

379. **ABBOTT v. THE BAKERS AND CONFECTIONERS' TEA ASSOCIATION, LIMITED.**

Nov. 16th, 1871; Feb. 8th, 1872.

[*Malins, V.C.*—*W. N.* 1871, p. 207; *L. J., Notes of Cases*, 1871, p. 199.]

[*Lord Hatherley, C.*—*W. N.* 1872, p. 31.]

The plaintiffs being tea merchants, the defendants sold tea in wrappers similar to those in which the plaintiffs' tea was sold, the general appearance being imitated, though the details differed.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per V.C. (L. J. N. of C. 1871, p. 199)—"The rule of the Court is that a man who has adopted a distinguishing mark has a right to be protected against any other person adopting one sufficiently like it to mislead an unwary public."

Per L. C. (W. N. 1872, p. 31).—"Though no one particular mark is exactly imitated, the combination is very similar and likely to deceive. It is true that there is no proof that any one has been deceived, or that the plaintiffs have incurred any loss; but where the similarity is obvious that is not of importance."

[380.]

IN RE WHYTE.

Nov. 28th, 1871.

[*U. S. Patent Office—Duncan, Act. Comm.* } —U. S. Pat. Comm. Decis. 1871, 304.]

Application for letters patent for a device described by the applicant as an "ornamental print for fabrics," refused, on the ground that the real intention of the applicant was to use the device by way of a trade mark, and that this being so, he must apply for its registration as a trade mark, and not for letters patent for it as a design.

ISAACSON v. THOMPSON.

381.

Dec. 6th, 1871.

[*Bacon, V.C.*—41 *L. J., Ch.* 101; 20 *W. R.* 196.]

The plaintiff trading as a milliner under the name of "Madame Louise," the defendant began to use on his shops the names of "Agnes Ellis" and "E. Louise," under the pretence that they were his daughters' names.

Motion by the plaintiff for an injunction to restrain the defendant from using those names, or otherwise causing his shops to be mistaken for the plaintiff's, refused, on the ground that the plaintiff had delayed moving for nine or ten months after he had obtained sufficient evidence of actual deception.

"It is one of the most wholesome rules that a person who comes for the extraordinary relief of an injunction should come speedily."

EX PARTE DAWES & FANNING.

[382.]

1871.

[*U. S. Patent Office*— } ———] *U. S. Pat. Gaz.* 27.]
Leggett, Comm. }

On an application to register a trade mark for use on umbrellas, consisting of the number "140,"

Held, that the number was a good trade mark within the U. S. Statute of 1870, as consisting of an arbitrarily selected combination of numerals, and not used in its ordinary signification, and registration granted.

BOND v. MILBOURN.

383.

Dec. 20th, 1871.

[*Bacon, V.C.*—20 *W. R.* 197.]

Partnership suit.

The plaintiff and defendant having carried on business

in partnership under the style of "James Milbourn & Co.," and the plaintiff having bought the interest of the defendant in the partnership, under a provision in the articles, the defendant set up business next door, and employed his former workmen, and used the former style, so as to render the goodwill purchased by the plaintiff valueless.

Held, that the plaintiff was not entitled to have the premium he had paid on originally entering the partnership returned to him, since "Milbourn" was the defendant's own name, which he had a right to use in his business, and there was no provision in the articles for a return of premium.

384.

FORD v. FOSTER.

Jan. 18th, June 11th, 1872.

[*Bacon, V.C.*—*L. R. 7 Ch. 616* ; *27 L. T., N. S. 220* ; *20 W. R. 311.*]

[*James and Mellish, L.JJ.*—*L. R. 7 Ch. 611* ; *41 L. J., Ch. 682* ; *27 L. T., N. S. 219* ; *20 W. R. 818.*]

The plaintiff being the manufacturer of "Ford's Eureka Shirt," which he marked "R. Ford's Eureka Shirt, London," the defendants sold other shirts as "The Eureka Shirt," and marked with those words.

Injunction granted, on appeal, to restrain the defendants from using the name "Eureka" upon any shirts not of the plaintiff's make, but the injunction not to extend to advertisements between the defendants and the trade. And

Held, (1) that the fact that the plaintiff had habitually used his own name with the fancy name did not deprive him of his remedy; (2) that the name in question was not proved to have become *publici juris*; (3) that the

plaintiff was not disentitled by reason of having called himself "patentee" in his advertisements, the misrepresentation being, at most, collateral; (4) that the plaintiff not having been active in defending his rights, and the defendants' business and connexion being much larger than his, so as to make it impossible to calculate the sales lost to the plaintiff by those effected by the defendants, the account should be granted only from the filing of the bill.

Per Mellish, L. J.—"What is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris*? I think the test must be whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods."

LABOUCHERE v. DAWSON.

385

Jan. 18th, 1872.

[*Lord Romilly, M.R.*—*L. R. 13 Eq. 322*; *41 L. J., Ch. 427*; *25 L. T., N. S. 894*; *20 W. R. 309.*]

The plaintiffs having purchased a brewery business, the defendant, being one of the vendors, set up in business in another place, and solicited his former customers to deal with him, and not with the plaintiffs, so as to destroy the value of the business he had sold.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

"The goodwill is the probability of the old customers going to the new firm to whom the business is sold."

"The new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business, but he is not entitled, either by private letter, or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the goodwill."

386.

ROWLAND *v.* BREIDENBACH.

[*Lord Romilly, M.R.*—Cited 1 *Trade Marks* 261.]

The plaintiff being the manufacturer of Rowland's "Macassar" Oil, the defendant began to manufacture and sell another article under the name of "Macassarine."

Injunction to restrain the defendant from so doing, refused, on the ground that the name of the plaintiff's article was descriptive.

[387.]

WEED *v.* PETERSON.

Feb., 1872.

[*N. Y. Sup. Ct.*— } —12 *Abb. Pr. N. S.* 178.]
Learned, J. }

The plaintiffs having succeeded to the business of "D. Simmons & Co.," and having acquired the right to use that name and the name "D. Simmons" alone as their trade mark, the defendants used the name "D. Simmons" on their goods, having received the stamps and labels from their predecessors in business, who had wrongfully used the same.

Action for an injunction to restrain the defendants from so doing.

Held, (1) that the plaintiffs were entitled to an injunction to restrain the defendants from using the name, notwithstanding that the latter had acted in ignorance of the plaintiffs' rights, and had since discontinued their business altogether, and that costs must be given; (2) but that the plaintiffs were not entitled to recover damages from the defendants, since they had acted perfectly *bonâ fide*.

JAMES v. JAMES.

388.

Feb. 23rd, 1872.

[*Lord Romilly, M.R.*—*L. R. 13 Eq. 421 ; 41 L. J., Ch. 353 ; 26 L. T., N. S. 568 ; 20 W. R. 434.*]

The plaintiffs being persons entitled, under an assignment by Robert James, the original inventor, to an ointment known as "Lieutenant James' Horse Blister," the defendant, Robert Joseph James, began to sell an ointment under the same name, with the signature "Robert James," and a statement that it alone was genuine.

Injunction granted to restrain the defendant from omitting the name Joseph from his signature, and from stating that his ointment alone was genuine ; but

Held, that the defendant could not be restrained from using the name "Lieutenant James' Horse Blister," that having become the name by which the article was known, and the defendant not having come into possession of the secret recipe by a breach of trust or fraud.

"When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like), may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by him."

GREEN v. ROOKE.

389.

Feb. 23rd, 1872.

[*Wickens, V.C.*—*W. N. 1872, p. 49 ; L. J., Notes of Cases, 1872, p. 54.*]

The plaintiff being the proprietor of an ointment known as "Dr. Johnson's" or "Singleton's Golden Ointment," the recipe of which had been invented by one Dr. Johnson in

the seventeenth century, and had long been in the possession of the Singleton family, the defendant began to sell an ointment under the name of "Dr. Rooke's Golden Ointment."

Motion by the plaintiff for an injunction to restrain the defendant from selling any ointment under the name "Golden Ointment," refused, on the ground that, although persons were not at liberty to sell "Singleton's Ointment," there was no law to prevent the sale of "Golden Ointment" by those who could discover its composition.

[390.]

WOLFE v. BARNETT.

Feb., 1872.

[*Sup. Ct. of Louisiana*—24 *La. Ann.* 97 ; 13 *Amer. Rep.* 111.]

The plaintiff making and selling "Wolfe's Aromatic Schiedam Schnapps," the defendants sold other spirits under the same name.

Injunction granted to restrain the defendants from so doing, with damages; and

Held, that the following defences failed:—(1) that the defendants had used their mark for ten years; (2) that the plaintiff was not the first manufacturer of the article; (3) that the separate words used by the plaintiff were not new, the combination being so; (4) that the defendants had a written permission from a Mr. Wolfe, not being the plaintiff, to use his name; (5) that the plaintiff's label, which he stated to be copyright, did not show the date of entry.

[391.]

HALLETT v. CUMSTON.

March, 1872.

[*Mass. Sup. Ct.*—110 *Mass.* (14 *Browne*) 29.]

The plaintiff having been in partnership with the defendant's father as "Hallett & Cumston," and having, on

the termination of the partnership, entered into the latter's service under an agreement by which the latter was to have the use of the plaintiff's name during the continuance of the agreement, the defendant continued, after his father's death, to carry on his father's business under the old name, and on the plaintiff withdrawing his permission to use his name, obtained the use of the name of another person of the same name.

Injunction to restrain the defendant from using the name "Hallett" or "Hallett & Cumston," refused, on the ground that (1) the plaintiff had no interest in the name or trade mark of "Hallett & Cumston;" (2) as to the name Hallett, although the defendant could not use the plaintiff's name without his consent, that did not prevent him from using the name of another person, though the same.

BLACKWELL v. ARMISTEAD.

[392.]

March, 1872.

[*U. S. C. C., Dt. of W. Va.*— } —5 *Am. L. T.* 85; *Browne on*
Rices, J. } *Trade Marks*, 510.]

The plaintiffs being manufacturers of tobacco at Durham, North Carolina, who used as their trade mark a side view of a bull, with the words "Genuine Durham Smoking Tobacco," the defendant also manufactured tobacco, and sold it with labels containing the figure of a bull's head, with the words "The Durham Smoking Tobacco."

Injunction granted, to restrain the defendant from infringing the plaintiffs' rights.

SCOTT v. ROWLAND.

393.

March 16th, 1872.

[*Wickens, F.C.*—26 *L. T., N. S.* 391; 20 *W. R.* 508.]

The plaintiff having been in partnership with the defendant as glass-stainers, under the name of "John

Scott & Co." and having been bought out by the latter, the defendant continued to trade under the old name of "John Scott & Co."

On motion by the plaintiff, injunction granted to restrain the defendant from using the plaintiff's name in connexion with his business, so as to represent that the plaintiff was a partner in his business, on the ground that the retention of the name of an outgoing partner, who survived the dissolution of partnership, in the firm name of the business might to some extent render him responsible for the liabilities of the concern.

[394.]

MORRISON v. CASE.

April, 1872.

[*U. S. C. C., Dt. of Conn.—* } —9 *Bl. C. C.* 548; 2 *U. S. Pat. Gaz.* 544.]
Shipman, J.

The plaintiff being the proprietor of certain trade marks registered under the U.S. Act of 1870, and consisting respectively of the words "The Star Shirt," the words "The Star Shirt" together with the figure of a star, and the words and device "The * Shirt," the defendant sold other shirts under the same marks.

Suit for an injunction to restrain the defendant from infringing the plaintiff's trade marks.

Held, that the marks in question were lawful trade marks within the Act, and that the injunction must be granted.

[395.]

COOK v. STARKWEATHER.

1872.

[*N. Y. Super. Ct.—* } —13 *Abb. Pr. N. S.* 392.]
Monell, J.

The plaintiffs being whiskey manufacturers who sold their whiskey in barrels branded with the words "Valley

Whiskey" or "Old Valley Whiskey," the letters "AAA," and a Maltese cross, the head of the barrel being glazed in a particular manner and the rim painted red, the defendants sold other whiskey in barrels similarly prepared and branded, except that the letters "XXX" and a crown were substituted for the letters "AAA" and the cross.

Action for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, that, whether the plaintiffs were or were not entitled to the exclusive use of the words "Valley Whiskey" or "Old Valley Whiskey," which was not clearly established, the course of conduct adopted by the defendants was intended and calculated to deceive, and that the plaintiffs were therefore entitled to an injunction.

"The package, case or vessel in which the commodity is put, if prepared in a peculiar or novel manner, though in itself, perhaps, not a trade mark, may very properly be a very important part of it; and where a peculiar device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such specially prepared box or barrel constitutes a part of the trade mark, and may participate in the protection which will be given to the trade mark itself."

"The rule is, that the imitation of a trade mark need not be exact and perfect. It may embrace variations that a comparison would instantly disclose. Yet, if a resemblance exists which was designed to mislead the public, its use may be restrained."

WINSOR v. CLYDE.
STETSON v. WINSOR.

[396.]

May 21st, 1872.

[*Phila. C. P.*—9 *Phila.* 513.]

Cross motions for injunctions.

Held, (1) that Stetson & Co., who carried on business as shippers of merchandise by ships which they did not own, but of which they had the entire management while loading and unloading, &c., and who denominated each line of vessels used by them and plying in a particular direction,

by the name "The Keystone Line for ——," had acquired a right of property in the name; (2) that Winsor and Harding, who had owned the steamships employed for a certain period on one of these lines, had acquired no right in the name by its application to their ships, but had at most been entitled to use the name under a revocable licence; (3) that an injunction must be granted to restrain Winsor and Harding from continuing to use the name after the termination of their connexion with Stetson & Co., and that their motion for an injunction must be refused.

397.

RADDE v. NORMAN.

May 30th, 1872.

[*Wickens, V.C.*—*L. R. 14 Eq. 348* ; *41 L. J., Ch. 525* ; *26 L. T., N. S. 788* ; *20 W. R. 766.*]

The plaintiff being entitled to the exclusive right of importing from the Leopoldshall mines in Anhalt a kind of rock salt called "Kainit," and who designated it "The Genuine Leopoldshall Kainit," the defendants sold another article, not being the article which the plaintiff had the exclusive right of exporting, under the name of "Kainit [*Leopoldsalt*]."

On motion by the plaintiff, injunction granted to restrain the defendants from infringing his rights.

398.

HOOHAM v. POTTAGE.

June 7th, Nov. 12th, 1872.

[*Malins, V.C.*—*L. R. 8 Ch. 93 n.* ; *26 L. T., N. S. 755* ; *20 W. R. 720.*]

[*James and Mellish, L.J.*—*L. R. 8 Ch. 91* ; *27 L. T., N. S. 595* ; *21 W. R. 47.*]

The plaintiff, defendant, and defendant's brother having been in partnership as tailors, under the name of "Hook-

ham and E. & S. Pottage," on the dissolution of that partnership the plaintiff was held by the Court of Chancery to be entitled to continue in possession of the business, the defendant receiving the value of his interest; and the plaintiff continued to trade under the new name of "Hookham & Co." The defendant subsequently set up in business within a few doors of the plaintiff, and placed over his shop the words "S. Pottage, from Hookham and Pottage," the words "from" and "and" being in small letters.

Injunction granted to restrain the defendant from using the plaintiff's name in such a manner as to deceive, on the ground that, although the defendant was entitled to state fairly his connexion with the former firm, he was not entitled to act so as to divert to himself custom intended for the plaintiff.

ARMISTEAD v. BLACKWELL.

[399.]

June 14th, 1872.

[*U. S. Patent Office—* } ———— *1 U. S. Pat. Gaz. 603 ; Browne on Trade*
Leggett, Comm. } *Marks, 495.*]

Blackwell (who manufactured tobacco at Durham, N.C., in succession to Green, who had begun to designate his tobacco as "Durham" tobacco in 1865) having obtained registration of a trade mark consisting of the words "Durham Smoking Tobacco, Manufactured by W. T. Blackwell, Durham, North Carolina," Armistead, who manufactured tobacco at Lynchburg, Va., applied for the registration in his name of the words "Durham Smoking Tobacco." His business was carried on in succession to W. A. Wright, who had in 1860, when in partnership with Morris as "Morris & Wright," begun to designate his tobacco made at Durham as "Best Spanish-Flavoured Durham Smoking Tobacco," but had dissolved partnership

with Morris in 1861, and after a few months longer discontinued manufacturing altogether till 1869, when he again began to prepare tobacco for the market.

Interference declared for the purpose of determining to which, if either, the words "Durham Smoking Tobacco" belonged.

Held, (1) that, to be entitled to claim the benefit of the prior user of Morris & Wright, Armistead should show that he claimed through Morris as well as through Wright; (2) that, at all events, the user by his predecessor was longer than that by Blackwell's predecessor; (3) but that the words were not registrable as a trade mark, and that Blackwell had obtained registration by error, since a geographical name could not constitute a trade mark capable of becoming the exclusive property of any one person, but must remain open to the use of all inhabitants of the town or district, although strangers might be enjoined against the use of it; (4) and that the fact that Blackwell had obtained a wrongful registration of the words mentioned, which could not be cancelled, could not entitle Armistead to a similar wrongful registration, and that his application must be refused.

400.

HIRST v. DENHAM.

June 20th, 1872.

[*Bacon, V.C.*—*L. R. 14 Eq. 542*; *41 L. J., Ch. 752*; *27 L. T., N. S., 56.*]

The plaintiff being a manufacturer of woollen cloths, who had invented and adopted certain new fancy patterns and named them respectively "Turin," "Sefton," "Leopold," "Liverpool," the defendants, one of whom had been in the plaintiff's service, began to use the same names on tickets resembling the plaintiff's, affixed to cloths of their own make of a similar pattern to the plaintiff's, but of inferior quality.

On motion by the plaintiff, injunction granted to restrain the defendants from describing their cloths by those names, and from placing them on tickets affixed to their cloths, imitating the plaintiff's tickets, &c.

SMITH v. REYNOLDS (1).

[401.]

June, 1872.

[*U. S. C. C., S. Dt. of N. Y.—* } ———10 *Bl. C. C.* 85 ; 3 *U. S. Pat.*
Blatchford, J. } *Gaz.* 213.]

Suit for an injunction to restrain the infringement of the plaintiffs' trade mark, registered under the U.S. Act of 1870.

Injunction refused, on the ground that there was no sufficient evidence of the filing at the Patent Office of a declaration under oath as to the right to the mark, as required by the Act, the only evidence produced being a certificate by the Commissioner of Patents of the deposit of the trade mark for registration, of the filing of a statement in respect of the mark, and that the depositor had otherwise complied with the Act, &c., but which certificate did not refer to any such declaration as was required.

SMITH v. REYNOLDS (2).

[402.]

July, 1872.

[*U. S. C. C., S. Dt. of N. Y.—* } ———10 *Bl. C. C.* 100 ; 3 *U. S. Pat.*
Blatchford, J. } *Gaz.* 214.]

The plaintiffs being paint manufacturers, who had registered as their trade mark on paints, under the U.S. Act of 1870, a device of a crown, but who had not actually used it on white lead, the defendants, who, or their predecessors in business, had used a device of a crown on white lead previously to the use and registration of the device by the plaintiffs, continued so to do.

On motion by the plaintiffs for an injunction to restrain the defendants from so doing,

Held, (1) that the registration of the device in the name of the firm, and not in the names of the individual partners, was good; (2) that the registration for paints generally was good, without further description of the particular goods; (3) that the device of a crown was a good registrable trade mark within the Act; (4) but that the prior use of the device on white lead by the defendants prevented the plaintiffs from having a right to register the mark in respect of white lead, and that the registration, being bad in respect of part of the class it purported to cover, was bad altogether; (5) that the motion for injunction must be refused.

403.

MACK v. PETER.

July 23rd, 1872.

[*Lord Romilly, M.R.*—*L. R. 14 Eq. 431; 41 L. J., Ch. 781; 20 W. R. 964.*]

The plaintiff being the proprietor and publisher of "The Birthday Scripture Text-Book," the defendants brought out a book of similar arrangement and style, under the name of "The Children's Birthday Text-Book."

Injunction granted to restrain the defendants from publishing any book with that title, or any other title calculated to deceive, and from imitating the arrangement, binding, &c., of the plaintiff's book in such a way as to deceive.

[404.]

IN RE JOHNSON & CO.

Sept. 12th, 1872.

[*U. S. Patent Office—Thacker, Act. Comm.* } —2 *U. S. Pat. Gaz.* 315.]

Application for the registration of two trade marks, consisting respectively of the words and letters "Parsons'

Purgative Pills, P.P.P.," and "Johnson's American Anodyne Liniment, Established A.D. 1810," refused, on the ground that both designations were descriptive of the article; the letters "P.P.P." becoming so when used in combination with the words of which they were the initials, though, if used alone, they might have acquired an arbitrary signification; and the date of discovery, in the second case, not supplying the needed distinctiveness.

IN RE TOLLE.

[405.]

Oct. 3rd, 1872.

[U. S. Patent Office—
Thacher, Act. Comm. } ——2 U. S. Pat. Gaz. 415.]

Application for the registration of two trade marks for flour, consisting of the words "Cherry St. Mills," in the one case, and "Market St. Mills" in the other, combined in both cases with the masonic emblem of the square and compass, refused, on the ground that as to the name of the locality no exclusive right could be acquired; and as to the emblem, it could not be divested of its universal signification and be exclusively appropriated in a particular business; and that, as to the whole, a combination of two objectionable parts could not constitute a valid trade mark.

THE MCGOWAN BROS. PUMP MACHINE CO.
v. MCGOWAN.

[406.]

Oct., 1872.

[*Cincinnati Super. Ct.*——2 *Cinc.* 313.]

The defendant in error, J. H. McGowan, having been in partnership with his brother, T. J. McGowan, as machine manufacturers, sold his interest in the partnership to his brother, reserving the right to manufacture under the partnership patents. The notice of dissolution of partner

ship stated that T. J. McGowan was to use the firm name "in settlement," and to carry on business "under the old style firm name." T. J. McGowan, having joined with other persons, incorporated a company under the name "The McGowan Bros. Pump and Machine Co.," being the plaintiffs in error. J. H. McGowan, the defendant in error, recommenced business under the name of "John H. McGowan & Co.," at "The McGowan Engine and Pump Company's Works."

Action by the defendant in error.

Injunction granted to restrain the plaintiffs in error from the use of the words "The McGowan Brothers," as part of their name, except on patterns sold by J. H. to T. J. McGowan, and castings therefrom, on the ground that, although the goodwill of the partnership business passed to T. J. McGowan, he had only a revocable licence to use the name, and that the continued user by him was injurious to, and objected to by the defendant in error. But the plaintiffs in error to be at liberty to style themselves "Successors to the McGowan Brothers."

Per Hagans, J.— "There can be no doubt that, where one partner sells to another partner a going business, every advantage arising from the fact of the sole ownership of the premises, stock and establishment, including advantages acquired by the old firm in carrying on its business, whether connected with the old place or the old name, passes to the purchaser. But the vendor will not be prevented from carrying on a similar business when, where, or with whom he pleases."

[407.]

LEA v. WOLFF.

Nov. 1872; Oct. 1873.

[*N. Y. Sup. Ct.*—
Ingraham, P. J.] — 13 *Abb. Pr., N. S.* 389; 1 *Thomp. & C.* 626.]

[*N. Y. Sup. Ct.*—1 *Thomp. & C.* 626; 15 *Abb. Pr., N. S.* 1; 46
How. Pr. 157; 1 *Am. L. T., N. S.* 400.]

The plaintiffs being manufacturers in Worcestershire of a sauce which they called "Worcestershire Sauce," the

defendants began to manufacture a sauce elsewhere, which they called by the same name, and placed on their bottles labels very closely resembling those of the plaintiffs, except that their own names appeared as those of the manufacturers.

On motion by the plaintiffs for an injunction to restrain the defendants from using the name and labels,

Held, by Ingraham, P.J., (1) that the name, being the name of the locality in which the sauce was made, could not be protected as a trade mark; (2) but that an injunction must be granted to restrain the imitation of the labels, notwithstanding the appearance therein of the defendants' own names.

Held, by the Supreme Court, that the injunction must be extended to restrain the use of the name "Worcestershire Sauce," since it was evident that the defendants had acted with fraudulent intention, and they, further, did not manufacture within the county in question.

Per Fancher, J.—"Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words and the allocation of words have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them as a trade mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued."

"As a general rule, geographical names cannot be appropriated as trade marks; but the rule has its exception, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to encroach upon the previous use and popularity of another's trade mark."

SOHIER v. JOHNSON.

[408.]

Nov. 1872.

[*Mass. Sup. Ct.*—111 *Mass.* (15 *Browne*) 238.]

W. P. Winchester, surviving partner in the firm of "E. A. & W. Winchester," whose trade mark consisted of

that firm name, having taken the defendant into partnership and died, and the defendant having subsequently continued to trade under and use that name, for some years in partnership with others, and afterwards by himself, the plaintiffs, being W. P. Winchester's executors and trustees, sold the factory and premises to a third person.

Suit for an injunction to restrain the defendant from using the trade mark, and an order for him to join in conveying it to the purchaser from the plaintiffs.

Held, that the trade mark had become the property of the partnership between W. P. Winchester and the defendant, on its formation, and had descended to the defendant on the death of the former, and that the plaintiffs had no right therein, and that the injunction and order must be refused.

"The trade mark is the device or symbol used to identify the article manufactured, and the right to use it will pass with the business and goodwill as an incident, unless something appears to show a different intention of the parties."

[409.]

THE MERIDEN BRITANNIA CO. v. PARKER.

Nov. 1872.

[*Conn. Sup. Ct.*—39 *Conn.* 450; 12 *Amer. Rep.* 401; 13 *Am. L. Rep., N. S.* 153.]

The plaintiffs having acquired from three brothers named Rogers the right to use a trade mark, "1847, Rogers Bros., A 1," and the brothers Rogers being employed by them to superintend the manufacture of the goods so stamped, the defendant began to place on similar goods stamps containing the words "C. Rogers Bros., A 1" and "C. Rogers & Bros., A 1."

Injunction granted to restrain the defendant from using such stamps or any other stamp containing the words "Rogers Bros." though he had used his stamps by the permission of three brothers of the name of Rogers.

But *Held*, that no injunction could be granted as to the name "Rogers" alone, nor with respect to goods already stamped by the defendant, the parties being left to their remedy at law as to the last point.

Per Carpenter, J.—"The fact that careful buyers who scrutinize trade marks closely are not deceived, does not materially affect the question. It only shows that the injury is less, not that there is no injury."

OSGOOD *v.* ALLEN.

[410.]

Nov. 1872.

[*U. S. C. C., Dt. of Maine.*— } ———1 *Holmes*, 185 ; 6 *Am. L. T.* 20 ;
Shepley, J. } 3 *U. S. Pat. Gaz.* 124.]

The plaintiffs being the proprietors and publishers of a monthly magazine for the young, published at Boston, Mass., under the title "Our Young Folks ; an Illustrated Magazine for Boys and Girls," the defendant began to advertise and publish and sell at Augusta, Maine, a fortnightly illustrated paper for the young, under the title "Our Young Folks' Illustrated Paper."

Suit for an injunction to restrain the defendant from using the words "Our Young Folks," as the title of a publication.

Held, (1) that the title of a copyrighted publication was not capable of protection as copyright, except in conjunction with the publication which it was used to designate, and that the copyright in the paper not having been infringed, that in the title had not been ; (2) that, treating the title on principles applicable to trade marks, the case must be referred to a Master to report whether the use of the title by the defendant was deceiving, or was calculated to deceive the public.

"Words or devices may be adopted as trade marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were

not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade mark, so as to give a right to the exclusive use of it. The office of a trade mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use, for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names, which point out only the place of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations."

411.

BROADHURST v. BARLOW.

Nov. 21st, 1872.

[*Wickens, V. C.*—*W. N.* 1872, p. 212; *L. J. Notes of Cases*, 1872, p. 183.]

The plaintiffs being manufacturers of Spanish shirtings for export to the East, who marked their goods with a lion in a scroll, the words "Spanish shirtings" in a scroll, the figures "No. 120," certain lines, and the words "exactly 12 yards," in Turkish, Armenian and Greek, the defendants used on their goods an elephant and castle in place of a lion, and curved instead of straight lines, the marks being in other respects the same.

On motion by the plaintiffs, injunction granted to restrain the defendants from using the words "exactly 12 yards" in the same languages as the plaintiffs used, and placed between a figure or crest and the words "Spanish Shirtings" in a scroll, in a manner similar to that used by the plaintiffs.

And *Held*, that an offer to submit and abandon the mark objected to did not deprive the plaintiffs of their right to the injunction.

IN RE GRAHAM.

[412.]

Nov. 30th, 1872.

[U. S. Patent Office—
Thacher, Act. Comm. } ———2 U. S. Pat. Gaz. 618.]

Application for the registration of the words "The New Manny" as a trade mark for a harvesting machine, refused, on the ground that the term "the Manny" was commonly applied to a large class of machines, that the word "new" was practically equivalent to "improved," and that the words, therefore, merely constituted a descriptive appellation of the article.

**THE SINGER MANUFACTURING CO. v. KIMBALL
AND MORTON.** [413.]

Jan. 14th, 1873.

[Ct. of Session.—Ct. of Sess. Cas., 3rd Ser., XI. 267; 10 Scot. L. Rep. 173.]

The plaintiffs being American manufacturers of the "Singer" sewing machines, the defendants advertised machines for sale as "Singer" machines, but placed their own names, as those of the makers, on all of them.

Interdict granted to restrain the defendants from using the name "Singer" in respect of machines other than those made by the plaintiffs, on the ground that the name was indicative of machines of the plaintiffs' make, and not of machines made according to a certain principle of construction.

Per Lord President Inglis.—"Whether it be a star, or any other device, or a name, as in the present case, the result is the same. If it be exclusively appropriated for a series of years, and has obtained a certain exclusive meaning in the trade, as signifying the goods or the productions of a particular manufacturer, then it is his property as a trade mark, and no one else is entitled to use it."

“In an application for an interdict it is not only not necessary to prove any pecuniary damage, but it is not necessary to prove that any injury has been actually inflicted. A threat of injury is a sufficient ground for an application for an interdict, and in like manner a reasonable apprehension of injury from the proceedings of the parties complained against is also in many circumstances a very good ground for such an application.”

Per Lord Ardmillan.—“Singer & Co. have no monopoly of the invention, and no exclusive right to make or to sell the machine. Any one may make it, any one may sell it. But there must be no deception, no sailing under false colours, no unfair and delusive assumption of a trade mark, or of a name appropriated and known as a trade mark.”

414.

CHRISTIE v. CHRISTIE.

Jan. 15th ; March 20th, 1873.

