

THE 931-
LAW OF TRADE MARKS

**AND THEIR REGISTRATION,
AND MATTERS CONNECTED THEREWITH;
INCLUDING
A CHAPTER ON GOODWILL.**

TOGETHER WITH

**THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883,
AND THE TRADE MARKS RULES AND INSTRUCTIONS THEREUNDER;**

FORMS AND PRECEDENTS;

**THE MERCHANDISE MARKS ACT, 1862,
AND OTHER STATUTORY ENACTMENTS;**

**THE UNITED STATES STATUTES, 1870—81,
AND THE RULES AND FORMS THEREUNDER;**

AND THE TREATY WITH THE UNITED STATES, 1877.

BY

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GOODWILL," ETC.**

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TO

The Memory of

THE RIGHT HON. SIR GEORGE JESSEL,

MASTER OF THE ROLLS,

TO WHOM,

BY HIS KIND PERMISSION,

THE

FIRST EDITION OF

This Work

WAS MOST RESPECTFULLY DEDICATED.

PREFACE

TO

THE SECOND EDITION.

DURING the six years which have passed since the first edition of this book was submitted to the profession, many new cases have been decided with respect to the registration and the infringement of trade marks, and a new Act of Parliament has been substituted for the statutes recently in force. These additions to, and alterations in, the law, together with other new matter (in particular, the forms and precedents in Appendix B.), account for the expansion of the book from 300 pages to 500. The cases cited have alone increased from under 500 to over 1000.

In this edition, as in the first, a large number of American decisions are cited, both because of the sale which this book has obtained in the United States and the Colonies, and also because of the increasing extent to which such decisions are cited in this country. "Although," as Cockburn, C.J., said (a), "the decisions of the American Courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part." The American references are explained by the Table of Abbreviations.

(a) In *Scaramanga v. Stamp*, 5 C. P. D. 295—303.

Some difficulty was felt in dealing with the unreported cases, of which a considerable number, especially in connection with registration, are cited in this edition, since, on the one hand, valuable decisions known to the author could hardly be passed over merely because they had not been published in the Reports and were too recent for the author's Digest of Trade Mark Cases, while, on the other hand, it was not possible to give the necessary details of these cases wherever they were mentioned. Some of the more important of these cases have been printed, at the author's suggestion, in the form of notes to later reported cases, and for them the references are given, but in most instances the particulars can be ascertained at some one or other of the pages of this book noted against the case in the Table of Cases. With respect to reported cases, all references are given in the Table of Cases, and the cases, reported and unreported, are brought down to the present date.

The author's thanks are due to various friends at the Bar and at the Patent Office, for useful hints and assistance, in particular to Mr. JOHN CUTLER, of Lincoln's Inn, who kindly prepared the three forms of Statements of Claim in Appendix B., and made several valuable suggestions.

The documents relating to the International Arrangements, just concluded, will be found inserted after the Table of Abbreviations.

L. B. S.

2, NEW SQUARE, LINCOLN'S INN,
July, 1884.

EXTRACT FROM THE
PREFACE
TO
THE FIRST EDITION.

IN this book an attempt is made to present a complete view of the Law of 'Trade Marks in this country. It is hoped that it may at least be found to be of some service to those who have to consider the numerous questions which are now constantly arising in connexion with that branch of Law.

Where practicable, the *ipsissima verba* of the various learned judges who decided the cases to which reference is made are given, as it is thought that their views are best expressed in the language they themselves advisedly employed.

A considerable number of American cases have been cited, containing the decisions of acute and practised lawyers, delivered after full consideration of English as well as American authorities. Such decisions are, it is admitted, "intrinsically entitled to the highest respect" (a); and though they are, of course, not in any way binding upon British Courts, it may reasonably be anticipated that English judges will in similar circumstances arrive at similar

(a) Per Patteson, J., in *Beverley v. Lincoln Gas Light and Coke Co.*, 6 Ad. & E. 829—37; and see per V.-C. Bacon, in *Dawson v. Bank of Whitehaven*, 4 Ch. D. 639—48.

conclusions with the Courts of the United States. The American cases have generally been cited from the "Reports of Trade Mark Cases" (a), by Mr. ROWLAND COX, or, in the more recent instances, from the "American Reports" (b).

L. B. S.

2, NEW SQUARE, LINCOLN'S INN,
March 1st, 1878.

(a) Robert Clarke & Co., Cincinnati, 1871.

(b) J. D. Parsons, Albany.

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 Downman—Motley *v.*
 Downs—England *v.*
- Drat—Ward *v.*
 Dubbins—Patching *v.*
 Du Boulay—Du Boulay *v.*
 Duncan—Hoffman *v.*
 Dundas—R. *v.*
 Dunn—Thompson *v.*
 D'Utassey—Faber *v.*
- EASTERBROOK—Saxby *v.*
 Edelsten—Edelsten *v.*
 Edgington—Edgington *v.*
 Edmonton—Clegg *v.*
 Edwards—Apollinaris Co.
 Ehlers—Siegert *v.*
 Ehrhart—Lee *v.*
 Eichele—Peltz *v.*
 Elkan—Upmann *v.*
 Ellinger & Co.—Twentsche Stoom Bleekery Goor *v.*
 Elsworth—R. *v.*
 Emery—Mickle *v.*
 Erhard—Zimmerman *v.*
 Ertheiler—Carroll *v.*
 Estcourt Hop Essence Co.—Estcourt *v.*
 Esterbrook—Gillott *v.*
 Evans—Brook *v.*
 Evans—Cope *v.*
 Evans—Rose *v.*
 Evans—Turner *v.*
 Everett—Smith *v.*
- FABER—Faber *v.*
 Farlow—Bozon *v.*
 Fassett—Filley *v.*
 Fawcus—Dixon *v.*
 Fenwick—Featherstonhaugh *v.*
 Field—Bonner *v.*
 Finch—Day *v.*
 Findlater—Raggett *v.*
 Findlater—Siegert *v.*
 Finlay—Robinson *v.*
 Fisher—Seeley *v.*
 Fitzgerald—R. *v.*
 Flanagan—Matsell *v.*
 Fleming—McLean *v.*
 Flint—Leidersdorf *v.*
 Floyd—Bowman *v.*
 Folgham—Green *v.*
 Forester—Upmann *v.*
 Foster—Burrows *v.*
 Foster—Ford *v.*
 Foster—R. *v.*
 Fox—Millington *v.*
 Français—Hobbs *v.*
 Franks—Pierce *v.*
 Freeman—Browne *v.*
 Freeman—Clark *v.*

- Fullwood—Fullwood *v.*
- GANTON—Lemoine *v.*
 Gardner—Harrison *v.*
 Garlick—R. *v.*
 Garner—Amoskeag Manufacturing Co. *v.*
 Garner—Merrimaek Manufacturing Co. *v.*
 Garnhart—McCartney *v.*
 Gaubert—Ansell *v.*
 Gebhardt—Farina *v.*
 Geisendorf—Sohl *v.*
 German Mutual Fire Insurance Co.—
 Clark *v.*
 Gerteken—Cory *v.*
 Gibbs—Missouri (State of) *v.*
 Gibson—Banks *v.*
 Gillard—Cotton *v.*
 Gillies—Taylor *v.*
 Gladstone—Stewart *v.*
 Glenn—Dunbar *v.*
 Godts—Nichol *v.*
 Goetze—Carter *v.*
 Gonn—Barrett *v.*
 Goss—R. *v.*
 Goulard—Wolfe *v.*
 Graham—Ransome *v.*
 Grand Junction Railway Co.—Pickford *v.*
 Grant, Smith & Co.—Orr-Ewing *v.*
 Graves—Smale *v.*
 Gray—Bullock, Lade & Co. *v.*
 Gray—Wotherspoon *v.*
 Gray & Gosling—R. *v.*
 Great Northern Railway Co.—North
 London Railway Co. *v.*
 Green—Duke *v.*
 Griffiths—Chubb *v.*
 Griffiths—Corns *v.*
 Grocer Publishing Co.—American Grocer
 Publishing Association *v.*
 Grosvenor—Seabury *v.*
 Grosvenor Gallery Co.—Hoby *v.*
 Guardian and General Assurance Co.,
 Limited—Guardian Fire and Life As-
 surance Co. *v.*
 Guéniou—Grillon *v.*
 Guggenheim—Dixon Crucible Co. *v.*
 Guy—Bunn *v.*
- HAISH—Washburn and Moen Manufac-
 turing Co. *v.*
 Haley—Lee *v.*
 Hall—Gillis *v.*
 Hall—Glen & Hall Manufacturing Co. *v.*
 Hall—Hall *v.*
 Hall—Morse *v.*
 Hall—R. *v.*
 Hall & Co.—Perks *v.*
- Hampshire and North Wilts Bank—Lon-
 don and County Banking Co. *v.*
 Hanbury—Liebig's Extract of Meat Co. *v.*
 Hand—Worral *v.*
 Harper—Blackwell *v.*
 Harris—Keene *v.*
 Harris—Palmer *v.*
 Harris—Smith *v.*
 Harrison—Flavel *v.*
 Hart—Low *v.*
 Hart—Wolfe *v.*
 Hart-Davies—Hill *v.*
 Hately—Burgess *v.*
 Hawxhurst—Walker *v.*
 Hayward—Parsons *v.*
 Hazard—Godillot *v.*
 Head—Walter *v.*
 Heap—Guinness *v.*
 Hegeman—Hegeman & Co. *v.*
 Helleley—Johnson *v.*
 Helmbold Manufacturing Co.—Helm-
 hold *v.*
 Hemmons—Weston *v.*
 Hendrickx—Laferme (Compagnie) *v.*
 Henley—Rose *v.*
 Henriques—Howard *v.*
 Henry—Mitchell *v.*
 Hickling—Whitney *v.*
 High Rocks Congress Spring Co.—Con-
 gress and Empire Spring Co. *v.*
 Highmoor—Caruncho *v.*
 Hill—Batty *v.*
 Hill—Blanchard *v.*
 Hills—Burgess *v.*
 Hinks—Rollins *v.*
 Hirschfeld—Leather Cloth Co. *v.*
 Hitchcock—Hopkins *v.*
 Hodgson—Davies *v.*
 Hoffman—Sanders *v.*
 Hogan—Hennessy *v.*
 Hoge—Moorman *v.*
 Hogg—Clowes *v.*
 Hogg—Harrison *v.*
 Hogg—Maxwell *v.*
 Holbrook—Coats *v.*
 Holden—Dixon *v.*
 Hollins—Campbell *v.*
 Holloway—Holloway *v.*
 Ho'mes, Booth & Atwood Manufacturing
 Co.—Holmes, Booth & Haydens *v.*
 Holt—Aubin *v.*
 Home and Colonial Assurance Co.—Colo-
 nial Life Assurance Co. *v.*
 Hood—Cooper *v.*
 Hooper—Kelly *v.*
 Hoosier Drill Co.—Julian *v.*
 Houghton—Rowley *v.*

How—Pidding *v.*
 How—Southern *v.*
 Howe—Whittaker *v.*
 Howe Machine Co.—Howe *v.*
 Hughes—Evans *v.*
 Hulme—Heathcote *v.*
 Hulton—Cowen *v.*
 Humphrey—Peterson *v.*
 Hunkele—Enoch Morgan's Sons' Co. *v.*
 Hunnewell—Gilman *v.*
 Hunter—R. *v.*
 Huntington—Rudderow *v.*
 Hutton—Kelly *v.*

INGELS—Hoosier Drill Co. *v.*

JACKSON—Dicks *v.*
 Jackson—Dixon *v.*
 Jacobus—Fairbanks *v.*
 James—James *v.*
 James—Newbery *v.*
 James—Oldham *v.*
 James—Spicer *v.*
 Jaques—Jollie *v.*
 Jarrett—Booth *v.*
 Jeffery—Spratt *v.*
 Jenkins—Wade *v.*
 Johnson—Kidd *v.*
 Johnson—Solier *v.*
 Johnson—Williams *v.*
 Johnston—Byron (Lord) *v.*
 Johnston—Wheeler *v.*
 Johnston & Co.—Orr-Ewing & Co. *v.*
 Jonas—Hirsch *v.*
 Jones—Canham *v.*
 Jones—R. *v.*
 Jones, Brothers & Co.—Young *v.*
 Jorss—Henderson *v.*
 Joseph Uhrig Brewing Co.—Conrad *v.*
 Junior Army and Navy Stores Ltd.—
 Army and Navy Co-operative Society,
 Ltd. *v.*

KAUFMANN—Hazzopulo *v.*
 Keating—Stevens *v.*
 Keen—Mollersh *v.*
 Kellogg—Sawyer *v.*
 Kendall—Davis *v.*
 Kennedy—Davis *v.*
 Kennett—Hennessy *v.*
 Kerr, Dods & Co.—Graham & Co. *v.*
 Ketcham—Weston *v.*
 Kettle—Gillott *v.*

Kilburn & Co.—Balfour & Co. *v.*
 Kimball—Singer Manufacturing Co. *v.*
 King & Co.—Strachan & Co. *v.*
 King & Co.—Wallace & Co. *v.*
 Kinney Tobacco Co.—Ginter *v.*
 Kirby—Hogg *v.*
 Kleinhaus—Armstrong *v.*
 Knight—Barrows *v.*
 Knight, Stocks & Co.—Berliner Brauerei
 Gesellschaft Tivoli *v.*
 Knos & Co.—Vulcan Match Manufac-
 turing Co. *v.*
 Knott—Prudential Assurance Co. *v.*
 Knott—Welch *v.*
 Koch—Gray *v.*
 Kraft, Meyer & Co.—Curtis, Harvey &
 Co. *v.*

LAIGHT—Shrimpton *v.*
 Lamb—Deiz *v.*
 Landgraff—Stokes *v.*
 Langdon—Lewis *v.*
 Larned—Lowell Manufacturing Co. *v.*
 Larsen—Singer Manufacturing Co. *v.*
 Lart—Hine *v.*
 Latimer—Carmichel *v.*
 Lawes Chemical Manure Co.—Western
 Counties Manure Co. *v.*
 Lazar—Woodward *v.*
 Lazarus—Rock *v.*
 Lazenby—Lazenby *v.*
 Lea—Foot *v.*
 Leach—Clark *v.*
 Le Barron—Magee Furnace Co. *v.*
 Lee—Kennedy *v.*
 Lee—R. *v.*
 Leuchars—Barnett *v.*
 Levine & Wood—R. *v.*
 Levinstein—Renard *v.*
 Levy—Electro-Silicon Co. *v.*
 Lewis—Field *v.*
 Lewis—R. *v.*
 Libby—Harrington *v.*
 Libby—Hilsen *v.*
 Liebig's Extract of Meat Co.—Ander-
 son *v.*
 Lincoln Gas Light and Coke Co.—Bever-
 ley *v.*
 Lloyd—Hovenden *v.*
 Lloyd—R. *v.*
 Locke—Bell *v.*
 Lockett—Lockett *v.*
 Loftus—Rose *v.*
 London and Westminster Assurance Cor-
 poration—London Assurance *v.*

London and Provincial Joint Stock Life Assurance Co.—London and Provincial Law Assurance Society *v.*
 Loog—Singer Manufacturing Co. *v.*
 Lopes & Co.—Jacoby & Co. *v.*
 Lonsont—Leather Cloth Co. *v.*
 Low—Benbow *v.*
 Lowell—Lawrence Manufacturing Co. *v.*
 Lucy—Falkinburg *v.*
 Lumphmans Iron Co.—Lochgelly Co. Ltd. *v.*
 Lund—Axmann *v.*
 Lye—Cuttwell *v.*

McADAM—Morgan *v.*
 McArthur—Lehmann *v.*
 McCubbin—McCormick *v.*
 McCulloch—Wilkie *v.*
 McGowan—McGowan Brothers' Pump and Machine Co. *v.*
 McKernan—Howe *v.*
 Mackintosh—Scott *v.*
 McMaster & Co.—Dickson *v.*
 McNulty—Powell *v.*
 McPherson—Potter *v.*
 Macrae—Young *v.*
 Maddick—Clement *v.*
 Major—Turner *v.*
 Maniere—Hunt *v.*
 Marble—United States *v.*
 Marsh—Post *v.*
 Marshall—Gillespie & Co. *v.*
 Martin—Morse *v.*
 Mason—Dence *v.*
 Mason—Mossop *v.*
 Mason—Smith *v.*
 Massam—Thorley's Cattle Food Co. *v.*
 Masury—Brooklyn White Lead Co. *v.*
 Maxfield—Wilson *v.*
 Maxwell—Hogg *v.*
 May—Cartier *v.*
 Mayer—Del Valle *v.*
 Mayo—Chase *v.*
 Megevand—Foster *v.*
 Meikle—Avery *v.*
 Mellis—Lichtenstein *v.*
 Menck—Partridge *v.*
 Meneely—Meneely *v.*
 Mercer—Brown *v.*
 Merchant—Pettridge *v.*
 Merchants' Joint Stock Bank, Ltd.—Merchant Banking Co. of London *v.*
 Meriden Britannia Co.—Boardman *v.*
 Merkel—St. Louis Piano Manufacturing Co. *v.*

Metcalf—Cassidy *v.*
 Metropolitan Board of Works—Cooper *v.*
 Metropolitan Collar Co.—Union Paper Collar Co. *v.*
 Meyer—India Rubber Comb Co. *v.*
 Midland Railway Co.—King *v.*
 Milbourn—Bond *v.*
 Millar—Lea *v.*
 Miller & Co.—Hurricane Patent Lantern Co. *v.*
 Mills—Tweed *v.*
 Mills, Johnson & Co.—Kidd & Co. *v.*
 Mitchell—Candy *v.*
 Mitchell—Rammelsberg *v.*
 Moat—Morison *v.*
 Montague—Hendriks *v.*
 Moore—Montague *v.*
 Moore—Talcott *v.*
 Morgan—Knott *v.*
 Morgan—R. *v.*
 Morris—United States *v.*
 Morson—Carnrick *v.*
 Mortimer—Prowett *v.*
 Moss—Boon *v.*
 Moss—Morris *v.*
 Mottram—Walker *v.*
 Mudie—Avanzo *v.*
 Munro—Bain *v.*
 Murphy—Christy *v.*
 Myers—Cave *v.*

NAIRS—Linoleum Manufacturing Co. *v.*
 Neale—Day *v.*
 New York Publishing Co.—England *v.*
 Newton—Fleming *v.*
 Noah—Snowden *v.*
 Norfolk—Peabody *v.*
 Norman—Radde *v.*
 Norris—Rivero *v.*
 Norrish—Apollinaris Co. *v.*
 Norton—Bradley *v.*
 Norton—Geary *v.*
 Nowill—Rodgers *v.*

OAKES—Skinner *v.*
 O'Brien—R. *v.*
 O'Byrne—Hegeman & Co. *v.*
 O'Connor—Wolmershausen *v.*
 Ogden—R. *v.*
 Oregon Central Railway Co.—Newby *v.*
 Orr-Ewing & Co.—Johnston & Co. *v.*
 Osborne—Hudson *v.*
 Osborne—Williams *v.*
 Osgerby—Hudson *v.*

PAINE—Stevens *v.*
 Parker—Meriden Britannia Co. *v.*
 Payne—Blofeld *v.*
 Peacock—Richardson *v.*
 Peake—Bulnois *v.*
 Pearce—Farr *v.*
 Pearson—Harper *v.*
 Pearson—Pearson *v.*
 Peck—Jarvis *v.*
 Peck—McArdel *v.*
 Peel—Stephens *v.*
 Pelsall Coal and Iron Co.—Barrows *v.*
 Perhamus—Morgan *v.*
 Peters—Swift *v.*
 Peterson—Weed *v.*
 Peto—Ponsardin *v.*
 Petter—Crookes *v.*
 Petter—Mack *v.*
 Phalon—Barnett *v.*
 Philp—Rodgers *v.*
 Pickering—Moet *v.*
 Pile—Pile *v.*
 Pillow—Barnard *v.*
 Pinkham—Marshall *v.*
 Pinto-Leite—Carver *v.*
 Piper—Aikins *v.*
 Plate—Derringer *v.*
 Plate—Graham *v.*
 Pond—Stimpson *v.*
 Pottage—Hookham *v.*
 Powell—Seltzer *v.*
 Prescott—Van Beil *v.*
 Price—Henry *v.*
 Priestley—R. *v.*
 Pritchard—Gee *v.*
 Provezende—Seixo *v.*
 Pullar—Pullar *v.*

QUIDDINGTON—Robertson *v.*

RAGG—R. *v.*
 Rateliff—Woollam *v.*
 Ray—Ledger *v.*
 Raylton—Johnson *v.*
 Read—Giblett *v.*
 Read—Mitchell *v.*
 Reed—Connell *v.*
 Reed—Milner *v.*
 Reeves—Collins Co. *v.*
 Reeves—Peru (Republic of) *v.*
 Registrar of Trade Marks—Orr-Ewing *v.*
 Reid—Davis *v.*
 Reynolds—Smith *v.*
 Reynolds—Southorn *v.*
 Richards—Allen *v.*

Richardson—McDonald *v.*
 Richardson & Co—Read, Brothers *v.*
 Ridgway—R. *v.*
 Riley—Springhead Spinning Co. *v.*
 Roberts—R. *v.*
 Robinson—Ward *v.*
 Roche—United States *v.*
 Rockwood—Osgood *v.*
 Rodgers—Rodgers *v.*
 Roebuck—R. *v.*
 Roffey—Nixey *v.*
 Rogers—Morgan *v.*
 Rohmann, Osborne & Co.—Hennessy *v.*
 Rolfe—Rolfe *v.*
 Rooke—Green *v.*
 Ross—Marshall *v.*
 Rouch—Burfield *v.*
 Rowland—Scott *v.*
 Royden—Clover *v.*
 Rubber Comb and Jewelry Co.—India
 Rubber Comb Co. *v.*
 Ruffner—Dausman & Drummond To-
 bacco Co. *v.*
 Rushton—Ayer *v.*
 Rutherford—Llewellyn *v.*
 Ruthin Soda Water Co.—Ellis & Sons *v.*
 Rylands—Davenport *v.*

SALEM FLOURING MILLS—Oliphant *v.*
 Salmon—Morison *v.*
 Samson—Steinthal *v.*
 Sands—Woods *v.*
 Sargood, Ewen & Co.—Moses *v.*
 Saunders—Correspondent Newspaper
 Co. *v.*
 Schueckmann—Fleischmann *v.*
 Schultz & Co.—Lautz Brothers *v.*
 Schuyler—Morgan *v.*
 Schwachhofer—Enoch Morgan's Sons'
 Co. *v.*
 Scott—Insurance Oil Tank Co. *v.*
 Scott—Scott *v.*
 Searing—Howe *v.*
 Sellers—Fulton *v.*
 Senate—Sedon *v.*
 Shakespear—Wheeler & Wilson Manu-
 facturing Co. *v.*
 Shaver—Shaver *v.*
 Shaw—Delondre *v.*
 Shaw—Farina *v.*
 Sheard—Chappe'l *v.*
 Sheard—Hutchings *v.*
 Sheffield Gas Consumers' Co.—Attorney-
 General *v.*
 Sheldon—Roberts *v.*
 Shepherd—Green *v.*

- Sheppard—Chance *v.*
 Sherrill—Royal Baking Powder Co. *v.*
 Sherwood—R. *v.*
 Shuttock—Crawford *v.*
 Sibbald—Reid *v.*
 Silverlock—Farina *v.*
 Silversides—R. *v.*
 Simms—Colburn *v.*
 Simpson—Wright *v.*
 Sims—Coles *v.*
 Singer Manufacturing Co.—Wilson *v.*
 Sixbury—Smith *v.*
 Slack—Ellen *v.*
 Slade—Jendwine *v.*
 Sleep—R. *v.*
 Smith—Dale *v.*
 Smith—Glenny *v.*
 Smith—Hargreaves *v.*
 Smith—McMurdo *v.*
 Smith—R. *v.*
 Smith—Russell & Sons, Limited *v.*
 Smith—Smith *v.*
 Smith—Wedgwood *v.*
 Smithson—Dale *v.*
 Smithson—Stewart *v.*
 Soares—Beazley *v.*
 Somborn—Actien Gesellschaft Apollinaris Brunnen *v.*
 Souvazoglu—Harter *v.*
 Spalding—Reinhardt *v.*
 Spear—Amoskeag Manufacturing Co. *v.*
 Spear—Fowle *v.*
 Spence—Williams *v.*
 Stanage—Singer Manufacturing Co. *v.*
 Starkweather—Cook *v.*
 Steffens—United States *v.*
 Stephens—Ego *v.*
 Stephenson—Caruncho *v.*
 Stephenson—Gamble *v.*
 Stetson—Town *v.*
 Stevens—R. *v.*
 Stiff—Ingram *v.*
 Stonebraker—Stonebraker *v.*
 Strange—Albert (Prince) *v.*
 Stratton—Burton *v.*
 Such—Clement *v.*
 Sullivan—Byass *v.*
 Sunley—R. *v.*
 Suter & Coulson—R. *v.*
 Sweet—Archbold *v.*
 Swezey & Dart—Josselyn *v.*
 Swiss Condensed Milk Co.—Anglo-Swiss Condensed Milk Co. *v.*
 Sykes—Sykes *v.*
 Symonds—Thompson *v.*
 TAINTOR—Rogers *v.*
 Taper Sleeve Pulley Works—Gray *v.*
 Tate—Burnett *v.*
 Taylor—Harrison *v.*
 Taylor—Taylor *v.*
 Teede—India & China Tea Co. *v.*
 Thalheimer—Sternberger *v.*
 Thomas—Chinn *v.*
 Thomas—Colton *v.*
 Thompson—Crawshay *v.*
 Thompson—Isaacson *v.*
 Thorley's Cattle-Food Co.—Massam *v.*
 Till—Coslake *v.*
 Toland—Seoville *v.*
 Townsend—Page *v.*
 Trainer—Amoskeag Manufacturing Co. *v.*
 Trask—Electro-Silicon Co. *v.*
 Tripp—Longman *v.*
 Troxell—Enoch Morgan's Sons' Co. *v.*
 Truefitt—Perry *v.*
 Trust—Gouraud *v.*
 Trustees of Port of Bombay—Shepherd *v.*
 Tudor—Tudor *v.*
 Turner—Beard *v.*
 Turpin—Dent *v.*
 Tylor—Davis *v.*
 Tynberg—Messerole *v.*
 UHLER—Glendon Iron Co. *v.*
 Ullmer—Guinness *v.*
 United States—Woodman *v.*
 VAN NOSTRAND—Dougherty *v.*
 Van Schaick—Marten *v.*
 Venning—Goodwin *v.*
 Vick—Edelsten *v.*
 Vining—Nuthall *v.*
 WAGNER—Lamley *v.*
 Walker—Allsopp *v.*
 Walker—Cheavin *v.*
 Walker—Collins Co. *v.*
 Walker—Levy *v.*
 Wallis—Wallis *v.*
 Walls—Day *v.*
 Walmsley—Ainsworth *v.*
 Walter—Polhill *v.*
 Ward—Colnaghi *v.*
 Ward—Mulkern *v.*
 Ward—Tonge *v.*
 Ward & Co.—Spratt's Patent *v.*
 Waring—Wason *v.*
 Waters—Buckingham *v.*
 Wattles—Binninger *v.*
 Watson—Cooper *v.*
 Watson—Marshall *v.*
 Weaver—Franks *v.*

Webster—Lacke *v.*
 Webster—Routh *v.*
 Webster—Webster *v.*
 Wedderburn—Wedderburn *v.*
 Weild—Wren *v.*
 Welch—Vickery *v.*
 Weller—Fradella *v.*
 Wells—Fetridge *v.*
 Wells & Co.—Leonard & Ellis *v.*
 Welsh—Sorg *v.*
 Westcott—Hanford *v.*
 Westhead—Cartier *v.*
 Wheatcroft—Allsopp *v.*
 Wheeler—Hennessy *v.*
 Wheeler—Lanferty *v.*
 Whitaker—Darbey *v.*
 White—Barrett *v.*
 White—Comstock *v.*
 White—Hennessy *v.*
 White—Lazenby *v.*
 White—R. *v.*
 Whitehead—Bryson *v.*
 Whiteman—Degraes *v.*
 Whitmore—Jacoby *v.*
 Whitwell—Standish *v.*
 Wilcox—Popham *v.*
 Wilder—Laird *v.*
 Wilder—Wilder *v.*
 Wilkes—Dayton *v.*

Wilkes—Roworth *v.*
 Williams—McCord *v.*
 Williams—Thomas *v.*
 Williams—Williams *v.*
 Williamson—Richards *v.*
 Willmett—R. *v.*
 Wilson—Singer Manufacturing Co. *v.*
 Wilson—Williams *v.*
 Winchester—Graveley *v.*
 Winchester—Longman *v.*
 Winchester—Thomson *v.*
 Winsor—Stetson *v.*
 Winyard—Yovatt *v.*
 Wood—Manhattan Medicine Co. *v.*
 Wood—Metzler *v.*
 Woodruff—Smith *v.*
 Woodside—Alleghany Fertilizer Co. *v.*
 Woolf—Lea *v.*
 Worrell—Morse *v.*
 Wright—Blackwell *v.*
 Wright—Heath *v.*
 Wright—Martin *v.*
 Wright—Phalon *v.*
 Wright—Simpson *v.*

YATES—Dicks *v.*
 Young & Sons—Dunnachie *v.*

ZEILEX & Co.—Ellis *v.*

TABLE OF ABBREVIATIONS.

A. J.	Australian Jurist.
Abb. Pr.	Abbott's Practice Reports (New York).
Act. Comm.	Acting Commissioner.
Ad. & E.	Adolphus and Ellis.
Alb. L. J.	Albany (New York) Law Journal.
Allen	Allen (Massachusetts).
Am. L. Reg.	American Law Register.
Am. L. Rev.	American Law Review.
Am. L. T.	American Law Times.
Amer. Rep.	American Reports.
App. Cas.	Appeal Cases.
Asst. Comm.	Assistant Commissioner.
Atk.	Atkins.
B. & Ad.	Barnewall and Adolphus.
B. & Cr.	Barnewall and Cresswell.
Barb. Ch.	Barbour's Chancery Reports (New York).
Barb. S. C. or Barb.	Barbour's Supreme Court Reports (New York).
Barnard.	Barnardiston.
Beav.	Beavan.
Bell	Bell's Crown Cases.
Beng. L. R. App.	Bengal Law Reports, Appendix.
Biss.	Bissell (U. S. Circuit Court).
Bl. C. C.	Blatchford (U. S. Circuit Court).
Bomb.	Bombay.
Bond	Bond (U. S. Circuit Court).
Bos.	Bosworth (New York).
Bos. & P., N. R.	Bosanquet and Puller New Reports.
Brews.	Brewster (Pennsylvania).
Browne	Browne (Massachusetts).
Bush	Bush (Kentucky).
C. A.	Court of Appeal.
C. B.	Common Bench.
C. C. C.	Central Criminal Court.
C. C. C. Sess. Pap.	Central Criminal Court Sessions Papers.
C. C. R.	Court of Crown Cases Reserved.
C. & M.	Carrington and Marshman.
C. & P.	Carrington and Payne.
C. P.	Common Pleas.
C. P. Div.	Common Pleas Division.
Cal.	California.
Ch. D.	Chancery Division.

Chitty Gen. Pr.	Chitty's General Practice.
Cinc.	Cincinnati.
Codd. Dig.	Coddington's American Digest of Trade Mark Cases.
Comm.	Commissioner.
Comm. of App.	Commission of Appeals (New York).
Conn.	Connecticut.
Coop.	Cooper.
C. P. Coop.	C. P. Cooper.
Cor.	Coryton (Bengal).
Cox	Cox's Criminal Cases.
R. Cox	R. Cox's American Trade Mark Cases.
Cro.	Croke.
Ct. of App.	Court of Appeal.
Ct. of Cl.	Court of Claims (U. S.).
Ct. of Sess. Cass.	Court of Session Cases (Scotch).
Curtis	Curtis (U. S. Circuit Court).
Cush.	Cushing (Massachusetts).
D. & B.	Dearsley and Bell.
D. & R.	Dowling and Rylands.
Daly	Daly (New York).
Deady	Deady (U. S. Circuit Court).
De G. F. & J.	De Gex, Fisher and Jones.
De G. & J.	De Gex and Jones.
De G. J. & S.	De Gex, Jones and Smith.
De G. M. & G.	De Gex, Macnaghten and Gordon.
De G. & Sm.	De Gex and Smale.
Den.	Denison, Crown Cases.
Dig.	Sebastian's Digest of Cases of Trade Mark, &c.
Dill.	Dillon (U. S. Circuit Court).
Doug.	Douglas
Dr.	Drewry.
Dr. & Sm.	Drewry and Smale.
Duer	Duer (New York).
E. & B.	Ellis and Blackburn.
East P. C.	East's Pleas of the Crown.
Ell. & Ell.	Ellis and Ellis.
Eq. Rep.	Equity Reports.
Esp. N. P. C.	Espinasse, Nisi Prius Cases.
Ex.	Exchequer.
F. & F.	Foster and Finlason.
Fed. Rep.	Federal Reports (U. S.).
Foster Cr. Cas.	Foster, Crown Cases.
Ga.	Georgia.
Giff.	Giffard.
Grant, Up. Can. Ch.	Grant, Upper Canada Chancery.
Green	Green, New Jersey.
H. L. C.	House of Lords Cases.
H. of L.	House of Lords.
H. & M.	Hemming and Miller.
H. & N.	Hurlstone and Norman.
H. & Tw.	Hall and Twells.
H. & W.	Harrison and Wollaston.

Hand	Hand (New York).
Hilt.	Hilton (New York).
Hoff.	Hoffman (New York).
Holmes	Holmes (U. S. Circuit Court).
Hopk.	Hopkins (New York).
How. App. Cas.	Howard's Appeal Cases (New York).
How. Pr.	Howard's Practice Cases (New York).
Hughes	Hughes (U. S. Circuit Court).
Hun	Hun (New York).
Hyde	Hyde (Bengal).
Ill.	Illinois.
Ind.	Indiana.
Ind. L. R.	Indian Law Reports.
Iowa	Iowa State Reports.
Ir. Ch.	Irish Chancery.
Ir. Eq.	Irish Equity.
Ir. Jur.	Irish Jurist.
J. & H.	Johnson and Hemming.
J. & S.	Jones and Spencer (New York).
Jac.	Jacob.
Jac. & W.	Jacob and Walker.
Johns.	Johnson.
Journ. of Jurisp.	Journal of Jurisprudence (Scotch).
Jur.	Jurist.
K. & J.	Kay and Johnson.
Keyes	Keyes (New York).
Ky.	Kentucky.
L. C.	Lord Chancellor.
L. J. J.	Lords Justices.
L. J. Bkptcy.	Law Journal, Bankruptcy.
L. J. Ch.	Law Journal, Chancery.
L. J. C. P.	Law Journal, Common Pleas.
L. J. Ex.	Law Journal, Exchequer.
L. J. K. B.	Law Journal, King's Bench.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. N. of C.	Law Journal, Notes of Cases.
L. J. P. C.	Law Journal, Privy Council.
L. J. Q. B.	Law Journal, Queen's Bench.
L. R. Ch.	Law Reports, Chancery Appeals.
L. R. C. P.	Law Reports, Common Pleas.
L. R. Eq.	Law Reports, Equity.
L. R. Ex.	Law Reports, Exchequer.
L. R. H. L.	Law Reports, House of Lords (English and Irish).
L. R. Ir.	Irish Law Reports.
L. R. P. C.	Law Reports, Privy Council.
L. R. Q. B.	Law Reports, Queen's Bench.
L. T.	Law Times.
L. & C.	Leigh and Cave, Crown Cases.
La. Ann.	Louisiana Annual Reports.
Lans.	Lansing (New York).
Lathrop	Lathrop (Massachusetts).
Leach	Leach, Crown Cases.

Leg. Obs.	Legal Observer.
M. M. A.	Merchandise Marks Act, 1862.
M. & Rob.	Moody and Robinson.
Mac. & G.	Macnaghten and Gordon.
McCrary	McCrary (U. S. Circuit Court).
McLean	McLean (U. S. Circuit Court).
Madd.	Maddock.
Man. & G.	Manning and Granger.
Mass.	Massachusetts.
Md.	Maryland.
Me.	Maine.
Mer.	Merivale.
Mich. C. C.	Michigan Circuit Court.
Mich. N. P.	Michigan Nisi Prius.
Mo.	Missouri.
Mo. App.	Missouri Appeals.
Mod.	Modern Reports.
Mont. D. & De G.	Montague, Deacon and De Gex.
Monthly L. R.	Monthly Law Reports.
Moo. P. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.
N. Car.	North Carolina.
N. J. (Eq.)	New Jersey (Equity).
N. P.	Nisi Prius.
N. R.	New Reports.
N. S.	New Series.
N. Y.	New York.
N. & M.	Neville and Manning.
N. & P.	Neville and Perry.
Neb.	Nebraska.
Ohio St.	Ohio State Reports.
Oreg.	Oregon.
Pa. St.	Pennsylvania State Reports.
Paige	Paige (New York).
Peake	Peake, Nisi Prius Cases.
Pemb.	Pemberton on Judgments.
Penn. St.	Pennsylvania State Reports.
Penn. L. J.	Pennsylvania Law Journal.
Ph.	Phillips.
Phila.	Philadelphia.
Pick.	Pickering (Massachusetts).
Post	Post (Missouri).
Q. B.	Queen's Bench.
R. I.	Rhode Island.
Robertson	Robertson (New York).
Russ.	Russell.
Ry. Cas.	Railway Cases.
S. & S.	Simons and Stuart.
Sandf. Ch.	Sandford's Chancery Reports (New York).
Sandf. S. C.	Sandford's Supreme Court Reports (New York).
Sawy.	Sawyer (U. S. Circuit Court).
Scot. L. Rep.	Scottish Law Reporter.

Scott, N. R.	Scott's New Reports.
Seton	Seton on Decrees.
Sickles	Sickles (New York).
Sim.	Simons.
E. D. Smith	E. D. Smith (New York).
Sol. J.	Solicitor's Journal.
Story	Story (U. S. Circuit Court).
Sup. Ct.	Supreme Court.
Super. Ct.	Superior Court.
Swanst.	Swanston.
T. M. A.	Trade Marks Registration Act.
T. R.	Term Reports.
Thomp. & C.	Thompson and Cook (New York).
Trade Marks	British and Foreign Journal of Commerce, Trade Marks, and International Exhibi- tions.
Trans. App.	Transcript Appeals (New York).
U. S. C. C., Dt. of—	United States Circuit Court, District of —.
U. S. Pat. Comm. Decis.	Decisions of the U. S. Commissioner of Patents.
U. S. Pat. Gaz.	United States Official Patent Gazette.
U. S. Rep.	United States Supreme Court Reports.
U. S. Sup. Ct.	United States Supreme Court.
V. & B.	Vesey and Beames.
V.-C.	Vice-Chancellor.
V. R. Eq.	Victoria Reports (First Series) Equity.
Va.	Virginia.
Ves.	Vesey.
Vict. L. R. Eq.	Victoria Law Reports (New Series) Equity.
Vt.	Vermont.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
W. Va.	West Virginia.
W. & W. (I. E. & M.)	Wyatt and Webb's Victoria Reports (In- solveny, Ecclesiastical and Matrimonial).
W. W. & A'B. Eq.	Wyatt, Webb and A'Beckett's Victoria Re- ports (Equity).
W. A'B. & W. Eq.	Webb, A'Beckett and Williams' Victoria Re- ports (Equity).
Wallace	Wallace (United States Supreme Court).
Wall, Jr.	Wallace, Junior, (U. S. Circuit Court).
Washb.	Washburn (Vermont).
Webs. P. C.	Webster, Patent Cases.
Wend.	Wendell (New York).
West. L. J.	Western Law Journal.
Wils.	Wilson.
Wils. (Ind.)	Wilson's Indianapolis Reports.
Wisc.	Wisconsin.
Wood. & M.	Woodbury and Minot (U. S. Circuit Court).
Y. & C. Ch.	Younge and Collyer's Chancery Reports.

INTERNATIONAL ARRANGEMENTS.

(See *Patents &c. Act, sec. 103, infra.*)

I.

INTERNATIONAL CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Signed at Paris, March 20, 1883.

[*Ratifications exchanged at Paris, June 6, 1884.*]

(*Official Translation.*)

His Majesty the King of the Belgians, His Majesty the Emperor of Brazil, His Majesty the King of Spain, the President of the French Republic, the President of the Republic of Guatemala, His Majesty the King of Italy, His Majesty the King of the Netherlands, His Majesty the King of Portugal and the Algarves, the President of the Republic of Salvador, His Majesty the King of Servia, and the Federal Council of the Swiss Confederation,

Being equally animated with the desire to secure by mutual agreement, complete and effectual protection for the industry and commerce of their respective subjects and citizens, and to provide a guarantee for the rights of inventors, and for the loyalty of commercial transactions, have resolved to conclude a convention to that effect, and have named as their plenipotentiaries, that is to say:—

(*Here follow the appointments of the plenipotentiaries.*)

Who, having communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE I.

The Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Switzerland constitute themselves into a union for the protection of industrial property.

ARTICLE II.

The subjects or citizens of each of the contracting states shall, in all the other states of the union, as regards patents, industrial designs or models, trade-marks and trade names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each state.

ARTICLE III.

Subjects or citizens of states not forming part of the union, who are domiciled or have industrial or commercial establishments in the territory of any of the states of the union, shall be assimilated to the subjects or citizens of the contracting states.

ARTICLE IV.

Any person who has duly applied for a patent, industrial design or model, or trade-mark in one of the contracting states, shall enjoy, as regards registration in the other states, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

Consequently, subsequent registration in any of the other states of the union before expiry of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by another registration, by publication of the invention, or by the working of it by a third party, by the sale of copies of the design or model, or by use of the trade-mark.

The above-mentioned terms of priority shall be six months for patents, and three months for industrial designs and models and trade-marks. A month longer is allowed for countries beyond sea.

ARTICLE V.

(Relates only to patents.)

ARTICLE VI.

Every trade-mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the union.

