighteenth and seventeenth centuries to whom we shall refer later on.¹ It has therefore been deemed desirable to include proprietary marks in this study of the metamorphosis of the modern trade-mark and of the development of trade-mark law.

We have drawn the distinction above² between merchants' marks, such as those regarded by the Admiralty and other courts as proof of ownership of goods, and called "merchants' personal and proprietary marks," and the production marks indicating the source or origin of goods. In the present chapter we shall deal with marks of ownership, in the three succeeding chapters with production marks or marks of origin. But it should be noted at the outset that the same mark might and did often serve the dual function of personal or proprietary mark³ and production mark. As we have said above,⁴ until the fifteenth century the craftsman and merchant were often one and the same person. As craftsman he might be compelled by statute law or gild regulations to affix his mark to his goods,⁵ — as merchant he would desire to affix a mark to the bale or wrapping of the same goods in order to identify them for the illiterate warehouse clerk and also for the Admiralty Court to which they might be brought after capture on the high seas or wreck on the English coast.

That individual merchants' marks were commonly used in medieval England is evident not only from the actual traces of these marks that still survive, but also from literary references of the period. A passage often quoted in this connection by English antiquarians is the description in

¹ See *infra*, pp. 124, 127-128, 147.

² See *supra*, pp. 15, 18, 20.

³ The following pages discussing the social uses of merchants' marks will indicate the distinction between personal and proprietary marks. The former designated ownership, the latter expressed personality. It was the proprietary rather than the personal merchant's mark that acquired legal significance in the Middle Ages.

⁴ *Supra*, p. 15, n. 4.

⁵ See ch. iii.

Pierce the Ploughman's Crede (ca. 1394) of a church of the Friars Preachers:

Wyde wyndowes y-wrought . y-written full thikke,
Schynen with schapen scheldes . to schewen aboute
With merkes of marchauntes . y-medled bytwene,
Mo than twenty and two . twyes y-noumbred.¹

A less well-known early English poem, *Wynnere and Wastoure*, antedating *Pierce the Ploughman's Crede* by over forty years, furnishes additional evidence of contemporary use of merchants' marks. *Wynnere and Wastoure*, an alliterative description of social and economic conditions in England in the year 1352, draws an elaborate picture of the various orders and estates that were assembled before the King (Edward III), with the Black Prince at his side, to listen to the debate between *Wynnere*, the representative of the wealth of merchants, of thrift and of skill on one side, and *Wastoure*, representing the lavish, reckless and unproductive self-indulgence of the military class on the other. Intermingled with the banners of the Pope, the lawyers and the Friars, are displayed those of the merchants bearing their marks.

And othere synes I see, sett appon lofte,
Some witesse of wolle, and some of wyne tounnes,
[And other] of merchandes merke[s], so many and so thikke
That I ne wote in my witt, for alle this werlde riche,
What segge (man) vnder the sonne can the sowme rekken.²

Antiquarian researches in the towns and villages of England as well as Scotland corroborate the literary evidences of the extensive use of merchants' marks in the Middle Ages. These

¹ Ed. W. W. Skeat (Early English Text Soc. 1867) p. 7, lines 175-178.

² *A Good Short Debate Between Winner and Waster* (Selected Early English Poems, ed. Sir Israel Gollancz for Early English Text Soc., III) lines 188-192. The "merchandis merke[s]" of this poem are compared by the editor with those in *Pierce Ploughman's Crede*, and are evidently regarded by him as the marks of individual merchants in contradistinction to the collective emblems of the wine and wool trades. See his note to lines 189-190. See also *Reliquae Antiquae*, ed. T. Wright & J. O. Halliwell, vol. ii (London 1845), p. 280 (cited in Murray, *New Eng. Dict.* vol. 6, p. 168 as for the year 1450):

"Thay salle be brynte on the hippe, chapmans merke,
Bothe in froste and in snawe to go with lyarde."

marks not only were used commercially to designate the proprietor of the goods to which they were affixed, but also acquired a distinct social significance. It would appear that very early in the history of medieval commerce, merchants, as soon as they had arrived at any degree of prominence or substance, were anxious to perpetuate the marks which they had used to designate their products. They — especially the wealthy wool-staplers — signified their recognition of the Divine source of their prosperity by the erection or restoration of churches, and in those churches they or the grateful recipients of their benefactions placed the same marks that they used upon their bales and their goods. Almost two centuries ago Blomefield, the learned historian of Norfolk, speaking of the time of Edward III, wrote:

The use of these marks were (sic) found so beneficial that at that time all merchants of any note had their peculiar marks with which they marked all their wares, and bare in shields impaled with or instead of arms; witness the abundance of merchant-marks to be found in the houses, windows, and grave-stones, in all cities and great towns (sic), as Norwich, Lynn, etc., by which the memory of their owners is still preserved, it being very obvious to all that search into the records of those places, to find who used such a mark; and then, if we see it on a house, we may conclude it to have been that man's dwelling; if on a disrobed grave-stone, that it was his grave; if on a church-window, or any other publick building, that he was a benefactor thereto; and nothing is of greater use than ancient deeds to make out their marks by, for they are always sealed with them.¹

¹ F. Blomefield, *History of Norfolk*, vol. i, p. 106 (ed. 1739), quoted from edition of 1805 (vol. i, p. 160, n. 5) by Edward Duke in his *Prologues Historicae* (Salisbury 1837) p. 83. The latter has collected (*ibid.* pp. 83-86) examples of the uses of merchants' marks in Lynn, Norwich, Salisbury, Southampton, etc. See William C. Ewing, "Notes of the Norwich Merchants' Marks" (*Pub. of Norfolk and Norwich Archaeol. Soc.*, vol. iii, p. 177) for much valuable data and plates reproducing over three hundred marks of the thirteenth to sixteenth centuries; J. Paul Rylands, "Merchants' Marks and Other Mediaeval Personal Marks" (*Trans. Hist. Soc. of Lancashire and Cheshire*, vol. lxii, [New Ser. vol. xxvi], p. 1) reproducing eighty-seven such marks. Cf. Stow, *Survey of London* (ed. C. L. Kingsford, vol. i, p. 274) "Concerning Arms of John Wells, Grocer"; R. R. Sharpe, *Cal. of Wills*, pt. i, p. 272, bequest of Thomas Carleton, "brouderer," for placing his "arms" upon a cross for his grave; *ibid.*, p. 544 bequests for tombstones with skinner's "arms" for decedent, his mother and his grandfather.

Since Blomefield's day, an additional source of information concerning medieval merchants' marks has been discovered in monumental brasses that were set up in churches by the gild or company to which the merchant may have belonged or by the church of which he had been a benefactor or by his surviving family. A large number of these brasses, such as that (dated 1525) of Thomas Pownder, merchant and "Bayley" of Ipswich, reproduced on the opposite page, bear a merchant's mark.¹ Merchants' marks usually consisted of crude lineal figures, such as the owner's monogram, or, often the reversed figure 4, thought by antiquarians to be a variation of the crucifix or a modification of the *Agnus Dei*,² under the protection of which the merchant hoped for the success of his venture. Sometimes, as in the brass to Thomas Pownder, the monogram and reversed figure 4 were combined.

These marks would appear sometimes to have been hereditary and, in some cases, the various branches of a family retained the same mark, but with slight variations, to prevent mistakes.³ By insisting on thus perpetuating their commercial conquests, the merchants soon found themselves in

¹ See W. H. Macklin, *The Brasses of England*, (2nd ed.) p. 97, for a description of this brass, also *ibid.*, pp. 166-73, for a list of wool-staplers' brasses in England. For other illustrations of or references to merchants' marks on monumental brasses, see *Trans. Monumental Brass Society*, vol. ii, p. 90, vol. vi, pp. 70, 332; H. Haines, *Manual of Monumental Brasses*, pt. i, pp. cxvii *et seq.*; J. S. Cotman, *Engravings of Sepulchral Brasses in Norfolk and Suffolk*, 2nd ed. vol. i, Plates 58 and 60; C. T. Davis, *Monumental Brasses of Gloucestershire*, pp. 56, 74, 95, 123, 136; E. H. W. Dunkin, *Monumental Brasses of Cornwall*, Plates LXI, Fig. 3, LXII, Fig. 3; J. L. Thorneley, *Monumental Brasses of Lancashire and Cheshire*, facing p. 286; J. M. Neale, *Illustrations of Monumental Brasses*, pp. 50 *et seq.*; T. F. Bumpus, *London Churches*, i, 165.

² For much valuable information concerning the history of the use of the reversed figure 4 as a merchant's mark, see David B. Morris, *The Stirling Merchant Guild*, pp. 160-170; J. P. Rylands, *op. cit.*, pp. 30-32.

³ See illustrations in J. P. Rylands, *op. cit.*, pp. 8-9; *cf.* W. C. Ewing, *op. cit.*, p. 179. *Cf.* C. Ffoulkes, "The Craft of the Armourer" in *The Connoisseur*, vol. xxiv, at p. 102 and Plates V and VI, p. 103, showing variations in the armor marks of various members of the famous Colman family of armorers of Augsburg; also, by the same writer, "The Armourers of Italy," in *The Connoisseur*, vol. xxv, p. 31, plate VII, showing similar variations by members of the equally illustrious Missaglia family of armorers in Milan. The Missaglia's mark has been discovered on the capital of a column in the *Via degli Spadari* or Sword Makers' Street, in Milan (see W. Boenheim, "Werke Mailänder Waffenschmiede" in *Jahrbuch der Kunsthistorischen Sammlungen* (Vienna), vol. ix at p. 384; G. F. Laking, *European Arms and Armour*, i, pp. 198 *et seq.*).



MEMORIAL BRASS COMMEMORATING THOMAS POWNDER, MERCHANT OF IPSWICH, AND HIS WIFE, EMMA, 1525, SHOWING HIS MERCHANT'S MARK (IN SHIELD, UPPER CENTER) AND THE ARMS OF THE MERCHANT ADVENTURERS (UPPER RIGHT) AND OF THE TOWN OF IPSWICH (UPPER LEFT).

conflict with the Heralds who answered the question "whether trade extinguisheth gentry" in the affirmative and feared the encroachment of a new system of semi-heraldry or pseudo-heraldry, which would bring them neither *kudos* nor fees.¹ In the recital of "what the authority of a king of arms is in his province", Francis Thynne, Lancaster Herald, said in 1605: "He shall prohibit any merchant, or any other, to put their names, marks or devises in escutcheons or shields; which belong only appertain to gentlemen bearing arms and to none others."²

However, despite the fulminations of Heralds, the use of merchant's marks did not decrease. There is an interesting indication of how widespread was the distribution of these marks in the devices that appear upon the trade tokens which were issued in the seventeenth century in England, Wales and Ireland as an illegal "money of necessity," to take the place of copper coins, the issuance of which had ceased during the Commonwealth.³ These tokens, issuance of which commenced in 1648 and was prohibited by royal proclamation in 1671, when the resumption of coinage of His Majesty's farthings and halfpence of copper was ordered,⁴ frequently contained the merchant's mark on the one side and the name or initials of the issuer, together with those of his wife and the town or locality in which their business was located, on the obverse side.

We have thus far considered the social and commercial uses to which merchants' marks were put in England in the

¹ See Wm. Newton, *A Display of Heraldry*, pp. 394 *et seq.*; Duke, *op. cit.*, p. 82; Charles Boutell, *Heraldry*, pp. 117-118, pp. 367 *et seq.*

² Francis Thynne, *A Discourse of the Duty and Office of an Herald of Arms* reprinted in *A Collection of Curious Discourses*, by Thomas Hearne, 2nd ed., London 1775, i, at p. 153. Cf. *Northumbrian Monuments* (Newcastle-upon-Tyne Records Ser. vol. iv) p. 141, no. 293.

³ For an excellent summary of the currency conditions necessitating the issuance of trade tokens see "Reasons Submitted by Thomas Violet of the Mint Committee to Prove the Necessity of Making Farthing Tokens" in *Col. State Papers, Dom.*, 1651, pp. 313-315, No. 23 (Aug. 10, 1651).

⁴ Wm. Boyne, *Trade Tokens Issued in the 17th Century* (revised ed.) i, Introd. pp. xix *et seq.*; W. Gilbert, "Token Coinage in Essex in the 17th Century," in *Trans. Essex Archæol. Soc.*, New Ser., vol. xiii, pp. 184 *et seq.*; Gray and Symonds, "Somerset Trade Tokens, XVII Century," in *Proceedings Somersetshire Archæol. and Natural Hist. Soc.*, vol. lxi, pp. 115 *et seq.*

Middle Ages. We shall now examine the legal implications of these merchants' marks.

Dunant¹ and Braun² have shown the universality of the use of merchants' marks on the continent for the purpose of establishing property in goods that had gone astray through shipwreck, piracy or other mishap. Braun refers to the *Handelsbuch*, dated 1420, which was kept by a merchant of the city of Danzig³ and which contains in the margin the marks of a great number of Dutch, English and Genoese merchants.⁴ In another document of the same period, the owners of three vessels bound from Riga to Flanders complained that the English had caused the loss of their ships. The cargo of flax is referred to as belonging to one hundred merchants, whose marks accompanied their respective names.⁵ Dunant likewise calls attention to the function of the merchants' marks appearing on the goods and also entered on the registry of the ships carrying these goods, to establish at least a *prima facie* presumption of ownership in the goods,⁶ and refers to a notarial instrument describing the steps which were taken in 1332 in the high court of Seville by merchants from the island of Majorca to recover certain balls of wax which had been thrown up on the coast of Flanders in a shipwreck. The Spanish bailiff in Flanders had refused to surrender these goods without surety that the proxy or agent (Bernardus Duran) of the owner (Bartholomeus Çagarra) could prove use of the mark appearing upon the wax ("*qualiter signum seu marca, de qua erant signate seu marcate dicte balle erat et est dicti Bartholomei Çagarra*").⁷ The instrument reproduces the mark of the claimant, Bartholomeus Çagarra, and

¹ *Traité des marques de fabrique*, pp. 10 et seq.

² Braun and Capitaine, *Les marques de fabrique*, Introd., p. xvii.

³ For the relation of English merchants to Danzig in the Middle Ages see *York Memorandum Book*, vol. ii (*Surtees Soc. Pub.* vol. 125) Introd. pp. xix et seq.

⁴ This document is the basis of a doctoral dissertation by W. von Slaski entitled *Danziger Handel in XVten Jahrhundert* (Heidelberg 1905).

⁵ Braun and Capitaine, *op. cit.*, Introd. p. xvii.

⁶ *Op. cit.*, pp. 12-13. For similar identification of goods strayed or stolen, in medieval German towns, see also Kohler, *op. cit.*, p. 27.

⁷ The document referred to by Dunant, which is in the possession of the *Bibliothèque Nationale*, is described by E. T. Hamy in an article entitled "Un Naufrage en 1332," in *Études historiques et géographiques* (Paris 1896), pp. 95-

recites the decree of the judges and Alguazil of the Council of Seville, requiring the bailiff to surrender the goods to Çagarra without surety, for the reason that the latter had satisfactorily proven by many witnesses his ownership and long use of the mark appearing on the goods:

Et dicti testes dixerunt omnes et singuli quod per sacramentum quod fecerant quod hoc signum seu marca, quod est scriptum seu signatum in ista carta, quod est et erat dicti Bartholomei Çagarra, et quod magnum tempus erat quod usus fuerat hoc signo seu marca et nunc cotidie utitur eo . . .¹

Just as the marks of English merchants were kept in foreign registries, so those of foreign merchants were sometimes entered in English trade records. For instance, in the Book of Entries of the Corporation of Great Yarmouth are many foreign marks, principally of the merchants of Brabant, which were regularly certified by foreign notaries.²

We shall find in English law in the fourteenth and following centuries how unvaried and unbroken was the recognition given to merchants' marks as affording practically conclusive evidence of proprietary right in the articles to which they were affixed or in connection with which they were used. In the reign of Edward III "the most constant danger to shipping was the ceaseless piracy that prevailed at sea, and from the responsibility for this none of the sea-faring nations of the age can be considered free."³ For a considerable time prior to Edward III, in cases where a ship was lost at sea and the cargo thrown upon the land, the goods belonged to the king as a "wreck" unless "a dog or other living animal escaped, by which the owner might be discovered, or if the goods was so marked, that they might be known."⁴ Accord-

103, containing much interesting material concerning similar uses of merchants' marks. Hamy publishes the whole document at pp. 444-447 of the same volume, from which the Latin quotations above are made.

¹ *Ibid.*, p. 445.

² See Henry Harrod, *Notes on the Records of the Corporation of Great Yarmouth*, *Pub. of the Norwich and Norfolk Archæol. Soc.* vol. iv, pp. 258-9.

³ Frank Sargeant, "The Wine Trade with Gascony," in *Finance and Trade under Edward III*, ed. George Unwin (Manchester University Historical Ser., No. XXXII), p. 292.

⁴ T. L. Mears, "Admiralty Jurisdiction" in *Select Essays in Anglo-American Legal History* ii, p. 333.

ingly in the epidemic of piracy during the reign of Edward III there was, as is disclosed by entries in the Close and Patent Rolls of the period, frequent occasion to resort to the merchants' marks upon goods for the purpose of establishing property rights in these goods. There were, as we shall see, also other occasions, non-piratical in nature, on which for one reason or another, it was necessary to establish property rights in goods, and such identification was made by means of merchants' marks. A few instances of both kinds follow.

In 17 Edward III (1343) there is an order to the Sheriff of Southampton

to deliver to Conrad Covenache, Burgess of Bruges, 20 packs of cloth of different colours, . . . by indenture containing the number of packs and the signs that are there signed (*signa quibus signantur*) as Conrad has besought the king to order those packs to be restored to him for himself and the remaining 15 as the proctor of John de Peroun, Burgess of Bruges, and Giles de Hooft, Burgess of that town, as 5 packs of Conrad's cloth under his seal (*signo suo*), 6 packs of John's cloth under his seal (*signo ipsius Johannes*) and 9 packs of Giles's cloth under his seal (*signo ipsius Egidii*) . . .¹

Likewise in 1346 Harvey Tirel, Sheriff of Devon, and the king's serjeant-at-arms, are ordered to obtain restitution for Sancius, a merchant of Spain, of certain tuns of wine lost in a piracy committed on the English coast, which tuns had been identified by Sancius and Tirel, who went "to the tavern of Richard Gordon of Dertemuth and there found two tuns of wine under Sancius's seal (*de signo predicti Sancii*)."² In the same year the Bailiffs of Ipswich are ordered to "cause 9 tuns and a pipe of woad to be restored to James called Urbaen, Burgess of Bruges, if they find that they are under his seal (*dicto signo in eisdem litteris inserto signato*)."³

An entry in 1356 indicates the manner in which English merchants were wont to trace their goods stolen abroad and

¹ *Cal. Close Rolls*, Edw. III, 1343-6, Feb. 24, 1343, p. 17.

² *Cal. Close Rolls*, Edw. III, 1346-9, pp. 10-11.

³ *Cal. Close Rolls*, Edw. III, 1346-9, p. 13.

the extent to which they believed their seals had probative value in the courts of Flanders:

To the burgomaster, *échevins* and consuls of the town of Bruges in Flanders. Request to hear the complaint of Richard de Stanhope or of his attorney, and to cause speedy justice to be done to him in accordance with the markets and customs of their town, as they would wish the king to do for them in like case, writing to the king of what they do as quickly as possible, as the king has received Richard's complaint containing that he was plundered of 38 sarplars of wool under his merchant seal, whereof a part was laded in the River Tweede in a ship of Flanders whereof Hugh Scuter, mariner of Lescluses, was master, and a part lodged in the town of Berwick upon Tweed and afterwards placed by the said thieves in the said ship, and the wool was then taken by those thieves to Flanders and was there arrested by the ministers of the burgomasters and others at the suit of Richard's servant or attorney, seeing his seal on the sarplars, and although the said servant has claimed the wool in Richard's name, praying that it may be delivered to him, yet the wool is still unjustly detained under arrest, whereupon Richard has petitioned the king to provide a remedy."¹

In 27 Edward III (1353) there was passed an important statute² by which it was provided that foreign merchants who had been spoiled of their goods either at sea or on shore should have restitution of their goods, upon proof of their property therein without having to sue at the common law.³ One of the three methods of proof of ownership enumerated by the statute affording this summary procedure for the restitution of goods was by evidence as to the ownership of the marks appearing on the goods:

¹ *Cal. Close Rolls*, Edw. III., 1354-60, pp. 305-6. For the functions and jurisdiction of the *échevins* and burgomaster of Bruges, see Malcolm Letts, "Law and Order in a Medieval Town," 39 *Law Quarterly Review*, p. 224. For additional instances of a similar probative use of merchants' marks see *Cal. Close Rolls*, Edw. III, 1343-6, *ibid.*, p. 71 (to the Sheriff of Southampton); *Cal. Close Rolls*, Edw. III, 1349-54, p. 3 (to the Mayor and Bailiffs of Sandwich); *ibid.*, p. 48 (to the Sheriffs of London); *ibid.*, p. 54 (to Thomas de Dagworth).