[*Malins, V.C.*—42 *L. J.*, *Ch.* 261 ; *L. R.*, 8 *Ch.* 502 *n.*]

[*Lord Selborne, C.*, and *Mellish, L.J.*—*L. R.*, 8 *Ch.* 499 ; 42 *L. J.*, *Ch.* 544 ; 28 *L. T.*, *N. S.* 607 ; 21 *W. R.* 493.]

The plaintiffs being Messrs. Christie, Manson & Woods, auctioneers, the defendants issued a certain prospectus in which they styled themselves “Messrs. Christie & Christie,” and made preparations for carrying on business under the name of “Christie & Co.”

Suit by the plaintiffs for an injunction to restrain the defendants from so doing.

Exceptions for scandal to a statement in the bill, to the effect that one of the defendants had, on a previous occasion, been brought up in a police court on a charge of fraud.

Held, on appeal, that the exceptions must be allowed, on the ground that such a charge of fraud, even if it could be substantiated, was wholly immaterial to the suit in question, and that its insertion in the bill was not only scandalous but oppressive.

BURKE v CASSIN.

[415.]

Jan. 1873.[*Cal. Sup. Ct.*—45 *Cal.* 467; 13 *Amer. Rep.* 204.]

The plaintiff being the executor of Udolpho Wolfe, who manufactured and sold "Wolfe's Aromatic Schiedam Schnapps," the defendants sold other spirits under the name of "Von Wolf's," or "Van Wolf's Aromatic Schiedam Schnapps."

Injunction granted to restrain the defendants from using the name "Wolfe," or "Wolf," or "Von Wolf," or "Van Wolf," but not from using the words "Aromatic Schiedam Schnapps," those words being descriptive of the article.

IN RE RICHARDSON.

[416.]

Feb. 7th, 1873.

[*U. S. Patent Office.*— } —3 *U. S. Pat. Gaz.* 120.]
Leggett, Comm. }

Application for the registration of the words "A. Richardson's Patent Union Leather-Splitting Machine" as a trade mark, refused, as to the word "patent," on the ground that, the patent having expired, the continued use of the word was deceptive; and, as to the remainder, on the ground that the name, having been applied to a patented article during the existence of the patent, had become descriptive of the article, and open to the use of the public on the expiration of the patent.

[417.]

STERNBERGER v. THALHEIMER.*Feb. 8th, 1873.*

[*U. S. Patent Office—* } —3 *U. S. Pat. Gaz.* 120.]
Thacher, Act. Comm. }

Thalheimer having in five or six instances used the word "Centennial" as an experimental trade mark on clothing about March 6th, 1872, and procured the registration of the word as his trade mark, but not having used the word seriously until June, Sternberger, in February, 1872, registered a trade mark containing that word, with other particulars, began to use the word extensively about March 12th, 1872, and applied for registration of the word as his trade mark.

Interference declared between the parties.

Held, that, notwithstanding the prior registration of Thalheimer, Sternberger was entitled to registration, since he was the first to use the word seriously, besides having previously registered it in combination with other particulars.

[418.]

LAIRD v. WILDER.*Feb., 1873.*

[*Kentucky Ct. of App.*—9 *Bush* 131 ; 15 *Amer. Rep.* 707.]

The plaintiff manufacturing and selling "Laird's Bloom of Youth or Liquid Pearl," the defendants began to sell another preparation in bottles of a similar shape to the plaintiff's, and with labels copied in all particulars from his, except that for "George W. Laird, No. 74, Fulton St., New York," were substituted the words, "Joseph Laird, No. 384, Broadway, New York."

Injunction to restrain the defendants from so doing,

refused, on the ground that the plaintiff's preparation contained carbonate of lead, or other noxious ingredients, whereas he described it as being "free from all mineral and poisonous substances," and that he was, therefore, disentitled to relief.

TUDOR v. TUDOR.

419

March 13th, 1873.

[*Malins, V.C.*—*W. N.* 1873, p. 72.]

The plaintiff, W. Tudor, having transferred a business, which he had carried on in partnership with his brother S. Tudor, during the latter's lifetime, and since his death, alone, under the name of "S. & W. Tudor," to the defendants, the sons of S. Tudor, the defendants continued to use the plaintiff's initial, "W.," as part of their firm name, notwithstanding that there was an express provision in the deed under which the plaintiff retired, for the removal of his name from the business.

On motion by the plaintiff, injunction granted to restrain the defendants from continuing so to do.

CORNS v. GRIFFITHS.

420.

May 3rd, 1873.

[*Malins, V.C.*—*W. N.* 1873, p. 93 ; *Pemberton, 2nd ed.* 308.]

The plaintiffs being the proprietors of a weekly newspaper entitled *The Iron Trade Circular (Rylands')*, the defendant, who had for many years published a weekly report of the iron trade, not in the form of a newspaper, as *The Iron Trade (Griffiths' Weekly Report)*, substituted for this report a newspaper much resembling the plaintiffs', and entitled *The Iron Trade Circular (Edited by Samuel Griffiths)*.

On motion by the plaintiffs, injunction granted to restrain the defendant from using a title for his newly-established newspaper identical with that used by the plaintiffs for theirs.

421.

FULLWOOD v. FULLWOOD. (1).

May 5th, July 31st, 1873.

[*Malins, V.C.—W.N. 1873, p. 93.*]

[*James & Mellish, L.JJ.—W. N. 1873, p. 185.*]

The plaintiff being a manufacturer of annatto, trading as "R. J. Fullwood & Co.," and who sold his annatto in earthenware bottles with special labels on the sides, the defendant, H. Fullwood, the plaintiff's nephew, began to manufacture annatto under the name of "H. Fullwood & Co.," though he had no partner, and removed into the same street as the plaintiff, and sold his goods in similar bottles, similarly labelled to the plaintiff's, as to which several instances of actual deception were proved.

On motion by the plaintiff, injunction granted to restrain the defendant from selling his annatto in similar bottles labelled in a similar manner to the plaintiff's.

[422.]

IN RE THE AMERICAN SARDINE CO.

May 13th, 1873.

[*U. S. Patent Office—* } ———3 *U. S. Pat. Gaz. 495.*
Leggett, Comm. }

Application for registration of the words "American Sardines" as a trade mark on boxes containing a species of American fish, not the true sardines, refused, on the ground that the application of the words to fish, not being really sardines, was calculated to deceive purchasers, while, if applied to true sardines, the words would be properly descriptive of the fish.

WITT v. CORCORAN.

423.

June 13th, 1873.

[*Bacon, V.C.*—*Seton, 4th ed., 257* ; 2 *Ch. D.* 69 ; 45 *L. J., Ch.* 603 ; 34 *L. T., N. S.* 550 ; 24 *W. R.* 501.]

The plaintiff having been in partnership with the defendant and his son, under the firm of "Bryan Corcoran, Witt & Co.," and having purchased the business, goodwill, trade name, trade marks, &c., the defendant carried on business under the name of "Bryan Corcoran, & Co.," or "Bryan Corcoran, Son & Co."

Injunction granted to restrain the defendant from carrying on business under those names, or any other name calculated to induce the belief that the defendant was carrying on business in succession to the original firm, and from interfering with letters intended for the original firm.

BROWNE v. FREEMAN (2).

424.

July 23rd, 1873.

[*James & Mellish, L. J. J.*—*W. N.* 1873, p. 178.]

The plaintiff being the original inventor of chlorodyne, but who had lost his exclusive right in the name, the defendant represented that a medicine of his own manufacture was the "True and Original Chlorodyne," and made certain other representations with regard to his chlorodyne.

Injunction to restrain the defendant from so doing, refused, on the ground that the name had become the name of the article; that the defendant had always sold his under his own name, and that any false statements in the defendant's advertisements only amounted to slander, for which damages were the proper remedy.

[425.]

POPHAM v. WILCOX.

(afterwards POPHAM v. COLE.)

1873; Dec. 9th, 1874; April 25th, 1876.

[N. Y. Super. Ct.— } —14 Abb. Pr., N. S. 206.]
Monell, J.

[N. Y. Super. Ct.—38 N. Y. Super Ct. (6 J. & S.) 274.]

[N. Y. Ct. of App.—66 N. Y. (21 Sickels) 69; 23 Amer.
Rep. 22.]

The plaintiff being a manufacturer of refined lard, which he sold in vessels stamped with the figure of a fat hog, his name, and "Prime Leaf Lard," the defendants began to sell the same article in vessels stamped with a globe, a small wild boar, their name, and "Prime Leaf Lard."

Action for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, by Monell, J., that although there was not much similarity between the marks when seen side by side, the defendants' mark was likely to attract to itself the same name as the plaintiff's, viz., "the pig brand," and that, therefore, the injunction which had been granted must be continued.

Held, by the N. Y. Super. Court, that, the plaintiff being unable to prove himself to have been the first inventor, and it being proved that the pig mark had been used by various other refiners, the injunction must be dissolved.

Held, by the N. Y. Ct. of App., that the decision in favour of the defendants must be maintained, on the ground that there was not sufficient resemblance between the marks to be calculated to deceive; and further, that it was doubtful whether the figure of the animal from which the lard was derived was not descriptive of the article, and, therefore, incapable of being appropriated.

Per Monell, J.—"The question in these cases always is, whether there is such a similarity of the two devices as to deceive the public. It is not required that the imitation shall be so close as to require a

careful examination to detect the difference, nor that it shall be such that persons entirely familiar with one would not be mistaken. But it must have such a resemblance to the genuine that the general public would be likely to mistake the one for the other."

"A mere design to injure would not of itself be sufficient. It must be accompanied by evidence of actual or prospective injury, but in establishing the injury the intent may properly be considered."

Per N. Y. Ct. of App.—"The question in this, as in every other case, is whether there is such resemblance between the two as to deceive a purchaser using ordinary caution. . . . The Court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade marks used by different parties."

DAWES v. DAVIES.

[426.]

1873.

[*N. Y. C. P.*—*Codd. Dig.* 260.]

The plaintiff being an umbrella manufacturer, whose trade mark consisted of the number "140," placed in a white oblong within a five-pointed star, the defendants used on their umbrellas the number "142" within a sunburst.

Motion by the plaintiff for an injunction to restrain the defendants from so doing, refused, on the ground that different numerals were commonly used in the trade as trade marks, and that it was not probable that persons of ordinary intelligence would be deceived.

HARDY v. CUTTER.

[427.]

1873.

[*U. S. C. C., Dt. of Cal.*— } —3 *U. S. Pat. Gaz.* 468.]
Wheeler, J.

The plaintiffs being manufacturers of "Cutter" whiskey (as successors by purchase to J. H. Cutter), who branded their barrels with a crown and the words "J. H. Cutter—Old Bourbon," and used wrappers and labels containing the

same words with other particulars, the defendant, a son of J. H. Cutter, also manufactured whiskey, and used wrappers and labels containing the words "J. F. Cutter, son of the late J. H. Cutter, of Louisville, Ky.," the wrappers and labels bearing no other resemblance to the plaintiffs'.

Action for an injunction to restrain the defendant from so doing.

Demurrer allowed, on the ground that there was no similarity between the marks, except in the use of the name "Cutter," and that, with regard to the name, the defendant was entitled to use his own name in an honest manner.

"Every person has the right to use his own name in connexion with the articles he manufactures or sells, provided he does not use it in such a way as to deceive or defraud the public, or to obtain for himself, at the expense of another, an undue advantage."

[428.]

LOWELL MANUFACTURING CO. v. LARNED.

1873.

[*U. S. C. C., Dt. of Penni.—Codd. Dig. 341.*]

The plaintiffs being carpet manufacturers, who were in the habit of rolling their carpets upon a peculiarly-formed stick, made in two pieces, and with the ends shaped into octagonal rings, which appeared in the centre of the rolls of carpet, and who had registered this stick in the U. S. as their trade mark, the defendants began to roll their carpets upon similar sticks.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

CLEMENS v. SUCH.

[429.]

July 11th, 1873.

[N. Y. Sup. Ct.—Codd. Dig. 312.]

The plaintiff, an author, who wrote under the *nom de plume* of "Mark Twain," having agreed to allow the defendant to publish one of his essays in a book of selections, and having delivered to him a volume of his essays, published but not copyrighted, for him to select one of them therefrom, the defendant published in his book six essays purporting to be by Mark Twain, with a statement on the title-page that they had been specially revised and selected by Mark Twain for the purpose, five of the six being taken from the plaintiff's volume, and the sixth not being his at all.

On motion by the plaintiff, injunction granted to restrain the defendant from using the *nom de plume* on the title-page of his book, or as the author or reviser of any book, and from publishing any matter alleged to have been written by the plaintiff under his *nom de plume*, except one essay from the plaintiff's volume, but the defendant to be at liberty to state on his title-page that the book included a sketch by Mark Twain.

OSGOOD v. ROCKWOOD.

[430.]

Sept., 1873.

[U. S. C. C., S. Dt. of N. Y.— } —11 Bl. C. C. 310.]
Blatchford, J.

The plaintiffs being American patentees, under an assignment by the English inventor, of a class of prints known as "Heliotypes," and who had registered the word "Heliotype" as their trade mark in respect thereof under the

U. S. Act of 1870, the defendant used the word "Heliotype" or "Heilotype" on prints not produced by the patented process.

Injunction to restrain the defendant from using the word, refused, on the ground that, whatever rights the plaintiffs might have apart from the Act, and which the Act preserved to them (but which the bill was not framed to assert), they were not entitled to any remedy in virtue of the registration under the Act, since the defendant had not used the word upon substantially the same goods as those in respect of which it was registered by them.

431.

RAGGETT v. FINDLATER.

Nov. 11th, 1873.

[*Malins, V.C.*—*L. R. 17 Eq. 29*; *43 L. J., Ch. 64*; *29 L. T., N. S. 448*; *22 W. R. 53.*]

The plaintiff being a manufacturer of stout, who sold it in bottles bearing labels on which the words "Nourishing London Stout" were conspicuous, the defendants sold stout in bottles bearing labels having on them the words "Nourishing Stout," but differing in other respects from the plaintiff's.

Injunction to restrain the defendants from using the words "Nourishing Stout," refused, on the ground that a right of trade mark could not be acquired in a mere English adjective denoting quality.

"It is of the highest importance that, on the one hand, every protection should be given to trade marks when fairly and properly used, and when used within just limits, and, on the other hand, it is of great importance that, by the use of a particular word or anything which may be called a trade mark, the right should not be unduly extended so as to infringe on the right of traders to call their articles by a quality they possess, or to give an undue protection to any person who happens to use a particular word."

SIEGERT v. EHLERS.

[482.]

Feb. 3rd, 1874.

[Trinidad Sup. Ct.—Cited 7 Ch. D. 803; 38 L. T., N. S. 351.]

The plaintiffs being a firm manufacturing at Ciudad Bolivar (formerly Angostura), in Venezuela, a fluid which they called "Aromatic Bitters," and put up in bottles enclosed in wrappers, which were printed with the name of the preparation and a description in several languages of its virtues and uses, the defendant, an agent of another manufacturer at Ciudad Bolivar, sold another article in bottles in very similar wrappers.

On motion by the plaintiffs, injunction granted to restrain the defendant from using wrappers printed with the name "Aromatic Bitters," and a description of the uses of the article, in imitation of the plaintiffs'.

COPE v. EVANS.

438.

Feb. 14th, 1874.

[Hall, V.C.—L. R. 18 Eq. 138; 30 L. T., N. S. 292; 22 W. R. 453.]

The plaintiffs being cigar manufacturers, who sold their cigars in boxes branded with the words "Flor Fina Prairie Superior Tabac," and the figure of a hunter, the defendants manufactured cigars and sold them in boxes branded with the words "Flor de la Prairie," and the half-figure of a girl.

Injunction to restrain the defendants from using the word "Prairie," refused, on the ground that no actual deception was proved, and that it was not to be anticipated that deception would occur.

“In cases where it appears that defendants have adopted a plaintiff's trade mark, and it is proved that defendants' object in doing so was to pass off their own goods as those of the plaintiff, the Court will, without further inquiry, restrain the defendants, and it will also do so where there has been such adoption, although proof of the defendants' object be wanting, if it appears that any one has in fact been thereby induced to buy the defendants' goods as being the goods of the plaintiff. In the absence of proof of such object and of such deception, if the two trade marks are not to the eye of the Court either altogether identical, or so similar that the Court considers the difference unsubstantial, the plaintiff must make out to the satisfaction of the Court that its intervention is required to protect the plaintiff from the defendants' goods being taken for his (the plaintiff's). For the plaintiff to say that his name or mark is to be found on the defendants' goods is not sufficient.”

[434.]

WOLFE v. BURKE.

March, 1874.

[*N. Y. Sup. Ct.*—7 *N. Y. Sup. Ct.* (7 *Lans.*) 151; 2 *U. S. Pat. Gaz.* 441.]

[*N. Y. Ct. of App.*—56 *N. Y.* (11 *Sickels*) 115.]

The defendants manufactured and sold spirits, in succession to Udolpho Wolfe, as “Wolfe's Aromatic Schiedam Schnapps,” and threatened proceedings against the plaintiffs, who sold “Hudson G. Wolfe's Bell Schnapps.”

Injunction, which had been granted to restrain the defendants from interfering with the plaintiffs' business by such threats, dissolved, and

Held, that the plaintiffs were not entitled to the favourable consideration of a Court of Equity, because—(1) they had endeavoured to secure a part of the goodwill of the defendants' business, while avoiding an infringement of their trade mark; (2) they, as well as the defendants, had improperly represented their article as, not merely a spirit, but a medicinal preparation.

BROWN v. MERCER.

[435.]

March, 1874.

[*N. Y. Super. Ct.*— } ———37 *N. Y. Super. Ct.* (5 *J. & S.*) 265.]
Van Vorst, J. }

The plaintiff being a manufacturer of a preparation for dressing leather, who sold his preparation in bottles enclosed in wrappers peculiarly coloured and arranged, the defendant sold a similar preparation in similar bottles, and gradually assimilated his wrappers more and more to the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendant from infringing the plaintiff's rights.

“It is no answer that, in certain particulars, the defendant's label differs from the plaintiff's, so long as the imitation in other respects is so apparent that purchasers have been and are likely to be deceived.”

MISSOURI (STATE OF) v. GIBBS.

[436.]

March, 1874.[*Missouri Sup. Ct.*—56 *Mo.* (15 *Post*) 133.]

The defendant imitated Messrs. Lea & Perrin's “Worcestershire Sauce” and the labels and wrappers used upon it by them.

Held, that the Missouri Statute of Feb. 22nd, 1870, making an infringement of trade mark a criminal offence in that State, was applicable to cases in which the imitated trade mark was the property of English or other foreign manufacturers.

“Trade marks are valuable to the persons who have a proprietary interest in them, and to the people who buy and use the articles, because they are a guarantee of their genuineness.”

[487.]

KIDD & CO. v. MILLS, JOHNSON & CO.

March 28th, 1874.

[U. S. Patent Office—
Leggett, Comm. } —5 U. S. Pat. Gaz. 337.]

S. N. Pike, having, when in partnership at Cincinnati with H. Pike as "S. N. and H. Pike," adopted as trade marks for whiskey the words "Magnolia" and "Dave Jones," continued to use those marks, sometimes trading alone, sometimes in partnership with various other persons. At a time when he was in partnership with Kidd as "S. N. Pike & Co." he sold the premises on which, and the apparatus, &c., with which the company carried on business at Cincinnati, but which were his private property, to Mills, Johnson & Co., and gave them what purported to be a licence to use the brands used by him. Mills, Johnson & Co. having registered those words as their trade marks, Kidd & Co., consisting of Kidd and another surviving partner in the firm of "S. N. Pike & Co.," carrying on business at New York, since the removal from Cincinnati, applied for the registration of those words as their trade marks.

Interference declared between the parties to try the right to the marks.

Held, (1) that on the dissolution of the various firms in which S. N. Pike was concerned, the right to use the trade marks must be held to have continued in him as the continuing partner, and to have been abandoned by the retiring partners, they having set up no claim thereto; (2) that he brought this right with him into the successive firms which he formed; (3) that at the time of the sale to Mills, Johnson & Co. the trade marks were the property of S. N. Pike & Co., and not of S. N. Pike individually; (4) that the right to use the trade marks did not, there-

fore, pass to Mills, Johnson & Co. on the sale of S. N. Pike's Cincinnati premises, nor under the licence which he purported to give them; (5) that the trade marks, therefore, remained the property of S. N. Pike & Co., and passed to Kidd & Co., the successors of that firm, and that Kidd & Co. were, therefore, entitled to registration.

REID v. SIEBALD.

[438.]

April 10th ; May 13th, 1874.

[*Home, Sheriff Subs.—* } —18 *Journ. of Jurisp.*
Monro, Sheriff of Linlithgowshire. } 392.]

The plaintiff being a sheriff's officer named William Roberts, the defendant, a draper, began to issue circulars to his debtors, signed "Andrew Roberts," threatening proceedings if their debts were not paid within a certain time.

Interdict granted, notwithstanding that the defendant had discontinued the practice and had given up the remaining circulars, to restrain the defendant from attaching the name "Andrew Roberts," or "Roberts" with any other Christian name, to such circulars, on the ground that the defendant intended to induce and had induced a belief that the circulars were issued by the plaintiff, and that the plaintiff would be injured by his name being supposed to be affixed to such absurd documents.

THE GLENDON IRON CO. v. UHLER.

[439.]

May, 1874.

[*Penn. Sup. Ct.—75 Penn. St. 467 ; 15 Amer. Rep. 599 ; 13 Am. L. Reg., N. S. 543 ; 6 U. S. Pat. Gaz. 154.*]

The plaintiffs having long stamped the word "Glendon" on their iron manufactured within that borough, the de-

defendants set up in business in the same place, and began to stamp the same word on their iron.

Injunction to restrain the defendants from so doing, refused, on the ground that all persons manufacturing within the borough had an equal right to use the name.

[440.]

ISAACS v. DALY.

May, 1874.

[N. Y. Super. Ct.— } —39 N. Y. Super. Ct. (7 J. & S.) 511.]
 Curtis, J.

The plaintiff being the author of a copyright play entitled "Charity," the defendant purchased another play bearing the same name, and proceeded to represent it under that name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing, refused, on the ground that the use of a word of such general application could not be restrained in the absence of bad faith, and that the defendant did not appear to have acted otherwise than *bona fide*.

441.

RICHARDS v. WILLIAMSON.

June 10th, 1874.

[Bacon, V.C.—30 L. T., N. S. 746 ; 22 W. R. 765.]

The plaintiff being a gun-maker, who stamped the lock-plates and levers of his rifles with the name "Westley Richards," or "Westley Richards & Co.," the defendants bought up some of such lock-plates and levers belonging to condemned or worn-out guns, and made them up with parts of other guns not of the plaintiff's make into complete carbines.

Injunction granted to restrain the defendants from so using such lock-plates and levers.

RODGERS v. RODGERS.

442.

July 28th, 1874.

[James and Mellish, L.JJ.—31 L. T., N. S. 285.]

The plaintiffs being J. Rodgers & Sons, who had long carried on business as cutlers in Norfolk Street, Sheffield, and stamped their goods, among other marks, with their name and address, the defendants, R. Rodgers & Son, also carried on business as cutlers in Sheffield, and they and their predecessor in business had since 1861 described their place of business and marked their cutlery as from "Norfolk Works, Sheffield."

Action for an injunction to restrain the defendants from using the words "Norfolk Works," or "Norfolk."

Held, that the injunction must be refused, on the ground of the plaintiffs' delay, and failure to produce evidence of actual deception, but that no costs of the cause prior to the appeal could be given, on account of the defendants' unfair dealing.

Per Mellish, L. J.—"I do not think that, as a matter of law, the mere fact that it (the title) has been used for a great number of years necessarily affords a defence. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs from having a remedy."—"In my judgment, in order to make out a clear case when it has lasted for such a great number of years as this, the plaintiffs ought to prove satisfactorily that persons have actually been deceived."

THE GLEN AND HALL MANUFACTURING CO.

[443.]

v. HALL.

Sept., 1874.

[N. Y. Sup. Ct.—6 N. Y. Sup. Ct. (6 Lans.) 158.]

[N. Y. Comm. of App.—61 N. Y. (16 Sickels) 226; 19 Amer. Rep. 278.]

The defendant, being the successor in business of Joseph Hall, who had long carried on business at No. 10, South

Water Street, Rochester, New York, began in February 1869 to use in his handbills the words "The Old Joseph Hall Agricultural Works, No. 10, South Water St., Rochester, N.Y." In September or October, 1869, the plaintiffs opened their establishment in the same street, and styled themselves in their handbills, &c., "The Glen and Hall Manufacturing Company, No. 10, South Water St., Rochester, New York."

Action for an injunction and counterclaim.

Injunction granted, on the defendant's counterclaim, to restrain the plaintiffs from using the words and figures "No. 10."

[444.] **CONSOLIDATED FRUIT JAR CO. v. DORFLINGER.**

Oct., 1874.

[U. S. C. C., E. Dt. of Penn.— } —2 Am. L. T., N. S. 511.]
Cadwalader, J.

The plaintiffs being manufacturers of jars, on which they placed certain trade marks, consisting respectively of the words "Mason's Patent, November 30th, 1858," "Mason's Improved," "The Mason Jar of 1858," as to which jars the patent under which they were made had been decided to be invalid, and also another trade mark, consisting of the words "The Mason Jar of 1872," not open to the same objection, the defendants sold other jars similarly marked.

On motion by the plaintiffs for an injunction to restrain the defendants from infringing their trade marks,

Held, that, as to the first three marks, the plaintiffs were disentitled by reason of the reference to the invalid patent as if it were valid; but that, as to the last mark, a renewed application might be made.

"No title can be successfully asserted in a trade mark, which is of a tendency to mislead or deceive the public. This objection may avail a defendant, notwithstanding what would otherwise be imputable to him as misconduct. The doctrine is that the complainant must come into a Court of Equity with clean hands."

MORSE v. WORRELL,
 Afterwards
MORSE v. CORNWELL.

[445.]

1874; 1875.

[*Phila. C. P.*—9 *Am. L. Rev.* 368; *Codd. Dig.* 242.]

The plaintiff being a manufacturer of stove polish, on which he used a trade mark consisting of the device of an orb, with rays of light, rising over a piece of water, with the words "Rising Sun Stove Polish," the defendant sold other stove polish with a very similar device, with the words "Rising Moon Stove Polish."

Injunction granted, to restrain the defendant from using the device, also from using the name "Rising Moon," and from using the device of an orb rising over a piece of water.

IN RE GODILLOT.

[446.]

Nov. 16th, 1874.

[*U. S. Patent Office.*— }
Spear, Act. Comm. } —6 *U. S. Pat. Gaz.* 641.]

Application for the registration of a label, refused, on the ground that, inasmuch as it possessed all the characteristics of a trade mark, it could only be registered as such.

COTTON v. GILLARD.

447.

Nov. 24th, 1874.

[*Jessel, M.R.*—44 *L. J., C'r.* 90.]

The defendant having invented a sauce which he called the "Licensed Victuallers' Relish," and placed in bottles labelled with a view of the Licensed Victuallers' Asylum,

the sauce was sold at first by the defendant and his partners in business, and after the dissolution of partnership (on which event the recipes and formulas used by the defendant reverted to him) by the defendant's son, who also bought the interest of the defendant's former partners in the sauce. The son becoming bankrupt, his interest in the sauce was bought by the plaintiffs from his trustee in bankruptcy, but the defendant retained the secret recipe, and publicly announced his claim to the title and trade mark.

Suit for an injunction to restrain the defendant from using the name and trade mark.

Injunction refused, on the ground that a trade mark could not exist or be transferred in gross, and that the plaintiffs were not entitled to apply to an article of their own invention the name and mark appropriated to an article of the recipe of which they were ignorant, the result of such a course of proceeding being to pass off a spurious article on the public as the genuine one of the defendant's invention.

[448.]

TAYLOR v. GILLIES.

Dec., 1874.

[*N. Y. C. P.*—5 *Daly*, 285.]

[*N. Y. Ct. of App.*—59 *N. Y.* (14 *Sickels*) 331 ; 17 *Amer. Rep.* 333.]

The plaintiff being a manufacturer of saleratus, which he sold in packages labelled "Allen's Gold Medal Saleratus," and "Taylor's Gold Medal Saleratus," the defendants began to sell the same article in packages labelled "Gillies' Gold Medal Saleratus."

Injunction to restrain the defendants from using the words "Gold Medal" in connexion with their saleratus, refused, on the ground that no exclusive right could be claimed in those words.

ESTCOURT v. THE ESTCOURT HOP ESSENCE CO.

449.

Dec. 3rd, 1874; Jan. 21st, 1875.[*Malins, V.C.*—31 *L. T., N. S.* 567.][*Lord Cairns, C.; James and Mellish, L.JJ.*—*L. R.*, 10 *Ch.* 276; 44
L. J., Ch. 223; 32
L. T., N. S. 80; 23
W. R. 313.]

The plaintiffs being manufacturers of a substitute for hops in brewing, which they called "Estcourt's Hop Supplement," the defendant company began to sell another article as "Estcourt and Co.'s Hop Essence."

Suit by the plaintiffs for an injunction to restrain the defendants from using the name "Estcourt," and from using the secret of the "Hop Supplement," which they alleged to have been communicated to the defendants by the defendant C. Estcourt, who had been in connexion with the plaintiffs.

Held, on appeal, (1) that the defendant, C. Estcourt, was under no obligation to keep the plaintiffs' secret, and, further, that it was not proved that the defendant company had obtained their knowledge from him; (2) that the plaintiffs were disentitled to obtain an injunction by having delayed to take proceedings for seven months after they became aware of the assumption of the name "Estcourt" by the defendant company, and failing even after that period to produce evidence of actual deception; (3) that both parties being engaged in an improper speculation, and the defendant company having made statements in their advertisements calculated to lead to the belief that they were the original inventors of the article, the bill must be dismissed without costs.

450.

WARD v. BEETON.*Dec. 21st, 1874.*[*Malins, V.C.*—*L. R.* 19 *Eq.* 207 ; 23 *W. R.* 533.]

The defendant's copyrights, stock-in-trade, &c., as a publisher (including a publication called "Beeton's Christmas Annual"), having been purchased by the plaintiffs in 1866, in 1869 the defendant entered into an agreement with the plaintiffs, under which he was to enter into the plaintiffs' service at a salary, and to give all his time to their business, and was not to permit the use of his name in publications without the consent of the plaintiffs, who were to have the right to use it. The plaintiffs and defendant having disagreed, the plaintiffs caused the Annual for 1874 to be prepared without the defendant's assistance, upon which the defendant put forth advertisements denying that such Annual was in continuation of his series, and stating that the genuine Annual was one which was being prepared by persons other than the plaintiffs.

Motion by the defendant to dissolve an injunction which had been granted to restrain the publication of such advertisements, refused, on the ground that the plaintiffs had a right to use the title, notwithstanding that the defendant had not prepared the work, and that the defendant's conduct was contrary to his engagement.