That country shall be deemed the country of origin where the applicant has his chief seat of business.

If this chief seat of business is not situated in one of the countries of the union, the country to which the applicant belongs shall be deemed the country of origin.

Registration may be refused if the object for which it is solicited is considered contrary to morality or public order.

ARTICLE VII.

The nature of the goods on which the trade-mark is to be used can, in no case, be an obstacle to the registration of the trade-mark.

ARTICLE VIII.

A trade name shall be protected in all the countries of the union, without necessity of registration, whether it form part or not of a trade-mark.

ARTICLE IX.

All goods illegally bearing a trade-mark or trade name may be seized on importation into those states of the union where this mark or name has a right to legal protection.

The seizure shall be effected at the request of either the proper public department or of the interested party, pursuant to the internal legislation of each country.

ARTICLE X.

The provisions of the preceding Article shall apply to all goods falsely bearing the name of any locality as indication of the place of origin, when such indication is associated with a trade name of a fictitious character or assumed with a fraudulent intention.

Any manufacturer of, or trader in, such goods, established in the locality falsely designated as the place of origin, shall be deemed an interested party.

ARTICLE XI.

The high contracting parties agree to grant temporary protection to patentable inventions, to industrial designs or models, and trade-marks, for articles exhibited at official or officially recognized international exhibitions.

ARTICLE XII.

Each of the high contracting parties agrees to establish a special Government Department for industrial property, and a central office for communication to the public of patents, industrial designs or models, and trade-marks.

ARTICLE XIII.

An international office shall be organised under the name of "Bureau International de l'Union pour la Protection de la Propriété Industrielle" (International Office of the Union for the Protection of Industrial Property).

This office, the expense of which shall be defrayed by the Governments of all the contracting states, shall be placed under the high authority of the Central Administration of the Swiss Confederation, and shall work under its supervision. Its functions shall be determined by agreement between the states of the union.

ARTICLE XIV.

The present convention shall be submitted to periodical revisions, with a view to introducing improvements calculated to perfect the system of the union.

To this end conferences shall be successively held in one of the contracting states by delegates of the said states. The next meeting shall take place in 1885 at Rome.

ARTICLE XV.

It is agreed that the high contracting parties respectively reserve to themselves the right to make separately, as between themselves, special arrangements for the protection of industrial property, in so far as such arrangements do not contravene the provisions of the present convention.

ARTICLE XVI.

States which have not taken part in the present convention shall be permitted to adhere to it at their request.

Such adhesion shall be notified officially through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the others. It shall imply complete accession to all the clauses, and admission to all the advantages stipulated by the present convention.

ARTICLE XVII.

The execution of the reciprocal engagements contained in the present convention is subordinated, in so far as necessary, to the observance of the formalities and rules established by the consti-

tutional laws of those of the high contracting parties who are bound to procure the application of the same, which they engage to do with as little delay as possible.

ARTICLE XVIII.

The present convention shall come into operation one month after the exchange of ratifications, and shall remain in force for an unlimited time, till the expiry of one year from the date of its denunciation. This denunciation shall be addressed to the Government commissioned to receive adhesions. It shall only affect the denouncing state, the convention remaining in operation as regards the other contracting parties.

ARTICLE XIX.

The present convention shall be ratified, and the ratifications exchanged in Paris, within one year at the latest.

In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto their seals.

Dated at Paris the 20th March, 1883.

(Signed by the Plenipotentiaries.)

II.

FINAL PROTOCOL.

(Official Translation.)

On proceeding to the signature of the convention concluded this day between the Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland, for the protection of industrial property, the undersigned plenipotentiaries have agreed as follows:

1. The words "industrial property" are to be understood in their broadest sense; they are not to apply simply to industrial products properly so called, but also to agricultural products (wines, corn, fruits, cattle, &c.), and to mineral products employed in commerce (mineral waters, &c.).

2. (Relates only to patents.)

3. The last paragraph of Article II. does not affect the legislation of each of the contracting states as regards the procedure to be followed before the tribunals, and the competence of those tribunals.

4. Paragraph 1 of Article VI. is to be understood as meaning that no trade mark shall be excluded from protection in any state of the union, from the fact alone that it does not satisfy,

in regard to the signs composing it, the conditions of the legislation of that state; provided that on this point it comply with the legislation of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and under reserve of the provisions of the other articles of the convention, the internal legislation of each state remains in force.

To avoid misconception, it is agreed that the use of public armorial bearings and decorations may be considered as being contrary to public order in the sense of the last paragraph of Article VI.

5. The organisation of the special department for industrial property mentioned in Article XII. shall comprise, so far as possible, the publication in each state of a periodical official paper.

6. (After providing for the common expenses of the international office, continues:—)

The Swiss Government will superintend the expenses of the international office, advance the necessary funds, and render an annual account, which will be communicated to all the other administrations.

The international office will centralise information of every kind relating to the protection of industrial property, and will bring it together in the form of a general statistical statement which will be distributed to all the administrations. It will interest itself in all matters of common utility to the union, and will edit, with the help of the documents supplied to it by the various administrations, a periodical paper in the French language dealing with questions regarding the object of the union.

The numbers of this paper, as well as all the documents published by the international office, will be circulated among the administrations of the states of the union in the proportion of the number of contributing units as mentioned above. Such further copies as may be desired either by the said administrations, or by societies or private persons will be paid for separately.

The international office shall at all times hold itself at the service of members of the union, in order to supply them with any special information they may need on questions relating to the international system of industrial property.

The administration of the country in which the next conference is to be held will make preparation for the transactions of that conference, with the assistance of the international office.

The director of the international office will be present at the

meetings of the conferences, and will take part in the discussions, but without the privilege of voting.

He will furnish an annual report upon his administration of the office, which shall be communicated to all the members of the union.

The official language of the international office will be French.

7. The present final protocol, which shall be ratified together with the convention concluded this day shall be considered as forming an integral part of, and shall have the same force, validity, and duration as the said convention.

In witness whereof the undersigned plenipotentiaries have drawn up the present protocol.

(Signed by the Plenipotentiaries.)

III.

ACCESSION OF HER MAJESTY'S GOVERNMENT TO THE CONVENTION.

The undersigned, ambassador extraordinary and plenipotentiary of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland to the French Republic, declares that Her Britannic Majesty, having had the International Convention for the Protection of Industrial Property, concluded at Paris on the 20th March, 1883, and the protocol relating thereto, signed on the same date, laid before her, and availing herself of the right reserved by Article XVI. of that convention to States not parties to the original convention, accedes, on behalf of the United Kingdom of Great Britain and Ireland, to the said international convention for the protection of industrial property, and to the said protocol, which are to be considered as inserted word for word in the present declaration, and formally engages, as far as regards the President of the French Republic and the other high contracting parties, to co-operate on her part in the execution of the stipulations contained in the convention and protocol aforesaid.

The undersigned makes this declaration on the part of Her Britannic Majesty with the express understanding that power is reserved to Her Britannic Majesty to accede to the Convention on behalf of the Isle of Man and the Channel Islands, and any of Her Majesty's possessions, on due notice to that effect being given through Her Majesty's Government.

In witness whereof the undersigned, duly authorized, has

signed the present declaration of accession, and has affixed thereto the seal of his arms.

Done at Paris, on the 17th day of March, 1884.

(L.S.) (Signed) LYONS.

IV.

DECLARATION OF ACCEPTANCE OF ACCESSION.

(Official Translation.)

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having acceded to the International Convention relative to the protection of industrial property, concluded at Paris, March 20, 1883, together with a protocol dated the same day, by the declaration of accession delivered by Her Ambassador Extraordinary and Plenipotentiary to the Government of the French Republic; the text of which declaration is word for word as follows:—

(Here is inserted the text of No. III. in English.)

The President of the French Republic has authorized the undersigned, President of the Council, Minister for Foreign Affairs, to formally accept the said accession, together with the reserves which are contained in it concerning the Isle of Man, the Channel Islands, and all other possessions of Her Britannic Majesty, engaging as well in his own name as in that of the other high contracting parties to assist in the accomplishment of the obligations stipulated in the convention and the protocol thereto annexed, which may concern the United Kingdom of Great Britain and Ireland.

In witness whereof the undersigned, duly authorized, has drawn up the present Declaration of Acceptance and has affixed thereto his seal.

Done at Paris, the 2nd April, 1884.

(L.S.) (Signed) JULES FERRY.

V.

ORDER IN COUNCIL.

(The Patents Act, 1883.)

At the Court at Windsor, the 26th of June, 1884. Present, the Queen's Most Excellent Majesty in Council.

Whereas by the provisions of the Patents, Designs, and Trade Marks Act, 1883, it is, amongst other things, provided:—

That if Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design, or trade mark in any such State shall, subject to the conditions further provided and set forth in the said Act, be entitled to a patent for his invention, or to registration of his design or trade mark (as the case may be) under the said Act in priority to other applicants, and such patent or registration shall have the same date as the date of the protection obtained in such foreign State:

And whereas it has pleased Her Majesty to make an arrangement of the nature contemplated by the said Act by and in virtue of a declaration signed and sealed by Her Majesty's Ambassador at Paris on the 17th of March, 1884, duly conveying the accession of Great Britain to the International Convention and Protocol for the Protection of Industrial Property, signed by representatives of certain powers on the 20th of March, 1883, and duly ratified on the 6th of June, 1884, power being reserved to Her Majesty to hereafter accede to the provisions of the said convention and protocol on behalf of the Isle of Man, the Channel Islands, and any of Her Majesty's possessions, which declaration of accession was duly accepted by the French Government on behalf of the signatory powers by and in virtue of a declaration dated the 2nd of April, 1884:

Now, therefore, Her Majesty, by and with the advice and consent of her Privy Council, and by virtue of the authority committed to her by the said Act, doth declare, and it is hereby declared, that the provisions of the said Act hereinbefore specified shall apply to the following countries, viz.:—Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Servia, Spain, Switzerland, Ecuador,* and Tunis.*

And it is hereby further ordered and declared that this order shall take effect from the 7th of July, 1884. C. L. PEEL.

* These States acceded to the Convention and Protocol

ADDENDUM.

Since the book has been in print a new edition of the Instructions to Applicants for Registration has been issued (see pp. 373-383, *infra*).

The only alterations of importance are:—

1. Par. 5 is cancelled, the official publications being now only obtainable at the Sale Branch of the Patent Office.
2. Par. 30 is altered by limiting the refusal of registration of the Royal Arms, or arms resembling them, to the case of new marks, and omitting the words "patent," "patented" from the list of prohibited phrases.
3. Par. 31 is altered by limiting the refusal of registration of National Arms or Flags to those of Great Britain, and omitting prize or exhibition medals from the list of prohibited particulars in new marks.

THE LAW OF TRADE MARKS.

CHAPTER I.

GENERAL INTRODUCTION.

THE general principle upon which the Courts exercise jurisdiction in the case of trade marks is, that “a manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture, becomes the exclusive owner of that which is henceforth called his trade mark. By the law of this country—and the like law prevails in most other civilised countries—he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners” (a). “A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he

General principle of trade-mark law.

(a) Per Bacon, V.-C., in *Ransome v. Graham*, 51 L. J. Ch. 897.

is selling are the manufacture of another person" (a). "Supposing the rival trader to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods, or from the higher price which the public are willing to give for them, rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturers who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy. The law considers this to be wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated" (b).

Function of
trade mark.

The function of the trade mark is to give the purchaser a satisfactory assurance of the make and quality of the article he is buying. Thus, it was said by Lord Cottenham, C. (c), "take a piece of steel; the mark of the manufacturer from whom it comes is the only indication to the eye of the customer of the quality of the article; so it is of

(a) Per Lord Langdale, M R., in *Perry v. Trucitt*, 6 Beav. 66.

(b) Per Lord Cranworth, C., in *Seixo v. Proccendo*, L. R. 1 Ch. 192. And see per the United States Supreme Court in *Canal Co. v. Clark*, 13 Wall. 311; *McLean v. Fleming*, 96 U. S. Rep. 245, and *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S. Rep. 51; and

per Molesworth, J., in the Supreme Court of Victoria in *In re Brbauer*, 2 W. & W. 12; and per Leverage, J., in the High Court of Bengal, in *Orr-Ewing & Co. v. Grant, Smith & Co.*, 2 Hyde 185.

(c) In *Spottiswoode v. Clarke*, 2 Ph. 154; and see *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60; *Kidd v. Johnson*, 100 U. S. Rep. 617.

blackening, or any other article of manufacture, the particular quality of which is not discernible by the eye." It is on the faith of the mark being genuine, and representing a quality equal to that which he has previously found a similar mark to indicate, that the purchaser makes his purchase. "That, in truth," said James, L. J. (a), "is the meaning and object of a trade mark. It indicates this—that you may take this as a warranty that it has come from the particular manufacturer of the goods with which you have been hitherto pleased."

Yet, while the object of the trade mark is to indicate quality, a mere English adjective, or word in common use (b), which indicates quality and nothing more, not serving to connect the goods with any particular manufacturer or seller, cannot be appropriated as a trade mark, for no person can be permitted to exclude others from the use of words common to all, even in their application to goods; and without such exclusive appropriation, the mark is a mere statement, offering no guarantee, and making no one responsible for its correctness. And in the same way the use of a mark which has for its object the enabling purchasers to divide into equal pieces the substance to which it is applied, cannot deprive other makers of the right to use other somewhat similar marks with the same object (c).

Mere statement of quality, no trade mark.

Marks, however, which do serve to indicate the production of a certain manufacturer, though at the same time subject to variation for the purpose of denoting different qualities, are entitled to protection (d). And it may be

Exception.

(a) *Massam v. J. W. Thorley's Cattle Food Co.*, (2) 14 Ch. D. 748; and see *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S. Rep. 51.

(b) *Braham v. Bostard*, 1 H. & M. 447; *Raggett v. Findlater*, L. R. 17 Eq. 29; *In re Barrows*, 5 Ch. D. 353; *Spottiswoode v. Clarke*, G. Coop. 154; *Gillott v. Esterbrook*, R. Cox 353; *Osgood v. Allen*, 1 Holmes 185; *In re Eagle Pencil Co.*, 19 U. S. Pat. Gaz. 921.

(c) *Dausman and Drummond Tobacco Co. v. Ruffner*, 15 U. S. Pat. Gaz. 559.

(d) *Hirst v. Denham*, L. R. 14 Eq. 542; *Ransome v. Graham*, 51 L. J. Ch. 897; *Moses v. Sargood*, Dig. 636; *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60; *Godillot v. Harris* (per Danforth, J.), 81 N. Y. 263. See *Stokes v. Landgraaf*, 17 Barb. 608; R. Cox, 137; *Gillott v. Kettle*, 3 Duer, 624; R. Cox, 148; *Gillott v.*

observed that a symbol or word indicating quality in one class of goods need not necessarily do so in another (*a*).

Trade mark not always indicative of actual manufacturer.

The use of the trade mark is not in all cases to designate the maker of the substance to which it is attached (*b*), though that is usually so; it may indicate some other person who has expended labour on the article, so that, as finished, it owes some portion of its value to him. Thus, in a case in the Supreme Court of New York (*c*) it was held that, where one person manufactured cotton cloths, and another printed them, the mark was indicative of the printer and not of the original manufacturer. So a trade mark has been recognised as indicating the bleacher who finished the goods which another person had manufactured (*d*); and, in the same way, one may serve to denote the importer (*e*) or exporter (*f*) of manufactured goods.

May be indicative of selector.

Again, a trade mark may be so composed as to indicate that the goods have been examined and selected by a person of known ability, so that they have attributed to them such value as his approval can give, and his reputation depends upon their corresponding to their alleged quality. In such a case, therefore, the trade mark belongs to the selector and not to the manufacturer (*g*).

May indicate actual producer.

To go farther, it is not necessary that the goods to which the mark is affixed should be manufactured goods at all; it is sufficient if the vendors, whose property the trade mark is, have alone the opportunity of procuring the article in question, so that the trade mark indicates accurately

Esterbrook, 47 Barb. 455; *R. Cox*, 340; 3 Sickels, 374; *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S. Rep. 51.

(*a*) *In re English*, U. S. Pat. Comm. Decis. 1870, 142; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538.

(*b*) See per V.-C. B. in *Ford v. Foster*, L. R. 7 Ch. 611.

(*c*) *Amoskeag Manufacturing Co. v. Garner*, 55 Barb. 151; *R. Cox*, 541. See *Amoskeag Manufacturing*

Co. v. Garner (2), 54 How. Pr. 298, and *Wamsutta Mills v. Allen*, 12 Phila. 535.

(*d*) *In re Sykes*, 43 L. T. N. S. 626.

(*e*) *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427.

(*f*) *Robinson v. Finlay*, 9 Ch. D. 489, though it was held on appeal that in that particular instance this was not the case.

(*g*) *Hirsch v. Jonas*, 3 Ch. D. 584.

the source from which the article is derived. This is particularly the case with mineral waters and similar productions (a). A mere name, however, for a natural product which is available by all the world, cannot be exclusively appropriated by an individual, who possesses no exclusive access to its source (b).

The benefits derivable from the recognition of the exclusive right of a trader to his trade mark are apparent from the consideration that the "trade mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the Court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded, not only as a matter of justice to him, but to prevent imposition upon the public" (c).

Advantages
of use of trade
marks.

The protection of trade marks is, therefore, beneficial to the public, since it enables them to buy, with confidence that they are getting what they require; while at the same time it is beneficial to the manufacturer, since it affords him the means of securing the benefit of the custom which he deserves and which is intended for him. When the owner of a trade mark is asserting his exclusive rights, "monopoly is not the thing for which the one party struggles and which the other resists. On the contrary, fair trading is all for the protection of which the law is invoked, and the public, as well as the manufacturer or

(a) *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Apollinaris Co. v. Edwards*, Seton, 4th ed. 237 (*Apollinaris Water*); *Rulde v. Norman*, L. R. 14 Eq. 348 (*Leopoldshall Kainit*); *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 599 (*Congress Spring Water*); *Wheeler v. Johnston*, 3 L. R. Ir. 284 (*Cromac Springs Water*); *Dunbar v. Glenn*, 42 Wis. 118 (*Bethesda Mineral Water*); and see the coal cases—

Canal Co. v. Clark, 13 Wall. 311; *Braham v. Beachin*, 7 Ch. D. 848; *Davis v. Tylor*, M. R., April 24th, 1879; *Lochelly Co. Ltd. v. Lumphinans Iron Co.*, Ct. Sess. Cas., 4th Ser. VI. 482.

(b) *Young v. Macrae*, 9 Jur. N. S. 322.

(c) *Per U. S. Sup. Ct. in Manhattan Medicine Co. v. Wood*, 23 U. S. Pat. Gaz. 1925; and see *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 599.

merchant, are concerned that infringement of trade marks and trade designations should be prevented. For there is a double wrong: the public are or may be deceived, and the trader whose trade mark or trade designation is infringed is or may be injured" (a). So advantageous did the adoption of a trade mark speedily prove to be that, in 1742, Lord Hardwicke, C., said, that "every particular trader had some particular mark or stamp" (b).

Southern v. Howe.

In the earliest case on record (c) damages were given for the infringement of a mark on cloth, though it is not clear from the reports whether the plaintiff was a clothmaker whose mark had been pirated, or a purchaser who had been deceived into buying the wrong goods.

Blanchard v. Hill.

In *Blanchard v. Hill* (d), however, in 1742, Lord Hardwicke refused to protect the "Great Mogul" stamp on cards, deciding, in effect, that there was no right of property in a trade mark, though actual fraud might be restrained or punished, as in *Southern v. Howe* (e). The decision seems in great measure to have been founded upon a dread of setting up a monopoly, the distinction between a trade mark and a patent not being clearly present to his lordship's mind.

Singleton v. Bolton.

In *Singleton v. Bolton* (f), in the Court of King's Bench (1783), Lord Mansfield, C. J., said that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie; but the name of an original inventor being the trade mark in question, evidence was necessary of the medicine having been sold as if prepared by the plaintiff, a distinction being thus drawn

(a) Per Lord Craighill in *Dunnachie v. Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874; and see *State of Missouri v. Gibbs*, 56 Mo. 133; and *Blackwell v. Wright*, 73 N. Car. 310.
(b) *Blanchard v. Hill*, 2 Atk.

484, 485.

(c) *Southern v. How*, Poph. 144; 3 Cro. 471; 2 Rolle 28.

(d) Atk. 484.

(e) *Ubi supra*.

(f) 3 Doug. 293.

between the transmissibility of a name and that of other trade marks, which has since been removed (*a*).

In Scotland an interdict was granted in 1823 to restrain the infringement of a trade mark (*b*), but in England it was for the first time perceived, in 1824, that goods sold with a pirated mark attached, though they might not deceive an immediate purchaser, yet might deceive an ultimate purchaser, who might have no notice of the fraud (*c*).

This case marks the last stage of development in the law of trade marks as recognised at Common Law (*d*); and the requisites necessary to entitle a plaintiff to recover damages were, in accordance with the judgment of Sir T. Wilde, C. J., in *Rodgers v. Nowill* (*e*), that he should have been accustomed to use a certain mark upon goods of his manufacture to denote that that was so, that that mark was known in the trade (*f*), and that the defendant had imitated the mark and sold goods bearing it, as and for the plaintiff's goods, with intent to defraud (*g*).

Lord Blackburn, discussing the history of trade-mark law in *Singer Manufacturing Co. v. Loog* (*h*), said that, "The original foundation of the whole law is this—that when one, knowing that goods are not made by a particular trader, sells them as and for the goods of that trader, he does that which injures that trader. At first it was put upon the ground that he did so when he sold inferior goods as and for the trader's; but it is established, alike at law and in equity, that it is an

(*a*) See *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523, and other cases.

(*b*) *Wilkie v. McCulloch*, Ct. Sess. Cas., 1st Ser. II. 413.

(*c*) *Sykes v. Sykes*, 3 B. & Cr. 541.

(*d*) See per Sir G. Mellish, L. J., in *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434—454.

(*e*) 5 C. B. 109.

(*f*) Registration, provided the connexion with the goodwill of the

business is observed, is now equivalent to public use of a mark: Patents Act, 1883, § 75; and see Trade Marks Act, 1875, § 2. This was held to be so also in America under the U. S. Statute of 1870: *In re The Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248. And see § 7 of the U. S. Act of 1881.

(*g*) See, however, the Judicature Act of 1873, § 25, by which the rules of Equity prevail.

(*h*) 8 App. Cas. 29.

actionable injury to pass off goods known not to be the plaintiff's as and for the plaintiff's, even though not inferior. The modes in which goods may be passed off as and for the plaintiff's vary. The most usual is where a particular mark on the goods, or on the packages in which they are sold, has been used to denote that they are made by a particular firm to such an extent that it is understood in the market to bear that meaning. The law as to those trade marks is now regulated by statutes, but before there was any legislation on the subject it was well settled that when any one adopted a mark so closely resembling the trade mark of the plaintiff that it would be likely to be mistaken for it, and put it on his goods and sold them, knowing that, though the persons to whom he sold them were well aware that they were not the plaintiff's make, yet that they were meant to be sold to others who would see only the trade mark, and were likely to be deceived by its resemblance to that of the plaintiff, he might be properly found to have knowingly and fraudulently sold the goods as and for the plaintiff's goods. And, so far, there was no difference between law and equity.

"But at law it was necessary to prove that an injury had been actually done; in equity it was enough to show that the defendant threatened to do, and would, if not prevented, do that injury. But there is a further question on which there may be a difference between law and equity." The difference to which allusion is here made arises from the fact that in equity the protection to the manufacturer and the public was carried a stage farther in 1833 by the decision of Lord Cottenham, C., in *Millington v. Fox*(*a*), since

Equity—
Millington v.
Fox.

(*a*) 3 My. & Cr. 338. In *Gout v. Aleploglu*, 5 Leg. Obs. 496, the Vice-Chancellor of England held that "the plaintiff had acquired by long previous usage the exclusive right" to his trade marks, but the report is too brief to show whether that expression was employed in its full

meaning. *Hogg v. Kirby*, 8 Ves. 215 (1803); and *Day v. Binning*, C. P. Cooper, 489, and 1 Leg. Obs. 205 (1831), were cases of fraudulent competition; and in *Henry v. Price*, 1 Leg. Obs. 364 (1831), there were circumstances of fraud.

which time it has not been necessary to prove an actual fraudulent intention, the remedy being obtainable if the defendant's conduct has been such as to produce the effects of fraud, though he may, in fact, have acted in perfect innocence.

It is, however, "no part of the duty of the Court to enforce the observance of the dictates of morality" (a), and, therefore, if a defendant "has an abstract right to do what he has done, the Court must permit it, however opposed to one's moral sense" (b). The Court will not interfere, simply on the ground that there is a misrepresentation, unless some right belonging to the plaintiff has been interfered with (c).

Limits to
Court's inter-
position.

The mode of acquiring a right to a trade mark was, from 1875 to 1883, regulated by the Trade Marks Registration Acts, 1875-7 (d). The trade mark was required to accord with the definition contained in section 10 of the Act of 1875 (e), and not to be obnoxious to the restrictions of section 6, and it had to be registered, or, if it had been used before the passing of the Act, application must have been made for registration, and have been refused, in which case a certificate of refusal could be obtained from the registrar (f), unsuccessful applicants thus retaining whatever rights might have been theirs before the Act. For a mark to have been used before the Act, it was sufficient for a vendible article to have been actually in the market, bearing the mark in question; it was not necessary for this to have been the case for any length of time, so long as there was some user (g).

Acquisition of
trade marks.

(a) Per Sir W. P. Wood, V.-C., in *Batty v. Hill*, 1 H. & M. 254. And see *Roper's, &c., Co. v. Cope- man's, &c., Association, Limited* 28 Sol. J. 218.

(b) *Braham v. Bustard*, 1 H. & M. 447.

(c) See *Batty v. Hill*, *ubi supra*.

(d) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; 40 & 41 Vict. c. 37.

(e) Which was so restricted as to exclude from registration some

marks previously recognised: *Ex parte Stephens*, 3 Ch. D. 659; *In re Mitchell* (1), 7 Ch. D. 36. See *Rose v. Evans*, 48 L. J. Ch. 618.

(f) Section 2 of the Amendment Act, 1876.

(g) Per Lord Westbury, C., in *McAndrew v. Bassett*, 4 De G. J. & S. 380; *Wheeler v. Johnston*, 3 L. R. Ir. 284; *In re Simpson, Durie & Sons*, M. R., Jan. 12, 1881, and other cases.

The Trade Marks Acts, 1875-7, are now repealed, and replaced by the Patents Act, 1883 (46 & 47 Viet. c. 57), which contains a wider and more comprehensive definition of a trade mark (*a*), but is in other respects substantially identical, so far as concerns the acquisition of trade marks, with the repealed Acts (*b*).

Appropriation
to special
classes of
goods.

A trade mark must, under the present Act, as under the repealed Acts, be registered as belonging to particular goods or classes of goods (*c*), according to the classification of goods contained in the Rules, and trade marks used before the Act of 1875 can only be protected in respect of the same classes of goods as those to which they have been habitually applied, for no man could be so deceived as to suppose that he was buying A.'s linen because he saw the same mark as A.'s on B.'s iron (*d*).

Assignment
and trans-
mission.

A trade mark is assignable and transmissible, but only in connection with the goodwill of the business concerned with the goods or classes of goods to which it relates (*e*). A trade mark cannot exist in gross and unattached to specific articles (*f*), for, if that could be so, the mark might come to be an instrument of deception, instead of a guarantee of genuineness (*g*). In an assignment of the business and goodwill, the trade mark passes as a matter of course (*h*), or, if specially excepted, must cease to be available by the vendor. On the death of a registered

(*a*) See § 64.

(*b*) See §§ 62-74.

(*c*) Trade Marks Act, 1875, § 2; Patents Act, 1883, § 65.

(*d*) *Hall v. Barrows*, 4 De G. J. & S. 150; *Ainsworth v. Walmesley*, L. R. 1 Eq. 518; *Merchant Banking Co. v. Merchants' Bank*, 9 Ch. D. 560; *Société Anonyme v. Baxter*, 14 Bl. C. C. 261; *Colman v. Crump*, 70 N. Y. 573.

(*e*) Patents Act, 1883, § 70, and see Trade Marks Act, 1875, § 2; *Hall v. Barrows*, 4 De G. J. & S. 150; and *Dixon Crucible Co. v. Guggenheim*, 2 Brewster, 321; R.

Cox, 559.

(*f*) *McAndrew v. Bassett*, 4 De G. J. & S. 380; *Leather Cloth Co. v. American Leather Cloth Co.*, *ib.* 137; 11 H. L. C. 522; *Dixon v. Guggenheim*, *ubi supra*; *Wheeler v. Johnston*, 3 L. R. Ir. 284; *Kidd v. Johnson*, 100 U. S. Rep. 617; *Weston v. Ketchum* (1) 39 N. Y. Super. Ct. 54; S. C. (2) 51 How. Pr. 455.

(*g*) *Cotton v. Gillard*, 44 L. J. Ch. 90; see *Wiltlaus v. Braun*, 44 Md. 303.

(*h*) *Shipwright v. Clements*, 19 W. R. 599.

proprietor, his legal personal representative acquires the title to the mark. Subsequent registered proprietors stood in the same position, under § 4 of the Trade Marks Act of 1875, as if their title were a continuation of the title of the first registered proprietor (*a*). And it seems that this will still be so, though the section has not been re-enacted in the new Act.

It has been held in bankruptcy that a trade mark Bankruptcy. passes to a trustee in bankruptcy, as being "goods and chattels" within § 15, sub-s. 5, of the Bankruptcy Act, 1869 (*b*).

Apart from the special provisions of the Patents Act, Trade mark
lost. 1883, a trade mark may be lost, as by its coming to be commonly applied to a special article, in which case it becomes *publici juris*; thus "Worcestershire sauce," which might at one time have been protected, could no longer be so when it had come into common use (*c*). So, too, if a person abandons a suit which he has undertaken to restrain infringement, he abandons his exclusive right (*d*).

When once a person has acquired a right in a trade Infringement. mark, any infringement of that right will form a ground for the interference of the Court. For the Court to interfere there must be fraud, for where there is no fraud there is no wrong to be redressed and no remedy applicable. But it is not necessary that there should be fraud in the sense that the infringer knowingly and wilfully makes a fraudulent attempt to appropriate to himself the fruits of another's reputation; if he acts so that custom intended

(*a*) And see *Walton v. Crowley*, 3 Bl. C. C. 440; *R. Cox*, 166.

(*b*) *Ex parte Young*; *Re Lemon Hart & Son*, Dig. 537; and see *Kelly v. Hutton*, L. R. 3 Ch. 708; *Hudson v. Osborne*, 39 L. J. Ch. 79; and cases at p. 93, note (*i*); also the Bankruptcy Act, 1883, § 44 (*iii*). In America it has been considered a disputable question whether property in a trade mark is the subject of attachment

or levy under execution (*Hegeman & Co. v. Hegeman*, 8 Daly 6), or whether it will pass under a general assignment (*Milliken v. Dart*, 33 N. Y. Sup. Ct. 24).

(*c*) *Lea v. Miller*, Dig. 513; and see per Sir G. Mellish, L. J., in *Ford v. Foster*, L. R. 7 Ch. 611.

(*d*) *Browne v. Freeman*, 12 W. R. 305.

for another is diverted to himself, and that the public buy and pay for one thing while intending to buy and pay for another, so that both vendor and purchaser are injured, there is fraud, and the animus of the infringer is unimportant (a). Even if the purchaser is told that the goods are the goods of the actual seller, but the imitated mark is upon them, there is ground for interference, since the goods may be resold bearing the mark, but without the information necessary to correct the statement thereby made (b). There is infringement if ordinary purchasers, purchasing with ordinary caution, are likely to be misled (c); on the one hand the Court will not strain its jurisdiction to protect fools and idiots (d); on the other hand, it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information.

Remedies for infringement.

Infringement is criminally punishable under an indictment for obtaining money by false pretences (e), or in accordance with the special provisions of the Merchandise Marks Act, 1862 (f), expressly enacted to prevent such practices. The Common Law remedy is by an action on the case for damages caused by the offender's fraud (g). The equitable remedy is by injunction, together with an account, or damages, if preferred. The greater suitability of this form of remedy has occasioned the adjudication in Chancery of the great majority of trade-mark cases, and the carrying into operation of the Trade Marks Registration Acts was further entrusted to the Chancery Division (h).

Fraudulent intention.

At Common Law, at all events until the Judicature Acts, it was necessary to prove knowledge of the plaintiff's rights and intentional deception on the part of the de-

(a) See cases collected at p. 153, note (d).

(b) *Sykes v. Sykes*, 3 B. & Cr. 541; and cases at pp. 145, 146.

(c) *Seixo v. Provezende*, L. R. 1 Ch. 192.

(d) *Singer Manufacturing Co. v.*

Wilson, 2 Ch. D. 434—47; *Blackwell v. Wright*, 78 N. Car. 310.

(e) See Ch. 5.

(f) 25 & 26 Vict. c. 68.

(g) An injunction may now form part of the relief.

(h) Trade marks rule 42 of 1876.

fendant (a); to obtain an injunction in Chancery this has not been required since *Millington v. Fox* (b), in 1833. It may, however, be material with reference to the extent of the relief to be granted, since a plaintiff is only entitled to an account in respect of such user of his trade mark by the defendant as has been subsequent to the latter becoming aware of the prior ownership, or at least of the prior existence as a trade mark of the mark used by him (c).

A plaintiff who in other respects would be entitled to obtain a remedy against an infringer may yet be deprived of his right by reason of some fraudulent statement contained in his own trade mark (d), for "*ex turpi causa non oritur actio*, and if the trade mark contains a false representation calculated to deceive the public, a man cannot by using that which is in itself a fraud obtain any right at all in the mark" (e).

Plaintiff dis-entitled to relief.

A mere collateral misrepresentation, not contained in the trade mark itself, and therefore not repeated at every transfer of the article, is not sufficient to disentitle the trade mark to protection (f).

When not disentitled.

A particular form of misstatement which has proved fatal in several cases has been the insertion or retention in a trade mark of the words "patent" or "patented," so as to indicate the protection of an existing patent, to which the article bearing the trade mark is not in fact entitled (g).

Unauthorized use of word "patent," &c.

"Trade marks have sometimes been likened to letters patent and sometimes to copyrights, from both of which they differ in many respects" (h). "There is this difference between the case of a trade mark and that of a patent: in the former case the article sold is open to the whole world

Distinction between trade mark and patent.

(a) *Rodgers v. Nowill*, 5 C. B. 109.

(b) 3 My. & Cr. 338.

(c) *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Cartier v. Carlile*, 31 Beav. 292; *Moet v. Couston*, 33 Beav. 578.

(d) See *Pidding v. How*, 8 Sim. 477; *Perry v. Trucfitt*, 6 Beav. 66;

and other cases in Ch. 7, p. 190.

(e) Per Sir G. Mellish, J. J., in *Ford v. Foster*, L. R. 7 Ch. 611.

(f) *Ford v. Foster*, *ubi supra*.

(g) See the cases in Ch. 7, p. 138.

(h) Per Lord Blackburn, in *Johnston v. Orr-Ewing*, 7 App. Cas. 219—228.

to manufacture, and the only right the plaintiff seeks is that of being able to say—'Don't sell any goods under my mark.' He may find his customers fall off in consequence of the defendant's manufacture; but it does not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark. On the other hand, every sale without license of a patented article must be a damage to the patentee" (a). In the case of a trade mark, "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" (b). The broad difference between a patent and a trade mark is, therefore, that the public are prohibited and restrained from manufacturing any article protected by the former, so long as the protection exists, whereas the public are at full liberty to manufacture an unpatented article (c), and that according to the identical original process, and to say that they are so doing, and this is so whether the original makers use, or do not use, a trade mark upon their goods. What the subsequent manufacturers may not do is to put upon their goods the mark used by the original makers, so as to represent that such goods are the actual goods of the original makers, and not merely equivalent goods made by others. The benefit conferred upon the public by the communication of a new invention, which after a limited period all

(a) Per Wood, V.-C., in *Davenport v. Rylands*, L. R. 1 Eq. 302.

(b) Per Monell, C. J., in *Godillot v. Hazard*, 49 How. Pr. 5; and see *McLean v. Fleming*, 96 U. S. Rep. 245; and *Swift v. Peters*, 11 U. S. Pat. Gaz. 1110.

(c) This is quite clear in America as well as in this country. See *Thomson v. Winchester*, 19 Pick. 214; R. Cox. 7; *Coffeen v. Brunton*, 4 McLean, 516; R. Cox, 82; *Davis v. Kendall*, 2 R. I. 566; R. Cox, 112; *Comstock v. White*, 18 How.

Pr. 421; R. Cox, 282; *Phalon v. Wright*, 5 Phila. 464; R. Cox, 307; *Falkinburg v. Lucy*, 35 Cal. 52; R. Cox, 448; *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427; *Hardy v. Cutter*, 3 U. S. Pat. Gaz. 468; *Frese v. Bachof* (2), 14 Bl. C. C. 492; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461. So also in Scotland, *Singer Manufacturing Co. v. Kimball and Morton*, Ct. Seas. Cas., 3rd Ser. IX. 267.

can use, is the consideration in respect of which a monopoly of the invention is granted to the inventor for that limited period (a). Any attempt, therefore, to prolong the term of the patent by means of a trade mark will be discouraged (b).

As a trade mark is not the same thing as a patent, so it is not the same as a copyright (c). The difference between them is in fact so wide that the United States statute of 1870, by which the registration of trade marks was authorized and regulated, was held to be unconstitutional and invalid on the express ground that the clause in the Constitution empowering the Legislature to regulate patents and copyrights conferred upon it no authority to make a statute for the regulation of trade marks. A copyright, like a patent, relates to the substance of an article, but differs in that it has reference to a literary instead of a material production. A trade mark does not protect the substance of the article to which it is attached from being imitated, but it identifies an article and indicates the source to which that article is to be attributed. Trade mark not being copyright, registration of a trade mark, or, what comes to be much the same thing, a title of a book or paper, under the Copyright Acts, is unnecessary and useless (d).

Trade mark distinguished from copyright.

Since trade marks are recognised throughout the world, and not merely in the manufacturer's own country, as indicative of his goods, so that the subjects of any country are liable to be defrauded by goods bearing an imitation of a foreign trade mark, and any manufacturer is liable to

Trade marks of aliens protected.

(a) *Cheavin v. Walker*, 5 Ch. D. 850—88.

(b) See per Sir G. Mellish, L. J., in *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 484—56.

(c) *Farina v. Silverlock*, 6 De G. M. & G. 214; *Collins Co. v. Cowen*, 3 K. & J. 428; *Correspondent Newspaper Co. v. Saunders*, 11 Jur. N. S. 540; *Kelly v. Hutton*, L. R. 3 Ch.

708; *Dicks v. Yates*, 18 Ch. D. 76; *Taylor v. Carpenter*, 11 Paige, 292; 2 Sandf. 603; *R. Cox*, 45; *Wolfe v. Barnett*, 24 La. Ann. 97; 18 Amer. Rep. 111.

(d) *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Kelly v. Hutton*, L. R. 3 Ch. 708; *Hirsch v. Jonas*, 3 Ch. D. 584; *Scoville v. Toland*, 6 West. L. J. 84.

suffer by the forgery of his marks abroad, the right of property in a trade mark is not limited by territorial bounds (a), though a limitation may be imposed by means of an exception of specified places by the assignor of a trade mark on assignment (b), and aliens' marks are protected in the English Court in precisely the same manner as if they belonged to British subjects (c). The same is the case in the United States (d), in India (e), Canada (f), and elsewhere.

Conflict of laws.

No direct conflict of laws has as yet arisen in the English Courts with respect to trade marks, though on some occasions such has appeared likely to be the case. In *Farina v. Cathery* (g) the question was raised whether a Prussian manufacturer could be restrained in this country from using a trade mark which he was entitled to use under Prussian law. It was held, however, that the mark was not identical with that to which a right had been acquired in Prussia. In *Compagnie Laferme v. Hendrickæ* (h) there was a question whether a German manufacturer could acquire a right in England to the exclusive use of a trade mark consisting of the word "Laferme," a mere word not being allowed in Germany to constitute a trade mark; but as the plaintiff failed to satisfy the Court that he had been the first to use the word in Germany, no decision was given on the point. In *In re Farina* (2) (i) registration was refused to a German mark on the ground of too great a similarity existing between it and a previously registered German mark, notwithstanding that the German Court of Appeal, reversing the decision of the Court of First

(a) *Derringer v. Plate*, 29 Cal. 292; R. Cox, 325.

(b) *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461.

(c) *Collins Co. v. Cowen*, 8 K. & J. 428; and cases at p. 75, note (a).

(d) *Taylor v. Carter*, 3 Story, 458; R. Cox, 14; and cases at p. 75, note (a).

(e) *Orr-Ewing v. Chooneelott Mullick*, Cor. 150.

(f) *Davis v. Kennedy*, 18 Grant Up. Can. Ch. 528.

(g) L. J. Notes of Cases, 1867, p. 134.

(h) Dig. 512.

(i) 27 W. R. 456.

Instance, had held that there was no such similarity as to prevent the registration in that country of the second mark. It has also been held that user abroad is not such user as will bring the person using within the three-mark rule (a), and that a person who has not even an intention of using a trade mark in England cannot be a person aggrieved by a wrongful entry on the register (b), but the latter decision was reversed (c). Sections 103 and 104 of the Patents Act provide for the grant of privileges to foreigners and colonists in cases in which their governments give protection to British subjects.

Besides cases of infringement of trade marks proper, there are some other classes of cases nearly akin to the former, but differing from them in some important particulars, which yet require notice in connection with the subject of trade marks, as where there is an unfair competition in trade contrived, not by imitation of trade marks, but by other forms of representation that one man's goods are another's. Such cases are governed by substantially identical principles with those which regulate the law of trade marks, the decision of the Court of Appeal to the contrary (d) having been overruled by the House of Lords (e).