² Statute 2, c. 13, *Stat. of the Realm*, i, p. 338.

³ "*Soit receu de prover les ditz biens estre les soens par ses marches ou par sa carte ou coket ou par bons et loialx marchantz privez ou estrangers et par tieles proeves soient meismes les biens delivres au marchand saunz autre seute faire a la coë lei.*" See *Select Pleas in the Court of Admiralty*, Vol. I (Selden Society Pub. vol. 6), Introd. p. 1.

Item, We will and grant, That if any merchant, Privy or Stranger, be robbed of his goods upon the Sea, and the Goods so robbed come into any Parte within our Realm and Lands, and he will sue for to recover the said Goods, he shall be received to prove the said goods to be his own [by his marks, or by his Chart or Cocket (*per ses merches ou per sa carte ou coket*)], or by good and lawful Merchants, Privy or Strangers; and by such Proofs (*per tieles proeves*) the same goods shall be delivered to the Merchants, without making other suit at the Common Law: And in case that any Ships, going out of the said Realm and Lands, or coming to the same, by Tempest or other Misfortune, break upon the Sea Banks, and the Goods come to the Land, which may not be said Wreck, they shall be presently without Fraud or evil Device delivered to the Merchants to whom the Goods be, or to their Servants, by such proof as before is said. . .¹

In an order "to the Mayor and Bailiffs and the true men of the town of Plummuth" in 1367 we see the practical working of the statute. The order requires those named to

take information by inquisition and otherwise, as they may best, concerning the goods and merchandise cast up from a ship of St. Antony . . . in consequence of the shipwreck thereof, and taken and carried off by the men of the said town and of the neighboring parts, and to cause all such as the merchants may, by marks, metes or other true evidence (*per signa metas vel alias evidencias veraces*) prove to be theirs which are withheld from them, to be without delay or difficulty delivered to . . . the shipmaster, . . . proctor of the said ship . . . or to . . . attorneys of the said merchants. . .²

That considerable indignation existed at Westminster at the flagrant disregard of the provisions of the statute of 27 Edward III is shown from an entry in 1371, addressed to the Bailiffs of Shoreham, which was quite a center of thriving English piracy.³ Piracy in this case had evidently been committed against merchants of London who, the order

¹ *Stat. of the Realm*, i, p. 338.

² *Cal. Close Rolls*, Edw. III, 1364-68, Feb. 7, 1367, p. 316.

³ For piracy at Shoreham, see Henry Cheal, *The Story of Shoreham Piracy*, pp. 121 *et seq.*

shows, have not been given the protection afforded by the summary procedure of the statute of 27 Edward III, and "the King's will is that the statute be kept inviolate. . . ."¹ As late as 1771² the statute of 27 Edward III was invoked in Lord Mansfield's court by a plaintiff seeking to recover certain hogsheads of tallow which were cast ashore from a wreck, and which bore the same marks of plaintiff as appeared on the bill of lading. Defendant claimed these goods as "wreck," since no man, cat or dog escaped alive from the ship. Lord Mansfield indignantly brushed aside the plea of "wreck" and found for the plaintiff.

That the municipal authorities of the period regarded merchants' marks as evidence of ownership and the imposition of such marks as an act evidencing the assumption of ownership is well illustrated by a letter from the Mayor and Corporation of the City of London to the Mayor and Aldermen of Calais, reciting that one Henry Hangard and other Burgesses of Amiens had purchased in Gloucester from "John Pykenham, citizen of London," two hundred pieces of cloth for 1200 pounds sterling, "whereupon each piece of cloth had been sealed with the seal of the said Henry." The letter alleges the readiness of Pykenham to deliver the cloth in London to said Henry. "But neither the said Henry nor his goods . . . were to be found. Desire them, therefore, to assist the said John Pykenham in their country, that he might obtain payment . . . God Almighty have them ever in His keeping."³

In the sixteenth century the records of the Admiralty Courts, as well as of the Privy Council, are replete with reference to merchants' marks. These marks, in addition to being affixed to the goods themselves or the wrapping thereof,

¹ *Cal. Close Rolls*, Edw. III, 1369-74, August 22, 1371, p. 325.

² *Hamilton v. Davis*, 5 Burr. 2732. The case is confusedly referred to and inaccurately quoted in Campbell's *Lives of the Chief Justices* (N. Y. 1873) iii, p. 316.

³ *Cal. of Letters from the Mayor and Aldermen of the City of London, 1350-70*, ed. R. R. Sharpe, p. 146, March 9, 1366. See also letter dated July 26, 1364, to the Admiral of France, etc. complaining of piracy by seamen from Normandy of 360 pieces of white tin, the marks on which are described for the information of those requested to obtain restitution of the goods. (*ibid.* p. 95.)

are found noted or reproduced in the bills of lading or in the ship's register.¹ For instance, a bill of lading dated November 28, 1541, and introduced in evidence in the Court of Admiralty, refers to "xlvj hogsheads of whales grece and on hogs hede of Cyvill oyle marked all with the mark in the margent and the by mark on the hogs hede of Cyvill oyle. . . ."² In the case of *Michell c. Wines in the Hands of Taylour*, certain goods spoiled from a ship in distress are ordered to be delivered to the plaintiff:

Which 9 vessels or butts of Cretan wine were and are the proper goods of the said Vincent Michell, and, being marked and signed with his usual and customary mark or sign, remain and are in the hands and custody of the said Thomas Taylour . . . (*Que quiden novem vasa sive buttas vini Cretici fuerunt et sunt bona propria dicti Vincentii Michell et signo sive stigmatate suo solito et consueto depicta et signata et in manibus et custodia dicti Thome Taylour remanent et existunt. . . .*)³

In a suit for freight in 1557 the bill of lading involved reads as follows:

"I, Cornelys Denys, master under God of one hoye named the Job of the burthen of lvth tonnes or there abouts doo confesse to have receyved aboard at the kayes of Roane of Peter de Flo merchaunte there residente for and in the names of Mr. Thomas Walker and Richarde Saltonstall That is to saye xxxvj peces of prunes, sixe bales of canvas, thre demye bales of peper, two bales of threde, and one vessell of almandes together with one barrel and a half of vergus (?) and drye peares, all well and duelic conditioned marked with the marke in the margent there resteth one demye bale of paper marked with this marke [the mark] . . . (*marcque de la marcque cy dehors reste ungue demye balle de pappier marcque de ceste marque . . .*)⁴

The Acts of the Privy Council in the same period, dealing with matters of piracy and other questions of restitution of

¹ See W. P. Bennett, *History and Present Position of the Bill of Lading*, p. 2; Scrutton on *Charter Parties* (ed. 1923), Index s.v. "Marks on Goods."

² *Select Pleas in the Court of Admiralty*, vol. i (Selden Society Pub., vol. 6, p. 112).

³ *Ibid.*, vol. ii (Selden Soc. Pub. vol. 11), p. 13 (1550).

⁴ *Ibid.*, vol. ii, p. 62. For other illustrations see *ibid.*, pp. 2, 61, 63.

goods, lay equal stress upon the marks of the goods involved, and frequently reproduce these merchants' marks on the margin of the order in question.¹ For instance, there is a recognizance, dated June 24, 1545, for the release to a certain Spaniard of 241 "balettes of . . . canvas . . . marcked undre the marck in the margent hereof . . ."² There are no less than six cases reported in 1546³ ordering restitution of goods, or rebuking the authorities for a failure to comply with prior orders to the same effect, in which these goods are described as "being marked with those marks in the margent." In 1570 the Council orders certain

merchaunt straingers to appere before the Lords of the Counsell, to thend they may upon their othes testifie upon sight of the markes of all such merchaundizes as in the said shippes are contened, which of late were staid in certen portes, what part thereof do appertaine to Portingales and what do not.⁴

In 1585 the Lords of the Council, writing to the Lord Warden of the Cinq Ports concerning certain merchandise brought into Dover Haven and unlawfully sold "praie the Lord Warden"

to take order that of those merchandises and wares fourtene lastes and one barille of sope may be delivered unto Charles Talven, one hundred and twentie peeces of course Osteland cloth unto David Haeex, three bagges of woll, and six barrills of tallowe unto Jaques Gellee, beinge marked under their severall markes according to a note enclosed in the letter. . . .⁵

The case of the ship *Ugiera Salvagina* which runs through the Acts of the Privy Council from the year 1590 to the year 1593 and appears to have been quite a *cause célèbre* is the last one that will occupy our attention in this connection. The case arose by reason of the fact that twenty-five bags of pepper, part of the goods sequestered from the ship *Ugiera*

¹ See *Acts of the Privy Council* (New Ser.), vol. i, Preface, p. xvii.

² *Ibid.*, p. 201. See also p. 248.

³ *Ibid.*, pp. 378, 382, 434, 435 (two entries), 537-8.

⁴ *Ibid.*, vol. viii, p. 17.

⁵ *Ibid.*, vol. xiv, pp. 10-11.

Salvagina, in the town of Dartmouth, "were uncased of the uppermoste bagges and contrary markes sett on the undermoste bagges."¹ The first entry (January 24, 1590)² refers to the complaint of the Venetian owners as to the alteration of their marks and other lawyers are joined by the Lords of the Council, with the Judge of the Admiralty Court, to determine the cause. The final disposition of this case occurred only after all proceedings in the Admiralty Court had been quashed and, on consent of all parties involved, the case had been sent by the Council to three members of the Council and to certain doctors learned in the civil law for arbitration.³ Finally, in July 1593, upon the basis of the arbitrator's report, an order was made for the distribution of the cargo of the *Ugiera Salvagina* which incorporates the schedules from the "purser's book" and, opposite each entry of bags of pepper, elephants' teeth, camphire, etc., reproduces the merchant's mark of the owner of these goods.⁴

Summarizing briefly the evidence adduced in this chapter, medieval proprietary marks, while not, strictly speaking, trade-marks in the modern sense of the word, were an important factor in the development of modern trade-mark law. As appears from municipal documents and the records of the Admiralty Courts, and also from the statute of 27 Edward III, merchants' marks were regarded as establishing *prima facie* and often even conclusive evidence of the ownership of the goods to which they were affixed. This proprietary significance of merchants' marks still survives in and distinctly tinges the judicial concept of the function of a trade-mark.

¹ See *Acts of the Privy Council* (New Ser.), vol. xxiv, p. 386.

² *Ibid.*, vol. xx, p. 234.

³ *Ibid.*, vol. xxiii, p. 92, August 2, 1592.

⁴ *Ibid.*, vol. xxiv, pp. 385-93. An interesting Italian parallel is the case cited by Lastig (*op. cit.*, pp. 72-3) of the English merchants who registered their mark at the Customs House in Florence and shipped to Samuel Budriess, a Florentine merchant, certain goods to be sold by him on commission. Budriess sold some of these goods to Alessandro Pucci, who went bankrupt a few days thereafter. The English merchants were able to reclaim their goods from Pucci's creditors upon proof of their mark.

A NOTE ON SWAN MARKS

One of the oldest English proprietary marks, which still serves its original function, is the swan mark. In the theory of English law the swan is regarded as "bird royal in which no subject can have property when at large in a public river or creek, except by grant from the crown. In according this privilege the crown grants a swan mark."¹

A silver swan was the principal device on the badge of Henry IV and Henry V, likewise, before his accession to the throne, used the silver swan. By a statute of 1483 it was ordered that no person except the king's sons should have a swan mark, unless he possessed a freehold of the clear yearly value of five marks.² The swan mark itself, called by Sir Edward Coke "*cigninota*," was cut in the skin of the beak of the swan with a sharp knife or other instrument. The king's swanherd was bound to keep a book of swan marks and no new marks were permitted to interfere with the old ones. Owners of swans and their swanherds were registered in the king's swanherd's book. The marking of the cygnets was generally performed in the presence of all the swanherds on the stream in question and on a particular day or days of which all had notice. Cygnets received the marks found on the parent birds but, if the swans bore no mark, the whole were seized for the king and marked accordingly. No swanherd was permitted to affix a mark except in the presence of the king's swanherd or his deputy.³

How seriously the matter of swan marks was taken is evident from the records of those who were permitted to use them. For instance, the Records of the Borough of Reading contain the following entries:

¹ W. Yarrell, *History of British Birds*, (4th ed.) iv, p. 320.

² 22 Edw. IV, c. 6, *Stat. of the Realm*, ii, p. 474. The Statute recites that cygnets had been stolen from their lawful owners and that swans had found their way into the hands of yeomen and husbandmen who had marked them either with their own unauthorized marks or with the marks of those entitled to use them.

³ *Ibid.*, p. 330. See also Browne on *Trademarks* (2nd ed.), p. 14; Edward Peacock, "Swan Marks," *Archæol. Journal*, vol. xli, p. 290; C. H. Mayo, "Swans on the Salisbury, Avon and Dorset Stour," *Somerset and Dorset Notes and Queries*, vol. xiii, p. 297.



(1507) The vew of the Game of Swannys belonging to the Maire and Burges of the Gilde Hall of Redyng after the marke above drawyn, browght in by Thomas Randall of Sonnyng on our Lady evyn th'Assumpcion [Aug. 15], in the xxijth yere of Kyng Henry the VIIth.¹

(1544) At this day is graunted to Nicholas Niclas the game of Swannes, that is to witt, viij Swannes, to have to hym from the feast of Saynt Michaell th'Archaungell [Vacat, *in margin*] last past unto th'end and terme of xx yeres, if the seid Nicholas so long do lyve, yeldyng and paying therfor yerely to the seide Mayour and Burgeses viijs, sterling at ij^o termys in the yere, that is to witt, at the feastes of th'Annunciacion of our Lady and Saynt Michaell th'Archaungell, by yeven procions; the seide Nicholas to maynteyn and kepe the stock, that is to witt, viij Swannes in the merke of the Hall contynowally, and in th'end of the seid terme, or after the disceasse of the seid Nicholas, shall delyver and yeld upp unto the seid Mayour and Burgeses or to their successours viij good white Swannes in the merke of the Hall.²

(1548) At this day, that is to sey, the Fryday [Dec. 21] in the Imbryng weke before the feast of the Nativitie of our Lord . . . anno regni Regis E[dwardi] VIth secundo, John Bell beyng Mayour, hit was graunted to Thomas Benwell the game of Swannes, that is to sey, viij white Swannes, to have to hym from the feast of th'Annunciacion of our Lady next cummyng after the date herof, unto th'end and terme of xx yeres, then next followyng, if the seid Thomas shall fortune so long to lyve; yeldyng and paying therfor yerely to the seid Mayour and Burgeses vjs. viijd. sterling, and also to delyver yerely to the Mayour and Burgeses ther one good signet of a swanne. The seid Thomas to maynteyn and kepe the stock, that is to sey, viij good white Swannes, in the Merke of the Hall, and in th'end of the seid terme, or after the disceasse of the seid Thomas, shall delyver and yeld upp to the seid Mayour and Burgeses, or to ther successours, viij good white Swannes in the seid Merke.³

¹ *Records of the Borough of Reading*, ed. J. M. Guilding, i, p. 104.

² *Ibid.*, p. 188.

³ *Ibid.*, p. 212.

The records of the city of Oxford¹ for the year 1553 contain an entry of an allowance to the Chamberlain for "markyng of the swannys . . . iiij^d." In 25 Elizabeth a jury at Seaford, Sussex, presented John Comber "for markyng of thre duckes of Edw. Warwikes, and two ducks of Symon Brighte with his own marke, and cutting out theire markes."² A most minute description of the method of appointing swanherds and of the procedure for marking swans, registering the marks and protecting the swans on the River Witham in Lincolnshire is contained in "The Ordinances respecting Swans on the River Witham," dated 1570.³ Accompanying these "Ordinances" is a "Roll of Swan Marks, Appertaining to the Proprietors on the Said Stream," the reproduction of which gives an excellent idea of the variations in such marks. In 1609 an entry in the Court Book of the Vintners Company of London requires that "the Swanherd of the Company, with His or Her Majesty's Swanherd and the Swanherd of the Dyers' Company assemble at Lambeth in August and proceed by the river to mark the swans."⁴

¹ Ed. W. H. Turner, p. 220.

² M. A. Lower, "Memories of Seaford," in *Sussex Archæol. Coll.* vol. vii, p. 99.

³ J. Banks, "The Ordinances Respecting Swans on the River Witham" in *Archæologia*, vol. xvi, p. 155.

⁴ W. H. Overall, "The Ward of Vintry," in *Trans. London and Middlesex Archæol. Soc.* vol. iii, p. 426.

CHAPTER III

PRODUCTION MARKS IN THE REGULATION OF TRADE BY THE GILDS AND COMPANIES

IN the preceding chapter we have dealt with merchants' marks *as indicative of property* in the goods to which they were affixed or in relation to which they were used. These marks were very remote in their essential significance from the modern concept of a trade-mark. The trade-mark today is in itself an asset, often of far greater value than the physical property of the business in connection with which it is used. As Mr. Rogers has pointed out, the modern trade-mark is "good will symbolized."¹

But if the merchant's mark considered in our last chapter did not approach the present notion of a trade-mark, the mark that we are now about to consider and that is often carelessly referred to in terms of modern trade-mark law, is even further distant in function and legal significance from our modern trade-mark. While the latter is, as has been pointed out above, an *asset*, the medieval mark indicating source or origin, or, as the Germans call it, the *Produktionsmark* or *Produktionszeichen*, is distinctly a *liability*. Except in a few instances, it is today entirely optional with a manufacturer whether he will use a trade-mark at all. The medieval craftsman would appear from a very early period in gild history to have had little choice as to the affixing of this "police mark" on his wares. In practically every trade, both in England and on the continent, these marks were compulsory.² Kohler describes the marks that the bakers of Verona, the fullers of Siena and other craftsmen of the Italian medieval towns were required

¹ E. S. Rogers, "Some Historical Matter Concerning Trade-marks," 9 *Michigan Law Review* 29, at p. 43.

² The most striking exception occurs in the printing and publishing industries, of which a special study appears at the end of this chapter.

to put upon their goods as "*häufig Pflichtzeichen*."¹ The French writers speak of such marks as "*marques de fabriques obligatoires*."² A Spanish authority on trade-marks points out the compulsory nature of the marks which the guilds of silversmiths, tinsmiths, candle-, taper-, or torchmakers of Barcelona required their craftsmen to affix to their wares in the 15th century.³ In his study of painters' signatures, De Mély shows that, as early as 1426, an Ordinance of the Corporation of Painters of Bruges made the failure to register painters' marks a punishable offense.⁴

It has already been noted that, in a great many instances, the very same mark fulfilled the dual function of proprietary mark, as described above, and of production mark.⁵ Hence, many of the marks that were compulsorily registered with municipal or guild authorities are identical in form with the merchants' marks we have described above. On the other hand, in some industries the production mark was often less complex or decorative. For instance, in the case of bakers' marks, some bakers stamped a regular merchants mark upon their bread,⁶ others contented themselves with a certain number of pricks to indicate the origin of their bread.⁷

Before illustrating what we may term the liability nature of the craftsmen's marks of the Middle Ages, in contradistinction to the asset nature of the modern trade-mark, it will be necessary for us to consider briefly the machinery of

¹ *Das Recht des Markenschutzes*, p. 44.

² See M. de Gailhard-Bancel, *Les anciennes corporations de métiers et la lutte contre la fraude dans le commerce et la petite industrie*, p. 65.