P. 216.—"When you sell a newspaper, it is not merely the right to sell one number of it, but continuing to publish it from day to day, it may be as long as the world lasts, under the name by which it has become known."

451.

BROUGHTON v. BROUGHTON.*May 25th, 1875.*[*Jessel, M.R.*—*44 L. J., Ch.* 526 ; 23 *W. R.* 779.]

G. Broughton and the defendant having carried on business in partnership, at the death of the former the partner-

ship was insolvent, but the defendant, being also G. Broughton's executor, carried on the business alone with such success that he subsequently sold it for £1,700.

Suit for the administration of G. Broughton's estate.

Held, that the defendant was only chargeable with the value of a moiety of the business at the time of the testator's death, and not at the time of the sale of the business.

BULLOCH, LADE & CO. v. GRAY.

[452.]

Jan. 6th, 1875.

[*Guthrie, Sheriff Subs.*—
Dickson, Sheriff of } ————19 *Journ. of Jurisp.* 218.]
Lanarkshire.

Cross suits by two rival firms of distillers at Glasgow, of whom the one firm called their establishment "The Loch Katrine Distillery," and the other called their whiskey "Loch Katrine Whiskey," for interdicts to restrain the respective defendants from using the words "Loch Katrine."

Interdict in both cases refused, on the ground that in each case the word was used as descriptive of the water used in the distillery, and that any one who used Loch Katrine water in the manufacture of his whiskey was at liberty to state that such was the fact.

PRUDENTIAL ASSURANCE CO. v. KNOTT.

453

Jan. 20th, 1875.

[*Lord Cairns, C.; James & Mellish., L.J.J.*——*L. R.* 10 *Ch.* 142; 44
L.J., Ch. 192; 31 *L. T.*,
N. S. 866; 23 *W. R.*
 249.]

Suit for an injunction to restrain the publication of a pamphlet alleged to contain passages injurious to the plaintiff company's reputation and business.

Held, that the Court of Chancery had no jurisdiction to restrain the publication of a libel, even when injurious to property.

454.

HARTER v. SOUVAZOGLU.

Jan. 20th, 1875.

[*Hall, V.C.*—*W. N.*, 1875, p. 11; *L. J. Notes of Cas.* 1875, p. 20.]

[*James & Mellish, L.JJ.*—*W. N.* 1875, p. 101.]

The plaintiffs being exporters of cotton cloths to Turkey and the Levant, who affixed to their cloths a certain heading consisting of different coloured threads in combination, the defendants shipped similar goods to Constantinople with a similar heading.

Injunction granted to restrain the defendants from infringing the plaintiffs' trade mark.

[455.]

WESTON v. KETCHAM (1).

Feb. 1st, 1875.

[*N. Y. Super. Ct.*—39 *N. Y. Super. Ct.* (7 *J. & S.*) 54.]

The inventor of "Captain S. Pepper's Extra Signal Oil" (the secret of which preparation was only known to himself, his wife, and the plaintiff, Weston,) arranged with the defendant, Ketcham, for the sale by the latter of his oil, on terms of equal profits; and, after Pepper's death, Weston and Ketcham entered into a similar arrangement as "F. O. Ketcham & Co.," one-tenth of the profits being paid to Pepper's widow in return for her interest in the trade mark. Weston subsequently arranged with the widow for the cancellation of the previous agreement with her, and the substitution of an exclusive agreement with himself, for an annual sum, contrary to the wishes of his then partners, Ketcham and another, who had instructed him to

negotiate on behalf of the partnership; but the partnership continued to deal in the article under the same name, the annual payments being made out of the partnership funds, until the dissolution of the partnership, two years later. After such dissolution the plaintiffs, being Weston and the third partner in the old firm, continued to manufacture the same article under the same name and trade mark, as "Weston & Fisk," and the defendants, Ketcham and another, who were not acquainted with the secret, also manufactured an article under the same name and trade mark, as "F. O. Ketcham & Co."

Injunction, which had been granted to restrain the use of the name and trade mark by the defendants, dissolved, on the ground that (1) under the circumstances of the case, Weston's partners in the original firm of "F. O. Ketcham & Co." were entitled to treat him as a trustee for them of the rights which he had acquired under the new arrangement with Pepper's widow; (2) that they were not debarred from enforcing their right by acquiescence, since they were at a disadvantage, in that Weston alone knew the secret, and were, therefore, compelled to submit; (3) that on the dissolution of Ketcham & Co., all the partners retained equal rights in the trade marks, &c., of the firm; (4) and that the fact that the defendants were not acquainted with the secret, gave no rights against them to the plaintiffs, whose right in the trade mark was only equal to theirs; whatever remedy might be open to any member of the public who was deceived by them.

IN RE ROTHSCHILD.

Feb. 13th, 1875.

[U. S. Patent Office— }
Spear, Act. Comm. } ———7 U. S. Pat. Gaz. 220.]

[456.]

On an application for registration of a trade mark,
Held, that, under the U. S. Statute of 1870, a new trade

mark, which had been devised and originated by the applicant, might be registered, although it had not been actually used by him previous to his application for registration.

457. **FISHER & CO. (LIMITED) v. THE APOLLINARIS CO. (LIMITED).**

Feb. 25th; March 23rd, 1875.

[*Malins, V.C.*—*L. R. 10 Ch. 299 n.; 32 L. T., N. S. 628.*]

[*James & Mellish, L.JJ.*—*L. R. 10 Ch. 297; 44 L. J., Ch. 500; 32 L. T., N. S. 628; 23 W. R. 460.*]

Suit by Fisher & Co. (limited), and E. Fisher, whose business had been bought by the company, for an injunction to restrain the defendants from continuing to publish a letter of apology which had been given them by E. Fisher, in order to induce them to discontinue prosecuting him under the Merchandise Marks Act, 1862, for selling spurious aerated water in the Apollinaris Co.'s bottles, such continued publication being injurious to the plaintiff company.

Held, on demurrer, by the L.JJ., that there was nothing improper in compromising a prosecution under the Act in question, and that the defendants could not be restrained from continuing to publish the letter.

458.

SMITH v. MASON.

March 4th, 1875.

[*Hall, V.C.*—*W. N. 1875, p. 62; L. J. Notes of Cas. 1875, p. 44.*]

The plaintiff being a chemist and druggist, who sold a medicine of his invention under the name of "Pectorine," the defendant began to sell another preparation under the same name.

On motion by the plaintiff, injunction granted to restrain the defendant from so doing.

WILSON v. MAXFIELD.

459.

March 15th, 1875.[*Malins, V.C.—L. J. Notes of Cas. 1875, p. 51.*]

The plaintiff being a sewing-machine manufacturer, who had stamped a figure of St. George and the Dragon upon certain sewing-machines made by him, and known as "England's Queen," but who had not used the device on bill heads or circulars, or generally in his business, before bill filed, the defendant, who had formerly been in the plaintiff's employ, placed on machines of his own make, and on his circulars, a device of St. George and the Dragon, with the words "Maxfield & Co.'s trade mark."

Injunction to restrain the defendant from using the device, refused, on the ground that the plaintiff had acquired no reputation for the mark by use, and that there was no attempt by the defendant to deceive, or probability of deception.

GOURAUD v. TRUST.

[460.]

March, 1875.[*N. Y. Sup. Ct.—10 N. Y. Sup. Ct. (3 Hun) 627.*]

The plaintiff, whose name had formerly been "Dr. J. W. Trust," but had been changed to "Dr. T. F. Gouraud," being the manufacturer of a cosmetic which he called "Gouraud's Oriental Cream or Magical Beautifier," the defendants, his sons, who had retained their original name, began to sell a cosmetic under the name of "Crème Orientale, by Dr. T. F. Gouraud's Sons."

Injunction granted to restrain the defendants from so infringing the plaintiff's rights, on the ground that the statement of the defendants' relationship to the plaintiff, though true, was made with the intention of deceiving, and was calculated to deceive.

[461.]

GODILLOT v. HAZARD.

April, 1875.

[N. Y. Super. Ct. — } ———49 How. Pr. 5.]
 Monell, C.J.

The plaintiff being an importer of an article made expressly for him by a particular firm in Paris, consisting of compressed ingredients for Julienne soup, and which he sold under a label containing the words "Conserves Alimentaires," the arms of the City of Paris, with a monogram "A. C." on each side, and the words "Paris," and "Julienne," with directions for use, beneath; the defendants began to sell a similar article under a similar label, except that the monogram was changed to "F. G.;" and they admitted that their label had, by their orders, been copied from the plaintiff's.

Suit for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, (1) that the plaintiff had no exclusive right in the word "Julienne" *per se*, that word being descriptive of an article commonly made; (2) but that the plaintiff was entitled to an injunction to restrain the use of his compound label by the defendants; (3) and that the fact that the plaintiff did not himself manufacture the article constituted no defence, since the article was expressly made for and imported by him.

"The property and right to protection is in the device or symbol, which is invented and adopted to designate the goods to be sold, and not in the article which is manufactured and sold."

462.

LLEWELLYN v. BUTHERFORD.

May 5th, 1875.

[Common Pleas——L. R. 10 C. P. 456; 44 L. J., C. P. 281; 32 L. T., N. S. 610.]

Held, that the sum which an outgoing tenant of a public house was entitled, under agreement, to receive on the

termination of his lease, as the value of the goodwill, must be determined by a calculation of the sum which an incoming tenant would be willing to pay for the goodwill in such a case, and that a general rise in the value of property in the neighbourhood should be taken into consideration.

Per Brett, J.—"In some classes of business, when the trade has long been carried on in a profitable manner in a particular house, and a new tenant comes in and continues to carry on the same business there, it is found by experience that many, if not all, of the customers resort there as before. This is found so regularly to happen that it has become usual to pay a money value for it, which is commonly called 'goodwill.' It may be that there may be a species of goodwill which may be the subject of bargain and sale, although not dependent on the business being carried on in any particular place: for instance, in the case of what are called 'quack medicines.' But when we come to speak of the goodwill of a public house, it is obvious that it is a thing which is attached to a locality."

DEVLIN v. DEVLIN.

[463.]

May, 1875; April 3rd, 1877.

[*N. Y. Sup. Ct.*—11 *N. Y. Sup. Ct. (4 Hun)* 651.]

[*N. Y. Ct. of App.*—69 *N. Y. (24 Sickles)* 212; 15 *Alb. L. J.* 290.]

The plaintiffs being engaged in the clothing business as "Devlin & Co.," the defendant, J. S. Devlin, who carried on the same business alone, put out a wire sign in front of his shop, bearing the words "Devlin & Co.," with the letters "J. S." in a monogram above, the number of the shop, "826," on each side, and the word "clothing" below.

An injunction having been granted to restrain the defendant from using the name "Devlin & Co.," and from continuing to use such sign, and from trading in any other name than his own christian names and surname, in plain characters and without monograms, the defendant, upon service of the order, so varied his sign that it now contained the initials "J. S.," with "826" on each side in the top

line, "Devlin's" with a hand in the middle, and "clothing" in the bottom line.

On motion by the plaintiffs to commit the defendant for breach of the injunction,

Held, by the Supreme Court, that the defendant had not sufficiently obeyed the injunction, and was, therefore, guilty of contempt, and that a fine must be imposed and the sign removed.

Held, by the Court of Appeal, that the decision of the Supreme Court on a point of fact must be followed, but that the case was sufficiently open to doubt for no costs of the appeal to be given to either party.

[464.]

IN RE HANKINSON.

June 2nd, 1875.

[U. S. Patent Office— }
 Thacher, Comm. } —8 U. S. Pat. Gaz. 89.]

Application by a carpet-cleaner, who used a certain mark on his waggons, circulars, &c., and on tags attached to the carpets, for the registration of such mark as his trade mark, refused, on the ground that the marks of manufacturers or merchants were alone registrable within the U. S. Statute of 1870, and that the applicant was incapable of specifying, in accordance with that statute, the class and description of goods or merchandise to which the mark was appropriated.

465. THE APOLLINARIS COMPANY (LIMITED) v. NORRISH.

June 3rd, 1875.

[Bacon, V. C.—33 L. T., N. S. 242.]

The plaintiffs being, by agreement with the owners of the Apollinaris Spring in Germany, the exclusive importers of "Apollinaris Water" into England, the defendants sold

an artificial water, containing the same chemical constituents as the natural water, as "London Apollinaris Water," but in different bottles, differently labelled, from those of the plaintiffs.

On motion by the plaintiffs, injunction granted to restrain the defendants from using the name "London Apollinaris Water," or making any other use of the name "Apollinaris" calculated to deceive.

BLACKWELL v. WRIGHT.

[486.]

June, 1875.

[*N. Carolina Sup. Ct.*—73 *N. Car.* 310.]

The plaintiff being a manufacturer of tobacco at Durham, N. Car., whose trade mark consisted of the figure of a bull, with the words "Genuine Durham Smoking Tobacco, Manufactured only by W. T. Blackwell (successor to J. R. Green & Co.), Durham, N. C.," the defendant used a trade mark consisting of the figure of a bull's head, and the words "The Original Durham Smoking Tobacco, Manufactured by W. A. Wright," and published various denials of the exclusive right of the plaintiff to sell "Genuine Durham Smoking Tobacco."

Action for damages, and for an injunction to restrain the defendant from infringing the plaintiff's trade mark, and slandering his title.

Demurrer allowed, and injunction refused, on the ground that there was no such similarity between the marks as to be calculated to produce deception.

Per Bynum, J.—"This rule (*i.e.*, that of the protection of trade marks) is grounded upon a twofold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit almost always is; and, 2nd, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him."

“It will make no difference whether the party designed to mislead the public, or whether the symbol adopted was calculated to deceive. But if it appear that the trade mark alleged to be imitated, though resembling the complainant’s in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colourable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated.”

“We must assume that dealers and consumers of such a commodity have ordinary intelligence, and adopt ordinary precaution against imposition and fraud.”

[467.]

WOODS *v.* SANDS.

1875.

[U. S. C. C., *Dt. of Ill.*—*Codd. Dig.* 50.]

The plaintiff, who had established and gained a reputation for a hotel at Chicago under the name of “Wood’s Hotel,” assigned his interest therein to another person, with the exclusive use of his name, and a covenant not to open another hotel during the remainder of the lease. During the continuance of such arrangement the hotel was burnt down, and the plaintiff having subsequently re-purchased the right to the use of the name “Wood’s Hotel,” and opened a hotel under that name in a different situation, the defendant opened a new hotel in Chicago as “Wood’s Hotel,” and announced the re-opening of that hotel.

Action by the plaintiff for an injunction to restrain the defendant from using the name.

Held, (1) that the name was capable of assignment, at all events for use in connexion with the premises to which it was attached; (2) that it had passed to the plaintiff under the re-assignment from his assignee, and that he was entitled to the benefit of whatever value it possessed; (3) that the injunction must be granted to restrain the defendant from using the name.

IN RE VOLTA BELT CO.

[468.]

June 26th, 1875.

[U. S. Patent Office— }
 Thacher, Comm. } ———8 U. S. Pat. Gaz. 144.]

On an application for the registration of a trade mark, consisting of a globe, surrounded by clouds, from which lightning-flashes proceeded, with the words "Electricity is life,"

Held, that a description of the mark in the statement on application, as being "a symbol, consisting of the words 'Electricity is Life,' placed beneath clouds, from which lightning-flashes proceed, the whole arranged generally as shown in the *fac simile*," was insufficient, as not clearly distinguishing between the essential and non-essential parts of the mark claimed, and, in particular, making no mention whatever of the globe.

IN RE VIDVARD AND SHEEHAN.

[469.]

June 29th, 1875.

[U. S. Patent Office— }
 Thacher, Comm. } ———8 U. S. Pat. Gaz. 143.]

On an application for the registration of a trade mark,

Held, that the requirement of the U. S. Statute of 1870, that a declaration should be made on oath "to the effect that the party claiming protection for the trade mark has a right to the use of the same, and that no other person, firm, or corporation has a right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive," was sufficiently complied with by a declaration that "no other person, firm, or corporation has a right to the use of the said trade mark, or of one substantially the same."

[470.]

IN RE BOEHM & CO.

Aug. 24th, 1875.

[U. S. Patent Office—
Spear, Act. Comm.] } —8 U. S. Pat. Gaz. 319.]

On an application for the registration of the word "Centennial" as a trade mark in respect of "alcoholic spirits,"

Held, that such an application for the general class of goods was sufficient, and that it was not necessary to make separate applications in respect of the several kinds of goods included in the class on which it was intended to use the mark, *i.e.*, "Bourbon, wheat, and rye whiskeys, wines, brandies, gins, and bitters," except as to the last, "bitters" not being properly included in the term "alcoholic spirits."

[471.]

IN RE GLINES.

1875.

[U. S. Patent Office—
Spear, Act. Comm.] } —8 U. S. Pat. Gaz. 435.]

The words "Slate Roofing Paint," admitted to registration as a trade mark on paint, on the ground that, though the words might be suggestive of qualities of the paint, they were not, properly speaking, descriptive of its composition or use.

[472.]

MENEELY v. MENEELY.

Sept., 1875.

[N. Y. Sup. Ct.—8 N. Y. Sup. Ct. (1 Hun) 673 ; 2 Thomp. & C. 540.]
[N. Y. Ct. of App.—62 N. Y. (17 Sickels) 427 ; 20 Amer. Rep. 489 ;
2 Am. L. T., N. S. 482.]

The plaintiffs and their predecessors in business having long manufactured bells at Troy, New York, and sold them with the inscription cast on them, "Meneely's, West Troy, N. Y.," the defendants made bells at the same place, and stamped them "Meneely and Kimberley, Troy, N. Y."

Injunction to restrain the defendants from using the name "Meneely" on their bells, refused, on the ground that the defendants were entitled to use their own names without fraud, and that no attempt at fraud was proved.

Per Rapallo, J., 62 N. Y. 427.—"Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the Courts will not interfere."

IN RE GREEN.

[473.]

Sept. 27th, 1875.

[U. S. Patent Office—
Spear, Act. Comm. } —8 U. S. Pat. Gaz. 729.]

The words "German Sirup" admitted to registration as a trade mark, on the ground that the word "German" was not used as descriptive of a German product, but was a purely arbitrary term.

THE TUCKER MANUFACTURING CO. v. BOYINGTON. [474.]

Oct., 1875.

[U. S. C. C., Dt. of N. Ill.—
Blodgett, J. } —9 U. S. Pat. Gaz. 455.]

The plaintiff company manufacturing the "Tucker Spring-Bed" under an expired patent, and having registered a trade mark consisting of a picture of the bed, the monogram "T. M. Co.," and the words "Tucker Spring-Bed," the defendant manufactured a similar bed, and used a label containing a picture of the bed and the words "Tucker Spring-Bed."

Motion by the plaintiffs for an injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the right to use the name and represent the bed had become common property on the expiration of the patent, and that the combination registered by the plaintiff company had not been used by the defendant, except as to such elements as were common property.

[475.]

THE INDIA-RUBBER COMB CO. v. MEYER.

1875.

[*N. Y. Super. Ct.*—*Cited*, 8 *U. S. Pat. Gaz.* 905.]

The plaintiff company placing the words "The India-rubber Comb Co." on combs and cases or packages of combs, the defendant used the same words on other combs, cases, &c.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights.

[476.]

IN RE INDIA-RUBBER COMB CO.

Nov. 24th, 1875.

[*U. S. Patent Office*—
Spear, Act. Comm. } —8 *U. S. Pat. Gaz.* 905.]

The words "The India Rubber Comb Company of New York," admitted to registration as a trade mark, on a rehearing, after a previous refusal, on the ground that the words were established to be the applicants' trade mark by the decision of the Superior Court of New York in *India-rubber Comb Co. v. Meyer*, and that, although registration of the mere name of a person, firm, or corporation was forbidden by the U. S. Statute of 1870, yet such a name might be registered as being "a lawful trade mark rightfully in use on the 8th July, 1870."

THE SINGER MANUFACTURING CO. v. WILSON.

477.

Dec. 14th, 1875 ; March 25th, 1876 ; Dec. 13th, 1877.

[*Jessel M. R.*—2 *Ch. D.* 431 ; 45 *L. J.*, *Ch.* 491 ; 34 *L. T.*, *N. S.* 858 ;
24 *W. R.* 1023.]

[*Ct. of App.*—
James, Mellish & Baggallay, L.JJ. } —2 *Ch. D.* 448 ; 45 *L. J.*, *Ch.*
490 ; 34 *L. T.*, *N. S.* 863 ;
24 *W. R.* 1026.]

[*H. of L.*—3 *App. Cas.* 376 ; 47 *L. J.*, *Ch.* 481 ; 33 *L. T.*, *N. S.* 303 ;
26 *W. R.* 664.]

The plaintiffs being manufacturers of sewing-machines under various patents, since expired, who placed on their machines the words "The Singer Manufacturing Company," and also a trade mark, consisting of an ellipse containing a shuttle and needles, crossed with a line of cotton in the form of an S, and the words and letters "Trade Mark," "The Singer M. F. G. Co., N. Y.," and who alleged that their machines had become generally known as the "Singer," or "Singer's" machines ; the defendant, who manufactured sewing-machines on the principles of a variety of expired patents, began to use, among others, the patents formerly owned by the plaintiffs and their predecessors in business, and, by his agents and in his price-lists, &c., described such machines as "Our Singer Machines," and placed on them his trade mark, consisting of a brass plate representing St. George and the Dragon, within the words "Newton, Wilson & Co., Manufacturers, 144, High Holborn," arranged in a circle, and he alleged that the name "Singer," or "Singer's," was indicative of an article made on the principle of construction which he asserted to run through all the plaintiffs' patents, though they varied in minor particulars, and not of an article made by the plaintiffs.

Suit by the plaintiffs for an injunction to restrain the defendant from using the name "Singer" or "Singer's" in connexion with his machines.

Held, by the M. R. and Ct. of App., upon the plaintiffs'

evidence alone : (1) that where a name or device is affixed to an article, or to a wrapper or vessel in which it is contained, thus becoming a trade mark proper, it is not necessary, to constitute an infringement, for actual fraud to be proved; (2) that where a trade name is used in respect of an article, but is not placed upon it, actual fraud must be proved for there to be infringement; (3) that the present case falling into the second class, and the plaintiffs producing no evidence of actual fraud, the injunction must be refused; (4) and that, this being so, it was unnecessary to inquire whether the name was indicative of the plaintiffs' make, or of a principle of construction.

Held, by the H. of L. : (1) that, whether the name is or is not affixed to the article, it is not necessary, to constitute infringement, for actual fraud to be proved, if it is established that the defendant has acted in a way calculated to deceive; (2) that, in the case in question, the plaintiffs had shown a *prima facie* case, but that, the plaintiffs' evidence only being before their Lordships, they were not in a position to decide finally whether the name "Singer" or "Singer's" was really indicative of the plaintiffs' manufacture, or of a principle of construction, or whether the defendant had acted in a way calculated to deceive; (3) and, therefore, that the case must be remitted to the Court below for decision upon the whole of the evidence.

Per Lord Cairns, C., 3 App. Cas. 389.—"It may well be that, if an imitated trade mark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever-present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question), must, in my opinion, be as injurious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves."

P. 391.—"I wish to state in the most distinct manner that, in

my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark."——"A man may take the trade mark of another ignorantly, not knowing it was the trade mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it, knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the Court must depend upon the right of the plaintiff, and the injury done to that right."

Per Lord O'Hagan, p. 396.—"If a man has acquired legitimately a right to the property in an exclusive use of a name, it is of small account to him, should it be invaded, whether the invasion comes from a purpose to deceive, or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties, and the law ought not to permit, and will not permit, the continuance of the invasion, whatever may have been its origin."

TALLCOT *v.* MOORE.

[478.]

Dec., 1875.

[*N. Y. Sup. Ct.*——13 *N. Y. Sup. Ct.* (6 *Hur*) 106.]

The plaintiff sold certain medicines under the name of "The Magic Cure," and described their virtues in a small pamphlet with a red cover, ornamented with a group of figures, and entitled "The Little Red Book, New Series, 1875;" the defendant sold other medicines under the name of "Moore's Pillules," and published a book in a red paper cover, entitled "The Red and White Book," the words "Red Book" being in red letters, but with no figures on the cover, the contents being much the same as those of the plaintiff's book.

Injunction, which had been granted to restrain the defendant from infringing the plaintiff's rights, dissolved, on the ground that deception was not probable, but an intention to deceive being held to be perceptible, no costs given of the appeal, nor of a motion in the Court below to vacate the injunction.

[479.]

PHELAN *v.* COLLENDER.

Dec., 1875.

[*N. Y. Sup. Ct.*—13 *N. Y. Sup. Ct.* (6 *Illin*) 244.]

The defendant being the surviving partner of the firm of "Phelan and Collender," billiard-table makers, and having purchased from the executors of his deceased partner the interest of the latter in the partnership property, patents, trade marks, &c., described himself as "H. W. Collender, Successor to Phelan and Collender," and his billiard-tables as "Phelan and Collender's Standard American Tables."

Suit by the son of the deceased partner, himself a billiard-table maker, for an injunction to restrain the defendant from so doing.

Injunction refused, on the ground that the plaintiff had no more right than any other person of the same name had to interfere with the defendant's use of his father's name, and that the defendant had not acted with any intent to deceive, or otherwise than he was entitled to do.

[480.]

IN RE KANE & CO.

Dec. 27th, 1875.

[*U. S. Patent Office—*
Duell, Comm. } —9 *U. S. Pat. Gaz.* 105.]

Application for the registration of "galvanized iron hoops placed on a barrel of a dark colour," as a trade mark in respect of spirituous liquors, refused, on the ground that such hoops had long been used on barrels, and that, even if the applicants were the first to use them on barrels of spirits, they would convey no distinctive idea.

FABER v. HOVEY.

[481.]

Dec. 30th, 1875.[*N. Y. Sup. Ct.*—*Codd. Dig.* 79, 242.]

Action by the plaintiff for an injunction to restrain an infringement of his trade mark on lead-pencils.

Held, (1) that the word "Star" was a good trade mark; (2) that there was no error in an assessment of damages by the referee, in which he found that the damages were equal to the profits which the plaintiff would have made from the manufacture and sale of the same number of articles as the defendant had sold under the spurious mark.

REPUBLIC OF PERU v. REEVES.

[482.]

Jan. 3rd, 1876.[*N. Y. Super. Ct.*—40 *N. Y. Super. Ct.* (8 *J. & S.*) 316.]

An injunction having been granted and continued until further order, in 1873, without opposition by the defendant, to restrain an infringement of the plaintiffs' trade marks on guano, and the defendant having died in 1874,

Motion by his administratrix, in 1875, to have the action continued against herself as such administratrix, refused, on the ground that it was not shown that the defendant had acquired any rights in the litigation, or that his estate would be prejudiced by the action not being continued.

HENNESSY v. WHEELER.

[483.]

Jan., 1876; April 10th, 1877.[*N. Y. C. P.*—
Robinson, J. } — 51 *How. Pr.* 457.][*N. Y. Ct. of App.*—69 *N. Y.* (24 *Sickels*) 271; 15 *Alb. L. J.* 454.]

Action by the plaintiffs, brandy manufacturers and importers, for an injunction to restrain an infringement of

their trade mark placed upon the bottles containing their brandy, being nominally "quart" and "pint" bottles.

Held, by the C. P., that the action must be dismissed, on the ground that the plaintiffs were themselves guilty of misrepresentation in selling, as quart and pint bottles, bottles which contained less, the deficiency amounting to about 7—30ths.

Held, by the Ct. of Appeal, that the bottles were not sold by the plaintiffs or others as measures of capacity, but were of the ordinary sizes used in the trade, the capacity of which was generally understood; that there was no evidence that any one had been or was likely to be deceived; that the plaintiffs were, therefore, not disentitled, and that a new trial must be granted.

[484.]

FRESE *v.* BACHOF (1).

Jan., 1876.

[U. S. C. C., S. Dt. of N. Y.— } —13 Bl. C. C. 234.]
 Johnson, J.

The plaintiffs selling tea in packets labelled "J. C. Frese & Co., Hopfensack, 6, Hamburg," the defendant sold tea in packets similarly labelled.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1) that an injunction must be granted to restrain the defendant from using the name "J. C. Frese & Co.," and from using on his labels the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," notwithstanding that he claimed to have discontinued the use of the name and label; (2) but that an injunction to restrain the defendant from making up his tea in packages of the same size, shape, and colour as the plaintiffs', must be refused, the defendant's

labels containing his own name in distinct characters, and the plaintiffs shewing no exclusive right to the size, &c., of their packages.

PELTZ v. EICHELE.

[485.]

Jan., 1876.

[*Missouri Sup. Ct.*—62 *Mo. (21 Post)* 171.]

The defendant, having covenanted with the plaintiffs or their assignors, on the sale to them of his match business in St. Louis, with the goodwill, trade marks, &c., and the trade names of "A. Eichele," and "A. Eichele & Co.," that he would not resume the manufacture of matches at St. Louis, or in any other place, for five years, or assist others in so doing, set up as a manufacturer of matches in St. Louis, within the five years, under the name of "P. Eichele & Co.," and diverted customers of the plaintiffs.

Action.

Held, (1) that the covenant was good, at all events as far as regarded St. Louis, and that a breach had been committed; (2) that the measure of damages was the loss occasioned to the plaintiffs by the breach of covenant, and not the defendant's profits, though the defendant's profits were one element to be considered in ascertaining what the plaintiffs had lost.

IN RE THE AMERICAN LUBRICATING OIL CO.

[486.]

Feb. 2nd, 1876.

[*U. S. Patent Office*— } —9 *U. S. Pat. Gaz.* 687.]
Duell, Comm.

Application for the registration of the word "Star," as a trade mark on oil, refused, on the ground that there was already registered in another name, for use upon the same class of goods, a device representing a star, containing the

letter "G," and that the use of the word "Star" by the applicants would be calculated to deceive the public, inasmuch as their oil, as well as that of the parties already registered, would acquire the name of "star oil."

[487.]

WESTON v. KETCHAM (2).

Feb., 1876.

[*N. Y. Super. Ct.*— } —51 *How. Pr.* 455.]
Sedgwick, J. }

Motion by the plaintiffs in *Weston v. Ketcham* (1) for an injunction to restrain the defendants in that case from selling "Pepper's Signal Oil," refused, on the ground (1) that the plaintiffs showed no title to the trade mark or name superior to that of the defendants; (2) that the agreement between the plaintiff Weston and the widow of the inventor could add nothing to the plaintiffs' rights, since the widow could acquire no right to the trade mark in gross, and had succeeded to no business to which it was attached; (3) that the allegation that the defendants sold as "Pepper's Signal Oil" that which was not so, gave the plaintiffs no cause of action.

"There is no such thing as a trade mark "in gross," to use that term by analogy. It must be 'appendant' of some particular business in which it is actually used upon, or in regard to, specific articles."

488.

WYLAM v. CLARKE.

Feb. 11th, 1876.