In imitations of trade names, again, used as such and not as trade marks on goods, there is a difference from trade mark cases proper; there is a false representation, but it is a representation, not that certain goods are certain other goods, but that a certain establishment is a certain other establishment, the object being that the one establishment should obtain custom intended for the other. Such cases are not cases of trade mark, not being concerned with marks placed on vendible articles in the market (f), but still the Court has to proceed on much the same lines.

(a) *In re Münch*, 50 L. T. N. S. 12.

(b) *In re Riviere & Co.*, 49 L. T. N. S. 506.

(c) 32 W. R. 390.

(d) *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 484.

(e) S. C. 3 App. Cas. 376.

(f) *McAndrew v. Bassett*, 4 De G. J. & S. 380.

Goodwill.

All such cases, whether of trade mark, or trade name, or other unfair use of another's reputation, are concerned with an injurious attack upon the goodwill of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to the other. Trade marks are really a branch of the goodwill of the business with which they are connected, representing it in the market, while the trade name over the shop represents it to the passer-by. It is by the devolution of the goodwill that that of the trade marks is regulated (a), they are in fact included in, and valued as part of, the goodwill (b); severed from it they cannot exist.

(a) § 70 of Patents Act, 1883; and see Rule 36, also § 2 of Trade Marks Act, 1875, and Rule 27 of

the Trade Marks Rules, 1876.

(b) *Hall v. Barrows*, 4 De G. J. & S. 150.

CHAPTER II.

WHAT IS A TRADE MARK?

THE first point which has to be considered in regard to the law of trade marks is, "What is a trade mark?" With what class of objects is this branch of law concerned? On the answer to this question must necessarily depend the principles to be applied in any given case.

The most important criterion by which a case of trade mark may be distinguished from a case of false representation not amounting to an infringement of trade mark, was thus described by Sir G. Jessel, M. R. (a): "The cases which have come before the Courts may, I think, be conveniently divided into two classes. The first class, which is the most numerous, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be description—that is, it may consist of a name or names or a lengthy description consisting of names with superadded words—and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods (b).

What is a trade mark?

A true trade mark must be affixed to the article.

"An illustration of the first class would be the common trade mark, which is either the name or the image of some

(a) *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 484—440.

(b) See the definition by the V.-C. of Ireland in *Wheeler v. Johnston*, 3

L. R. Ir. 284; also *St. Louis Piano Manufacturing Co. v. Merkel*, 1 Mo. App. 305.

known or unknown thing, actually impressed upon, or worked into, the material, or made to adhere to the surface of the material, or it may be not what is commonly known as a trade mark, a distinguishing mark which, perhaps, to a legal mind would be a trade mark, but some form of the material itself." His lordship then instanced a case recently before him in which the trade mark consisted of certain lines woven into the fringe of a certain make of cloth and continued—

"Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, when there are liquids, upon which, of course, you cannot put a mark, and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade marks, whether affixed in the shape of a label on a bottle of liquid, or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars, or the string which encircles them, they are in some way or other attached to the goods, and go along with the goods on sale. That I call the first class."

As to the second class, his lordship said that "they are cases where the defendant, without putting any trade mark at all on his goods, or putting a trade mark which is admittedly different in substance from the trade mark, if any, of the plaintiff on the goods, has represented the goods as being goods manufactured by the plaintiff. Here, again, the Court has to try the question of representation. What the defendant has said or has done must amount to a representation that the goods to be sold are the goods of the plaintiff, or that they are manufactured by the plaintiff. What amount of representation will be sufficient for that purpose must again depend, of course, on the facts of each particular case."

For a trade mark to be entitled to protection, it must therefore not only be applicable, but be actually applied to a "vendible article" (a) in the market; the registration, however, of a trade mark under the Patents Act of 1883, as under the Trade Marks Acts of 1875-77, is equivalent to public use of the same (b). Registration equivalent to public use.

But it is not everything that can be marked on goods that will constitute a valid trade mark: a mere descriptive adjective, for instance, cannot be appropriated from the rest of the world (c). It is necessary, therefore, to distinguish true trade marks from other marks, which, though affixed to goods, yet cannot be claimed as the exclusive trade marks of any individual. Not every mark applied can be a trade mark.

In some American cases a difficulty has been raised with regard to a supposed requirement for a trade mark to contain an indication of the name and address of its proprietor. This requirement, however, which appears to have been based on a misconstruction of the language of Duer, J., in *Amoskeag Manufacturing Co. v. Spear* (d), has in practice been disregarded, and the reasoning of the U. S. Commissioner of Patents, when admitting the number "140" Name and address of proprietor need not be stated.

(a) See per Lord Westbury, C., in *McAndrew v. Bassett*, 4 De G. J. & S. 380; also *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Civil Service Supply Association v. Dean*, 18 Ch. D. 512; *In re Simpson, Davies & Sons*, M. R., Jan. 12th, 1881; *Wheeler v. Johnston*, 8 L. R. Ir. 284; *Candee v. Deere*, 54 Ill. 439.

(b) 38 & 39 Vict. c. 91, § 2; 46 & 47 Vict. c. 57, § 75. And this is so also in the United States. See *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248.

(c) Cf. *Raggett v. Findlater*, L. R. 17 Eq. 29; *Braham v. Bustard*, 1 H. & M. 447; *In re Brandreth*, Dig. 626; *Fulton v. Sellers*, 4 Brews. 42, and other cases. As to trade marks composed of an essential particular with an addition varied to indicate different qualities or other matters, and how such marks should be regis-

tered, see *infra*.

(d) 2 Sandf. S. C. 599; R. Cox, 87. The passage alluded to runs thus:—"The owner of an original trade mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to an exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

Duer.

to registration as a trade mark for umbrellas (a), seems to be conclusive. "A trade mark," he says, "must be of such a character as, when attached to the applicant's goods in the market, will distinguish them as to origin from other goods of the same class. To do this, it need not necessarily give the name of the person owning the said mark, nor the place where the goods are made or sold. It is enough if the mark is of such a character as to indicate to the purchaser that all articles bearing it come from one and the same source. The object a man has in view in adopting a trade mark is to secure to himself the benefits arising from the superior merits of his goods over others of the same class. To do this he puts upon them a peculiar mark, that purchasers may be able to distinguish them in the market. It matters not to him nor to others whether the purchasers know either his name or place of business, provided that his goods have some mark by which they may be designated and inquired for." Again, "If a trade mark possesses the evidence upon its face that it is put forth or given out as a distinguishing mark of the goods to which it is attached, that is, distinguishing as to origin, and not as to kind or quality, it may have all the requisites of a valid trade mark without naming the person or place whence it came" (b). In short, if a trade mark is properly distinctive, no further particularity can be required, unless under the provisions of some statutory enactment.

Non-restraint of mark, no presumption in favour of mark.

The fact that an action to restrain the use of a particular trade mark has been successfully defended raises no presumption that the defendant's mark is a valid trade mark or capable of registration, for the action may have failed on such grounds as, *e.g.*, that the plaintiff's and defendant's marks were alike descriptive (c).

Definition of trade mark in

For the purposes of the Merchandise Marks Act, 1862 (d),

(a) *Ex parte Dawes & Fanning*, 1 U. S. Pat. Gaz. 27.

(b) Per U. S. Commissioner in *In re Dutcher Temple Co.*, U. S. Pat.

Comm. Decis. 1871, 248.

(c) *In re Anderson*, W. N. 1884, p. 75.

(d) 25 & 26 Vict. c. 88, § 1.

a very wide definition was adopted for the words "trade mark," a definition too little precise to be of much practical use outside of that Act, although it was adopted by the V.-C. of Ireland in *Wheeler v. Johnston* (a). Merchandise
Marks Act,
1862.

The Trade Marks Registration Act of 1875 (b), however, contained a definition, which was not only valuable in itself, but was of great practical importance, qualifying, as it did, for registration and the accompanying advantages, all marks which satisfied its requirements; and this definition is now repeated, in a somewhat amplified form, in the Patents Act, 1883 (c). Definition in
Patents Act,
1883.

The definition in question, as it now stands, is as follows:—

"For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars:

- (a.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or
- (b.) A written signature, or copy of a written signature, of the individual or firm applying for registration thereof as a trade mark; or
- (c.) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

There may be added to any one or more of these particulars any letters, words, or figures (d), or combination of letters, words, or figures, or of any of them.

Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures, used as a trade mark before the 13th day of August, 1875, may be registered as a trade mark under this part of this Act" (e).

(a) 3 L. R. Ir. 284.

(b) § 10.

(c) § 64.

(d) "Figures" means "numerals:"
Ex parte Stephens, 3 Ch. D. 659.

(e) And see the definition in
McLean v. Fleming, 96 U. S. Rep.

245. The House of Lords appears to have considered that it was the essential elements that constituted the trade mark, not the whole label with all the minor and immaterial additions: *Orr-Ewing v. Registrar of Trade Marks*, 4 App. Cas. 479.

And by § 74 provision is made for the registration of additions to registered trade marks.

Effect of this definition.

The effect of this definition is to restrict the variety of marks now capable of adoption for the first time by a manufacturer, for he cannot register or obtain protection under the Act for a new mark which does not comply with this definition by containing some one of the three first mentioned essential particulars, although previously to the Act it would have been perfectly good. "There was obviously much more difficulty," said Lord Blackburn (a), referring to the Act of 1875, "in dealing with existing trade marks, in which there was a vested right of property, than in dealing with new trade marks, as to which no one as yet had a vested right. According to the usual course of legislation in this country, vested rights of property are to be respected, and not interfered with farther than is necessary; but as to rights to be acquired hereafter, it is merely a question of expediency what conditions the Legislature may think fit to attach to the acquiring of those rights." The Act of 1883 goes beyond the Act of 1875 in admitting to registration as a new trade mark a fancy word or fancy words, but there are still some marks incapable of registration as new ones which would have been protected before the Act of 1875. However, a manufacturer is entitled under § 64 to register any distinctive mark used as such *before* the passing of the Act of 1875, and which is within the wording of § 64 (b), so obtaining for it the benefits of the Act, or, in case of registration being refused, to demand a certificate of such refusal (c), the possession of which will place him in a position to exercise whatever rights he may have had before and independently of the Acts.

(a) *Orr-Ewing v. Registrar of Trade Marks*, 4 App. Cas. 495.

(b) This is wider than the wording of § 10 of the Act of 1875, and a single distinctive letter or figure

may be registered as an old trade mark, though this was not so under the Act of 1875: *In re Mitchell* (1), 7 Ch. D. 36.

(c) Patents Act, 1883, § 77.

In accordance with the above definition, the first species of trade marks consists of a name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner, to which essential particular may be added any letters, words, or figures, or combination of letters, words, or figures, or of any of them.

First class of trade marks. —A name.

There is between a name of an individual or firm used as a trade mark, and a fancy name or arbitrary symbol used for the same purpose, a broad distinction, which was early perceived, and which caused some difficulty in the universal acceptance of a name as an efficacious trade mark. This difference is that a name is in its very nature generic, and is properly applied to designate, not one individual in the world, but, it may be, many thousands, to all of whom it is equally appropriate. The addition of the Christian to the surname does, indeed, diminish the number of persons to whom the appellation belongs; but the Christian name is commonly abbreviated to an initial letter, and, in any case, the surname is the important part of the name, beyond which many persons do not care to investigate.

How names differ from other trade marks.

The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced that, while, as against persons bearing a different name, a manufacturer's right in his name trade mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up (a). Thus in *Dence*

Consequently the right in a name used as a trade mark is less complete.

(a) *Burgess v. Burgess*, 3 De G. M. & G. 896, and *infra*, p. 27; *Faber v. Faber*, 49 Barb. 357; R. Cox, 401; *Meneely v. Meneely*, 17 Sickels, 427. See *Howe v. Howe Machine Co.*, 50 Barb. 286; R. Cox, 421; *Lazenby v. White* (1), 41 L. J. Ch. 354; *Massam v. Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *McLean v. Fleming*, 98 U. S. Rep. 215; *Binninger*

v. Wattles, 28 How. Pr. 206; *Gilman v. Hunnewell*, 122 Mass. 139; *Prince Metallic Paint Co. v. Carbon Metallic Paint Co.*, Dig. 573; *Helmbold v. Helmbold Manufacturing Co.*, 53 How. Pr. 458; *Aikins v. Piper*, 15 Grant Up. Can. Ch. 581; *Decker v. Decker*, 52 How. Pr. 218; *Hardy v. Cutter*, 3 U. S. Pat. Gaz. 468; *In re Consolidated Fruit Jar Co.*, 14

v. Mason (a), Malins, V.-C., held that during the continuance of the partnership between two persons named Mason and Brand they could not be prevented from using the latter's name in their business, notwithstanding that it was well known in connection with a similar old-established business; and the Court of Appeal held (b) that the same would be the case if a new *bond fide* partnership should be formed. This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered (c). And the Criminal Law also admits of the punishment of such fraudulent user of a man's own name (d).

Statements on
this point.

A valuable statement of the law was made by Lord Craighill in the Scottish Court of Session, in *Dunnachie v. Young & Sons (e)*, in which he said:—"The name of a person may be a trade mark; there may be other manufacturers of goods of the same description, and the latter are not precluded from placing their own names on their goods by reason of the fact that this name has already become the trade mark of another manufacturer. The only condition they must fulfil is that the name as used by them shall be accompanied with something which shall be

U. S. Pat. Gaz. 269; *Marshall v. Pinkham*, 52 Wisc. 572. And in the same way it seems that a manufacture may put his address, the name of his mill, on his goods, though it may resemble the address on another man's goods: *Carmichel v. Latimer*, 11 R. I. 395.

(a) Dig. 534.

(b) 41 L. T. N. S. 573.

(c) *Holloway v. Holloway*, 13 Beav. 209, and *infra*; *Rodgers v. Nowill*, 6 Hare, 325; 5 C. B. 109; *Taylor v. Taylor*, 23 L. J. Ch. 255; *James v. James*, L. R. 13 Eq. 421; *Fullwood v. Fullwood*, W. N. 1873, pp. 93-185; *Fullwood v. Fullwood (2)*,

9 Ch. D. 176; *Massam v. Thorley's Cattle Food Co. (2)*, 14 Ch. D. 748; *Pullar v. Pullar*, Fry, J., April 9th, 1883; *Gillis v. Hall*, R. Cox, 596; *Stonebraker v. Stonebraker*, 88 Maryland, 252; *McLean v. Fleming*, 96 U. S. Rep. 245; *Devlin v. Devlin*, 69 N. Y. 212; *Wilder v. Wilder*, Dig. 372; *Peltz v. Bichels*, 82 Mo. 171; *Rogers v. Taintor*, 97 Mass. 291; *In re Consolidated Fruit Jar Co.*, 14 U. S. Pat. Gaz. 269; *Shaver v. Shaver*, 52 Iowa, 208; *India Rubber Comb Co. v. Rubber Comb & Jewelry Co.*, 45 N. Y. Super. Ct. 258.

(d) *R. v. Dundas*, 6 Cox, 380.

(e) Ct. Sess. Cas. 4th Ser. X. 874.

a distinction, if the bare name would lead to the deception of the public and the injury of the trader on whose goods the name first appeared as a trade mark." And in the New York case of *England v. The New York Publishing Co. (a)*, Daly, C. J., said:—"The fact that a man has used his own name to designate the article he produces, and that the name has become valuable to him through the article becoming extensively known, gives him no right to exclude any other man of the same name from affixing his name upon the same kind of article, if he manufactures it. The test is whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another."

In *Holloway v. Holloway (b)*, the defendant, Henry Holloway, sold pills and ointment in packets and pots, similar to those in which his brother, the plaintiff, Thos. Holloway, sold his, and the defendant also affixed to his packets and pots similar labels and wrappers, but with "H. Holloway," instead of simply "Holloway." Thomas Holloway having filed a bill for an injunction, Lord Langdale, M. R., granted the injunction, saying, on the evidence, that it was as clear and as plainly avowed a fraud as he ever knew. He, however, expressly stated that "the defendant's name being Holloway, he had a right to constitute himself a vendor of Holloway's pills and ointment," and that he, the M. R., "did not intend to say anything tending to abridge such right;" the defendant had, nevertheless, no right to do so with such additions to his own name as to deceive the public and make them believe that he was selling the plaintiff's pills and ointment.

The case of *Burgess v. Burgess (c)* was somewhat similar. There the plaintiff's father, to whose business the plaintiff had succeeded, had invented "Burgess' Essence

(a) 8 Daly, 375.
(b) 18 Beav. 209.

(c) 3 De G. M. & G. 896.

of Anchovies." He employed his two sons as his assistants, and the business was conducted by him and them at 107, Strand. After a time one of the sons, W. H. Burgess, took a house in King William Street, and setting up for himself, put on his shop front, "W. H. Burgess, late of 107, Strand." He also headed his labels, "36, King William Street, City, London (Royal Arms), late of 107, Strand, Burgess' Essence of Anchovies;" plaintiff's labels being headed, "107 (Royal Arms), Strand, corner of the Savoy Steps, John Burgess and Son, Original and Superior Essence of Anchovies." Sir R. T. Kindersley, V.-C., granted an injunction as to "late of 107, Strand," and the continuance on the sides of the defendant's shop door of a plate with the words "Burgess' Fish Sauce Warehouse, late of 107, Strand;" but the part of the motion which referred to the use of the words "Burgess' Essence of Anchovies" being refused, the plaintiff appealed, and the Lords Justices then distinctly refused to deny a man the use of his own name. Sir J. L. Knight-Bruce, L. J., said, "All the Queen's subjects have a right to sell their articles in their own names, and not the less so that they bear the same name as their fathers (a). The defendant carries on business in his own name, and sells his essence of anchovies as 'Burgess' Essence of Anchovies,' which, in truth, it is;" and Sir G. Turner, L. J., added that, "where a person was selling goods under a particular name, and another person, not having that name, was using it, it might be presumed that he so used it to represent the goods sold by himself as the goods of the person whose name he used (b); but that where the defendant sold goods under his own name, and

(a) And see *Hardy v. Cutter*, 3 U. S. Pat. Gaz. 468. However, a son has no right to deceive the public by using his father's new name, after the father has assumed a different name from that to which the son is entitled: *Gouraud v. Trust*, 10 N. Y. Sup. Ct. 627; but if the son has assumed the same fictitious

name with the father, by the father's desire, the latter cannot afterwards interfere with the honest use of the fictitious name by the son: *England v. New York Publishing Co.*, 8 Daly, 375.

(b) See *Perks v. Hall & Co.*, W.N. 1881, p. 111.

it did happen that the plaintiff had the same name, it did not follow that the defendant was selling his goods as the goods of the plaintiff" (a); if, however, a fraudulent intention had been proved, both judges agreed that the case would have been different.

The fact that according to these cases a man might with impunity, in the absence of proof of actual fraud, sell the same goods as another, under the same name, provided that his own name was the same as that of the rival manufacturer, who had been in the habit of using his name as his trade mark, not unnaturally produced doubts whether a trade mark which was not capable of protection against infringement in all cases could rightly be termed a trade mark at all; and in *Ainsworth v. Walmsley* (b), where the defendant had affixed to thread not of the plaintiff's make labels with the words, "Ainsworth's Thread," it was argued that such a case was no case of trade mark, and that, this being so, it became necessary for the plaintiff to prove the *scienter* on the part of the defendant. Sir W. P. Wood, V.-C., however, declined to adopt that argument, and intimated that in his opinion a man's name was "as strong an instance of trade mark as could be suggested," adding that it was subject "only to this inconvenience—that if a Mr. Jones or a Mr. Brown relied on his name, he might find it a very inadequate security, because there might be several other manufacturers of the same name."

The decision in this case finally established the principle that the name of an individual or firm duly appended to the vendible article is a valid trade mark (c), subject to the inconvenience mentioned above.

(a) In *Massam v. J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 743, James, L. J., expressed the opinion that the language of Turner, L. J. was to be preferred to that of Knight-Bruce, L. J., the terms used by the latter being somewhat calcu-

lated to mislead.

(b) L. R. 1 Eq. 518.

(c) See per Lord Kingsdown, in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523, where he treats a name as a good trade mark.

Ainsworth v. Walmsley.

A name may be a true trade mark.

A name now first used as a trade mark must be in a distinctive form.

That inconvenience has now been removed as to new marks by the requirement for the name claimed as a trade mark to be "printed, impressed, or woven in some particular and distinctive manner" (a). For the future, a new trade mark consisting of a name will be available against all the world, without exception, for with the mere collocation of letters there is to be combined some further element, in respect of colour, pattern, or some other such differentia, which shall effectually distinguish the trade mark from even a similar succession of letters from which that further characteristic shall be absent (b). The effect of this provision is to render necessary for the future a precaution which many manufacturers have already voluntarily adopted, and the employment of a mode of printing, the imitation of which would furnish an almost irrefutable presumption of fraud, may be instanced from *Stephens v. Peel* (c), before Sir W. P. Wood, V.-C., in which case the labels on the bottles containing the plaintiff's ink were printed in letters which are described as being in part white on a red ground, in part white on a blue ground, and in part blue on a white ground.

The name need not be that of the actual manufacturer.

There is no provision in the Act which requires that the name selected as the trade mark shall be the name of the individual or firm by whom the goods to which the trade mark is to be attached are actually manufactured. Neither was this the case before the passing of the Act. In many instances, it is true, the name was that of the actual manu-

(a) Patents Act, 1883, § 64; Trade Marks Act, 1875, § 10.

(b) See per Jessel, M.R., in *In re Horsburgh & Co.*, 53 L. J. Ch. 287. In the same way, the United States Statute of 1870, § 79, provided that the Commissioner of Patents should not receive and record any proposed trade mark which was merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the

same name where used by other persons. And the Statute of 1881, now in force, provides by § 3, that "no alleged trade mark shall be registered which is merely the name of the applicant." See the decisions in *In re India Rubber Comb Co.*, 8 U. S. Pat. Gaz. 905, and *In re Rowe & Post*, 9 U. S. Pat. Gaz. 496, under the Act of 1870, and other cases noted against the Act.

(c) 16 L. T. N. S. 145.

facturer; thus, the words "Ainsworth's Thread" (a) and "Taylor's Persian Thread" (b) were used as trade marks on thread produced by those makers, "Ramsay" was used on bricks by G. H. Ramsay (c), Thomas Holloway placed "Holloway's Pills" and "Holloway's Ointment" on his boxes and pots (d), and so in many cases more (e).

But where a name has once become a trade mark, by registration, or, if used before the passing of the Trade Marks Registration Act of 1875, by actual user on a vendible article (f), since followed by registration or the procurement of a certificate of refusal to register, it is assignable (g), subject to a connection with the goodwill of the business (h), and may easily pass to and become the property of a person or firm whose own name is widely different. Thus, the trade mark "William Ash" in *Bury v. Bedford* (i), "1847, Rogers Bros. A. 1," in *Meriden Britannia Co. v. Parker* (k), "Thorley's Cattle Food" in *Massam v. J. W. Thorley's Cattle Food Co.* (2) (l), "D. Simmons" in *Weed v. Peterson* (m), "Pepper's Signal Oil" in *Weston v. Ketcham* (1), (2) (n), "Dr. C. McLane's Pills" in *McLean v. Fleming* (o), "Smith, Snyder & Co." in *Young v. Jones Bros. & Co.* (p), "Oakes' Candies" in *Probasco v. Bouyon* (q). But it is a fraudulent act to pur-

A name become a trade mark may pass with the business.

(a) *Ainsworth v. Walmesley*, L. R. 1 Eq. 518.

(b) *Taylor v. Taylor*, 23 L. J. Ch. 255.

(c) *Dixon v. Fawcus*, 3 Ell. & Ell. 537.

(d) *Holloway v. Holloway*, 13 Beav. 209.

(e) *Burgess v. Burgess*, 3 De G. M. & G. 896; *Wedgwood v. Smith*, Dig. 96; *Collins Co. v. Brown*, 3 K. & J. 428; *Stephens v. Peel*, 16 L. T. N. S. 145, &c.

(f) *McAndrew v. Bassett*, 4 De G. J. & S. 380.

(g) *Hall v. Barrows*, 4 De G. J. & S. 150; *The Leather Cloth Companies' case*, 1 H. & M. 271 (V. C.

Wood), and 11 H. L. C. 523 (Lords Cranworth and Kingsdown); *Rogers v. Taintor*, 96 Mass. 291; *Emerson v. Badger*, 101 Mass. 82.

(h) Trade Marks Registration Act, 1875, § 2. Patents Act, 1883, § 70.

(i) 82 L. J. Ch. 741, and 4 De G. J. & S. 352.

(k) 39 Conn. 450; 12 Amer. Rep. 401.

(l) 14 Ch. D. 748.

(m) 12 Abb. Pr. N. S. 178.

(n) 39 N. Y. Super. Ct. 54; 51 How. Pr. 455.

(o) 96 U. S. Rep. 245.

(p) 3 Hughes, 274.

(q) 1 Mo. App. 241.

chase the right to use the name of a small maker because it happens to be identical with that of a maker of reputation (a).

Names of fancy personages.

Among trade marks used before the passing of the Trade Marks Act of 1875, instances are not unusual of marks consisting of a name which neither is nor ever has been borne by the present or any past manufacturer, but which either belongs to some person who actually exists or has existed, or to some imaginary or symbolical personage, or character from a book. Thus, the names "Victoria," "Albert," &c., are very commonly used on a great variety of articles; thus "Bismarck" denoted paper collars (b), and "Roger Williams" long cloth (c), "Dave Jones" whiskey (d), "Lone Jack" tobacco (e); so too "Britannia," "Dolly Varden," &c. All such names, whether of real or fictitious characters, will properly be classed with fancy names.

Name sometimes used alone.

In some cases the name constituting the trade mark is used alone, as "Wilkie" in *Wilkie v. McCulloch* (f), "Dent" in *Dent v. Turpin* (g), "Ramsay" in *Dixon v. Fawcus* (h), "Howe" in *Howe v. Howe Machine Co.* (i), "Wedgwood" in *Wedgwood v. Smith* (k), "Derringer" in *Derringer v. Plate* (l), "Jules Jurgensen" in *Jurgensen v. Alexander* (m), "A. W. Faber" in *Faber v. Faber* (n).

(a) *Perks v. Hall & Co.* W. N. 1881, p. 111.

(b) *Messerole v. Tynberg*, 4 Abb. Pr. N. S. 410; R. Cox, 479. In the U. S. Patent Office it has been held that one man may register as his trade mark another man's name with the latter's written consent: *Ex parte Sullivan & Burke*, 16 U. S. Pat. Gaz. 765; *Ex parte Pace, Talbott & Co.*, *ib.* 909.

(c) *Barrows v. Knight*, 6 R. I. 434; R. Cox, 238.

(d) *Kidd & Co. v. Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337.

(e) *Carroll v. Ertheiler*, 21 Alb. L. J. 503.

(f) Ct. Sess. Cas. 1st Ser. II. 418.

(g) 2 J. & H. 139.

(h) 3 Ell. & Ell. 537.

(i) 50 Barb. 236; R. Cox, 421.

(k) Dig. 96.

(l) 29 Cal. 292; R. Cox, 324.

(m) 24 How. Pr. 269; R. Cox, 298.

(n) 49 Barb. 357; R. Cox, 401.

And see *Richards v. Williamson*, 30 L. T. N. S. 746; *Fullwood v. Fullwood*, W. N. 1873, pp. 98—185; *Tonge v. Ward*, 21 L. T. N. S. 480; *Fullwood v. Fullwood* (2), 9 Ch. D. 176; *Bowman v. Floyd*, 85 Mass. 76; *Rogers v. Taintor*, 97 Mass. 291; *Emerson v. Badger*, 101 Mass. 82; *Sohier v. Johnson*, 111 Mass. 238; *Sherwood v. Andrews*, 3 Am. L. Reg. N. S. 588; *In re India Rubber Comb Co.*, 8 U. S. Pat. Gaz.

In other cases the name is used in combination with other letters, words, or figures, or combinations of letters, words, or figures; and the name of an inventor, discoverer, manufacturer, &c., "may make words distinctive which, without the name, would not be so" (a). Thus "Chubb's Patent-Lock Fire-proof Safe" (b), "Collins & Co. Hartford Cast Steel, Warranted" (c), "Taylor's Persian Thread" (d), "Stephens' Blue Black Writing Fluid" (e), "Thorley's Cattle Food" (f), "Coe's Super-phosphate of Lime" (g), "Wolfe's Aromatic Schiedam Schnapps" (h), "Mrs. Winslow's Soothing Syrup" (i), "1847, Rogers, Bros., A 1" (k), "Meneely's West Troy, N. Y." (l). Again, "J. Rodgers & Sons" was coupled with a crown between the initials of the sovereign (m), and "Ransomes & Co." was followed by "H. H. 6" (n).

Sometimes
in combina-
tions.

905; *India Rubber Comb Co. v. Meyer*, ib. 905; *India Rubber Comb Co. v. Rubber Comb & Jewelry Co.*, 45 N. Y. Super. Ct. 258; *In re Rubber Clothing Co.*, 10 U. S. Pat. Gaz. 111; *In re Coggin, Kidder & Co.*, 11 U. S. Pat. Gaz. 1109; *In re Hall & Co.*, 13 U. S. Pat. Gaz. 229; *Carmichel v. Latimer*, 11 R. L. 395.

(a) *Fulton v. Sellers*, 4 Brews. 42.

(b) *Chubb v. Priest*, 1 L. T. 142.

(c) *Collins Co. v. Brown*, 3 K. & J. 428; *Collins Co. v. Cowen*, 3 K. & J. 428.

(d) *Taylor v. Taylor*, 23 L. J. Ch. 255.

(e) *Stephens v. Peel*, 16 L. T. N. S. 145.

(f) *Massam v. J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748.

(g) *Bradley v. Norton*, 33 Conn. 157; R. Cox, 331.

(h) *Burke v. Cassin*, 45 Cal. 467; 13 Amer. Rep. 204.

(i) *Curtis v. Bryan*, 2 Daly, 212; R. Cox, 434.

(k) *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Amer. Rep. 401.

(l) *Meneely v. Meneely*, 17 Sickles, 427.

(m) *Rodgers v. Nowill*, 6 Hare, 325; 5 C. B. 109; 3 De G. M. & G. 614.

(n) *Ransome v. Bentall*, 3 L. J. Ch. 161. And see *Green v. Polgham*, 1 S. & S. 398; *James v. James*, L. R. 13 Eq. 421; *Lazenby v. Lazenby*, Dig. 160; *Gillis v. Hall*, R. Cox, 596. Also *Wilder v. Wilder*, Dig. 372 ("J. B. Wilder & Co.'s Stomach Bitters"); *Weston v. Hemmons*, 2 Vict. L. R. Eq. 121 ("Weston's Wizard Oil"); *Pilkins v. Blackman*, 13 Bl. C. C. 440 ("Dr. J. Blackman's Genuine Healing Balsam"); *Gouraud v. Trust*, 10 N. Y. Sup. Ct. 627 ("Gouraud's Oriental Cream, or Magical Beautifier"); *Weston v. Ketcham*, (1) and (2) 39 N. Y. Super. Ct. 54; 51 How. Pr. 456 ("Capt. S. Pepper's Extra Signal Oil"); *In re Roland*, 10 U. S. Pat. Gaz. 980 ("Dr. Lobenthal's Essentia Antiphthisica"); *Swift v. Peters*, 11 U. S. Pat. Gaz. 1110 ("The John C. Ragdale Ammoniated Dissolved Bone"); *McLean v. Fleming*, 96 U. S. Rep. 245 ("Dr. C. McLane's Liver Pills"); *Davis v. Kennedy*, 13 Grant Up. Can. Ch. 523 ("Perry Davis' Vegetable Pain-Killer"); *Fulton v. Sellers*, 4 Brews. 42 ("Dr. J. M. Lindsay's Improved Blood Searcher"); *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461 ("Atwood's Physical Vege-

Second class
of trade
marks.—A
signature.

The second class of trade marks to which the Act allows registration is really little else than a subdivision of the first class, consisting, as it does, of "a written signature, or copy of a written signature of the individual or firm applying for registration thereof as a trade mark," to which there may be added, as before, "any letters, words, or figures, or combination of letters, words, or figures, or of any of them." The signature of an individual or firm is in fact the name of the individual or firm printed or written in a "particular and distinctive manner," and as such, even before the Registration Acts, necessarily exhibited characteristics which could hardly be copied without the presumption being irresistible that the imitation was fraudulent and intended to invade the rights of the person whose signature was in question. In the cases of *Farina v. Silverlock* (a) and *Welch v. Knott* (b), the signature formed an important part of the trade mark concerned, and in America the signatures of individuals and firms have been admitted to registration on the same principle. Under the Act of 1875, § 10, there was no necessity for the signature to be that "of the individual or firm applying for registration thereof as a trade mark," but that is now required by § 64 of the Act of 1883, so that an individual or firm will not in the future be able to register the signature of the person or firm to whose business he or they succeeded, unless that is an old mark, having been used as such before the passing of the Act of 1875. However, when the signature is once registered as a trade mark, whether with or without additions, it will descend and be assignable just

table Jaundice Bitters"); *Hostetter v. Fowinkle*, 1 Dill. 329, and *Hostetter v. Anderson*, 1 V. R. Eq. 7 ("Hostetter's Celebrated Stomach Bitters"); *Radway v. Coleman*, 15 Grant Up. Can. Ch. 50 ("Radway's Ready Relief"); *Chinn v. Thomas*, 5 Vict. L. R. Eq. 188 ("Hood & Co.'s Soluble Sheep Dip"); *Hanford v. Westcott*, 16 U. S. Pat. Gaz. 118

("Hanford's Chestnut Grove Whiskey"); *Morgan v. Rogers*, 26 *ib.* 1118 ("Dr. Haynes' Arabian Balsam").

(a) 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650.

(b) 4 K. & J. 747. See *Mossam v. Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *In re Farina* (2), 27 W. R. 456; *In re Farina* (3), Dig. 654; *In re Maignen*, 28 W. R. 759.

as any other trade mark, without its new owner being liable to any imputation of representing the person whose signature is employed to be still in charge of the business, although formerly the use of a mark of this description might not improbably have been held to convey some such representation to the public. To a case of this description Lord Cranworth's observations very directly apply, when, speaking of a buyer of a business using the name of a former maker, he said (a), "the question in every such case must be whether the purchaser in continuing the use of the original trade mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such a case I see nothing to make it improper for the purchaser to use the old trade mark, as the mark would in such a case indicate only that the goods so marked were made at the manufactory which he had purchased." The provision in the Acts of 1875 (b) and 1883 (c) that a trade mark "shall be assigned and transmitted only in connexion with the goodwill of the business" will enable the purchaser to use the trade mark so acquired by him without his motives being open to question, and will at the same time ensure that marked goods purchased by the public shall, except in cases of punishable infringement, be produced at the works from which they purport to have come.

The third class of marks comprises "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use," to which again may be added "any letters, words, or figures, or combination of letters, words, or figures, or of any of them." Third class of trade marks. —A distinctive device, &c.

The important feature which is absolutely necessary in all the varieties of trade marks included in this class is Distinctive-ness required.

(a) *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523.

(b) § 2.
(c) § 70.

that of distinctiveness; each mark must be such that, if a question of infringement arises, it shall be perfectly clear what it is that is being infringed, and that this something is quite different from all other marks used upon the same class of goods.

Composition of trade mark, and manner of use alluded to.

Of the words "device, mark, brand, heading, label, or ticket," some point more directly to the matter of which the trade mark is composed, others to the manner in which it is affixed to the vendible article.

"Device" and "mark."

"Device" and "mark" seem, at first sight, wide enough to include any of the symbols or combinations of which a trade mark could consist. It has, however, been held, under the Act of 1875, that they do not include a mere word, or collocation of letters or figures, however strangely combined, or singular in their application (*a*), and the decision seems to be equally applicable to the Act of 1883, though such combinations can now be registered as fancy words.

Mode of application indicated by them.

When used as indicative of the mode of application of the trade mark, these words will include such cases as where the mark is stamped on shirts (*b*) or other cotton goods (*c*), or imprinted on sticks of liquorice (*d*), or sealing-wax (*e*), and, generally, any cases which do not come within the remaining and more exact terms.

"Brand."

"Brand" refers to cases in which the trade mark is branded on metal goods (*f*) or on wine-casks (*g*), or corks (*h*).

"Heading."

"Heading" applies to cases where, in addition to the ordinary label on the goods, there is a separate label

(*a*) *Ex parte Stephens*, 3 Ch. D. 659.

(*b*) *Ford v. Foster*, L. R. 7 Ch. 611.

(*c*) *Henderson v. Jorss*, Dig. 198; *Carver v. Pinto Leite*, L. R. 7 Ch. 90; *Broadhurst v. Barlow*, W. N. 1872, p. 212; *Carver v. Bowker*, Dig. 581.

(*d*) *McAndrew v. Bassett*, 4 De G. J. & S. 380.

(*e*) *In re Hyde & Co.* 7 Ch. D. 724.

(*f*) *Molloy v. Downman*, 3 My. & Cr. 1; *Millington v. Fox*, *ib.* 338; *Crawshay v. Thompson*, 4 M. & G. 357; *Hall v. Barrows*, 82 L. J. Ch. 548; and 4 De G. J. & S. 150, &c.

(*g*) *Seizo v. Provezende*, L. R. 1 Ch. 192; *Moet v. Couston*, 33 Beav. 578; *Ponsardin v. Peto*, 33 Beav. 642, &c.

(*h*) *Moet v. Clybourn*, Dig. 533; *Moet v. Pickering*, 8 Ch. D. 372.

affixed above it, on which the special mark is exhibited (a). It also applies to the kind of marks specially applicable to the case of textile fabrics, in which a heading of special pattern is inwoven into the edge of the goods (b).

"Label" indicates an impression of a trade mark upon a piece of paper, or some other thin substance, which is made to adhere to the goods to which it is applied, or to the vessel containing them. Thus, in *Wotherspoon v. Currie* (c), the label was affixed to packets of starch; in *Bass v. Dawber* (d) to bottles of beer; in *Blackwell v. Crabb* (e), *Cocks v. Chandler* (f), *Cotton v. Gillard* (g), and other cases, to bottles of pickle.

"Ticket" points to a mark also impressed upon a separate material, but only loosely attached to the goods the make of which it indicates. Thus the trade mark of a wire manufacturer consisted of an anchor stamped on the tallies, or metal labels, attached to the bundles of his wire (h); the trade mark of a clothier was imprinted on a ticket pinned on to his wares (i).

The question, "What is a trade mark?" is, however, less directed to the manner in which the trader's symbol is attached to his goods than to its composition, and the varieties of mark which will merit and receive protection.

The original form of trade mark was probably the representation of some animal, or other natural object, or mathematical figure, as the Hall mark of the lion or leopard's head, the Freemasons' square and compasses (k), or the

(a) *Ex parte Stephens*, 24 W.R. 968.

(b) *Harter v. Souvasoglu*, W. N. 1875, pp. 11-101; *Carrer v. Bowker*, Dig. 581; *Robinson v. Pinlay*, 9 Ch. D. 487; and see per Sir G. Jessel, M. R., in *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 484.

(c) L. R. 5 H. L. 508. See *Gilman v. Hunnewell*, 122 Mass. 139.

(d) 19 L. T. N. S. 626.

(e) 86 L. J. Ch. 504.

(f) L. R. 11 Eq. 446.

(g) 44 L. J. Ch. 90.

(h) *Edelsten v. Edelsten*, 1 De G. J. & S. 185.

(i) *Hirst v. Denham*, L. R. 14 Eq. 542.

(k) As to this Freemasons' emblem, it has been held in the United States that it is so generally appropriated to a special purpose as not to be registrable by a private firm, even in combination: *In re Tolle*, 2 U. S. Pat. Gaz. 415. But this decision was not followed in *In re Thomas*, 14 U. S. Pat. Gaz. 821, though in *Ex parte Smith* (3), 16 U. S. Pat. Gaz. 764, registration was refused to the word "Masonic."

Government broad arrow. Such a mark would be independent of language, and would serve to distinguish goods of a certain make, even for the illiterate.

Examples.

Such marks are still frequently employed, and this clause specially includes them. To this class belong the marks of an anchor (*a*), an eagle (*b*), a lion (*c*), an elephant (*c*), a cross (*d*), a pyramid (*e*), a bell (*f*), a hand (*g*), a cock (*h*), a rising sun (*i*), or a triangle (*k*).

A crest.

A crest is just as capable of becoming a trade mark as any other arbitrary device (*l*). In *Beard v. Turner* (*m*) Sir W. P. Wood, V.-C., said, "I am not prepared to say or hold that a man putting his crest should not so put it as to establish his right to say, 'Nobody shall use my crest.' It is incumbent on him, as on every plaintiff, to show that the crest is an essential part of his trade mark." The readiest way of proving this is now by reference to the Register of Trade Marks.

Portrait.

The portrait of a person whose name has become descriptive of the goods, is not sufficiently distinctive to be registered as a good trade mark (*n*); but the portrait of a public character has been allowed to be registered in America (*o*).

Initials.

Before the Trade Marks Act of 1875 a trade mark might consist of initials, either alone, or in combination with

(a) *Edelsten v. Edelsten*, 1 De G. J. & S. 185.

(b) *Standish v. Whitwell*, 14 W. R. 512.

(c) *Henderson v. Joss*, Dig. 198.

(d) *Cartier v. Carlile*, 31 Beav. 292; *Cartier v. Westhead*, Dig. 199; *Cartier v. May*, Dig. 200.

(e) *Bass v. Dawber*, 19 L. T. N. S. 626.

(f) *Bell v. Bell*, Dig. 514.

(g) *Allsopp v. Walker*, Dig. 545.

(h) *In re Walkden Aërated Waters Co.*, Dig. 558.

(i) *Morse v. Worrell*, 10 Phila. 168.

(k) *In re Worthington*, 14 Ch. D. 8.

(l) In *Steinthal v. Samson*, Dig. 546, the trade mark consisted of the

crest, arms, and motto of the plaintiff's family. See *Robinson v. Finlay*, 9 Ch. D. 487; *Hargreaves v. Smith*, 11 Ch. D. 388; *In re Rosing*, Dig. 621; *In re Farina* (1), 26 W. R. 261; *In re Farina* (3), Dig. 654; *Godillot v. Hazard*, 81 N. Y. 263; also Instructions, as to royal, national, municipal, &c., arms.