³ D. R. Pella, *Marcas de Fábrica y de Comercio en España*, (Madrid 1911), p. 20.

⁴ Re-registration of such marks was required by an Ordinance of 1500. See F. de Mély, *Les primitifs et leurs signatures*, i, pp. 78-80. For counterfeiting of the marks of "old masters" by copyists, see M. Christ, *Dictionnaire des monogrammes* (tr. from German, Paris, 1672), pp. xvii, xix.

⁵ See *supra*, p. 21.

⁶ See J. H. Macadam, *The Baxter Books of St. Andrews*, p. 132.

⁷ E.g. Three "prykkes" in the case of William Hobold, reported in *Cal. Letter Books, Letter Book K*, p. 247. I am informed by Mr. John C. Tingey, one of the editors of the Norwich records, that these prick marks were also used in Norwich. For other prick marks see E. Bain, *Merchant and Craft Guilds*, p. 213.

production and the economic theories under which this machinery operated during the Middle Ages.

The phases of medieval economic history that bear directly on our subject are threefold:

(1) In the first place, until the fifteenth century or even later, "so large a part of the manufacturing work of the country was arranged on the gild system, that that term may be fairly used to describe the whole organization of industry."¹ Even when industry became the subject of national, rather than local regulation, the guilds and companies were greatly relied upon by the Crown and Parliament to supervise manufacturing processes and trade.²

(2) Secondly, grants of monopoly "formed a regular and almost universal feature in gild charters,"³ and the enforcement of the monopoly was accompanied by the preservation of high standards of production. "Work must be good and 'legal' . . . , an infraction of the regulations must be reported that the gild may not secure a bad reputation."⁴ The supervision of industry by the guilds as well as the observation by the consuming public of the materials and methods of production employed were rendered easy by the physical conditions involved. "Wants were comparatively few and unchanging"; writes Ashley, — particularly of the earlier period of gild control, — "they were supplied by neighboring craftsmen; consumer and producer stood in direct relation with one another."⁵

The great majority of articles in the daily use of the mass of the people were bought by the consumer from the actual maker. If the making of an article was divided between several craftsmen as, for example, that of cloth between weavers, fullers and dyers, each of these groups of craftsmen

¹ W. J. Ashley, *English Economic History and Theory* (10th Impression, 1919), i, part i, p. 96.

² W. S. Holdsworth, *History of English Law* (3rd ed.), iv, p. 321. See also *infra*, pp. 81, 125.

³ A. P. Evans, "The Problem of Control in Medieval Industry" in *Political Science Quarterly*, vol. xxxvi, pp. 610-11. See also W. S. Holdsworth, *op. cit.*, i, p. 568.

⁴ A. P. Evans, *op. cit.*, pp. 615-16.

⁵ W. J. Ashley, *op. cit.*, i, part i, p. 95.

lived within a narrow circuit and under the eyes of most of those who ultimately bought their manufactures.¹

The members of each craft usually lived in the same street or neighborhood. Thus in London the saddlers lived round, and attended, the Church of S. Martin-le-Grand; the lorimers lived in Cripplegate, the weavers in Cannon Street, smiths in Smithfield, and bucklers in Bucklersbury. So in Bristol there were Tucker Street, the home of the tuckers or fullers, Corn Street, Knifsmith Street, Butcher Row, Cooks' Row, and the like. Such a grouping must have enormously strengthened the sense of corporate life in each craft, and must also have made the work of supervision comparatively easy.²

The difficulty of the "appropriation of trade values" in the face of the control of industry either by or through guilds under the physical conditions just described is apparent. From the consumer's standpoint, the greater his proximity to the producer, the better are his opportunities for personal inspection of the goods before purchase, and the less becomes his necessity for relying upon trade-marks or trade-names in the modern sense as a symbol or guarantee of excellence of material or workmanship. Furthermore, had the medieval craftsman been tempted to engage in unfair competition against his fellow-craftsman living in the same narrow street, his desire would seem to have been a very difficult thing to accomplish without detection.

(3) Unfair competition would, however, in all probability have been prevented by other and more fundamental considerations. The guilds sought to exercise and actually acquired a fairly rigid monopoly of the trade in their area,³ and they strove by every means at their disposal to prevent "foreigners" — as the merchants coming from a town five miles away might be described — from competing with their

¹ *Ibid.*, p. 138.

² *Ibid.*, p. 96. For maps showing the localization of industries in medieval London, Paris and Bruges, see G. Unwin, *The Guilds and Companies of London*, pp. 32-4; cf. J. M. Lambert, "The Trade Guilds of Beverley," in *Trans. East Riding Antiquarian Soc.*, vol. xix, p. 91, at p. 99.

³ See W. Cunningham, *The Growth of English Industry and Commerce*, i (5th ed.), p. 445.

gild. But within the gild itself — at any rate, according to the theory of their legislation — there was no such thing as competition, solely co-operation.¹

As on the Continent,² so in England the gild records abound in oaths and ordinances that were calculated to prevent not only the enticing away of each others' apprentices³ but all other forms of or tendencies towards intra-gild competition. The ordinances of the Plumbers of London, enacted in 1365, required "that no one of the said trade shall oust another from his work undertaken or begun, or shall take away his customers or his employees, to his damage. . . ."⁴

The ordinances of the Pewterers' Company of London of 1438 provide "that no persone of the said craft hire procure ne put othir persone of the same craft out of his hous shop or standing place in the cite of London nor in faires markettes

¹ The ethical basis of the gild control of industry is an interesting problem in itself. Charles Gross, in his pioneer study of the *Gild Merchant* (vol. i, p. 36), warns against viewing the medieval guildsmen's motives through "the rose-hued glasses of sentimentality." The English "Guild Socialists," such as Penty in his *Guildsman's Interpretation of History* (London, 1920), in complete disregard of the evidence gathered by Gross and others, insist that "the guilds grew up around the idea of the Just Price" and picture "the whole hierarchy of the guild arising out of the primary necessity of maintaining the Just Price," (Penty, p. 40). However, as pointed out by Lipson (*Economic History*, i, p. 301) the "fair price" or "just price" was determined by the gild itself, and that such determination was not always in accord with the doctrines of Thomas Aquinas is easily discernible in the history of guilds and their relation to the state. One striking bit of evidence on the subject that seems to have escaped notice is the order of Edward III to his justices in 1372 to investigate the gild monopoly in marble for altars and gravestones at Bishop's Lynn, "to the oppression of the people setting a fixed price upon the sale thereof." (*Cal. Close Rolls*, Edw. III 1369-1374, p. 413.) For a recent discussion of the "Just Price" see A. P. Evans, *op. cit.*, pp. 610 *et seq.*

² Cf.: "Even the doctors at Florence might not undertake the cure of a patient who had already been attended by a colleague; but this rule was repealed, no doubt because it was dangerous to the patients. Again it was forbidden . . . to invite into your own shop the people who had stopped before a neighbor's display of goods, to call in the passers-by, or to send a piece of cloth on approbation to a customer's house. All individual advertisement was looked upon as tending to the detriment of others. The Florentine innkeeper who gave wine or food to a stranger with the object of attracting him to his hostelry was liable to a fine. Equally open to punishment was the merchant who obtained possession of another man's shop by offering the landlord a higher rent. Any bonus offered to a buyer was considered an unlawful and dishonest bait." — Georges Renard, *Guilds in the Middle Ages* (ed. Cole), pp. 41-2.

³ W. Cunningham, *op. cit.*, i, pp. 338, 343, 350. Cf. A. H. Thomas, *Cal. of Early Mayor's Court Rolls*, p. 168, for action in trespass, 5 Feb. 1304-5, for enticement of plaintiff's apprentice by defendant.

⁴ H. T. Riley, *Memorials of London*, p. 322.

nor in othir places out of this Citee. . . ."¹ Pursuant to their ordinances, 6 Edward IV, 1467-8, the tailors of Exeter took an oath upon entering the gild not "to stir, procure nor excite either by themselves or by any other men from a brother of the craft any of his customers" even if these customers were quite willing to be served by him.² According to the ordinances of the Brotherhood of St. Christopher of the Waterbearers of the City of London (1496):

Also if ther be eny brother or syster that takeyth eny custemar owt of eny brothers handys without so be that the parties that he serveth wille no lengar have his service and that the said brother seith that he be content of his diewte that he shold have or ellis he to take no mannys custymer owt of hys hands under the payne of vj^sviiij^d, be hit brother or syster.³

The "Barbers' Composition" at Shrewsbury (1483) provided that "no broder" might "induce or tyce any other Mastres Accostom" nor might he obtrude his wares before passers in the open street or erect booths "for to have better sale than eny of the combrethren."⁴ Similar provisions against enticing away one another's customers are found in the ordinances of the Brewers of Oxford (1570),⁵ and the Saddlers of London.⁶

¹ C. Welch, *History of the Worshipful Company of Pewterers of the City of London*, i, p. 10.

² Toulmin Smith, *English Guilds*, p. 317.

³ H. C. Coote, "Ordinances of Some Secular Guilds of London," in *Trans. London and Middlesex Archæol. Soc.*, vol. iv, p. 56.

⁴ F. A. Hibbert, *Influence and Development of English Guilds*, p. 45.

⁵ W. H. Turner, *Selections from the Records of the City of Oxford*, p. 334.

⁶ J. W. Sherwell, *History of the Guild of Saddlers of the City of London*, p. 192.

In the Records of the Borough of Leicester appears the following entry, dated July 5, 1647: "It is ordered and agreed by all the Companie (name unspecified) that if any master of the said occupacion or any of his or their servants, shall at any time call or entice any Chapman or Customer out of, or from, any other man's shopp, or stall in the markt, that then everie such master or servant shall forfeite for everie such offence 2s." (*Records of Borough of Leicester, 1603-1688*, ed. II. Stocks, p. 355.)

See also for a later application of the same principle Acts regulating methods of trade passed by the Merchant Adventurers of Newcastle-upon-Tyne, as most explicit and emphatic on this point: "[30 Sept. 1669] Whereas divers bretheren of this Fellowship have made complaint of severall disorders, and unbecoming words and actions used by severall members of this Court and their servants, not fitt for marchants to use, in selling their marchandise,

To what extent the guilds and their successors, the companies, sought to repress the establishment of an individual good-will on the part of their members, as opposed to a collective or guild good-will, is evidenced by their reluctance to permit one gildsman to use a mark or sign of greater prominence than another, or to exploit the gild seal, which was always set upon goods conforming to gild standards, in conjunction with his own. This was so even in the seventeenth century when the influence of the guilds and companies and their control over their members had long been on the wane.

According to the *Annals of the Barber-Surgeons of London*:¹

Here was Edward Parke for yt he hath wretten upon his Surgeons signe the skoller of St. Thomas of Wallingforde and the said Edward Parke is comaunded by the aucthoritie of this worsshyphfull Courte That he the said Edward Parke shall with all expedicion put out of his said Signe the said wryting & to sett his signe as other Surgeons do without any superscription yt upon and not else otherwyse as he wyll answeere to the contrarye.

An example of the reluctance of the guilds to permit the association of their arms with the mark of one of their mem-

for redressing of which and the like that may followe, it is ordered, &c., That noe brother or sister shall, either by themselves, their servants, or anie other person whatsoever, call too, or invite anie person, either by word or anie signe, to come to their shoppes or sellars, while such person is either speaking with another of this Fellowship or his servants, against their owne shoppes, sellar, or houses, or goeing with them to shew them anie commodity, or be present with them or anie of them; but shall dilligently attende their customers, comeing to their owne shoppes and sellars. And that in their selling they shall not undervalue or disgrace their neighbours goods, but leaveing every chapman to his owne discretion in buying the goods he is to buy, and hath presented to him. Upon paine that every brother or sister soe offending shall forfeite, for the first offence, twenty shillings, for the second forty shillings, and for the third five pounds. Neverthelesse it is and may be lawfull that, if anie chapman have beene treating with anie brother or sister, or their servants, for the price of anie sortes of goods, and doe not agree, the said parties may goe or sende after them to lett them know they may have the goods as they proffered, or the lowest price they will sell att; provided the said chapman be not present with some brother or sister of this Fellowship, or their servants, nor goeing into the shopp of anie brother or sister of this Companie. And it was further ordered, that such person or persons who should truely informe against anie brother or sister, for their breach of the act afforesaid, or anie clause therein specified, should be gratified as the Company shall thinke fitt." (*Surtees Society Pub.*, vol. xciii, pp. 76-77.)

¹ S. Young, *Annals of the Barber-Surgeons of London*, p. 316. Entry dated March 16, 1568.

bers is the ordinance of the Merchant Adventurers of Newcastle-upon-Tyne (1651) that, at the burial of their members, upon their gravestones

the Companye's armes shall not be impaled in the same scucheon with their owne but severally. For every default herein it is ordered that every executor to the deceased brother or sister shall forfitt 5^{li} to the use of this Fellowship, and every brother, that is a carier, for every default shall forfitt 20^s, likewise for this Companye's use. The beadle at burials is required to take care that the armes be thus ordered.¹

Another trade in which individual initiative was strongly repressed was that of the Pewterers of London. In 1569 it was ordered "that Hugh Colyers rose and crowne shalbe made lesser . . ." ², by which it was intended to prevent Colyer from appropriating to himself a mark awarded by the company for use upon goods of superior quality. A century later there was much discussion in the Court of the Pewterers' Company as to whether any member "of the Mistery may have liberty to strike his name at length. . . . It passed in the negative."³ This question as to the desirability of making known to the consumers the name of the maker of pewter seems to have agitated the company for many years, and it was only as late as 1747 that it was finally settled in favor of this practice.⁴ As has been remarked by a writer on pewter marks and old pewter,⁵

¹ *The Merchant Adventurers of Newcastle-upon-Tyne* (Surtees Society Pub. vol. xciii, p. 75. See T. P. Cooper, "The Armorial Bearings of Guilds and Livery Companies" in *The Antiquary*, vol. xlix (New Ser. vol. ix), p. 348. I am indebted to Mr. A. Hamilton Thompson of Leeds, the Honorary Secretary of the Surtees Society, for the following comment, 17 December 1923, with regard to this ordinance: "The reason for the enactment you mention was probably the undesirability of the practice from the point of view of the company. The impaling of the company's shield was in itself incorrect; but, if once impaled, the family of the man who did so, or any member of it, might claim the right to use it among his quarterings, irrespective of his own membership of the company. This seems to me the only possible reason, as the shield thereby would cease to have any distinctive meaning. . . . The measure was, I think, taken by the company to protect its own property from indiscriminate use."

² C. Welch, *op. cit.*, i, p. 264.

³ *Ibid.*, ii, p. 164.

⁴ *Ibid.*, ii, p. 193.

⁵ C. A. Markham, *Pewter Marks and Old Pewter Ware*, p. 112.

Most of the regulations made by the Craft relating to makers' marks seem to have been made with the intention of preventing any form of self-advertisement. But while the Craft as a body were against the members advertising themselves, the members as individuals were very much in favor of doing so.

The sale of wares that were shoddy in material or imperfect in workmanship constituted, in the case of certain commodities, not only a violation of the criminal law or police regulations but also, from the civil standpoint, as intimated above, an injury to the collective good-will of the gilds.¹ In 1316 the Potters of London complained to the Mayor and Aldermen concerning the practices of those who

buy in divers places pots of bad metal and then put them on the fire so as to resemble pots that have been used, and are of old brass; and then expose them for sale . . . to the deception of all those who buy such pots: for the moment that they are put upon the fire and become exposed to great heat they come to nothing, and melt. By which roguery and falsehood the people are deceived and the trade aforesaid is badly put in slander.²

The Fourbours (or Furbishers) of London, in their petition for ordinances of the trade (1350) refer to "the perils which might befall the lords of the land and other folks of the people because of false workmanship and to the great scandal of the folks of the said trade (*en graunt esclauder des gentz du dit mistier*)."³ The Heaumers of London (makers of helmets) in their petition for ordinances (1347), protesting against the intrusion of strangers who, they allege, "have intermeddled, and still do intermeddle, in the making of helmetry, whereas they do not know their trade," state that "by reason whereof, many great men and others of the realm have been slain through their default, to the great scandal of the said trade. . . ." ⁴ Likewise, the Hatters of

¹ E. Lipson, *Introd. to Economic History of England*, i, p. 297 *et seq.*

² H. T. Riley, *Memorials of London and London Life*, p. 118.

³ C. Welch, *History of the Cutlers' Company of London*, i, pp. 240-241.

⁴ H. T. Riley, *op. cit.*, p. 237.

London in the same year pray for an ordinance prohibiting night work since "some workmen in the same trade have made hats that are not befitting, in deceit of the common people, from which great scandal, shame and loss have often arisen to the good folks of the said trade."¹ In the ordinance of the Skinners of Bristol (1408) certain trade practices "whereby the said craft may be defamed" are denounced.²

With the foregoing anti-competitive and regulatory features of the gild system in mind, we now proceed to an examination of the marks with which the medieval craftsman stamped his wares. Every craft, of course, either had its own ordinances concerning such marks or administered statutory or municipal regulations of a similar nature. All of these regulations, whatever their source, made the use of the production mark compulsory. Their expressed purpose was to facilitate the tracing of "false" or defective wares and the punishment of the offending craftsman. The compulsory production mark likewise assisted the gild authorities in preventing those outside the gild from selling their products within the area of the gild monopoly. But what the whole theory of the legislation pertaining to production marks did *not* permit was, as we have already seen in the case of the pewterers, the exploitation of these marks to the direct individual advantage or for the personal advertisement of those who used them. In the course of time in certain trades these police marks or liability marks gradually became, as we shall see, asset marks, — that is to say, they became valuable symbols of individual good-will. This was so in the case of goods of durability and transportability for long distances, especially in the clothing³ and cutlery⁴ trades. But even in the case of these trades their trade-marks began as solely regulatory indicia or police marks of origin and only later developed as symbols of good-will.

¹ *Ibid.*, p. 239.

² *Little Red Book of Bristol*, ed. F. B. Bickley, ii, p. 97. See also letter to the Mayor of London concerning "false work" of the girdlers "to the damage and scandal of the men of the mistery" in *Cal. Close Rolls*, Edw. III, 1354-1360, p. 331; *MS. Archives of the Company of Grocers of the City of London*, ed. J. A. Kingdon, pt. i, p. 66.

³ See *infra*, ch. iv.

⁴ See *infra*, ch. v.

The function of such marks is made apparent not merely from the circumstances under which they were used, but in most cases from the laws and ordinances in which their use was prescribed.

The most typical regulatory mark of the Middle Ages and the one which, through the nature of the goods upon which it was imposed, always remained a regulatory or liability mark was that of the baker. The regulation of baking, the maintenance of standards of bread and the prevention of extortionate prices for bread have always constituted a source of anxiety to those who seek the welfare or the taxes of the people. "Those who supply the people with their necessary food or drink," observes Daines Barrington, an eighteenth century antiquarian, "(as bakers, millers and brewers) have not only always been suspected, more than other traders, of impositions, but have likewise been subject to regulations of peculiar severity."¹

From the trade-mark law standpoint it should also be remembered that "bread could only be made in comparatively small quantities; it cannot be made for a distant or for a far-future market."² It is not surprising, therefore, that on the one hand there is much national as well as local legislation on the subject of bakers' marks, and that on the other hand, whatever references we find to these marks show their uses to have been solely regulatory. The latter fact is true in Scotland and on the continent as well as in England. Considerations of space will prevent any detailed reference to Scottish marks. A minute in the Council Registry of Aberdeen for 1457 gives a list of eleven bakers and reproduces their marks.³ "Every neighbor of the calling was required to stamp his bread and numerous instances are recorded of the punishment of members of the craft for breach of this ordinance."⁴ In the Baxter Books of St. Andrews⁵ it is

¹ Quoted by Sidney and Beatrice Webb, "The Assize of Bread," *Economic Journal*, vol. xiv, 1904, p. 196, n. 1.

² W. J. Ashley, *op. cit.*, vol. i, pt. 2, p. 192.

³ E. Bain, *Merchant and Craft Guilds*, pp. 212 *et seq.*

⁴ *Ibid.*, p. 224.