[*Bacon, V.C.*—*W. N.* 1876, p. 68.]

The plaintiffs being manufacturers of Spratt's dog biscuits, which they stamped with a X and the words "Spratt's Patent," the defendant began to manufacture

similar biscuits, but marked them with an anchor and the words "Buffalo Meat."

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the biscuits were not sufficiently alike to deceive, but the defendant not having proved his *bona fides* in the matter, no costs given, except as to a part of the case which the plaintiffs had abandoned.

COE v. BRADLEY.

[489.]

Feb. 17th, 1876.

{ U. S. C. C., Dt. of Mass.— } —9 U. S. Pat. Gaz. 541.]
Shepley, J.

The plaintiff, being the inventor of "Coe's Superphosphate of Lime," entered into a contract with the defendant, under which the latter was to have the exclusive use of the plaintiff's trade mark, consisting of the name of the article, for a limited period, the contract providing for the payment to the plaintiff of a certain share of the profits of the business, and also that a breach of the contract by the one party should release the other from his obligations.

Suit by the plaintiff for the recovery from the defendant of the share of profits agreed to be paid to the plaintiff.

Held, that, notwithstanding that the plaintiff had broken the contract by the sale of an article under the name of "Coe's Superphosphate of Lime," and "Andrew Coe's Superphosphate of Lime," he was entitled to recover the share of profits agreed to be paid to him, but that there must be deducted from such share a sum to be assessed by way of damages for the infringement by the plaintiff of the trade mark which the defendant had acquired the exclusive temporary right to use.

[490.]

IN RE COGGIN, KIDDER & CO.

Feb. 21st, 1876.

[U. S. Patent Office— }
 Spear, Act. Comm. } ———11 U. S. Pat. Gaz. 1109.]

Application for the registration of a device, consisting principally of the word "Haxall" and a Maltese cross, as a trade mark on flour, refused, on the ground that the word "Haxall" had for many years been the trade mark of another firm, and that the use of the proposed trade mark would be calculated to deceive.

[491.]

IN RE ROWE & POST.

Feb. 25th, 1876.

[U. S. Patent Office— }
 Spear, Act. Comm. } ———9 U. S. Pat. Gaz. 496.]

Application for the registration of the words "New York Cutlery Co." as a trade mark, refused, on the ground that the name, having only been used by the applicants for a fortnight, had neither acquired a reputation in the market, nor been in use as an existing trade mark on the 8th July, 1870, and that its registration was, therefore, prohibited by the U. S. Statute of 1870, as being a "mere name of a person, firm, or corporation."

[492.]

WITTHAUS v. BRAUN.

March, 1876.

[Maryland Ct. of App.——44 Md. 303; 22 Amer. Rep. 44.]

The plaintiff being a tobacco manufacturer, who had been accustomed to manufacture a certain kind of tobacco for another person, according to his instructions, and had

recently purchased and had assigned to him the trade mark used by that other person on the tobacco so manufactured, the defendants sold other tobacco under a similar trade mark.

Suit by the plaintiff for an injunction to restrain an alleged infringement of this trade mark by the defendants.

Held, (1) that, although a trade mark could not be transferred in gross, since that would involve a fraud upon the public, a transfer to one who was already the manufacturer of the article was not open to objection on this ground; (2) but that the title of the original user of the mark to its exclusive use was too doubtful for an injunction to be granted.

“Where a trade mark is used to designate the place and the person by whom the goods are made, the right to such trade mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made.

“The mere sale of a trade mark, apart from the article to which it is affixed, confers no right of ownership, because no one can claim the right to sell his goods as goods manufactured by another. To permit this to be done would be a fraud upon the public. But where the trade mark is assigned to the person who manufactured the article to which the trade mark was affixed, there is no false representation to the public, because the tobacco is still manufactured at the same place and by the same person. It is, in fact, the same article.”

IN RE DICK & CO.

[493.]

March 8th, 1876.

[U. S. Patent Office— } —9 U. S. Pat. Gaz. 538.]
 Duell, Comm. }

Application for the registration of the words and letters “D. D. & Co.—Tasteless” as a trade mark for drugs and medicines, refused, on the ground that the adjective was either descriptive of a quality of the article, or was deceptive; and that the fact that the other elements associated with the word were unobjectionable did not constitute the combination a valid mark.

494.

HIRSCH v. JONAS.*March 12th, 1876.*[*Jessel, M.R.*—3 *Ch. D.* 584; 45 *L. J., Ch.* 364; 3 *L. T., N. S.* 228.]

The plaintiff was a London cigar merchant, who imported cigars made by Genir, of Havannah, and which were, at the plaintiff's suggestion, supplied to him by the latter in boxes labelled with a design of Britannia and the words "Gloria de Inglaterra," to which Genir added the words "Of Joseph Genir, Manufacturer of Cigars, of Havannah." Boxes of cigars so labelled were supplied by Genir, until shortly before the commencement of the action, to the plaintiff alone, but he had no contract with Genir for the continued exclusive or any supply of such cigars, and the defendants, being new London agents of Genir, began to sell boxes of cigars, consigned to them by Genir, similarly labelled.

Motion by the plaintiff for an injunction to restrain the defendants from so doing, refused, on the ground that, although it was possible for a trade mark to indicate selection by a person of reputation in that capacity, all that was indicated by the trade marks in question was that the cigars were of Genir's manufacture, and that there was no contract between Genir and the plaintiff, securing to the latter the exclusive sale of the cigars.

495.

MICKLE v. EMERY.*March 18th, 1876.*[*Jessel, M.R.*—*Seton*, 4th ed. 234.]

On motion by the plaintiff, injunction granted, upon an undertaking as to damages, to restrain an infringement of the plaintiff's trade marks registered under the T. M. A., 1875.

LAUTZ BROS. & CO. v. SCHULTZ & CO.

[496.]

April 3rd, 1876.[*U. S. Patent Office—*
Duell, Comm. } ———9 *U. S. Pat. Gaz.* 791.]

Interference declared between the applications of the parties for registration, for the purpose of deciding to which the trade mark, the subject of the applications, belonged.

Motion to dissolve the interference, on the ground that there was no statutory authority given to the Patent Office to declare an interference, refused, on the ground that the Commissioner of Patents was authorised to establish regulations for the conduct of proceedings in the Patent Office, and that this was sufficient to empower him to direct an interference in a trade mark case.

IN RE ROHLAND.

[497.]

April 6th, 1876.[*U. S. Patent Office—*
Doolittle, Asst. Comm. } ———10 *U. S. Pat. Gaz.* 980.]

On an application to register the words "Dr. Lobenthal's *Essentia Antiphthisica*" as a trade mark on a medical composition,

Held, that the words were not merely descriptive of the article, and registration granted.

ROBINEAU v. CHARBONNEL.

498.

May 4th, 1876.[*Malins, V.C.—IV. N.* 1876, p. 160; *L. J. Notes of Cas.* 1876, p. 104.]

The plaintiff carrying on business as a confectioner in Paris, under the style of "*Maison Boissier*," the defendants,

who had been principal *employés* in the plaintiff's establishment, set up business in Bond Street, and placed in their window the words "Ex 1^{ères} de la Maison Boissier de Paris," the words "Ex 1^{ères} de la" being in very small letters.

Injunction to restrain the defendants from infringing the plaintiff's rights, refused, on the ground that, the plaintiff having no shop in England, the public would not be deceived, but no costs given, the conduct of the defendants not having been blameless.

499.

FOSTER v. MEGEVAND.

May 19th, 1876.

[*Jessel, M.R.*—*Pemb. 2nd ed. 393.*]

Injunction granted to restrain an infringement of the plaintiff's trade mark, with an account and inquiry as to damages.

[500.] THE AMOSKEAG MANUFACTURING CO. v. GARNER (2).

1876.

[*N. Y. Sup. Ct.*—*4 Am. L. T., N. S. 176.*]

The plaintiff company manufacturing cotton goods, but not prints, and placing on the cotton goods labels containing the word "Amoskeag," or the initials "A. M. Co.," or "A. M. C.," the defendant sold prints labelled with the word "Amoskeag."

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1) that the defendant had no right to use the plaintiffs' corporate name; (2) that his intention in so doing was immaterial; (3) that, to constitute infringement,

it was sufficient for there to be a probability, or even a possibility, of the public being deceived; (4) that the injunction must be granted; (5) but that, on account of the plaintiffs' delay in taking proceedings, no damages, account of profits, or costs, could be given.

IN RE WEAVER.

[501.]

June 6th, 1876.

[*U. S. Patent Office—* } ———10 *U. S. Pat. Gaz.* 1.]
Duell, Comm. }

An alternative trade mark, consisting either of the figure of a lion, or of the word "Lion," or of both, admitted to registration, on the ground that the above were merely three forms of the same trade mark.

FILKINS v. BLACKMAN.

[502.]

June, 1876.

[*U. S. C. C., Dt. of Conn.—* } ———13 *Bl. C. C.* 440.]
Shipman, J. }

Jonas Blackman, the inventor of a medicine which he called "Dr. J. Blackman's Genuine Healing Balsam," having assigned to M. L. Filkins, for ten years from January 1st, 1866, the exclusive right to manufacture the medicine under that name, on certain terms, with a proviso that if M. L. Filkins complied with those terms for the ten years, the right should be continued for a further period of fifty years, the defendant, being the son of Jonas Blackman, began, after the expiration of the ten years, to make and sell a medicine under the same name.

On motion by Filkins Brothers, injunction granted to restrain the defendant from so doing, and

Held, (1) that the name was a good trade mark; (2) that the assignment was a good transfer of the right to use it on the same goods, though it would give no right to it as used on different goods; (3) that after the assignment the original inventor could give no right in the name to the defendant; (4) that the fact that M. L. Filkins had his brother as a co-plaintiff was no defence, since the trade marks of a person entering into a partnership became partnership property.

“The right to the use of a trade mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached.”

[503.] **AMERICAN GROCER PUBLISHING ASSOCIATION v. GROCER PUBLISHING CO.**

June, 1876.

[*N. Y. Sup. Ct.*—51 *How. Pr.* 402.]

Action by the plaintiffs for an injunction to restrain the publication of a newspaper in imitation of their paper, *The American Grocer*.

Motion by the plaintiffs to continue *pendente lite* an injunction which had been granted, refused, on the ground that there was not such similarity between the papers as to justify the Court in deciding in the plaintiffs' favour on motion, and that the balance of convenience was against the continuance of the interlocutory injunction.

[504.] **IN RE LAWRENCE & CO.**

June 20th, 1876.

[*U. S. Patent Office—* }
Duell, Comm. } —10 *U. S. Pat. Gaz.* 163.]

Application for the registration of the German words “Für Familien Gebrauch,” and “Lawrence Feiner Familien

Flannel," signifying respectively "For Family use," and "Lawrence Fine Family Flannel," as trade marks on flannel goods, refused, on the ground that they were mere words in common use and not distinctive.

EX PARTE STEPHENS [T. M. A. 1875] (1).

505.

June 21st, 1876.

[*Jessel, M.R. — 24 W. R. 819; 1 Trade Marks, 13.*]

Application having been made for the registration of a trade mark under the T. M. A., 1875, and the Registrar having declined to register the proposed trade mark, as not being within the Act;

On motion by the applicant, for directions as to the proper mode of applying to the Court, so as to obtain the registration of the proposed trade mark,

Held, that the proper mode of applying for the opinion of the Court was by way of motion to rectify the register by the insertion of the applicant's name as the proprietor of the trade mark, two clear days' notice being given to the Registrar of Trade Marks, and the application being supported by an affidavit by the applicant, stating the facts.

IN RE BUSH & CO.

[506.]

June 21st, 1876.

[*U. S. Patent Office—* }
Duell, Comm. } ———10 *U. S. Pat. Gaz.* 164.]

Application for the registration of the words "Centennial, Isidor Bush & Co., St. Louis, Mo.," in combination with the applicants' already registered trade mark and the obverse and reverse of the centennial medal, as a trade mark on sparkling wines, refused, on the ground that the word "Centennial" had already been registered in another

name for alcoholic spirits, which would to some extent include wines, and that the obverse and reverse of the centennial medal had already been registered in a third name, and that purchasers would be likely to be deceived by the appearance of these appropriated particulars in another trader's mark.

[507.]

IN RE THE RUBBER CLOTHING CO.

June 28th, 1876.

[U. S. Patent Office—
Duell, Comm. } —10 U. S. Pat. Gaz. 111.]

On an application for the registration of the words "Rubber Clothing Company" as a trade mark on clothing,

Held, that, although the words merely composed the name of a corporation, and, therefore, came within the prohibition to register in the U. S. Statute of 1870, yet registration should be granted, as of a "lawful trade mark rightfully in use on the 8th July, 1870," on its being satisfactorily established by affidavit evidence that the name was in actual use as a trade mark at that date.

[508.]

IN RE SIMPSON & SONS.

July 13th, 1876.

[U. S. Patent Office—
Doolittle, Act. Comm. } —10 U. S. Pat. Gaz. 333.]

Application for the registration, as labels, of two labels, of which one consisted of the word "Eddystone," with a picture of a lighthouse and the words "Wm. Simpson & Sons, Philadelphia, No.—yds.," and the other of a picture of three female figures standing near a tomb, with the words "Wm. Simpson & Sons, Philadelphia," refused, on the ground that they were properly trade marks, and must be registered as such.

THE APOLLINARIS COMPANY (LIMITED) v. EDWARDS. 509.

July 13th, 1876.

[*Bacon, V. C.*—*Seton, 4th ed.* 237.]

The plaintiffs being the exclusive importers of Apollinaris water into England, under agreement with the owners of the Apollinaris Spring in Germany, the defendants used the word "Apollinaris" in connexion with waters other than the genuine.

On motion by the plaintiffs, injunction granted to restrain the defendants from so doing.

EX PARTE STEPHENS [T. M. A. 1875]. (2). 510.

July 28th, 1876.

[*Jessel, M. R.*—3 *Ch. D.* 659; 46 *L. J., Ch.* 46; 24 *W. R.* 963; 1 *Trade Marks*, 13.]

Motion to register as a trade mark on inks the word or combination of letters "AEILYTON," such word not having been used as a trade mark before the passing of the above Act, refused, on the ground that the wording of the 10th section of the above Act excluded from registration a mere combination of letters, newly adopted since the Act.

SMITH v. REYNOLDS. (3). [511.]

July, 1876.

[*U. S. C. C., S. Dt. of N. Y.*— } —13 *Bl. C. C.* 458.]
Shipman, J.

The plaintiff having registered a crown under the U. S. Act of 1870 as his trade mark for paints, but not having at that time, or since, used the crown on white lead, the

defendants used a trade mark containing a crown as their trade mark on white lead, they, or their predecessors in business, having done so from about a year previous to the registration of the plaintiff's mark.

Injunction to restrain the defendants from continuing to use the crown on their white lead, refused, on the ground that the registration of the plaintiff's mark for paints generally did not give him a right to interfere with the continued user by the defendants of a mark which they had acquired a right to use in connexion with a particular kind of paint before the registration of the plaintiff's mark.

513.

COMPAGNIE LA FERME v. HENDRICKX.*July 20th, 1876.*[*Jessel, M.R.*]

The plaintiffs being a Dresden company of cigarette makers, who sold their cigarettes in certain special wrappers, &c., and under the name "Laferme," the defendant sold other cigarettes under the same name and in similar wrappers.

Injunction granted to restrain the use of labels and wrappers imitated from the plaintiffs', but refused as to word "Laferme," on the ground that it was not established that the plaintiffs' predecessor in business was the first in Germany to use it.

Costs up to the motion, at which the interlocutory injunction as to the wrappers, &c., was granted, given to the plaintiffs, subsequent costs to be borne by the respective parties.

LEA v. MILLAR.

513.

*July 26th, 1876.**[Jessel, M.R.——Scot, 4th ed. 242.]*

The plaintiffs being manufacturers of a sauce which they termed "Worcestershire Sauce," the defendant sold a sauce under the same name and with similar labels.

Injunction to restrain the defendant from using the name and imitating the plaintiffs' labels, refused, on the ground that both the name and the style of label had been long used by sauce manufacturers other than the plaintiffs, and that the plaintiffs had publicly abandoned their old labels by the recent adoption of a new label bearing their signature as a distinctive mark.

BELL, BLACK & CO. v. BELL & CO.

514.

*Aug. 1st, 1876.**[Bacon, V.C.]*

The plaintiffs being manufacturers of lucifer matches, who sold their matches in boxes bearing a label of deep blue and red colour, on a white ground, with the device of a bell, the defendants, who had sold the same article in boxes bearing a label of the same colours, but paler, with the device of a small beehive, diminished the difference between the labels by deepening the colours of theirs and enlarging the beehive.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing the plaintiffs' rights.

515.

IN RE MEIKLE [T. M. A., 1875].

Aug. 7th, 1876.[*Hall, V.C.*—24 *W. R.* 1067 ; 1 *Trade Marks*, 22.]

The registrar of trade marks refused to register, or advertise for registration, a design accompanied by the words "The Registered Seal of the Bonus Tea Association," unless the word "registered" were omitted, on the ground that the Commissioners of Patents had directed him not to allow that word to appear in connexion with any registered trade mark.

On summons to rectify the register by the insertion of the applicants' name as proprietors of the unaltered mark, adjourned into Court,

Held, (1) that an order could not be made for the registration of the trade mark without the preliminary advertisement required by the rules being inserted in the official journal; and (2) that the Court would not interfere with the directions given to the registrar by the Commissioners of Patents in their discretion, or direct an advertisement of the unaltered mark with a view to its registration.

[516.]

IN RE ROACH.

Aug. 9th, 1876.

[*U. S. Patent Office*— } —10 *U. S. Pat Gaz.* 333.]
Duell, Comm. }

Application for the registration of the words "Croup Tincture" as a trade mark on a croup medicine, refused, on the ground that the words were merely descriptive.

WESTON v. HEMMONS.

[517.]

Aug. 10th, 1876.

[*Victoria Sup. Ct.*— } ————2 *Vict. L. R. Eq.* 121.]
Molesworth, J. }

The plaintiff being the inventor of a secret medicine called "Weston's Wizard Oil," and the defendants having manufactured this medicine by agreement with him, after the termination of the agreement the defendants continued to use the recipe and name.

Injunction granted to restrain the defendants from using or imparting the secret recipe, and from using the name, except in respect of medicines manufactured before the termination of the agreement, but the order to be discharged if the plaintiff should fail to pay for any ingredients, &c., purchased by the defendants for the purpose of the medicine, and which would have been charged in account against the plaintiff if the connexion had continued. As to certain other medicines not satisfactorily proved to have been invented by the plaintiff, or to have been sold in Victoria before the commencement of his connexion with the defendants, no order made.

IN RE IMBS.

[518.]

Aug. 29th, 1876.

[*U. S. Patent Office*— } ————10 *U. S. Pat. Gaz.* 463.]
Doolittle, Asst. Comm. }

A device consisting of the letter "I" within a shield, the shield being surrounded with wheat and situated above the word "Charm," admitted to registration as a trade mark, notwithstanding that two other trade marks were already on the register, of which the one consisted

of the words "Golden Charm" above a monogram of the letters "F. G. S. & Co.," and the other of the words "Attrition Flour" above a shield on which were bunches of wheat, on the ground that the proposed trade mark was not sufficiently similar to those already registered as to be calculated to deceive.

519. .

ORR v. DIAPER.

Nov. 6th, 1876.

[*Hall, V.C.*—4 *Ch. D.* 92; 46 *L. J., Ch.* 41; 35 *L. T., N. S.* 468; 25 *W. R.* 23.]

The plaintiffs being manufacturers of sewing thread, who sold their thread in England and abroad, including Valparaiso, under certain marks, discovered that large quantities of thread bearing marks similar to theirs had been shipped to Valparaiso by the defendants on account of other persons.

Action by the plaintiffs for discovery of the names and addresses of the consignors, and particulars and dates of the consignments of marked thread, with a view to further proceedings against the consignors.

Demurrer overruled, and

Held, that the defendants must answer within a month.

[520.]

CHARLESON v. CAMPBELL.

Nov. 17th, 1876.

[*Ct. of Session*—*Ct. of Sess. Cas., 4th Ser., IV.* 149; 14 *Scot. L. Rep.* 104.]

The plaintiff being the proprietor of "The Station Hotel, Forres," the defendant, who had become proprietor of "The County and Family Hotel," in Forres, changed its name to "The Royal Hotel," and afterwards to "The Royal Station Hotel, Forres."

Interdict to restrain the defendant from styling his hotel "Station Hotel," refused, on the ground that (1) the name of the plaintiff's hotel was a mere descriptive title, not a specific one, and that there was no averment that the defendant had assumed his title with fraudulent intent; and (2) the use of the word "Royal" by the defendant, as part of the name of his hotel, was sufficient to distinguish it from the plaintiff's.

CARMICHEL v. LATIMER.

[521.]

Nov., 1876.

[*Rhode I. Sup. Ct.*—11 *R. I.* 395; 23 *Amer. Rep.* 481; 16 *Alb. L. J.* 73.]

The plaintiffs being A. Carmichel & Co., who had purchased the goodwill of the business of Stillman & Co., woollen manufacturers, and with it the right to use the tickets or labels of that firm, bearing the name "Stillman & Co.," the defendants, Latimer, Stillman & Co., leased a mill formerly used by Stillman & Co., and known as the "Seventh Day Mill," or "Stillman Mill," and there began to manufacture goods similar to the plaintiffs', and to sell them ticketed with a label containing the words "Stillman Mill."

On motion by the plaintiffs for an injunction to restrain the defendants from so doing,

Held, (1) that the plaintiffs' right to use the name "Stillman & Co.," there being no person of that name in the firm, was doubtful; (2) that the defendants were entitled to place the name of their mill on their goods, if they did so without fraud; (3) that there was no evidence or probability of fraud or deception; (4) and, therefore, that the motion must be refused.

Per Potter, J.—"In some of the cases the question has been between partners, or there has been a sale of a business, to be con-

tinued by the vendee, and more or less connected with a place and the goodwill of the business, and in many of these cases the sale of the trade mark would be upheld. But where the reputation of the goods and of the name has grown out of excellence of manufacture, depending on the honesty and skill of the maker, it is more difficult to hold that it can be sold to a stranger, or that it is generally assignable."

Per Durfee, C.J.—"A manufacturer has a right to attach his own name to his manufactures, even though a rival manufacturer of the same name, who has given it prestige in the market, may suffer in consequence. The resulting damage is *damnum absque injuria*. And if a manufacturer has the right to label the products of his mill with his name, I do not see why he has not an equal right to label them with the name of that mill itself, provided the name is not unfairly assumed for that purpose, or fraudulently employed."

[522.]

IN RE THE EAGLE PENCIL CO.

Nov. 21st, 1876.

[U. S. Patent Office—
Doolittle, Asst. Comm. } ———10 U. S. Pat. Gaz. 981.]

Application for the registration of a trade mark on pencils, stated to consist essentially in the combination of a fraction with the whole number usually marked on a pencil, as $1\frac{1}{4}$ for 1, $2\frac{1}{2}$ for 2 (the figure of an eagle, or the word "Eagle," or other characters, being added or omitted at pleasure), refused, on the ground that the alleged trade mark was in reality a mere indication of the quality of the article.

[523.]

CHASE v. MAYO.

Nov. 23rd, 1876.

[Mass. Sup. Ct.—121 Mass. (7 Lathrop) 343.]

The plaintiff being a packer and seller of fish, who was also an official inspector of fish, and who branded the parcels of fish packed by him for his private business with

his official brand, the defendant branded other fish with a similar mark.

Action for damages.

Held, that the plaintiff was not entitled to recover damages, on the ground that a public officer could not acquire any private right of trade mark in the brand used by him in his official capacity.

BOOTH v. JARRETT.

[524.]

Nov., 1876.

[N. Y. C. P.—
Van Brunt, J. } ———52 How. Pr. 169.]

The plaintiff being Edwin Booth, who had established a theatre in New York and called it "Booth's Theatre," and who had assigned the lease to J. B. Booth, under whom the defendants claimed, the premises having been described in both assignments, and also in various mortgages made by the plaintiff, as "Booth's Theatre," the defendants continued to call the theatre by that name.

Motion by the plaintiff for an injunction to restrain the defendants from continuing to use the name "Booth" in connexion with the theatre, refused, on the ground that the plaintiff's name had become affixed to the establishment, and did not imply that it was conducted by him.

DECKER v. DECKER.

[525.]

Nov., 1876.

[N. Y. Sup. Ct.—
Lawrence, J. } ———52 How. Pr. 218.]

The plaintiffs being manufacturers of pianofortes in New York, trading under the name of "Decker Brothers," the defendants, also manufacturers of pianos in New York,

trading as "Decker & Barnes," and whose senior partner had previously been in business as "Decker & Co.," placed on their pianos a trade mark consisting of the words "The Decker Piano," which they had registered in the U. S. Patent Office.

Motion by the plaintiffs for an injunction to restrain the defendants from so doing, refused, on the ground that the defendants could not be restrained from the use of their own names, if no fraud appeared, and further, that it was doubtful whether the Court was empowered to interfere with a trade mark awarded by the Commissioner of Patents.

526.

POWELL v. McNULTY.

Nov. 27th, 1876.

[*Bacon, V.C.*]

The plaintiff manufacturing a sauce under the name of "Yorkshire Relish," the defendant sold another sauce under the same name.

Injunction granted to restrain the defendant from so doing.

[527.]

IN RE PRATT AND FARMER.

Nov. 27th, 1876.

[*U. S. Patent Office—*
Doolittle, Asst. Comm. } ———10 *U. S. Pat. Gaz.* 866.]

Application for the registration of the figure of a fish as a trade mark for fishing lines, refused, on the ground that the figure was descriptive of the purpose of the article.

CHEAVIN v. WALKER.

528.

Dec. 8th, 1876 ; May 9th, 1877.[*Bacon, V.C.*—5 *Ch. D.* 854 ; 46 *L. J., Ch.* 265 ; 35 *L. T., N. S.* 757.]*Ct. of App.*—*Jessel, M.R., James & Baggallay,*
L.JJ.} —5 *Ch. D.* 850 ; 46 *L. J.,*
Ch. 686 ; 36 *L. T., N. S.*
938.]

The plaintiff being G. Cheavin, who manufactured filters on a principle patented by his father, S. Cheavin, in 1862 (but which patent lapsed in 1865), and who placed on his filters a tablet with the words "G. Cheavin's Improved Patent Gold Medal Self-Cleaning Rapid Water Filter, Boston, England," beneath a medallion with the Royal Arms and the words "By Her Majesty's Royal Letters Patent," the defendants, Walker, Brightman & Co., manufactured filters on the principle of the same patent, and placed on them a tablet with the words "S. Cheavin's Patent Prize Medal Self-Cleaning Rapid Water Filter, Improved and Manufactured by Walker, Brightman & Co., Boston, England."

Action for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, by the V. C., (1) that the plaintiff had acquired a right of trade mark in the tablet ; (2) that this right had been fraudulently infringed by the defendants ; (3) that the plaintiff was not deprived of his right to an injunction by his reference to the lapsed patent ; and (4) that the injunction must be granted.

Held, by the Court of Appeal, (1) that the alleged trade mark was a mere inscription and not a trade mark ; (2) that in any case the defendants had committed no infringement, but had merely stated the principle on which the filter was manufactured by them ; (3) that the plaintiff was disentitled by reason of his reference to the lapsed patent being such as to induce the belief that it was still

in force; and (4) that the injunction must be dissolved and the action dismissed.

Per Jessel, M.R., 5 Ch. D. 862.—“You may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. But if you suggest that it is protected by an existing patent, you cannot obtain the protection of that representation as a trade mark. Protection only extends to the time allowed by the statute for the patent, and if the Court were afterwards to protect the use of the word as a trade mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade mark.”

Per James, L.J.—“It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade mark. Whatever is mere description is open to all the world.”

[529.]

DUNBAR v. GLENN.

Jan., 1877.

[*Wisconsin Sup. Ct.*—42 *Wisc.* 118.]

The plaintiff being the proprietor of a spring of mineral water, which he sold under the name of “Bethesda Mineral Water,” styling the spring the “Bethesda Mineral Spring,” the defendants, who were the proprietors of a neighbouring spring, which they alleged to contain exactly the same water, began to call their spring and water “Glenn-Bethesda Mineral Spring” and “Water,” and to issue circulars using those terms and stating that their water was “identical with Bethesda” water.

Injunction granted to restrain the defendants from using the name “Bethesda Mineral Water” in connexion with the water of their spring, and from issuing circulars or trade cards, &c., representing their water to be “Bethesda” water.

“Where the trade mark, in its original signification, or by association, distinctively points to the origin or ownership of the article to

which it is applied, it will be protected. But where it is a generic or geographical name, designating a city or district of country, or is merely descriptive of the article manufactured, and can be employed with truth by other manufacturers, it is not entitled to legal protection as a trade mark."

BARROWS v. THE PELSALL COAL AND IRON COMPANY.

530.

Jan. 11th, 1877.

[Hall, V.C.]

The plaintiffs being manufacturers of iron, which they stamped with the letters "B. B. H." (the initials of the original partners in the firm—Bradley, Barrows & Hall) in Roman characters, and a crown, the defendants, carrying on business in succession to Messrs. Boaz Bloomer & Son, stamped their iron (as that firm had done) with the Roman letters "B. B. S." and a crown. In 1874 the plaintiffs commenced a suit for an injunction, which was compromised, the defendants undertaking to discontinue the use of their mark. The defendants subsequently took proceedings to procure the registration of the letters "B. B. S." in italic characters, with a crown, as their trade mark under the Trade Marks Act, 1875.

On motion by the plaintiffs, injunction granted to restrain the defendants from using or procuring the registration of the mark in question.

HENNESSY & CO. v. ROHMANN, OSBORNE & CO.

531.

Jan. 18th, 1877.

[Malins, V.C.—36 L. T., N. S. 51.]

On an *ex parte* application on the part of the plaintiffs, being brandy merchants, who alleged that the defendants had obtained cases of the plaintiffs', and filled them with inferior brandy;

Interim injunction granted, to restrain the defendants from selling brandy not the plaintiffs', so as to deceive, and order made, under Order LII., rule 3, for inspection of the defendants' premises to be made and samples taken by a proper person.

532.

GRILLON v. GUÉNIN.*Jan. 19th, 1877.*[*Bacon, V.C.—W. N. 1877, p. 14.*]

The plaintiff being a manufacturer of lozenges which he sold in boxes labelled with the words "Tamar Indien," the defendant sold other lozenges under the name of "American Tamar."

Injunction granted to restrain the defendant from infringing the plaintiff's trade mark, and

Held, that a defence that the words "Tamar Indien" were merely descriptive of the composition of the plaintiff's lozenges failed.

533.