(m) 18 L. T. N. S. 746. In *Standish v. Whitwell*, 14 W. R. 512, the defendant was restrained from using what he alleged to be his own crest as his trade mark.

(n) *In re Anderson*, W. N. 1884, p. 75.

(o) *Ex parte Sullivan & Burke*, 16 U. S. Pat. Gaz. 765; *Ex parte Pace, Talbot & Co. ib.* 909.

Initials in combination with other marks

other ingredients (a). Now, however, it would be difficult to assert that initials alone, printed in the usual manner, and without any distinguishing peculiarities of shape, colour, &c., could be described as "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words." Where the letters are combined together into the form of a monogram, or enclosed within a distinctive border, or are in any other way used in such a combination as to be distinguishable from the same letters used in the plain ordinary way, it might have been supposed that a device or mark would be constituted capable of registration; but in *Lucke v. Webster* (b), the late Master of the Rolls, while admitting to registration as an old mark a monogram on a shield, suggested that he could not have done so if it had been a new mark. In the American case of *United States v. Marble* (c), the Commissioner of Patents considered that the letters "W. G." in a monogram were registrable as a trade mark.

Marks which have a mechanical purpose, e. g., to serve as guides for the equal division of the article to which they are applied, cannot deprive other manufacturers of the right to use somewhat similar marks for the same purpose (d). Marks with a mechanical purpose.

In some American cases it has been held or suggested that a device which represents the article to which it is intended to be applied must be treated as descriptive and incapable of appropriation, in the same way as words which are descriptive of the article to which they are applied are refused recognition as fancy names. Thus the representation of a pig, attached to packages of lard (e), the representation of a fish, for fishing-lines (f); the representation of a bed made under a special patent, for beds so made (g); the Marks representing the article.

(a) See p. 67, *infra*.

(b) M. R., April 4th, 1879.

(c) 22 U. S. Pat. Gaz. 1866.

(d) *Dausman and Drummond Tobacco Co. v. Ruffner*, 15 U. S. Pat. Gaz. 559.

(e) *Popham v. Wilcox*, 66 N. Y. 69.

(f) *In re Pratt & Farmer*, 10 U. S. Pat. Gaz. 866.

(g) *Tucker Manufacturing Co. v. Boyington*, 9 U. S. Pat. Gaz. 455.

representation of a barrel composed of alternate light and dark staves, for barrels of flour so made up (a); the representation of a twig with three leaves and a plum, for medicated prunes (b). But there is no English authority in favour of such devices being incapable of appropriation, and it is very doubtful whether the principle would be recognised in this country. In the case of the descriptive name, the right to use it could hardly be separated from the right to make and sell the article; but there is no imperative necessity that every one who has the latter right should also be entitled to sell the article under a mark containing a representation of it. If the trade are entitled to sell the article, and to sell it by its appropriate name, their requirements appear to be satisfied. However, the question would probably be treated as being, to some extent at least, one of degree.

*Harter v.
Sourazoglu.*
"Heading."

In *Harter v. Sourazoglu* (c) the trade mark consisted of a certain combination of purple, pink, and green threads, nine stripes in three gradations, which were woven as a heading into cotton goods, which were forwarded to the markets of Turkey and the Levant. The owners of this mark having filed a bill for an injunction against a rival trader who had copied the mark, Sir C. Hall, V.-C., held "that a heading could be the subject of a trade mark, that the evidence in the case showed that this heading was distinguished from others in Turkey, and that it had become a trade mark, although it was sometimes associated with stamps on the goods, of the lion and the sun, and other devices. Customers had bought goods because of this particular heading, and he therefore considered that the plaintiffs who had adopted it were entitled to the protection they asked, and that no other persons could use it" (d).

(a) *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.

(b) *Ex parte Smith* (2), 16 U. S.

Pat. Gaz. 679.

(c) W. N., 1875, pp. 11-101.

(d) And see per Sir G. Jessel.

Besides the varieties of marks to which reference has already been made, the third class of registrable trade marks under § 64 of the Patents Act, 1883, also includes "a fancy word or words not in common use." This was not so under the Trade Marks Registration Act, 1875—7, which entirely excluded fancy words from registration as new marks, and only admitted such as had been used before the Act of 1875. This exclusion was, however, found to cause great annoyance and inconvenience, since a fancy name is of all trade marks the most useful, seeing that it affords so easy a mode of inquiring for and obtaining goods produced by the precise manufacturer whose production is desired. For this reason the use of such words as trade marks has been more general than that of any other description of mark, and during the period of exclusion from registration recourse was had to all kinds of contrivances for obtaining the registration and at least partial protection of fancy names. The present Act places the matter on a proper footing.

For fancy names to be capable of exclusive appropriation by registration they must be "distinctive," and "not in common use," that is to say, they must be peculiar in their application to the goods manufactured at a certain establishment, and be capable of being understood by the public as ascribing the article to which they are applied to the manufacture of that establishment, and that only. Whether, however, a name selected for this purpose is really and truly a fancy name is often a question of extreme nicety.

The word may be purely descriptive, that is to say, it may express accurately and appropriately the material or mode of composition of the goods to which it is affixed, and unless the exclusive manufacture of such goods is

M. R., in *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434. Also *Carver v. Bowker*, Dig. 581, and *Robinson v. Finlay*, 9 Ch. D. 487,

where a heading of coloured threads was a part of the combination mark, though not mentioned in the report.

protected by a patent, and the same result cannot be attained without infringement of the patent, all the world has the right to make and sell such goods; and further, when the goods are manufactured and in course of sale, not only has the right, but is in duty bound to describe them, for the proper information and protection of the public, in such manner as will convey the most correct idea. Hence the original maker can claim no exclusive right in the properly descriptive name, nor would it be in accordance with the principles of Equity that he should be able to do so, for, as was well said by Mr. Justice Strong, in the Supreme Court of the United States (a), "Equity will not enjoin against telling the truth."

*Young v.
Macrae.*

The reasoning of Sir W. P. Wood, V.-C., in *Young v. Macrae* (b), affords a good example of the just way of considering cases of this description. In that case the plaintiffs, who held a patent for manufacturing a kind of oil which they called "Paraffin oil," filed a bill against the defendant, who sold a substance which he styled "Kerosene oil," or "American Paraffin Oil." The case coming on on motion for injunction, the Vice-Chancellor said, "In the patent the process is described as 'a distillation of coal so as to obtain oil containing paraffin, and from this oil I obtain paraffin.' So he calls it paraffin oil because it contains paraffin. Here is a well-known substance called 'paraffin.' A chemist discovers that by the same process by which paraffin is produced, an oil containing paraffin, and from which paraffin can again be produced, is obtainable. Therefore, it being an oil containing paraffin, and producing paraffin, he calls it 'paraffin oil.' It is not a fanciful or whimsical name, but it describes the thing which he has produced. A man cannot take out a patent for a natural substance, but he can take out a patent for arriving at that natural substance, and he may christen it,

(a) *Canal Co. v. Clark*, 13 Wall.
311.

(b) 9 Jur. N. S., 322.

putting aside all other people, having called it by that name." The Vice-Chancellor then put the case of a man extracting sugar from beet-root by a patented process, and calling the extract "beet-root sugar" for a period of ten years. In such a case, when beet-root sugar was asked for, it would be known that his was meant, because he was the only man who made it. "The name," the Vice-Chancellor said, "does not become a trade mark, but it gets fixed to his sugar simply because nobody else could make it. Then, suppose that another man found out another method of making sugar from beet-root, and so extracted it, not wanting to patent it, and described it as 'beet-root sugar,' may he not call it 'beet-root sugar' because the other gentleman for ten years has been the manufacturer of it, and sold it as such? I think the question of the fancifulness of the name is a question whether it is taken by way of trade mark or not. All he (*i. e.*, the plaintiff) has done here is this, he has found out an article which is a natural product, and he has given that natural product a name." "This is not like the case of the 'Medicated Mexican Balm,' which is a name extravagantly ridiculous. I therefore should not assume *mala fides* against a person who calls the thing what it is. It is paraffin and it is oil, therefore paraffin oil. There is paraffin in it, and paraffin to be obtained from it, and it is American." Injunction refused.

In a later case (a) the same Vice-Chancellor referred to the above case of *Young v. Macrae* (b), and remarked that "if the evidence had gone to show that the plaintiff had been the first to apply the name 'paraffin' to the oil, he would have granted an injunction (c); but that he had there

(a) *Braham v. Bustard*, 1 H. & M. 447.

(b) 9 Jur. N. S. 322.

(c) So in *Eno v. Stephens*, Dig. 609, the term "Fruit Salt" was protected at the instance of the person who was the first to use it;

but see *Siegert v. Findlater*, 7 Ch. D. 807; *Linoleum Manufacturing Co. v. Nairn*, 7 Ch. D. 834; and *Canal Co. v. Clark*, 18 Wall. 311, as to a name which is appropriated to an article.

had it proved that the name 'paraffin oil' had long been known as the scientific name of the article, and that the defendant could not well have called it anything else."

Name become
publici juris.

Again, a word which was first applied to, or was even invented for the sole and express purpose of designating a substance or composition may prove, on investigation, to have ceased to retain the characteristic which it once possessed, of conveying the idea of the goods being of a particular manufacture, in which case the person who first used the word, though its inventor, will cease to have any exclusive rights in it, since it will have become purely descriptive of an article which all may freely make (a). The name thus becomes *publici juris*, and not only can be, but ought to be employed by all who manufacture and sell an article which they are at perfect liberty to manufacture and sell, and of which the name in question is generally recognised as the appropriate designation. This point is well stated by Lord Selborne, C., in *Singer Manufacturing Co. v. Loog* (3) (b), where he says, "The reputation acquired by machines of a particular form or construction is one thing, the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right under colour of the former to invade the latter, neither have the plaintiffs any right under colour of the latter to claim (in effect) a monopoly of the former. If the defendant has a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way."

Effect of
registration.

The registration as a trade mark of a name of this

(a) *E.g.*, "Worcestershire Sauce"—*Lea v. Millar*, Dig. 513; "Calhoun Plough," *In re Hall & Co.*, 13 U. S. Pat. Gaz. 229; "Holbrook's School Apparatus," *Sherwood v. Andrews*,

3 Am. L. Reg. N. S. 588.

(b) 8 App. Cas. 27; and see per Mellish, L. J., in *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434—456.

description will somewhat complicate the question, as registration of a trade mark is to be *prima facie* evidence, and, after five years' registration, conclusive evidence of the right of the registered owner to the exclusive use of such trade mark (a); but the wording of the Act is entirely directed to the registration of "a trade mark," the exclusive use of "a trade mark," &c., and since a name which has become *publici juris*, whether registered or not, cannot be a "trade mark" within the definition section of the Act, because it contains nothing distinctive, it seems that this enactment does not preclude a defence on the ground that the name so registered is in fact no trade mark, and was registered, or is continued on the register, by error. At all events, whether that be so or not, it has been decided by the Court of Appeal that five years' registration cannot protect a descriptive term which has been registered as a trade mark from being removed from the register on the ground of its descriptiveness (b); and the remarks of Sir G. Mellish, L. J., in *Ford v. Foster* (c), appear to be equally applicable since the Act as before it. "There is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successor in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been instanced of Harvey's sauce (d). Then, 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

(a) Patents Act, 1883, § 76.

(b) *In re Palmer* (1) and (3), 21 Ch. D. 47; 24 *ib.* 504. The wisest course to take in such a case is no doubt to apply to rectify the register by the removal of the offending mark, e.g., *Leonard & Ellis v. Wells & Co.* 58 L. J. Ch. 213; C. A. 32 W. R. 530.

(c) L. R. 7 Ch. 611.

(d) With respect to this example, an injunction was granted by Sir J. Romilly, M. R., in 1858, to restrain a representation that the defendant's sauce was that of the inventor's successor in business. See *Lazenby v. Lazenby*, Dig. 160. But in *Lazenby v. White*, 41 L. J. Ch. 354, it was admitted that the name was common to the trade.

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. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, or can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent a trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone" (a).

The three-mark rule.

When the Trade Marks Registration Act, 1875, first came into operation, it was found that in many trades application was made by two or more traders for the registration of substantially identical marks, the fact being that the marks had not previously come into collision on account of their being used in different parts of the country, without any suspicion of want of *bona fides* on the part of any of the rival applicants. If the strict letter of the Act and Rules had been adhered to, much injustice would have been done to the later applicants, whose applications must have been refused; and the Commissioners of Patents, therefore, framed the rule that identical or similar *old* marks might be registered by different persons in the same trade up to the number of three, but not more; the rule providing that if the mark had been used *bona fide* by more than three persons it must be treated as common to the trade, and no registration at all be allowed. This rule was recognised by Courts of First Instance in numerous cases (b);

(a) Thus, the marks of the crown and horseshoe were proved to be common to the iron trade: in *In re Barrows*, 5 Ch. D. 353; the term "Braided Fixed Stars" to be common to the match trade, as describing cigar-lights having their heads secured by braiding: *In re Palmer*

(8), 24 Ch. D. 504; and see § 9 of the Merchandise Marks Act, 1862.

(b) *In re Walkden Co.*, Dig. 558; *In re Powell*, Dig. 559; *In re Hyde & Co.*, Dig. 593; *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Ex parte Sales Pol-*

and in two cases (a) three substantially identical *new* marks were allowed to be registered for the same goods by different traders with consent of all the parties concerned. The rule has now found its way into the Patents Act, 1883, in the shape of a provision in § 74, *q. v.*, that any device which was before August 13th, 1875, publicly used by more than three persons on the same or a similar description of goods shall, for the purposes of the section (*i.e.*, for the purpose of registration as an addition to a trade mark, exclusive rights therein being disclaimed) be deemed common to the trade in such goods (b).

In the majority of cases in which the question has been raised whether a word was descriptive of the article to which it was applied, or distinctive of the maker by whom that article was made, the question has been whether the word, according to the ordinary usage of the English language, indicated correctly the nature or origin of the article. Thus, "Porous Plasters" (c), "Croup Tincture" (d), and so on. But in a considerable number of instances the question has been whether a word, which had no descriptive signification to persons unacquainted with the particular trade, did or did not indicate to persons versed in the trade an article prepared according to a definite process, or a machine constructed on a definite principle, the rule being that if the word indicates such a process or principle it is descriptive and incapable of exclusive appropriation.

This difficulty has especially arisen with respect to articles made under a patent, which can only be made by the patentee during the existence of the patent, and to which, consequently, his name or some other special name usually becomes attached. "Where a patented article is known

Name indicative of a principle of construction.

Articles made according to a patented process.

lard & Co., Dig. 620; *In re Kuhn & Co.*, 58 L. J. Ch. 238; *In re Brook*, 26 W. R. 791; *In re Hodson & Co.*, 26 Sol. J. 43; *Benbow v. Low* (4), 44 L. T. N. S. 875.

(a) *In re Walkden Co.*, Dig. 558; *In re Vergaras*, V.-C. H., June 3rd, 1881.

(b) Common user is not proved by the books containing applications for registration: *Orr-Ewing & Co. v. Johnston & Co.*, 13 Ch. D. 434.

(c) *In re Brandreth*, Dig. 626.

(d) *In re Roach*, 10 U. S. Pat. Gaz. 333.

in the market by any specific designation, whether of the name of the patentee, or otherwise, every person at the expiration of the patent has a right to manufacture and vend the same under the designation thereof by which it was known to the public. . . . The original patentee or his assignees have no right to the exclusive use of the designation as a trade mark. Their rights were under the patent and expired with it" (a).

The sewing-machine cases.

Thus in the case of *The Wheeler & Wilson Manufacturing Co. v. Shakespeare* (b), Sir W. M. James, V.-C., and in that of *The Singer Mfg. Co. v. Wilson* (c), Sir G. Jessel, M. R. (affirmed by the Court of Appeal), refused to assist an attempt at continuing the monopoly in sewing machines which had been patented, after the expiration of the patent, by a claim to the exclusive use, by way of trade mark, of the name by which the peculiar principle of construction had come to be generally known. In the latter case the House of Lords declined to decide whether the name "Singer" was indicative of a maker or of a principle of construction, the defendant's evidence being incomplete, but it was assumed 'that if the latter had been proved, the defendant would have succeeded (d), and that result actually took place in *Singer*

(a) Per Treat, J., in *Singer Manufacturing Co. v. Stanage*, 2 McCrary 512; and see *Edelsten v. Vick*, 11 Hare, 78; *Young v. Macrae*, 9 Jur. N. S. 322; *Green v. Rooke*, W. N., 1872, p. 49; *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298; *Same v. Anderson*, W. N., 1883, p. 185; *Lazenby v. White*, 41 L. J. Ch. 354; *Condy v. Mitchell*, 37 L. T. N. S. 766; *James v. James*, L. R. 13 Eq. 421; *Cheavin v. Walker*, 5 Ch. D. 850; *Massam v. Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *Siegert v. Pindlater*, 7 Ch. D. 801; *Linoleum Manufacturing Co. v. Nairn*, 7 Ch. D. 834; *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 32 W. R. 530, 1884, per Cotton L. J.; *In re*

Richardson, 3 U. S. Pat. Gaz. 120; *Tucker Manufacturing Co. v. Boyington*, 9 U. S. Pat. Gaz. 455; *Cahal Co. v. Clark*, 13 Wall. 323, per Strong, J.; *In re Kane & Co.*, 9 U. S. Pat. Gaz. 105; *In re Consolidated Fruit Jar Co.*, 14 U. S. Pat. Gaz. 269; *Ex parte Consolidated Fruit Jar Co.*, 16 *ib.* 679; *Fairbanks v. Jacobus*, 14 Bl. O. C. 337; *Burton v. Stratton*, 78 L. T. 349. See *In re Eastman*, W. N., 1880, p. 128, in which registration was granted to a name which had been used for soap made under a patent.

(b) 39 L. J. Ch. 36.

(c) 2 Ch. D. 434.

(d) 3 App. Cas. 376.

Mfg. Co. v. Loog (3) (a). So in America, in *Singer Mfg. Co. v. Larsen* (b), and *Singer Mfg. Co. v. Stanage* (c), though in the earlier Scotch case of *Singer Mfg. Co. v. Kimball & Morton* (d) the decision was in favour of the company.

And even where no patent is obtained, "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" (e). Thus it was held by the Court of Appeal that a firm who invented a new description of oil, and called it "Valvoline," had no right of trade mark in the word (f).

Of course, in any case which arises, any element of actual intentional fraud will be taken into consideration, and the Court will, in the exercise of its general jurisdiction for the repression of fraud, award an injunction or damages in a case in which, but for the fraud, no remedy would have been given. Thus, for instance, in a case in which the infringer might have taken with impunity the name of an article invented by another, but not content with so doing, described his own manufacture as "the original" article, he was restrained by injunction from the use of that misleading epithet (g).

The general principle, however, is that where a name used by way of a trade mark either was originally, or has since come to be, merely descriptive of the article to which it is attached, so that while serving to indicate what the article is, it does not serve to connect it with any particular manufacturer or manufacturing establishment

New name
for new
article.

Actual fraud.

Name merely
descriptive
cannot be
protected.

(a) 8 App. Cas. 15.

(b) 8 Biss. 181.

(c) 2 McCrary, 512.

(d) Ct. Sess. Cas., 3rd Ser. XI., 267.

(e) Per Fry, J., in *Siegert v. Findlater*, 7 Ch. D. 801; and see *Linoleum Manufacturing Co. v. Nairn*, *ib.* 834.

(f) *In re Leonard & Ellis*, 32 W. R. 530.

(g) *Cocks v. Chandler*, L. R. 11 Eq. 446. The presumption of fraud may, however, be refuted, as by a fair statement of the maker's own name: *Browne v. Freeman*, 12 W. R. 305.

that name cannot be protected as a trade mark (a), or registered as special and distinctive. The Act establishing registration "takes nothing away from anybody. It

Descriptive words.

(a) The following are cases in which words have been held to be descriptive:—*Thomson v. Winchester*, 19 Pick. 214 ("Thomsonian Medicines"); *Petridge v. Wells*, R. Cox, 180 ("Balm of Thousand Flowers"); *Wolfe v. Goulard*, 18 How. Pr. 64 ("Schiedam Schnapps"); *Burke v. Cassin*, 45 Cal. 467 (do.); *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125 (do.); *Corwin v. Daly*, 7 Bos. 222 ("Club House Gin"); *Young v. Macrae*, 9 Jur. N. S. 322 ("Paraffin Oil"); *Phalon v. Wright*, 5 Phila. 464 ("Extract of Night-Blooming Cereus"); *Binninger v. Wattles*, 28 How. Pr. 208 ("Old London Dock Gin"); *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298 ("Liebig's Extract of Meat"); *Same v. Anderson*, W. N. 1883, p. 185 (do.); *Canwell v. Davis*, 58 N. Y. 223 ("Ferrophosphorated Elixir of Calisaya Bark"); *Town v. Stetson*, 4 Abb. Pr. N. S. 218 ("Desiccated Codfish"); *Canal Co. v. Clark*, 13 Wall. 311 ("Lackawanna" coal); *Choynski v. Cohen*, 39 Cal. 501 ("Antiquarian Book Store"); *Gray v. Koch*, 2 Mich. N. P. 119 ("Mammoth Wardrobe"); *In re Hauthaway* (1 and 2), U. S. Pat. Comm. Decia. 1871, 97, 284 ("Beeswax Oil"); *In re Roberts* (4), *ib.* 100 ("Razor Steel"); *In re Blakeslee & Co.*, *ib.* 284 ("Cundurango Ointment, C. O."); *Ex parte Palmer*, *ib.* 289 ("Invisible Face Powder"); *Rowland v. Breidenbach*, Dig. 386 ("Macassar" oil); *James v. James*, L. R. 13 Eq. 421 ("Lieut. James' Horse Blister"); *Green v. Rooke*, W. N. 1872, p. 49 ("Golden Ointment"); *In re Johnson & Co.*, 2 U. S. Pat. Gaz. 315 ("Parsons' Purgative Pills, P. P. P." and "Johnson's American Anodyne Liniment, Established A.D. 1810"); *In re Graham*, 2 *ib.* 618 ("New Manny Harvester"); *In re Richardson*, 3 *ib.* 120 ("Richardson's Patent Union Leather-splitting Machine"); *In re The American Sardine Co.*, 3 *ib.* 495 ("American Sardines"); *Hardy v.*

Cutter, 3 U. S. Pat. Gaz. 468 ("Old Bourbon" whiskey); *Tucker Manufacturing Co. v. Boyington*, 9 *ib.* 455 ("Tucker Spring Bed"); *Browne v. Freeman*, 12 W. R. 305 ("Chlorodyne"); *Bulloch, Lade & Co. v. Gray*, 19 Journ. of Jurisp. 218 ("Loch Katrine" whiskey); *Godillot v. Hazard*, 81 N. Y. 263 ("Julienne" soup); *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538 ("Tasteless" drugs); *In re Lawrence & Co.*, 10 *ib.* 163 ("Für Familien Gebrauch," and "Lawrence Feiner Familien Flannel"); *In re Roach*, 10 *ib.* 333 ("Croup Tincture"); *Gilman v. Hunnewell*, 122 Mass. 139 ("Cough Remedy"); *In re Goodyear Rubber Co.*, 11 U. S. Pat. Gaz. 1062 ("Crack-proof" indiarubber); *In re Warburg & Co.*, 13 *ib.* 44 ("Cachemire Milano"); *Ayer v. Rushton*, 7 Daly, 9 ("Cherry Pectoral"); *Helmbold v. Helmbold Manufacturing Co.*, 53 How. Pr. 453 ("Highly Concentrated Compound Fluid Extract of Buchu"); *In re Dole Brothers*, 12 U. S. Pat. Gaz. 939 ("Egg Macaroni"); *Siegert v. Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *In re Horsburgh*, 53 L. J. Ch. 237, and *In re Leonard & Ellis*, 53 L. J. Ch. 233; O.A. 32 W. R. 530 ("Valvoline" oil); *In re Rader & Co.*, 13 U. S. Pat. Gaz. 596 ("Ironstone" water pipes); *In re Saurion & Co.*, Dig. 625 ("Anglo-Portugo" oysters); *In re Brandreth*, Dig. 626 ("Porous" plasters); *Ex parte Safety Powder Co.*, 16 U. S. Pat. Gaz. 136 ("Safety" powder); *Fairbanks v. Jacobus*, 14 Bl. C. C. 337 ("Fairbanks' Patent"); *Linoleum Manufacturing Co. v. Nairn*, 7 Ch. D. 834 ("Linoleum"); *Lazenby v. White*, 41 L. J. Ch. 354 ("Harvey's Sauce"); *Wotherspoon & Co. v. Gray & Co.*, Ct. Sess. Cas., 3rd Ser. II., 38 ("Victoria" lozenges); *Popham v. Wilcox*, 66 N. Y. 69 ("Prime Leaf" lard); *Sherwood v. Andrews*, 3 Amer. L. Reg. N. S. 588 ("Holbrook's School Apparatus"); *Alleghany Fertilizer*

confers, upon certain conditions and under particular circumstances, rights which, but for the Act of Parliament,

Co. v. Woodside, 1 Hughes, 115 ("Ammoniated Bone Superphosphate of Lime"); *Frese v. Bachof* (2), 14 Bl. C. C. 432 ("Hamburg" tea); *Ex parte Alden*, 15 U. S. Pat. Gaz. 389 ("Evaporated" articles of food); *Ex parte Marsching & Co.*, 15 ib. 294 ("French" paints); *Ex parte Cohn* (1), 16 ib. 680 ("Standard A" cigars); *Ex parte Cohn* (2) 16 ib. 680 ("Druggists' Sundries" cigars); *Ex parte Smith*, (2) 16 ib. 679 ("Medicated Prunes"); *Ex parte Thompson, Derby & Co.*, 16 ib. 137 ("Swing" scythe-sockets); *Ex parte Smith* (3) 16 ib. 764 ("Masonic" cigars); *Ex parte Waeferling*, 16 ib. 764 ("Granulated Dirt-killer Soap"); *Laplough v. Beedler*, C. A., Nov. 12th, 1880 ("Pyretic Saline"); *Day v. Neale*, V. C. B., May 24th, 1881 ("White Chemical Extract," "Brown Chemical Extract," "Red Paste," "Red Drench," "Gaseous Fluid," &c.); *Roberts v. Sheldon*, 8 Biss. 398 ("Parabola"—eye needles); *Van Beil v. Prescott*, 82 N. Y. 630 ("Rye and Rock" liquor); *Marshall v. Pinkham*, 52 Wisc. 572 ("Old Dr. S. Marshall's Celebrated Liniment"); *Hostetter v. Adams*, 22 U. S. Pat. Gaz. 943 ("Celebrated Stomach Bitters"); *Ex parte Brigham*, 20 ib. 891 ("Satin Polish" boots and shoes); *Ex parte Ams*, 23 ib. 344 ("Albany Beef"); *Ex parte Strasburger & Co.*, 20 ib. 155 ("Time-keeper" watches); *Ex parte Kipling*, 24 ib. 899 ("Cristalline" brilliants); *Electro Silicon Co. v. Levy*, 59 How. Pr. 469 ("Silicon" polishing powder); *Hegeman & Co. v. Hegeman*, 8 Daly, 1 ("Hegeman's Fermented Elixir of Bark, or Elixir of Calisaya Bark with Iron," "Hegeman's Compound Fluid Extract of Buchu," "Hegeman's, formerly Velpeau's, Celebrated Remedy for Diarrhoea"); *In re Ralph*, 25 Ch. D. 194 ("The Homewasher").

In the following cases descriptiveness has either not been alleged or has been held not to be established, and the words have been treated as

fancy words:—*Pidding v. How*, 6 Sim. 477 ("Howqua's Mixture"); *Perry v. Truefitt*, 6 Beav. 66 ("Medicated Mexican Balm."); *Taylor v. Carpenter* (1), 3 Story, 458 ("Persian Thread"); S. C. (2) 2 Wood. & M. 1 (do.); S. C. (3) 2 Sandf. Ch. 603 (do.); *Taylor v. Taylor*, 2 Eq. Rep. 290 (do.); *Hine v. Lart*, 10 Jur. 106 ("Ethiopian" stockings); *Fowle v. Spear*, 7 Penn. L. J. 176 ("Wistar's Balsam of Wild Cherry"); *Coffeen v. Brunton* (1), (2), 4 McLean, 516; 5 ib. 256 ("Chinese Liniment"); *Davis v. Kendall*, 2 R. I. 566 ("Pain Killer" medicine); *Davis v. Kennedy*, 13 Grant Up. Can. Ch. 523 (do.); *R. v. Dundas*, 6 Cox, 380 ("Everett's Premier" blacking); *Heath v. Wright*, R. Cox, 154 ("Kathairon"); *Fetridge v. Merchant*, 4 Abb. Pr. 156 ("Balm of Thousand Flowers"); *Williams v. Johnson*, 2 Bos. 1 ("Yankee Soap"); *Williams v. Spence*, 25 How. Pr. 366 (do.); *Williams v. Adams*, 8 Biss. 452 (do.); *Comstock v. White*, 18 How. Pr. 421 ("Dr. Morse's Indian Root Pills"); *Braham v. Bustard*, 1 H. & M. 447 ("Excelsior" soap); *McAndrew v. Bassett*, 4 De G. J. & S. 380 ("Anatolia" liquorice); *Faber v. Hovey*, Dig. 481 ("Star" pencils); *Rillet v. Carlier*, 61 Barb. S. C. 435 ("Grenade" syrup); *Smith v. Woodruff*, 48 Barb. 438 ("Sweet Op ponax of Mexico" perfume); *Burnett v. Phalon*, 3 Keyes, 594 ("Cocaine" hair oil); *Messerole v. Tynberg*, 4 Abb. Pr. N. S. 410 ("Bismarck" collars); *Rowley v. Houghton*, 2 Brews. 303 ("Hero" jars); *Palmer v. Harris*, 6 Penn. 156 ("Golden Crown" cigars); *Filley v. Fassett*, 44 Mo. 173 ("Charter Oak" stoves); *Filley v. Child*, 16 Bl. C. C. 376 (do.); *Lockwood v. Bostwick*, 2 Daly, 521 ("Bovilene" pomade); *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291 ("Congress Spring" Fancy words. water); *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115 ("Eureka" manure); *Ford v. Foster*, L. R. 7

would not be as clearly asserted, but it takes nothing away. Any man who has a right to a trade mark has his trade mark just the same after the passing of the Trade Marks Registration Act as he had before. Only, if the persons enjoying the trade mark have been so numerous that it is impossible to say that any of them, or all of them together, had an exclusive right to it, then they shall not have the benefit of the registration, which would give an exclusive right" (a). Common marks may, however, now be registered as additions to good trade marks, if an exclusive right in them is disclaimed (b). If the name is descriptive, the addition of "new" or "improved" does not better the case (c), nor that of initials representing the name of the goods (d), or of a mere oval border (e).

Ch. 611 ("Eureka" shirts); *Seltzer v. Powell*, 8 Phila. 296 ("Silver Grove" whiskey); *In re Francis & Mallon*, U. S. Pat. Comm. Decis. 1871, 283 ("Beaverine" boots); *Blackwell v. Armistead*, 5 Am. L. T. 85 ("Durham" tobacco); *Armistead v. Blackwell*, 1 U. S. Pat. Gaz. 603 (do.); *Blackwell v. Wright*, 73 N. Car. 310 (do.); *Blackwell v. Dibrell*, 14 U. S. Pat. Gaz. 633 (do.); *Hirst v. Denham*, L. R. 14 Eq. 542 ("Turin," "Sefton," "Leopold," "Liverpool," cloth); *Sternberger v. Thalheimer*, 3 U. S. Pat. Gaz. 120 ("Centennial" clothing); *In re Bush & Co.*, 10 *ib.* 164 ("Centennial" wine); *Kidd & Co. v. Mills, Johnson & Co.*, 5 *ib.* 337 ("Magnolia," "Dave Jones," whiskey); *Morse v. Worrell*, 10 Phila. 168 ("Rising Sun" stove polish); *Colton v. Gilbard*, 44 L. J. Ch. 90 ("Licensed Victuallers' Relish"); *Smith v. Mason*, W. N. 1875, p. 62 ("Pectorine" medicine); *Gouraud v. Trust*, 10 N. Y. Sup. Ct. 627 ("Gouraud's Oriental Cream"); *In re Glines*, 8 U. S. Pat. Gaz. 435 ("Slate Roofing Paint"); *In re Green*, 8 *ib.* 729 ("German Sirup"); *In re Wearer*, 10 *ib.* 1 ("Lion" goods); *Grillon v. Guènin*, W. N. 1877, p. 14 ("Tamar Indien" lozenges); *Cararick v. Morrison*, Dig. 543 ("Lactopeptine" medicine); *In re Cornwall* (2), 12 U. S.

Pat. Gaz. 312 ("Dublin" soap); *Eno v. Stephens*, Dig. 609 ("Fruit Salt"); *Reinhardt v. Spalding*, 49 L. J. Ch. 57 ("Family Salve"); *Rosing v. Atkinson*, 27 Sol. J. 534 ("Edelweiss" perfume); *Berliner Brauerei Gesellschaft Tirol v. Knight*, *Stocks & Co.*, W. N. 1883, p. 70 ("Tivoli" lager beer); *In re Porter Blanchard's Sons*, U. S. Pat. Comm. Decis. 1871, 97 ("Blanchard Churn"); *In re Rohland*, 10 U. S. Pat. Gaz. 980 ("Dr. Lobenthal's Essentia Anti-phthisica"); *Sorg v. Welsh*, 16 *ib.* 910 ("Tidal Wave" tobacco); *In re Eastman*, W. N. 1880, p. 128 ("Kitchen Crystal Soap"); *Burton v. Stratton*, 73 L. T. 349 ("Twin Brothers" yeast); *Hier v. Abrahams*, 82 N. Y. 519 ("Pride" cigars); *Insurance Oil-tank Co. v. Scott*, 33 La. Ann. 946 ("Insurance" oil); *Smith v. Sicbury*, 32 N. Y. Sup. Ct. 232 ("Magnetic Balm"); *Ex parte Heyman*, 18 U. S. Pat. Gaz. 922 ("Invigorator" spring bed-bottoms).

(a) Per Bucon, V.-C., in *Benbow v. Low* (4), 44 L. T. N. S. 875.

(b) Patents Act, 1873, § 74.

(c) *In re Graham*, 2 U. S. Pat. Gaz. 618.

(d) *In re Blakeslee & Co.*, U. S. Pat. Comm. Decis. 1871, 284; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538.

(e) *In re Rader & Co.*, 13 U. S. Pat. Gaz. 596.

Again, where a mark, though not descriptive, yet does not serve to distinguish the person using it from a number of other persons who use or are entitled to use it, it cannot be a valid trade mark, since it is common, if not to the whole world, at all events to a class of persons. Thus "prize medal" (a), "gold medal" (b). The objection, however, will not prevail where the class is very limited (c).

Name not
distinctive.

Again, an ordinary adjective in the common language of the country, descriptive of the quality of the article, and not designating it to be of the manufacture of a certain individual or establishment, as "superior" (d), "superfine" (d), "nourishing" (e), cannot be exclusively appropriated as a trade mark. And the same is the case with a word or symbol which is understood generally, or in the trade, to indicate quality and not a special manufacturer. Thus "A, No. 1," "A X, No. 1" (f).

Adjective
denoting
quality only,
no trade mark.

But in some of the American cases this principle appears to have been carried to an extent which is unreasonable, and which has not been and would not be recognised in this country, the rule having been laid down too generally that every word or symbol which serves to indicate quality is incapable of appropriation as a trade mark, the qualification being omitted that, if such word or symbol also serves

Marks
denoting
maker as well
as quality may
be trade
marks.

(a) *Batty v. Hill*, 1 H. & M. 264. See *Roper's, &c. Co. v. Copeman's, &c. Association, Ltd.*, 28 Sol. J. 218.

(b) *Taylor v. Gillies*, 14 Sickels, 331.

(c) *Dent v. Turpin*, 2 J. & H. 139. And see p. 97, note (a).

(d) *Braham v. Bustard*, 1 H. & M. 447.

(e) *Raggett v. Findlater*, L. R. 17 Eq. 29; and see *Spottiswoode v. Clarke*, G. Coop. 154; *Gillott v. Esterbrook*, R. Cox, 353; *Ex parte Palmer*, U. S. Pat. Comm. Decis. 1871, 289; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538; *In re Goodyear Rubber Co.*, 11 *ib.* 1062; *Fulton v.*

Sellers, 4 Brews. 42; *Ex parte Cohn* (1), 16 U. S. Pat. Gaz. 680.

(f) *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439; 5 Amer. Rep. 125; and see *The Amoskeag Manufacturing Co. v. Spear*, 2 Sand. N. C. 599; R. Cox, 87; *Same v. Trainer*, 101 U. S. Rep. 51; *Burke v. Cassin*, 45 Cal. 467; 13 Amer. Rep. 214; *Stokes v. Landygraf*, 17 Barb. 608; R. Cox, 137; *Kinney v. Allen*, 1 Hughes, 106; *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981; *Osgood v. Allen*, 1 Holmes, 185; *Carver v. Bowker*, Dig. 581; *Arery v. Mcikle*, 23 Alb. L. J. 413.

to indicate a particular manufacturer, the mark may be a good trade mark. In *Amoskeag Manufacturing Co. v. Trainer* (a) the Supreme Court of the United States itself appears to have decided in favour of the wider rule. There the plaintiff company manufactured cotton tickings, and sold the different qualities under different labels, of which the one affixed to the best quality of the goods bore a combination device, in which the prominent and conspicuous feature consisted of the letters "A. C. A." Those letters had for many years been recognised as indicating that the goods to which they were attached were of the plaintiff company's manufacture, and also of the best quality of the goods so manufactured, and the plaintiffs' user of the letters had been substantially exclusive. In an action, however, brought against defendants who had sold similar goods of their own make under a label containing the same letters in a conspicuous place, the Supreme Court held that the letters being indicative of quality, no protection could be given. All trade marks, however, which are of any value at all, denote that the goods to which they are attached are of good quality, and by far the greater number of large manufacturing firms use a variety of trade marks, which they apply to goods of different descriptions or qualities, or intended for different markets. So that it seems that the English rule that combinations of letters, or words, or symbols, which indicate that the goods to which they are applied have been manufactured by a particular person or firm, may constitute valid and registrable trade marks, notwithstanding that they also indicate the quality or pattern of the goods as compared with other goods of the same makers (b), is preferable to that formulated in some of the American Courts. Thus, in *Hirst v. Denham* (c), different fancy patterns of the plaintiff's cloth were marked with different names,

(a) 101 U. S. Rep. 51.

Ch. 897.

(b) *Ransome v. Graham*, 51 L. J.

(c) L. R. 14 Eq. 542.

each of which was protected; in *Moses v. Sargood, Erwen & Co.* (a), the plaintiff's clothing was marked with a number of crowns, varying from one to six, according to quality; in *Ransome v. Graham* (b) the plaintiff's ploughs were marked with the letters "R. N." and an additional letter or numeral, varied according to pattern and quality (c).

If a word or symbol is only indicative of quality in a particular trade, it seems that it may be used as a trade mark in a different trade (d):

Marks denoting quality in only one trade.

Again, a trade mark which contains false representations, so as to deceive the public, will not be protected in equity as a valid trade mark (e), and cannot be registered as such under the Patents Act of 1883 (f). In short, as was said by Wallace, J., in *Ginter v. Kinney Tobacco Co.* (g), "no principles are better settled in the law of trade marks than that a generic name, or a name merely descriptive of the ingredients, quality, or characteristics of an article of trade, cannot be the subject of a trade mark; and that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied will not be tolerated." But mere collateral misrepresentations do not disqualify (h).

Deceptive marks.

An attempt has occasionally been made to meet the contention that a word claimed as a trade mark is incapable of appropriation by reason of its descriptiveness, by the allegation that the goods to which it is applied do not answer the description imported by the word, and there-

Marks which are either descriptive or deceptive.

(a) Dig. 636.

(b) 51 L. J. Ch. 897.

(c) And see *In re Brook*, 26 W. R. 791; *Mitchell v. Henry*, 15 Ch. D. 181; and the American cases of *Lawrence Mfg. Co. v. Lowell*, 129 Mass. 325; *Godillot v. Harris*, 81 N. Y. 263, per Danforth, J.; and *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60.

(d) *In re English*, U. S. Pat. Comm. Deci. 1870, 142.

(e) *Pidding v. How*, 8 Sim. 477; *Perry v. Truefitt*, 7 Beav. 66; *Flavel v. Harrison*, 10 Hare, 467; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137; *Morgan v. McAdam*, 36 L. J. Ch. 228; *Connell v. Reed*, 128 Mass. 477; and see c. 7, *infra*.

(f) See § 73.

(g) 22 U. S. Pat. Gaz. 770.

(h) *Ford v. Foster*, L. R. 7 Ch. 611.

fore that the word is not, in fact, descriptive of the goods. But in cases where a word is used which is descriptive of qualities which the goods might reasonably be supposed to possess, if the goods do not possess those qualities the use of the word is deceptive, so that *quâcunque viâ* the claim fails. Thus, in *In re Saunion & Co. (a)*, the late Master of the Rolls refused registration to the words "Anglo-Portugo Oysters," on the ground that if the oysters were Anglo-Portuguese the use of the term was descriptive, while, if they were not, it was deceptive. And there are many American authorities to the same effect (b). But if the term claimed is one which is notoriously inappropriate to the article, it will not be treated as deceptive. Thus the name "Edelweiss" was allowed to be appropriated to scent not derived from that flower, it being well known that the edelweiss yields no perfume (c).

Extravagance
an advantage
in fancy
names.

It may be stated as a general rule that the more extraordinary and extravagant the name that is adopted by way of trade mark, the better will the object be attained, and the protection of the Courts and of the Registration Office secured, for the more uncommon the designation is, the less obnoxious is the exclusive claim of the manufacturer, and the more conclusive the evidence of fraud supplied by an infringement. Thus, Sir W. P. Wood, V.-C., said, "I have not the least doubt that if the plaintiff (if I doubted I should be going quite contrary to the Mexican Balm case and other cases in which ridiculous names have been used)

(a) Dig. 625.