⁵ Ed. by J. H. Macadam, p. 131.

stated that Aberdeen bakers were required to adopt marks as early as 1398 and a St. Andrews ordinance is quoted that "ilk brother or brother relict Mark thair bread with thair name and surname."

As at Poitiers and St. Germain-des-Prés,¹ so also at Rheims,² the *Statutes des boulangers pâtissiers* (1561), Art. 17, provided that "*chaque boulanger aura marque diverse. . .*" In the statutes of the Gild of Bakers of Florence, each loaf had to bear the mark of the baker stamped upon it. Any bread offered for sale unstamped was at once confiscated by the "officers of abundance" and the offending baker was mulcted in heavy damages.³ Kohler quotes a statute of the city of Novaria likewise severely penalizing the omission of the baker's mark or the counterfeiting of one baker's mark by another.⁴

National regulations as to the price, weight, quality, etc. of bread in England have been traced as far back as Anglo-Saxon times,⁵ and Cunningham has cited ordinances of the eighth and twelfth centuries on this subject.⁶ But the earliest statutory requirement as to baker's marks is found in the *Statutum de Pistoribus*, providing for the punishment of those who violated the more celebrated Assize of Bread (*Assisa Panis et Cervisiac*), usually ascribed to the 51st year of the reign of Henry III (1266). The *Statutum de Pistoribus* which, as just indicated, is a penal statute, provides that "every baker shall have a mark of his own for each sort of bread (*Quilibet Pistor habeat suum proprium signum super quodlibet genus panum suorum*)."⁷ The regulatory feature of

¹ M. de Gailhard Bancel, *op. cit.*, p. 65.

² *Ibid.*, p. 68.

³ E. Staley, *The Guilds of Florence* (2nd ed.), p. 440; G. Lastig, *op. cit.* p. 28.

⁴ *Op. cit.*, p. 45.

⁵ Sidney and Beatrice Webb, *op. cit.*, p. 196.

⁶ W. Cunningham, *op. cit.*, i, pp. 567 *et seq.*

⁷ *Stat. of the Realm*, i, p. 202. Cf. *Rotuli Parliamentorum*, v, 426a. That the crown officials, even prior to the *Statutum de Pistoribus*, recognized the efficacy of bakers' marks is evident from the royal confirmation of provisions made before Gilbert de Preston, who had been sent to Grimsby in 43 Henry III to adjust disputes there between "the rich men" and "the poor men." Among these provisions is one that "every baker shall have his own seal to mark the bread made by him." (*Cal. Charter Rolls*, ii, 1257-1300, p. 15.)

this provision was re-enacted by royal grant to the Mayor and Bailiffs of Cambridge in the following year (52 Henry III) for the keeping of the Assizes, in which is ordained that "every baker shall have his seal and seal his bread (*Quilibet pistor habeat sigillum suum et signet panem suum*), whereby it may be know whose bread it is and if he did not do this he shall be grievously amerced."¹

The Assize of Bread and the *Statutum de Pistoribus*, or at any rate, certain portions of these,² including a provision for the registration of bakers' marks, appear to have been re-enacted or incorporated in many of the local customals or municipal ordinances throughout the kingdom. Section 38 of *The Usages of Winchester*, which probably antedate 1275, requires every baker to put his recognized stamp ("*sua sel cunu*") upon his bread.³ In the version of these *Usages* in Toulmin Smith's *English Gilds*⁴ it is pointed out that this provision concerning bakers' marks was considered of such importance that, in the margin of the Roll wherein it appears, a special mark calls attention thereto. In the "Ancient Ordinary" of the Bakers of York a fine of 40^d was provided for failure to mark bread.⁵ Another provision of the Bakers of York, evidently designed to preserve the monopoly of baking intact from encroachment by the innkeepers, and probably copied from a similar ordinance of the Bakers of London, dated 1365,⁶ ordained

that every loofe of bread be marked with the mark of the baker of whom the sayd bread was bought, to thend and intent that everye person may know that the bread is of the right assize, of such value as it should be, whereby the

¹ *Cal. Pat. Rolls*, Hen. III, 1266-1272, p. 195. The same grant provides that "whosoever of the town of Cambridge shall brew for sale, shall hang out his sign (*exponat signum suum*), otherwise he shall lose the ale."

² See L. Toulmin Smith, "The Bakers of York and their Ancient Ordinary," in *Archæol. Review*, vol. i, p. 125.

³ J. S. Furley, *City Government of Winchester from the Records of the XIVth and XVth Centuries*, p. 82.

⁴ P. 355.

⁵ L. Toulmin Smith, *op. cit.*, p. 131.

⁶ H. T. Riley, *op. cit.*, p. 323.

inkeepers, harborers and ostelers may advouch the sale of their bread by the mark of the baker.

A fine in the extraordinarily large amount of 20^s to the "common Chambre" and 20^s to the "Presenter" was prescribed for bread sold not so marked, to be paid by the innkeeper, harborer or hostler in question.¹ A similar provision that horsebread shall not be made by hostlers but only by bakers and that each loaf was to be stamped with the mark of the baker from whom it had been purchased by the hostler is contained in the Hull Compositions.² The proclamations of the town of Bristol in the fourteenth century also required bakers to put their marks on the loaves they make ("*quod ponant signa sua in panibus quos faciunt*") under a penalty of forfeiture.³

The prevention or punishment of the infraction of such bread-marking ordinances was in some cases part of the function of the local Leet Courts and, in others, came within the jurisdiction of the gild organizations themselves. As we shall see in the case of London, where the bakers' organization was strong and the enforcement of their monopoly the main concern, the bread-marking provisions were often and rigorously enforced. On the other hand, when such matters were left to the local Leet Court and where only the public interest was involved, violations of the ordinances do not appear to have been regarded in a very serious light by the Court. In John Wilkinson's noted *Treatise . . . Concerning the Office . . . of Coroners and Sherifes, together with an Easie and Plaine Method for the Keeping of a Court Leet . . .* (London 1638) is contained the instruction that "also a Baker must set his owne proper marke upon euery loafe of bread that hee maketh and selleth, to the end that if any bread be faultie in weight, it may bee then knowne in whom the fault is."⁴ But the Leet Courts do not appear to have

¹ L. Toulmin Smith, *op. cit.*, p. 218.

² J. M. Lambert, *Two Thousand Years of Guild Life*, p. 305.

³ *The Little Red Book of Bristol*, (ed. F. B. Bickley) ii, p. 224.

⁴ Quoted by J. P. Earwaker, *Court Leet Records of the Manor of Manchester*, i, Introd., p. xiv, n. 1.

been greatly troubled by infractions of the Assize. An entry in the Manchester Leet Court records¹ recites: "*et Dicunt* that all the Bakers and Brewers within this manerr hathe offended and broken the Assize," and indicates that a fine of one penny was the penalty. In the same way, in Southampton, although bakers were required to have the impress of their seal clearly appearing on every loaf "that they might the more readily be detected if they broke the assize" and although bakers' marks seem to have been registered with the municipal authorities,² nevertheless, "time after time, the same bakers were guilty of breaking the assize and yet they escaped with paltry fines of 3^d, 4^d or 6^d."³

The history of the baking industry in London is even richer in this connection than that of the provinces. The bakers appear to have been among the earliest organized industries of London with, at first, a practically autonomous hallmoot of their own.⁴ According to the *Liber Albus*,⁵ a compilation in the latter half of the fifteenth century of ordinances of a very much earlier date:

(1) Each baker shall have his own seal, (*soun seal*) as well for brown bread as for white bread; that so it may be the better known whose bread it is (*issaint que mieutz soit conus a qi le payn soit*).

(2) Each Alderman shall view (*veit*) the seals of the bakers in his ward (*en sa Garde*)⁶.

(3) The bread of the bakers shall be taken (that is, for

¹ April 18, 1560.

² P. Studer, *The Oak Book of Southampton* (in Southampton Record Society, vol. II) ii, Introd. pp. xxvi-xxvii.

³ *Ibid.*, p. xxviii. Not without justification J. W. Jeudwine, *Tort Crime and Police*, p. 220, remarks that "the assize was broken so wholly and with such regularity that the fines look like excise licenses."

⁴ G. Unwin, *The Gilds and Companies of London*, p. 31.

⁵ *Liber Albus in Munimenta Gildhallae Londoniensis* (Rolls Series) i, pp. 264-5.

⁶ At the end of the *Liber Albus* (i, p. 702), where references are given to matters found in the Letter Books, the wording is "*Quod quilibet Aldermannus habeat signum in custodia*." The wording in *Letter Book A* reads "that each Alderman shall view (*videat*) the seals in his ward (*custodia*)." (R. R. Sharpe, *Cal. Letter Books of the City of London, Letter Book A*, p. 216). It would therefore appear that possibly the earlier practice may have been for the baker to leave his seal in the custody of the alderman who, at the proper time, either sealed the bread himself or delivered the seal to the baker for the particular occasion.

examination as to weight and quality) every month, once at the very least, or more times if it might be necessary.

(4) Each baker shall show his seal at each Wardmote, so that it may be known (*si qil soit conuz*).¹

The antiquity as well as the importance of bakers' marks in London is strikingly indicated by two entries in the Rolls of the Mayor's Court for the year 1303. The first of these entries reads as follows:

A jury of the venue of St. Clement's Lane, consisting of Thomas de Wynton and others, said on oath that Stephen de Wynton did not make the brown bread (*panem bissum*) which was seized in the bakehouse of Thomas de Wrotham in St. Clement's Lane, for which he was arrested on the ground that bread weighed 20s 8d less than it ought to do, but that a certain Thomas de Bedeford, oven-man (*furnator*) of Thomas de Wrotham, made it and *sealed it with the seal belonging to the house of his master*, to his master's profit. Judgment that Stephen go quit, and that Thomas de Wrotham be distrained to answer concerning what may be charged against him.²

Four days later it is recorded that

A jury was summoned from the venue of St. Clement's Lane by Candelwykstrete to say whether Thomas de Wrotham made a certain brown loaf &c. . . . Finally a jury consisting of Stephen le Potter and others said on oath that the above Thomas had no profit from bread made in his bakehouse, except 4d the quarter, which was the rent for the use of the bakehouse and utensils, and that a certain Thomas de Bedeford made the bread and sustained judgment for the same. Judgment that the defendant be acquitted.³

The system of registration of bakers' marks, especially when considered in connection with the ordinance of 1365 for the stamping of all bread sold by hostlers,⁴ affords an excellent illustration of the monopolistic aspect of gild activity and

¹ *Munimenta Gildhallae Londoniensis* (Rolls Ser.) iii, p. 264.

² A. H. Thomas, *Cal. of Early Mayor's Court Rolls of the City of London*, p. 152. (Italics, the writer's.)

³ *Ibid.*, p. 153.

⁴ See *supra*, p. 50.

purposes.¹ This phase is again strikingly manifested in an incident that occurred in 1440 when, according to *Letter Book K* of the City of London²

came William Hobold, baker, before Robert Large, the Mayor, and the Aldermen, and complained of John Halle, a foreign baker of Southwerk, marking the bread with his (*i.e.*, the said William's) mark, viz., with three "prikkys," a mark that from time immemorial had belonged to his house in Clement Lane, whereas every baker ought to have his own mark. Thereupon the Mayor and Aldermen forbade the said John Halle to use the said mark, except (*sic*)³ for bread exposed for sale in the City, and so to be weighed like all other bread made in the same borough.

This passage at first blush reads much like a modern case of trade-mark infringement. But the explanation of it is to be found in the antipathy of the London bakers for the bakers of Southwark. The importation of "foreign bread," that is, of bread made outside the walls of the city of London was often prohibited,

and against that made in Southwark, as against most other things connected with that locality, there seems to have been an extraordinary degree of prejudice, the bread of that place being more than once excluded by name, "because the bakers of Southwark are not amenable to the justice of the city."⁴

I am indebted to Mr. A. H. Thomas, the courteous and learned Clerk of the Records of the Guildhall, London, for the explanation that the case of William Hobold was simply

the case of a foreigner either intentionally or unintentionally adopting the trade-mark of a citizen . . . It appears that the trade-mark went with the bake-house which will explain why Hobold asserted that the "*signum*" belonged to

¹ See *supra*, pp. 40, 42, n. 1.

² *Cal.*, p. 247.

³ The word *except* renders this passage meaningless and should be omitted. I am advised by Mr. Thomas who writes in a letter dated Oct. 31, 1923, containing much valuable information concerning this case, that Dr. Sharpe "clearly made an error in his abstract of the passage."

⁴ *Munimenta Gildhallae Londoniensis*, Introd. to *Liber Albus*, i, p. lxvi.

his bake-house in Clement Lane from a time whereof the memory of man runneth not to the contrary.¹

Mr. Thomas concludes that "Hobold was afraid of being called to account if Halle's bread was found unsatisfactory. . . ."

The cases of Thomas de Wrotham in the fourteenth, and of William Hobold in the fifteenth century, are therefore merely incidental to the general plan of attempting the restriction of local trade to local bakers and, from the trade-mark standpoint, merely indicative of one baker's fear of being held responsible for the defective goods of another. The anxiety of a baker not to be held liable for his fellow-baker's sins of commission and omission in the baking of bread is quite intelligible when we consider that the penalty for selling "false bread" was the hurdle, or later, the pillory.²

That, at any rate in the sixteenth century, the bakers of London regarded the sale of "false bread" and the failure to

¹ For a similar but later association of a mark with a certain business or premises in which the business was conducted, rather than with the individual owner or occupant, see R. Fitch, "Notices of Norwich Brewers' Marks" in *Norfolk Archæology: Norfolk & Norwich Archæol. Soc.*, vol. v, page 313, with plates of forty marks. E.g., the mark (no. 1) "borne by Henry Woodes in 1606, and after him, by five successive brewers, ending . . . in 1725."

² According to the *Liber Albus* (compiled 1419), the law was that, for the first penalty, the baker of defective bread was to "be drawn upon a hurdle from the Guildhall to his own house, through the great streets where there may be most people assembled, and through the midst of the great streets that are most dirty, with the faulty loaf hanging from his neck. If a second time he shall be found in the same transgression, let him be drawn from the Guildhall through the great street of Chepe, in form aforesaid, to the pillory; and let him be put upon the pillory, and remain there at least one hour in the day. And the third [time that such] default shall be found, he shall be drawn, and the oven shall be pulled, down and the baker [made to] forswear the trade within the City for ever. . . ." (*Munimenta Gildhallæ Londoniæ* (Rolls Ser.) i, p. 265; iii, pp. 83-4). The punishment of the hurdle was instituted in 10 Edw. I, 1281-2 (*Cal. Letter Books, B*, p. 244, n. 1; *French Chronicle of London*, tr. H. T. Riley, p. 240), and in *Letter Book A* (*Cal.*, pp. 120-1) appears a list of bakers "condemned to the hurdle" in 1282. According to *Letter-Book B* (*Cal.*, pp. 243-44), in 1297 it was ordained that the pillory be substituted for the hurdle. However, the following colorful entry in the *Early Mayor's Court Rolls* would indicate that use of the hurdle continued for some years subsequent to 1297:

"[19 March, 1299-1300] Richard Davy, baker, was attached to answer the Mayor and Aldermen on a charge that, whereas on Friday the Feast of the Translation of St. Edward, he was dragged on the hurdle because his bread was false, when he arrived home and descended from the hurdle and entered his house, he took a bone and threw it at the tabor-player [*i.e.*, the musician customarily marching ahead of such offenders in their procession through the streets], and broke the tabor through the middle . . ." (A. H. Thomas, *op. cit.*, p. 67).

impress a mark upon the bread as injurious to the whole craft is evident from the records of the Bakers' Company. An entry for January 16, 1536, states that

every baker that doth not seall or marke apparantly on almaner lofe brede, white and wheten and houshold, that it may be knowen of whoes bakying it is, shall forfaytt and pay without any redempcion as often as it shall be founden defectyff, vjs. viijd. to th'use of the Company.¹

The following month "Davyd Johns is commaunded to bryng in vjs. viijd. at the next Great Day for noon-sealyng of his halff-peny manchettes."²

In how heinous a light the mis-use of seals on bread was regarded is evident from an entry in the year 1554 which recites that "at this Co'te . . . John Davys was charged in all his offence, that is to say, as-well for lack of weight, as for having a wrong seall, and for beating his wife, for the which he hath not onely deserved shame but also banyshment."³

If bread was essential for the sustenance of the king's people, drink of good quality and in good measure was likewise necessary for their cheer and contentment. Consequently, not only were the ale-sellers required, as indicated above,⁴ to display their signs (*signa*) for their proper control under the Assize of Ale, but barrels and bottles were to be carefully marked to insure full measure, and both the manufacturer of a short-measure container as well as the actual seller of the liquids in such containers were to be punished. As early as 1373 an ordinance of the Bottle-Makers of London prescribes that "every bottle-maker shall place his mark on bottles and other vessels, made of leather, in order that his work may be identified."⁵

Likewise, all "turnours," *i.e.*, makers of wooden measures for wine and ale, were in 1347 summoned before the Mayor and Aldermen of London and ordered,

¹ J. G. Nichols, "Bakers Hall and the Muniments of the Company", in *Trans. London and Middlesex Archæol. Soc.*, vol. iii, pp. 59-60. See also entry April 16, 1537, on same page.

² *Ibid.*, p. 60. ³ *Ibid.*, p. 62. ⁴ E.g., *supra*, p. 50, n. 1.

⁵ *Cal. Letter Books, City of London*, Letter Book G, p. 317.

that each of these makers shall have a mark of his own, and should place such mark upon his measures at the bottom thereof, without, when by the standard they should have been examined; that so, when any measure made by one of the makers aforesaid shall in any tavern or brewhouse be found to be false or defective, then as well the person by whom such measure shall have been made, as he who shall have sold by such measure, shall incur the punishment at the discretion of the Mayor and Aldermen to be ordained for the same . . . and the said makers of the city aforesaid were ordered to bring here samples of their marks . . . and deliver the same to . . . the Chamberlain, there in the Chamber of the Guild Hall to remain. Which marks at the end of this book [Letter Book F] are set forth.¹

For the same purpose an ordinance of the "Bere Breurs" (1453) required that beer brewers make their vessels according to the Assize and "and have them stamped with their own iron marks, which marks are to be recorded in the Chamber. . . ." ²

In the reign of Henry VIII the subject of coopers' marks was considered of such importance that a statute was passed, requiring that "every couper marke his vessell with his own marke upon the payne of iij^s and iiij^d." ³ However, long before the enactment of this statute, coopers' marks were the subject of local regulations. In 1420 it was ordained by the Coopers' Company of London that every cooper should have his own mark or sign of iron (*soun propre une merche ou signe de ferre*), which he was to record in the Coopers' Court.⁴ A lengthy petition of the Coopers' Company to the Lord Mayor and Aldermen of London in 1440 indicates how important the coopers believed it to be to prevent the misappropriation of their marks. The petition, after reciting prior efforts to protect coopers' marks, states:

Also, the seid Coupers besechyn to be graunted that when

¹ H. T. Riley, *Memorials*, p. 235.

² *Cal. Letter Books, Letter Book K*, p. 354. See *supra*, p. 55, n. 1.

³ *Stat. of the Realm*, vol. iii, p. 368, 23 Hen. VIII, c. 4, clause XI. See W. S. Holdsworth, *op. cit.*, vol. iv, p. 560 for extract from Lambard's *Eirenarcha* (1581) concerning enforcement of this Act by Justices of the Peace.

⁴ J. F. Firth, *Coopers' Company, London*, p. 10.

ony Couper of the citee aforseid dieth or passeth away, that his executours or assignes bryng in or do bryng, to the chamb'layn of this citee for the tyme beyng, the same iren marke the which he hath vsed in his life in his warde, to be kepced for dowte of alienynge of the seyde marke in to the handes of evyldoers or counterfetors, be the which the common people mught be dyscevyd and the craft reproued to grete hurt and damage, on the peyn to pay at euery tyme in whome suche defaute is found x^s, to be departed betwene the chambre and the crafte in fourme aforsayde.