MOET v. CLYBOUW.*Jan. 20th, 1877.*[*Jessel, M.R.*]

The plaintiffs being Moët and Chandon, wine growers, who sold their champagne in bottles closed with corks branded with the letters "M. & C." in a circle on the bottom, and the word "England" on the side, the defendant sold other champagne in bottles closed with corks similarly marked, claiming to use the initials in right of a firm of "Meadows & Clybouw," to whose business he alleged himself to have succeeded, and claiming to use the word "England" as common to the trade.

On motion by the plaintiffs, injunction granted to restrain the defendant from infringing the plaintiffs' rights.

DENCE v. MASON (1).

534.

Jan. 25th, 1877 ; Feb. 12th, 1878.

[*Malins, V.C.*—*IV. N.* 1877, p. 23 ; 1878, p. 42 ; *L. J. Notes of Cases*, 1877, p. 33.]

The plaintiffs having recently acquired a provision dealer's business in Little Stanhope Street, Mayfair, carried on under the name of "Brand & Co.," and which name was placed on all the packets of essence of beef and other preparations made by the firm ; F. Mason, who had been for many years in the employ of the plaintiffs' predecessor in business, and who alleged that during that period he had been the discoverer of the essence of beef, left their service, and began to deal in the same class of goods, in partnership with one Brand as "Brand & Mason." In consequence of proceedings taken by the plaintiffs, this name was changed to "Mason & Brand," and shortly afterwards Brand refused to continue in the partnership, or to permit the defendant to make use of his name, but the defendant nevertheless continued to trade under the name of "Mason & Brand," and to represent that he was the original maker of the article.

On motion by the plaintiffs for an injunction to restrain the defendant from infringing their rights, and again at the hearing of the action,

Held, (1) that during the continuance of the partnership between Mason and Brand it was impossible to prohibit entirely the use of the latter's name in the business ; (2) but that after the retirement of Brand the defendant was not entitled to continue to use his name for the purpose of imitating the plaintiffs' name and marks, although he was at liberty to manufacture the same article as the plaintiffs under his own name ; (3) that in arranging with the proprietor of a small shop in the same street as the plaintiffs for the exhibition on her shop-front of the words

“Agent for Mason & Brand’s Essence of Beef,” the words “Agent for” being in small and the rest in large letters, the defendant had acted in a manner intended and calculated to deceive; (4) that, supposing the defendant to have discovered the recipe of the essence of beef, which was not established, he was nevertheless not entitled to represent himself as the original maker, since whatever essence of beef he had made had been made by him as the servant of the plaintiffs or their predecessors, but that he might state that he had been in the plaintiffs’ service, and had there learnt the recipe; (5) and that an injunction must be granted to restrain the defendant in the particulars above mentioned.

535. **EX PARTE GRIMSHAW** [T. M. A., 1875].

Jan. 25th, 1877.

[*Hall, V.C.*—*W. N.* 1877, p. 24; *L. J. Notes of Cas.* 1877, p. 24; 1 *Trade Marks*, 23.]

Two applications being made for the registration of the same trade mark,

Motion by one of the two applicants for a direction that the case should be heard on motion, and not on special case as directed by the rules, refused, on the ground that the method of procedure directed by the rules was the more convenient.

536. **LINOLEUM MANUFACTURING COMPANY v. NAIRN.**

Feb. 1st, 1877; Jan. 30th, 1878.

[*Hall, V.C.*]

[*Chanc. Div.*— } ———7 *Ch. D.* 834; 47 *L. J.*, *Ch.* 430; 38 *L. T.*, *N. S.*
Fry, J. } 448; 26 *W. R.* 463; 1 *Trade Marks*, 291.]

The plaintiffs being manufacturers, under certain patents recently expired, of a new species of floor-cloth, which

they called "Linoleum Floor-cloth," or "Linoleum," and who had used and registered as their trade mark a device consisting of a fleur-de-lys in a lozenge, with the words "Linoleum Floor-cloth" and "F. Walton's Patent," the defendants made preparation, upon the expiration of the patents, for the manufacture and sale of a similar article, under the name of "Linoleum Floor-cloth," and adopted a trade mark entirely different from the plaintiffs', consisting of a bunch of thistles with the name "Nairn's."

On motion by the plaintiffs for an injunction to restrain the defendants from using the word "Linoleum,"

Held, by Hall, V. C., that nothing having yet been done, and the question being purely one of the right to use the word, the matter must stand over till the hearing.

At the hearing of the action,

Held, by Fry, J., (1) that the word "Linoleum," as inserted in the plaintiffs' trade mark, did not form an essential feature of the mark; (2) that if the word was descriptive of a substance which the defendants were entitled to make, they were entitled to use the name of the substance also; (3) that the fact that the word had been previously used by the plaintiffs alone, they being hitherto patentees, did not give them an exclusive right in it, since a name appropriated to an article made under a patent was indicative in the first place of the article so made, and only in the second place of the manufacturers; (4) and that the injunction must, therefore, be refused.

"Until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name, as showing that the manufacture of one person is indicated by it, and not the manufacture of another."

537. **EX PARTE YOUNG, RE LEMON HART & SON.**

Feb. 3rd, 1877.

[*London Ct. of Bankruptcy—
Spring Rice, Reg. for C.J.*]

Lemon Hart & Son, wine merchants, whose trade mark consisted of the initials "L. H. & S.," having been compelled to liquidate by arrangement, and the partnership property, goodwill, &c., having been sold by the trustee in the liquidation, the purchaser became bankrupt without having fully paid the purchase-money.

Motion by the trustee in liquidation for an order for the payment to him of the proceeds of a sale of the trade mark by the trustee in bankruptcy, refused, on the ground that the trade mark passed to the purchaser from the trustee in liquidation, under the assignment from the latter, and that the purchaser's trustee in bankruptcy was entitled to the benefit of it, and

Held, that the trade mark was a chattel within sect. 15, sub-s. 5 of the Bankruptcy Act, 1869.

[538.]

HARRINGTON v. LIBBY.

Feb., 1877.

[*U. S. C. C., S. Dt. of N. Y.—* } ————12 *U. S. Pat. Gaz.* 188.]
Johnson, J.

The plaintiff selling small pails of ornamented tin, for use as collar boxes, the defendant sold similar boxes.

Motion by the plaintiff, for an injunction to restrain the defendant from selling such boxes, as being an infringement of the plaintiff's trade mark, the alleged trade mark consisting of the article, refused, on the ground that such an article could not constitute a trade mark.

STRAHAN & CO., LIMITED, v. KING & CO.

539.

Feb. 22nd, 1877.

[Malins, V.C.]

The plaintiffs being the proprietors of *The Contemporary Review*, the defendants, the publishers and an ex-editor of that periodical, made preparations for publishing a new magazine or review under the title of *The Nineteenth Century*.

Motion by the plaintiffs for an injunction to restrain the defendants from so doing, and from representing their new magazine to be a continuation of *The Contemporary Review*, and from misrepresenting the principles or objects of the latter periodical, refused, on the ground that the defendants were engaging in a perfectly fair competition with the plaintiffs, as they had a right to do, and that they had not been guilty of any misrepresentation with regard to either their own intended publication, or the plaintiffs'.

IN RE BARROWS [T. M. A., 1875-8.]

540.

March 1st; April 26th, 1877.

[Malins, V.C.—5 Ch. D. 353; 46 L. J., Ch. 450; 36 L. T., N. S. 291; 25 W. R. 407; 1 Trade Marks, 122.]

[Ct. of App.—

Jessel, M.R., James and Baggallay,
L.JJ.

—5 Ch. D. 364; 46 L. J.,
Ch. 725; 36 L. T., N. S.
780; 25 W. R. 564;
1 Trade Marks, 126.]

On motion by Barrows & Sons, successors to Bradley, Barrows & Hall, iron manufacturers, of Bloomfield Works, Staffordshire, for the separate registration of numerous trade marks used by them in their business, consisting respectively of the letters "B. B. H.," (being the initials of the former firm), and of the word "Bloomfield" or "Bloom,"

(representing the name of the works), used with a variety of marks indicative of quality, as "Best," "Best, Best," &c., or common to the trade, as the figure of a crown, of a horseshoe, &c., and the Registrar of Trade Marks having, by direction of the Commissioners of Patents, declined to place on the register all the combinations, but offered to register any one of them,

Held, by the V.-C., (1) that every valid mark used before the Act of 1875 was entitled to separate registration under it; (2) that the Court was not bound by the direction of the Commissioners of Patents; (3) that the motion must, therefore, be granted.

Held, by the Court of Appeal, that the proper mode would be to register the letters "B. B. H." and the words "Bloomfield" and "Bloom," being the essential particulars, separately, a note being appended in each case, to the effect that the mark might be used either alone, or in combination with common marks, words of quality, &c., so that the various combinations would be protected by representative registration.

[541.]

GILMAN v. HUNNEWELL.

March 1st, 1877.

[*Mass. Sup. Ct.*—122 *Mass.* (8 *Lathrop*) 139.]

The plaintiffs having purchased from John L. Hunnewell certain medicines and the wrappers, labels, trade marks, &c., used upon them, the defendant, Edwin Hunnewell, who had formerly been in John L. Hunnewell's employ, set up in business in the same house as the plaintiffs as "Hunnewell & Co.," and made and sold similar medicines with wrappers and labels similar in many respects to the plaintiffs', except that for "John L. Hunnewell" "Hunnewell & Co." was substituted.

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that (1) the plaintiffs could not have a right of trade mark in such words as "cough remedy," or "a sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption;" (2) there was not such similarity as to be likely to deceive; (3) no intention to defraud was proved; (4) the circulars distributed by the defendant to his customers correctly stated his former relation to John L. Hunnewell.

"A trade mark may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use. The right in a trade mark, so applied, is recognised as property, which a Court of Chancery will protect by injunction.

"A mere general description, by words in common use, of a kind of article, or of its nature or qualities, cannot of itself be the subject of a trade mark.

"A person may have a right in his own name as a trade mark, as against a person of a different name. But he cannot have such a right as against another person of the same name, unless the defendant uses a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture.

"The Court will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade mark, unless the form of the printed words, the words themselves, and the figures, lines and devices, are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other."

KINNEY v. BASCH.

[542.]

March, 1877.

[*N. Y. Sup. Ct.*— } —1 *Trade Marks*, 183.]
Van Brunt, J. }

The plaintiff being a manufacturer of cigarettes, on which he used a label containing a device of sun's rays,

the words "St. James," and the symbol " $\frac{1}{2}$," the defendants sold other cigarettes with a label containing the words "St. James' Parish Perique Cigarettes" (of which the words "St. James" were much the more conspicuous) and the symbol " $\frac{1}{2}$ " in the same style as the plaintiff's, but the labels were in other respects different.

Injunction granted to restrain the defendants from infringing the plaintiff's trade marks, on the ground that whether the plaintiff had or had not an exclusive right in the marks, the defendants had acted so as to deceive.

"The use of any words, geographical or otherwise, numerals or symbols, adopted for the purpose of defrauding the public, will be restrained by the Court. It is the duty of the Court to protect the public from fraud, even at the suit of a plaintiff who has not the exclusive right to the use of such words, numerals, or symbols."

543.

CARNRICK v. MORSON.

March 22nd, 1877.

[*Bacon, V.C.*—*L. J., Notes of Cas.* 1877, p. 71; *Chemist and Druggist*, 1877, p. 161.]

The plaintiffs being the manufacturers of a medical compound which they called "Lacto-Peptine," the defendants sold a preparation in bottles labelled "Lacto-Pepsine."

On motion by the plaintiffs, injunction granted to restrain the defendants from using the name, and

Held, that a defence that the word "Lacto-Peptine" was descriptive of the composition of the plaintiff's article, failed.

IN RE PARK.

[544.]

March 26th, 1877.

[U. S. Patent Office— }
 Spear, Comm. } ———12 U. S. Pat. Gaz. 2.]

On an application for the registration as labels of three labels, each including a figure of a swan, or the word "Swan," which figure and word the applicant had previously sought unsuccessfully to register as his trade mark on gin,

Held, that, before this figure or word could be registered as part of a label, the applicant must establish his right of trade mark therein.

ALLSOPP *v.* WALKER [T. M. A., 1875.]

545.

April 10th, 1877.

[Jessel, M.R.]

The defendants having applied for the registration of a device consisting of a female hand pointing horizontally, with the letters "W. & G." upon it, as their trade mark for bottled ale and porter, the plaintiffs opposed the application, on the ground that the use of the mark by the defendants, if permitted, would be calculated to deceive, by reason of the similarity between that mark and their own trade mark on the same article, consisting of a male hand pointing upwards.

Special case stated by the Registrar of Trade Marks.

Held, that the mark too nearly resembled the plaintiffs' mark to be admitted to registration in the same class.

546.

STEINTHAL v. SAMSON.*April 17th, 1877.**[Ct. of App.—**James, Mellish and Baggallay, L.JJ.]*

The plaintiffs being manufacturers and exporters of cotton goods, to whom the defendant, a former partner, had, on the dissolution of the partnership, assigned all his interest in the business, the deed containing a proviso to the effect that the defendant should be at liberty to continue to carry on a similar business, and to use the trade marks of the firm, except the private arms, crest, and motto of the plaintiffs, the motto consisting of the word "Excelsior," the defendant subsequently sold cotton goods bearing that word, but not used as a heraldic device.

Injunction to restrain the defendant from the breach of the covenant alleged to be thereby committed, refused, on the ground that the restrictive covenant had reference only to the heraldic use of the plaintiffs' arms, crest, and motto, and not to the use of the word "Excelsior" in another manner.

[547.]

IN RE THE GOODYEAR RUBBER CO.*April 25th, 1877.*

[U. S. Patent Office—
Doolittle, Asst. Comm.] } ———11 *U. S. Pat. Gaz.* 1062.]

Application for the registration of the words "Crack-proof" as a trade mark on india-rubber goods, refused, on the ground that the term was merely descriptive of quality.

CAMPBELL v. HOLLINS.

548.

April 26th, 1877.[*Malins, V.C.*][*House of Lords.*]

The appellant (defendant) Campbell and the respondent (plaintiff) Hollins, having been in partnership as manufacturers of china and encaustic tiles, separated the two businesses in 1859, the former being styled by them "Herbert Minton & Co.," and the latter "Minton, Hollins & Co.," and the respondent (defendant) Taylor was afterwards taken into the latter firm. On the retirement of Taylor in 1868 the partnership was dissolved, Campbell taking the china business, Hollins the tile business. Taylor having subsequently begun to manufacture tiles as "Robert Minton, Taylor & Co.," Hollins commenced proceedings to restrain him from so doing, but these were discontinued on Taylor's undertaking not to trade in any other name than "Robert Minton Taylor." Campbell purchased Taylor's business in 1875, and announced his intention of continuing it as "The Minton Brick and Tile Co."

Action by Hollins for an injunction to restrain the defendant Campbell from using the name "Minton."

Held, by the V.-C. and House of Lords, that the plaintiff was entitled to the exclusive use of the name "Minton & Co." in connexion with the tile business, and that an injunction must be granted to restrain the infringement of that right by Campbell.

HENNESSY v. COOPER.

549.

April 26th, 1877.[*Malins, V.C.*]

The plaintiffs being brandy merchants, the defendant

sold his own brandy in cases formerly belonging to the plaintiffs, and still bearing their marks.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

550.

LEDGER v. RAY.

April 28th; May 3rd, 1877.

[*Bacon, V.C.*]

[*Ct. of App.—*

James, Baggallay, Bramwell and Brett, L.JJ.]

The plaintiff being the proprietor of a dramatic and sporting newspaper called *The Era*, which had for many years published articles signed "Touchstone," the defendant made preparations for the publication of a new newspaper on the same subjects, under the title of *Touchstone, or, the New Era*.

Action by the plaintiff for an injunction to restrain the defendant from so doing.

Held, by the Court of Appeal, that the adoption of that name for a new newspaper was not calculated to cause it to be bought in mistake for the old one, and that an injunction which had been granted must, therefore, be dissolved.

551.

ROSE v. HENLEY.

April 27th, 1877.

[*Malins, V.C.—Cited 47 L. J., Ch. 577; 38 L. T., N. S. 410.*]

The plaintiff being a manufacturer of lime juice, who sold his article in bottles moulded specially for him with a spray of lime-tree leaf and blossom and his name "Rose & Co.," and who further placed on his bottles a label con-

taining the same spray and name, the defendant systematically collected the plaintiff's empty bottles, and sold them refilled with lime juice not of the plaintiff's preparation.

Injunction granted to restrain the defendant from infringing the plaintiff's rights.

WOLMERSHAUSEN v. O'CONNOR.

552.

May 3rd, 1877.

[*Bacon, V.C.*—36 *L. T., N. S.* 921.]

The defendant (who had for many years been manager of, and for a shorter time partner in, the firm of Foster & Co., tailors, of High Street, Oxford, and Mayfair, and had latterly resided at Headington Hill, near Oxford) covenanted with the plaintiff, the principal partner, on the dissolution of the partnership, not to carry on the business of a tailor, &c., within ten miles of Oxford, and not to represent himself in any manner as having been connected in trade with the plaintiff or his firm, as partner, manager, or servant, but shortly afterwards set up a tailor's business in Cavendish Square, and issued advertisements, in which he described himself as "late of Headington Hill, Oxford, and formerly of Mayfair."

On motion by the plaintiff, injunction granted to restrain the defendant from acting in breach of his covenant and from issuing the advertisements in question.

IN RE KIMBALL.

[553.]

May 3rd, 1877.

[*U. S. Patent Office—*
Doolittle, Act. Comm. } —11 *U. S. Pat. Gaz.* 1109.]

On an application for the registration of the words "Vanity Fair" as a trade mark on cigarettes, the applicant

having prepared eight different arrangements of his manner of using the words, by way of complying with the requirement of the U. S. Statute of 1870 for the manner of application to be described,

Held, that one *fac simile* was sufficient to illustrate the method of use, and that so many varieties of arrangement could not be permitted to be filed, on account of the encumbrance that such a practice would occasion.

[554.]

SWIFT v. PETERS.

May 8th, 1877.

[U. S. Patent Office—
Doolittle, Act. Comm. } —11 U. S. Pat. Gaz. 1110.]

Interference declared between Swift, an applicant for the registration in his name of a trade mark on an agricultural compost, consisting of the words "The John C. Ragsdale Ammoniated Dissolved Bone," and Peters, in whose name the trade mark was already registered, for the purpose of determining to whom the mark in question belonged.

Held, (1) that Swift had acquired no title to the mark by being the first to suggest it, the title to a trade mark depending on its adoption and use, and not on its invention; (2) that Swift had acquired no title to the mark by user, since whatever use of the mark had been made by him he had made in the capacity of agent for the firm of Snowden & Peters; (3) that the question whether Peters, the registered proprietor of the mark, was or was not entitled to the exclusive use of it, inasmuch as he was only one of the former members of the dissolved firm of Snowden & Peters, was a question for the Courts and not for the Patent Office; (4) and, therefore, that priority must be awarded to Peters, Swift never having acquired any right to the mark by adoption or user.

EX PARTE BARROWS [T. M. A., 1875].

555.

*May 11th, 1877.**[Jessel, M.R.—W. N. 1877, p. 119; L. J., Notes of Cas. 1877, p. 110.]*

Messrs. Barrow having long used as their trade mark on bar-iron the letters "B. B. H.," surmounted by a crown, and having registered that device as their trade mark in class 5 in the first schedule to the rules, Messrs. Halton & Co., who had used the letters "T. H. H.," surmounted by a crown, as their trade mark on tin plates, turn plates, and sheet-iron, applied for the registration of that device as their trade mark in class 5, the articles on which they had used the mark being included with bar-iron and other goods in that class.

On motion by Messrs. Barrow for a declaration that Messrs. Halton & Co. were not entitled to have the mark so registered,

Held, that the mark in question, being an old mark, might be registered for part of a class only, and that leave should be given for the mark to be registered in class 5 for the articles on which it had been previously used only.

HENNESSY v. KENNETT.

556.

*May 18th, 1877.**[Malins, V.C.]*

The plaintiffs were brandy merchants, who sold two classes of brandy, the best being sold in cases and the other in casks.

Injunction to restrain the defendant from selling brandy not the plaintiffs' "case" brandy in cases branded with the latter's name and trade mark, refused, on the ground that the only occasion on which the defendant was proved to have done so was when an agent of the plaintiffs bought some of the plaintiffs' "cask" brandy of the defendant, and the defendant, at the agent's request, placed the "cask" brandy in one of the plaintiffs' cases.

[557.]

KINNEY v. ALLEN.

May, 1877.

[U. S. C. C., Dt. of E. Va.— } ———1 Hughes 106; 4 Am. L. T., N. S.
Hughes, J. { 258.]

The plaintiff being a manufacturer of cigarettes, who placed upon several varieties of his cigarettes the symbol “ $\frac{1}{2}$,” in red, and had registered the same as his trade mark in the U. S. Patent Office, the defendants sold other cigarettes under a similar symbol.

Suit for an injunction to restrain the defendants from using the symbol.

Held, (1) that as the plaintiff had always used the symbol on cigarettes containing tobacco of two different kinds, half and half, and as the symbol served to indicate this, though it did not clearly express it, an injunction restraining the use of the symbol generally could not be granted; (2) that a limited injunction should be granted, restraining the use of the symbol in the identical form, size, colour, and style in which the plaintiff had used and registered it, and this, notwithstanding that the defendants had used it on a label which was in other respects quite unlike those of the plaintiff.

558. **IN RE THE WALKDEN AERATED WATERS CO.**
[T. M. A., 1875-6].

June 8th, 1877.

[*Jessel, M.R.*—1 *Trade Marks*, 39.]

On motion to register as the applicants' trade mark for mineral waters a newly adopted device of a cock standing on a circle, registration having been refused by the registrar, on the ground that two marks of a similar character were already on the register in respect of the same class of article,

Held, that the consent of the proprietor of one of the two registered marks having been already given, the mark might be registered on the consent of the proprietor of the other registered mark being obtained.

“The Commissioners of Patents have considered the point as to how often any new device or emblem may be registered as a trade mark for goods or articles in the same class, and they have decided that, for the sake of distinctiveness, in no case whatever should the number of times exceed three. They have also decided that if a device is used by more than three persons it cannot be registered at all under the Act, as by being used by so many persons it wants that element of distinctiveness which it is necessary for a trade mark as defined by the Act to possess. A mark that is common to several persons cannot be said to be a distinctive mark, and, therefore, cannot be registered.”

SOCIÉTÉ ANONYME DES MINES ET FONDERIES DE ZINC DE LA VIEILLE MONTAGNE v. BAXTER. [559.]

June 12th, 1877.

[*U. S. C. C., S. Ct. of N. Y.—* } —14 *U. S. Pat. Gaz.* 679.]
Blatchford, J.

The plaintiffs being manufacturers of dry white oxide of zinc, the defendants sold white oxide of zinc ground in oil, under the same trade mark as that used by the plaintiffs.

Injunction to restrain the defendants from infringing the plaintiffs' rights, refused, on the ground that the article on which the defendants used the mark was different from that on which it was used by the plaintiffs.

MASSAM v. J. W. THORLEY'S CATTLE FOOD CO. 560.

June 14th, 1877.

[*Malins, F.C.—6 Ch. D.* 574; 46 *L. J., Ch.* 707; 36 *L. T., N. S.* 848.]

Joseph Thorley having in his lifetime been a manufacturer of a compound known as “Thorley's Food for

Cattle," which was sold in packets labelled with those words and with Thorley's signature; and Thorley's brother, J. W. Thorley, having been for many years his manager, and equally acquainted with the secret recipe of the compound; J. W. Thorley, after his brother's death, founded the defendant company for the manufacture and sale of the same article, which was sold in packets labelled with the words "Thorley's Food for Cattle," with a *fac simile* of the seal of the company, composed of its name in a circle enclosing the heads of various animals, and the company also issued a prospectus stating its connexion with J. W. Thorley, and containing the same directions for use as those issued by Joseph Thorley.

Motion by the executors of Joseph Thorley, who had registered the signature alone as the trade mark of their business, for an injunction to restrain the defendants from representing their business or goods to be those of the plaintiffs, and from infringing the plaintiffs' trade mark, refused, on the ground (1) that J. W. Thorley was entitled to use his own name, either alone, or as part of the name of a company, or in the phrase "Thorley's Cattle Food," in the manufacture of an unpatented article, with the recipe of which he was acquainted, provided that he acted without fraud; (2) that the name "Thorley's Cattle Food" had become the common recognised designation of an article which any one might use who could produce the same article, although he might not represent it to be made by any one but himself; (3) that the article being the same as the plaintiffs', the same directions for use were correctly used; (4) that the trade marks of the parties, consisting respectively of the signature and seal, were entirely different.

CONDY v. MITCHELL.

561.

June 15th ; Nov. 27th, 1877.[*Bacon, V.C.*—37 *L. T., N. S.* 268.][*Ut. of App.*—} —37 *L. T., N. S.* 766 ; 26*James, Baggallay & Thesiger, L.JJ.* } *W. R.* 269.]

Shortly after the dissolution of the firm of “Bellmann Condy & Co.,” who carried on business as manufacturers of “Condy’s Fluid,” and “Condy’s Ozonized Water” (those articles having been invented and formerly patented by H. B. Condy) under articles of partnership, by which the partnership profits, goodwill, and property became, on dissolution, divisible in equal shares between the partners, H. B. Condy and Mitchell, Condy set up a separate business of his own as “H. Bollmann Condy,” and Mitchell founded a company for the same purpose under the name of “The Condy’s Fluid Co.”

Action by Condy for an injunction to restrain Mitchell from using the name “Condy” in the title of his company and its manufactures.

Injunction refused, on the ground (1) that the name “Condy’s Fluid” had come to be the name of an article of commerce made under Condy’s expired patent ; (2) that on the formation of the partnership between Condy and Mitchell, the latter acquired an equal right with the former to manufacture the article and use the name ; (3) that this was not affected by the dissolution ; (4) that Mitchell had not acted fraudulently in the adoption of the name for his company, or otherwise, nor in a manner calculated to cause his article to be mistaken for the plaintiff’s.

[562.]

SEABURY v. GROSVENOR.

June 16th, 1877.

[U. S. C. C., S. Dt. of N. Y.— } —53 How. Pr. 192; 14 U. S. Pat.
Blatchford, J. } Gaz. 679.]

The plaintiffs being manufacturers of "Benson's Capcine Plasters," which name they had registered in the U. S. Patent Office as their trade mark, the defendant sold other plasters under the name of "Capsicin."

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the plaintiffs were disentitled by their own false representations of the origin and value of their plasters, the word "Capcine" being shown to be quite unknown, and not to imply any such qualities as were described by the plaintiffs, whereas the defendant's word "Capsicin" was the name of a well-known substance.

[563.]

IN RE CORNWALL (1).

June 20th, 1877.

[U. S. Patent Office— } —12 U. S. Pat. Gaz. 138].
Doolittle, Act. Comm. }

A device, consisting of a star and crescent, admitted to registration as a trade mark in respect of soap, notwithstanding that the figure of a star was already registered as a trade mark on soap, on the ground that the use of the proposed mark was not calculated to deceive.

564. J. W. THORLEY'S CATTLE FOOD CO. v. MASSAM.

June 30th, 1877.

[Malins, V.C.—6 Ch. D. 582; 46 L. J., Ch. 713.]

The plaintiffs in *Massam v. J. W. Thorley's Cattle Food Co.* began, shortly after the decision of that case, to issue

advertisements of their cattle food, in which they stated that they alone were possessed of the secret recipe of the article.

Motion by the defendants in that case for an injunction to restrain the issue of such advertisements, as being detrimental to them, refused, on the authority of *Prudential Assurance Co. v. Knott*, but

Held, that, notwithstanding that decision, the Court had now power, under the Judicature Act, 1873, s. 25, sub-s. 8, to grant an injunction in such a case. The plaintiffs' costs made costs in the cause, but the defendants to pay their own costs in any event.

IN RE CORNWALL (2).

[565.]

July 7th, 1877.

[*U. S. Patent Office—*
Doolittle, Act. Comm. } ———12 *U. S. Pat. Gaz.* 312.]

The word "Dublin" admitted to registration as a trade mark on soap, on the ground that the fact that the soap was not manufactured in Ireland, but in America, showed that the word was not used in its ordinary descriptive geographical sense, but as an arbitrary fancy designation.

SELBY v. THE ANCHOR TUBE CO.

566

July 19th, 1877.

[*Bacon, V.C.—W. N. 1877, p. 191.*]

The plaintiff and defendants having been partners in a firm of tube manufacturers, who carried on business at Birmingham as "The Imperial Iron Tube Co.," and at Smethwick as "The Birmingham Patent Iron and Brass Tube Co.," the plaintiff became entitled, on the dissolution of the partnership, under the articles

of partnership, to the Smethwick premises, and the styles and goodwill of the firm, and the defendants became entitled to the Birmingham premises. The plaintiff then began to carry on business on his own account as "The Imperial Iron Tube Co." at new premises in Birmingham, and also at the Smethwick premises, and the defendants carried on business at the old Birmingham premises, and issued circulars headed "The Anchor Tube Co. (late) the works of and partners and manager in the Imperial Tube Co., Gas Street, Birmingham," and also employed a traveller to solicit orders from the customers of the old firm.

On motion by the plaintiff, injunction granted to restrain the defendants from representing that they were lately the partners in the plaintiff's firm of the Imperial Tube Company, or that they had succeeded to the business of that company, or that that company had ceased to exist, and also from soliciting or executing orders on any such representations.

367.

MOET v. PICKERING.

July 23rd, 1877 ; March 29th, 1878.

[*Chanc. Div.*— } —6 *Ch. D.* 770.]
Fry, J.

[*Ct. of App.*— } —8 *Ch. D.* 372 ; 47 *L. J.*, *Ch.* 527 ;
James, Cotton & Thesiger, } 38 *L. T.*, *N. S.* 799 ; 26 *W. R.*
L.JJ. } 637.]

The plaintiffs being French wine growers, who branded on the bottoms of the corks used by them for a special quality of wine the letters "M. & C.," enclosed, together with a star, in a circle, and also branded the word "England" on the side of each cork, the defendant Pickering had consigned to him from abroad a quantity of wine having corks similarly branded to the plaintiffs', the wine being in the possession of certain wharfingers.

Action by the plaintiffs for an injunction to restrain the defendant Pickering from infringing the plaintiffs' trade mark, and from dealing with the wine in the wharfingers' possession, and to restrain the wharfingers, who were also made defendants, from parting with the wine, except under the direction of the Court, and for an order on Pickering to deliver up all spuriously marked corks, and for an account and damages from him.

Held, by Fry, J., (1) that the plaintiffs were entitled to the injunctions, order, and account; (2) that the plaintiffs were entitled to a lien upon the wine for their costs in priority to the wharfingers' lien for their charges; (3) that, the wharfingers having only submitted to act as the Court should direct upon having their charges and costs paid or provided for, and it having been argued on their behalf that, even if the plaintiffs' right were established, they would not be entitled to touch the bottles for the purpose of removing the spurious corks until the charges were paid, the wharfingers, as well as Pickering, must be made liable for the plaintiffs' costs.