(b) *Fairbanks v. Jacobus*, 14 Bl. C. C. 337 ("Fairbanks' Patent"); *In re American Sardine Co.*, 3 U. S. Pat. Gaz. 495 ("American Sardines"); *In re Dole Brothers*, 12 *ib.* 939 ("Egg Macaroni"); *In re Warburg & Co.*, 13 *ib.* 44 ("Cachemire Milano" silks); *Ex parte Marsching & Co.*, 15 *ib.* 294 ("French" paints); *Ex parte*

Knapp, 16 *ib.* 318 ("London" animal foods); *Ex parte Farnum & Co.*, 18 *ib.* 412; ("Lancaster" tickings); *Ginter v. Kinney Tobacco Co.*, 22 *ib.* 770 ("Straight-cut" cigarettes). With which compare *In re Green*, 8 *ib.* 729 ("German Sirup"); *In re Cornwall (2)*, 12 *ib.* 312 ("Dublin" s ap).

(c) *Rosing v. Atkinson*, 27 Sol. J. 534.

had invented a fanciful and ridiculous name—and the more ridiculous, the better it is for his purpose—and has used it for eight or ten years in his trade, that the Court would take care that nobody else should use that absurd name; for such user could only be a user for the express purpose of imitating the plaintiff's, and so defrauding the plaintiff, by representing goods manufactured by one person to be goods manufactured by another" (a).

In many cases the fancy name used as a trade mark is an entirely new word, invented for the occasion by the manufacturer of the material or composition to which it is applied, and such a name may be registered and otherwise treated as a valid trade mark (b). Thus "Pectorine" (c) and "Lactopeptine" (d) were protected as names for medical compounds; "Cocaine" (e) and "Boviline" (f) for pomades. "Chlorodyne" (g) was only not protected because the proprietor, on a mistaken view of his rights, consented to have his bill for an injunction dismissed with costs (h).

Fancy names specially invented.

In many other cases the trade mark consists, not of a newly coined word, but of a word, or a combination of words, already in common use, but which for the purpose of the trade mark is or are used and applied in a manner quite different from the ordinary use and application, so different that it is seen at the first glance that the word or

Existing words composing a fancy name.

(a) *Young v. Macrae*, 9 Jur. N. S. 322; and see *Petridge v. Merchant*, 4 Abb. Pr. 156; R. Cox, 194.

(b) See Patents Act, 1883, § 64.

(c) *Smith v. Mason*, W. N. 1875, p. 62.

(d) *Carnrick v. Morson*, L. J. Notes of Cases, 1877, p. 71.

(e) *Burnett v. Phalon*, 9 Bos. 192; R. Cox, 376.

(f) *Lockwood v. Bostwick*, 2 Daly, 521; R. Cox, 555.

(g) *Browne v. Freeman*, 12 W. R. 305.

(h) *In re Francis & Mallon*, U. S.

Pat. Comm. Decis. 1871, 283 ("Beaverine" boots and shoes); *Enoch Morgan's Sons' Co. v. Schwachhofer*, 55 How. Pr. 37, and *same v. Hunkele*, 16 U. S. Pat. Gaz. 1092 ("Sapolio" soap); *Electro-Silicon Co. v. Trask*, 59 How. Pr. 189 ("Electro-silicon"). And see *Young v. Macrae*, 9 Jur. N. S. 322, in which "Paraffin Oil," *Lamplough v. Balmer*, W. N. 1867, p. 293, in which "Pyretic Saline," and *Wolfe v. Goulard*, 18 How. Pr. 64, R. Cox, 555, in which "Schiedam Schnapps," was not protected for special reasons only.

combination of words is or are being used quite out of the common signification, and in the nature of a fancy name designatory of the goods (a). Thus, "Pharaoh's Serpents" (b), applied to a toy; "The Licensed Victuallers' Relish" (c), to a sauce; "Turin," "Sefton," "Leopold," and "Liverpool" (d), to cloth; "United Service" (e) and "Genuine Yankee" (f), to soap; "Sweet Opoponax of Mexico" (g), and "Balm of Thousand Flowers" (h), to perfume; and "Charter Oak," to stoves (i).

(a) See *Newman v. Alvord*, R. Cox, 413, in which Daniels, J., said that "any member of the community, whose interests and business may be promoted by doing so, should be at liberty to apply even names and words in common use to the products of his industry, in such a manner as to indicate their origin or particular manufacture, where such application will not intrench upon and will be in no way included in their use by the public. By doing so, the rights of no member of the community can be in any manner infringed, and no public inconvenience whatever can be occasioned by it. The public will still be left at full liberty to use such words or terms as they were used before; while for a special purpose a new office or purpose may be imposed upon them;" *Osgood v. Allen*, 1 Holmes, 185, in which Shepley, J., said that "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;" and *Lea v. Wolff*, 15 Abb. Pr. N. S. 1; *Ex parte Palmer*, U. S. Pat. Comm. Decis. 1871, 289; *M'Lean v. Fleming*, 96 U. S. Rep. 245; *Smith v. Woodruff*, 48 Barb. 438; and *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.

(b) *Barnett v. Leuchars*, 13 L. T. N. S. 495.

(c) *Cotton v. Gillard*, 44 L. J. Ch. 90.

(d) *Hirst v. Denham*, L. R. 14 Eq. 542.

(e) *Field v. Lewis*, Dig. 280.

(f) *Williams v. Johnson*, 2 Bos. 1; R. Cox, 214; *Williams v. Spence*, 25 How. Pr. 366; R. Cox, 305.

(g) *Smith v. Woodruff*, 48 Barb. 438; R. Cox, 373.

(h) *Petridge v. Merchant*, 4 Abb. Pr. 156; R. Cox, 194; but see *Petridge v. Wells*, 13 How. Pr. 385; R. Cox, 180.

(i) *Filley v. Fassett*, 44 Mo. 173; R. Cox, 530; *Filley v. Child*, 16 Bl. C. C. 376. And see *Weston v. Hemmons*, 2 Vict. L. R. Eq. 121 ("Wizard" oil); *Sternberger v. Thalheimer*, 8 U. S. Pat. Gaz. 120 ("Centennial" clothing); *Kidd & Co. v. Mills, Johnson & Co.*, 5 ib. 337 ("Magnolia" whiskey); *Kidd v. Johnson*, 100 U. S. Rep. 617 (same); *In re Glines*, 8 U. S. Pat. Gaz. 435 ("Slate Roofing Paint"); *In re Kimball*, 11 ib. 1109 ("Vanity Fair" cigarettes); *Marcovitch v. Bramble, Wilkins & Co.*, Dig. 595 (same); *Davis v. Kennedy*, 18 Grant Up. Can. Ch. 523 ("Painkiller" medicine); *Faber v. Hovey*, Dig. 481 ("Star" pencils); *Ex parte Peper*, 16 U. S. Pat. Gaz. 678 ("Coin" tobacco); *Wright v. Simpson*, 15 ib. 968 ("Pond Lily Wash"); *Crawford v. Shuttock*, 13 Grant Up. Can. Ch. 149 ("Imperial" soap); *De-graves v. Whiteman*, 5 Vict. L. R. Eq. 304 ("Cascade" ale); *Royal Baking Powder Co. v. Sherrill*, 59 How. Pr. 17 ("Royal" baking powder).

Occasionally it has been sought to protect as a trade mark, and to claim exclusive rights in, an inscription or advertisement composed of ordinary English words, used in their ordinary sense, and only peculiar from the length of the sequence. Usually, indeed, there is in such cases some feature which might be really distinctive, but of which the plaintiff, for some reason or other, is unable to avail himself; this failing, the whole inscription is claimed. Such cases, however, are in fact "advertisements of the character and quality of the goods" (a), in which advertisements no exclusive rights can be claimed, as was expressly decided by the Court of Appeal in *Cheavin v. Walker* (b), where the inscription was "G. Cheavin's improved patent, gold-medal, self-cleaning, rapid water filter, Boston, England," the name Cheavin having become indicative of a principle of construction. In *Shrimpton v. Laight* (c), the use of the words "graduated, grooveless, drill-eyed, ground-down" needles was also accompanied by that of the maker's name, and this being obviously imitated by the defendant, the injunction was granted.

Inscriptions
or advertise-
ments.

Sometimes a word taken from a dead language has been applied to goods and protected as a valid trade mark, as

Words taken
from the dead
languages.

(a) Per Lord Westbury, C., in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 528, which see.

(b) 5 Ch. D. 850. And see *Blackwell v. Crabb*, 36 L. J. Ch. 504; *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115 ("Ammoniated Bone Superphosphate of Lime"); *Helmbold v. Helmbold M'fg. Co.*, 53 How. Pr. 453 ("Highly Concentrated Compound Fluid Extract of Buchu"); *In re Johnson & Co.*, 2 U. S. Pat. Gaz. 815 ("Johnson's American Anodyne Liniment, Established A.D. 1810"); *Gilman v. Hunnewell*, 122 Mass. 139 ("A sure remedy for chronic or common cough, sore throat, and other minor throat complaints, so often by neglect the forerunner of consumption").

(c) 18 Beav. 164. And see *Board-*

man v. Meriden Britannia Co., 35 Conn. 402; R. Cox, 490, where an injunction was given. In *Roberts v. Sheldon*, 8 Biss. 398, the plaintiffs used the words "Roberts' Parabo a Gold-Burnished Sharps" on his needles, and the defendant was restrained from using the words "William Clark & Sons' Parabola Gold-Burnished Sharps." In *In re Roberts* (1), (2), (3), U. S. Pat. Comm. Decis. 1871, 118, 100, 101, the following were registered as trade marks:—"A luxury—R. J. Roberts' Razor-Steel Scissors. The best in the world. The best is the cheapest. For sale here;" "An exquisite pleasure to shave with R. J. Roberts' Diamond-Edged Razors;" "R. J. Roberts' Diamond-Edge Razor. Every razor warranted."

the Latin word "Excelsior" in respect of soap (a), or the Greek word "Eureka" on shirts (b), or on an agricultural compost (c).

Or from
modern
foreign lan-
guages.

In some instances words taken from modern foreign languages have been protected, though the precise extent to which trade marks so composed will be acknowledged has not yet been authoritatively decided. Where the name employed is a fancy name which happens to be in a foreign language, or framed in imitation of the forms of a foreign language, there is no doubt that there is just as good a trade mark as if it had been in English or framed on English forms; thus, "Flor Fina Prairie Superior Tabac" (d) was allowed to be a good trade mark, though the defendant was held not to have infringed, and "Tamar Indien" (e) was actually protected. In *In re Rotherham* (f), an Arabic word, used by way of a pun, was held to be entitled to registration as a good trade mark, though the Commissioners of Patents had directed the registrar to the contrary.

Foreign words
in their
ordinary
signification.
Gout v.
Aleptoglu.

When, however, the foreign words are used in their ordinary sense, or in a sense not widely remote therefrom, the case is different. In *Gout v. Aleptoglu* (g), the plaintiff was a maker of watches for the Turkish market. These watches he marked in Turkish with his own name (Ralph Gout) with the word "Pessendede" ("warranted"), with his initials "R. G." and a crescent, and also with a sprig and crescent. The defendant procured watches to be made, in which the minor features of the marks used by the plaintiff were omitted, but in which the main characteristics, the name ("Ralph Gout") and the word "Pessendede," in Turkish characters, were reproduced, the style

(a) *Braham v. Bustard*, 1 H. & M. 447.

(b) *Ford v. Foster*, L. R. 7 Ch. 611.

(c) *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115. See *Raggett v. Findlater*, L. R. 17 Eq. 29.

(d) *Cope v. Evans*, L. R. 18 Eq.

138.

(e) *Grillon v. Guézin*, W. N. 1877, p. 14; and see *Caruncho v. Stephenson*, 25 Sol. J. 929 ("Intimidad" cigars).

(f) 14 Ch. D. 585.

(g) 6 Beav. 69; 5 Leg. Obs. 496.

of engraving being copied. Such watches were then sent by the defendant to Constantinople, and there sold, to the prejudice of the plaintiff's business. This was a clear case of fraud, and so it was held to be by the Vice-Chancellor of England, Sir L. Shadwell, who, however, did express an opinion that the plaintiff had acquired an exclusive right in the word "Pessendede" (a). But the point that had to be decided was not simply whether the word "warranted," in Turkish, could be protected, and indeed, when it is considered that the watches were to be sold in Turkey, the case does seem to be just the same as if the word had been engraved in English on watches to be sold in this country, when such a proposition would be clearly untenable. But not only the word, but the manner of engraving it was copied, and not only that word, but the name of the maker; and what the Vice-Chancellor actually decided was that here there was a clear case of attempted fraud, which was quite sufficient ground for the issue of an injunction, without its being necessary to consider whether the imitation of one single feature would have been sufficient to entitle the plaintiff to that remedy. The use of the name "Ralph Gout" alone by the defendant, whose own name was entirely different, would indeed have been sufficient to entitle the plaintiff to an injunction (b), but the case with respect to "Pessendede" was different.

In *Broadhurst v. Barlow* (c), the case was again a far more complicated one than that of a single foreign word, or even a succession of words taken from the same foreign language. Here the plaintiffs were spinners and manufacturers at Manchester and Bolton, who exported to the East large quantities of pieces of Spanish shirting, which they marked with their proper trade mark, a lion in a border, and with the words "Spanish shirting" in a scroll,

(a) 5 Leg. Obs. 496.

1881, p. 111.

(b) See per Sir G. Turner, L. J., in *Burgess v. Burgess*, 3 De G. M. & G. 896; *Perks v. Hall & Co.*, W. N.

(c) W. N. 1872, p. 212; and L. J. Notes of Cases, 1872, p. 183.

Broadhurst v. Barlow.

and "No. 120." To this they had added "exactly 12 yards," in Turkish, Armenian, and Greek, the same statement being repeated in the three languages, placed one below the other (a). The defendants were discovered to be preparing Spanish shirting for export, similarly marked, except that there were five lines instead of four, and that an elephant was used in place of the lion. Sir J. Wickens, V.-C., held that "though an elephant was used by the defendants, the three sentences in the same languages in the same order was an infringement of the plaintiffs' rights," and he therefore granted the injunction to restrain the use of the words in the three languages in the order used by the plaintiffs.

Conclusion.

The true principle appears to be that, while foreign words employed in their ordinary signification may, even when used on goods intended for consumption in the country where that foreign language is spoken, form a part of a combination trade mark, the infringement of which will be restrained, the exclusive use of such words themselves, apart from fraud, will not be protected in this country, any more than that of an ordinary English adjective. In an American registration case (b) it was sought to register the German words "Fur Familien Gebrauch," and "Lawrence Feiner Familien Flannel," meaning respectively "For Family Use" and "Lawrence Fine Family Flannel," but the application was refused, on the ground of descriptiveness. In *Rillet v. Carlier* (c) it was indeed held that an American maker of pomegranate syrup had acquired an exclusive right in America to the term "Grenade Syrup," though "Grenade" was the ordinary French word for pomegranate, and the term "Grenade Syrup" was in common use in France. In this case, how-

(a) In *Curtis v. Bryan*, 2 Da'y, 212; R. Cox, 434, a label was used, with an inscription in English, French, German, and Spanish; and see *Siegert v. Pindlater*, 7 Ch. D.

801, and *Siegert v. Ehlers*, Dig. 432.

(b) *In re Lawrence & Co.*, 10 U. S. Pat. Gaz. 163.

(c) 61 Barb. S. C. 435.

ever, there were elements of fraud, and actual fraud will always be restrained. —

Under the head of "Fancy Names" should be included ^{Geographical names.} trade marks consisting of geographical names. When such names are used as trade marks they are in that application to be understood, not as ascribing the goods to which they are affixed to any special section of the earth's surface, but as expressing the works at which, or the manufacturer by whom, those goods have been produced. So Sir W. P. Wood, V.-C., in the "Anatolia" liquorice case (a), said that "the plaintiffs had established beyond all doubt the connection of their name with that mark, that was beyond dispute," and that "he could not treat the word as being otherwise than a designation mark, which the plaintiffs had caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property." Lord Westbury, C., in that case strongly confirmed the opinion of the Vice-Chancellor; and in the later case of *Wotherspoon v. Currie* (b), where the subject of dispute was the word "Glenfield" applied to starch, he stated that that word had acquired a secondary signification or meaning in connection with a particular manufacture: in short, it had become the trade designation of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which he had referred. The word "Glenfield," therefore, as a denomination of starch, had become the property of the appellants. It was their right and title in connection with the starch. —

In some cases there is no pretence for saying that the name is used in its ordinary geographical sense. Thus no one could affirm that the use of the names "Persian" ^{Rules as to geographical names.}

(a) *McAndrew v. Bassett*, 4 De G. J. & S. 380.

(b) L. R. 5 H. L. 508.

thread" (a) or "Ethiopian stockings" (b) had induced him to suppose that the articles in question were imported from those countries. In other cases, however, the name is less purely arbitrary, and was originally, at least, indicative of local origin. For instance, the pipes marked with "E. Southorn, Broseley" (c), were manufactured at a village of that name; Glenfield starch (d), in the same manner, came from Glenfield; Anatolia liquorice (e), and Leopoldshall Kainit (f), from those respective places. This fact, however, does not deprive the trade mark of the right to protection. It is true that the name of an existent place cannot for all purposes be appropriated (g), and that any one who manufactures at a place the name of which has become another's trade mark, indicative of that other's productions, may still describe his goods as made on that spot (h). But by English law he cannot stamp that name on his goods in the character of a trade mark of his own.

(a) *Taylor v. Taylor*, 23 L. J. Ch. 255.

(b) *Hine v. Lart*, 10 Jur. 106; and see *In re Cornwall* (2), 12 U. S. Pat. Gaz. 312 ("Dublin" soap); *Fleischmann v. Schuckmann*, 62 How. Pr. 92 ("Vienna" bread); *Lauferty v. Wheeler*, 63 *ib.* 488 ("Alderney" oleo-margarine).

(c) *Southorn v. Reynolds*, 12 L. T. N. S. 75.

(d) *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

(e) *McAndrew v. Bassett*, 4 De G. J. & S. 380.

(f) *Rudde v. Norman*, L. R. 14 Eq. 348; and see *Apollinaris Co. v. Edwards*, Seton, 4th ed. 237; and *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 342 ("Apollinaris Water"); *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 57 Barb. 526, R. Cox, 599 ("Congress Spring Water"); *Amoskeag Manufacturing Co. v. Garner* (1), 55 Barb. 151; R. Cox, 541, and *s. c.* (2), 54 How. Pr. 298 ("Amoskeag" cloths); *Neuman v. Alvord*, 6 Sickels, 189 ("Akron"); *Lea*

v. Millar, Dig. 513 ("Worcestershire Sauce"); *Powell v. McNulty*, Dig. 526 ("Yorkshire Relish"); *Sievert v. Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *Kinney v. Basch*, Dig. 542 ("St. James' Cigarettes"); *Wheeler v. Johnston*, 3 L. R. Ir. 284 ("Cromac Springs"); *Davis v. Tylor*, M. R., April 24, 1879 ("Ferndale" coal); *Lochgelly Co., Limited, v. Lumphinans Iron Co.*, Ct. Sess. Cas., 4th Ser. VI., 482 ("Lochgelly" coal).

(g) "Property in the word for all purposes cannot exist:" per Lord Westbury, C., *McAndrew v. Bassett*, 4 De G. J. & S. 380.

(h) Thus in *Braham v. Beachin* (1), 7 Ch. D. 848, an injunction was only granted to restrain the defendants from describing their coal as "Radstock" until they had some justification for so describing it, and when that justification could be produced, no relief was granted against them. See *Braham v. Beachin* (2), Dig. 633; and see *Sievert v. Findlater*, 7 Ch. D. 801.

In *Seixo v. Provezende (a)*, where it was urged by the defendants that parts of their vineyards were known by the name of Seixo, the Lord Chancellor (Lord Cranworth) said that even assuming that to be true, "that did not justify the defendants in adopting a device or brand, the probable effect of which was to mislead the public when purchasing their wine, to suppose that they were purchasing wine produced from the vineyards, not of the defendants, but of the plaintiff. Cases might be imagined, though very unlikely to arise, in which a person bringing into the market for the first time the produce of a newly established manufacture, to come into competition with one already established, might really be embarrassed as to the mode in which he should describe it, so as not to interfere with the description adopted by a manufacturer who had been before him." And he added that if such a case should arise, it would have to be dealt with on its own merits.

Again, in *McAndrew v. Bassett (b)*, Lord Westbury, C., *McAndrew v. Bassett.* said, "I am told that the word 'Anatolia,' being a general geographical expression—being, in point of fact, the geographical designation of a whole country—is a word common to all, and that in it, therefore, there can be no property. That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public."

In America, the rule prohibiting the appropriation of Geographical names in America.

(a) L. R. 1 Ch. 192.

Wheeler v. Johnston, 3 L. R. Ir.

(b) 4 De G. J. & S. 380; See 284.

geographical names as trade marks appears to be more stringent than in England, as the Courts there deny that such names can constitute trade marks (*a*), and registration is, as a rule, refused to them (*b*). Where, however, the use of a geographical name is clearly fraudulent (*c*), or where it is used by a defendant whose residence and works are not situate in the locality the name of which he seeks to employ (*d*), relief may be obtained, and registration has also been effected in cases where there was a plausible ground for the assertion that the name was selected and used in a purely arbitrary way (*e*).

Words dis-
entitled to
protection.

In addition to deceptive words, no other words, the exclusive use of which would be deemed disentitled to protection in a court of justice, can be registered (*f*).

Fourth class
of trade
marks—old
marks.

The fourth class of trade marks allowed to be registered under the Patents Act, 1883, consists of "any special and distinctive word or words, letter, figure, or combination of

(*a*) Thus in *Canal Co. v. Clark*, 13 Wall. 311, the Supreme Court of the United States allowed the defendants to use the name "Lackawanna" on coal produced in that district, though the defendants had previously so used it; and see *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439; 5 Amer. Rep. 125 ("Moline" ploughs); *Glendon Iron Co. v. U'her*, 75 Penn. St. 467; 15 Amer. Rep. 599 ("Glendon" iron); *Carmichel v. Latimer*, 11 R. I. 395 ("Stillman Mill"); *Osgood v. Allen*, 1 Holmes, 185; *Dunbar v. Glenn*, 42 Wisc. 118; *Burton v. Stratton*, 73 L. T. 349. But see Mr. R. Cox's note to *Glendon Iron Co. v. U'her*, at 8 Am. L. Reg. N.S. 543, in which he disputes the decision that a geographical name cannot be a trade mark.

(*b*) *Armistead v. Blackwell*, 1 U. S. Pat. Gaz. 603 ("Durham" tobacco); *Blackwell v. Dibrell*, 14 ib. 633 (same); *In re Tolle*, 2 ib. 415 ("Cherry St. Mills," "Market St. Mills"); *In re American Sardine Co.*, 3 ib. 495 ("American Sardines");

In re Warburg & Co., 13 ib. 44 ("Cachemire Milano"); *Ex parte Marsching & Co.*, 15 ib. 294 ("French" paints); *Ex parte Knapp*, 16 ib. 318 ("London" animal foods); *Ex parte Farnum & Co.*, 18 ib. 412 ("Lancaster" tickings); *Ex parte Oliver*, 18 ib. 923 ("Raleigh" tobacco).

(*c*) *Kinney v. Basch*, Dig. 542 ("St. James' Parish" cigarettes); *Dunbar v. Glenn*, 42 Wisc. 118 ("Bethesda" mineral water).

(*d*) *Lea v. Wolff*, 15 Abb. Pr. N.S. 1 ("Worcestershire Sauce").

(*e*) *In re Green*, 8 U. S. Pat. Gaz. 729 ("German Sirup"); *In re Cornwall* (2), 12 ib. 312 ("Dublin" soap); and see *Ex parte Farnum & Co.*, 18 ib. 412, in which it was said that a geographical name would not be registered in the U. S. Patent Office unless it was clearly shown that it would be understood to be primarily fanciful, and that manufacturers residing at the place denoted by the name could be excluded from the use of it.

(*f*) See Patents Act, 1883, § 73.

letters or figures, or of letters and figures, used as a trade mark before August 13th, 1875" (a).

This clause is designed to extend the benefits conferred by registration under the Act to trade marks which, though protected by the Courts as such before the passing of the Registration Act of 1875, yet do not come within the more restricted definition which it has been thought right to apply to marks adopted and used for the first time since that date. The class of existing trade marks the registration of which this clause is intended to permit is to be composed of marks consisting of a special and distinctive letter, figure (*i.e.*, numeral) (b), or combination of letters or figures, or of letters and figures; other old trade marks can be registered under some one of the former heads, and this remark also applies to the "special and distinctive word or words," which appear to be now unnecessarily inserted in this part of the section, seeing that a fancy word or words (and no other word or words can well be special or distinctive) can now be registered either as an old or a new mark under the earlier part of the section. It will be observed that the wording of this part of the section differs considerably from that of the corresponding part of § 10 of the Registration Act, 1875, the object being to bring all old trade marks composed of letters, figures, or combinations within the scope of the provisions for registration, an object which the old section had failed to achieve (c).

Letters, generally in the form of initials, have, with or without additions, frequently been treated as trade marks. Among the earliest of these cases are *Motley v. Downman* (d)

(a) For a mark to be old, it seems that the old user must have been within the United Kingdom. See *In re Münch*, 50 L. T. N. S. 12; *In re Riviere & Co.*, 49 L. T. N. S. 506; (App.) 32 W. R. 390; *In re Leonard & Ellis*, 53 L. J. Ch. 233; (App.) 32 W. R. 530. *Contrà*, *In re Eastman*, W. N. 1880, p. 128. And the user must have been user as of a trade

mark, and not as of a mere descriptive term, and it must have been user of the letter, figure, &c., alone, and not in combination with a device, &c., within the classes of marks registrable as new marks: *In re Leonard & Ellis*, *ubi supra*.

(b) *Ex parte Stephens*, 3 Ch. D. 659.

(c) See *In re Mitchell* (1), 7 Ch. D. 36.

(d) 3 My. & Cr. 1.

and *Millington v. Fox* (a); in the first of which cases "M. C.," and in the second "J. H." was branded on iron. Still earlier than these cases, in the year 1834, "H. H. 6" formed part of a trade mark protected by injunction (b). In *Crawshay v. Thompson* (c), "W. C." in an oval was employed, and infringement being alleged through the use of "W. O." in a similar oval, a verdict was given by the jury for the defendants. The question whether initial letters could form a trade mark, alone or in conjunction with other symbols, was definitively raised before the Lord Chancellor of Ireland, in *Kinahan v. Bolton* (d). In that case the alleged trade mark consisted of the letters "L L" (standing for "Lord Lieutenant"), with a ducal coronet, which mark, it was alleged, had been adopted at a time when there was a ducal Lord Lieutenant of Ireland. The case of the defendants was that "L L" could no more compose a trade mark than "X X," but was a mere mark of quality. The Lord Chancellor, saying that there was no doubt as to this mark being a trade mark "in the strictest sense," went on to observe: "A most competent witness says that this whisky, under the name of 'L L,' is a well-known article of commerce, that it has no other name than 'L L,' that under this name it has acquired a special reputation, and that for the long period of forty years this name has been applied to it. What is a trade mark more than that? It is proved that these two letters designate this whisky. The letters of themselves mean nothing; no one *à priori* could know the meaning of such a trade mark: it is merely like a diamond, an anchor, or a crown, stamped on any article, the mark by which the vendor enables the public to recognise his wares."—"There can be no doubt, and indeed it is not disputed, that two letters may

(a) 3 My. & Cr. 338.

(b) *Ransome v. Bentall*, 3 L. J. Ch. 161.

(c) 4 M. & G. 357.

(d) 15 Ir. Ch. 75.

constitute a trade mark." Reference was then made to the cases of *Motley v. Downman* (a) and *Millington v. Fox* (b), and the injunction was granted. Since that time "S. and H." with a crown (c), "B. B. H." with a crown (d), or in any other combination (e), "C. B." with a cross (f), "M. and C." in a circle (g), and other letters (h), have been treated as undoubted trade marks.

In the result, while letters used as a trade mark for the first time since the Act of 1875 must be combined with some distinctive feature, it seems clear that, if used as such before the Act, they will, even standing alone, be entitled to protection, though probably not as against persons having them for their initials and using them without fraud (i).

The Trade Marks Registration Act of 1875, § 10, only authorised the registration of letters by the use of the term "any special and distinctive combination of figures or letters," and in *In re Mitchell* (1) (k), Hall, V.-C., felt himself compelled to hold that a single letter, however long and exclusively used by an applicant for registration, was not within the section, and was incapable of registration. Now, however, the wording of the present Act permits in express terms the registration of a "letter" as an old mark, so that the difficulty is removed. The letter will, of course, have to be proved to be special and distinctive. In America, the single letter "D" in a

(a) 3 My. & Cr. 1.

(b) 3 My. & Cr. 338.

(c) *Hopkins v. Hitchcock*, 32 L. J. C. P. 154.

(d) *Hall v. Barrows*, 4 De G. J. & S. 150; *Barrows v. Pelsall Coal & Iron Co.*, Dig. 530.

(e) *Re Barrows*, 5 Ch. D. 353.

(f) *Cartier v. Carlile*, 31 Beav. 292; *Cartier v. Westhead*, Dig. 199; *Cartier v. May*, Dig. 200.

(g) *Moet v. Clybourn*, Dig. 538; *Moet v. Pickering*, 8 Ch. D. 372.

(h) See *Ex parte Young*, Dig. 537 ("L. H. & S."); *Carrer v. Bowker*,

Dig. 581 ("R. H."); *Ransome v. Graham*, 51 L. J. Ch. 897 ("R. N."); *Bondier v. Depatie*, Montreal Q. B., May 29th, 1883 ("G. B. D."). See also *In re Brook*, 26 W. R. 791; *Candee v. Deere*, 54 Ill. 439; *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S. Rep. 51; *Avery v. Meikle*, 23 Alb. L. J. 443; *Burton v. Stratton*, 73 L. T. 349.

(i) The case is much the same as that of a maker's name. See *Ainsworth v. Walsley*, L. R. 1. Eq. 518.

(k) 7 Ch. D. 36.

lozenge has been admitted to registration (a), notwithstanding the decision in *Ferguson v. Davol Mills* (b) with respect to the letter "K" enclosed in circular lines, a decision which appears to have been founded on the mistaken interpretation of the expressions used in *Amoskeag Manufacturing Co. v. Spear* (c) previously referred to.

Numerical
figures.

Numerals can only be registered as part of a new mark when combined with some essential particular (d), but provision is made for the registration of a single numeral or a combination of numerals, when it was used as an old mark and is special and distinctive, and in America a numeral may be registered as a trade mark (e). There does not, however, appear to be any case in which the English Courts have recognised a mere numeral or combination of numerals, standing alone, as sufficiently special and distinctive to constitute a trade mark (f), and in *Carver v. Bowker* (g), Little, V.-C. of Lancaster, held that that could not be; and in *Kinney v. Basch* (h) and *Burton v. Stratton* (i) the American Courts seem to have been of the same opinion. The use of numerals is, however, common in some trades, especially in the cotton trade, in which the usual combination marks generally include some arbitrary number or numbers; and there have been cases, both in England (h) and America (l), in which the

(a) *In re The Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248; and see *In re Imbs*, 10 U. S. Pat. Gaz. 463.

(b) 2 Brews. 314.

(c) 2 Sandf. S. C. 599.

(d) See Patents Act, 1883, § 64.

(e) *Ex parte Dawes & Fanning*, 1 U. S. Pat. Gaz. 27; and see *Dawes v. Davics*, Dig. 426.

(f) In *Ainsworth v. Walmaley*, L. R. 1 Eq. 518, the imitation of a series of numbers was held to be an important *indicium* of fraud, but the V.-C. did not treat the numbers as a trade mark; on the contrary, he distinguished them from one. See L. R. 1 Eq. 527.

(g) Dig. 581. The decision of the V.-C. was affirmed by the Court of Appeal in general terms.

(h) Dig. 542.

(i) 73 L. T. 349.

(k) *Carver v. Pinto Leite*, L. R. 7 Ch. 90; *Carver v. Bowker*, Dig. 581; *Broadhurst v. Barlow*, W. N. 1872, p. 212; *Robinson v. Finlay*, 9 Ch. D. 487.

(l) *Gillott v. Kettle*, 3 Duer, 624; *Gillott v. Esterbrook*, 3 Sickles, 374; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Kinney v. Basch*, Dig. 542; *Kinney v. Allen*, 1 Hughes, 106; *Lawrence Manufacturing Co. v. Lowell*, 129 Mass 325; *India Rubber Comb Co. v. Rubber Comb and Jewelry Co.*, 45 N. Y. Super. Ct. 258.

imitation of numbers has been restrained. In such cases, however, either the numerals have been parts of combination marks (*a*), or they have been printed in a special and distinctive colour and configuration (*b*), or they have been selected in so arbitrary a manner that they have conveyed no idea of number (*c*), or there has been an evident intention to commit a fraud (*d*); and it is apprehended that if a case were to occur in which the plaintiff's numeral was printed in an ordinary style, and the defendant could show any reason for desiring to use the number in the course of his business, which was not necessarily attributable to a wish to appropriate the plaintiff's custom, no relief would be granted against him.

A special and distinctive combination of letters and figures may also be registered as an old mark, and though the contention may possibly be raised that this does not include a combination of one letter and one figure, as "A 1," or of several letters with one figure (*e*), or of one letter with several figures, the intention of the words is so obviously comprehensive that it does not appear likely that the contention could succeed.

In some cases protection has been granted to a combination of marks, taken as a whole, notwithstanding that some of the component marks were *publici juris* (*f*); but it seems that a combination of marks, none of which

Combinations
of letters and
figures.

Combination
marks.

(a) *Carver v. Pinto Leite*, L. R. 7 Ch. 90; *Carver v. Bowker*, Dig. 581; *Broadhurst v. Barlow*, W. N. 1872, p. 212; *Robinson v. Finlay*, 9 Ch. D. 487; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Lawrence Manufacturing Co. v. Lowell*, 129 Mass. 325.

(b) *Kinney v. Basch*, Dig. 542; *Kinney v. Allen*, 1 Hughes, 105.

(c) See *Kinney v. Allen*, 1 Hughes, 106; and compare *Burton v. Stratton*, 73 L. T. 349, and *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981, in which registration was refused to

numerals which had not been selected with sufficient arbitrariness.

(d) *Gillott v. Kettle*, 3 Duer, 624; *Gillott v. Esterbrook*, 3 Sickles, 374; *Boardman v. Meriden Britannia Co.*, 35 Conn. 412; *Kinney v. Basch*, Dig. 542.

(e) E.g., "H. H. 6," in *Ransome v. Bentall*, 3 L. J. Ch. 161; "R. N. 1," in *Ransome v. Graham*, 51 *ib.* 897.

(f) *Carver v. Bowker*, Dig. 581; *Robinson v. Finlay*, 9 Ch. D. 487; &c.

was capable in itself of forming a valid trade mark, could hardly be claimed. And this has been so held in America (*a*).

Official stamps.

An official stamp or brand can never become a private trade mark (*b*).

Colour.

It has been said in many cases that there can be no right of trade mark in the colour of wrappers, labels, &c., but in the case of trade marks consisting of coloured threads in the border of a piece of stuff (*c*), or in the wick of a candle (*d*), or of the representation of a coin (*e*), the colour may form a material part of the mark, and such marks will be registered by deposit.

Price.

The price of the article to which the trade mark is attached is no part of the trade mark (*f*).

Shape of barrel, &c.

A particular shape of barrel, bottle, parcel, &c., containing goods is no trade mark for the goods contained in it (*g*); nor is the representation of such barrel, bottle, or parcel a trade mark for such goods (*h*), though the fraudulent imitation of it will be restrained (*i*). Nor is a mechanical convenience not used for purposes of identification, such as a strip of tobacco rolled round the mouth-piece of cigarettes (*k*), nor the general configuration and appearance of a machine (*l*), nor a sampler-pattern (*m*), a trade mark. But where the mark is "something different from the article itself which the mark designates" (*n*), such as a stick placed in a roll of carpet, showing an

(*a*) *In re Tolle*, 2 U. S. Pat. Gaz. 415.

(*b*) *Chase v. Mayo*, 121 Mass. 343.

(*c*) *Harter v. Sourazoglu*, W. N. 1875, pp. 11, 101; *Carver v. Bowker*, Dig. 581; *Mitchell v. Henry*, 15 Ch. D. 181; *Robinson v. Finlay*, 9 Ch. D. 487.

(*d*) See the Public Stores Act, 1875.

(*e*) *In re Robinson*, 29 W. R. 31. See Patents Act, 1883, § 67.

(*f*) *In re Steedman*, L. J. N. of C. 1883, p. 83.

(*g*) *Moorman v. Hoge*, 2 Sawy. 78 (a barrel); *Harrington v. Libby*, 14 Bl. C. C. 128 (a collar-box). See *In*

re Kane & Co., 9 U. S. Pat. Gaz. 105, and *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461.

(*h*) *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.

(*i*) *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392.

(*k*) *In re Gordon*, 12 U. S. Pat. Gaz. 517.

(*l*) *Fairbanks v. Jacobus*, 14 Bl. C. C. 337.

(*m*) *In re Parler*, 13 U. S. Pat. Gaz. 323.

(*n*) Per Johnson, J., in *Fairbanks v. Jacobus*, 14 Bl. C. C. 337.

octagonal ring at each end (*a*), or a band attached to cigar-boxes (*b*), and is special and distinctive, and not in common use, then it may be recognised as a good trade mark, notwithstanding that it is not attached to the goods in the usual way.

If a mark is in other respects a good trade mark, the fact that it is consumed with the article to which it is attached is no objection to its validity (*c*).

Mark may be consumed with the article.

(*a*) *Lowell Manufacturing Co. v. Larned*, Dig. 428.

(*b*) *Ex parte Straiton & Storm*, 18 U. S. Pat. Gaz. 923.

(*c*) *In re Gordon*, 12 U. S. Pat. Gaz. 517; and see *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 441.

CHAPTER III.

ACQUISITION, TRANSFER, AND DISCONTINUANCE OF TRADE MARKS.

1. *Acquisition.*

Who may
acquire.

AS a general rule, any person capable of acquiring any other species of property is capable of acquiring a right to a trade mark, and this is equally the case with artificial persons, as corporations (*a*), as with physical persons, or individuals.

Aliens.

A question has, however, been raised as to whether an alien was capable of acquiring a right to a trade mark, but when raised was at once finally decided by Sir W. P. Wood, V.-C., in accordance alike with justice and expediency. The plaintiffs in *The Collins Co. v. Cowen* (*b*), were an American firm of edge-tool manufacturers, whose trade marks appear to have been systematically infringed by English rivals. In the case in question the defendants, who had copied the plaintiffs' stamp of "Collins Co., Hartford, cast steel, warranted," demurred. The Vice-Chancellor overruled the demurrer, and observed in the course of his judgment, "I apprehend that every subject of every country, not being an alien enemy—and even to an alien enemy the Court has extended relief in cases of fraud—has a right to apply to this Court to have a fraudulent injury to his property arrested. And here the plaintiffs have the right, a right recognised, I imagine, everywhere in the world, or at least in every civilised community, of

(*a*) See Patents Act, 1883, § 117, for definition of "person."
(*b*) 3 K. & J. 428.

saying, 'We, being the manufacturers of certain goods, claim that another man shall not manufacture goods and put upon them our trade mark, and then pass them off as manufactured by us.' It would be most grievous if any Court should hold that there was an incapacity of affording relief in a case where a fraud has been committed upon a subject of any country. I speak, of course, of a fraud so far connected with property as to be not a shadowy but a substantial injury. If you use the name of another for the purpose of securing to yourself, in the disposition of property, advantages which belong to him, the fraud is complete, and the remedy ought to be complete, as in the case of a libel, where the action is allowed to a foreigner. I cannot in my own mind entertain the slightest misgiving in this case, whether it be new or not" (a).

When no goods bearing the foreign trade mark have been sold in this country, the trade mark can have acquired here no reputation for its foreign owner, so that it would appear doubtful whether the protection extended to foreign trade-mark owners should be afforded in cases where there has been no user in this country, and the mark does not expressly state a foreign origin. In such a case the first person to use the mark in the United Kingdom is the first person to gain a reputation for it here (b).

Where no
user in
England.

(a) See also *Collins Co. v. Brown*, 3 K. & J. 423; *Collins Co. v. Walker*, 7 W. R. 222; *Collins Co. v. Reeves*, 28 L. J. Ch. 56; *Hoce v. McKernan*, 30 Beav. 547. So in Scotland the trade marks or names of American manufacturers have been protected: *Singer Manufacturing Co. v. Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267. The same rule obtains in America: *Taylor v. Carpenter*, 8 Story, 458; R. Cox, 14; *Same v. Same*, 2 Wood. & M. 1 R. Cox. 32; *Same v. Same*, 11 Paige, 292; R. Cox, 45; *Coats v. Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; and *Lemoine v. Ganton*, 2 L. D. Smith, 343; R. Cox, 142. And the infringement

of a British trade mark has been criminally punished in Missouri: *State of Missouri v. Gibbs*, 58 Mo. 133. In India protection is afforded to British trade marks: *Orr-Ewing v. Choonecloll Mullick*, Cor. 150; *Orr-Ewing v. Grant, Smith & Co.*, 2 Hyde, 185; and in Canada also the trade marks of aliens are protected: *Davis v. Kennedy*, 13 Grant, Up. Can. Ch. 523.

(b) See *In re Münch*, 50 L. T. N. S. 12; *In re Riviere & Co.*, 49 L. T. N. S. 506; (App.) 32 W. R. 390; *In re Leonard & Ellis*, 32 W. R. 530, per Fry, L. J. Registration is equivalent to public use: Patents Act, 1883, § 75.

New rules as to foreign trade marks.

The rules under the Trade Marks Registration Act, 1875, distinctly provided for the registration of his trade mark by any person, whether a British subject or an alien (a); and although § 103 (3) of the Patents Act, 1883, appears to imply that before registration can be granted to a foreign trade mark here, application must first have been made in its country of origin, yet, in the case of subjects of any foreign state between which and the British Government a convention exists, a priority is given by the same section over other claimants, so that there is some compensation for the new requirement of application abroad.