Also, the seide Coupers besechen that ordenēce might be made that no man, fre nor foreyne, ymagyne nor falsly contrefete the markes of Coupers, the which thei haue in grete charge, and ar entrid in the Yeldhalle, nor vnder the colour of theym bere no by marke be the which the common people might be disceuyd and the craft gretely hurt; but that euery Couper wel and pesably his marke jciouse and occupie vnto the same entent that the seid markes wer ordeigned. . . .¹

These marks were entered in the *Letter Books of London*. For instance in *Letter Book I* (1419-20) the ordinance of January 27, 1419-20 (7 Henry V), requiring all coopers to have their own mark or sign for making barrels or kilderkins, recites the very heavy penalty of £10 for not recording these marks and 40^s for selling unmarked vessels. The entry in the *Letter Book* records that, pursuant to the above ordinance, 'coupers' residing within the franchise of the city were to present to the court within fourteen days their marks, made of iron, to be recorded. The names of such 'coupers' and their respective marks are subsequently entered in the *Letter Book*.² Some of the marks in question are reproduced in the frontispiece to this volume.

Despite much legislation on the subject,³ the enforcement

¹ *Ibid.*, pp. 12-13. The ordinance prayed for was granted 6 May, 1440 (*ibid.*, p. 14).

² *Cal. Letter Books, Letter Book I*, pp. 237-8. From the standpoint of any early traces of a succession of marks it is interesting to note that in this list of coopers' marks there is a reference to a transfer of a mark after death of the holder to another cooper. Again in *Letter Book K* (see *Cal.*, p. 134) the marks of a number of coopers are entered, and at the end of *Letter Book L* (see *Cal.*, p. 322) are entered the marks of twenty-four coopers.

³ For Aberdeen regulation, 1507, see E. Bain, *Merchant and Craft Guilds*, p. 237.

of the regulations concerning coopers' marks would in many instances appear to have been even less successful than in the case of marks on bread. In London a member of the Coopers' Company was amerced in 1444 "for defective marking,"¹ and the Southampton Court Leet records contain a constant succession of fines for failures of the coopers there to "sett there marks upon there caske by reason whereof we cannot come to the true knowledge of the offenders."²

But it was not only in the matter of eating and drinking that the craft and the consumer were enabled to trace defective wares through the use of regulatory marks. From the standpoint of coinage, the crown had a vital interest in maintaining the standards and regulating the assay of gold and silver plate.³ Furthermore, from considerations already indicated with regard to other crafts, it was to the interest of the goldsmiths themselves to maintain such standards. A statute of 37 Edward III (1363) provided that

every Master Goldsmith shall have a Mark by himself (*un merche a per lui*) and the same Mark shall be known by them which shall be assigned by the king to survey their work and Allay . . . and after the assay is made the surveyors shall set the King's Mark [i.e., the leopard's head] and after the Goldsmith his Mark for which he will answer (*& puis lorseure son merche per quel il veot respondre. . .*)⁴

The ancient customs and liberties of the town of Beverly indicate that the local point of view coincided with that of the national authorities as to the regulatory nature of the goldsmiths' marks.

¹ J. F. Firth, *op. cit.*, p. 41.

² *Southampton Court Leet Records*, vol. ii, (Southampton Record Soc. Pub., Vol. IV) p. 446, entry No. 64. Cf. *ibid.*, p. 447, entry No. 67, also Vol. i, p. 105, entries No. 63, 64, 65, 66.

³ W. Cunningham, *op. cit.*, pp. 326 *et seq.*

⁴ C. 8. *Stat. of the Realm*, i, p. 380. For further provisions requiring the imposition and registration of goldsmiths' marks, see 2 Hen. VI (1423) c. 17 (*Statutes of the Realm*, ii, p. 224); 17 Edw. IV (1477-8) c. i (*ibid.* ii, pp. 456-7). For legislation concerning goldsmiths see C. J. Jackson, *English Goldsmiths and Their Marks* (2nd ed. 1921) ch. 2. This monumental work completely justifies its sub-title: "History of the Goldsmiths and Plate-Workers of England, Scotland and Ireland."

Also Tuesday next before St. Martin's Day in winter A.D. 1365, Simon of Corby, Walter of Swine . . . goldsmiths, took oath before the twelve keepers of the town of Beverly . . . that they would not let any vessels or other works wrought or to be wrought by them pass out of their hands unless they have been marked with their usual marks (*nisi signis suis consuetis fuerint signata*).

Again in 1409 an order was made that "gold and silver wrought in the town of Beverly should be pure and fine and of true alloy, without fraud or defects that should be prevented, and that everyone's mark should be known in the Guild Hall."¹

The regulatory nature of the goldsmith's mark is well stated in a valuable seventeenth century treatise for goldsmiths, entitled *The Touchstone for Gold and Silver Wares*, printed in London in 1677:

Our law (as I conceive) did think the thus setting up the marks on the work to be the securest way to prevent fraud . . . ; for if it would not deter from the working and selling coarse gold and silver wares, yet would it be a sure way to find out the offenders and to have the injured righted. But if the mark might be omitted and the works should pass but into a third owner's hand, for the most part it would be impossible to discern one man's work from another, by reason that divers workers made all sorts of work in shapes so near alike.²

There is hardly a phase of medieval industry in which similar ordinances do not occur and in which the basis of these ordinances is not recited in the law itself. Every court hand-writer or scrivener of the city of London was required (1373) to "put his name to the deeds which he makes; that it may be known who has made the same."³ Every master blade-smith of London (1408) "shall put his own mark upon his work, such as heads of lances, knives and axes . . . that it may be known who made the same, if default be found

¹ *Beverly Town Documents*, ed. A. F. Leach (Selden Soc. Pubs. vol. 14), p. 40.

² Quoted by C. J. Jackson, *op. cit.*, p. 56.

³ H. T. Riley, *op. cit.*, p. 373.

therein.”¹ The Northampton Waxchandlers’ Ordinances (1466) required that, “after the seal of the wardens had been affixed to torches and torchettes”, “the Owner of the Torchcs or Torchettes shall have Anothere seall of his owne, that he may sett upon Torchcs or Torchettes . . . in witnessyng of his owne deede.”² The Worcester Tilers’ Ordinances (1467) provide that

every tyller makynge and sillynge it into the cite, sett his propre marke vppon his tyle, to that ende, yf it be defectif or smalle, that men may have remedy of the seid partie a[s] lawe and resonne requirith. And he that refusith to marke his tyle as it is aforn reherced, shalle lese to the comyn tresor xx.s, as ofte tyme as it apperith to be areryd.³

A complaint in the Norwich Assembly (1512) was made that weavers “leue out . . . their woven markys” to conceal the origin of worsted “defectiff in stuff and workmanship.”⁴

But a further recital of these ordinances would be supererogatory. The joiners of London (1309),⁵ the heaumers of London (1347),⁶ the weavers of Bristol (1355),⁷ the cutlers and bladesmiths of London (1365),⁸ the fullers and walkers of Coventry (1468 and 1472),⁹ the pewterers of London (1501-2),¹⁰

¹ *Ibid.*, p. 570.

² W. L. D. Adkins, *Records of the Borough of Northampton*, i, p. 306.

³ Toulmin Smith, *English Gilds*, p. 399.

⁴ *Records of the City of Norwich*, ed. W. Hudson and J. C. Tingey, i, p. 108. Under date November 17, 1923, Mr. Tingey has been good enough to refer me to the “usual formula: ‘We find a piece of cloth marked thus (indicating mark) to be defective in . . .’ The weaver’s mark was forced upon him and its appropriation by another was a matter for the officers of his craft, for it could not be tolerated by the Company.”

⁵ *Liber Custumarum in Munimenta Gildhallae Londoniensis*, ii, p. 538.

⁶ *Cal. Letter Books of the City of London, Letter Book F.*, p. 169; H. T. Riley, *Memorials*, p. 238. Cf. *Cal. Letter Books, K*, p. 334. See *infra*, ch. v, for further references to helmet-makers’ and other armorers’ marks.

⁷ *The Little Red Book of Bristol*, ed. F. B. Bickley, ii, pp. 5-6.

⁸ C. Welch, *History of the Cutlers of London*, i, p. 249. *Cal. Close Rolls, Edw. III, 1364-8*, p. 182. See *infra*, ch. v, on cutlers’ marks.

⁹ *Coventry Lect Book*, ed. M. D. Harris, i, pp. 338, 375.

¹⁰ See C. Welch, *History of the Pewterers’ Company*, vol. i, pp. 94-6. Cf. statute 19 Hen. VIII, c. 6, clause III (1503-4) requiring pewterers and braziers to mark all hollow wares of pewter ley mettal “with severall markes of their own.” (*Stat. of the Realm*, ii, 651-2). Further reference to pewterers’ marks will be found in the chapter on cutlers’ marks.

the hatmakers of Norwich (1543),¹ the cordwainers and shoemakers of Hull (1564),² the cutlers of Sheffield (1564),³ the founders of London (1614),⁴ — all insisted, or were compelled by local or royal authority to insist that the products of their members should be marked not only with the seal of their organization but with the individual mark or seal of the producer in question. A single illustration of the practical application of this system will suffice. In 1428 proceedings were held before the Mayor of York concerning the sale of adulterated metal products, one John Fyssh being accused of selling “gyrdels of mengeld metaille agayn ye ordenaunce of hys crafte.” Fyssh defended himself by setting up the claim that he had bought the metal from John Lyllyng. In the subsequent proceedings against Lyllyng, which ended in his being adjudged guilty, the record states:

And, after this, come William Kyam of York merchaunt, and sayd to ye sayd Mayr and other that he was late at Hull, and come to John Bower stathe, and thar John Bower profered to sell hym a laste of osmundes [a certain quantity of iron], and yar this William Kyam saw ij barells of osmundes market with ye marke of John Lyllyng. . . .⁵

To summarize briefly, neither the physical circumstances surrounding gild life nor the economic theories underlying the functions actually exercised by the gilds encouraged the development of an individual gildsman's good-will, nor the exploitation of the symbol of such goodwill, *i.e.*, his trade-mark. The profuse legislation of the gilds concerning marks was designed solely to maintain standards of workmanship for the protection of the collective good-will of the gild and to permit the tracing of the sale of “foreign goods” for the enforcement of the gild monopoly. The marks used by the medieval

¹ *Records of the City of Norwich*, ed. W. Hudson and J. C. Tingey, ii, Introd. pp. lxiii to lxiv.

² J. M. Lambert, *op. cit.*, pp. 316-17.

³ R. Leader, *History of the Cutlers of Hallamshire*, i, p. 7.

⁴ W. M. Williams, *Annals of the Founders Company*, pp. 26, 30, 71, 91, 98, 114, 118, 130.

⁵ “English Miscellanies,” in *Surtees Soc. Pub.* vol. lxxxv (1888, vol. ii), p. 2.

gildsman, *quâ* gildsman, were in their origin purely regulatory or police marks, and, as such, liabilities, not assets. The same mark might ultimately acquire a secondary significance as a symbol of the excellence of its user's workmanship and wares, but this secondary development is found only in certain industries dealing in commodities capable of transportation for a long distance, such as cloth, cutlery and to a lesser degree pewterware, and not in perishable foodstuffs. The same was true of those marks which craftsmen were required by statute to affix to their wares. The gildsman might, or might not, as he saw fit, and often did use his compulsory production mark or some other mark to establish the ownership of his goods, but this proprietary mark or merchant's mark, as it was called, has no inherently necessary historical or legal relation to the production mark.

A NOTE ON EARLY PRINTERS' AND PUBLISHERS' DEVICES¹

Writers on the history of trade-mark law have always attached much significance to the oft-quoted warnings concerning infringement of devices by three famous printers and publishers of the Renaissance.² They cite Aldus Manutius, (*fl.* 1494-1515) who, in his preface to his edition of Livy of 1518, said,

. . . to Aldus' *Institutiones Grammaticae*, printed in their offices, they [that is, the Florentine competitors of Aldus] have affixed our well-known sign of the dolphin wound around the anchor. But they have so managed, that any person who is in the least acquainted with the books of our production cannot fail to observe that this is an impudent

¹ Although the printers' and stationers' organizations much resemble in form and purpose other guilds and companies, it has been deemed advisable to separate all references to printers' devices and marks in a note at the end of this chapter. The primary function and origin of printers' devices and marks would, upon careful investigation, appear to have been decorative rather than regulatory.

² J. Kohler, *Das Recht des Markenschutzes*, p. 41; W. H. Browne, *Treatise on the Law of Trademarks* (2 ed. Boston 1898) pp. 12-14; F. S. Rogers, "Some Historical Matter Concerning Trademarks, in 9 *Michigan Law Review*, p. 29, at pp. 35-6. Mr. Rogers states, at p. 36: "The use of trademarks by printers was the inevitable consequence of the conditions which resulted from the absence of any notion of property in literary work."

fraud; for the head of the dolphin is turned to the left, whereas that of ours is well known to be turned to the right.

Josse Badius Ascensius who flourished at Paris from 1502 to 1532 wrote: "We beg the reader to notice the sign, for there are men who have adopted the same title and the name of Badius, and so filch our labor."¹ Benedictus Hector of Bologna (*fl.* 1487-91) in his edition of *Justinus et Florus* inserted the following notice: "Look at my sign which is represented on the title page and you can never be mistaken."

However, these warnings uttered by early printers must be regarded as the exclamations of outraged victims of unfair competition rather than as a threat to invoke the protection of the law for a definite legal right in a device. No inference can properly be drawn therefrom that the original employment of printers' devices was "merely an attempt to prevent the inevitable pirate from reaping where he had not sown,"² that is to say, in some way or other, to protect the copyright of the books in which they appeared.³ Bibliographical researches into the history of printers' devices have established that at any rate in their origin and primary *raison d'être* they bear no resemblance to the industrial marks which we have described above, but that on the contrary: (1) their use was optional, — never compulsory; (2) that they were variable or replaceable at the will of the user; (3) that there was no limitation upon the number of devices used; (4) that their use was that of a symbol of self-expression — a mark of personality; and that their functional development was decorative rather than regulatory.

¹ For the counterfeiting of Badius' devices and imitation of his publications, see P. Renouard, *Bibliographie des impressions et des œuvres de Josse Badius Ascensius*, i, pp. 24, 46.

² W. Roberts, *Printers' Marks*, p. 1. An interesting recent application of the view that printers' devices were in origin essentially trade-marks is to be found in H. R. Plomer's study of *English Printers' Ornaments* (London 1924). Explaining his exclusion of printers' devices from that work, Mr. Plomer writes (Preface, p. vii): "Printers' devices, being in the nature of trade marks, have no place in this volume, as, although decorative in themselves, they were not used simply for the sake of embellishing the page."

³ See A. W. Pollard, "Printers' Marks of the Fifteenth and Sixteenth Centuries," in *The Connoisseur*, vol. ii, p. 262, at p. 264.

Gutenberg appears to have seen no necessity for the use of any device,¹ and it was not until 1457, three years after the earliest dated piece of printing (1454),² that the first known printer's device — the twin-shields — was used by Fust and Schoeffer of Mainz in their colophon to the Mainz Psalter. The original function of printers' devices and their relation to colophons has been dealt with at some length by Pollard in his *Essay on Colophons*.³ He there points out that in 1472 Schoeffer concludes his colophon to the *Decretum Gratiani cum glossis* with the phrase, "*suis consignando scutis feliciter consumavit.*" ". . . Here," says Pollard, "on the authority of the printer who has used one, we have a clear indication of the reason which made him put his mark in a book — the simple reason that he was proud of his craftsmanship and wished it to be recognized as his: 'By signing it with his shields Peter Schoeffer has brought the book to happy completion.'" ⁴ "As between printers in different cities, there was certainly no copyright in colophons" ⁵ and both Schoeffer's colophons and his device of the twin-shields were used, without recorded complaint on his part, by printers at Nuremburg and Basel in their reprints of his edition.⁶ The relation of device to colophon is thus elsewhere explained by Pollard:

Sometimes it was placed so as to separate the colophon from the text, sometimes it followed the colophon and sometimes superseded it. . . . In any position the device was sure to be decorative and effective and long after the introduction of the title page it maintained its position as an appropriate ornament to the end of a book.⁷

¹ K. A. Barack, *Introd. to Elsässische Büchermarken* (ed. Heitz, Strassburg 1892), p. xii.

² A. W. Pollard, *Fine Books*, p. 47.

³ A. W. Pollard, *An Essay on Colophons* (The Caxton Club, Chicago 1915), p. 21. In 1473 a similar colophon and device of twin-shields was used by Schoeffer and the device and phrase, "*suis consignando scutis feliciter consumavit,*" occur again in colophons of 1475 and in those to several of his books of the three following years. In 1479 the phrase is varied to "*cuius armis signantur*" (*ibid.*, p. 22).

⁴ *Ibid.*, p. 22. For further evidence adduced by Pollard see *ibid.*, p. 23.

⁵ *Ibid.*, p. 17.

⁶ *Ibid.*, p. 18. See also A. W. Pollard, *Fine Books*, pp. 60-61.

⁷ A. W. Pollard, *Last Words on the History of the Title-Page*, pp. 12-13.

In the third decade of the sixteenth century, when the label title-page became more common, printers' devices, especially in Italy and Germany, were often used to decorate the blank space beneath the title.¹

If the evidence of the colophons wherein printers' devices were first used as to the reason for the use of these devices is insufficient, the remarkable series of studies of printers' devices in various European cities, *Die Büchermarken oder Buchdrucker, — und Verlegerzeichen*, edited by Heitz of Strassburg, may be said to have adequately established their original function and nature. Barack in his introduction to the volume on Alsatian marks has pointed out how devices began as a simple monogram or merchant's mark or *Hausmark* in a shield, — often accompanied by a cross for the protection of the sale or goodwill of its user, — and how later these devices became highly decorative and ornamental.² Heitz's great series of studies, supplemented by later researches, has likewise established the use of printers' devices to have been entirely optional and without legal significance, — at any rate until toward the end of the sixteenth century.

For instance, Ulrich Zell, who printed at Cologne from about 1463 to nearly the end of the fifteenth century, did not commence to use a device until practically the end of his career and then did so but seldom. Among the early printers of Basel many omitted their devices as they did their names.³ The early Strassburg printers likewise used no mark.⁴ Kristeller, the historian of Italian printers' devices and of Italian woodcuts, has shown the close relation of the two and points out that devices occur more commonly in early illustrated and popular books than in un-illustrated and in later works.⁵ It has been estimated that the 351 marks reproduced by Kristeller belonged to 184 printers or publishers, "perhaps a

¹ A. W. Pollard, *Early Illustrated Books* (2nd ed. London 1917), pp. 33-34.

² See K. A. Barack, *Introd. to Elsässische Büchermarken*, p. xii; cf. H. G. Aldis, *The Printed Book*, p. 25.

³ C. Bernouilli, *Introd. to Basler Büchermarken*, p. x.

⁴ K. A. Barack, *op. cit.*, *Introd.* p. xii.

⁵ Paul Kristeller, *Die Italienischen Buchdrucker, — und Verlegerzeichen bis 1525*, p. xi.

third of the whole number at work in Italy up to 1525 so that plainly many Italian firms never used them at all."¹ Haebler, the historian of the early printers of Spain and Portugal, has shown that many famous early Spanish printers such as Johan Kronberger,² of Lisbon and Seville, Juan de Burgos³ and Luschner⁴ of Monteserrat and Barcelona, used such devices indifferently and inconsistently if at all.

Printers who adopted devices often used several at the same time or in succession.⁵ According to Roberts, "a full description of the various marks used by Christophe Plantin alone would fill a small volume."⁶ While some Italian firms used no devices, on the other hand, "Lucantonio Giunta at Venice had ten different variations of the Florentine Lily, and Filippo Giunta at Florence employed five more."⁷ The Elzevirs used four major as well as several minor devices.⁸ Johann Rosenbach, the second printer in Barcelona (1492), used two quite different marks at different times, the first with the initial of his native town Heidelberg as the principal feature, the second, late in the sixteenth century, featuring the arms of Burgundy supported by two stags.⁹ Jan Van Doesborgh, who flourished in Antwerp in the first quarter of the sixteenth century and specialized in the English book trade, used during his career three variations of one device and two variations of another.¹⁰

Furthermore, as has been pointed out by Mr. Falconer Madan in the case of the three devices showing the printing press, first used by Badius¹¹, the same devices with slight varia-

¹ *Bibliographica* pt. 1, p. 124. Cf. A. Freimann's article "Printers' Marks" in *Jewish Encyclopedia*, x, p. 200.