Held, by the Court of Appeal, on appeal by the wharfingers, (1) that the wharfingers were entitled to a lien on the wine for their charges, in priority to any lien of the plaintiffs for their costs, if such plaintiffs' lien existed, which was doubted; (2) that the wharfingers had done nothing to disentitle them to their costs, and that the plaintiffs must pay such costs in both Courts.

IN RE MITCHELL [T. M. A., 1875-6] (1).

568.

Aug. 2nd, 1877.

[*Hall, V.C.*—7 *Ch. D.* 36; 46 *L. J., Ch.* 876; 26 *W. R.* 326; 1 *Trade Marks*, 55.]

Motion to register the applicants as the proprietors of a trade mark for steel pens, consisting of the letter "A.,"

refused, notwithstanding that the applicants and their predecessors in business had used that letter and other letters of the alphabet as their trade marks for many years, on the ground that a single letter was not within the definition of a registrable trade mark contained in the T. M. A., 1875, and that that definition was not extended by the Act of 1876.

569.

IN RE SALAMON [T. M. A., 1875].

Aug. 3rd, 1877.

[*Jessel, M.R.—1 Trade Marks, 135.*]

An application for the registration of certain trade marks on sewing machines, consisting respectively of the words "Howe Sewing Machine Company," a monogram inscribed with the same words, and the name "Little Howe," having been opposed, mainly on the ground that the exclusive right to use the name "Howe" as a trade mark belonged to the opponents, and that the applicant had never used the name as a trade mark, nor otherwise, except as agent for them or their predecessors in business ;

On motion by the opponents for a direction as to how the case should be heard,

Held, that the question being one of title to the marks and their user by the applicant, one of the parties should bring an action to try the right.

"I always direct that these cases should be mentioned to the Court, that I may decide the proper way in which they are to come before the Court ; that way depends on the circumstances in each case. If it be a simple question of law, it had better be by special case ; if for directions as to carrying out the Act, by summons at chambers ; if of disputed facts, by motion."

DENCE v. MASON (2).

570.

Aug. 8th, 1877.[*Malins, V.C.*]

The defendant, F. Mason, in *Dence v. Mason* (1), having been enjoined from using the name "Brand" in connexion with his articles, nevertheless continued to sell goods bearing the words "Frank Mason & Co.'s ('Brand's') Essence of Beef."

On motion by the plaintiffs, defendant committed for contempt. (On Dec. 18th he was discharged, on undertaking not to use the name "Brand" until the hearing of the action.)

IN RE WARBURG & CO.

[571.]

Aug. 25th, 1877.

[*U. S. Patent Office—*
Doolittle, Act. Comm.] } ———13 *U. S. Pat. Gaz.* 44.]

Application for the registration of the words "Cachemire Milano" as a trade mark on silks (the words being claimed as the essential part of the mark, though used in connexion with the name "R. Savie & Co.," and a picture of Milan Cathedral), refused, on the ground that the words were either descriptive of the quality and appearance of the article, or deceptive.

IN RE GORDON.

[572.]

Aug. 27th, 1877.

[*U. S. Patent Office—*
Doolittle, Act. Comm.] } ———12 *U. S. Pat. Gaz.* 517.]

On an application for the registration of a strip of leaf tobacco, intended to be wrapped round the mouthpiece of a cigarette, and to vary with the size of the cigarette, as a trade mark on cigarettes,

Held, (1) that the mere fact that the proposed trade mark was consumed with the article to which it was attached was no objection to it; (2) but that the proposed trade mark was, in fact, adapted to serve a mechanical purpose rather than to distinguish the applicant's goods from others, and that, therefore, registration must be refused.

[573.] **PRINCE METALLIC PAINT CO. v. CARBON METALLIC PAINT CO.**

1877.

[*N. Y. Sup. Ct.*—*Codd. Dig.* 209.]

The plaintiffs manufacturing paint, on which they placed the words "Prince's Metallic Paint" in a special form, the defendants, being brothers of the name of Prince, manufactured a paint which they called "Iron Ore Paint," and sold under the words "Prince Bros. Iron Ore Paint."

Motion by the plaintiffs to continue an injunction which had been granted to restrain the defendants from infringing the plaintiffs' rights, and using the name "Prince," refused, and injunction dissolved, on the ground that the defendants were entitled to use their own name so as not to deceive, and that the manner in which the defendants had used it was not intended or calculated to deceive.

[574.]

AYER v. RUSHTON.

1877.

[*N. Y. C. P.*—*Codd. Dig.* 229.]

The plaintiff being the inventor and manufacturer of a medical preparation, which he sold under the name of "Ayer's Cherry Pectoral," the defendant began to make

lozenges, which he called "Cherry Pectoral Troches," and subsequently to make a liquid medicine, which he put up in bottles somewhat similar to the plaintiff's, and labelled with the words "Cherry Pectoral, for sale, wholesale and retail, by Rushton & Co., 11, Barclay Street, New York." He also put up over his premises a sign, with the words "Depôt of the Cherry Pectoral Company," and inside a notice "Ayer's Cherry Pectoral, One Dollar; Rushton's Cherry Pectoral, Fifty Cents. Which will you have?" and he instructed his employés to explain the differences between the articles to customers.

Injunction which had been granted to restrain the defendant from using the words "Cherry Pectoral," and otherwise infringing the plaintiff's rights, dissolved, and

Held, (1) that the defendant had only traded in competition with the plaintiff, and had not acted in a manner intended or calculated to cause his article to be mistaken for the plaintiff's; (2) that the plaintiff could have no exclusive right in the words "Cherry Pectoral," since the first word described one of the ingredients in the compound, the wild cherry, and the other described the intended application of the compound, so that the whole term was common property and incapable of appropriation.

**HELMBOLD v. THE HENRY T. HELMBOLD
MANUFACTURING CO.**

[575.]

Sept., 1877.

[N. Y. Sup. Ct.— } —53 How. Pr. 453.]
Westbrook, J. }

Henry T. Helmbold having invented an article which he called "H. T. Helmbold's Highly Concentrated Compound Fluid Extract of Buchu," and having become bankrupt, the plaintiff, his brother, claimed to have manufactured the article for H. T. Helmbold and his assignee in bank-

ruptcy, and to have purchased the assignee's rights in the preparation. The defendant company was subsequently formed and assisted by H. T. Helmbold, and sold the same compound under the same name.

Motion by the plaintiff for an injunction to restrain the defendant company from so doing, refused, and

Held, (1) that the plaintiff was in any case disentitled by reason of his own false representations in continuing to use labels guaranteeing the personal inspection and supervision of H. T. Helmbold; (2) that, while H. T. Helmbold could himself have sold the right to use his name, a sale by the assignee in bankruptcy could not deprive him of the right to use it; (3) that the same principle applied to his trade secret, even assuming the plaintiff to be acquainted with it, which H. T. Helmbold denied; (4) that the remainder of the title of the preparation (exclusive of the name) was purely descriptive and incapable of appropriation.

[576.]

BOON v. MOSS.

Sept. 18th, 1877.

[N. Y. Ct. of App.—70 N. Y. (25 Sicksels) 465.]

Hall, the proprietor of a newspaper called *The Watertown Weekly Reunion*, entered into a contract with Warren to sell to him (subject to certain conditions, including certain specified payments) "*The Watertown Weekly Reunion* printing establishment, including the presses, machinery, type of all description, newspaper and jobbing material, tools, implements, &c., appertaining to the said printing business." Warren assigned his interest under the agreement to Moss and Boon, and Hall assigned his to Flower. Boon and Moss failed after some years to make the payments, and an action was commenced between them for

dissolution of partnership, &c., in which a receiver was appointed.

An action was subsequently brought, by leave of the Court, by Flower against the receiver, to enforce his rights under the agreement.

Held, that the agreement between Hall and Warren being for a conditional sale, the title did not vest in the purchaser till the payments were made and conditions fulfilled; that the goodwill of the business, including the name of the paper, subscription list, &c., was included in the sale; and that Flower was entitled to recover from the receiver the value of the goodwill, which had been sold by him.

“The goodwill of a newspaper establishment often constitutes its largest value. . . . There is one kind of goodwill which has been said to be only a probability that customers will resort to the old place; and another, far more valuable, when a retiring partner agrees not to engage in the same business in competition with the old establishment. The goodwill of a permanent newspaper establishment is generally more tangible than either.”

IN RE DOLE BROTHERS.

[577.]

Sept. 20th, 1877.

[U. S. Patent Office—
Doolittle, Act. Comm. } ———12 U. S. Pat. Gaz. 939.]

An application for the registration of the words “Egg Macaroni” as a trade mark on macaroni having been refused, on the ground that the words were either descriptive of the article, or, if no eggs were used in its manufacture, deceptive; on a renewed application based on the proviso in the U. S. Act of 1870 admitting to registration lawful trade marks rightfully in use on July 8th, 1870,

Held, (1) that long before the adoption of the words by Pfeiffer, the applicants’ assignor, in connexion with his

macaroni, the words were in common use; (2) that, besides this, Pfeiffer had always used the words in connexion with his own name, as "Pfeiffer's Egg Macaroni," and generally with a landscape picture; (3) and that, for both these reasons, the words "Egg Macaroni" alone were not a lawful trade mark rightfully in use on July 8th, 1870, and that registration must, therefore, be refused.

[578.] IN RE CONSOLIDATED FRUIT JAR COMPANY.

Sept. 20th, 1877.

[U. S. Patent Office—
Doolittle, Act. Comm. } —14 U. S. Pat. Gaz. 269.]

On an application by the assignees of certain patents for screw-neck bottles and jars granted to J. L. Mason, for the registration as their trade mark of the name "Mason," which they alleged that they had used on their jars, cards, circulars, &c., for many years,

Held, (1) that the name, being the name merely of a person, unaccompanied by a distinctive mark, could only be registered if it were a lawful trade mark rightfully in use on July 8th, 1870; (2) that the name was not such a lawful trade mark, since it was the name of the inventor of a patent article attached to that article, which article the applicants had, indeed, the sole right to make, and therefore to designate by its name, until the expiration of the patents, but which article would then cease to be the exclusive property of the applicants, whereupon all makers of it would be entitled to describe it by its appropriate descriptive name; (3) and that the application must, therefore, be refused.

COLMAN v. CRUMP.

[579.]

Oct. 2nd, 1877.

[N. Y. Super. Ct.—40 N. Y. Super. Ct. (8 J. & S.) 548.]

[N. Y. Ct. of App.—70 N. Y. (25 Sickels) 573; 16 Alb. L. J. 352.]

The plaintiffs being English manufacturers of mustard, which they sold in packages labelled with the device of a bull's head, the defendants began to sell mustard in packages also labelled with a bull's head.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, notwithstanding that there were points of difference between the two bull's heads, and that the same device had long been used by other manufacturers on other classes of goods.

70 N. Y. 578—"It is not necessary that the symbol, figure, or device used, or printed and sold for use, should be a *fac simile* or precise copy of the original trade mark, or so close an imitation that the two cannot be distinguished except by an expert, or upon a critical examination by one familiar with the genuine trade mark. If the false is only colourably different from the true, if the resemblance is such as to deceive a purchaser of ordinary caution, or if it is calculated to deceive the careless and unwary, and thus to injure the sale of the goods of the proprietor of the trade mark, the injured party is entitled to relief. Neither is it necessary to establish a guilty knowledge or fraudulent intent on the part of the wrongdoer. It is sufficient that the proprietary right of the party and its actual infringement are shown."

P. 580.—"The fact that the same device is used upon other articles of merchandise does not take from the plaintiffs their right to its exclusive use on this one article of their manufacture."

McLEAN v. FLEMING.

[580.]

Oct., 1877.

[U. S. Sup. Ct.—96 U. S. Rep. (6 Otto) 245; 13 U. S. Pat. Gaz. 913.]

The plaintiff (respondent), being entitled, under the will of the previous proprietor, to a druggist's business and

goodwill, first established by Dr. C. McLane in or about 1834, an important part of the business consisting of the manufacture and sale of pills known as "Dr. C. McLane's Liver Pills," which pills were, from the year 1847, put up in boxes sealed on the top with a red seal bearing the name of the inventor, and enclosed in a certain wrapper containing, among other things, the name of the pills, the defendant (appellant), Dr. J. H. McLean, commenced a similar business in 1849, and from and after 1851, to the knowledge of the plaintiff or his predecessors in business, manufactured and sold pills under the name of "Dr. McLean's" or "Dr. J. H. McLean's Universal Pills," and placed them in boxes sealed similarly to the plaintiff's, and enclosed in wrappers of similar colour and appearance, bearing the name applied by the defendant to his pills, but in 1872 he changed his wrappers, and adopted new and unobjectionable ones, on complaint made by the plaintiff.

Suit by the plaintiff for an injunction to restrain the defendant from infringing his rights.

On appeal by the defendant from the decision of the U. S. Circuit Ct. for the E. Dt. of Missouri, awarding an injunction and an account,

Held :—

1. That in trade mark cases the original invention or proprietorship of the article with which the trade mark is connected is not in question, but that the Court proceeds on the ground that the plaintiff has a valuable interest in the goodwill of his business, and that in this is included the trade mark by which his goods are distinguished.

2. That a trade mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant as distinctive of his goods.

3. That even common words and phrases, not invented for the purpose, may be so adopted and used, if not previously applied to the same or similar articles.

4. That a name, when so adopted and used, but not otherwise, may be a good trade mark, as against a trader or dealer of a different name.

5. But that there is no exclusive right of trade mark in a name, even a man's own name, as against a person of the same name.

6. But that a person will not be allowed so to use his name as to represent his goods to be those of another person of the same name.

7. That a person may have a good trade mark for goods which he exposes for sale, though not of his manufacture, and this, although the name of the actual manufacturer is included in the device.

8. That, to constitute an infringement of trade mark, exact similitude is not required, but that an infringement has been committed when ordinary purchasers buying with ordinary caution are likely to be misled.

9. That positive proof of fraudulent intention is not required, when probability of deception has been produced.

10. That it is not necessary to prove infringement of a specific trade mark if the defendant has acted with fraudulent intention, and has refused to change his course of conduct.

11. That an injunction will not in general be refused only on the ground of delay.

12. But that, although the injunction may be granted, yet, where there has been great delay, an account may be refused.

13. That, in the case in question, a probability of deception had been established, and the injunction must be continued.

14. And that the plaintiff must, therefore, have his costs in the Court below.

15. But that, on account of the plaintiff's great laches, the account granted by the Court below must be refused.

16. And that, that being so, the appellant was entitled to his costs of the appeal.

581.

CARVER v. BOWKER.

Nov. 10th, 1877.

[Lancaster Chanc.— } —1 Trade, Marks 252.]
 Little, V.C.]

The plaintiffs carrying on business at Manchester as merchants and shippers of cotton goods, on which they used certain combinations of marks, of which combinations the first consisted of a heading of specially coloured stripes, certain other stripes, the number "109," the figure of a coronetted eagle, the words "Carver Irnaos," the initials "R. H.," and the name of the firm of Portuguese importers, and the other combinations were substantially the same, but with variations in the number and colour of the stripes, and in the number, for "109" being substituted "406," "409," "413," &c., the defendant, who carried on a similar business at Manchester, used on his goods combinations of marks resembling those of the plaintiffs.

Suit by the plaintiffs for an injunction to restrain the defendant from infringing their rights.

Held, (1) that, as to the component parts of the various combinations, the eagle and the number "109" were in common use and descriptive of quality; (2) that, although the remaining numbers were not in common use, they could not be exclusively appropriated; (3) that the remaining parts of the combinations were distinctive of the plaintiffs' goods; (4) that an injunction must be granted to restrain the defendant from the use of the combination marks as a whole, and also of the individual component parts, with the exception of the eagle and the numbers, on any goods to be exported for sale in the Oporto market; (5) and that the plaintiffs were further entitled to an account of profits or to damages, the defendant not being able to establish a systematic infringement amounting to public user.

IN RE PARKER.

[582.]

Nov. 13th, 1877.

[U. S. Patent Office—
Doolittle, Asst. Comm. } ———13 U. S. Pat. Gaz. 323.]

On an application for the registration as a trade mark of the figure of a boy, together with certain words, surrounded by a border of lines, and printed in minute squares upon a card, for the purpose of serving as a pattern for sampler-work to be wrought in the squares, and then the whole to be attached to a piece of abrasive paper and used in firing friction matches,

Held, that the combination in question was not a trade mark but a design, inasmuch as it was not intended to be attached to an article as a distinguishing feature, but was itself the article, and, therefore, that application should have been made to patent it as a design, and that registration as a trade mark must be refused.

TWENTSCHE STOOM BLEEKERY GOOR v. ELLINGER & CO. 583.

Nov. 15th, 1877.

[Malins, V.C.—26 W.R. 70.]

On motion by the plaintiffs, a Dutch bleaching company, injunction granted to restrain the defendant, a commission agent, from infringing the plaintiffs' trade marks, and

Held, (1) that the fact that the plaintiffs' marks were not registered, and that the writ in the action was issued on a date (July 27th, 1877) subsequent to the date (Jan. 1st, 1877) fixed by the T. M. A., 1876, as the date before which a trade mark must have been registered to entitle its proprietor to sue for an infringement, and before the Royal Assent (Aug. 15th, 1877) had been given to the

T. M. A., 1877, by which the time was extended to Jan. 1st, 1878, did not disentitle the plaintiffs to their remedy; (2) that the assertion of the defendant that the goods had been marked, packed, and exported without his knowledge was no defence; (3) that the defendant must pay all the costs, though it might have been otherwise if he had submitted at once, having regard to the fact that no proper notice had been given him by the plaintiffs before the issue of their writ.

[584.]

IN RE BLOCK & CO.

Nov. 22nd, 1877.

[U. S. Patent Office— } ———14 U. S. Pat. Gaz. 235.]
 Spear, Comm.

An application for the registration of a trade mark having been refused, on the ground that the proposed mark did not constitute a registrable trade mark, an application was made for the registration of an essentially different mark, which was granted, but an application for the second application to be considered and treated as an amendment of the original application was refused.

On an application for the return of the fee paid upon the filing of the original application, as having been paid by mistake,

Held, that a fee paid upon an application could only be returned when it had been paid by actual mistake, such as when it was a payment in excess of the proper amount, or was not required by law, and that the application must be refused.

ROBINSON v. FINLAY.
WARD v. ROBINSON.

585.

Nov. 24th, 1877; May 14th, 1878.

[Bacon, V.C.—9 Ch. D. 489.]

[Ct. of App.—

James, Baggallay & Bramwell, L.JJ. }

—9 Ch. D. 487; 39 L. T.,
N. S. 398; 27 W. R.
294.]

A certain group of five trade marks, consisting respectively of Robinson's name, his coat of arms, his crest, a figure of an elephant, and a varying number, called a range number, together with a heading of coloured threads, having been exclusively used on cotton goods, which, in the habitual course of business, were manufactured by Ward, exported by Robinson, and consigned to Galbraith, who sold them, after bleaching, at Rangoon (three of such marks having been previously used by Robinson, one, in a slightly different form, by Robinson and Galbraith, while the other one was new); after the interruption of the connexion, Robinson continued to use the same group of marks, and Ward began to export goods bearing substantially the same marks, through Finlay.

Cross actions commenced respectively by Robinson against Finlay, and by Ward against Robinson, for an injunction to restrain the use of the group of marks.

Held, by the V.C., that the marks were indicative of goods selected by Robinson, and exported and sold on his responsibility, and that an injunction must be granted in the first action.

Held, by the Ct. of App., that, inasmuch as the group of marks had never been used except on goods which had passed through the hands of all the three parties (although separately some of them had been so used), the group of marks, as a whole, was indicative of goods which had passed through that particular course of trade, that neither

of the parties was entitled to the exclusive use of the group, and that both actions must, therefore, be dismissed without costs.

Per Baggallay, L.J.—"It being clear upon the evidence that the designs were designs in which three persons were interested for the purpose of carrying on a business or adventure in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other."

586. **IN RE ORR-EWING & CO. [T. M. A., 1875-6].**

Dec. 15th, 1877; June 7th, 1878.

[*Hall, V.C.*—8 *Ch. D.* 798; 47 *L. J.*, *Ch.* 180; 38 *L. T.*, *N. S.* 313; 26 *W. R.* 259; 1 *Trade Marks*, 211.]

[*Ct. of App.*—

James, Baggallay & Bramwell, L.JJ. }

—8 *Ch. D.* 794; 47 *L. J.*,
Ch. 807; 38 *L. T.*, *N. S.*
695; 26 *W. R.* 777.]

An application having been made for the registration of certain trade marks in respect of cotton goods, consisting of triangular green labels or tickets with a device in gold, being a curtain bearing an inscription and held up by supporters, the Committee of Experts at Manchester placed such marks in the second class, as being not entitled to registration, on the ground that the shape and style and principal component parts of the marks were in common use in the trade, though the exact combinations were only used by the applicants.

On motion by the applicants for a declaration that the marks were true trade marks within the Trade Marks Registration Acts, and for a direction to the Registrar to proceed with the registration,

Held, by the *V.C.*, that each of the tickets, looked at as a whole, was distinguishable from the other tickets in use, and that the motion must be granted.

Held, by the *Ct. of App.*, that the Committee of Experts

were constituted by the Trade Marks Registration Acts and Rules a tribunal to decide as to the validity or invalidity of cotton marks; that their decision should not be reversed, except on proof that they had proceeded on some wrong principle, or in some improper manner; that, in the case in question, this was not established; and that the motion should have been refused.

METZLER v. WOOD.

587.

Dec. 17th, 1877; April 1st, 1878.

[*Malins, V.C.*—8 *Ch. D.* 608.]

[*Ct. of App.*—

James, Cotton & Thesiger, L.JJ. }

—8 *Ch. D.* 606; 47 *L. J.*,
Ch. 625; 38 *L. T., N. S.*
541; 26 *W. R.* 577.]

The plaintiffs being the proprietors of "Hemy's Royal Modern Tutor for the Pianoforte," published in a yellow cover bearing that title, the defendant employed Hemy to prepare a new edition of an obsolete work called "Jousse's Royal Standard Pianoforte Tutor," and published it in a grey cover with the title "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the name "Hemy's" being in large and conspicuous letters.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights, and

Held, by the V.-C., (1) that the plaintiffs were not disentitled by reason of a representation that this was the 600th edition of the plaintiffs' work, it being proved to be a trade custom to style every issue of 250 copies a new edition, nor by a statement that their work was specially revised by Hemy, the words being properly interpreted to mean that it was a specially revised edition, but not to distinguish it from all previous ones in that respect; (2) that the plaintiffs having set up claims as to copyright

and gone into the internal structure of the defendant's work, but failed on that point, the defendant must pay one-half, instead of the whole, of the plaintiffs' taxed costs.

[588.]

BAIN v. MUNRO.

Jan. 10th, 1878.

[*Ct. of Session*—*Ct. of Sess. Cas.*, 4th Ser., V. 416; 15 *Scot. L. Rep.* 260.]

Action to recover from the widow and executrix of a medical man a sum of money guaranteed by the defendant's husband to the plaintiff.

Held, by the Lord Ordinary (Lord Curriehill) and the Court, that a sum of money paid to the defendant by way of purchase-money for the goodwill of her husband's medical practice, with a recommendation from herself, belonged to the defendant, and not to the estate of her deceased husband, on the ground that the goodwill of a medical practice was personal and not transmissible, and that the money was, in fact, paid for the defendant's recommendation.

Per Lord Curriehill.—“There is truly no such thing as goodwill in the case of a business carried on by a professional man, such as a physician, surgeon, or law agent, whose success depends entirely upon his own personal skill. It is quite different in the case of a trade or manufacture, where the employer may have the possession of patents or trade secrets, or may, by long exercise of his trade or manufacture in some particular locality, have drawn together skilled artisans and attracted the custom of a district to his establishment. In such a case it is not the individual skill of the employer, but the reputation which his establishment has acquired, which creates that incorporeal, but frequently valuable, estate known as the ‘goodwill’ of a trade. But there is no such thing in the case of a professional man. His business dies with him, and the man who comes after him in the district must depend for success upon his own exertions. It is quite true that such businesses are occasionally sold; but what is thus sold in the case of a living professional man retiring from

business is truly the personal recommendation which the seller gives to his former clients or patients in favour of his successor, coupled with the predecessor's own retirement from business. But where the physician or law agent is dead, nothing of the kind can take place. He has been removed by death from all possibility of competing with the new doctor or the new solicitor, and his voice being for ever silenced, he cannot give any recommendation to his clients or patients. But if the family of the deceased professional man offer to recommend a successor to the clients or patients of the deceased on receiving a money equivalent, what is paid for is merely the recommendation of the living members of the family of the deceased."

Per the Lord Justice Clerk.—"It is quite clear that a distinction has always been drawn between the goodwill of a trade, where the individual skill of the trader has often less to do with the success of the undertaking than other circumstances connected with it, and a profession which is only carried on with success by means of the brain and other personal qualifications of the person conducting it. The distinction which has been drawn between these is thorough, and so the law has been laid down in these cases which have been quoted to us. The benefit derived from the exercise of a profession seems to me to be so personal to the individual exercising it that nothing can be said to transmit to the effect of being assets in the hands of an administrator."

Per Lord Ormidale.—"I think it is impossible to hold that a medical man's practice can transmit, and that the value of the goodwill of such a practice can be considered an asset in the deceased's executory."

Per Lord Gifford.—"I think it is quite clear that there may be the goodwill of the practice of a professional man as well as of a trade. You have instances of this in the case of medical men every day. It is said that this is only the case when both parties are living, the retiring doctor and his successor. But I cannot assent to this. I see nothing to prevent a medical man bequeathing his practice to a friend."

IN RE FOWELL } [T. M. A., 1875.]
IN RE PRATT }

589.

Jan. 12th, 1878.

[*Jessel, M.R.*—1 *Trade Marks*, 237.]

A representation of a willow-pattern plate having been used by the former of the above parties since 1864 as his

trade mark on his "Goodall's Yorkshire Relish," and by the latter of the parties since 1868 on his "Club Sauce," and each of the parties having applied for the registration of the device as his trade mark, and opposed the application of the other;

On two summonses taken out by the parties by direction of the judge and adjourned into Court,

Held, that, inasmuch as each of the parties had used the mark independently and *bonâ fide* for several years, the mark should be registered in both names.

[590.]

BLACKWELL v. DIBRELL.

Jan. 14th, 1878.

[U. S. C. C., E. Dt. of Va.— } —14 U. S. Pat. Gaz. 633.]
Hughes, J.

The plaintiffs being manufacturers of tobacco at Durham, in North Carolina, who labelled their tobacco with the figure of a Durham ox and the words "Durham Smoking Tobacco" (their title being derived as stated in *Armistead v. Blackwell*), the defendants manufactured tobacco at Richmond, Virginia, and labelled it in the same way, except that the head and neck of the bull were substituted for the entire figure.

Suit for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, (1) that, even if W. A. Wright (through whom the defendants claimed to be entitled to use the label) had, as he alleged, adopted the label used by the defendants before Green, through whom the plaintiffs claimed, had begun to use the label used by them, yet he had lost whatever rights he had in the mark by abandonment and disuse for eight or nine years from 1861; (2) that during that period of disuse the name had acquired a local signification, as indicating tobacco grown at the town of Durham; (3) that

whether the plaintiffs had or had not an exclusive right in the mark as against other manufacturers at Durham, they were at all events entitled to a remedy against the defendants, who did not carry on business at Durham, and that an injunction must be granted, with an account.

“That the right to use a trade mark may be lost by abandonment or disuse is too clear to need argument or the support of authority.”

SIEGERT v. FINDLATER.

591.

Jan. 15th, 1878.

[*Chanc. Div.*— } ———7 *Ch. D.* 801 ; 47 *L. J.*, *Ch.* 233 ; 38 *L. T.*, *N. S.*
Fry, J. } 349 ; 26 *W. R.* 459.]

Dr. Siegert having in 1830 commenced manufacturing at Angostura (since 1846 re-named Ciudad Bolivar), in Venezuela, a fluid which he termed “Aromatic Bitters,” and sold in peculiarly shaped bottles, enclosed in wrappers printed with descriptions of the virtues and uses of the preparation, in parallel columns of Spanish, English, and German, and underneath in French, the heading of the centre column being “Aromatic Bitters, prepared by Dr. Siegert at Angostura (now Ciudad Bolivar),” and the fluid having generally acquired the name of “Angostura Bitters,” though not so termed by Dr. Siegert; in 1870 Dr. Meinhard began at Ciudad Bolivar to make and sell another preparation in bottles similarly shaped to Dr. Siegert’s, with similar descriptions on the wrappers in the same languages similarly arranged, the heading of the centre column being “Aromatic Bitters, prepared by Teodoro Meinhard, Ciudad Bolivar, formerly Angostura,” which inscriptions he somewhat altered in 1874, after the suit of *Siegert v. Ehlers* in Trinidad, so that the new heading was “Angostura Bitters, prepared by Teodoro Meinhard, Ciudad Bolivar, formerly Angostura,” and across the three columns the words “Angostura Bitters” were printed in red letters.

Action by the successors in business of Dr. Siegert, who had in 1875 removed their business to Port of Spain, in Trinidad, and thereupon somewhat varied their wrappers, adopting the term "Angostura Bitters" for the first time, so that the heading now ran "Aromatic Bitters, or Angostura Bitters, prepared by Dr. Siegert, at Angostura (now at Port of Spain, Trinidad)," and who, after the commencement of the action, again changed their wrappers, for an injunction to restrain an infringement by the English agents of Dr. Meinhard.

Held, (1) that Meinhard had acted in a manner intended and calculated to deceive, and which had deceived; (2) but that the plaintiff was not entitled to the exclusive use of the term "Angostura Bitters," since that had become the name of an unpatented article which any one who could discover the secret recipe might make and call by its name, although it had hitherto been made by only one firm, because they alone knew the secret; (3) that a defence, based on the plaintiffs being disentitled by reason of misrepresentation in their new wrappers, failed, there being, in the first place, no substantial misrepresentation, and the label having, in the second place, not been adopted till after the commencement of the action; (4) and, therefore, that an injunction must be granted to restrain the defendant from using the word "Angostura," or the words "Angostura Bitters," in such a way as to be calculated to deceive, but not so as to prevent their being applied to an article identical with the plaintiffs', by whomsoever made.

"It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species and the name of the class will be the same."

IN RE FARINA [T. M. A., 1875] (1).

592.

Jan. 17th, 1878.[*Hall, V.C.*—26 *W. R.* 261.]