Sovereigns.

It seems that there is nothing to prevent sovereign princes or states from being the proprietors of trade marks in respect of goods manufactured or produced on their account (b).

Officials.

A person in an official position, using an official stamp in his official capacity, cannot thereby acquire any private right therein (c). Nor can an agent acquire any interest in his principal's mark from the fact that he has used it (d).

Agents.

Length of user formerly required.

There was for some time a doubt as to the circumstances under which one person could acquire a sufficient right to a trade mark to be entitled to restrain another from infringing it. The right to redress being treated as founded on the defendant's intentional fraud, it was thought that a plaintiff who claimed an injunction against a defendant ought to show that he (the plaintiff) had acquired for the mark indicating his manufacture such a reputation (e) as would raise a presumption that the

(a) Compare Merchandise Marks Act, 1862, § 1.

(b) See *Ex parte King of Saxony*, Dig. 598; *Republic of Peru v. Reeves*, 40 N. Y. Super. Ct. 316.

(c) *Chase v. Mayo*, 7 Lathrop, 343.

(d) *Hirsch v. Jonas*, 3 Ch. D. 584; *Swift v. Peters*, 11 U. S. Pat. Gaz. 1110.

(e) In *Hine v. Lart*, 10 Jur. 106,

Sir L. Shadwell, V.-C. of England, thought that the imitation by a defendant of a plaintiff's trade mark afforded a presumption of that mark having acquired a reputation. And see *Dixon v. Jackson*, Court of Session Cases, 3rd Series V. 326, per the Lord Justice Clerk, and *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

defendant in adopting a similar mark had done so with the intention of availing himself of that reputation to divert to himself the plaintiff's custom, or at all events that the plaintiff ought to show that he had used the mark long enough to render it probable that such a reputation had been acquired (a).

But when it came to be recognised that there was a right of property in a trade mark, intentional fraud being unnecessary to justify restraint, it was at once seen that, as was stated by Sir J. Romilly, M. R., "the interference of a Court of Equity could not depend on the length of time the manufacturers had used it" (b), but that, "from the time of their commencing the user of their trade mark they became entitled to the protection of the Court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs" (c).

In *Siegert v. Findlater* (d), it was even held that the plaintiffs were entitled to restrain the defendant from using the term "Angostura Bitters," although the defendant had used it on his labels before the plaintiffs had done so, on the ground that, before the plaintiffs had themselves used the term, it had become attached to their

Latterly considered unnecessary.

Acquisition by common repute.

(a) See *Purser v. Brain*, 17 L. J. Ch. 141; *Edelsten v. Vick*, 11 Hare, 78; *Collins Co. v. Brown*, 3 K. & J. 423; and compare *Spottiswoode v. Clarke*, 2 Ph. 154.

(b) *Hall v. Barrows*, 32 L. J. Ch. 548.

(c) Per Sir C. Hall, V.-C., in *Cope v. Evans*, L. R. 18 Eq. 138; and see *Orr-Ewing & Co. v. Grant, Smith & Co.*, 2 Hyde, 185. This principle does not appear to be universally recognised in America. See *Seltzer v. Powell*, 8 Phila. 296. In *Sternberger v. Thalheimer*, 3 U. S. Pat. Gaz. 120, it was held that prior registration and prior use of about six days, but only on a few articles by way of experiment, by one manufacturer, did not disentitle another

to registration, he having systematically used the mark for some time before his rival had seriously adopted it. It is the adoption and use, not the invention, of the mark that gives a title to it: *Swift v. Peters*, 11 U. S. Pat. Gaz. 1110; *Hoosier Drill Co. v. Ingels*, 14 *ib.* 785; *Leidersdorf v. Flint*, (1) 8 Biss. 327; *McLean v. Fleming*, 96 U. S. Rep. 245; *U. S. v. Steffens*, 100 *ib.* 82; and a trade mark may have been in part purchased and in part invented: *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60.

(d) 7 Ch. D. 801. And see *Smith v. Woodruff*, 48 Barb. 438; *Rowley v. Houghton*, 2 Brews. 303; *De-graves v. Whiteman*, 5 Vict. L. R. Eq. 304.

article in common parlance. But acquisition of a trade mark by common report has not been universally recognised (a).

How property
in a trade
mark acquired.

Lord Westbury, C., said, in *McAndrew v. Bassett* (b), that the elements of the right to property in a trade mark might be represented as being the fact of the article being in the market as a vendible article with that stamp or trade mark at the time when the defendants imitated it; and he went on: "The essential qualities for constituting that property probably would be found to be no other than these: first, that the mark has been applied by the plaintiffs properly (that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation) (c); secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the defendants knowing that to be so, have imitated the mark for the purpose of passing off in the market other articles of a similar description" (d).

The mark
must be on a
vendible
article.

From this judgment it follows, and it was expressly recognised in *Maxwell v. Hogg* (e), that no property could be acquired in a trade mark, except through the process of sale, or offering for sale, in the market, of the article to which the trade mark was affixed (f). And in the last-mentioned case it was held that no expenditure during the course of manufacture in advertisements or other announcements to the public of the article so in course of manufacture could give any right in the mark or name by which it was intended that the article should be known when

(a) See *Blackwell v. Armistead*, 5 Amer. L. T. 85.

(b) 4 De G. J. & S. 380.

(c) Compare §§ 72, 73, 86 of the Patents Act, 1883.

(d) Compare remarks of Lord Kingsdown in the *Leather Cloth Companies' case*, 11 H. L. C. 523.

(e) L. R. 2 Ch. 307.

(f) And see per Willes, J., in *Lawson v. Bank of London*, 18 C. B. 84. Also *Civil Service Supply Asso-*

ciation v. Dean, 13 Ch. D. 512; *In re Simpson, Davies & Sons*, M. R., Jan. 12th, 1881; *Wheeler v. Johnston*, 3 L. R. Ir. 284; *Rowley v. Houghton*, 2 Brewster, 303, R. Cox, 486; *Bowman v. Floyd*, 85 Mass. 76; *McLean v. Fleming*, 96 U. S. Rep. 245; *St. Louis Piano Manufacturing Co. v. Merkel*, 1 Mo. App. 305. As to the difficulty of acquiring a right of trade mark in a name applied to a patented article, see p. 47, ante.

completed and in the market (a). Moreover user must be as of a trade mark, and not as of a mere descriptive term (b).

By the Trade Marks Registration Act, 1875, now repealed, a new manner of acquiring a right to a trade mark was introduced, and with respect to new marks substituted for the earlier method. By the Patents Act, 1883 (c), which has now taken the place of the Act of 1875, no infringement of a registrable trade mark can be restrained or punished, unless the mark has been registered. For five years after registration the fact of registration is *prima facie* evidence of the right of the registered proprietor to the exclusive use of the trade mark (d), or, in other words, it qualifies him for taking proceedings against infringers (e); after five years have expired from the date of registration, the fact of registration becomes conclusive evidence of his right to the mark (f), provided only that the mark is one within the definition of registrable trade marks contained in the Act (g). Registration protects the trade mark in all sizes and in all colours, whether registered in colour (h) or not (i). In the case of trade marks in use before August 13th, 1875, application must be made for registration, and if that is refused, a certificate of refusal will preserve to the applicant whatever rights he would have had independently of the Act (k).

A trade mark must be registered as belonging to particular goods or classes of goods (l), as arranged in the Third

(a) And see *Civil Service Supply Association v. Dean*, 13 Ch. D. 512.

(b) *In re Leonard & Ellis*, 32 W. R. 530.

(c) § 77.

(d) § 76; and see *Reinhardt v. Spalding*, 49 L. J. Ch. 57, *Wheeler v. Johnston*, 3 L. R. Ir. 284.

(e) *Nuthall v. Vining*, C. A. Jan. 21st, 1880. In the case of *Morse v. Martin*, Montreal Sup. Ct. Feb. 28th, 1882, it was held that the corresponding Canadian statute gave no right of action for anything done before registration. But the Court

of Appeal did not decide the point, Feb. 23rd, 1884.

(f) § 76. This is, however, subject to the provisions of the Act, e.g., as to the connection with the goodwill: § 70.

(g) *In re Palmer* (1), 21 Ch. D. 47; S. C. (3) 24 *ib.* 504; *In re Leonard & Ellis*, 53 L. J. Ch. 233; (App.) 32 W. R. 530.

(h) See § 67.

(i) *Nuthall v. Vining*, C. A. Jan. 21st, 1880.

(k) § 77.

(l) § 65.

Schedule to the Rules; the class to which the goods belong being determined, in case of doubt, by the comptroller (a). This requirement is no alteration of the rules of the pre-existing law, but is merely a statement of one of those rules as bearing upon registration under the Act. It had been already fully recognised that a particular trade mark could be protected as such only in connection with particular goods or classes of goods. Thus Lord Westbury, C., says, "Property in a trade mark is the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity; consequently the use of the same mark in connection with a different article is not an infringement of such a right of property" (b). And again, "An ironfounder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods; for the property in a trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture" (c). And V.-C. Wood similarly says, that "this Court has taken upon itself to protect a man in the use of a certain trade mark as applied to a particular description of article. He has no property in that mark, *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them," his right to the mark so applied will be protected (d).

(a) Rule 6.

(b) *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137.

(c) *Hall v. Barrows*, 4 De G. J. & S. 150.

(d) *Ainsworth v. Walmsley*, L. R.

1 Eq. 518; and see *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434—43; *Merchants' Banking Co. of London v. Merchants' Joint Stock Bank, Limited*, 9 *ib.* 560; *Colladay v. Baird*, 4 Phila. 139; R. Cox, 257; *Rowley v. Houghton*, 2

As a result of the rule that a trade mark can only be acquired by user in respect of the goods on which it has been used, it has been decided that the use of a mark before August 13th, 1875, on certain descriptions of goods gives no right to have it registered in respect of other descriptions of goods, except as a new mark, so that although the mark may have been long used in respect of some goods, it will be refused registration in respect of other goods or classes of goods (though of a somewhat similar character), if it conflicts with another mark already registered therein (a). And it has been held in America, with apparently good reason, that a mark which is descriptive, and therefore incapable of registration, when applied to one description of goods, may be open to no such objection when applied to another description of goods (b). In *Moses v. Sargood* (c) it was held to be an infringement of the plaintiffs' rights for the defendants, who had previously only exported goods unmade up, and used their trade mark upon such goods, to begin to export and to use their trade mark upon ready made clothing, having regard to the fact that the plaintiffs had been in the habit of exporting and using a somewhat similar trade mark upon made up goods.

Limit of rights
acquired by
user.

By § 72 the registration of a mark identical with, or nearly similar to a mark already registered, is prohibited, not generally, but in connection with such goods or description of goods as those in respect of which the mark already on the register is registered. And, with a view to the protection of the public, this prohibition is extended over a period of five years after the removal of the mark once registered from the register for non-payment of a continuance fee, during which period of five years the renewed mark in

Provisions in
the Patents,
&c., Act and
Rules.

Brewster, 303; R. Cox, 486; *Amoskeag Manufacturing Co. v. Garner*, 55 Barb. 151; R. Cox, 541; *Colman v. Crump*, 70 N. Y. 573; *Société Anonyme, &c. v. Baxter*, 14 Bl. C. C. 261.

(a) *In re Jelley, Son & Jones*, 51

L. J. Ch. 639; and see *In re Braby & Co.*, 21 Ch. D. 223.

(b) *In re English*, U. S. Pat. Comm. Decis. 1870, 142; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538.

(c) Dig. 636.

question is to be still deemed to be registered for this purpose only (a).

Steps necessary to obtain registration. The application.

A person desirous of having his trade mark registered must send an application to the comptroller in the prescribed form (b), together with the prescribed number (c) of representations (d) of the trade mark. When a representation cannot be given in the usual manner, a specimen or copy of the trade mark may be supplied instead (e). The application must state the particular goods or classes of goods in connection with which the applicant desires the trade mark to be registered (f), and when the application is in respect of metal goods, other than cutlery, edge tools, and raw steel, *i.e.*, other than the goods within the Cutlers' Company's Acts, the metal of which the goods are made must be stated (g). Words in other than Roman character must have a translation supplied (h).

When mark is an old mark.

When the mark is claimed as an old mark, *i.e.*, a mark used before the passing of the Trade Marks Registration Act, 1875 (August 13th, 1875), the facts as to such prior user are to be stated (i), but no statutory declaration is now required, as was formerly the case. In such cases it is essential that the mark should be claimed and registered precisely in the form in which it has been used (k).

(a) § 79 (5).

(b) Form F. in the Second Schedule to the Rules. See § 62 (2) and Rules 4, 5, 11.

(c) Three, except when the application is in respect of goods in classes 23 to 35, *i.e.*, the textile classes. In such a case four representations must be sent. In either case one of the representations is to be placed on the application form. See Rule 13. When the application is for the registration of a series of marks under § 66, the case will be governed by Rule 14.

(d) For form of Additional Representation, see Form G. See also § 62 (3).

(e) See Rule 13.

(f) § 62 (3).

(g) Rule 12.

(h) Rule 15.

(i) Rule 10.

(k) *In re Horsburgh*, 53 L. J. Ch. 237; *In re Royal Baking Powder Co.*, W. N. 1880, p. 49; *Russell & Sons, Limited, v. Smith*, M. R., June 18th, 1880; *In re Palmer* (3), 24 Ch. D. 504; *In re Leonard & Ellis*, 82 W. R. 530. In *In re Eastman*, W. N. 1880, p. 128, a trade mark was allowed to be registered as an old mark, because of its having been used abroad; but it hardly seems that foreign user, without use in the realm, should give any right. See *In re Münch*, 50 L. T. N. S. 12; *In re Riviere & Co.*, 49 L. T. N. S. 506; (App.) 32 W. R. 390; *In re Leonard & Ellis*, 53 L. J. Ch. 233; (App.) 32 W. R. 530. And user, even within the realm, must have been user as a trade mark, and not as a mere descriptive term: *In re Leonard & Ellis, ubi supra*.

When the application is made by a firm or partnership it may be signed by some one or more members of the firm or partnership, as the case may be (a). When by a firm.

When the application is made by a body corporate, it may be signed by the secretary or other principal officer of such body corporate (a). When by a body corporate.

The application and all other communications between the applicant and the comptroller may be made by or through a duly authorised agent (b), and may be sent by a prepaid letter through the post (c). Manner of making application.

All that remains to be done by the applicant for registration, after sending in his application, is to await an acknowledgment of its receipt by the comptroller (d), and then to furnish the comptroller with the means of inserting in the official paper the necessary advertisement of the application (e). Advertisement, &c.

At the expiration of two months from the date of the first advertisement, and subject to any proceedings which may have been taken, the comptroller is, if satisfied of the applicant's title, to register the trade mark (f) as from the date of the receipt of the application for registration (g), and upon registration is to send notice thereof to the registered proprietor with a reference to the advertisement (h). Registration.

If an applicant dies between application and registration the registration may be completed in the name of the successor to the goodwill of his business (i). In case of applicant's death.

Trade marks applied for in respect of goods within the Cutlers' Company's Acts (k) are governed by special rules (l); but marks on cotton goods, even, it would seem, B list marks, are for the future to be dealt with on the same footing as other trade marks. The only special requirements in the case of cotton marks are for the name by which the Sheffield and cotton marks.

(a) Rule 7.
 (b) Rule 8.
 (c) § 97 and Rule 16.
 (d) Rule 9.
 (e) § 68 and Rules 25—28.
 (f) Rule 30.

(g) Rule 32.
 (h) Rule 33.
 (i) Rule 31.
 (k) See Appendix C., *infra*.
 (l) § 81 and Rules 53—56. See also Rule 12.

mark would be referred to in invoices to be stated (*a*), and for three additional representations to be sent instead of two (*b*).

Series of marks.

Where it is desired to register a number of trade marks which, while resembling each other in the material particulars thereof (*c*), yet differ in respect of statements of the goods for which they are to be used, or of numbers, or price, or quality, or names of places, they may be registered as a series in one registration, each of the marks being treated as separately registered, except for purposes of assignment and transmission (*d*).

Common marks.

Additions which are common to the trade may, in accordance with the provisions of § 74, be registered together with trade marks, but such common elements must be disclaimed by the applicant (*e*).

Alternative marks.

No provision is made in the Patents Act, 1883, for registering alternative marks, as has sometimes been done in America, *e.g.*, where a trade mark was registered as consisting either of the figure of a lion, or the word "lion," or both (*f*).

Colour.

Trade marks may now be registered in colour, and the effect of such registration is no longer to limit the protection conferred by registration to the one colour in which the registration has been effected (*g*).

Registration by deposit.

Provision is made by the Rules for registration by deposit in cases where such a course is rendered necessary by the nature of the trade mark (*h*).

Refusal to register.

Registration is by no means a necessary consequence of application. The comptroller may refuse to grant registration if he thinks fit (*i*), or if he thinks the use of the mark

(a) Instructions, par. 15.

(b) Rule 13.

(c) See § 64 as to essential particulars.

(d) § 66 and Rules 14, 28. This is new as an enactment, but the practice is not new. See note (a) to § 66, and note (c) to § 72, *infra*.

(e) The practice of requiring common parts of marks or additions

to marks to be disclaimed is not new. See per Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238. Also notes to § 74, and note (c) to § 72, *infra*.

(f) *In re Weaver*, 10 U. S. Pat. Gaz. 1.

(g) See § 67 and note thereto, *inf.*

(h) Rules 13, 25. And see note to § 67.

(i) § 62 (4).

would be contrary to law or morality (*a*), and he must refuse registration where the same or a similar mark is already registered for the same goods (*b*), or where words inherently calculated to deceive are offered for registration (*c*). Where the refusal is made in the exercise of a discretion vested in the comptroller, he is not to exercise that discretion adversely to the applicant until he has had an opportunity of being heard personally, or by his agent (*d*), and if he does, in his discretion, refuse to register, there is an appeal to the Board of Trade (*e*), who may, if they think fit, refer the appeal to the Court (*f*), and any person aggrieved by the omission of the name of any person from the register, may apply to the Court to rectify the register (*g*). This provision appears to have the effect of enabling an applicant whose application has been refused to go direct to the Court, instead of to the Board of Trade, if he prefers that tribunal, or even to go to the Court after his application has been refused by the Board of Trade (*h*).

Even if the comptroller is willing to treat the application as unobjectionable, any person (*i*) may give notice of opposition at the Patent Office within two months after the first advertisement, and the applicant is then allowed two months for sending in a counter-statement, or the registrar may extend the time. If no such counter-statement is sent, the application is deemed to be withdrawn;

(*a*) § 86.

(*b*) § 72.

(*c*) § 73.

(*d*) § 94 and Rules 17—19.

(*e*) § 62 (4). See Rules 20—24.

(*f*) § 62 (5). "The Court" is the High Court of Justice (§ 117), the Chancery Division being no longer specified, but recourse will, no doubt, still be had to that Division.

(*g*) § 90. When the registration is objected to on the ground that the mark tendered for registration is not qualified for registration, "the first duty cast upon the Court is to ascertain whether some one or more than one of the essential particulars of a trade mark, as defined

by the Act, is found to exist, so that the mark may be described with the one or more than one essential particular or particulars which distinguish it." Per Lord Cairns, C., in *Orr-Ewing v. Registrar of Trade Marks*, 4 App. Cas. 484.

(*h*) See note (*n*) to § 62, *infra*.

(*i*) It need not be the proprietor of a registered mark. In *In re Simpson, Davies & Sons, M. R.*, Jan. 12th, 1881, the proprietors of a trade mark registered for coal in class 4 successfully opposed the registration of a similar mark for railway waggons in class 22, the opponent's coal being carried in and sold out of waggons.

Opposition to application.

if it is sent, the person giving notice of opposition will be required to give security for costs, which if he does not do within fourteen days the opposition is deemed to be withdrawn. If he does give the required security, the comptroller is to inform the applicant thereof in writing, and thereupon the case stands for the determination of the High Court of Justice (*a*). Upon this point being reached, the comptroller is to require the applicant within one month, or such further time as he may allow, to take out a summons in chambers for leave to register (*b*), or to take such other proceedings as may be proper (*c*). If the applicant does not take the proceedings directed within the time allowed, and give notice to the comptroller, the application is to be deemed to be abandoned (*d*). If he does so, then the case will be dealt with by the Court in the usual way, and it seems that the Court will now have jurisdiction over the whole costs of the proceedings (*e*).

Limited
registration.

In deciding whether registration is to be allowed or not, the Court will frequently grant the application in such a limited form as to obviate the risk of its clashing with the mark which it is considered to resemble (*f*). Thus registration has been granted in such a form as to be partial in respect of the mark itself which is registered (*g*), or of the goods for which it is registered (*h*), or of the manner of

(*a*) § 69. An opportunity will first be afforded the applicant of objecting to the security given. See Instructions, par. 34, *infra*.

(*b*) This is under Rule 29. Hitherto the practice has been to require the opponent to take out a summons for directions as to the mode of proceeding. See *In re Simpson, Davies & Sons*, 15 Ch. D. 525.

(*c*) The recent usual practice has been to go by summons where there was a notice of opposition, by motion where the registrar objected to the application. As to going by way of motion, see *Ex parte Stephens*, 24 W. R. 819; see also *In re Johnston*, 43 L. T. N. S. 672; *In re*

Salomon, Dig. 569.

(*d*) Rule 29.

(*e*) See § 90. Formerly the Court had only jurisdiction over the costs as from the time when the case stood for its determination, but not before. *In re Brandreth*, 9 Ch. D. 618.

(*f*) See as to the growth of this form of registration, per Jessel, M.R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238.

(*g*) See note (*c*) to § 72 and *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Hoyle & Sons, Limited* (2), Chitty, J., Nov. 30th, 1883.

(*h*) See note to § 65, *infra*.

user (*a*), or of the locality within which it is to be used (*b*) or of the persons against whom it is to be protected (*c*).

Again, where each of several persons claims the same trade mark the comptroller may refuse to register any of them until their rights have been determined according to law, and he may himself submit or require the claimants to submit their rights to the Court (*d*) in the form (unless the Court shall otherwise order) of a special case (*e*), agreed to by the parties, or, in case of difference, settled by the registrar (*f*). Conflicting claims.

In any proceeding for rectification of the register, *e.g.*, for placing a name on it which has been rejected, the Court may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved (*g*). Issue may be directed.

Subsequently to registration clerical errors may be corrected by the comptroller (*h*), who may also alter the address of the registered proprietor (*i*), and by leave of the Court the registered proprietor may alter his trade mark and procure an alteration of the register accordingly, but the alteration must not extend to any of the "essential particulars" of the trade mark (*k*). Alteration of registered trade mark.

No notice of any trust, expressed, implied, or constructive, can be received by the comptroller, or entered in the register (*l*). No trust entered on register.

2. Transfer.

A trade mark is capable of being assigned during the life of its proprietor, and of being transmitted at his death; but it can be assigned and transmitted only in connection Assignment and transmission.

(*a*) See note (*c*) to § 72, *infra*, and *In re Whiteley*, 43 L. T. N. S. 627; *In re Sykes*, *ib.* 626; *In re Farina* (3), Dig. 654.

(*b*) *In re Rabone*, Dig. 643; *In re Keep*, 32 W. R. 427.

(*c*) *Ex parte Hemming & Son*, M. R., April 27th, 1881.

(*d*) § 71, and Rules 40, 41.

(*e*) Rule 42, and see note to § 71,

infra.

(*f*) Rule 43.

(*g*) § 90.

(*h*) § 91.

(*i*) Rule 46.

(*k*) § 92; and see *In re Dewhurst*, M. R., June 11th, 1880. Notice of the application must be given to the comptroller: Rule 48.

(*l*) § 85.

with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered (a), and trade marks registered as a series can only be assigned and transmitted as a whole (b).

Trade mark cannot be severed from goodwill.

Even apart from the Act, there is no doubt that the trade mark cannot be severed from and used independently of the goodwill. If that could be done, the *indicium* of genuineness might only serve to mislead. This view was clearly put by Lord Westbury, C., in the *Leather Cloth Companies' case* (c), when he suggested the case of a firm of clothiers in Wiltshire, trading as A. B. & Co. for fifty years, and acquiring a great reputation for their broad cloth marked "A. B. & Co. Wilts"; then, he asked, supposing A. B. & Co. to discontinue their business, and to sell the right to use the mark to C. D. & Co. clothiers in Yorkshire, would the latter be protected in Equity in their claim to the exclusive use of the mark? and he answered the question in the negative.

Trade mark passes with goodwill.

To such an extent is a trade mark an accessory of the goodwill, that in *Shipwright v. Clements* (d), Sir R. Malins, V.-C., held that in the sale of the latter the trade mark would pass, whether specially mentioned or not (e).

Same principle adopted in America.

In a case before the New York Court of Appeals (f), the expression was adopted that "a property in trade mark might be obtained by transfer from him who had made the primary acquisition, though it was essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade mark had been attached." In another American case (g), the statement

(a) § 70. See *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Ex parte Lawrence & Co.*, 44 L. T. N. S. 98.

(b) § 66.

(c) 4 De G. J. & S. 137; and see *Cotton v. Gillard*, 44 L. J. Ch. 90; *Taylor v. Bemis*, 4 Biss. 406; *Wittluis v. Braun*, 44 Md. 303; *Skinner v. Oakes*, 10 Mo. App. 45; *Morgan*

v. Rogers, 26 U. S. Pat. Gaz. 1113.

(d) 19 W. R. 599.

(e) And see *Churton v. Douglas, Johns*, 174; *Fulton v. Sellers*, 4 Brews. 42.

(f) *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, R. Cox, 599.

(g) *Dixon Crucible Co. v. Guggenheim*, 2 Brewster, 321; R. Cox, 559;

that the "property or right to a trade mark might pass by an assignment or by operation of law," was followed by this limitation, "to any one who took at the same time the right to manufacture or sell the particular merchandise to which the trade mark had been attached." And in the very recent case of *Kidd v. Johnson (a)*, the Supreme Court of the United States laid down that "as distinct property, separate from the article created by the original producer or manufacturer, a trade mark may not be the subject of sale. But when it is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character, as those to which the mark was attached by its original designer."

It is possible that occasionally, though rarely, a trade mark may be so framed as not to be merely a simple indication of quality, or a guide to the place of manufacture, but to have the effect of ascribing the article to which it is attached to the personal skill or supervision of an individual. In such a case the question arises whether the trade mark which, when originally adopted, contained no assertion which was incorrect, is capable of transfer to another person so as to enable him to apply it to his own goods and to prevent a similar use of it by others, the personal skill and supervision of its former proprietor having ceased to be applied.

Personal
trade mark.

Name of
former
proprietor.

and see *Walton v. Crowley*, 3 Bl. C. C. 440; *R. Cox*, 166; and *Derringer v. Plate*, 29 Cal. 292; *R. Cox*, 325. (a) 100 U. S. Rep. 617.

some American authority (a) to the contrary, that the mere fact of the trade mark consisting of or containing the name of its former proprietor, who originally conducted the business with which the trade mark is connected, is not of itself sufficient to disentitle the transmittee or assignee of the business to continue to use the mark, since the mere name of the maker will be deemed to be indicative rather of a business, in whosoever hands it may be, than of an individual proprietor of it (b).

When trade mark is personal.

It is, however, conceivable that a trade mark may be "so completely personal as of necessity to import that the goods sold under it have been manufactured by a particular individual" (c), as if it contains not only the name of the proprietor, but also some reference to his personal qualifications or supervision (d), or an allusion to particular workmen in his employ (e), in which case the mark will already become deceptive even while the business remains in the same hands, if the proprietor should cease to give his personal attention, or to employ the same workmen. And in *Manhattan Medicine Co. v. Wood* (f), the Supreme Court of the United States said that "if one affix to goods

(a) *Sherwood v. Andrews*, 3 Amer. L. Reg. N. S. 588; and see *Partridge v. Menck*, 2 Sandf. Ch. 622; *Carmichel v. Latimer*, 11 R. I. 395; and *Manhattan Medicine Co. v. Wood* (App.), 23 U. S. Pat. Gaz. 1925.

(b) *Bury v. Bedford*, 4 De G. J. & S. 352; *Churton v. Douglas*, Johns. 174; *Hall v. Barrows*, 4 De G. J. & S. 150; *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; *Massam v. J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748; and the American cases of *McLean v. Fleming*, 96 U. S. Rep. 245; *Filkins v. Blackman*, 13 Bl. C. C. 440; *Weed v. Peterson*, 12 Abb. Pr. N. S. 178; *Booth v. Jarrett*, 52 How. Pr. 169; *Weston v. Ketcham* (1), 39 N. Y. Super. Ct. 54;

S. C. (2) 51 How. Pr. 455; *Woods v. Sands*, Dig. 467; *Fulton v. Sellers*, 4 Brews. 42; *Young v. Jones Bros. & Co.*, 3 Hughes, 274. Compare *Clark v. German Mutual Fire Insurance Co.*, 7 Mo. App. 77.

(c) Per Sir G. Turner, L. J., in *Bury v. Bedford*, 4 De G. J. & S. 352; so in *Carmichel v. Latimer*, 11 R. I. 395.

(d) *Helmbold v. Helmbold Manufacturing Co.*, 53 How. Pr. 453.

(e) And compare the reference by Lord Kingsdown to an artist's special skill, in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523.

(f) 23 U. S. Pat. Gaz. 1925, and see *In re Swezey & Dart*, 62 How. Pr. 215; and Daly, C. J.'s observations in *Hegeman & Co. v. Hegeman*, 8 Daly, 1.

of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person at a different place, is a fraud upon the public which no Court of Equity will countenance."

In such a case, independently of statute, it is clear that no protection will be given to a mark become deceptive. Thus, Lord Westbury, C., was of opinion that the Court would not sell and transfer the right to use a mark of a personal character simply and without alteration (a). No protection of deceptive marks.

The objection to the use of a trade mark become deceptive, which, independently of statute, applied rather to the use of the mark assigned than to the power of assigning it (b), should now, as it appears, more properly apply to the registration of the assignee or transmittee, by which the latter acquires, at least, a *prima facie* right to practise deceit. The Act, indeed, contains no provision expressly directed to meet a case of this kind, the 73rd section being only aimed at an attempted registration of a mark disentitled from the beginning to protection, by reason of being inherently calculated to deceive, and not to a registration of a subsequent proprietor of a mark which has lost its right to protection through a change of circumstances. The spirit of the Act is, however, to favour the general The Patents, &c., Act.

(a) *Hall v. Barrows*, 4 De G. J. & S. 150. See, too, the Clothiers' case, suggested by him in the *Leather Cloth Co.'s case*, 4 De G. J. & S. 137; and the remarks of Lord Cranworth in that case in the House of Lords, 11 H. L. C. 523; and

those of the L. JJ. in *Bury v. Bedford*, 4 De G. J. & S. 352. Compare *Sherwood v. Andrews*, 3 Am. L. Reg. N. S. 588, and *Partridge v. Menck*, 2 Sandf. Ch. 622.

(b) Per Turner, L. J., in *Bury v. Bedford*, 4 De G. J. & S. 352.

assignability of trade marks together with the goodwill to which they are attached, and it may be expected that such elements in a trade mark as would impede this assignability will very rarely, if ever, survive the original process of registration now necessary.

Trade marks
generally
transferable.

Subject only to the provision prohibiting the severance of a trade mark from the goodwill of the business with which it is connected, the trade mark is freely assignable. "The right to a trade mark may, in general, treating it as property, or an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser" (a). If this were not so the value of a very valuable and important part of the goodwill of the business carried on by a person (b) would be seriously diminished. And for a similar reason, and in the interest alike of the owner of a trade mark himself and of his assignee, the original owner will, subsequently to assignment, be restrained from the use of his former trade mark, equally with persons who have never had an interest in it (c). Nor after that event does he retain any power of conferring on another a right to use it (d). The same will be the case if the sale has been

(a) Per Lord Cranworth in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523; and see per V.-C. Wood in *Ainsworth v. Walmsley*, L. R. 1 Eq. 518; also *Hall v. Barrows*, 4 De G. J. & S. 150; *Hudson v. Osborne*, 39 L. J. Ch. 79; *Weed v. Peterson*, 12 Abb. Pr. N. S. 178; *Cook v. Starkweather*, 13 *ib.* 392; *Frese v. Bachof* (2), 14 Bl. C. C. 432; *In re Rohland*, 10 U. S. Pat. Gaz. 980; *Lockwood v. Bostwick*, 2 Daly, 521; and the clear and full statement by Daly, C. J., in *Hegeman & Co. v. Hegeman*, 8 Daly, 1. It was said by Shipman, J., in the American case of *Filkins v. Blackman*, 13 Bl. C. C. 440, that "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."

(b) Compare the observations of Sir W. P. Wood, V.-C., as to the sale of a trade name, involving the same considerations, in *Churton v. Douglas*, Johns. 174; also *Shipwright v. Clements*, 19 W. R. 599.

(c) *Bury v. Bedford*, 4 De G. J. & S. 352; and see *Churton v. Douglas*, Johns. 174.

(d) *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60; *Filkins v. Blackman*, 13 Bl. C. C. 440.

made, not by the owner himself, but by his trustee in bankruptcy (*a*). In the sale of a business a trade mark will pass to the purchaser without special mention (*b*).

When a person becomes entitled to a registered trade mark by assignment or transmission, or other operation of law, the way in which he has to obtain the registration of himself as the proprietor (*c*) is by sending a request to that effect to the comptroller (*d*), signed in the same way as is required in the case of an original application (*e*), stating the name, address, and description of the claimant, and the particulars of his title, showing that the trade mark has gone with the goodwill of the business (*f*), and accompanied by a statutory declaration verifying the several statements made (*g*). And further proof of title is to be furnished to the comptroller if he requires it (*h*).

Registration
of subsequent
proprietor.

On the owner of a trade mark becoming bankrupt, his trade mark is transmitted with his business to his representative in bankruptcy, and will, together with the business and goodwill, be dealt with by him (*i*). But, apart from the statutory provisions regulating registration, it seems that a trade mark which owes its value to its owner's personal skill will not pass; and in the American case of *In re Swezey and Dart* (*k*), an insolvent trader was directed to be examined for the purpose of ascertaining whether the value of the mark was owing to such skill or to the general working of the factory. And it has been held in America that an assignee in bankruptcy cannot sell a trade secret or a trade mark of which the main feature is

Transmission
on bank-
ruptcy.

(*a*) *Hudson v. Osborne*, 39 L. J. Ch. 79; *Hegeman & Co. v. Hegeman*, 8 Daly, 1.

(*b*) *Shipwright v. Clements*, 19 W. R. 599.

(*c*) § 87.

(*d*) Rule 34.

(*e*) Rule 35.

(*f*) Rule 36, and see § 70.

(*g*) Rule 37. For form of application and declaration, see Form K. in Second Schedule to Rules. § 84

(*h*) Rule 38.

(*i*) *Hudson v. Osborne*, 39 L. J. Ch. 79; *Cotton v. Gillard*, 44 L. J. Ch. 90; *Bury v. Bedford*, 4 De G. J. & S. 352; *Ex parte Young*, Dig. 537; *Royers v. Tuintor*, 97 Mass. 291; *Hegeman & Co. v. Hegeman*, 8 Daly, 1. And see *Longman v. Tripp*, 2 Bos. & P., N. R. 67; and *Ex parte Foss*, 2 De G. & J. 230.

(*k*) 62 How. Pr. 215.

the bankrupt's name, so as to restrict the bankrupt's right to use them (a); and also that where one of the partners in a solvent firm becomes bankrupt, his interest in the name or trade mark of the firm cannot be sold, on the ground that his right is only to an undivided part of the mark, and that this is of no value apart from its connection with the goodwill (b).

Formation of partnership.

Upon the formation of a partnership, one member of which is the proprietor of a trade mark, the trade mark will, in the absence of express provisions, or tacit acquiescence by the other partners in the previous owner's retention of his trade mark (c), pass into and become part of the partnership assets, for the trade mark is but an element of the trade (d). In that case it seems that the partner who has newly acquired an interest in the trade mark will be entitled to registration as joint proprietor with his partner who is already on the register. And where, without the actual formation of a partnership, three persons agreed to carry on business in common, one manufacturing, another acting as exporting agent, and the third as consignee and merchant at Rangoon, it was held on appeal that neither had an exclusive right to the combination of marks used on the goods which had passed through this course, though some of the marks in the combination had been used separately by one of the three before the arrangement between them was made, the decision being based on the fact that the combination as a whole had come to denote goods which had passed through the hands of all three (e).

Dissolution of partnership.

Upon the dissolution of a partnership among whose

(a) *Helmhold v. Helmhold Manufacturing Co.*, 53 How. Pr. 453.

(b) *Taylor v. Bemis*, 4 Biss. 406.

(c) *Kidd v. Johnson*, 100 U. S. Rep. 617, practically reversing *Kidd & Co. v. Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337.

(d) *Bury v. Bedford*, 4 De G. J. & S. 352, per Sir G. Turner, L. J. And see *Condy v. Mitchell*,

37 L. T. N. S. 268, *ib.* 766; *Filkins v. Blackman*, 13 Bl. C. C. 440; *Swift v. Peters*, 11 U. S. Pat. Gaz. 1110; *Rogers v. Taintor*, 97 Mass. 291; *Sohier v. Johnson*, 111 Mass. 238; *Weston v. Ketcham* (2), 51 How. Pr. 455.

(e) *Robinson v. Finlay*, 9 Ch. D. 487.

property a trade mark is included, whether that dissolution be brought about by the mutual agreement of the partners, or by the death of one of them, the trade mark, as forming part of the partnership assets, and also on account of its close connection with the goodwill of the business, must be treated in the same way as the business and goodwill are treated, unless there is an express agreement for its discontinuance. If the business and goodwill are sold, the trade mark will be included in the sale (a); if the share of the retiring or deceased partner is, by arrangement, taken over by the continuing or surviving partner or partners, the retiring or deceased partner's interest in the trade mark passes with his share in the business, and must be included in the valuation of that share (b); if the partners merely agree to divide the partnership assets, so that each in effect carries on the same business, though they carry it on severally instead of jointly, then each is at liberty to use the mark as he did before (c). Thus, where H. B. Condy had brought into a partnership formed between himself and one Mitchell certain trade marks, which consisted in part of the former's name, it was held that after the dissolution, on which the goodwill became divisible in equal shares between the partners, Mitchell was equally entitled with Condy to continue to use the trade mark (d). And where

(a) *Bradbury v. Dickens*, 27 Beav. 53; *Hull v. Barrows*, 4 De G. J. & S. 150; *Banks v. Gibson*, 34 Beav. 566; *Rogers v. Taintor*, 97 Mass. 291; *Armistead v. Blackwell*, 1 U. S. Pat. Gaz. 603.

(b) *Banks v. Gibson*, 34 Beav. 566; *Hull v. Barrows*, 4 De G. J. & S. 150; *Hazard v. Cuswell*, 47 N. Y. Super. Ct. 537. But it seems that if a retiring partner sets up no claim to an interest in the trade mark, and the continuing partner continues to use it without objection, the former will be held to have given up his interest in favour of the latter: *Kidd & Co. v. Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337. See *Kidd v.*

Johnson, 100 U. S. Rep. 617, and *Simpson v. Wright* (1), 15 U. S. Pat. Gaz. 248. On the other hand, the continued use of the mark by the retiring partner, even on a spurious article, is evidence of his intention to preserve his interest in the mark: *Wright v. Simpson*, 15 *ib.* 968.

(c) *Banks v. Gibson*, 34 Beav. 566. And see *Bond v. Milbourn*, 20 W. R. 197; *Weston v. Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2) 51 How. Pr. 455; *Young v. Jones Bros. & Co.*, 3 Hughes, 274; *Robinson v. Finlay*, 9 Ch. D. 487.

(d) *Condy v. Mitchell*, 37 L. T. N. S. 268, 766.

certain partners sold to their co-partners their interest in the business premises, and in certain personal property connected with the business, but not their interest in the goodwill or trade mark, it was held that they retained their right to use the trade mark concurrently with their former co-partner (a).

Transmission
on death.

Where a trade mark has been transmitted by the death of the registered proprietor, his legal personal representative will be recognised as having the title to the mark. So long since as the reign of King George II., Lord Hardwicke, C., decided (b) that shares in the goodwill of a newspaper, entitled *The St. James's Evening Post*, were to be considered as part of the personal property of the proprietor; and that, on the death of the proprietor, his trade mark passes to his personal representative with the remainder of his personal property has never been questioned (c). Where letters of administration to a person who had adopted a trade mark for an article of his invention had not been taken out, it was held that his son could not, by merely continuing to make the article and use the trade mark after his father's death, acquire a right in the trade mark so as to be entitled to prevent another person from using it; still less could a purchaser of the son's business do so (d).

Bequest of
trade mark.

The proprietor of a trade mark may bequeath it according to pleasure (e), but this is subject to the provisions prohibiting its transmission otherwise than in connection with the goodwill of his business (f), and a registered series of marks can only be transmitted as a whole (g).

(a) *Huxer v. Dannenhoffer*, 82 N. Y. 499.

(b) *Giblett v. Read*, 9 Mod. 459.

(c) Thus in *Croft v. Day*, 7 Beav. 84, 28 Leg. Obs. 378, the successful plaintiffs were the executors of the former proprietor of the business and trade mark. See *In re Parina*, (4), 44 L. T. N. S. 99.

(d) *Hovenden v. Lloyd*, 18 W. R. 1132. And see *Singleton v. Bolton*, 3 Doug. 293.

(e) *Dent v. Turpin*, 2 J. & H. 100; *M'Lean v. Fleming*, 96 U. S. Rep. 245.

(f) § 70. And see Rules 36, 37, and Form K.

(g) § 66.

By means of bequest, dissolution of partnership, &c., it is possible for more than one person to become severally entitled to the same trade mark at the same time (a), and concurrent rights may similarly arise by reason of concurrent substantial user by more firms than one (b). In such cases it was provided by the old rules, now repealed, that the several claimants might, by their common consent, be registered separately as separate proprietors of such trade mark; and although no such provision is contained in the new rules, it would appear that in such a case the comptroller would have a discretion to register each of the claimants (c). But where one of the claimants has got on to the register, the comptroller cannot register the other without the leave of the Court (d); neither can he do so where either application is opposed (e).