² Konrad Haebler, *The Early Printers of Spain and Portugal* (Bibliographical Soc. Illustrated Monographs, No. IV, 1897), pp. 63-4, 77.

³ *Ibid.*, p. 67.

⁴ *Ibid.*, p. 75.

⁵ M. P. Delalain, *Inventaire des Marques d'Imprimeurs et de Libraires*, Introd. p. xiv.

⁶ W. Roberts, *op. cit.*, p. 203.

⁷ *Bibliographica*, pt. 1, p. 124.

⁸ W. Roberts, *op. cit.*, pp. 205 *et seq.*

⁹ K. Haebler, *op. cit.*, p. 70.

¹⁰ See R. Proctor, *Jan Van Doesborgh* (Bibliographical Soc. Illustrated Monographs, No. II (1894)), pp. 9-10.

¹¹ Reproduced by P. Renouard, *op. cit.*, i, pp. 43-45.

tions might be in use at approximately the same time by a dozen different printers or publishers scattered throughout the continental printing centers.¹ Thus, the oldest Cologne device resembles that of Peter Schoeffer, — the small shield.² Again Friedrich (or, as he was called in Castilian, Fadrique) of Basel, once a partner of Michael Wensler, who settled in Burgos about 1485, for one of his two marks practically reproduced that of two well-known printers of Basel.³

The French printers appeared to have shared their continental fellow-craftsmen's indifference towards the consistent use of devices.⁴ However, comparatively early in the history of French printing, printers' devices appear to have been regarded as industrial property worthy of some protection. In 1539 François I issued an ordinance requiring every printer and bookseller to have his own mark so that the purchasers of books might easily know where the books were printed and sold.⁵ This statute, which was re-enacted in identical form for the printers of Lyon in 1541,⁶ may have been intended to aid in the suppression of heresy⁷ as well as of trade piracy.

¹ See Falconer Madan, "Early Representations of the Printing Press," in *Bibliotheca*, pt. ii, p. 223 *et seq.* For additional illustrations of the contemporaneous use of the same mark in various printing centres, see W. Roberts, *op. cit.*, Introduction; A. Freimann, *op. cit.*, x, p. 200.

² *Die Kölner Büchermarken*, ed. Paul Heitz, Introd. by Otto Zaretzky, p. vii.

³ See K. Haebler, *op. cit.*, p. 34.

⁴ When Josse Badius, whose complaint of piracy we have referred to above (p. 64), printed books for publishers having their own mark, or when he shared the printing of a book with another printer, he did not use his own mark, but theirs. (See P. Renouard, *op. cit.*, i, pp. 46-47.) In the case of one of the early Paris printers, Antoine Verard, he appears to have been a publisher as well as a printer and to have given some of his work out to other printers. One of these latter, named Pierre LeCaron, shortly after 1486, cut out Verard's monogram from the heart in the center of the device and his name from the lower edge and printed his own name in the place thus left blank. See J. Macfarlane, *Antoine Verard* (Bibliographical Soc. Illustrated Monographs, No. VII, 1900), Introd. pp. xxv-xxvi.

⁵ Art. 16: "Ne pourront prendre, les Maîtres Imprimeurs & Libraires, les marques les uns des autres, ains chacun en aura une à part soi, & différente les unes des autres; en manière que les acheteurs des Livres puissent facilement connoître en quelles Officines les livres auront été imprimés & lesquels se vendront aux dites Officines, & non ailleurs." (C. M. Saugraine, *Code de la librairie et imprimerie de Paris*, Paris 1744, pp. 93-4.)

⁶ F. A. Isambert, *Anciennes lois Françaises* (Paris 1828), xii, p. 763.

⁷ The first *Index Expurgatorius* was not issued till 1544, but was preceded by partial edicts on the subject of heresy addressed to provincial Parliaments on December 16, 1538 and June 24, 1539. See *Cambridge Modern History*, ii, p. 288; G. H. Putnam, *The Censorship of the Church of Rome*, i, pp. 96 *et seq.*; H. Reusch, *Die Indices Librorum Prohibitorum des XVIten Jahrhunderts*, p. 2.

Subsequent legislation and also punitive proceedings before various French tribunals indicate a considerable amount of infringement in the sixteenth and seventeenth centuries.¹

That the repression of the counterfeiting of devices had become a matter of decided importance to French printers and bibliographers, — at any rate by the seventeenth century, is strongly suggested in a quaint work of Adrian Baillet, entitled *Jugemens des savans sur les principaux ouvrages des auteurs*, first published in Paris in 1685. The author, after discussing the infringement of devices, finds that it may be “*peut-être pas mauvais*” to include a table of the marks and devices of the principal printers and booksellers which have appeared until the middle of his century.²

In England, the early history of printers' devices runs parallel to that on the continent. Their use was optional and occasional and until the end of the seventeenth century their infringement was not the subject of litigation, — and even then, as we shall see, quite incidentally. Indeed McKerrow, in his introduction to his invaluable compilation of English devices, finds English printers to have been even less consistent in the use of devices than their continental fellow-craftsmen.³ “The fashions change,” he writes, “no doubt, in these as in other things, and what in one period was a necessity to every reputable printing house and to every well printed book, in others was a thing of no moment at all.”⁴

To the lack of originality in English devices and to the extent to which English printers adopted continental devices, Pollard has attributed much of the trouble in the history of English bibliography. “Thus,” he points out,

the earliest device used by Pynson [fl. 1492-1530] seems to be adapted from that of de Talleur, that of Richard Faques [fl. 1500-1530] is an altered copy of Thielmann Kerver's, the “wild men” of Peter Treveris [fl. 1522-32] are taken from

¹ See C. M. Saugraine, *op. cit.*, pp. 94-5.

² See Adrian Baillet, *Jugemens des Savans* (2nd ed. 1722), i, pp. 400-404. In 1730 Friederich Roth-Scholtz published at Nuremberg a *Thesaurus Symbolorum et Emblematum*, reproducing 508 printers' and publishers' devices.

³ R. B. McKerrow, *Printers and Publishers Devices*, Introd., p. xli.

⁴ *Ibid.*, p. xliii.

those of Pigouchet, and John Bydell's figure of Virtue (a very ungainly and not too decent lady) is copied from a device used by Jacques Sacon, a Lyons printer of the beginning of this century. The list might easily be lengthened, and though printers borrowed each other's devices in other countries, the imitativeness of English firms is certainly exceptional.¹

Although the first English book was printed by William Caxton in 1477,² he used no device until 1487,³ and McKerrow estimates that only eleven such devices in all were used in England between 1485, when the first one was imprinted by the St. Albans press, and 1500.⁴ Caxton's chief workman, Wynkyn de Worde, adopted Caxton's most famous device consisting of his initials W. C. and certain hieroglyphics said to stand for the figures 74, and in addition had no less than fifteen other devices in use at one time or another.⁵

Both legal and bibliographical writers on English devices have based their overestimation of the importance of these devices as a form of industrial property upon their misreading of the will of a famous sixteenth century printer, Reynold Wolfe, whose sign was a brazen serpent. Upon Wolfe's death his trade was continued by his wife, Johanne, who made her will on July 1, 1574,⁶ bequeathing to her son, Robert Wolfe, the sign of the Brazen Serpent. Dibdin, in his *Typographical Antiquities*,⁷ merely refers to this bequest of the sign of the Brazen Serpent in conjunction with the bequest of another piece of real estate known as the Chapel House. But Larwood and Hotten, in their interesting *History of Signboards*,⁸

¹ A. W. Pollard, "Some Notes on English Illustrated Books," in *Trans. Bibliographical Soc.*, vol. vi, p. 29 at p. 35. See also R. B. McKerrow, *op. cit.*, *Introd.*, p. xxv.

² H. R. Plomer, *Short History of English Printing*, 2nd ed., p. 6.

³ *Ibid.*, p. 14.

⁴ R. B. McKerrow, *op. cit.*, *Introd.* pp. xi, xli.

⁵ H. Plomer, *op. cit.*, pp. 30-31. For an interesting combination of several marks on one title-page, see 1609 Edition of Spenser's *Faerie Queene* reproduced on the opposite page and described by Silvanus Thompson, "Peter Short and His Marks," in *Trans. Bibliographical Soc.*, vol. iv, p. 124; R. B. McKerrow, *op. cit.*, Device No. 335, described p. 130.

⁶ Printed in full abstract in H. R. Plomer, *Abstracts from the Wills of English Printers and Stationers from 1492 to 1630*, pp. 19-22.

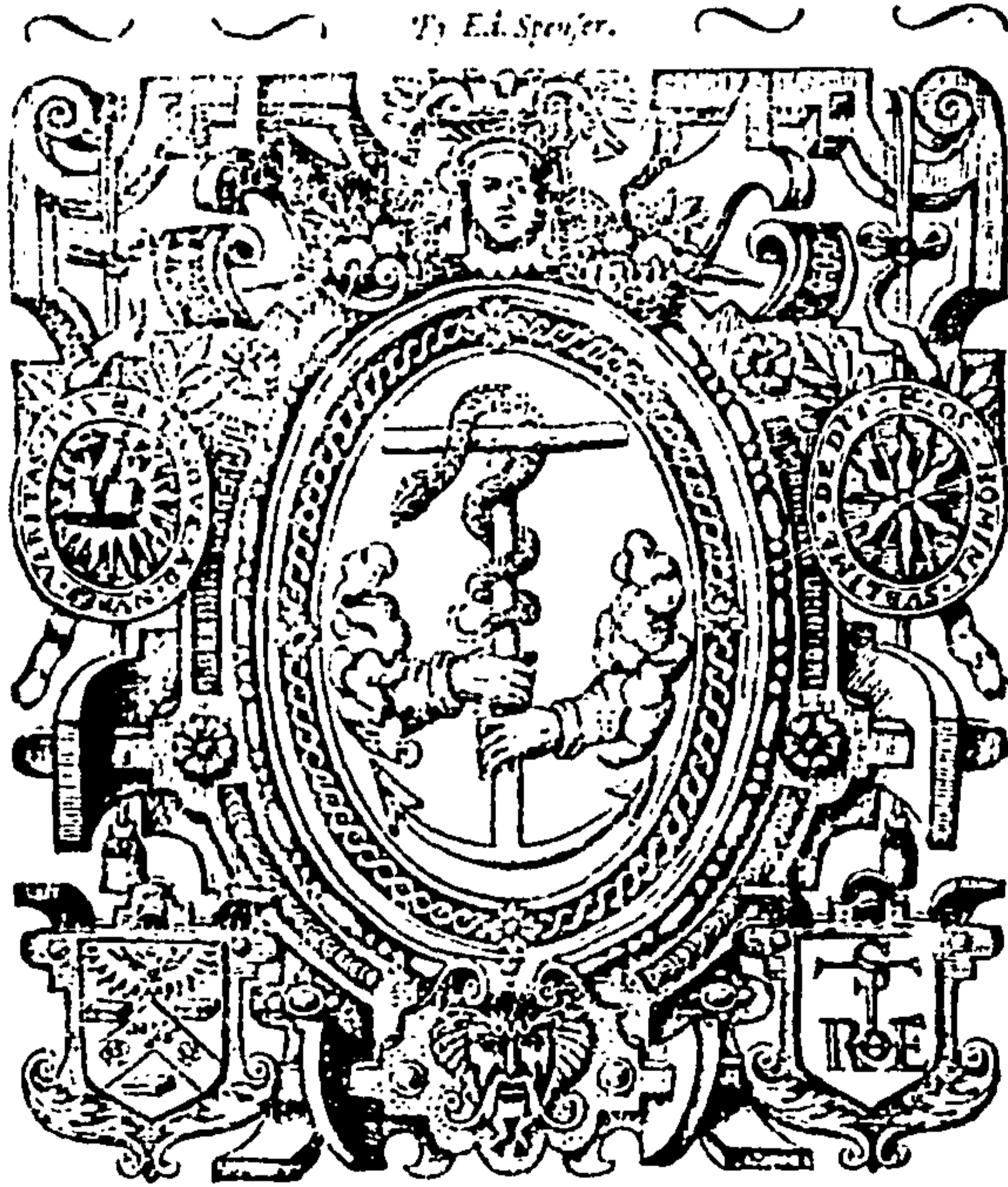
⁷ Vol. iv, p. 6.

⁸ 3rd ed. 1908, p. 7.

THE
SECOND
PART OF THE
FAERIE QUEENE:

Containing
FOURTH,
THE FIFT, &
SIXT BOOKE.

By *Ed. Spenser.*



Imprinted at London for *Mathew Lownes.*
1609.

Reproduced from the copy in The J. Pierpont Morgan Library

TITLE PAGE OF 1609 EDITION OF SPENSER'S *FAERIE QUEENE* SHOWING A PRINTER'S DEVICE COMBINING THE BRAZEN SERPENT (IN CENTRAL OVAL), TWO PRINTER'S DEVICES OF PETER SHORT (RIGHT AND LEFT CENTER), HIS MONOGRAM (LOWER RIGHT), AND THE ARMS OF STATIONERS' COMPANY (LOWER LEFT).

quoting the passage in question from Dibdin, state: "No wonder then, that a sign was considered an heirloom and descended from father to son . . ., which was the case with the Brazen Serpent, the sign of Reynold Wolfe." The same reference by Dibdin to the bequest of the Brazen Serpent has also been quoted by Mr. E. S. Rogers, in his article entitled "Some Historical Matter Concerning Trademarks",¹ as evidence that "these symbols were regarded as valuable property." Roberts, in his work on *Printers' Marks*, likewise states that the "possession" of the Brazen Serpent "was considered of sufficient importance to merit special mention among the goods bequeathed by his [*i.e.* Wolfe's] widow to her son Robert."²

All these references to the bequest of the Brazen Serpent are evidently produced by a confusion in the minds of their authors between the signs that were used by printers,³ in common with other tradesmen, over their shops and to denominate their places of business, with the devices used by printers or publishers in their books.⁴ It is true that certain printers both in England and on the continent used their signs as the bases of their devices,⁵ but the most perfunctory study of English as well as continental devices will show that such a coincidence of sign and device had no legal significance and was furthermore by no means the general rule. The distinction between a printer's sign and his device is clearly

¹ 9 *Michigan Law Review*, p. 36. This statement is repeated by Mr. Rogers in *Good Will, Trade-marks and Unfair Trading* (1919) pp. 42-3.

² W. Roberts, *op. cit.*, p. 20.

³ See H. R. Plomer, *Abstract from the Wills of English Printers and Stationers, 1492-1630*, p. 23, where various premises are referred to by names such as "The Sign of the Green Dragon," "The Sign of the Parott and Angell."

⁴ See R. R. Sharpe, *Calendar of Wills*, ii, p. 711, bequest of a dwelling house called "The Sign of the Lute and Maydenheads"; also, p. 723, bequest of the "Grene Dragon." As has been pointed out by Mr. E. G. Duff: "There does not seem to have been any kind of copyright in the signs themselves." (E. G. Duff, *A Century of the English Book Trade*, Introd. p. xviii.) See *ibid.*, Appendix III for index of London printers' and stationers' signs before 1558.

⁵ E.g., Thos. Berthelet, who succeeded Pynson as the King's Printer, used the latter's sign, *Lucretia Romana*, in 1535 and 1554 as his devices. (See R. B. McKerrow, *op. cit.*, Device No. 80, p. 27.) John Bydell used a device consisting of a sign where he traded from 1533 to 1535, — "Our Lady of Pity" — together with his merchandise marks. (See R. B. McKerrow, *op. cit.*, Device No. 82, p. 27.) For similar examples on the continent see W. Roberts, *op. cit.*, pp. 8-9.

illustrated in the case of Julian Notary, who from about 1498 to 1518 printed at various establishments in London, known as "At the Sign of the Three Kings."¹ He never used the "Three Kings" in any of his devices.²

A full abstract of the will of Johanne Wolfe has been published by Mr. Plomer and in several places it specifically refers to "that tenement . . . called or known by the sign c^t the Brazen Sarpent",³ again to "my saide dwelling house called the Brazen Sarpente,"⁴ and to "the saide Tenement called the brason Sarpent."⁵ The will specifically bequeathes to Robert Wolfe "the presses, letters, furniture, Coppies and other necessarie tooles being within my prynting house or belonging vnto the same for concerning or belonging to the arte of prynting,"⁶ but contains no reference whatsoever to the *device* of the Brazen Serpent. The subsequent history of the device of the Brazen Serpent which, it may be remarked, had originally been borrowed by Reynold Wolfe from foreign printers⁷ shows that Robert Wolfe never used the mark of the Brazen Serpent, but that this mark was used from time to time by Henry Binnerman and another apprentice of Reynold Wolfe as well as by successors of Henry Binnerman.⁸

There is, therefore, no evidence at all in the will of Johanne Wolf, — nor indeed in any of the published wills in connection with the printing trade⁹ — of the actual bequest of a printer's device. McKerrow in his "Notes on the Transfer of Marks from One Printing-House to Another"¹⁰ gives no indication of any legal machinery by which transfers of printers'

¹ See E. G. Duff, *op. cit.*, Introd. p. xviii; Roberts, *op. cit.*, p. 61.

² See R. B. McKerrow, *op. cit.*, Devices, Nos. 8, 13, 26, 28.

³ H. R. Plomer, *op. cit.*, p. 20.

⁴ *Ibid.*, p. 20.

⁵ *Ibid.*, p. 20.

⁶ *Ibid.*, p. 20.

⁷ See Dibdin's *Typographical Antiquities*, iv, p. 2 and 3rd note thereto.

⁸ For the history of the *caduceus* device and its use in England and on the continent see Silvanus B. Thompson, *op. cit.*, p. 163; H. R. Plomer, "The Eliot's Court Printing House," in *The Library*, 4th Ser., vol ii, pp. 177, 179; also R. B. McKerrow, *op. cit.*, No. 293, p. 114. As to the subsequent history of the shop called "The Brazen Serpent," see H. R. Plomer, *Wills*, p. 23, n. (4).

⁹ See wills in H. R. Plomer, *Wills*; Gray and Palmer, *Wills of Cambridge-shire Printers*; S. Gibson, *Abstracts from the Wills of Oxford Printers*.

¹⁰ R. B. McKerrow, *op. cit.*, pp. 164 *et seq.*

devices might have been effected; that is to say, by will or descent, by deed, by bill of sale or otherwise. Indeed, the carelessness with which the blocks from which these devices were printed were sometimes handled would lead one to believe that the wood or metal block itself, the tangible property, rather than the device itself, or the intangible property, was alone of importance. As McKerrow has pointed out,

The owner of a device would send it to a printer to be used in a particular book which was being printed for him. . . . When, however, the publisher died or went out of business there was a considerable chance that the device would not be reclaimed, and I suppose after a certain time the printer would feel quite justified in considering it as his own.¹

Furthermore, those printers or stationers who did care to use devices, were not under any compulsion to register them when recording their publications with the Stationers' Company. In fact, in striking contradistinction to the records of the Cutlers' and Goldsmiths' Companies or to the municipal registries for coopers' marks, the registers of the stationers contained no entries concerning the registration or transfer of printers' or stationers' marks.

Edward Arber, in his introduction to the *Transcript of Registers* of the Stationers' Company, thus describes the function of these Registers: ". . . the primary object of these book entries was to account for the fees received in connection therewith . . . the *Registers* — most precious as they are to posterity — are practically in their original intention the subsidiary cash books of a London guild. . . ." ²

As further evidence of the little regard in which these devices were held as species of property or as legal symbols of im-

¹ *Ibid.*, pp. xlvi-xlvii.