J. M. Farina and his predecessors in business having long manufactured Eau-de-Cologne at Cologne, which was sold in bottles bearing a label, on which was printed Farina's signature, with a peculiar flourish, and with a medallion of his family arms in the upper left hand corner, and he having registered this label as his trade mark in Germany and England, another manufacturer of Eau-de-Cologne, who used a label on his bottles very similar to Farina's, but having a different medallion in the corner, obtained registration in Germany, and applied for registration in England of a medallion identical with that contained in the plaintiff's label, asserting that it was also his own family arms.

Motion by the registered proprietor for a declaration that the applicant was not entitled to registration, and to restrain him from taking further proceedings with a view to registration, refused, on the ground that the question whether registration should be allowed must depend on whether an injunction would be granted in an action independent of the Registration Acts, and that in the case in question the medallion, used alone, was not so similar to the label with the medallion in the corner as to be calculated to deceive.

IN RE HYDE & CO. [T. M. A., 1875.]

593.

Jan. 18th, 1878.

[*Jessel, M.R.*—7 *Ch. D.* 724; 38 *L. T.*, *N. S.* 777; 26 *W. R.* 625; 1 *Trade Marks*, 245.]

Hyde & Co. obtained the registration of the words "Bank of England," which they had used on sealing-wax

for upwards of forty years, as their trade mark on that article, notwithstanding that the words had been used by various other sealing-wax makers for different periods up to thirty years, and for at least six years to Hyde & Co.'s knowledge.

On motion by other firms of manufacturers of sealing-wax for the removal of the mark from the register,

Held, (1) that where an old mark had been used habitually by more than three firms on the same class of goods, it had become a common mark and incapable of appropriation; (2) that this was the case with the words in question, and that the registration must, therefore, be rescinded; (3) that Hyde & Co., having registered a mark to which they were not entitled, and having declined until the hearing of the motion, to consent to the rectification of the register, they must pay the costs of the motion, notwithstanding that the firms moving in the matter had allowed the mark to be placed on the register without opposition.

694.

HINRICHS *v.* BERNDES.

Jan. 18th, 1878.

[*Jessel, M.R.*—*W. N. 1878, p. 11; L. J., Notes of Cas. 1878, p. 11.*]

Motion for an injunction to restrain the publication of certain libellous statements, refused, but

Held that, if a plaintiff in an action of libel had obtained a verdict, and the libel were repeated, damages might be given at the hearing for the past libel, and at the same time its continuance in the future be restrained by injunction.

MARCOVITCH v. BRAMBLE, WILKINS & CO.

595.

Jan. 24th, 1878.

[Malins, V.C.]

On motion to commit for contempt of court an auctioneer, who had had served on him a notice of an injunction which had been granted to restrain his firm from offering for sale a parcel of cigarettes marked with the plaintiff's trade mark, the words "Vanity Fair," and who had nevertheless offered them for sale, but without success, he supposing the notice of injunction to require some further official authentication,

Held, that, while the defendant had made himself liable to committal, under the circumstances, he should only be required to submit to the injunction and pay the costs.

 IN RE HALL & CO.
 IN RE ATKINSON.

[596.]

Feb. 2nd, 1878.

[U. S. Patent Office—
 Doolittle, Act. Comm. } —13 U. S. Pat. Gaz. 229.]

On two separate applications for the registration of the name "Calhoun" as a trade mark on ploughs,

Held, that, although the name had, when first used, been the valid trade mark of the firm of Calhoun and Atkinson, under the latter of whom both applicants claimed, it had since then become *publici juris* by being used by a number of firms without opposition by the representatives of Calhoun and Atkinson, and that registration must, therefore, be refused in both cases.

597.

IN RE HORSBURGH [T. M. A., 1875].

Feb. 3rd, 1878.

[*Jessel, M.R.*—1 *Trade Marks*, 260.]

The registered proprietors of a trade mark used by them on lubricating oils, and consisting of a certain device with the word "Valvoline," opposed an application by other oil merchants for the registration in their name of another trade mark, consisting of an entirely different device with the word "Valvoleum," on the ground that it was calculated to produce deception.

On summons adjourned into Court,

Held, (1) that each of the words in question was simply equivalent to "Valve Oil," and, therefore, merely descriptive of the use of the article and incapable of appropriation, although, if the words were ornamented in some special manner, the manner of ornamentation might be claimed; (2) that the devices used in combination with the words being perfectly distinct, each might be registered with or without the additional word, the device being the essential particular, which must be encroached upon for the trade mark to be infringed; (3) that the enactment in § 6 of the T. M. A., 1875, forbidding the registration of any words, the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of Equity, has reference to deceptiveness inherent in the mark itself, and not to any question of comparison or similarity between two or more trade marks.

598.

EX PARTE THE KING OF SAXONY [T. M. A., 1875].

Feb. 7th, 1878.

[*Hall, V.C.*—1 *Trade Marks*, 245.]

The King of Saxony being the proprietor of certain

long established marks for porcelain, which had been registered in England, opposed an application by another person for the registration in the latter's name of certain marks for porcelain, on the ground that they so nearly resembled his own registered marks as to be calculated to deceive.

On an *ex parte* application on behalf of the King of Saxony for a direction as to the mode of trial,

Held, that the case should be heard on motion, but that leave should be given to the other party to give notice of motion for the following week to have the case heard in some other way, if he wished to do so.

BRAHAM v. BEACHAM (1).

599.

Feb. 12th, 1878.

[*Chanc. Div.*— } ——— 7 *Ch. D.* 848; 47 *L. J.*, *Ch.* 348; 38 *L. T.*, *N. S.*
Fry, J. } 640; 26 *W. R.* 654.]

The principal plaintiff, Countess Waldegrave, being the owner or lessee of all the collieries within the parish of Radstock, except one very small piece, and raising and selling the coal therefrom under the style of "The Radstock Coal Company," the defendants began to sell coal under the same title; after which the plaintiff changed her style to "The Countess Waldegrave's Radstock Collieries," and the defendants adopted the style of "The Radstock Colliery Proprietors," and, upon remonstrance, of "The Radstock Coal Company, Colliery Proprietors," in newspapers and on their office blind, although they were never entitled to raise coal within the parish of Radstock, nor, until after the commencement of the action, within any part of the district through which the seams of Radstock coal extended.

Action by the Countess and her trustees for an injunction to restrain the defendants from infringing their rights.

Held, (1) that the defendants were not entitled to call themselves "The Radstock Colliery Proprietors," since that was calculated to attract to them custom intended for the plaintiff as practically the only colliery proprietor in the parish, as well as the largest proprietor in the district; (2) that the defendants were not entitled to style themselves proprietors of collieries at Radstock, since that designation also pointed to the parish, and, therefore, to the plaintiff's works; (3) that the course of conduct adopted by the defendants was calculated to deceive, and that proof of actual damage having been sustained by the plaintiff was, therefore, not requisite; (4) that an injunction must, therefore, be granted to restrain the defendants from using either of the above appellations; (5) but that this injunction should not extend to prevent the defendants from adopting those appellations if they should at any time become owners or lessees of collieries within Radstock parish.

[600.]

IN RE LISNER.

Feb. 14th, 1878.

[U. S. Patent Office—
Doolittle, Act. Comm. } —13 U. S. Pat. Gaz. 455.]

On an application for the registration of a trade mark in respect of "fancy goods,"

Held that, although a trade mark might be registered on a single application for an entire class of merchandise, it could not be so registered for the numerous classes of goods included in the term "fancy goods," and that registration must, therefore, be refused until the particular class of goods in respect of which the application was made was more clearly specified.

IN RE PATON [T. M. A., 1875.]

601.

March 1st, 1878.

[*Jessel, M.R.*—1 *Trade Marks*, 285.]

An application for the registration of the word "Alloa" as the applicants' trade mark for woollen yarns being opposed,

On motion for a direction as to the manner in which the case should be heard,

Held, (1) that the case should be heard on summons taken out by the opponents and adjourned into Court; (2) that a delivery at the Trade Marks Registry Office by the opponents' solicitors of a copy of the notice of the opposition motion, together with a copy of the endorsement of acceptance by the applicants' solicitors, was a sufficient compliance with the requirement in the Instructions to Applicants for Registration (paragraph 37) for notice of the opposition motion having been brought before the Court to be given to the Registrar of Trade Marks by the delivery at the office by the opponent's solicitors of a copy of the notice of motion, with an endorsement of service on the applicants, signed by the opponents' solicitors, and that the personal service on the applicants and the endorsement might be dispensed with.

FULLWOOD v. FULLWOOD (2).

602.

March 5th, 1878.

[*Chanc. Div.*— } —9 *Ch. D.* 176; 47 *L. J.*, *Ch.* 459; 38 *L. T.*, *N. S.*
Fry, J. } 380; 26 *W. R.* 435.]

The plaintiff carrying on at Somerset Place, Hoxton, the business of an annatto manufacturer, established by his father in 1785, under the name of "R. J. Fullwood & Co.,"

the defendants, one of whom had formerly been the plaintiff's partner, but had sold his interest to the plaintiff, began to carry on the same business under the name of "E. Fullwood & Co.," and to put out advertisements, in which they described themselves as "late of Somerset Place, Hoxton, Original Manufacturers of Liquid and Cake Annatto," and their business as having been "Established in 1785."

Action by the plaintiff for an injunction to restrain the defendants from representing their business to be identical with or similar to his own.

Held, (1) that the defendants had acted in a way intended and calculated to produce deception; (2) that the fact, if it were established, that the plaintiff had delayed till November, 1876, to commence his action, he having been aware of the defendants' conduct early in 1875, was no defence, the period fixed by the Statute of Limitations not having elapsed; (3) and that the injunction must be granted.

"The right asserted by the plaintiff in this action is a legal right. He is in effect asserting that the defendants are liable to an action for deceit. It is clear that such an action is subject to the Statute of Limitations, and it is also clear that the injunction is sought merely in aid of the plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course if the legal right be proved to exist. In saying that, I do not shut my eyes to the possible existence in other cases of a purely equitable defence, such as acquiescence or acknowledgment, and the various other equitable defences which may be imagined. But mere lapse of time, unaccompanied by anything else, and to that I confine my observations, has, in my judgment, just as much effect and no more in barring a suit for an injunction as it has in barring an action for deceit."

FRESE v. BACHOF (2).

[603.]

March 22nd, 1878.

[U. S. C. C., S. Dt. of N. Y.— } ———13 U. S. Pat. Gaz. 635.]
 Wheeler, J.

The plaintiffs being a firm of tea-merchants, who sold "Hamburg Tea" in a peculiar form of package, the tea being enclosed in long cylindrical parcels with pink wrappers, and with crimson papers of directions and yellow ones of warning tied in, and having a white label with the firm name within a circle pasted across the ends of the string, and another white label with the same and the words "Hamburg, Hopfensack, 6" embossed thereon, pasted on the package, the defendant at first put up his tea in a precisely similar manner, with the firm name and address, but after the commencement of the suit, discontinued the use of the firm name and address, and substituted his own.

Injunction granted to restrain the defendant from using packages similar to those of the plaintiffs, with damages.

HAGG v. DARLEY.

604.

March 25th, 1878.

[Bacon, V.C.—47 L. J., Ch. 567; 38 L. T., N. S. 312.]

The plaintiff purchased from the "Government Sanitary Company," composed of the defendant and three others, the goodwill of their business of manufacturing certain fluids and soaps known as the "Government Carbolic Disinfectants," (on which occasion the defendant and his partners covenanted with the plaintiff not to manufacture or sell disinfectants for fourteen years, nor for the same time to disclose the secrets of the manufactures in question), and carried on the business of the company under the old name with the defendant as his manager.

Action by the plaintiff, alleging that the defendant had left his employ and set up in business as the "Old Government Sanitary Company," and was committing other breaches of the covenant by communicating the secret to his workmen, &c., and claiming an injunction to restrain the defendant from using the name, carrying on the manufacture of disinfectants, communicating the secret, &c.

Demurrer by the defendant overruled, on the ground that (1) the defendant had both pleaded and demurred without the leave of the Court, under Order XXVIII, rule 5; (2) the covenant was not too wide or unreasonable.

605.

STEUART v. GLADSTONE.

March 25th, 1878; March 4th, 1879.

[Chanc. Div.— } ———10 Ch. D. 646; 47 L. J., Ch. 423; 38 L. T.,
Fry, J. } N. S. 557; 26 W. R. 657.]

[Ct. of App.— } ———10 Ch. D. 626; 40 L.
Jessel, M.R., James & Bramwell, L.JJ. } T., N. S. 145; 27
W. R. 512.]

Partnership action.

The plaintiff had been expelled from the defendants' firm of commission merchants, in which he had been a partner, and which was carried on under articles, one of which provided that a retiring partner should receive the share in the partnership property to which he was entitled upon the basis of annual accounts taken, under another article, of the partnership "estate and effects," provision being thereby made for a fair valuation and appraisement of all the particulars included in such accounts, which might be in their nature susceptible of valuation, but no mention being made of the goodwill of the business.

Held, on appeal, that the share of partners in the goodwill of a commission business not being ordinarily estimated in calculating their annual share of profits, and it not

having been so in the present case, the goodwill could not be taken into account and valued as being included in the partnership "estate and effects."

SAXBY v. EASTERBROOK.

606.

March 25th, 1878.

[C. P. Div.—3 C. P. D. 339 ; 27 W. R. 188.]

Action for damages, and an injunction to restrain the publication of statements with regard to certain patents, the property of the plaintiff, which statements were found by the jury to be libellous.

Held that, the question of libel or no libel having been decided by the verdict of the jury, the injunction must be granted.

Per Lindley, J.—“The principle upon which the courts of equity have acted in declining to restrain the publication of matter alleged to be libellous, is, that the question of libel or no libel is pre-eminently for a jury. But, when a jury have found the matter complained of to be libellous, and that it affects property, I see no principle by which the Court ought to be precluded from saying that the repetition of the libel shall be restrained.”

WARD v. DRAT.

607.

April 3rd, 1878.

[Chanc. Div.—} —L. J. Notes of Cas. 1878, p. 67.]
 Fry, J. }

Motion for an injunction to restrain the defendant from sending libellous demands for payment of rent, having been refused by Malins, V.C., who reserved the costs,

Held, that the Court had no authority to grant an injunction in such a case, either original, or under the Judicature Act, 1873, § 25, sub-s. 8.

608.

ROSE v. LOFTUS.*April 10th, 1878.*[*Malins, V.C.*—47 *L. J., Ch.* 576 ; 38 *L. T., N. S.* 409.]

The plaintiff being a manufacturer of lime juice, which he sold in bottles moulded specially for him with a spray of lime tree leaf and blossom and his name "Rose & Co.," and who further placed on these bottles a label containing the same spray and name, the defendant, who manufactured a similar article, on one occasion, at the request of a customer, filled some of the plaintiff's bottles brought to him by the customer with his own article, but washed the plaintiff's labels from the bottles and replaced them with his own, and also gave the customer a large printed card with the words "Loftus' Lime Juice Cordial," for public exhibition.

Action by the plaintiff for an injunction to restrain the defendant from infringing his rights.

Held, (1) that the defendant had acted wrongfully, notwithstanding that he had placed his own labels on the bottles, since they still bore the plaintiff's name and mark ; (2) but that he had not acted with any fraudulent intention, and that charges of fraud made by the plaintiff in his statement of claim were not established ; (3) and, therefore, that on the defendant undertaking not to repeat the act the injunction should not be granted, nor any costs or account of profits.

609.

ENO v. STEPHENS.*April 11th, May 29th, 1878.*[*Bacon, V.C.*—1 *Trade Marks* 324.][*Ct. of App.*—

<i>Jessel, M.R., James & Bramwell,</i>	}	—1 <i>Trade Marks</i> 325.]
<i>L.JJ.</i>		

The plaintiff being the proprietor of "Eno's Fruit Salt,"

who had for some time used, and had registered under the T. M. A., 1875, certain labels containing, with other words and devices, those words, and the words "Fruit Salt," "Fruit Saline," or "Fruit Powder," without the name, the defendant sold certain preparations under the names of "Fruit Saline," "Stephens & Co.'s Effervescing Vinous Fruit Salts," and "Stephens' Vinous Salts."

Injunction granted to restrain the defendant from using the words "Fruit Salt," "Fruit Saline," or "Fruit Powder," or any such combination of words.

IN RE LEONARDT [T. M. A., 1875.]

610.

April 12th, 1878.

[Jessel, M.R.—1 Trade Marks 316.]

A steel-pen manufacturer procured the registration, as parts of his trade marks on pens, of certain words and devices, consisting respectively of the royal arms, the words "Penna Vittorio Emmanuele" with a portrait, the word "Garibaldi" with a portrait, the word "Masonic" with the Masonic arms, and the words "Selected," "Improved," "Superior," "Office," "Commercial," and "International," those words and devices having been in common use by more than three firms of steel-pen makers for some years.

On motion by certain firms of steel-pen manufacturers, and with the consent of the registered proprietor,

Held, that there must be added to the registration of the marks in question a note containing a disclaimer of an exclusive right in the particulars specified.

IN RE MITCHELL [T. M. A., 1875] (2).

611.

April 12th, 1878.

[Jessel, M.R.—W. N. 1878, p. 101; 1 Trade Marks 317.]

The words "Selected Pens, London," together with the arms of the city of London, were registered by a steel-pen

manufacturer as his trade mark on steel-pens, the word "Selected" having been in common use by more than three firms of steel-pen makers.

On motion by certain firms of steel-pen manufacturers,

Held, that on evidence of the consent of the registered proprietor being produced a note must be added to the registration of the mark in question, to the effect that the word "Selected" in the above-mentioned mark was common to the pen trade.

[612.]

IN RE RADER & CO.

April 16th, 1878.

[U. S. Patent Office— } ———13 U. S. Pat. Gaz. 596.]
 Spear, Comm. }

Application for the registration of the words "Iron Stone," enclosed in an oval border, (other words descriptive of the article and place of sale or manufacture being also included within the border), as a trade mark on water pipes, refused, on the ground that the words were in themselves merely descriptive of the substance of the pipes, and that the oval border in which they were enclosed did not give the requisite distinctiveness, and, further, that the oval border was not associated with the words in question only.

[613.]

DUWEL v. BOHMER.

April, 1878.

[U. S. C. C., S. Dt. of Ohio— } ———14 U. S. Pat. Gaz. 270.]
 Swing, J. }

Suit by a citizen of the State of Ohio for an injunction to restrain an infringement of his trade mark, registered in the United States, by another citizen of Ohio.

Demurrer, on the ground that the U. S. Circuit Court had no jurisdiction in such a suit between two citizens of the same State, overruled, and

Held, that the U. S. Circuit Courts had jurisdiction in trade mark cases between citizens of the same State, concurrent with that of the State Courts.

BOLT v. BULMER.

614.

May 13th, 1878.

[*Jessel, M.R.*—*W. N.* 1878, p. 119.]

Action for a dissolution of partnership and accounts, the partnership having been carried on under articles which provided for an account being taken, at the determination of the partnership, of the partnership "moneys, stock-in-trade, debts, effects, and things," but did not directly refer to the goodwill of the business.

Held, that the goodwill must be taken into account, as being included in the "effects and things."

REYNOLDS v. BULLOCK.

615.

May 13th, 1878.

[*Hall, V.C.*—47 *L. J.*, Ch. 773; 39 *L. T.*, N. S. 443; 26 *W. R.* 678.]

Action for a partnership account commenced by one of two members of a partnership firm, on the expiration of the partnership term, the partnership having been carried on under articles which provided for the valuation of the partnership "property and effects" on the dissolution, but contained no reference to the goodwill of the business.

Held, that, there being no direct negative stipulation in the articles, the goodwill must be taken into account and valued, as being included in the "property and effects."

816. IN RE JELLEY, SON & JONES [T. M. A., 1875.]

May 18th, 1878.

[*Jessel, M.R.*—1 *Trade Marks* 346.]

Application having been made for the registration of a device, consisting of a pointer eating out of a porridge-pot, (which the applicants had long used on a variety of metal goods contained in class 13, but not on other goods), as an old trade mark for class 13, and as a new trade mark for other classes, in particular for class 12, containing cutlery and edge tools, and for fencing-wire, being one of the kinds of goods included in class 5; the application was opposed by the proprietor of another trade mark, consisting of a device of a pointer dog standing at a point, with the word "Staunch," and registered for all the goods contained in classes 5, 12, and 13, on the ground that the applicants' device so nearly resembled his as to be calculated to deceive.

On summons adjourned into Court,

Held, (1) that with respect to old marks, the rule of the Court was to permit registration of even identical old marks up to the number of three, though if more than three applications for the registration of the same old mark were received, it must be treated as common, and that, with regard to class 13, the mark, being a *bonâ fide* old mark, must be admitted to registration; (2) that with respect to new marks, it was the duty of a person about to adopt one to make it as distinct as possible, and that the fact that a man had been in the habit of using a certain trade mark on one class of goods did not entitle him to begin to use it on another class if it would interfere with another person's mark, and, therefore, with respect to class 12, that inasmuch as the applicants' mark so nearly resembled the opponent's as to be calculated to deceive, especially when

they were compared as stamped on the metal, registration in class 12 must be refused; (3) that with respect to class 5, the mark might be registered in that class for fencing-wire only, as that would not interfere with the opponent's trade; (4) that no order could be made as to costs.

GUINNESS v. HEAP.

617.

May 30th, 1878.
 [*Malins, V.C.*]

The plaintiff being a brewer of stout, who used a trade mark on his bottles containing the words "Guinness' Extra Stout," with a harp, the defendant sold other beer in bottles bearing labels of the same shape as those used by the plaintiff, but which had the words "Genuine Extra Stout" substituted for the words "Guinness' Extra Stout" in the plaintiff's mark, and also contained a device in imitation of the harp used by the plaintiff.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, notwithstanding that the defendant had altered the device, discontinued the use of the labels, and offered to undertake not to use any more of them.

THE LONDON AND COUNTY BANKING CO. v. THE HAMPSHIRE AND NORTH WILTS BANK.

618.

June 7th, 1878.
 [*Jessel, M.R.*]

Motion by the plaintiff company, under § 20 of the Companies Act, 1862, for an injunction to restrain the defendants from changing their name to "The Capital and Counties Bank," refused, on the ground that the adoption of the latter name by the defendants was not calculated to deceive persons who used ordinary care in the conduct of their business transactions.

619. THE MERCHANT BANKING COMPANY OF LONDON
(LIMITED) v. THE MERCHANTS' JOINT STOCK BANK.

June 23th, 1878.

[*Jessel, M.R.*—9 *Ch. D.* 560 ; 47 *L. J., Ch.* 828 ; 26 *W. R.* 847.]

On motion by the plaintiff company for an injunction to restrain the defendant company from using its name recently assumed and registered, as being too similar to the name of the plaintiff company, or any other too similar name,

Held, (1) that inasmuch as § 20 of the Companies Act, 1862, only affected the question of registration of the name of a company, the rights of companies after registration were not varied by that enactment; (2) that the similarity between the names was not sufficient to show an intention or probability of deception; (3) and that the motion must, therefore, be refused.

620. EX PARTE SALES POLLARD & CO. [T. M. A., 1875.]

July 8th, 1878.

[*Jessel, M.R.*]

On motion by the registered proprietors of a trade mark on snuff, consisting of the letters "S. P." (the initials of the firm), which they had discovered, subsequently to registration, to have been in common use for many years in the snuff trade, though used originally by themselves,

Leave given to rectify the register by striking out the mark in question.

IN RE ROSING [T. M. A., 1875.]

621.

July 11th ; Nov. 13th, 1878.[*Bacon, V.C.*—1 *Trade Marks* 371.][*Ct. of App.*—

<i>Jessel, M.R., Baggallay &</i>	}
<i>Thesiger, L.JJ.</i>	

Application having been made for the registration of the applicant's family arms, consisting of a sprig of two roses and a twisted horn, as his trade mark for several classes of goods, and among others for classes 5, 12, and 13, containing cutlery and other metal goods, the Cutlers' Company of Sheffield opposed the application as to classes 5, 12, and 13, on the ground that the mark in question so nearly resembled a Sheffield corporate mark many years previously assigned to another manufacturer of cutlery, and still used by him, as to be calculated to deceive, the latter mark consisting of a plain horn suspended by a looped cord.

On motion by the applicant for a direction to the Registrar to register the mark in the classes in question,

Held, by the V.-C., (1) that the two marks were not sufficiently similar for deception to be anticipated, and that the applicant's mark must, therefore, be registered; (2) that the Cutlers' Company must pay the costs, notwithstanding that they had intended to act in the public interest.

Held, by the Court of Appeal, (1) that the two marks were too similar, especially when looked at as stamped on the metal, for the applicant's mark to be admitted to registration in classes 12 and 13 (as to class 5 the Cutlers' Company abandoned their opposition); (2) that the applicant must pay the costs of the appeal, but that no costs of the motion in the Court below could be given, the applicant having succeeded as to class 5.

622.

IN RE BROOK [T. M. A., 1875-6-7.]

July 13th, 1878.

[Hall, V.C.—26 W. R. 791.]

An application having been made for the registration of a considerable number of trade marks in respect of cotton goods, the Committee of Experts at Manchester placed half of the marks in the first class, as being entitled to registration, and the other half in the second class as not being so entitled; and the Registrar of Trade Marks refused registration to the marks so placed in the second class, and further divided the marks placed in the first class, admitting six of them to separate registration, but offering only representative registration to the remainder, on the ground that the essential feature in all of them was a device consisting of a goat's head crest, and the name "Brook's."

On motion by the applicants for the separate registration of the whole of the marks,

Held, (1) that as to the marks placed by the Committee in the second class, the case was governed by *In re Orr Ewing & Co.*, and that the Court was debarred from re-considering the decision of the Committee; (2) that as to the marks placed in the first class, but offered only representative registration, the case was governed by *In re Barrows*, and that separate registration must be refused; but that the goat's head crest and the name "Brook's" should each be registered separately, as a representative mark, with the additional words to mark its representative character appended to each.

IN RE LYSAGHT [T. M. A., 1875.]

623

July 19th, 1878.[*Jessel, M.R.*]

A trade mark having been registered in respect of the goods contained in class 5,

On motion by the registered proprietor,

Order made to rectify the register by limiting the registration to galvanized sheet iron, on which alone it was his old mark.

 EX PARTE WALKER & CO.

624.

July 25th, 1878.[*Malins, V.C.*]

On motion by the registered proprietors of a trade mark on iron, consisting of the letter W, a crown, and the word "Netherton,"

Leave given to rectify the register by substituting the word "Dudley" for the word "Netherton," the address being held not to be an essential particular of the trade mark in question.

 IN RE SAUNION & CO. [T. M. A., 1875.]

625.

Aug. 2nd, 1878.[*Jessel, M.R.*]

The Anglo-Portuguese Oyster Fisheries Company having been for some years in the habit of importing oysters dredged in Portuguese waters into England, and selling them there, either without previous fattening, or after fattening at beds at Queenborough, and Saunion & Co.

having acted as the agents for the company in this undertaking, under an agreement which amounted in law to an agreement for a partnership terminable at the will of the company, the partnership was dissolved and the connexion terminated by the company, who then carried on business through a new agent. Saunion & Co. afterwards applied for the registration of a trade mark consisting of a device containing, among other particulars, the words "Anglo-Portugo Oysters," those words being the words by which the company had designated their oysters, and they claimed to use this mark upon any oysters which they considered to be of the same breed as the company's, whether brought from Portugal or not.

On motion by the company,

Held, that the inclusion of the words "Anglo-Portugo" in the applicants' trade mark was either deceptive, if the oysters did not come from Portugal, or descriptive if they did, or if the words denoted a particular breed, and not the country of origin, and that the words must be struck out of the trade mark which it was proposed to register.

626.

IN RE BRANDRETH [T. M. A., 1875.]

Aug. 8th, 1878.

[*Jessel, M.R.*—9 *Ch. D.* 618; 47 *L. J., Ch.* 816; 27 *W. R.* 281.]

On application, by way of adjourned summons, for the registration of the word "Porous" as a trade mark in respect of "Allcock's Porous Plasters," and opposed,

Held, (1) that the word "Porous" was descriptive, and, therefore, incapable of registration; (2) that in any case it could only be registered as included in the phrase "Allcock's Porous Plasters," which phrase was itself descriptive; (3) that the application must be refused with costs; (4) that the only costs which, under Order LV., could be given were the costs of the proceedings subsequent

to security for costs being given by the opponents, that being the time when, by rule 16 of the Trade Marks Rules, the case stood for the determination of the Court, and that the costs of the previous proceedings in the Trade Marks Registry Office could not be given.

THE HOOSIER DRILL CO. v. INGELS.

[627.]

1878.

[U. S. Patent Office—
Doolittle, Act. Comm. } ———14 U. S. Pat. Gaz. 785.]

A trade mark having been registered in the name of Ingels at a time when another application by the company for the same trade mark was pending, and an interference having been declared between the parties, the Commissioner of Patents held that only the question of priority of adoption could be inquired into on an interference, and not questions of disputed ownership.

On motion by the company to rehear,

Held, (1) that neither prior invention, use, or adoption was necessary to entitle to the registration of a trade mark under the U. S. Statute, a simple intention to use being sufficient; and (2) that in investigating the title to a trade mark, all matters relating to the ownership should be gone into, and not only the question of priority of adoption, and that the motion must be granted.

THE MANHATTAN MEDICINE CO. v. WOOD.

[628.]

Sept. 21st, 1878.

[U. S. C. C., Dt. of Me.—
Clifford, J. } ———14 U. S. Pat. Gaz. 519.]

The plaintiffs manufactured a medicine called "Atwood's Vegetable Physical Jaundice Bitters" (which they sold in peculiar shaped bottles, having the words "Atwood's

Genuine Physical Jaundice Bitters, Georgetown, Mass." blown in the glass, and bearing a yellow label), in succession to the firm of Carter & Dodge, who had purchased from the original inventor and proprietor the right to manufacture and sell the medicine and use the trade mark used by him, but not in Maine and some other excepted places. The defendant in 1861 purchased from the son of the original proprietor the genuine secret recipe for the medicine, to be used in Maine, and from that time till the commencement of the suit he continued to manufacture and sell the medicine and use the trade mark without interference, though it did not appear that the son had sold by his father's authority.

Suit for an injunction and an account.

Held, (1) that the plaintiffs had no exclusive right to sell the medicine or use the trade mark; (2) that neither they nor their predecessors in title had ever had any right to do so in Maine; (3) that the rights possessed by some of the assignors to the plaintiffs had been lost by reason of their having used the genuine trade marks on spurious medicines of inferior quality; (4) that the plaintiffs were, further, disentitled by their delay; (5) that the plaintiffs' assignors had lost whatever right they had in the trade mark by not confining themselves to the districts to which alone the grants from the original proprietor extended; (6) that the trade mark used by the original proprietor had been abandoned by those claiming under him, when they adopted new bottles and labels in place of those used by him; (7) that the article not being patented, and the defendant being in possession of the genuine recipe, and the plaintiffs having no exclusive right, and none at all in Maine, the defendant could not be restrained from using the trade mark, and that the injunction must be refused with costs.