By the 4th section of the Act of 1875, it was provided that every proprietor registered in respect of a trade mark subsequently to the first registered proprietor was, as respected his title to that trade mark, to stand in the same position as if his title were a continuation of the title of the first registered proprietor (f). This section is not re-enacted, but there appears to be no doubt that the result will be the same as if it had been. It may be noticed that by § 76 the privileges conferred by § 3 of the Act of 1875 upon the *first* registered proprietor are now given to the registered proprietor.

3. Discontinuance.

In order for a trade mark to be entitled to protection, it is now necessary either that the trade mark shall be registered

(a) *Hine v. Lart*, 10 Jur. 106; *Dent v. Turpin*, 2 J. & H. 139; *Banks v. Gibson*, 34 Beav. 566; and see *Southorn v. Reynolds*, 12 L. T. N. S. 75.

(b) *In re Powell*, Dig. 589; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Benbow v. Low* (4), 41 L. T. N. S. 875; *Day v. Neale*, V.-C. B.,

May 24th, 1881; *In re Hodson & Co.*, 26 Sol. J. 43; and other cases on the Three Mark Rule. See note (c) to § 72, *infra*.

(c) See § 71.

(d) § 72.

(e) § 69.

(f) Compare *Hovenden v. Lloyd*, 18 W. R. 1132.

tered, or, if an old mark is in question, that registration shall have been refused (a). The protection of a mark once registered terminates, therefore, with the cessation of registration.

Duration of registration.

The original registration of a trade mark is for a period of fourteen years, and unless previously to the expiration of that period the fee for continuance is paid, the comptroller may, after the end of three months from such expiration, remove the mark from the register, and in the same way from time to time at the expiration of every fresh period of fourteen years (b). No difficulty need in ordinary cases be apprehended from the prolongation of registration, for the exclusive use of a trade mark is no injury or deprivation to the public, but a protection against fraud.

If subsequently to the expiration of the fourteen years, but before the expiration of the additional three months, the proprietor pays the increased fee, the comptroller may accept the fee as if paid before the expiration of the fourteen years, and allow the mark to remain on the register (c).

Restoration to register.

Even after the removal from the register for non-payment of the fee, the mark may be restored to the register by the comptroller, if he is satisfied that it is just so to do, on payment of an additional fee.

Must be a vendible article with trade mark attached.

Independently of registration no trade mark can exist as such unless there is actually existent in the market a vendible article to which the mark is in some way affixed or attached (d), though it is not necessary for the mark to

(a) § 77.

(b) § 79 (1), (2).

(c) § 79 (3).

(d) *McAndrew v. Bussett*, 4 De G. J. & S. 380; *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Wheeler v. Johnston*, 3 L. R. Ir. 284; *Candee v. Deere*, 54 Ill. 439; *Blackwell v. Dibrell*, 14 U. S. Pat. Gaz. 633. And see *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434. In *Cotton v. Gillard*, 44 L. J. Ch. 90, the plaintiffs had bought from the trustee in bank-

ruptcy the interest of the bankrupt in a certain sauce and in his trade mark, but the sauce being compounded according to a secret which the trustee could not communicate, Sir G. Jessel, M.R., held that the plaintiff could not use or protect the trade mark. See *Witthaus v. Braun*, 44 Md. 303; *Taylor v. Bemis*, 4 Biss. 406; *Helmbold v. Helmbold Manufacturing Co.*, 53 How. Tr. 453; *Weston v. Ketcham* (1), 39 N. Y. Super. Ct. 54; *S. C.* (2), 51

be externally visible, *e.g.*, where it is placed on the bottom of a wine cork, which is not seen until the bottle is bought and opened (*a*).

The necessity of proving the existence of such an article so marked, in the case of registered marks, now no longer exists, since, subject to the connection with the goodwill of the business, registration is to be deemed to be equivalent to public use (*b*); but in the case of old marks, it seems that a certificate of refusal will not entitle the unsuccessful applicant to his remedy, if discontinuance can be established. The old 34th Rule contained provisions intended to prevent the continuance of restrictions which no longer served any useful purpose, and this rule was put into practice in the very recent case of *In re Ralph* (*c*). It is not now re-enacted; but since, by § 70, a trade mark is determinable with the goodwill, it may be held, though it is not clear, that the Court has jurisdiction under § 90 to remove from the register, on the application of any person aggrieved, a trade mark which has lost its right to existence by the discontinuance of its proprietor's business.

"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" (*d*), and the neglect on the part of the owner which is fatal to his exclusive right may either take the shape of a cessation of user on his own part, or of the growth of a concurrent right in others. Each of these depends upon intention. "To constitute abandonment" (*i.e.*, by cessation of user) "an intention to abandon must be shown. Mere non-user of a trade mark can no more be said to constitute abandonment than the mere non-user of a right to foul a stream

How. Pr. 455; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461; *Morgan v. Rogers*, 26 U. S. Pat. Gaz. 1113.

(*a*) *Moët v. Pickering*, 8 Ch. D. 372; *Moët v. Clybourn*, Dig. 533.

(*b*) § 75. This is so also in the

United States: *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248. See *Sternberger v. Thalheimer*, 3 U. S. Pat. Gaz. 120.

(*c*) 25 Ch. D. 194.

(*d*) Per Hughes, J., in *Blackwell v. Dibrell*, 14 U. S. Pat. Gaz. 633.

belonging to a mill as an easement can be said to constitute an abandonment of the easement" (a). "The question of abandonment" (i.e., by non-interference with infringers) "is one of intention, and the burden of establishing it lies upon the party who affirms it," said an American judge (b), and in the same way it was said in the High Court of Bengal (c) that the right of property in a trade mark acquired by user "would continue until it had been proved by evidence that the proprietor had abandoned it." In particular, where the trade mark owner is ignorant of infringements taking place, it will not be held that he has abandoned his rights because of his failure to enforce them, that failure being due to his ignorance of what was going on (d), but it may be assumed that there must be reasonable diligence shown in the defence of his rights.

Fancy words
become
descriptive.

With respect to trade marks consisting of words which originally were fancy names, it has occasionally happened that they have ceased to denote the manufacture of any particular person, and have become simply descriptive of a certain article or a certain principle of manufacture. When that has become the case, such words have ceased to be capable of protection as trade marks, having become *publici juris*, open to the use of all (e). But a composite mark is not abandoned by isolated words or symbols

(a) Per Chitty, J., in *Monson v. Boehm*, 28 Sol. J. 361. It would be evidence of intention to abandon if a trade mark owner were to break up his moulds and erase the mark from his books and lists: *Ib.*

(b) Morris, Comm., in *Julian v. Hoosier Drill Co.*, 75 Ind. 408, in which a delay of three years was held not to amount to abandonment.

(c) In *Orr-Ewing & Co. v. Grant, Smith & Co.*, 2 Hyde, 185, per Levinge, J.

(d) *Weldon v. Dicks*, 10 Ch. D. 247; *In re Farina* (2), 27 W. R. 456; *Monson v. Boehm*, 28 Sol. J. 361; *Williams v. Adams*, 8 Bies. 452;

Sawyer v. Kellogg, 19 U. S. Pat. Gaz. 1627.

(e) Per Sir G. Mellish, L. J., in *Ford v. Foster*, L. R. 7 Ch. 611. And see *Wheeler & Wilson Manufacturing Co. v. Shakespeare*, 39 L. J. Ch. 36; *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298; *Same v. Anderson*, W. N. 1883, p. 185; *Lazenby v. White*, 41 L. J. Ch. 354; *In re Hyde & Co.*, 7 Ch. D. 724; *Browne v. Freeman*, W. N. 1873, p. 178; *Lea v. Millar*, Dig. 513; *Wolfe v. Goulard*, 18 How. Pr. 64; *R. Cox*, 226; *Burke v. Cassin*, 45 Cal. 467; 13 Amer. Rep. 204. See also the Merchandise Marks Act, 1862, § 9.

contained in it being used by others (a). Where a name, which it has been attempted to appropriate as a trade mark, has been in fact descriptive throughout, the case can hardly be said to have arisen of a discontinuance of a trade mark, inasmuch as it was invalid throughout (b).

In this connection the "three-mark rule," as it is called, becomes of importance. This rule originated in the discovery—soon after the Act of 1875 came into operation—that the same or substantially the same trade mark was in many instances in use by more firms than one, generally carrying on business in different parts of the country, and in order to avoid injustice being done in such cases the rule was laid down by the Commissioners of Patents and acted on in various decisions of the Courts, that where two or three firms could prove that they had used the same or substantially the same mark on the same or substantially the same goods, to a substantial extent, before the passing of the Act of 1875, each should be allowed to register; but that where the mark had been used by more than three firms it was common to the trade (c), and on this principle it has been held that various marks were common in different trades (d). This rule is now incorporated in § 74, so far as is necessary for the purpose of determining what parts of a composite mark must be disclaimed as common.

In *Braham v. Bustard* (e) and *Ford v. Foster* (f), it was held that the habitual use of the manufacturer's name (which was alone a sufficient trade mark), before the special and distinctive appellation of "Excelsior" in the one case, and "Eureka" in the other, did not amount to an abandonment of the manufacturer's right in those appel-

The Three
Mark Rule.

Trade mark
not abandoned
by habitual
user in com-
bination with
name.

(a) *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60; *Filley v. Child*, 16 Bl. C. C. 376.

(b) *Young v. Macrae*, 9 Jur. N. S. 322; *Raggett v. Pindlater*, L. R. 17 Eq. 29; *In re Horsburgh*, 53 L. J. Ch. 237; *Rowland v. Breidenbach*, Dig. 386; *In re Leonard & Ellis*,

53 L. J. Ch. 233; 32 W. R. 530; *Bulloch, Lade & Co. v. Gray*, 19 Journ. of Jurisp. 218; and see p. 50, note (a), *supra*.

(c) See note (c) to § 72, *infra*.

(d) See notes to § 74, *infra*.

(e) 1 H. & M. 447.

(f) L. R. 7 Ch. 611.

lations when used without the name, but that the manufacturer remained entitled to his essential mark. In *Lea v. Millar* (a) it was held that, in addition to the evidence as to the common use of the alleged trade mark by persons other than the plaintiff, the fact that the plaintiff had recently adopted a new label upon these goods, on the ground that his existing label did not afford sufficient protection, was a public abandonment of the latter. And in *Manhattan Medicine Co. v. Wood* (b), it was held that a trade mark had been lost by abandonment, a new form of bottle and label having been adopted in place of the old ones. An exclusive right to a mark may be lost by its owner using it habitually and exclusively upon goods which pass through other persons' hands so that they acquire a right in it (c).

Abandonment
by a retiring
partner.

It has been held in the United States that a partner who, on retiring from the partnership, sets up no claim to an interest in the trade mark, and sees, without objection, the remaining partner continuing to use it, must be taken to have abandoned all interest in it (d). But it has also been held in America that the continued use of the mark by the retiring partner, even on a spurious article, is evidence that he does not intend to abandon his interest (e).

Abandonment
by dismissal
of suit.

In *Browne v. Freeman* (f) it was held that the plaintiff, having previously commenced a suit against an infringer of his trade mark, and then having got his bill dismissed with costs, in consequence of being advised that his right was doubtful, had lost all rights in the trade mark. Under the registration system such a loss of trade mark can seldom occur except in the case of unregistered though cer-

(a) Dig. 513.

(b) 23 U. S. Pat. Gaz. 1925.

(c) *Robinson v. Finlay*, 9 Ch. D. 487.

(d) *Kidd & Co. v. Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337; but see *Kidd v. Johnson*, 100 U. S. Rep. 617. See also *Swift v. Peters*, 11

U. S. Pat. Gaz. 1110; *Simpson v. Wright* (1), 15 *ib.* 248.

(e) *Wright v. Simpson*, 15 U. S. Pat. Gaz. 968.

(f) 12 W. R. 305; and see W. N. 1873, p. 178. See *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748.

tified marks, since the rights of a proprietor of a registered mark are such that it is impossible to suppose that in many cases such a proprietor would resign his claims without a struggle. With respect to marks unregistered, or even uncertified, there does not appear to be anything in the Act to prevent proof of the imitation of such marks being given in support of an action for unfair competition in trade carried on by means of actual intentional fraud, and not depending solely on the similarity of the marks.

On the whole, it may be expected that, while with respect to unregistered marks things will remain much as they were, with respect to registered ones there will be in the future but little discontinuance or abandonment, except where registration has been discontinued, in consequence of non-compliance on the part of the registered proprietor with the requirements of the Act with respect to prolonged registration.

In *Lemoine v. Ganton* (a), a plaintiff was allowed to recover nominal damages for the infringement by the defendant of a trade mark which the plaintiff had formerly used, but had ceased to use for a year. And it has also been held by the United States Commissioner of Patents that a person who, after having acquired certain rights in a trade mark, has discontinued his business for several years, recovers, on again commencing business, superior rights in the trade mark to those possessed by another person who has used the mark during the period of discontinuance (b).

By § 79 (5) a registered trade mark removed from the register is, for the purpose of any application for registration during the five years next after the date of such removal, to be deemed to be a trade mark already registered.

(a) 2 E. D. Smith, 343; R. Cox, 142.

(b) *Armistead v. Blackwell*, 1 U. S. Pat. Gaz. 603.

Cancellation. By § 91 power is given to the comptroller upon a proper application to cancel the whole or a part of the entry of a trade mark on the register. In this case a statutory declaration by the registered proprietor is necessary (a).

(a) See notes to § 91, *infra*, and Forms O. and P.

CHAPTER IV.

INFRINGEMENT.

WHEN an action has been commenced, having for its object the restraint of an unfair competition in trade, carried on by means of an employment by the defendant of a trade mark identical, or nearly identical, with the plaintiff's, there must be established, in order for the action to be successful, the existence of the trade mark, the plaintiff's exclusive right therein (a), the fact of an imitation, and the absence of licence or acquiescence on the part of the plaintiff (b).

Requisites for infringement.

Assuming, then, the validity of the trade mark and the rights of the plaintiff therein to be established, the next and most important point for the plaintiff to prove is the fact of infringement. The plaintiff has no right to say that the defendant shall not sell exactly the same article, better or worse, or an article looking exactly like his own unpatented article, but he has a right to say that the defendant shall not sell such article in such a way as to steal (so to call it) the plaintiff's trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied (c). In the language of

Fact of infringement.

(a) As to this, see *Witthaus v. Braun*, 44 Md. 303; *Popham v. Wilcox*, 88 N. Y. Super. Ct. 274; *Weston v. Ketcham* (1) and (2) 39 *ib.* 54; 51 How. Pr. 455; and *Compagnie Laferme v. Hendrickx*, Dig. 612.

(b) See *Kinahan v. Bolton*, 15 Ir.

Ch. 75; and *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137.

(c) See per Lord Cranworth, C., in *Farina v. Silverlock*, 6 De G. M. & G. 214; and per Lord Langdale, M.R., in *Franks v. Wearer*, 10 Beav. 297.

the Common Law, the defendant has no right to sell his goods "as and for" those of the plaintiff (a); and "where it is shown that a dealer has the imitated article in his store, and offers it for sale as genuine, even though but a single sale is proved (b), that is sufficient to sustain an injunction against a continuance of the wrong, and an action for such injunction will not be defeated solely on the ground that on the day it is brought the dealer happens not to have any of the article on hand" (c).

Fraudulent
intention.

The question of how far a fraudulent intention in the mind of the defendant was necessary to entitle the plaintiff to obtain redress from him long remained a subject of discussion in connection with trade marks. The doctrine of the Common Law was that, inasmuch as the only manner in which the Common Law could be set in motion to repair the wrongful proceedings of an infringer was by the institution of an action on the case (d), an allegation of intentional fraud (e), supported by evidence, was necessary to enable the plaintiff to bring his action to a successful conclusion (f).

First pur-
chaser not
deceived.

While, however, it was necessary at Common Law for a fraudulent intention to be proved, it was not required that the defendant should have represented to his immediate purchaser that the goods marked were of the plaintiff's manufacture, it was sufficient to bring the case within the reach of the law if he had sold the goods for the purpose of their being resold as and for goods of the plaintiff's manufacture, which object the mark attached to them by

(a) *Sykes v. Sykes*, 3 B. & Cr. 541; *Morison v. Salmon*, 2 Man. & G. 385; *Crawshay v. Thompson*, 4 *ib.* 357.

(b) See *Bondier v. Depatie*, Montreal Q. B., May 29th, 1883.

(c) Per the New York Court of Appeals in *Low v. Hart*, 90 N. Y. 457.

(d) See *Crawshay v. Thompson*, 4 Man. & G. 357.

(e) *I.e.*, that the defendant had acted knowingly—*scienter*.

(f) *Singleton v. Bolton*, 3 Doug. 293; *Morison v. Salmon*, 2 Man. & G. 385; *Crawshay v. Thompson*, 4 *ib.* 357; *Rodgers v. Nowill*, 6 C. B. 109; and *Myers v. Baker*, 3 H. & N. 802. See, too, per Parke, B., in *Taylor v. Ashton*, 11 M. & W. 415.

the defendant would be calculated to facilitate (a). "No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign, or symbol, device, or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer" (b). "If a man does that, the natural consequence of which (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to him) is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable. But this is confined to those things which in their necessary or natural uses accompany the things sold. For instance, the corks of champagne bottles marked "Moet and Chandon" must be in the bottles sold, and must accompany the bottles. They must necessarily accompany the thing to the retail buyer, and so must labels to be put on the bottles. The very reason for their existence is that they must be put on the bottles, and if they are deceptive and fraudulent, then the person who prepares them is answerable for it. Such things must not be used if their natural and legitimate consequence is, not to deceive the person to whom they are sold, but to enable the purchaser to pass off the goods as being the goods of other persons" (c). These observations apply equally at Law and in Equity.

When plaintiffs in trade mark cases began to seek redress in the Court of Chancery, desirous of obtaining the more convenient remedy by way of injunction and account, which was superior to the damages to be gained at

Early doctrine
in Chancery.

(a) *Sykes v. Sykes*, 3 R. & Cr. 541; and see *Chappell v. Davidson*, 2 K. & J. 123; *Rose v. Loftus*, 47 L. J. Ch. 576; *Orr-Ewing & Co. v. Johnston & Co.*, 7 App. Cas. 219; *Balfour & Co. v. Kilburn & Co.*, 1

Hyde, 270.

(b) Per James, L.J., in *Singer Manufacturing Co. v. Looy* (3), 18 Ch. D. 412.

(c) Per Cotton, L.J., in S. C., 18 Ch. D. 422.

Common Law alike in the compensation for the past and in the security for the future, the Chancery judges held that the Courts in which they presided could act only in aid of, and as ancillary to the legal right (*a*). And acting upon this same principle, they held that the rules by which they had to judge of infringement must be identical with those of the Common Law, the plaintiff's right to his remedy being considered to be based, not on any right of property in him, but on the fraudulent proceedings of the defendant (*b*). The cases which were frequently sent by Chancery judges to be tried at Common Law by a jury were, of course, tried in accordance with Common Law principles (*c*).

Same injury caused, whether actual fraud or not.

It is, however, apparent that the seriousness of the injury inflicted on the manufacturer who has acquired a reputation for excellence in a particular class of goods, denoted by a special trade mark, by the offering for sale in the market of other goods, side by side with his, bearing the same mark, is not affected by the question whether such rival goods are made and marked by a person who is aware of the reputation of the original goods and desirous of attracting to himself some of the profits of that reputation, or by one who is actuated by no such motives, and is even ignorant of the prior use of the mark. As Lord Cairns, C., said, in a well-known case (*d*):—"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

(a) See per Lord Cottenham, C., in *Motley v. Downman*, 3 My. & Cr. 1.

(b) *Blanchard v. Hill*, 2 Atk. 484; *Canham v. Jones*, 2 V. & B. 218; *Perry v. Truefitt*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84. And see the observations of V.-C. Wood in *Edelsten v. Vick*, 11 Hare, 78; *Collins*

Co. v. Cowen, 8 K. & J. 428; *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; *Hall v. Barrows*, 32 L. J. Ch. 548; and *McAndrew v. Bassett*, 33 L. J. Ch. 561.

(c) E.g., *Rodgers v. Nowill*, 5 C. B. 109.

(d) *Singer Manufacturing Co. v. Wilson*, 3 App. Cas. 391.

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." "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" (a). The first maker is defrauded, even though his rival's conduct be not intentionally fraudulent.

In 1838, Lord Cottenham, C., awarded a perpetual injunction in a case in which he rejected any imputation of intentional fraud (b), and this is not now necessary to obtain redress in Equity. The principles in accordance with which relief will be given in Equity were summed up as follows by Lord Westbury, C.:—"At Law the proper remedy is by an action on the case for deceit, and proof of fraud on the part of the defendant is of the essence of the action; but the Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in Equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's

Later doctrine
in Chancery.

(a) Per Lord O'Hagan, S. C., 3 App. Cas. 396; and see per Cotton, L.J., in *Singer Manufacturing Co. v. Loog* (8), 18 Ch. D. 412; and *Black-*

well v. Wright, 73 N. Car. 310.

(b) *Millington v. Fox*, 3 My. & Cr. 338.

manufacture. If the goods were so supplied by the defendant for the purpose of being sold again in the market the injury to the plaintiff is sufficient. Again, it is not necessary for relief in Equity that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other" (a). It is not necessary for the plaintiff to show that the defendant knew whose trade mark his resembled (b), nor, in fact, to show that the defendant knew that his trade mark resembled any existing mark (c). "The action of the Court must depend upon the right of the plaintiff, and the injury done to that right. What the motive of the defendant may be, the Court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them." (d). In short, "the absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured" (e); and even if a person

(a) *Edelsten v. Edelsten*, 1 De G. J. & S. 185. That the rule of the Court of Chancery was as here stated, was recognised by the Court of Queen's Bench in *Dixon v. Parnus*, 3 Ell. & Ell. 537.

(b) *Cartier v. Carlile*, 31 Beav. 292.

(c) *Kinahan v. Bolton*, 15 Ir. Ch. 75; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Burgess v. Hills*, 26 Beav. 244; *Harrison v. Taylor*, 11 Jur. N. S. 408; *Orr-Ewing & Co. v. Grant, Smith & Co.*, 2 Hyde, 185; and see per Colton, L.J., in *Singer Manufacturing Co. v. Loog* (3), 18 Ch. D. 412.

(d) Per Lord Cairns, C., in *Singer Manufacturing Co. v. Wilson*, 3 App. Cas. 376—391.

(e) Per Sir J. Stuart, V.-C., in *Clement v. Maddick*, 1 Giff. 98; *Orr-Ewing & Co. v. Johnston & Co.*, 18 Ch. D. 434; *Rose v. Loftus*, 47 L. J. Ch. 576; *Upmann v. Forester*, 24 Ch. D. 231; *Cowen v. Hulton*, 46 L. T. N. S. 897. The same principle holds good in the United States: *McLean v. Fleming*, 96 U. S. Rep. 245; *Stonebraker v. Stonebraker*, 33 Md. 252; *Amoskeag Manufacturing Co. v. Garner* (2), 54 How. Pr. 298; *Colman v. Crump*, 70 N. Y. 573; *Blackwell v. Wright*, 73 N. Car. 310;

who has in his possession a quantity of goods bearing a spurious trade mark, is not intending to sell them or part with them, but to use them for his own consumption, relief will be granted against him (a).

It was, however, suggested by Lord Romilly, M. R., that the Court would not require a person to completely change a trade mark which he had taken *bonâ fide*, and without any intention of deception, but which did in point of fact resemble the trade mark of another person, since the complete change of trade mark might be of so serious consequence to the unintentional offender (b); and it has been held in America that a plaintiff may lose by delay his right to an injunction against an innocent vendor of goods spuriously marked, whatever might be the case with regard to the guilty manufacturer (c).

Indulgence to innocent offender.

It is also important to prove the fact of fraudulent intention, having regard to the account to be obtained, which may not be given in respect of sales by the defendant during such time as he continued in ignorance that he was infringing the plaintiff's rights (d), or with a view to the question of damages (e).

Fraudulent intention, as affecting account, or damages.

Again, in *Rodgers v. Rodgers* (f), Sir G. Mellish, L. J., expressed an opinion that, in a case in which the application for an injunction would, in the absence of proof of actual fraud, have to be rejected on the ground of long user by the defendants without assertion by the plaintiffs of their right, yet if it were clearly made out that the

Fraudulent intention in case of delay.

in India: *Balfour & Co. v. Kilburn & Co.*, 1 Hyde, 270; *Orr-Ewing & Co. v. Grant, Smith & Co.*, 2 Hyde, 185; *Graham & Co. v. Kerr, Dods & Co.*, 8 Beng. L. R. App. 4; and in Australia: *Hennessy v. White*, 6 W. W. & A'B. Eq. 213; *Hennessy v. Hogan*, 6 W. W. & A'B. Eq. 225.

(a) *Upmann v. Forester*, 24 Ch. D. 231.

(b) *Bass v. Dawber*, 19 L. T. N. S. 626.

(c) *Rodgers v. Philp*, 1 U. S. Pat.

Gaz. 29.

(d) *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Moet v. Couston*, 33 Beav. 578. See *Rose v. Loftus*, 47 L. J. Ch. 576.

(e) See *Faber v. D'Utassy*, 11 Abb. Pr. N. S. 399.

(f) 31 L. T. N. S. 285. And see *McLean v. Fleming*, 96 U. S. Rep. 245, where an injunction which had been granted was confirmed by the U. S. Supreme Court, notwithstanding a delay of many years.

use of the trade mark by the defendants was fraudulent, and that it had the practical effect of deceiving the public, then that in such a case the intentional fraud would operate to prevent the application for the injunction from being defeated on the ground of lapse of time.

In other respects.

Further, in *Radde v. Norman* (a), it was held by Sir J. Wickens, V.-C., to be quite obvious that much less absolute proof of the plaintiff's title would be required where there was reason to doubt the defendant's good faith; and in *Cope v. Evans* (b), Sir C. Hall, V.-C., said that where fraudulent intention was proved, the Court would restrain the defendants without further inquiry.

Circumstances pointing to fraudulent intention.

In default of direct proof of fraudulent intention, there are various circumstances which may serve to point to the conclusion that such intention has existed: thus, the continuing to use a mark after objections raised (c); the exact imitation of peculiar characteristics (d); the addition to an existing mark of a feature taken from the plaintiff's mark (e); the imitating changes introduced by the plaintiff (f); the removal, one by one, of points of difference, which originally served to distinguish the defendant's mark from the plaintiff's (g); the marking goods in obedience

(a) L. R. 14 Eq. 348.

(b) L. R. 18 Eq. 138. And see *Condy v. Mitchell*, 37 L. T. N. S. 268, 766; *Wilson v. Maxfield*, L. J. N. of C. 1875, p. 51; *McLean v. Fleming*, 96 U. S. Rep. 245.

(c) See per Lord Cairns in *Singer Manufacturing Co. v. Wilson*, 3 App. Cas. 376; and per Cotton, L.J., and Lord Blackburn in *Singer Manufacturing Co. v. Loog* (3), 18 Ch. D. 395; 8 App. Cas. 15. Also *Williams v. Osborne*, 18 L. T. N. S. 498; *McAndrew v. Bassett*, 4 De G. J. & S. 380; *Orr-Ewing & Co. v. Johnston & Co.*, 13 Ch. D. 434; and *Walker v. Alley*, 13 Grant Up. Can.

Ch. 366.

(d) *Hine v. Lart*, 10 Jur. 106; *McLean v. Fleming*, 96 U. S. Rep. 245; *Freese v. Bachof* (2), 14 Bl. C. C. 482; *Davis v. Reid*, 17 Grant Up. Can. Ch. 69; *Rodgers v. Philp*, 1 U. S. Pat. Gaz. 29.

(e) *Dixon v. Jackson*, Court of Session Cases, 3rd Series. V. 826 (a star added).

(f) *Braham v. Beachim* (1), 7 Ch. D. 848; *Siegert v. Findlater*, *ib.* 801.

(g) *Farina v. Cathery*, L. J. Notes of Cases, 1867, p. 184; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265; *Bell, Black & Co. v. Bell & Co.*, Dig. 514.

to an order to imitate the plaintiff's mark (a); the giving orders for that to be done (b); the adoption of an essential part of the plaintiff's mark, with a trifling and colourable alteration (c); the statement that the sources from which both plaintiff and defendant derive their raw material, and after which the plaintiff's works are named, are the defendant's sole property (d); the copying directions for use (e); the giving thanks to the plaintiff's customers for past favours (f); the adoption of similar type to the plaintiff's (g); the use of large type for a catchword (h); or of small type for a word showing the article not to be the original (i); the imitation of the barrels (k), or bottles (l), containing the plaintiff's article; the buying up and using the plaintiff's old bottles (m); the use by the defendant of a name not his own (n), possibly under the authority of

(a) *Woollam v. Ratcliff*, 1 H. & M. 259.

(b) *Godillot v. Hazard*, 81 N. Y. 263; *Twentsche Stoom Bleekery Goor v. Ellinger & Co.*, 26 W. R. 70.

(c) *Radde v. Norman*, L. R. 14 Eq. 348 ("Leopoldsalt" for "Leopoldshall"); *Davis v. Reid*, 17 Grant Up. Can. Ch. 69; *Orr-Bwing & Co. v. Johnston & Co.*, 18 Ch. D. 434; *Balfour & Co. v. Kilburn & Co.*, 1 Hyde 270.

(d) *Wheeler v. Johnston*, 3 L. R. Ir. 284.

(e) *Franks v. Weaver*, 10 Beav. 297; *Sedon v. Senate*, Dig. 18; *Yosatt v. Winyard*, 1 Jac. & W. 364; *Blofeld v. Payne*, 4 B. & Ad. 410; *Day v. Walls*, 12 Phila. 274; and many other cases.

(f) *Mogford v. Courtenay*, 45 L. T. N. S. 308; *Walker v. Alley*, 18 Grant Up. Can. Ch. 366.

(g) *India Rubber Comb Co. v. Rubber Comb and Jewelry Co.*, 45 N. Y. Super. Ct. 258; *Potter v. McPherson*, 28 N. Y. Sup. Ct. 559.

(h) *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Metzler v. Wood*, 8 Ch. D. 606; *Dence v. Mason* (1),

Dig. 534; *Foot v. Lea*, 13 Ir. Eq. 484.

(i) *Day v. Binning*, C. P. Coop. 489; *Glenny v. Smith*, 2 Dr. & Sm. 476; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Robineau v. Charbonnel*, W. N., 1876, p. 160; *Dence v. Mason* (1), Dig. 534; 41 L. T. N. S. 578; *Colton v. Thomas*, 7 Phila. 267; *Chubb v. Priest*, 1 L. T. 142; *Hennesy v. White*, 6 W. W. & A'B., Eq. 216; *Morgan v. Schuyler*, 79 N. Y. 490.

(k) *Moorman v. Hoge*, 2 Sawy. 78; *Cook v. Starkweather*, 18 Abb. Pr. N. S. 392.

(l) *Henry v. Price*, 1 Leg. Obs. 364; *Siegert v. Findlater*, 7 Ch. D. 801; *Wolfe v. Goulard*, 18 How. Pr. 64; *Laird v. Wilder*, 9 Bush 131; *Congress Co. v. High Rock Co.*, 45 N. Y. 291; *Wilder v. Wilder*, Dig. 372; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125; *Fullwood v. Fullwood* (1), W. N. 1878, p. 93, 185.

(m) *Rose v. Henley*, Dig. 551; *Allen v. Richards*, 26 Sol. J. 658; *Hostetter v. Anderson*, 1 V. R. Eq. 7

(n) *Ainsworth v. Walmsley*, L. R. 1 Eq. 518.

some person who bore the same name as the plaintiff (a); the formation of a partnership with another person, whose name or initial was such as to enable the defendant to imitate the plaintiff's mark with some specious pretence of legality (b); the addition of "and Co." after the name (c); the removal into the plaintiff's neighbourhood (d); the adoption of a name for a manufactory similar to that used by another, and placing it on goods, but keeping it out of the Directory (e); the making an improper use of the defendant's relationship to the plaintiff (f); the making an intentional misstatement as to the date of the commencement of a business (g); or as to prizes gained at an exhibition (h); the false pretence of an appointment as purveyor to a royal personage (h); have all been held to afford ground for reasonable suspicion of the presence of an *animus fraudandi*.

Circumstances pointing to absence of fraud.

On the other hand, if the defendant uses, on the goods which he is alleged to be endeavouring to pass off as the plaintiff's, a distinct and obvious trade mark of his own, or if he states plainly and in fair sized and clear type that such goods are in fact manufactured by himself, there is a strong indication that the defendant has no intention of attempting deception (i). So, again, if the defendant has

(a) *Meriden Britannia Co. v. Parker*, 89 Conn. 450; 12 Amer. Rep. 401; *Perks v. Hall & Co.*, W. N. 1881, p. 111.

(b) *Croft v. Day*, 7 Beav. 84 (Day & Martin); *Moet v. Clybourn*, Dig. 533 (M. & C.). And see *Schweitzer v. Atkins*, 37 L. J. Ch. 847; and *Hallett v. Cumston*, 110 Mass. 29.

(c) *Ohurton v. Douglas*, Johns. 174; *Fullwood v. Fullwood* (1), W. N. 1878, pp. 98, 185; *Devlin v. Devlin*, 69 N. Y. 212; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416.

(d) *Lee v. Haley*, L. R. 5 Ch. 155; *Fullwood v. Fullwood* (1), *ubi sup.*

(e) *Rodgers v. Rodgers*, 31 L. T. N. S. 285.

(f) *Gouraud v. Trust*, 10 N. Y. Sup. Ct. 627.

(g) *Fullwood v. Fullwood* (2), 9 Ch. D. 176; *Blackwell v. Armistead*, 5 Amer. L. T. 85.

(h) *Cave v. Myers*, Dig. 304.

(i) *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 484—484; so, too, in *Cherwin v. Walker*, 5 Ch. D. 850, where the goods were stated to be manufactured by the defendants. And see *Beard v. Turner*, 18 L. T. N. S. 746; *Raggett v. Findlater*, L. R. 17 Eq. 29; *Singer Manufacturing Co. v. Loog* (8), 18 Ch. D. 395; *Magee Furnace Co. v. Le Barron*, 127 Mass. 115; *Wolfe v. Goulard*, 18 How. Pr. 64; *McCartney v. Garnhart*, 45 Mo. 593; *Gilman*

ventured to display at a public exhibition goods bearing the mark to which exception is afterwards taken (a); or if he has truly stated the connection between himself and the original adopter of the trade mark (b); or if, when using bottles moulded with the plaintiff's name, which have come into his possession without fraud, he places his own labels on the bottles in place of the plaintiff's (c).

A registered trade mark is property, and evidence of fraudulent intention is unnecessary in a case of alleged infringement of such a mark, as appears from the Patents Act, 1883, § 76 (d), in accordance with which the registration of a person as proprietor of a trade mark is *prima facie* evidence of his right to the *exclusive use* of such trade mark, and, after the expiration of five years from the date of such registration, conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of the Act.

But when infringement of a registered trade mark is in question, the point is, not whether there has been infringement of the mark which the plaintiff has used in his business, but whether there has been infringement of the mark which he has actually registered. Thus Jessel, M. R.,

Fraud unnecessary where mark registered.

Where mark registered, infringement must be of mark as registered.

v. *Hunnewell*, 122 Mass. 139; *Ayer v. Rushton*, 7 Daly 9. But compare *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Singer Manufacturing Co. v. Wilson*, 3 App.-Cas. 376; *Perry v. Truefitt*, 6 Beav. 68; *Braham v. Bustard*, 1 H. & M. 447; *Ford v. Foster*, L. R. 7 Ch. 611; *Siegert v. Findlater*, 7 Ch. D. 801; *Reinhardt v. Spalding*, 49 L. J. Ch. 57; *Henderson v. Joss*, Dig. 198; *Singer Manufacturing Co. v. Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267; *Lea v. Wolff*, 48 How. Pr. 157; *Field v. Lewis*, Dig. 280; *Rose v. Loftus*, 47 L. J. Ch. 576; *Eno v. Stephens*, Dig. 609; *Kinahan v. Bolton*, 15 Ir. Ch. 75; *Williams v. Johnson*, 2 Bos. 1; *Phalon v. Wright*, 5 Phila. 464; *Boardman v. Meriden Britannia Co.*, 85 Conn.

402; *Whitney v. Hickling*, 5 Grant Up. Can. Ch. 605; *Hier v. Abrahams*, 82 N. Y. 519; *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527; *Hegeman & Co. v. O'Byrne*, 9 Daly 284; *Frese v. Bachof* (2), 14 Bl. O. O. 432; *Carroll v. Ertheiler*, 21 Alb. L. J. 503; *Fleischmann v. Schuckmann*, 62 How. Pr. 92.

(a) *Beard v. Turner*, 13 L. T. N. S. 746.

(b) *Emerson v. Badger*, 101 Mass. 82; *Gilman v. Hunnewell*, 122 *ib.* 139.

(c) *Rose v. Loftus*, 47 L. J. Ch. 576; *Barrett v. Gomm*, 74 L. T. 388; *Barrett v. White*, North, J., May 12th, 1883.

(d) This re-enacts § 3 of the Trade Marks Registration Act, 1875.

said, in *Ellis & Sons v. Ruthin Soda Water Co.* (a), "As I understand the Trade Marks Act, if you come for trade mark and not for actual fraud, you can only sue in respect of what you had registered as a trade mark." And in considering whether there has been infringement of the registered mark, it is necessary to see whether the essential particular in that registered mark has been imitated. Thus it was held by Jessel, M. R., in *In re Horsburgh* (b), that there was no conflict between two marks which combined substantially the same descriptive word with different devices, since the essential particulars, the devices, being different, it was immaterial that the marks resembled each other in a non-essential feature.

Burden of proof.

When a defendant has taken the material and essential part of the plaintiff's trade mark, the burden is upon the defendant to disprove the probability of deception, not upon the plaintiff to prove it (c).

Infringement of names as old marks.

With respect to trade marks used before the passing of the Trade Marks Registration Act, 1875, and consisting of a name printed or stamped in ordinary characters, which might be the case independently of the Act, it has been held that it is not necessary, in order to obtain an injunction, to prove the *scienter* where the infringer does not bear the name he has assumed (d), but that, on the other hand, where he does bear that name, such evidence must be produced (e); and, in the same way, where two firms have become entitled to use the same trade mark or firm name, it is only in a case of fraud that an injunction will be granted; and an allegation that the defendants use the

(a) M. R., Nov. 21st, 1879. And see *Nuthall v. Vining*, C. A., Jan. 21st, 1880; *Lamplough v. Beedler*, C. A., Nov. 12th, 1880; *Russell & Sons, Limited v. Smith*, M. R., June 18th, 1880.

(b) 53 L. J. Ch. 287. And see *Lucke v. Webster*, M. R., April 4th, 1879.

(c) *Pord v. Foster*, L. R. 7. Ch.

611; *Singer Manufacturing Co. v. Wilson*, 3 App. Cas. 376; *Orr-Ewing & Co. v. Johnston & Co.*, 13 Ch. D. 434.

(d) *Ainsworth v. Walmsley*, L. R. 1 Eq. 518; *McLean v. Fleming*, 26 U. S. Rep. 245.

(e) *Burgess v. Burgess*, 3 De G. M. & G. 898; *McLean v. Fleming*, 26 U. S. Rep. 245.

mark on inferior goods is not sufficient, since, if they have the right to use it, they can use it as they please (a).

With respect to names first used as trade marks after the passing of the Act of 1875, the requirement that they shall be "printed, impressed, or woven, in some particular and distinctive manner" (b), renders the mere use of the same name no infringement, unless the particular and distinctive manner is also copied, in which case evidence of actual intentional fraud will be unnecessary, whatever may be the name of the infringer.

Infringement of names as new marks.

In the same way, where a trade mark consisting of the coloured threads which form the heading to a piece of stuff (c), or of the representation of a coin (d), or of any other mark in which colour is essential, and which would lose its distinctiveness by being registered in the ordinary way, has been registered by deposit, it will not be infringed unless the colour and arrangement have been imitated. But, where the trade mark does not substantially consist in colour, then, though the mark has been registered in colour, the exclusive right to use the mark in any colour is now given to the registered proprietor (e).

Colour.

When it is alleged that a trade mark registered without colour has been infringed, it has been said that the proper manner of comparing the two trade marks is to compare their designs in the same size and free from colour, and that similarities in respect of colour should only be regarded in order either to prove fraud or to turn the scale when the question of infringement, leaving colour out of sight, is very difficult to decide (f). Where the plaintiffs had used a label for coffee, coloured red, white and blue, and con-

Mode of comparing uncoloured marks.

(a) *Rogers v. Taintor*, 97 Mass. 291; *Emerson v. Badger*, 101 *ib.* 182.

(b) Patents Act, 1888, § 64.

(c) *Mitchell v. Henry*, 15 Ch. D. 181.

(d) *In re Robinson*, 29 W. R. 31. And see *In re Horsburgh*, 53 L. J. Ch. 287. In America it has been held that where the identical form, size, colour, and style of a numeral regis-

tered a trade mark had been copied, an infringement had been committed, although it would have been no infringement to have used the numeral without copying those peculiarities, *Kinney v. Allen*, 1 Hughes, 106.

(e) Patents Act, 1888, § 67.

(f) Per Ct. of App. in *Nuthall v. Vining*, C. A., Jan. 21st, 1880.

taining the words "red, white and blue label," and had registered it without colour, the use by others of labels similarly coloured and containing the words was restrained (a). Another mode of comparing them is to compare the designs in the same colour (b), but this is more appropriate to cases of opposed registration.

What is infringement.

The real question which the Court has to try in a case of alleged infringement of trade mark, is whether what the defendant has done is calculated to deceive, whether there is so much imitation that goods bearing the one mark may be readily mistaken for goods bearing the other, whether a careful inspection is necessary to distinguish the mark and appearance of the former goods from those of the latter (c).