² E. Arber, *Transcript of Registers, 1554-1640*, vol. iii, Introd. p. 18; see also Eyre and Rivington, *Transcript of the Registers of the Company of Stationers, 1640-1708*, vol. 1, Preface, p. v: "At no time was the Register complete, for in its inception it was simply a record of the property of members of the Stationers' Company established by the Governing Body with the object of avoiding disputes as to ownership, and it does not include publications issued under Letters Patent and other Royal grants. . . ."

portance, it should be noted that, while in other trades royal charters or licenses contained a specific grant of a mark or of the right to use a mark¹ for distinguishing products made under the royal authority, such was not the case with patents or licenses for printing. Reynold Wolfe's license as printer to the king, granted in 1547,² Thomas Vautrollier's patent of 1574 to print the Bible, Ovid, Cicero and other books for ten years,³ John Day's three privileges for the printing of various books including the *A. B. C. with a little cathechisme* and for the printing of music,⁴ and similar privileges and patents for the printing of music⁵ contained no reference to marks.⁶

In connection with the enforcement of these printing monopolies and also with the suppression of heresy — the main considerations of governmental control of the book industry,⁷ — it is evident that if a printer's device was no asset, neither was it a liability. As to the tracing of heretical publications through such devices, McKerrow writes:

No doubt in cases where it was very important to conceal the origin of a book, the printer would attempt to eliminate all traces whatever of his work, but a comparatively large number of books are to be found in which the printer seems not to have wished to advertise his share, and yet not particularly anxious to conceal it. Thus the printer of the three "Pasquil" tracts against the Martinists in 1589-90 refrained from putting his name on them, using such fantastic imprints as "printed between the sky and the ground within a mile of an oak", . . . and "printed where I was," but nevertheless placed on these tracts a device which must surely have revealed to those in the trade from whose press they came.⁸

¹ See *infra*, p. 94, n. 4.

² Dibdin, *op. cit.*, iv, pp. 4-5.

³ E. Arber, *op. cit.*, ii, p. 745.

⁴ Reprinted by R. Steele in *Earliest English Music Printing* (Bibliographical Soc. Illustrated Monographs, No. XI), pp. 21 *et seq.* I am indebted to Mr. H. R. Plomer for this reference.

⁵ *Ibid.*, pp. 26-29.

⁶ Nor did the privilege given to Aldus by the Senate of Venice in 1502 contain any such reference. (See A. Firmin-Didot, *Alde Manuce*, Paris 1875, p. 479.)

⁷ A. Birrell, *The Law and History of Copyrighting Books*, pp. 49 *et seq.*

⁸ R. B. McKerrow, *op. cit.*, pp. xlii-xliii. For an ingenious but fantastic and thrilling rather than convincing theory that printers' devices themselves

At the end of the sixteenth century printers' devices came for the first time under the scrutiny of English law. The first case involving the misuse of a printers' device occurs in 1581 in connection with a patent for the printing of the *A. B. C. with a little cathechisme* which had been granted to John Day and to which we have referred above. Day, who achieved remarkable typographical skill,¹ had three devices.² In 1580 Day became Master of the Stationers' Company³ and two years later he became engaged in a series of lawsuits for the enforcement of the monopoly granted by his patent in the *A. B. C. with a little cathechisme*.⁴ In the Bill of Complaint to the Privy Council in this case of *Day v. Ward* no allegation is made as to the misuse of Day's mark but solely as to the unauthorized setting of Day's name to the fraudulent edition of the *A. B. C. with a little cathechisme*. Among the evidence adduced by Day was the imitation of the particular type used by him in printing the *A. B. C. with a little cathechisme*, and also the use of one of his marks. The interrogatories to the defendant in this case which was heard in the Star Chamber inquired "whi . . . was the marke of the sayd John Day sett therunto and who made you the same marke."⁵ The reply to this question is:

*To the iij he saith he doth not knowe what the cause was whie the name of the said John Day was sett thervnto . . . but the cause whie the marke of the said John Day was put therunto was to th[e] ende to haue the same artificiall as those were which passyd from the said John Daye and it was a Frencheman Dwelling within the blackefriers whose name he knoweth not that made the same marke for this defendant.*⁶

were used, with water-marks, for secret symbolic communication by various heretical sects, see Harold Bayley, *A New Light on the Renaissance* (London 1906) ch. ix, mentioned to me by Dr. S. L. Wolff of Columbia University. Cf. criticisms in C. M. Briquet, *Les Filigranes*, vol. i, Introd. pp. 8-10, also in *The Bookman*, vol. xxix, p. 531; *The Athenæum*, vol. ii, p. 327.

¹ D. B. Updike, *Printing Types, their History, Form and Use*, ii, p. 90.

² H. R. Plomer, *Short History of English Printing*, p. 80.

³ *Ibid.*, p. 77.

⁴ For the history of this case see *ibid.*, pp. 77 et seq.; G. Unwin, *Gilds and Companies of London*, p. 259.

⁵ E. Arber, *op. cit.*, ii, p. 758.

⁶ *Ibid.*, ii, p. 760.

Of course this answer may have been sheer fraud but it is unlikely that the suggestion would have been made that Day's mark had been used to make the infringing work "artificial," that is to say, to display special art or skill,¹ unless it possessed at least some degree of plausibility. In other words it is possible that even as late as the case of *Day v. Ward* printers' devices were regarded as essentially of a decorative nature. In any event, it is quite evident from a study of the interrogatories in this case that the question of the infringement of Day's mark was quite incidental to that of the infringement of Day's patent.² Despite the evident interest in the case of *Day v. Ward*, the first Star Chamber decree regulating printing, promulgated June 23, 1586,³ makes no mention of marks. The second Star Chamber decree regulating printing, 1637, provides as follows:

. . . That no person or persons whatsoever, shall hereafter print, or cause to be printed, or shall forge, put, or counterfeit in, or vpon any book or books, the name, title, marke or vinnet of the Company or Society of Stationers, or of any particular person or persons, which hath or shall haue lawful priuiledge, authoritie, or allowance to print the same, without the consent of the said Company or party or parties that are or shall be so priuiledged, authorized, or allowed to print the same booke or books, thing or things, first had and obtained, vpon paine that euery person or persons so offending, shall not onely loose all such books and other things, but shall also have and suffer such punishment, by imprisonment of his body, fine, or otherwise, as by this Honourable Court, or high Commission Court respectiuely, as the seuerall causes shall require, it shall be to him or them limited or adiudged.⁴

It was not until 1662 that for the first time the printing trade became the subject of parliamentary, instead of royal regulation. The Statute of 14 Charles II, the objects of which

¹ Murray's *New English Dictionary*, i, p. 473.

² T. B. Reed, *History of Old English Letter Foundries*, pp. 125-6, suggests that this was a case of the infringement of type rather than infringement of a mark. Cf. H. F. Brown, *The Venetian Printing Press*, pp. 48 *et seq.* concerning the forgeries of the Aldean Italic.

³ E. Arber, *op. cit.*, ii, p. 607.

⁴ E. Arber, *op. cit.*, iv, p. 531.

were declared therein to be the prevention of the dissemination of "heretical schismatical blasphemous seditious and treasonable Bookes Pamphlets and Papers" and the general control of the printing trade,¹ reproduces substantially² the provision concerning the counterfeiting of devices from the second Star Chamber decree quoted above. It will be noted that in neither the Star Chamber decree of 1637 nor the statute of 1662 is there any suggestion, much less compulsion, of the registration of devices.

Recapitulating the results of the foregoing investigation, we find that printers' and publishers' devices, as such, appeared to have originated as simple marks of personality which gradually acquired a decorative function rather than any particular legal significance. They were used optionally and occasionally,³ not compulsorily or consistently. From the legal standpoint they constitute neither asset (except perhaps in France in the middle of the sixteenth century) nor liability. While the blocks with which they have been printed may have been transmissible by will, gift, or other legal machinery, there is no evidence that the devices themselves were so transferable.

¹ See *Stat. of the Realm*, v, 428 *et seq.* (14 Car. II, c. 33, Preamble and cl. VI) also A. W. Pollard, "Some Notes on the History of Copyright in England, 1662-1674," in *The Library*, 4th Ser., vol. iii, p. 97. This Act lapsed toward the end of 1679; in 1685 it was renewed for seven years and then for one year more, and was then finally dropped.

² "VI. No person or persons shall hereafter print or cause to bee imprinted nor shall forge, put or counterfeit in or upon any Books or Pamphlet the Name, Title, Marke or Vinnet of any other person or persons which hath or shall have lawfull Priviledge, Authority or Allowance of sole printing the same, without the free consent of the person or persons so priviledged first had and obtained."

³ In this respect printers' and publishers' devices resembled paper marks, the first appearance of which in Europe antedated the twin-shields of Fust and Schoeffer by almost two hundred years. C. M. Briquet in his introduction to his great work on paper marks, *Les filigranes* (Paris 1907), states (vol. i, p. 10) that for a long time prior to the appearance of the first paper mark in Europe — a cross — about 1282, papers had been manufactured both by the Arabs and by European paper makers without any mark at all; further (p. 17) that after the introduction of paper marks the same mark was used simultaneously by many paper makers and that despite many complaints as to the counterfeiting of paper marks the practice seems to have been fairly common.

CHAPTER IV

TRADE-MARKS AND THE NATIONAL REGULATION OF INDUSTRY — THE CLOTH TRADE

IN the previous chapter we have seen that the characteristics of the typical craftsman's mark of the Middle Ages were: (1) that it was compulsory, not optional; (2) that its purpose was the preservation of gild standards of production and the enforcement of gild or other local monopolies rather than the impressing on the mind of the purchaser the excellence of the product in question and thereby the creation of a psychological need for that product; (3) that, consequently, while the modern trade-mark is distinctly an asset to its owner, the medieval craftsman's mark was essentially a liability. These characteristics of the medieval mark we have ascribed to a great extent to the proximity of the producer to the consumer and of one producer to another, and also to the theory and practice of gild control of industries in each locality.

When, however, we come to industries such as the cloth and cutlery trades, the situation is quite different. In these trades is clearly noticeable the evolution of the trade-mark from a mark of origin to a mark of quality and hence from a liability to an asset, of distinct value to the owner of the mark. In a later chapter we shall trace the systems of trade-mark law developed by the cutlers of London and Sheffield, and we shall find that, while the rivalry between the cutlers of London and Sheffield was very great, the rivalry between the members themselves in each of these centers of industry appears to have been no less keen, with a consequent emphasis upon the importance of individual cutlers' marks. On the other hand, in the cloth trade, the trade-marks which became of importance and the subject of protection were not only those of individual clothiers but, to a more considerable degree, the collective

marks of the centers of the cloth industry. Furthermore, while the cutlers developed their own law mainly within their own organizations, the development of trade-mark law in the cloth industry was, as we shall see, largely the creation of administrative law concerned with the national expansion of that industry. While we shall refer first to the protection of collective or geographical marks and shall perforce devote considerably more space to these marks than to individual marks, we shall find the development of the latter to be of at least as great significance as that of the former.

The idea of a collective good-will enjoyed by a given locality or organization and of the protection of a mark or seal as the symbol of that collective good-will is very common in the history of medieval as well as of modern commerce.¹ We have seen in the preceding chapter that practically every guild, in the exercise of its right of search or supervision, affixed its seal or mark to the products of its members.² In many instances, these seals or marks or the symbols of the municipal authorities became assets of great value to the corporation or *universitas* from which they emanated, and goods to which they were affixed were sold merely upon the strength of these marks without the formality of opening or carefully scrutinising the bales or bolts to which they were affixed. The Parisian weavers, for instance, sought to prevent the use of the phrase *façon de Paris* upon foreign-made goods;³ at Ypres, towards the end of the thirteenth century the pieces of cloth stamped with the name of the town numbered eight thousand a year.⁴ The mark of the town of Osnabrück, the center of the Westphalian linen industry, was held in so great respect and esteem abroad that, in England, in the

¹ Recent examples of the protection of "regional good-will" are to be found in Sheffield steel, Rochester clothing, Durham tobacco, Minnesota flour, Swedish matches, champagne, cognac, Madeira, Rhine and Moselle wines, Pilsen beer. See Hopkins on *Trade-marks*, 4th ed., pp. 67 *et seq.*; G. C. Henderson, *The Federal Trade Commission*, pp. 189-90; W. Notz, "New Phases of Unfair Competition and Measures for Its Suppression" in 30 *Yale Law Journal* 384, at pp. 392 *et seq.*; also *infra*, p. 105, n. 2, at p. 106.

² See *supra*, p. 44.

³ M. de Gailhard-Bancel, *Les anciennes corporations de métiers*, p. 101.

⁴ G. Renard, *Guilds in the Middle Ages*, (ed. Cole), p. 34.

middle of the fifteenth century, linen bearing this mark commanded a price twenty per cent higher than other Westphalian linens.¹ A similar development of collective good-will and of corporate and regional marks is to be found in the case of the weavers of Barcelona and Torroella,² in the guilds of Florence³ and in the famous cutlery and armor manufacturing centers at Toledo, Ferrara, Passau and Solingen.⁴

In England the development of corporate or collective marks is particularly conspicuous in the cloth industry and is, in its origins, to a considerable degree associated with the royal interest in and regulation of the trade. In the later Middle Ages wool was the main article of export from England.⁵ "But England was not content," writes Ashley, "thus to furnish Europe with the raw material: its government made continuous and strenuous efforts to gain for it the manufacture also; and its measures succeeded. Cloth became 'the basis of our wealth' and at the end of the seventeenth century, woolen goods were 'two-thirds of England's exports.'"⁶ In these constant efforts of the crown to capture and maintain supremacy in the European cloth markets and also in its efforts to derive as much custom as possible from the trade, (and incidentally to insure for the subjects of the realm the maintenance of certain standards in the manufacture of clothing) the government began to foster and protect the reputation of the trade-marks of the various centers of industry in England. Of course, just as in the case of the individual craftsman whose trade-mark began as a purely regulatory or liability mark, so in the case of the corporations or localities engaged in the cloth industry the affixing of seals was a compulsory part of the scheme of national regulation.

In discussing the relation of national regulation of the cloth

¹ H. Potthoff, *Die Leinenleggen in der Grafschaft Ravensburg*, pp. 38-9.

² D. R. Pela, *Marcas de Fábrica*, p. 18.

³ E. Staley, *The Guilds of Florence*, 2nd ed., p. 148 (woolen cloth); p. 262. (merciers, veilmakers, perfumers and stationers).

⁴ See C. Ffoulkes, *The Armourer and His Craft*, p. 70.

⁵ W. J. Ashley, *Economic History*, i, pt. ii, p. 191.

⁶ *Loc. cit.*

industry to the development of trade-mark law, it will not be necessary to consider at any length the causes of the decay of the guilds or the effect of this decay upon the supervision of industry by the guilds. From very early times the crown undertook the regulation of the cloth industry.¹ This Royal supervision was effected partly through officials of the crown and partly through the guild officials acting practically in the same capacity.² "It was in the nature of things inevitable," says Lipson,

that the dealers, who traded in cloth, should organize the different branches of the woolen industry under their own control. The guild system broke down earlier in the weaving industry than in any other direction. The rapid growth of the cloth trade was incompatible with the old restrictions, and the manufacture overflowed from the towns into the suburbs and country districts, where it ran its course free from any impediment or restraint.³

In the fifteenth century, outside the towns, to quote Ashley again, "a new class of men called *clothiers* or *clothmakers* to arose, commanding an amount of capital great relatively previous conditions and bringing into dependence upon themselves large numbers of work-people."⁴ However, the replacement of the guilds by the domestic system, or the transformation of the guilds "to be at once the organs of and subject to national regulation"⁵ does not, as we shall see, retard, but rather accelerates and broadens the development of trade-mark law. With the capitalists who engaged extensively in the manufacture of cloth, the government entered into direct relationship,⁶ and the crown came to concern itself more and more with the various individual weavers' and clothiers' marks, as well as with both guild and town seals.

Without attempting to trace the evolution of the cloth

¹ See E. Lipson, *op. cit.*, ch. ix.

² W. Cunningham, *op. cit.*, p. 226.

³ E. Lipson, *op. cit.*, pp. 415-16.

⁴ W. J. Ashley, *op. cit.*, pt. ii, p. 222.

⁵ W. Cunningham, *op. cit.*, p. 447; see also *ibid.*, pp. 509 *et seq.*

⁶ See Stat. 4 Edw. IV, c. 1, *Stat. of the Realm*, ii, p. 404.

industry, it should be observed that, by the end of the fifteenth century, a large number of important local varieties of cloth, such as Bristol, Norwich, Guildford, Colchester, Kendal, Coventry and Taunton had acquired individual reputations, which naturally enhanced the value of cloths made not only in the particular towns in question, but in cloth-making settlements in proximity to these towns. For instance, a statute of 15 Richard II, enacted in 1391 and containing "the first definite notice we have of the cloth-making industry of Surrey",¹ recites that "of old times divers cloths were made in the town of Guildford and other places within the counties of Surrey, Sussex and Southampton, called Cloths of Guildford, *which were of good making and of good value, and did bear a great name. . . .*"²

That these local reputations were most jealously guarded by the local authorities, quite irrespective of their protection by the crown, is well illustrated in the cases of Salisbury and Coventry. In a Convocation at Salisbury held in 1417 before the Mayor and Council proceedings were taken against a counterfeiter of the City cloth seal, Salisbury being then noted for its "motley cloths and whites."³

As early as 1398 trade in the "frieze of Coventry" had become international. "In that year £200 worth, the export of one merchant, lay in the port of distant Stralsund on the Baltic Coast."⁴ *Frise de Coventre* is also mentioned in a statute of the following year, together with Cogware, Kendal Cloth and Cloth of Kersey.⁵ "In London and other places the cloth was in great request during the fifteenth and early sixteenth centuries. But about 1528 there was a great depression in the local industry."⁶ In that year the Leet Court, which was largely in the hands of the great cloth merchants

¹ *History of the County of Surrey*, (Victoria History of the Counties of England, ii, p. 342).

² C. 10, *Stat. of the Realm*, ii, p. 81. (Italics the writer's.)

³ *Modern History of Wiltshire*, iii (Ed. by R. Benson and H. Hatcher), pp. 113-114.

⁴ M. D. Harris, *Life in an Old English Town*, p. 253.

⁵ 1 Hen. IV, c. 19 (1399) *Stat. of the Realm*, ii, p. 119.

⁶ M. D. Harris, *op. cit.*, p. 253.

of Coventry,¹ in an evident desire to retrieve the lost trade in frieze, enacted "an order for the True Makinge of Clothe" which clearly indicates the importance to the trade and the town of attaching the noted town seal — the elephant — to cloth of very high standard:

Hit is to be had in mynde that for a trueth of Clothmakynge to be had in this Cite as foloweth, if it myght be folowed & the execucion of the same to be don shortly, Or else the Cite wol-be so fer past that it wol-be past remedie to be recouered to eny welth or prosperite- hit is thought hit were good to haue ij weuers & ij walkers [fullers] sworn to make true serche of the weuers doying & also fo the walkers & to present the trueth: and also to be chosen vj Drapers to be Maisters & Ouerseers of the doying of the serchers, That if some of them cannot a-lesour to be at the serchyng at the dayes of the serchers yet some of these vj Maisters schall euer be ther; and by-cause it were to great a besynes for the serchers to go to euery mannes howse, hit is enacted (etc.) to haue a howse of the gilde or of some other mannes nyghe the Drapery doore to be ordeyned Well with perches to drawe ouer the Clothes when they be thykked, and also weightes & ballaunce to wey the Cloth. And when it cometh frome the walkers, The walkers to bryng it to the serchyng house, & to serche it & to se it ouer a perche; and if it be good Cloth, as it owght to be, in brede & lenth, that the Cite may haue a preise by hit & no sklauder, then to sett vpon hit the Olyvaunt [the elephant and castle are the city arms] in lede, and of the Bak of the seall the lenth of the Cloth, by the which men schall perceyve & see it is true Couentre Cloth; ffor of suertie ther is in London & other places that sell false & vntrewe made Cloth, & name hit Couentre Cloth, the which is a gret [er] slauder to the Cite than hit deserueth by a gret partie. And if ther be eny man that hath eny Cloth brought to the serchyng house, what degre so euer he be of, if it be not able for the worship of the Cite to be let passe, let hym pay for the serche & lett hym do his best with hit, but set not the Olyvaunt vpon it.²

¹ *Ibid.*, pp. 258-9.