LEIDERSDORF v. FLINT.

[629.]

1878.

[U. S. C. C., E. Dt. of Wisc.— } ———13 Am. L. Rev. 390.]
 Harlan and Dyer, JJ.

The plaintiffs and defendant being alike citizens of Wisconsin, the defendant used upon his packages of tobacco a trade mark which the plaintiffs alleged to be an infringement of that used by them on theirs.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights, brought under the U. S. Revised Statutes, section 4942 (Act of 1870, section 79).

On demurrer,

Held, that, inasmuch as Congress was only authorized by the Constitution of the United States to "secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and the right to a trade mark did not depend upon invention or originality, but upon prior user, legislation by Congress upon the subject of trade marks was *ultra vires*; and therefore that, although if trade marks had been within the legislative power of Congress, the Federal Court would have had jurisdiction, under the authority conferred on it by statute, even between citizens of the same State, that not being so, the demurrer must be sustained on the ground of want of jurisdiction.

"In every aspect suggested, and in other respects which might be suggested, it would seem that the analogy between property in the use of a trade mark and a patent for an invention, and between a trade mark right and a copyright, fails. Property in a trade mark exists independently of statute. It is otherwise with inventions and discoveries."

680. **EX PARTE LAWRENCE & CO. [T. M. A., 1875.]**

Nov. 2nd, 1878.

[*Jessel, M.R.*]

Lawrence & Co. carrying on business as manufacturers of printers' rollers and of the composition used for coating the same, and having since 1872 used a trade mark thereon, consisting of a device of a printer's roller, with the words "The Durable" in an oval, their manager, Marler, during the absence abroad of the members of the firm, and without their knowledge, obtained the registration of a mark substantially the same as theirs in his own name, describing himself as a manufacturer of the same articles as his employers, and of their address.

On motion by Lawrence & Co. for rectification of the register, either by the insertion of their firm name in the existing entry in place of that of Marler, or by that entry being expunged, with liberty for them to proceed to advertise their mark, with a view to registration *de novo*,

Held, (1) that relief in the first alternative could not be granted, since the registration of Marler, having been effected without instructions from the applicants, was not a registration on their behalf, or one of which Marler could be treated as a trustee for them, but a wrongful act from the beginning, of which if the applicants wished to take the benefit, they must at the same time take the inconveniences, so that the applicants could only utilise the existing entry by obtaining an assignment from Marler, but that this was impossible, since he had never carried on any business, and, therefore, could not assign the mark, being unable to assign with it the goodwill of the business in which it was used; (2) that the proper method of rectifying the register was by expunging the improper entry altogether, and that relief must, therefore, be granted in the second alternative.

DAY v. BROWNRIGG.

631.

Nov. 6th ; Dec. 4th, 1878.

[Malins, V.C.——39 L. T., N. S. 226.]

[Ct. of App.—

Jessel, M.R., James & Thesiger, L.JJ.]

} ———10 Ch. D. 294; 39 L.
T., N. S. 553 ; 27
W. R. 217.]

The plaintiffs being the owners of a house and estate at Ashford, Middlesex, known as "Ashford Lodge" and "The Ashford Lodge Estate," the defendant acquired another house in the same neighbourhood, known as "The Villa, Ashford," or "Ashford Villa," and changed the name to "Ashford Lodge."

Action for an injunction to restrain the defendant from using that name to the injury of the plaintiffs' property.

On demurrer,

Held, by the Ct. of App., (1) that the plaintiffs could not acquire an exclusive right in the name of a house, apart from trade, and that the demurrer must be allowed ; (2) that no extended power of granting injunctions was conferred upon the Court by the Judicature Act of 1873, s. 25, sub-s. 8.

EX PARTE EDE BROS. & CO. [T. M. A., 1875-6-7.]

632.

Nov. 8th, 1878.

[Jessel, M.R.]

Application having been made for the registration of certain trade marks for goods included in the cotton classes, such trade marks were placed by the Manchester Committee of Experts in the first class of marks submitted to them, as being marks qualified for registration. On subsequent application by other firms for the registration in their names of trade marks substantially identical with those so

classed, the Committee placed the marks in respect of which such later application was made in their second class, on the ground that the later applicants had no title to the marks which they sought to register.

On motion by the later applicants,

Held, that the function of the Committee of Experts was to decide whether a trade mark offered for registration contained the particulars necessary to constitute a registrable trade mark, and not to decide questions of title between rival claimants; that in the cases in question the Committee had acted on a mistaken view of their functions; and that, notwithstanding the classification by the Committee, the Registrar must proceed to advertise the marks with a view to registration, leaving the question of title to be decided in the future on any opposition which the prior claimants might offer to the registration of the marks, after due advertisement.

633.

BRAHAM v. BEACHIM (2).

Nov. 14th, 1878.

[Chanc. Div.— }
Fry, J. }

After the decision in *Braham v. Beachim* (1), the defendants in that case acquired a colliery, but not in the parish of Radstock, and carried on business as "The Radstock Coal and Waggon Co., Colliery Proprietors, Radstock, Somerset."

Motion by the plaintiffs to commit the defendants for breach of the injunction, refused, on the ground that the term used by the defendants did not imply more than that they were proprietors of collieries, whose place of business was at Radstock, which they were entitled to state, and that no breach of the injunction had been committed.

IN RE THOMAS.

[634.]

Nov. 18th, 1878.

{ U. S. Patent Office—
Doolittle, Act. Comm. } ——— 14 U. S. Pat. Gaz. 821.]

On an application for the registration as a trade mark of a certain device, to be used in conjunction with other words and symbols, among which were certain of the words and symbols used in Freemasonry,

Held, that the fact that such words and symbols were used in Freemasonry did not disentitle a manufacturer to use them in his trade, by reason of probability of deception of the public or otherwise, and that the application must be granted.

THE SINGER MANUFACTURING CO. v. LOOG.

635.

Nov. 21st, 1878.

[Bacon, V.C.]

During the pendency of an action by the plaintiffs, for an injunction to restrain the English agent of German manufacturers from infringing the trade mark on the plaintiffs' sewing machines, the publisher of a newspaper called *The Sewing Machine Gazette* published a paragraph in which it was stated that the action was pending, that during its pendency unprincipled traders had issued unfair and illegal advertisements, and that, after the conclusion of the existing action, further proceedings would be taken.

Motion by the defendant to commit the publisher of the newspaper for contempt of Court, refused, on the ground that the paragraph in question was not calculated to prejudice the fair trial of the action.

636.

MOSES *v.* SARGOOD, EWEN & CO.

Nov. 22nd, 1878.

[Hall, V.C.]

The plaintiffs being merchants and manufacturers of ready-made clothing, who placed on their goods a trade mark registered in England and the Colonies, consisting of one or more Royal Crowns, up to the number of six, the number varying according to the quality of the goods, from which mark the goods had acquired the name of "Crown Clothing," the defendants, who alleged that they had long exported to the Colonies quantities of material for clothing not made up bearing a trade mark consisting of an Imperial Crown between two standards, began to export ready-made clothing ticketed with that mark.

On motion by the plaintiffs, injunction granted to restrain the defendants from selling or shipping ready-made clothing bearing the mark in question, or any other mark infringing the plaintiffs' rights, on the ground that, although the mark might not deceive if placed side by side with the plaintiffs' mark, it was calculated to obtain for the defendants' goods the same name as that by which the plaintiffs' were known, and to deceive an ordinary purchaser who had not an opportunity of comparing the marks.

637.

IN RE KUHN & CO. [T. M. A., 1875.]

Nov. 29th, 1878.

[Jessel, M.R.]

Kuhn & Co. having obtained registration as their trade mark of a mark to be placed on steel pens for the German market, containing a description of the pens in German, with a figure of a steel pen,

On motion by other manufacturers of steel pens,

Held, (1) that the figure of a steel pen was common to the trade, and could not be exclusively appropriated, and that a note must be appended to the registration to the effect that that figure was not claimed *per se*, but only in combination; (2) that Kuhn & Co. must pay the costs of the proceedings, notwithstanding that the applicants had not given them previous notice of their intention to take action in the matter, but that no costs would have been given if it had been further proved that the mark had only become common by Kuhn & Co.'s mark being copied by English firms without their permission, and that their entire mark had been registered for a year and a half before any objection was made to it.

WELDON *v.* DICKS.

638.

Dec. 3rd, 1878.

[*Malins, V.C.*—10 *Ch. D.* 247; 39 *L. T., N. S.* 467.]

The plaintiff being the proprietor of the copyright in a novel entitled "Trial and Triumph," first published in 1854, and republished in 1860, and since then long out of print, the defendant in 1875 published a tale under the same name in *Bow Bells*, and republished it in a volume, with other tales, at the end of the same year, and again, in a separate form, in 1877.

Action for an injunction to restrain the defendant from infringing the plaintiff's copyright in the title.

Held, (1) that the title of the plaintiff's book was included in the copyright by which the book was protected; (2) that the fact that the plaintiff's book had been long out of print did not deprive him of the right to protection against infringers; (3) that the plaintiff was not disentitled by reason of delay, he having commenced his action within two months after he first became aware of the assumption

of the title by the defendant; (4) that the injunction must be granted.

“There can only be acquiescence where there is knowledge. This Court never binds parties by acquiescence where there is no knowledge, though it is true that knowledge and acquiescence is in many cases fatal to parties.”

639.

LEVY v. WALKER.

Dec. 21st, 1878; Feb. 5th, 1879.

[Hall, V.C.—39 L. T., N. S. 654.]

[Ct. of App.—

Jessel, M.R., James & Bramwell, L.JJ.]

} ———10 Ch. D. 436; 48
L. J. Ch. 273; 39
L. T., N. S. 656.]

The plaintiff, Mrs. Levy, having (while Miss Charbonnel) carried on business in partnership with the defendant as confectioners, under the name of “Charbonnel and Walker,” on the dissolution of the partnership and sale of the business under the direction of the Court, the defendant purchased the entirety of the partnership business, leasehold premises, stock-in-trade, goodwill, &c., and continued to carry on the business under the old firm name.

On motion by the plaintiffs (Mrs. Levy and her husband) for an injunction to restrain the defendant from using the old firm name, and from representing that the plaintiffs or either of them were or was in partnership with her,

Held, on appeal, that the plaintiffs were not entitled to an injunction, on the ground that neither of them could be subjected to any liability by the use of the name by the defendant; and (*per* James, L.J.) that, in any case, the sale of the business and goodwill carried with it the right to use the old firm name.

Per James, L.J.—“The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark. That is to say, somebody has a right to say ‘You must not use a name, whether

fictitious or real, or a description, whether true or not, which is intended to represent, or is calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent mis-statement of yours of the profits of the business which would otherwise come to me.' That is the sole principle on which the Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

"I hold that the sale of the goodwill and business did convey the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and as against all the world, if any person in that world were representing himself as carrying on the same business."

THE ARMY AND NAVY CO-OPERATIVE SOCIETY (LIMITED) v. THE JUNIOR ARMY AND NAVY STORES (LIMITED). 640.

Jan. 17th, 1879.
[*Jessel, M.R.*]

Motion by the plaintiffs for an injunction to restrain the defendants from using in their business their name (as above) or any other name calculated to deceive, refused, on the ground that the word "Junior" prefixed to the defendants' title was quite sufficient to prevent deception, and that, in any case, there could be no mistake, since the only persons admitted to deal with either establishment were shareholders, or persons introduced through shareholders, who would not be deceived.

IN RE WHITELEY [T. M. A., 1875.] 641.

Feb. 8th, 1879.
[*Jessel, M.R.*]

An application having been made by Whiteley, a universal provider, for the registration of a trade mark,

consisting principally of two globes, for goods comprised in numerous classes, including classes 11, 12 and 13 (surgical instruments, cutlery, metal implements, &c.), which trade mark he had used for some years on wrappers, labels, bill-heads, &c., and on metal plates affixed to some of the articles, the application was opposed as to classes 11, 12 and 13 by a firm of cutlers, who had for many years stamped a single globe on their cutlery and metal goods, and had obtained registration of that mark on goods included in the classes in question.

On adjourned summons,

Held, that registration of the applicant's mark should be granted in the classes in question, he giving an undertaking (of which a note was to be entered on the register) not to stamp or impress the mark on any part of the metal of any article in classes 11, 12, or 13, but to affix it to, or use it in connexion with articles in those classes in the manner in which it had previously been affixed or used.

642.

IN RE FARINA [T. M. A., 1875] (2).

Feb. 13th, 1879.

[*Hall, V.C.*—27 W. R. 456.]

J. M. Farina having long used, and recently registered, three trade marks on Eau de Cologne, consisting respectively of a label with his signature, and a seal in the corner, to be applied to the side of the bottle, a circular stamp with three parallel lines running from it, to be applied to the top and neck of the bottle, and a label consisting of a picture of his house, "Gegenüber dem Jülichs Platz," with medals and letter-press, to be applied to the boxes containing the bottles, another maker of Eau de Cologne applied for the registration in his name of three trade marks similarly composed, to be used in the same manner.

On motion by the registered proprietor for an injunction to restrain the second applicant from proceeding with his application,

Held, (1) that the trade marks were too similar to those already on the register for registration to be allowed, and that the fact that the house on the applicant's third mark, described as "Gegenüber dem Elogius Platz," was said to be a correct view of his house in a street turning out of that square, did not prevent his label from being a colourable imitation of the original, having regard to the similarity in the letterpress and the position of the medals, though these last were not themselves the same as those in the label registered; (2) that the applicant's allegation that he had used his marks for several years without interference did not entitle him to registration, since it was not proved that the original proprietor was aware of such use; (3) that the injunction must be granted as to all three marks, notwithstanding that the German Court of Appeal, differing from the Court of First Instance, had, while prohibiting the registration in Germany of the label with the signature, permitted that of the label with the house, the question of resemblance being purely one of fact, as to which the German decisions were to be merely regarded as opposite verdicts by two special juries.

IN RE RABONE BROS. & CO. [T. M. A., 1875.]
IN RE BURYS & CO. (LIMITED.)

643.

Feb. 15th, 1879.

[*Jessel, M.R.*]

Rabone Bros. & Co. having long used a trade mark consisting of a lion couchant, with their trade name, upon iron bars, sheets, and hoops (included in class 5), and upon a large variety of cutlery, edge tools, and other implements (included in classes 12 and 13), applied for the registration

of their trade mark in classes 5, 12, and 13. Burys & Co. having long used a trade mark consisting of a lion couchant, with or without their trade name or other additions, upon steel (included in class 5), and upon edge tools, files, and other goods (included in classes 12 and 13), also applied for the registration of their trade marks in classes 5, 12, and 13. Each application was opposed by the other applicants.

On adjourned summonses,

Held, (1) that both parties should be registered in class 5, for the goods respectively specified only; (2) that since Rabone Bros. & Co.'s trade had been mostly confined to the colonies, both parties should be registered in classes 12 and 13, upon an undertaking being given by Rabone Bros. & Co. not to use their mark in Europe, and an undertaking by Burys & Co. not to use theirs in Australia, Tasmania, New Zealand, the West Indies, or British Columbia, a note of each undertaking to be entered on the register; (3) that inasmuch as Burys & Co.'s marks were cutlers' corporate marks, which had been assigned to them by one John Bedford, but had not been surrendered by him to the Cutlers' Company, or re-assigned by the company to Burys & Co., without which Burys & Co.'s title was not recognised by the company, the registration of their marks must be deferred until their title was perfected.

644.

SPRATT'S PATENT v. WARD & CO.

Feb. 27th, 1879.

[*Bacon, V.C.*—40 *L. T.*, *N. S.* 250; 27 *W. R.* 470.]

Action for an injunction to restrain the defendants from selling dog-biscuits under the name of "Fibrine Dog Cakes," or any other title intimating that their biscuits were

manufactured under Spratt's patent, the property of the plaintiffs.

Notice having been given by the defendants that they required the action to be tried before a judge and special jury,

On adjourned summons taken out by the plaintiffs for the trial to be before the judge himself,

Held, that there being questions involved beyond a mere simple issue of fact, an order must be made on the summons, as asked.

IN RE HARGREAVES [T. M. A., 1875.]

645.

Feb. 27th, 1879.

[*Hall, V.C.*—27 *W. R.* 450.]

On motion for leave to register a new trade mark, consisting of an anchor with the words "Anchor Brand," for bacon and ham, being goods included in class 42, in which class there were already four marks registered in which an anchor was a conspicuous feature, such four marks being used, not for bacon and ham, but for butter, dog-biscuit, preserved fish and meat, and cattle food, respectively, all of which came within class 42,

Held, that leave would not be given to register the mark in question, being a new mark, for part of a class, nor at all, there being more than three similar marks already on the register.

ORR EWING & CO. v. JOHNSTON & CO.

646.

March 15th, 1879.

[*Chanc. Div.*— } —40 *L. T., N. S.* 307; 27 *W. R.*]
Fry, J. }

The plaintiffs being manufacturers and exporters to the Indian markets of Turkey red yarn, on which they had long

placed a triangular ticket or label, in green and gold, on which a conspicuous feature was two elephants supporting a banner with an inscription, with a crown between the elephants, the defendants, who had for some years exported other goods to India, with a ticket bearing a figure of the elephant-headed Hindoo goddess, Gunputty, began to export Turkey red yarn, and to place upon it a ticket of a similar shape, and in similar colours to the plaintiffs' (the shape and colours being common to the trade), and having upon it two different elephants supporting a banner with an inscription, with the figure of Gunputty between the elephants, in place of the crown. The plaintiffs' ticket was proved to have acquired a variety of names in India, among which was the name "Bhe Hathi," or "Two Elephant" ticket. Registration had been refused to this ticket (*In re Orr Ewing & Co.*), on the ground that elephants were common to the trade.

Action by the plaintiffs for an injunction to restrain the defendants from infringing their rights.

Held, (1) that though it was not probable that English purchasers or Indian dealers would be deceived, it was not improbable that the ultimate purchasers in India would be, in consequence of the defendants' ticket being calculated to obtain the same name of "Bhe Hathi" as the plaintiffs'; (2) that it was not necessary to prove any fraudulent intention on the part of the defendants; (3) that the fact that a variety of names had become attached to the plaintiffs' ticket and goods did not destroy their right to protection for the mark, where one of those names was likely to be attributed to the defendants' ticket and goods; (4) that the two elephants, forming a material and substantial part of the plaintiffs' trade mark, having been taken by the defendants, the burden was upon them to disprove the probability of deception, not upon the plaintiffs to prove it; (5) that the two elephants were not established to be

common to the trade, since, though a number of other tickets bearing those animals were produced, it was not shown that they had been used or known; (6) that the rights of the plaintiffs in their mark were not affected by the refusal to register, and that the injunction must be granted.

IN RE ROTHERHAM [T. M. A., 1875]

647.

March 27th, 1879.

[Bacon, V.C.—27 W. R. 503.]

Messrs. Rotherham & Sons, of Coventry, having long manufactured watches and exported them to Messrs. Tod & Co., of Alexandria, by whom they were sold, such watches bearing on the dial the word "Tod," in Arabic characters, (and that word, when treated as an Arabic substantive, denoting "a high mountain"), applied for the registration of that Arabic word as their trade mark, but registration was refused by the Registrar, on the ground that he was instructed by the Commissioners of Patents not to register words in foreign languages.

On motion by the applicants,

Held, that the direction given by the Commissioners was contrary to the Act and *ultra vires*, and that the registration must proceed.

GILLESPIE & CO. v. MARSHALL.

648.

April 7th, 1879.

[Ct. of App.—
Brett, Cotton & Thesiger, L.JJ. }

The plaintiffs, agents for a Canadian firm, contracted with the defendant, a sheet-iron manufacturer, to purchase from him a quantity of "Marshall's Canada Plates." The term "Canada plates" was proved to have come within

the previous twelve years to mean plates of iron for roofing purposes, rolled in a particular manner with respect to grain, and to be usually made by tin-plate makers. Formerly "Canada plates" were mere plates of sheet-iron cut irrespective of grain, and the defendant, who had occasionally supplied such plates, and on one occasion to the plaintiffs themselves, under the name and mark of "Marshall's Canada Plates," now supplied the same article to the plaintiffs, by whom the plates were shipped to their principals in Canada. The latter objected to the quality, and re-sold them at a loss.

Action by the plaintiffs to recover the amount of the loss on the re-sale.

The jury having found at the trial—(1) that the contract was for Canada plates as made by Marshall; (2) that the plates were reasonably merchantable; (3) that the goods were not in the commercial sense "Canada plates;" on which verdict judgment was entered for the defendant,

Held, on appeal, by Brett and Thesiger, L.JJ., that the contract was for the goods usually supplied by the defendant under the name of "Marshall's Canada Plates," that the defendant was justified in supplying those goods, and that the judgment must stand.

Held, by Cotton, L.J., that the contract was for "Canada plates," in the commercial sense, to be of Marshall's manufacture, there being no evidence to show that "Marshall's" plates had a different meaning in the market, and that the plaintiffs were entitled to judgment.

[649.]

IN RE BREBNER.

April 30th, 1863.

[Victoria Sup. Ct.— }
Molesworth, J. } —2 IV. & IV. (I. E. & M.) 12.]

On appeal from a decision of the Geelong District Commissioner of Insolvent Estates, by which the appellant, an

insolvent, was refused his certificate, on various grounds, among which was one that he had squandered his means in litigation, he having infringed a trade mark used by other persons on flour, which led to a litigation, which he had to compromise at considerable expense.

Held, that the certificate should be suspended for a year, but not refused.

“The last ground of objection is the general conduct of the insolvent, and under this head comes the imputation against him of having imitated the brands or trade marks of another person. I must regard this as a great dishonesty. It is depriving another man of the benefit of his good name. He is fairly entitled to the benefit of the repute which he has obtained for personal skill and honesty, or the good quality of his produce; and another person who deprives him of that, robs him of his own. Such person, indeed, not only takes that which does not belong to him, but risks the loss by the true owner of his good repute altogether, when an inferior article is substituted for the genuine one. It is also a fraud on the purchaser. Whether he rightly or wrongly thinks an article produced by a particular person to be a superior one, he is cheated if an article made by another person is substituted. It is no answer to say to the purchaser, ‘I gave you an article substantially as good as that which is represented;’ he would not have given his money at all if he had known the article was made by another person. If a man wants an article of oak, and gets an article of deal, and pays an oak price, it is no answer to say that deal will do as well. A fraud of this sort must also have been accompanied with a great deal of deliberation and contrivance; there must have been combination and systematic continuous action resolved upon and carried out.”

HENNESSY v. WHITE.

[650.]

April 5th; Sept. 2nd, 1869.

[*Victoria Sup. Ct.*— }
Molesworth, J. } —6 *W. W. & A'B. Eq.* 216.]

[*Victoria Sup. Ct.*—6 *W. W. & A'B. Eq.* 221.]

The plaintiffs being brandy merchants, of Cognac, who sold their brandy in cask and in bottle, the latter being of the better quality, and who placed on their bottles certain

distinctive labels, corks and capsules, the defendants purchased a large quantity of the plaintiffs' inferior or cask brandy, and sold it in bottles bearing labels, corks and capsules of a similar shape, colour and design to the plaintiffs', except that instead of "Jas. Hennessy & Co., Cognac," on the plaintiffs' labels, corks and capsules, the defendants' had "Jas. Hennessy & Co.'s Cognac;" that instead of an arm with a battle axe on the plaintiffs' they had a spread eagle; and that the defendants' labels also had in small letters the words "Bottled by T. & W. White, Melbourne." And there were some minor differences.

On motion by the plaintiffs,

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per Molesworth, J.—"According to the authorities, an intention to produce a mistake is sufficient to warrant the interference of this Court by injunction. According to the authorities, also, it is not necessary that the intention should be to deceive persons who carefully examine. It is enough that there are a class of customers who examine so carelessly that they would be deceived by the resemblance between the two."

"I think a new feature which has not been present in any other case, and is, therefore, not touched by the language of the other cases, is one which I ought to act upon here; that is, that the makers of articles of different qualities are entitled to brand their best article in a particular way, to show the superior value they put upon it. . . . I put this case upon the particular ground, that an article of Hennessy & Co.'s manufacture of a higher quality has had a particular mark used for it, and that the defendants' brand is an attempt to deceive, probably not the direct purchaser of the article, but the ultimate consumer."

Per Stawell, C.J.—"If a brandy different from that which the manufacturer bottled is put into bottles and sold as the manufacturer's bottled brandy, the fact that it is the manufacturer's bulk brandy, does not make the sale less an imposition."

"We were invited to consider the arm and battle axe on the respondents' label as their trade mark, and, because it was not adopted by the appellant, to disregard all other matters as of no importance; but this is precisely the course which the Courts have carefully avoided, namely, selecting any one or more matters, either of resemblance or

difference, and considering them essential, or attempting to define *à priori* what might or might not constitute an improper imitation by one person of the manufacture of another, for such a course would manifestly offer inducements for fraud; persons so disposed would then endeavour to avoid the one or more objectionable points, but yet so present the particular article for sale as to impose on the unwary, who accept as sufficient proof of genuineness a resemblance in the main, without closely examining details. An imitation of the trade mark would, no doubt, render the case still stronger against the appellant; but the mere substitution of one mark for another, both being in the same position and of the same colour, does not, in our opinion, neutralize the effect of all the other points of resemblance."

HENNESSY v. HOGAN.

[651.]

April 29th, 1869.

[*Victoria Sup. Ct.*— }
Molesworth, J. } — 6 *W. W. & A'B. Eq.* 225.]

The plaintiffs being brandy merchants, of Cognac, who sold their brandy in cask and in bottle, the latter being of the better quality, and who placed on their bottles certain distinctive labels, corks and capsules, the defendants purchased a quantity of the plaintiffs' inferior or cask brandy, and sold it in bottles bearing labels, corks and capsules, of a similar shape, colour and design to the plaintiffs', except that the name of the plaintiffs did not appear on the defendants' corks and capsules; that the defendants used the device of an arm holding a dart, instead of an arm holding a battle axe; and that the defendants placed on their labels, in bold type, the words "Bottled by Hogan, Money & Co."

On motion by the plaintiffs,

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

"It is not necessary that the imitation should be such as to deceive a person accurately scrutinizing it. It is sufficient if it is done with the intention of deceiving any class of purchasers, or to enable sub-vendees to make the article in question more attractive."

[652.]

HOSTETTER v. ANDERSON.*Feb. 17th, 1870.*

[*Victoria Sup. Ct.* — } ——— 1 *V. R.* (1 *W. A'B. & W.*) *Eq.* 7 ;
Molesworth, J. } 1 *A. J.* 4.]

The plaintiffs being American manufacturers of bitters, which they sold in bottles having the words "Dr. J. Hostetter's Stomach Bitters" moulded in them, and labelled with the words "Hostetter's Celebrated Stomach Bitters," the defendants bought up a considerable quantity of the plaintiffs' moulded bottles, and sold them refilled with other bitters, and labelled "Celebrated Stomach Bitters," but the labels did not in form or colour resemble those used by the plaintiffs.

On motion by the plaintiffs,

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

[653.]

WOLFE v. HART.*July 8th ; Sept. 19th, 1878.*

[*Victoria Sup. Ct.* — } ——— 4 *Vict. L. R.* *Eq.* 125.]
Molesworth J. }

[*Victoria Sup. Ct.* ——— 4 *Vict. L. R.* *Eq.* 134.]

The plaintiff selling gin under the name of "Udolphe Wolfe's Aromatic Schiedam Schnapps," in square moulded bottles, enclosed in wrappers bearing inscriptions in blue and red inks, the defendant, a former agent for the plaintiff, began to sell gin under the name of "Hart's Imperial Schiedam Schnapps," or "Imperial Schiedam Aromatic Schnapps," and to sell them in somewhat similar bottles, enclosed in somewhat similar wrappers to the plaintiff's.

On motion by the plaintiff for an injunction to restrain the defendant from infringing the plaintiff's rights,

Held, by Molesworth, J., that the words "Aromatic Schiedam Schnapps" were descriptive and incapable of appropriation, but that the bottles and wrappers were intended and calculated to deceive, and that an injunction must be granted in that respect.

Held, on appeal to the full Court, that the injunction must be affirmed as granted.

Per Stawell, C. J.—"Nor do I concur in the argument that we are to consider the intelligence, or want of intelligence, of the purchaser. We ought not to pronounce a decision which would be applicable to the one and inapplicable to the other, or ignore an uneducated and illiterate person, who may desire to ascertain whether the article he is about to purchase is the same he has had before. We are to consider whether the infringement of the plaintiff's rights has been proved, not by taking particular isolated points, but by looking at the general resemblance of the packages, labels, bottles and other points."

IN RE FARINA [T. M. A., 1878] (3).

654.

April 22nd, 1879.

[*Hall, V.-C.*]

J. M. Farina having long used, and recently registered, two trade marks on Eau de Cologne, consisting respectively of a label with his signature and flourish, the words "Gegenüber dem Jülichs Platz," and a seal in the corner, to be applied to the side of the bottle, and a label bearing a circular seal with three parallel lines running from it, to be applied to the top and neck of the bottle, another manufacturer used on the sides of his bottles a label of similar appearance, bearing the signature "Joseph Anton Farina, Gegenüber dem Central Bahnhof," with a similar flourish, and with a similar seal in the corner, and on the tops and necks of his bottles a label with a circular seal and three parallel lines, similar to J. M. Farina's second label, though differing in some details. The latter manu-

facturer applied for the registration of the two circular seals used respectively in the corner of the first label, and on the top of the bottle, without other accompaniments.

On motion by J. M. Farina for an injunction to restrain the rival manufacturer from proceeding with his application for registration,

Held (1), that the two seals might be registered, but only, as to the first, with a note that it was not to be used with or as part of any label similar to or only colourably differing from J. M. Farina's first label, and, as to the last, with a note that it was not to be used upon the top or cork of any bottle of Eau de Cologne, or with or as part of any label similar to or only colourably differing from J. M. Farina's second label; (2), that the applicant for registration must pay the agreed costs of the application.

655.

IN RE WORTHINGTON & CO.

May 9th, 1879.

[*Jessel, M.R.*]

Bass & Co. having long used and since registered as their trade mark on ale and beer (included in class 43), the figure of a triangle, which in practice was coloured red, and from which the beer was known as "triangle beer," Worthington & Co. applied for the registration of a new mark to be used on beer, wine and spirits (all these articles being included in the same class, No. 43, in which Bass & Co.'s mark was registered), such new mark consisting of a triangular device, which contained a church in the centre, and the words "Beccles Brewery—Established 1830," in a border.

On motion by Bass & Co., injunction granted to restrain Worthington & Co. from taking any further proceedings for the purpose of obtaining the registration for which they applied, on the ground that the marks were so similar as to render deception probable.

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E. G. A. A.