Croft v. Day.

In *Croft v. Day* (d), it was remarked by Lord Langdale, M. R., that two things were necessary for the accomplishment of a fraud such as was there contemplated: "First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance was calculated to produce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold. For the accomplishment of such a fraud it was necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practising the deception by preserving his own individuality" (e). In that case, however, a deliberate attempt was made to represent the defendant's establishment as the plaintiff's, and the

(a) *Hanson v. British Tea and Trading Association (Ld.)*, Bacon, V.-C., April 9th, 1884.

(b) *In re Worthington*, 14 Ch. D. 8.

(c) See per Bynum, J., in *Blackwell v. Wright*, 73 N. Car. 310.

(d) 7 Beav. 84.

(e) And see *Edelsten v. Vick*, 11 Hare, 78; *Rowley v. Houghton*, 2 Brewster, 803; *R. Cox*, 486; *Knock Morjan's Sons' Co. v. Schwachhofer*, 55 How. Pr. 37.

injury done to the plaintiff by the sale of goods bearing the spurious marks instead of his genuine goods is ordinarily sufficient to entitle him to his remedy, independently of any habit induced in the customer to resort to the defendant instead of to the plaintiff.

By what test, then, has it to be determined whether there is such a degree of similarity as to require the interference of the Court? Tests of infringement.

In the first place, where one person has adopted the trade mark of another, or a mark nearly resembling it, and there is evidence of actual deception; that is to say, "that any one has in fact been thereby induced to buy the defendant's goods as being the goods of the plaintiff," the question of resemblance has been decided by the test of facts, and the Court will restrain the defendant without further enquiry (a), unless it is clearly of opinion that the resemblance is so slight that no rational person ought to have been deceived (b). It is not, indeed, necessary that there shall have been actual deception (c), or damage sustained (d); but since, unless that can be proved, the case which the Court has to try is a hypothetical case, in which honest evidence as to the likelihood of deception can in all probability be procured on both sides (e), it is always safer for a plaintiff to obtain proof of actual deception if pos- Actual deception.

(a) *Cox v. Evans*, L. R. 18 Eq. 182; and see *Woollam v. Ratcliff*, 1 H. & M. 259; *McLean v. Fleming*, 96 U. S. Rep. 245; *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392; *Kinney v. Basch*, Dig. 542.

(b) *Civil Service Supply Association v. Dean*, 13 Ch. D. 512.

(c) *Abbott v. Bakers and Confectioners' Tea Association*, W. N. 1871, p. 207; *Field v. Lewis*, Dig. 280; and see *Filley v. Fassett*, 44 Mo. 173; *R. Cox*, 580; *Dixon Crucible Co. v. Guggenheim*, 2 Brews. 321; *R. Cox*, 559; and *India Rubber Comb Co. v. Rubber Comb & Jewelry Co.*, 45 N. Y. Super. Ct. 258.

(d) *Braham v. Beacham* (1), 7 Ch. D. 848.

(e) As a rule, not much weight is given to expert evidence on questions of similarity. See *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392; *Popham v. Wilcox*, 66 N. Y. 69; but there may be circumstances in which much weight will be given to it, *Mitchell v. Henry*, 15 Ch. D. 181. In *Wallace & Co. v. King & Co.*, Bomb. High Ct., April 30th, 1879, it was held in the High Court of Bombay that evidence given by European witnesses in Bombay and Manchester as to the probability of deception, was not admissible under the Indian Evidence Act, the witnesses not being experts, and the question not being one of science or art.

sible, and a certain degree of delay to enable him to obtain such proof will be excused (a).

Probable
deception.

In most cases, however, there is not produced any evidence of actual deception, and the plaintiff then has to satisfy the Court or jury that the defendant has used a mark either identical with, or only colourably differing from his own (b). It is not sufficient for the plaintiff to produce evidence tending to show that in the opinion of the witnesses deception may occur: he has to convince the Court or jury that there is such reasonable probability of deception as to justify interference with the defendant (c); and if he "cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the mark by others" (d). But where this burden is discharged, the defendant's conduct "cannot be justified by showing that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways" (e).

When is

It is obvious that in these cases questions of considerable

(a) *Lee v. Haley*, L. R. 5 Ch. 155; *Care v. Myers*, Dig. 304.

(b) See *Cartier v. Carlile*, 31 Beav. 292; and *Cope v. Evans*, L. R. 18 Eq. 138.

(c) *Blackwell v. Crabb*, 36 L. J. Ch. 504; *Bass v. Duxter*, 19 L. T. N. S. 626; *Cope v. Evans*, L. R. 18 Eq. 138; *Snowden v. Noah*, Hopk. 347; R. Cox, 1; *Colladay v. Baird*, 4 Phila. 139; R. Cox, 257; *Colton v. Thomas*, 2 Brewster, 308; R. Cox, 507; *Fulkinburg v. Lucy*, 35 Cal. 52; R. Cox, 448; *Bell v. Locke*, 8 Paige, 75; R. Cox, 11; *Ledger v. Ray*, Dig. 550; *Stephens v. De Conto*, 7 Robertson, 343; R. Cox, 442; *Wylam v. Clarke*, W. N. 1876, p. 68; *Condy v. Mitchell*, 37 L. T. N. S. 268, 766; *Wilson v. Maxfield*, L. J. N. of C. 1875, p. 51; *Ellis v. Zeilen & Co.*, 42 Ga. 91; *Blackwell v. Wright*, 73 N. Car. 310; *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392; *Degraves v. Whitman*, 5 Vict. L. R.

Eq. 304; *Lamplough v. Beedler*, C. A., Nov. 12th, 1880; *Enoch Morjan's Sons' Co. v. Trozell*, 89 N. Y. 292; *American Grocer Publishing Association v. Grocer Publishing Co.*, 32 N. Y. Sup. Ct. 398; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748; *In re Imbs*, 10 U. S. Pat. Gaz. 463; *Dawes v. Davies*, Dig. 426; *Prince Metallic Paint Co. v. Carbon Metallic Paint Co.*, Dig. 573; *Wheeler v. Johnston*, 8 L. R. Ir. 284; *Chinn v. Thomas*, 5 Vict. L. R. Eq. 188; *Goodwin v. Venning*, 24 Sol. J. 690; *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S. Rep. 51; *Hurricane Patent Lantern Co. v. Miller & Co.*, 56 How. Pr. 234.

(d) Per Lord Watson in *Singer Manufacturing Co. v. Loog* (3), 8 App. Cas. 39.

(e) Per Lord Selborne, C., in *Singer Manufacturing Co. v. Loog*, 8 App. Cas. 18.

nicety may arise; and, in the language of Lord Cranworth, C., in *Seixo v. Provezende* (a), "it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity (b). What degree of resemblance is necessary, is, from the nature of things, a matter incapable of definition *à priori* (c). All that Courts of Justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that *ordinary purchasers, purchasing with ordinary caution*, are likely to be misled (d). deception probable.

"It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who

(a) L. R. 1 Ch. 192.

(b) As to this, see per Lord Chelmsford in *Wotherspoon v. Currie*, L. R. 5 H. L. 508; and per Sir R. Malins, V.-C., in *Anglo-Swiss Condensed Milk Co. v. Swiss Condensed Milk Co.*, W. N. 1871, p. 168. And see post, p. 125.

(c) What will constitute infringement is not to be defined. See per Stawell, C. J., in the Sup. Ct. of Victoria in *Hennessy v. White*, 8 W. W. & A'B. Eq. 216.

(d) As to this criterion, see *Archbold v. Sweet*, 1 Mo. & Rob. 162; *Shrimpton v. Laight*, 18 Beav. 164; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 528 (per Lord Cranworth); *Barnard v. Pillow*, W. N. 1868, p. 94; *Anglo-Swiss Condensed Milk Co. v. Swiss Condensed Milk Co.*, W. N. 1871, p. 168; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Condy v. Mitchell*, 37 L. T. N. S. 268, 766; *Abbott v. Bakers and Confectioners' Tea Association, Limited*, W. N. 1872, p. 31; L. J., N. of C. 1871, p. 199; *Singer Manufacturing Co. v. Wilson*, 3 App. Cas. 376, 392, 394; *London & County Banking Co. v. Hampshire & North Wilts Bank*, Dig. 618; *Moses v. Sargood*, Dig. 636; *In re Worthington*, 14 Ch. D. 8; *Liebig's Extract of Meat Co. v. Anderson*, W. N. 1883, p. 185; *Hennessy v. White*, 8 W. W. & A'B. Eq. 216; *Hennessy v. Hovan*, *ib.* 225; *Partridge v. Menck*, 1 How. App.

Cas. 558; R. Cox, 72; *Walton v. Crowley*, 3 Bl. C. C. 440; R. Cox, 166; *Clark v. Clark*, 25 Barb. 76; R. Cox, 208; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; R. Cox, 210; *Swift v. Dey*, 4 Robertson, 611; R. Cox, 319; *Rowley v. Houghton*, 2 Brewster, 303; R. Cox, 486; *Colton v. Thomas*, 2 Brewster, 308; R. Cox, 507; *Lockwood v. Bostwick*, 2 Daly, 521; R. Cox, 555; *Dixon Crucible Co. v. Guggenheim*, 2 Brewster, 321; R. Cox, 559; *Blackwell v. Wright*, 73 N. Car. 310; *Gilman v. Hunnewell*, 122 Mass. 139; *Popham v. Wilcox*, 66 N. Y. 69; *Talcott v. Moore*, 18 N. Y. Sup. Ct. 106; *Brown v. Mercer*, 37 N. Y. Super. Ct. 285; *McLean v. Fleming*, 96 U. S. Rep. 245; *Dawes v. Davies*, Dig. 426; *Colman v. Crump*, 70 N. Y. 578; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125; *Ex parte Caire*, 15 U. S. Pat. Gaz. 248; *Robertson v. Berry*, 50 Md. 591. In *Singer Manufacturing Co. v. Loog* (3) (8 App. Cas. 18), Lord Selborne, C., says: "The imitation of a man's trade mark, in a manner liable to mislead the unwary, cannot be justified by showing either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled."

should see the two marks placed side by side (a). The rule so restricted would be of no practical use. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go farther. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of *any* mark which will cause his goods to bear the same name in the market (b), may be as much a violation of the rights of that rival as the actual copy of his device."

(a) See *Moses v. Sargood*, Dig. 636; *Read v. Richardson*, 45 L. T. N. S. 57; *Sohl v. Geisendorf*, 1 Wils. (Ind.) 60; *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461; *Sawyer v. Kellogg*, 19 U. S. Pat. Gaz. 1627; 20 *ib.* 1898.

(b) Thus, where the plaintiff's yarn had become known as "Bhe Hathi," or "two elephant" yarn, from the representation of two elephants on the trade mark, the defendants were restrained from using two different elephants (*Orr-Ewing & Co. v. Johnston & Co.*, 7 App. Cas. 219); where the plaintiff's beer was known as "Dog's Head Beer," the defendants were restrained from using on their beer the head of a different kind of dog from that used by the plaintiffs (*Read v. Richardson*, 45 L. T. N. S. 54); where the plaintiff's clothing was known as "Crown Clothing," from the use of a royal crown, the defendants were restrained from using an imperial crown between two standards (*Moses v. Sargood*, Dig. 636). So, if in *Edelsten v. Edelsten*, 1 De G. J. & S. 185, the defendant had called his wire "Anchor Wire," without

using the figure of an anchor, the plaintiff's wire having acquired the name of "Anchor Wire" because of the trade mark being an anchor. See *Cartier v. Carlile*, 81 Beav. 292; *Cartier v. Westhead*, Dig. 199; *Cartier v. May*, Dig. 200 ("Cross Cotton"); *In re Jelley, Son & Jones*, 51 L. J. Ch. 689 ("Dog-brand Files"); *In re Whiteley*, 48 L. T. N. S. 627 ("Globe Steel"); *In re Rabone*, Dig. 648 ("Lion" edge tools); *In re Worthington*, 14 Ch. D. 8 ("Triangle Beer"). In the U. S. Patent Office there was held to be a fatal conflict between two trade marks for hams, of which the one consisted of the word "Bouquet," the other of a bouquet of flowers: *Schrauder v. Beraford & Co.*, U. S. Patent Office, June 27, 1872; and in *In re American Lubricating Oil Co.*, 9 U. S. Pat. Gaz. 687, registration was refused to the word "Star" for oil, the device of a star having already been registered for that article. But in *Curtis, Harvey & Co. v. Kraft, Meyer & Co.*, Chitty, J., June 16, 1882, it was thought that the German words "Diamant Pulver" were not likely to be mistaken for the English

The infringement may consist in the adoption of the essential part of the plaintiff's trade mark by the defendant, as the word "Eureka" (a), or "Glenfield" (b), or "Apollinaris" (c). And where there is no imitation of the essential part, a resemblance in particulars common to the trade does not constitute an infringement (d). But, on the other hand, the infringement may consist in the imitation of the general appearance of the plaintiff's mark, and where both trade marks are of a composite character, it is possible that, though no one particular mark has been exactly imitated, or the principal mark which has been reproduced cannot, for some reason or other, be protected as a trade mark, the combination may be very similar and likely to deceive, and will therefore be restrained by injunction (e).

Infringement
of essential
part, or of
combination.

words "Diamond Powder." See *McLean v. Fleming*, 96 U. S. Rep. 245; *Morrison v. Case*, 9 Bl. C. C. 548; *In re Weaver*, 10 U. S. Pat. Gaz. 1; *In re Pratt v. Farmer*, *ib.*, 866; *In re Park*, 12 *ib.* 2.

(a) *Ford v. Foster*, L. R. 7 Ch. 611.

(b) *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

(c) *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; and see *Filley v. Fassett*, 44 Mo. 178; *R. Cox*, 530 ("Charter Oak" stoves); *Siegert v. Ehlers*, Dig. 432, and *Siegert v. Findlater*, 7 Ch. D. 801 ("Augostura Bitters"); *Eno v. Stephens*, Dig. 609 ("Fruit Salt"); *Reinhardt v. Spalding*, 49 L. J. Ch. 57 ("Family Salve"); *Berliner Brauerei Gesellschaft Tivoli v. Knight, Stocks & Co.*, W. N. 1883, p. 70 ("Tivoli" beer); *Dunbar v. Glenn*, 42 Wisc. 118 ("Bethesda" water); *Blackwell v. Armistead*, 5 Am. L. T. 85 ("Durham" tobacco); *In re Coggin, Kidder & Co.*, 11 U. S. Pat. Gaz. 1109 ("Haxall"); *Rillet v. Carlier*, 61 Barb. S. C. 435 ("Grenade Syrup"); *Davis v. Kennedy*, 13 Grant Up. Can. Ch. 523 ("Pain Killer"); *Crawford v. Shuttock*, *ib.* 149 ("Imperial" soap); *Carroll v. Ertheiler*, 21 Alb. L. J. 503 ("Lone

Jack" tobacco); *Fleischmann v. Schuckmann*, 62 How. Pr. 92 ("Vienna Bread"); *Lauferty v. Wheeler*, 63 *ib.* 488 ("Alderney" oleomargarine). See, also, per Cotton, L. J., in *In re Leonard & Ellis*, 32 W. R. 530.

(d) *Lucke v. Webster*, M. R., April 4, 1879; *In re Horsburgh*, 53 L. J. Ch. 237; *Wallace & Co. v. King & Co.*, Bomb. High Ct., April 30, 1879; *Tucker Manufacturing Co. v. Boyington*, 9 U. S. Pat. Gaz. 455; *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527.

(e) *Abbott v. Bakers and Confectioners' Tea Association*, W. N. 1871, p. 207; *ib.* 1872, p. 31; *Hargreaves v. Smith*, Dig. 338; *Lazenby v. Lazenby*, Dig. 160; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265; *Godillot v. Huzard*, 81 N. Y. 263; *Lea v. Wolf* (S. T.), 13 Abb. Pr. N. S. 389; *Whitney v. Hickling*, 5 Grant Up. Can. Ch. 605; *Davis v. Reid*, 17 *ib.* 69; *Day v. Walls*, 12 Phila. 274; *Sawyer v. Kellogg*, 19 U. S. Pat. Gaz. 1627, 20 *ib.* 1893; *Hostetter v. Adams*, 22 *ib.* 943; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277; *Electro-Silicon Co. v. Levy*, 59 How. Pr. 469; but see *Blackwell v. Crabb*, 36 L. J. Ch. 504; and *Blackwell v. Wright*, 73 N. Car. 310.

Infringer's
mark need not
be identical
with mark
infringed.
Colourable
differences.

“For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs” (a). It is seldom that the mark employed by the infringer does correspond in all respects with that of the person whose rights he is attacking; the usual practice is to introduce some colourable variation, which may supply the infringer with a plausible excuse for his fraud. “In every case,” however, “the Court must ascertain whether the differences are made *bonâ fide* in order to distinguish the one article from the other; whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the Court to consider, because if the Court finds, as it almost invariably does find in such cases as this, that there is no reason for the resemblance, excepting for the purpose of misleading, it will infer

(a) Per Lord Chelmsford, in *Wotherspoon v. Currie*, L. R. 5 H. L. 508. And see *Moses v. Sargood*, Dig. 636; *In re Farina* (2), 27 W. R. 456; *Hennessy v. White*, 6 W. W. & A'B. Eq. 216; *Hennessy v. Hogan*, *ib.* 225; *McLean v. Fleming*, 96 U. S. Rep. 245; *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes 115; *Barrows v. Knight*, 6 R. I. 434; *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265; *Shaver v.*

Shaver, 54 Iowa 208; *Godillot v. Hazard*, 81 N. Y. 263; *Rodgers v. Philp*, 1 U. S. Pat. Gaz. 29; *Coleman v. Crump*, 70 N. Y. 573; *Amoskeag Manufacturing Co. v. Garner* (2), 54 How. Pr. 298; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125; *Actien Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Bl. C. C. 380; *Hegeman & Co. v. O'Byrne*, 9 Daly 264; *Leidersdorf v. Flint* (2), 50 Wisc. 401.

that the resemblance is adopted for the purpose of misleading" (a).

Thus, it was held that "Cacaotine" was a colourable imitation of "Cocoatina" (b), "Steel pens" of "Stephens" (c), "Tung's" of "Tonge's" (d), "Leopoldsalt" of "Leopoldshall" (e), "Lactopepsine" of "Lactopeptine" (f), "Cocaine" of "Cocoaine" (g), "Bovina" of "Bovilene" (h). Again, a beehive was held to be a colourable imitation of a bell of a similar shape, similarly printed on a label (i).

In *Seixo v. Provezende* (k) the plaintiff, a Portuguese nobleman and wine grower, sold his wine in casks branded

Examples.

Seixo v. Provezende.

(a) Per Sir W. P. Wood, V.-O., *Taylor v. Taylor*, 23 L. J. Ch. 255; and in the case of a prosecution for obtaining money by false pretences, see per Erle, J., in *R. v. Dundas*, 6 Cox, 380.

(b) *Schweitzer v. Atkins*, 37 L. J. Ch. 847.

(c) *Stephens v. Peel*, 16 L. T. N. S. 145.

(d) *Tonge v. Ward*, 21 L. T. N. S. 480.

(e) *Rudde v. Norman*, L. R. 14 Eq. 348.

(f) *Carnrick v. Morson*, L. J., Notes of Cases, 1877, p. 71.

(g) *Burnett v. Phalon*, 9 Bos. 192; R. Cox, 376.

(h) *Lockwood v. Bostwick*, 2 Daly, 521; R. Cox, 555. Other instances are:—"Schrewsbury-Marchal Patent Thread" put for "Shrewsbury-Marshall & Co. Patent Thread," *Marshall v. Ross*, L. R. 8 Eq. 651; "Burgiss" for "Burgessa," *Burgess v. Hills*, 26 Beav. 244; "Genuine" for "Guinness," *Guinness v. Heap*, Dig. 617; "Hostetter & Smyte" for "Hostetter & Smith," *Hostetter v. Vowinkle*, 1 Dill. 329; "Rogers & Son" for "J. Rodgers & Sons," *Rodgers v. Philp*, 1 U. S. Pat. Gaz. 29; "Andrew Coe's Superphosphate of Lime" for "Coe's Superphosphate of Lime," *Coe v. Bradley*, 9 ib. 541; "Star" for "Stark," *Gardner v. Bailey*, Dig. 365; "Wamyesta" for "Wamsutta," *Wamsutta Mills v. Allen*,

12 Phila. 535; "Royal Standard" baking powder for "Royal" baking powder, *Royal Baking Powder Co. v. Sherrill*, 50 How. Pr. 17; "Electric-Silicon" for "Electro-Silicon," *Electro-Silicon Co. v. Trask*, 59 ib. 189; "Pride of Syracuse" for "Pride," *Hier v. Abrahams*, 82 N. Y. 519.

(i) *Bell, Black & Co. v. Bell & Co.*, Dig. 514. Other instances are:—A crown with "B. B. S." in italics put for a crown with "B. B. H." in Roman characters, *Barrows v. Pelsall Coal and Iron Co.*, Dig. 530; a volcano with a man coming out of it and the words "Volcanic Paraffin Matches," for a volcano with the words "The Vulcan Paraffin Matches," *Vulcan Match Manufacturing Co. v. Knos & Co.*, Pearson, J., June 22, 1888; a pelican, with an inscription in gold on a green ground, for a crane with an inscription in gold on a green ground, *Balfour & Co. v. Kilburn & Co.*, 1 Hyde 270; an orb rising over a piece of water, with the words "Rising Moon Stove Polish," for an orb with rays rising over a piece of water, with the words "Rising Sun Stove Polish": *Morse v. Worrell*, 10 Phila. 168. But in *McCartney v. Garnhart*, 45 Mo. 593, it was held that two picks with a pair of scales and the words "J. H. Garnhart's Old Bourbon," were not too similar to two anchors and the initials "S. McC."

(k) L. R. 1 Ch. 192.

on the head with a crown and eagle, and the letters "B. S.," and also at the bung-hole with a crown, the word "Seixo," and the year of vintage. This wine had acquired a reputation as "Crown Seixo Wine," when the defendant began to sell wine which he called "Seixo de Cima," and placed in casks branded in a somewhat similar manner to the plaintiff's. The injunction was granted and affirmed, although the defendants contended that parts of their own vineyards were called "Seixo," and that the name was an ordinary Portuguese adjective, signifying "stony."

*Wotherspoon
v. Currie.*

In *Wotherspoon v. Currie* (a) the plaintiffs manufactured starch, which, under the name of "Glenfield Starch"—a name derived from a small place near Paisley, where it was made—acquired a great reputation. They subsequently removed their works to Paisley, and there continued to make "Glenfield Starch." The defendants, also starch manufacturers at Paisley, bought a small plot of land at Glenfield, and began selling "Glenfield Starch." It was held by V.-C. Malins and the House of Lords that the use of the word "Glenfield" in connexion with starch had the effect of inducing people to buy the defendants' manufacture, under the impression that it was the plaintiffs', and that there was a colourable imitation of the mark to which the plaintiffs were entitled (b).

Similarity of
packing.

Where the goods of one manufacturer are so packed or arranged as externally to resemble those of others engaged in the same trade, as where starch was put up commonly in the trade in packets of a certain colour and appearance, the similarity common to all does not of itself expose the manufacturer to an action, but it makes it incumbent upon

(a) L. R. 5 H. L. 508.

(b) See also the American cases, *Coffeen v. Brunton*, 4 McLean, 516, R. Cox, 82; *Amosbeag Manufacturing Co. v. Spear*, 2 Sand. S. C. 599, R. Cox, 87; *Davis v. Kendall*, 2 R. I. 566, R. Cox, 112; *Williams v. Johnson*, 2 Bos. 1, R. Cox, 214; *Bradley*

v. Norton, 33 Conn. 157, R. Cox, 381; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, R. Cox, 490; *Gillis v. Hall*, R. Cox, 596; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Amer. Rep. 401; *Burke v. Cassin*, 45 Cal. 467, 18 Amer. Rep. 204.

him to take care that his distinguishing mark is really distinguishing (*a*). And where a plaintiff has been in the habit of packing his goods in a peculiar and distinctive manner, he will be entitled to restrain another from imitating his packages (*b*); and the imitation of bottles (*c*) or barrels (*d*) of a peculiar design, such as is used only by the plaintiff, will afford a strong presumption that fraud is intended.

However, where a defendant had, in obedience to express directions, put up his silk in imitation of the plaintiff's bundles, his execution of the order was held not to be conclusive against him (*e*). So, too, where a defendant packed inferior brandy in the plaintiff's cases at the express request of an agent of the plaintiff, who was seeking to entrap him, Sir R. Malins, V.-C., refused the injunction with costs (*f*).

Not conclusive.

The use by one manufacturer of a trade mark resembling or even identical with that used by another, is not an infringement of that other's rights, unless the class of goods on which the two marks are used is the same (*g*) or, at least, of so similar a description that they may fairly be supposed to be of the same manufacture as the goods to which the mark is properly applied (*h*).

Infringement must be by use on same class of goods.

(*a*) See per Lord Hatherley, C., *Wotherspoon v. Currie*, 5 H. L. 508; and *Enoch Morgan's Sons' Co. v. Troxell*, 89 N. Y. 292.

(*b*) *Frese v. Bachof* (2), 14 Bl. C. C. 432; *Enoch Morgan's Sons' Co. v. Schwachhofer*, 55 How. Pr. 37.

(*c*) *Henry v. Price*, 1 Leg. Obs. 364; *Siegert v. Findlater*, 7 Ch. D. 801; *Fullwood v. Fullwood* (1), W. N. 1873, 185; *Wolfe v. Goulard*, 18 How. Pr. 64; *Laird v. Wilder*, 9 Bush 131; *Congress Co. v. High Rock Co.*, 45 N. Y. 291; *Wilder v. Wilder*, Dig. 372.

(*d*) *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392. See *Moorman v. Hoge*, 2 Sawy. 78.

(*e*) *Woollam v. Ratcliff*, 1 H. & M. 259. And see *Frese v. Bachof*

(1), 13 Bl. C. C. 234.

(*f*) *Hennessy v. Kennett*, Dig. 556. But in the Indian case of *Orr-Ewing v. Chooneeloll Mullick*, Cor. 150, the defendant was restrained, though there was no evidence of his having sold the spurious goods (which he had bought ready marked) to any one but the plaintiff's agent.

(*g*) *Hall v. Barrows*, 4 De G. J. & S. 150; *Ainsworth v. Walmsley*, 1 R. 1 Eq. 518; *Moses v. Sargood*, Dig. 636; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Whiteley*, 43 L. T. N. S. 627; *In re Rabone*, Dig. 643; *In re Ashton*, V.-C. H., Feb. 26, 1881; *Colman v. Crump*, 70 N. Y. 573; *Société Anonyme v. Baxter*, 14 Bl. C. C. 261.

(*h*) *Wamsutta Mills v. Allen*, 12

Infringement
of disused
mark.

It has been held in America that the use by a manufacturer, of a mark previously used by another manufacturer, but discontinued by him for a year, is an infringement of the rights of the latter (a).

Infringement
by use of a
registered
mark.

Registration of a trade mark which resembles a prior trade mark, which is registered, so nearly as to be calculated to deceive does not, for five years from the date of registration, prevent the owner of the prior mark from obtaining an injunction to restrain its use (b); but it seems that after the lapse of five years an absolute title to use the mark, irrespective of the rights of others, will have been obtained, if the only objection to it is a claim of superior title on the part of another person (c).

Infringement
by improper
use of genuine
mark.

It is an infringement to use a genuine trade mark of a manufacturer upon goods not of his production (d); and it is no less an infringement to use it upon goods to which he did not intend it to be applied, even though the goods upon which the infringer uses it are of the make of the owner of the mark (e).

Moulded
bottles.

In some cases a rather difficult question has arisen with respect to the use of bottles moulded with the plaintiff's name or trade mark. Where such bottles have been systematically bought up and refilled with spurious waters, &c., so as to pass them off as being of the plaintiff's manu-

Phila. 535; *Carroll v. Ertheiler*, 21 Alb. L. J. 503.

(a) *Lemoine v. Ganton*, 2 E. D. Smith, 343, R. Cox, 142.

(b) *Read v. Richardson*, 45 L. T. N. S. 54. In *Goodwin v. Venning*, 24 Sol. J. 690, the defendant's mark was a registered one. Since registration is for the first five years only a qualification for bringing an action (see *Nuthall v. Vining*, O.A., Jan. 21st, 1880), it would appear that if the second of two registered marks was used first, the owner of that mark would, by virtue of his prior user, be entitled to restrain the owner of the mark which was used later but registered first.

(c) See Patents Act, 1883, § 76.

(d) *Barnett v. Leuchars*, 18 L. T. N. S. 495 (boxes for "Pharaoh's Serpents"); *Richards v. Williamson*, 80 L. T. N. S. 746 (gun stamps); *Hennessy v. Rohmann*, 86 L. T. N. S. 51; *Hennessy v. Cooper*, Dig. 549 (cases for brandy).

(e) *Hennessy v. Kennett*, Dig. 558; *Hennessy v. White*, 6 W. W. & A'B. Eq. 216; *Hennessy v. Hogan*, ib. 225 (cases intended for brandy of superior quality used for brandy of inferior quality); *Gillott v. Kettle*, 3 Duer, 624, R. Cox, 148 (labels indicating superior pens placed on boxes of inferior ones).

facture, an injunction will be granted to restrain the continuance of the fraud (a); but where the bottles have been bought by the defendant in the ordinary course of his business, it does not appear that he will be restrained from using what he has bought, merely because the bottles are moulded, so long as he uses them in a fair manner, and places on them his own adhesive labels (b). There does not, indeed, seem to be a clear decision on the point, as the question has not been raised free from complications. Thus, in *Barrett v. Gomm* (c), the Court of Appeal held that no injunction could be granted against soda-water manufacturers whose labels were found to be placed on two bottles of soda-water moulded with the plaintiff's name and trade mark, but in this case there was no evidence to show that the soda-water in the bottles was of the defendants' manufacture, or that the defendants had filled or sold them. The Master of the Rolls (Sir G. Jessel), however, stated that if some of the plaintiff's engraved bottles had come fairly into the defendants' possession, they would have been entitled to refill and sell them, at all events if they had placed on them their own adhesive labels, so as to cover the plaintiff's name and trade mark. And this opinion appears to have been adopted by North, J., in *Barrett v. White* (d).

It is an infringement for an engraver to prepare and supply to one person printing-blocks engraved with the trade mark, or an important part of the trade mark of another, inasmuch as the piracy would be impossible without the blocks; and Sir L. Shadwell, V.-C. of E., went so far as to say that if a thing contained twenty-five parts, and one only was taken, such an imitation would be sufficient to contribute to a deception, and the law would

Infringement
by engraver.

(a) *Rose v. Henley*, Dig. 551;
Allen v. Richards, 26 Sol. J. 658;
Hostetter v. Anderson, 1 V. R. Eq. 7.
 (b) *Welch v. Knott*, 4 K. & J. 747;

Rose v. Loftus, 47 L. J. Ch. 576.
 (c) 74 L. T. 388.
 (d) North, J., May 12, 1883.

hold those responsible who had contributed to the fraud (a.) The principle is the same where the engraver, though retaining the blocks in his own possession, yet facilitates fraud by the dissemination of labels bearing pirated trade marks (b). Lord Cranworth, C., thought, however, that a man who had A.'s goods, but none of his labels, might rightfully employ a printer or engraver to supply him with imitated labels, and that A. could have no ground of complaint against the sale of his goods with something on them to represent his trade mark, though not his genuine mark (c).

Untrue allegation of registration.

It does not appear that the position of a defendant in an action for infringement is altered for the worse by the fact of his having alleged his trade mark to be registered, before it in fact was so (d); but by so doing he will expose himself to penalties under section 105 of the Patents Act, 1883.

Use by a trade mark owner of his mark upon another's goods.

It seems that a manufacturer is entitled to place his trade mark on articles not of his own make, unless there is some trade custom or contract that he shall not do so, and to remove the maker's mark for the purpose of substituting his own, and that such a course would not be actionable (e). Nor is there any reason why it should be so. The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guarantee implied by its presence on them. The purchaser, by substituting his own mark, undertakes the responsibility for the quality of the goods, which are, in effect, selected and guaranteed by him (f).

(a) *Guinness v. Ullmer*, 10 L. T. (Old Series) 127.

(b) *Farina v. Silverlock*, 1 K. & J. 599; 6 De G. M. & G. 214; 4 K. & J. 653.

(c) *Ib.* 6 De G. M. & G. 214.

(d) *Ellis & Sons v. Ruthin Soda Water Co.*, M. R., Nov. 21, 1879.

(e) See *Johnson v. Raylton*, 7 Q. B. D. 438.

(f) See *Hirsch v. Jonas*, 3 Ch. D. 584.

CHAPTER V.

THE CRIMINAL PROSECUTION.

“IN cases like the present” (*i.e.*, in cases of imitation of a wrapper imprinted with a trade mark), “the remedy,” said Willes, J., “is well known. The prosecutor may, if he pleases, file a bill in Equity to restrain the defendant from using the wrappers, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretences” (*a*).

Remedies for fraudulent imitations.

At Common Law the imitation of a trade mark or of a trade wrapper is not a forgery. “A forgery must be of some document or writing” (*b*); “it is the forging of a false document to represent a genuine document” (*c*). In a case in which the prisoner had imitated the label used on Borwick’s baking powder, and was indicted for forgery (*d*), the Court of Crown Cases Reserved, consisting of Pollock, C. B., Willes and Byles, JJ., and Bramwell and Channell, BB., decided that the conviction for forgery was not sustainable, though an indictment for false pretences would have been good. The grounds of the decision are thus stated by Bramwell, B.: “I think that this was not a forgery. Forgery supposes the possibility of a genuine document, and that the false document is not so good as

Infringement of trade mark not forgery at Common Law.

(*a*) *R. v. John Smith, D. & B.* 566; 8 Cox, 82. This was in 1858, before the Merchandise Marks Act of 1862.

(*b*) Per Cockburn, C. J., *R. v.*

Closs, D. & B. 460; 7 Cox, 494.

(*c*) Per Willes, J., *R. v. John Smith, ubi supra.*

(*d*) *R. v. John Smith, ubi supra.*

the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case, one of these documents is as good as the other; the one asserts what the other does; the one is as true as the other; but one gets improperly used. But the question is whether the document itself is a false document. It is said that the wrapper is so like one used by somebody else, that it may mislead; but that is not material to the question we have to decide. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery" (a).

Not even if the mark consists of a signature.

It might be thought that where the trade mark consisted of a signature, an imitation of this would amount to forgery; but this has been decided not to be so, in the case of *R. v. Closs* (b), in which the prisoner imitated the signature of the artist, J. Linnell, in the corner of a spurious picture. Cockburn, C. J., in delivering the judgment of the Court of Crown Cases Reserved, said that the stamp was merely in the nature of a mark put upon the painting with a view to identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the painting being his, and in the course of the argument he expressed a similar opinion with respect to the imitation of a signature stamped on a gun.

The Merchandise Marks Act, 1862.

Under the Merchandise Marks Act, 1862 (c), the forgery of trade marks is now made a misdemeanour, and the Criminal Law made to cover such offences as those committed in *R. v. John Smith* (d), and *R. v. Closs* (e).

(a) Taking the same view, Pollock, C. B., said that the real offence was the enclosing the false powder in the false wrapper; that the issuing of the wrapper without the stuff within it would be no offence; but that the real offence was the issuing them with the fraudulent matter in them.

(b) D. & B. 460; 7 Cox, 494. 25

& 26 Vict. c. 68, § 7, now provides for spurious pictures with a forged signature.

(c) 25 & 26 Vict. c. 88.

(d) D. & B. 566; 8 Cox, 82.

(e) D. & B. 460; 7 Cox, 494. See *R. v. Lloyd* (Recorder of Birmingham, Oct. 18, 1881), in which the infringement of a gunmaker's trade

By that Act the following offences are made punishable: What offences are punishable under that Act.

1. Forging or counterfeiting a trade mark, with intent to defraud (a).
2. Applying any trade mark, or any forged trade mark (b), with intent to defraud, to any article not being the manufacture, &c., of any person denoted or intended to be denoted by such trade mark, or by such forged trade mark, or not being the manufacture, &c., of any person whose trade mark shall be so forged (a).
3. Applying any trade mark, or forged trade mark, with intent to defraud, to any article not being the particular or peculiar description of manufacture, &c. (c), denoted or intended to be denoted by such trade mark or forged trade mark (a).
4. Applying any trade mark, or forged trade mark, with intent to defraud, to any cask, &c., in, on, or with which any article shall be intended to be sold, or shall be sold, or uttered, or exposed for sale, or intended for any purpose of trade or manufacture (d).
5. Enclosing or placing, with intent to defraud, any article in, upon, under, or with any cask, &c., to which any trade mark shall have been falsely applied, or to which any forged trade mark shall have been applied (d).
6. Applying or attaching with intent to defraud, to any article, any case, &c., to which any trade mark shall have been falsely applied, or to which any forged trade mark shall have been applied (d).
7. Enclosing, placing, or attaching, with intent to defraud, any article in, upon, under, with or to any

mark was punished under the Merchandise Marks Act with six months' imprisonment.

(a) § 2 of the Merchandise Marks Act.

(b) As to what is included in a "forged trade mark," see § 5.

(c) See cases at p. 128, and notes.

(d) § 3 of the Merchandise Marks Act.

cask, &c., having thereon any trade mark of any other person (a).

8. Selling, uttering, or exposing, either for sale, or for any purpose of trade or manufacture, any article, together with any forged trade mark, which he shall know to be forged, or together with the trade mark of any other person applied or used falsely or wrongfully, or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used; and that, whether such trade mark or forged trade mark shall be in, upon, about, or with such article, or in, upon, about, or with any cask, &c., in, upon, about, or with which such article shall be so sold, &c. (b).
9. Putting, with intent to defraud, or to enable another to defraud, upon any article, or upon any cask, &c., together with which any article shall be intended to be or shall be sold, or uttered, or exposed for sale, or for any purpose of trade or manufacture, or upon any case, &c., in or by means of which any article shall be intended to be or shall be exposed for sale, any false description, statement, or other indication, of or respecting the number, quantity, measure, or weight (c) of such article, or any part thereof, or of the place or country in which such article shall have been made, manufactured, or produced (d).
10. Putting, with intent to defraud, or to enable another to defraud, upon such article, cask, &c., any word, letter, figure, signature, or mark, for the purpose of falsely indicating such article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent (e), privilege, or copyright.

(a) § 2 of the Merchandise Marks Act.

(b) § 4 of the Merchandise Marks Act.

(c) See *R. v. Sherwood*, 7 Cox, 270; *R. v. Ragg*, 8 Cox, 265; *R. v.*

Lee, 9 Cox, 460.

(d) § 7.

(e) See § 9, and the cases cited in Ch. 7. See also § 105 of the Patents Act, 1883.

11. Selling, uttering, or exposing for sale, or for any purpose of trade or manufacture, any article upon which shall have been, to the offender's knowledge, put, or upon any cask, &c., together with which such article shall be sold or uttered, or exposed for sale, or other purpose as aforesaid, shall have been so put, or upon any case, &c., used to expose or exhibit such article for sale, shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight, of such article or any part thereof, or the place or country in which such article shall have been made, manufactured, or produced (a).

13. Aiding, abetting, counselling, or procuring the commission of any offence made a misdemeanour by the Merchandise Marks Act (b).

By § 12, there is no necessity to allege in the indictment, or to prove any intention to defraud any particular person. In the same way it seems that on the principle that "the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom credit was due" (c); the making and using a fictitious trade mark, with intent to defraud, by representing it to be the known trade mark of a person of established reputation, would be punishable.

By § 5, fraudulent additions to and alterations of a trade mark are made forged trade marks within the Act. At Common Law "it is forgery to alter a material part of a true instrument" (d). Thus, where in a bill of exchange

Intention of defrauding a particular person not necessary.

Fraudulent additions to and alterations of marks.

(a) § 8.

(b) § 13.

(c) 2 East, Pleas of the Crown, 957; and see *R. v. Lewis*, Foster Cr. Cas. 116; *R. v. Avery*, 8 C. & P.

596; *R. v. White*, 72 C. C. C. Sessions Papers, 222.

(d) 2 East, Pleas of the Crown, 978.

“0” was added to “£8,” and “y” to “eight,” so as to make it appear to be for £80 (a).

Expressions generally understood may be employed.

It is not an offence for persons to use any name, word, or expression generally used for indicating the article with which it is used to be of some particular class or description of manufacture only (b). Thus, patent leather, patent thread (c), patent pins (d).

Civil remedy not affected by conviction.

A conviction under this Act does not take away or affect any civil remedy of the person aggrieved (e).

Exact fac-simile not required.

“An exact resemblance, or *fac-simile*, is not required to constitute the crime of forgery, for if there be a sufficient resemblance to show that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient” (f).

Where deception succeeds, indictment for false pretences will lie.

While, apart from the Merchandise Marks Act, the fraudulent imitation of a trade mark is not forgery, such an imitation, when it has been intended to be and has been the means of inducing persons to part with their money, in the belief that they were buying one thing, when in fact they were buying another, is sufficient to support a conviction on an indictment for obtaining money by false pretences. This affords sufficient protection to the innocent purchaser of goods falsely marked; the Act gives protection to the manufacturer who has suffered in his custom and in his reputation by piracies.

Convictions.

“There is no difference in principle between a misrepresentation of a mark, and one that an acceptance was the acceptance of John Jones or any other person” (g); and it is established that the fraudulent imitation of a trade mark will be punished in the same way, where the necessary circumstances exist. Thus, in *R. v. Dundas* (h), the

(a) *R. v. Elsworth*, 2 East P. C. 986.

(b) § 9.

(c) *Marshall v. Ross*, L. R. 8 Eq. 651.

(d) *Edelsten v. Vick*, 11 Hare, 78.

(e) § 11.

(f) Per Grose, J., in *R. v. Cecilcott*, 2 Leach, 1048, a Stamp case.

(g) Per Kelly, C. B., in *R. v. Suter & Coulson*, 10 Cox, 577.

(h) 6 Cox, 880.