² *Coventry Lect Book*, (Early English Text Society), ed. M. D. Harris, pp. 656-7. The official recognition or even authorization of the surreptitious disposal of sub-standard goods in such a way as not to injure the town or gild from which they emanated is not unusual; Renard (*Guilds in the Middle Ages*, ed. Cole, p. 34) mentions the deliberations of the medieval goldsmiths of Paris concerning a plated bowl which might have been mistaken for solid

The necessity or desirability of regulating the sealing of cloth by the towns is evident from the statute of 1 Richard III (1483-4), c. 8, which provided that:

afore the seid fest [of St. Michael the Archangel] by the Treasurer of England be provided and ordeigned Seales to be impressed in lede havynge [the Royal] Armes of Englonde on the oon side and on the other syde the Armes signe or tokyn of every Citee Burgh or Towne within this Realme when the Cloth is made, havynge any such armes signe or tokyn, for a merke and evident tokyn and knowlege of the Cloth made within every suche Citee Burgh and Town of this Realme; and over that Seales for every Shire of this Reame for the sealyng of all maner Cloth made within every Shire. . . .¹

So detailed did the legislation concerning marks in the cloth industry become that even individual weavers' marks in some localities were the subject of regulation.²

During the reign of Elizabeth, in which came the strong centralization of the control of industry, with the Council as the "pivot" of the system,³ the seals on cloth appear to have

metal: "It was decided after deliberation, to sell it secretly, and he was cautioned never to make another." The wardens of the Grocers of London likewise, upon examining John Palmer for selling ginger not up to standard, fined him 5 marks, and "they ordered the corrupt ginger to be sealed up and sent oversea, there to be sold. . . ." (J. A. Rees, *The Worshipful Company of Grocers*, p. 99.)

¹ 1 Ric. III (1483-4) c. 8. *Stat. of the Realm*, ii, 486. Other legislation referring to individual towns or counties prescribed the use of *individual* weavers' marks within these areas. As early as 1467 an act regulating deceits practised in the making of worsteds in Norfolk and Norwich required "that no Man of the said Craft make any Worstede unless he put *his proper Mark fixed or woven (son propre signe tistez ou entexez)* upon the same, by the Ordinance of the said Wardens." (7 Edw. IV, 1467, c. 1, *Stat. of the Realm*, ii, 420.)

² For local requirements as to registration of weavers' marks in Norwich, see Acts of Assembly (1460) in *Records of the City of Norwich* (ed. Hudson and Tingey), ii, No. CLXII, p. 94, also Act of Assembly, 19 July 1580, No. CCXLVI, p. 145. An Act of 14 and 15 Henry VIII, c. 3 (1523), regulating the weaving industries of Yarmouth and Lynn, requires the Wardens of those towns to "lymytte distincte and severall markes to every of the said Worstede Weavers of the same Towne and the same markes by the said Warden to be registred in a booke." (*Stat. of the Realm*, iii, 210.) In 1534 "an Acte for makeinge of Worstedes in the cite of Norwiche and yn the towns of Lynne and Yermouth," it was likewise enacted that ". . . everie Warden of the said Towne shulde lymytte distincte and severall markes to everie of the said Worstede weavers of the same Towne of greate Yermouthe and the same Markes by the said Warden to be registrid in a booke." (26 Hen. VIII, c. 16, *Stat. of the Realm*, iii, 511.)

³ W. Cunningham, *op. cit.*, ii, p. 53, The Privy Council delved into such minute industrial questions as the recovery of broadcloth stolen from a Dublin

been the subject of much popular interest and comment. The famous preacher, Clement Armstrong, writing (circa 1535) on "How to reforme the Realme in Settyng them to work and to restore Tillage", exhorts the king

to make a staple of all wollen clothes in London and that all clothe makers . . . dwell to gethers in market townes like as in old tyme, and that every market towne of clothe making have a common seale . . . to recourde the trew making of wollen clothes so sealed with the sealles of the townes, wherein they be made. . . ¹

England, says Armstrong, "shall cause the more nombre of common people to drape clothes and to worke theym so substancially and truly by the recorde of every towne seale. . . ." ²

On the other hand, in *A Discourse of the Common Weal of this Realm of England*, an imaginary dialogue written about 1549, not only the credit given to the various town seals of cloth but also their subsequent debasement by their use upon inferior goods is indicated. In the second dialogue (between the doctor and the knight) the former compares the debasement of the currency and of the attempt to "marke a halfe pound with the marke of the pound, and the halfe ounce with the marke of the ounce" with the loss of credit by the towns for their seals on cloth:

. . . and they consequently lost their credit, much like as I haue knowen certain townes in england to haue donne; which weare wount to make their clothes of a certaine breadth and length, and to sett their sealles to the same; while they kept their Rate truly, strangers did but looke vppon their seall, and receaved their wares, whearby those townes had greate vent of their cloth, and consequently prospered very well. Afterward some in the townes, not content with reasonable gaynes, continually desiringe more

merchant (*Acts*, N. S., xxv, 1595, p. 49), abuses in the leather trade in Devon (*ibid.*, xxvii, 1597, p. 260), and the right to make and sell gingerbread in Norwich (*ibid.*, xxviii, 1597, p. 417). See also W. S. Holdsworth, *Hist. of English Law*, iv, p. 360.

¹ Reinhold Pauli, *Drei Volkswirtschaftliche Denkschriften aus der Zeit Heinrichs VIII von England* (Göttingen 1878), p. 65.

² *Ibid.*, p. 70.

and more, devised clothes of lesse lengthe, breadthe, and goodnes then they weare wounte to be, and yet, by [the commendacion] of the seall, to haue as muche monie for the same as they had before for good clothes; and for a time they gat much, and so abased the credit of their prodescissors to their singuler laker, which was recompensed with the losse of their posteritie; for after these clothes weare founde faultie, for all their sealles they weare not only never the better trusted, but much lesse for their seall, yea, though their clothes weare well made; for whan their falsehood and vntrewth was espied, then no man would bie their clothes till they weare searched and vnfolded, Regardinge nothinge the seall. And yet, because they found them vntrew in some part, they mistrusted them in other; and so would give lesse for their clothes then they would for anie other like, havinge no sealles to the same; wherby the credit of the same townes was lost, and the townes vtterly decayd.¹

In the third dialogue the doctor again mentions the importance of the town seals or trade-marks: "Also an other thinge I reckon woulde healpe muche to releve our townes decayed, yf they could take order that all the wares made their should haue a speciall marke, and that marke to be set to none but to suche as be truly wrought."²

In view of the popular desire to be able to continue the purchase of cloth upon the basis of their seals and in view also of the great losses to the clothing trade and consequently to the royal revenues occurring through the debasement of these seals, it is not surprising that the whole subject of trade-marks upon clothing, both individual and collective, soon came under the observation and regulation of the Privy Council. In 1591 an Act of the Privy Council, referring to the "ambiguous abridgement" by the clothiers of Wiltshire, Gloucestershire, Somerset and Oxon of the seals required by the statutes of 27 Edward III³ and 27 Henry VIII⁴ to indicate the true amount

¹ *A Discourse of the Common Weal of this Realm of England* (ed. E. Lamond) pp. 77-8). Miss Mary Dormer Harris, the editor of the Coventry Leet Book and the historian of Coventry, quoted above, to whom I am indebted for this reference, writes, November 12, 1923, that in her opinion this quotation clearly refers to the seal upon Coventry cloth.

² *Ibid.*, p. 130. ³ *i.e.*, 27 Edw. III, stat. i, c. 4 (*Stat. of the Realm*, i, 330-1).

⁴ *I.e.*, 27 Hen. VIII, c. 12 (*ibid.*, iii, 544).

of yardage, "by which abuse Her Majestic in her custome may be much deceaved," also refers to the weavers' private marks in the following language:

. . . it is therefore this daye ordered by their Lordships for avoiding of these inconveniences that the said cloathes (*sic*) shal from henceforth weave into every of their said white broad cloathes hereafter to be made their proper markes or tokens according to the statute of 27 Henry 8. Howbeit whereas some clothiers have used in some few cloathes of greater price to work in with a needle with threed of gold or copper guilt their said markes for the beautifieng of their said fine cloaths, their Lordships thinke yt not inconvenient that the clothiers of Wiltes, Gloucester, Somerset and Oxon should continue their use in that behalfe yf they shal thinke yt good, so that they do not omyt also to weave their markes or tokens into the said cloathes according to the said statute. . . .¹

In the following year the Council intervened to protect the individual marks of a Taunton clothier² with the following order:

A letter to Hugh Portman, John Coles, Gabriell Hawley and William Hall, or to anie 3 or 2 of them. Whereas a petition hath ben exhibited unto us by John Godsall of Tanton in the countie of Somerset, clothier, wherein he complaineth as well of a greate abuse commytted by one John Cole and other badd persons in makeinge of cloth in those partes with flockes and thrummes and dyinge of them in false cullours, as in counterfaictinge to the same false clothes the usuall markes (long tyme used by the suppliant, and other clothiers which make clothe of good and perfect stuff). If therefore the informacion be true, yt ys fraud and deceit that deserveth to be severelie punished, and a greate abuse besides unto this suppliant and the rest that are true makers of cloth, in so moche as their clothes which heretofore have ben well sold and esteemed of beyond the seas (by the deceit of these badd persons) are now greatlie dyscredyted. Wee have therefore thought good to praie and require you by

¹ *Acts of the Privy Council of England*, New Ser., xxi, 1591, pp. 98-9.

² For Taunton cloth, which was known merely as "Tauntons," see *History of the County of Somerset* (Victoria County Histories), ii, pp. 411 *et seq.*; J. Toulmin, *History of Taunton* (ed. Savage, 1822), p. 372.

vertue hereof to call before you as well the said Godsall as John Cole and anie others of the clothiers or false makers of clothe that are chardged with this deceitfull makinge of clothes, and to examyne by all good waies and meanes this manner of abuse, and also to viewe and conferr together the mark of this suppliant and others that are alledged to be true makers of clothe with the marke of the said Cole and others that use that fraude. The which yf you shall find to be counterfaited, wee then doe require you not onlie to certyfie us thereof and of all soche abuses which you shall perceave to have ben commytted by them and others, but also to take good and sufficient bondes to her Majesty's use of Cole and the other parties faultie by a certaine daie lymitted to appeere at the Court before us, to the ende that wee maie tak soche order for reformation of these abuses as to us shall seeme expedyent.¹

The strongest evidence of the interest of the national government in the protection of collective or geographical trade-marks occurs in the case of the Colchester baize industry. As early as the fourteenth century Colchester became an important center of the cloth industry.² But it was only upon the settlement there in 1570-1571³ of the Flemish refugees, driven from the Low Countries by the persecution of the Duke of Alva, that Colchester acquired a particularly enviable reputation for cloth-making.⁴ The so-called "Dutch congregation" was practically a semi-autonomous community under the direct supervision of the crown, and officers of the "Dutch Bay Hall" spared no effort to maintain the high standards of workmanship for which their organization soon acquired a national and later an international reputation. John

¹ *Acts of the Privy Council of England*, New Ser., xxii, 1591-2, pp. 406-7. This interest of the Privy Council in the protection of the mark of an individual clothier of Taunton is important, not merely as a recognition of the existence of individual trade-marks, but also because the particular trade-mark in question was not that of the weaver but of a *clothier*. For further discussion on this point see *infra*, pp. 94-95, in connection with the proclamation of Charles I in 1633.

² *History of the County of Essex* (Victoria County Histories) ii, pp. 382-3.

³ *Ibid.*, ii, p. 387.

⁴ "As early as 1568 there were not less than 1132 Flemish-speaking and 339 Walloon-speaking strangers within Norwich; and similar settlements were made in Colchester, Sandwich, Canterbury, Southampton, London, Southwark and elsewhere." (W. Ashley, *Economic History*, i, pt. ii, p. 240.)

Evelyn, in his diary, refers to Colchester as "the only place in England where these stuffs are made unsophisticated,"¹ and Samuel Pepys reports a conversation with a former ambassador to Spain, who "talked much of the plain habit of the Spaniards; how the King and Lords themselves wore but a cloak of Colchester bayze."²

Philip Morant, in his *History and Antiquities of Colchester*,³ thus describes the method and reasons for sealing the baize:

Among other regulations to keep up the goodness and reputation of their manufactures they had this standing rule: that all Bays should be searched and surveyed at the Dutch Bay Hall by sworn searchers maintained by their Company, and, according to the contents and the goodness of the said Bays, they were sealed, whereby the buyer or merchant might know the length and goodness of every Bay. There were Four several Sorts of Bays made in Colchester which were allowed to be sealed, viz. Rents, Cuts, Crowns, and Crosses: and different leaden Seals were affixed to each, to show what sort they were of. A Rent (so called because both the Selvages were rent off) had two leaden seals: A Cut (so called because one end was cut sloping) had three seals. A Crown-bay, being the most common sort, had four seals. A Cross-Bay, which was the last sort, had five broad leaden seals, whereof one was the same that was affixed to all sorts, the other four only to Cross-Bays.⁴

It is not to be expected that so valuable a trade-mark as that of Colchester should have gone un infringed for any length of time. "The Bays being sold upon the credit and bare inspection of their seals," writes Morant,

without opening the bags and examining the length and goodness of them, the exactest care possible was taken to prevent all undue practices, and when discovered, to punish them . . . but these seals were, as early as the year 1588,

¹ *Diary of John Evelyn* (ed. Austin Dobson 1906), ii, p. 113, July 8, 1656.

² *Diary and Correspondence of Samuel Pepys* (ed. Bright, New York 1884), vii, p. 34, Feb. 24, 1666.

³ (London 1748), pp. 74-5.

⁴ Morant explains that there was about 30^s difference in the values of a Cross, Crown, Cut or Rent. For reproductions of leaden "Bay" and "Say" seals used at Colchester, see *History of County of Essex* (Victoria County Histories), ii, Fig. 7, facing p. 388.

counterfeited by the Bay-makers at Halstead and afterwards in London; and even falsified in this very town . . . to the scandal of the whole nation and great prejudice of this town. . . .¹

The action of the Privy Council with regard to the infringement of the Colchester mark by the weavers of Halstead is significant. These infringers were also Flemish refugees; their settlement in Halstead was indeed an offshoot from the Dutch Bay Hall, at Colchester.² Nevertheless the Council took great care to differentiate the marks of the two towns in the following letter to Sir Thomas Lucas and Edmund Huddleston (28 July 1592):

We have considered of your reporte³ in the cause betweene the towne of Colchester and Halstedd concernynge the markes they do use to sett in their bayes, wherein they of Colchester do find fault that Halstedd men use the same marke and stampe which first was used by them of Colchester, being parte of the armes of that towne, wherein we do lyke very well the order that ys by you devysed for more apparaunt dyfference, that the bayes makers of Halsted shall have a

¹ Morant, *op. cit.*, p. 75.

² W. J. Hardy, "Foreign Settlers at Colchester and Halstead," in *Proceedings of the Huguenot Society of London*, vol. ii, p. 182. Also *Acts of the Privy Council*, New Ser., xix, pp. 127-8, -- Letter to the Bailiffs of Colchester.

³ Submitted in response to a request dated May 12, 1592, reading as follows: "By a supplicacion lately exhibited unto us on the behalf of such as make baies in the town of Colchester in the county of Essex we are geven to understand that other of the same trade that do inhabit in the town of Halsted apperteyning to Sir William Walgrave, knight, should of late have taken upon them to sett the same markes unto the baies by them made that they of Colchester have of longe tyme used, notwithstanding that it [is] avouched that the said baies makers (*sic*) of Halsted heretofore used other marke different from that of Colchester, that is with a crowne and six fethers. Forasmuch as for divers good considerations we think it verie convenient that every corporacion and towneshipp should reteine their owne particuler and accustomed markes for the wares by them made, and that other straungers should not use the same, wherebie many abuses maie be committed and by such a confuzion it cannot be knowne where the fault is committed and maie be amended, we praie you upon receipt hereof to consither (*sic*) of this matter, and finding the informacion trew, to take order that from hence forth they of Halsted maie be inhibited to use anie scale or scales comonlie heretofore used to be sett by those of Colchester upon the baies there made, but either to use their former markes or some other, so as there maie be a distinction betwene th'one and th'other. Otherwise we praie you to informe us what you shall have understood tuching the premises, and what lawfull cause maie be pretended to the contrarie, so as there upon we maie take such other order as shalbe thought convenient. And so praing you to use all expedicion you maie therein, we bid you, &c." (*Acts of the Privy Council*, New Ser., xxii, 1591-2, p. 444.)

rose underneath the crowne full stamped, the second sorte two crownes one above an other with a rose full stamped at the foote of the lowest crowne, the third sorte, three crownes sett two and one with a rose full stamped at the foote of the lowest crowne, the fourth and best sort of bayes, three crownes with a plaine crosse and roase full stamped at the foote of the crosse and lowest crowne. Which performed, seeing they both doe use two scales, and the other hath in letters expressed the name of the towne, and therefore wee doe hereby require you to take order that the said towne of Halstedd maie hereafter, observe in the marking of their bayes the said difference, and that no other towne hereafter that maie use the lyke trade shall use markes lyke to these, wherein in one respect those of Halstedd doe deserve to be favored because they sett a woork their owne contry people in this trade. So fare you hartilie well. From, &c.¹

The attitude of the Privy Council towards the infringement of the Colchester mark in London indicates to an even greater degree the amount of protection which they desired to give this mark and strongly supports Cunningham's statement that, in the period of the Stuarts, "the system of trade-marks seems to have established itself, at all events in the cloth trade, before very many years had elapsed."²

In 1632 one Thomas Jupp of London, cloth-worker, was punished for affixing counterfeit Colchester seals "to other bays of meaner condition, namely, to bays manufactured at Bocking." Under examination at the Star Chamber by the Attorney-General, Jupp admitted his fraud, disclosing an elaborate scheme for smuggling inferior cloth with Colchester seals out of the country. Jupp was fined £1000 and condemned to stand in the pillory in Cheapside, in Cornhill, at Bocking and at Colchester

upon several market days with a Paper on his head, wherein shall be inscribed words declaring the nature of his offense. At which time it is also thought fit and ordered that this Decree shall be publikely read, and severall Copies be thereof Printed, and set up upon Postes and other eminent places

¹ *Acts of the Privy Council, New Ser.*, xxiii, 1592, pp. 76-7, July 28, 1592.

² W. Cunningham, *Growth of English Industry and Commerce*, iii, p. 311.

about and neere the said Pillary, to remaine there, so as the cause of his punishment may be generally knowne, and other like lewd persons deterred from committing the like offences.

And it is also further Ordered and Decreed, that the said Jupp shall in like manner be set upon the Pillary in Cornehill over against the Exchange, at Blackwell Hall, Bocking and Colchester, upon severall Market dayes, with the like Paper on his head, inscribed as is aforesaid. At all which said severall times and places it is Ordered, that this Decree bee publikely read, and that severall Printed Copies of this Decree shall also be set up on severall eminent places, on, and about, and neere the said places and Pillaries, to remaine there for the purposes aforesaid; and specially at Blackwell Hall the officers there shall continue the said Printed Copies upon Postes and open places, in, and about the said Hall so long that the Clothiers of all parts of the Kingdome comming thither may have notice thereof.¹

The examination of Thomas Jupp reads very much like the evidence on the question of user in a modern trade-mark case:

He saith also that Colchester Bayes are commonly somewhat dearer than the Bayes of Bocking. He taketh it that Colchester Bayes sell better beyond the Sea than other Bayes, and hath long beene of that opinion. He saith, that he having long beene a Worke-man, is able to discerne a Colchester or Sandwich or Bocking Bay one from another, but other men that are not Worke-men discerne them by their Seales.²

The findings of the Council also have a very modern ring about them:

That the people of this Towne of Colchester and of the parts adioyning, receive a great part of their sustenance by the making of Bayes: That for many yeeres past, by occasion of the carefull Search there made, they have beene truely and

¹ The proceedings in this case are digested in Rushworth's *Historical Collections*, ii, pp. 148-9, and are published in full in the appendix to vol. iii, pp. 102-5. However, in view of the importance of the case and also of certain discrepancies between Rushworth's version and that of the original imprint of these proceedings by Robert Barker, the King's Printer, dated London 1632, the latter's imprint of the decree has been reproduced in full in an appendix to this chapter (*infra*, pp. 96-100.)

The decree also offered informers in similar cases in the future one-half of any fines that might be imposed by the Council. For comment upon the "*turbidum genus*" of informers created by such provisions, see W. S. Holdsworth *op. cit.*, iv, p. 356.

² *Infra*, pp. 96-97.