

§ 786. The continued use of the same name, by father and son succeeding to the same business, without disclosing the change of the actual manufacturer, is not misrepresentation such as to bar the right to restrain infringement of the same.¹

§ 787. T. sold to his partners all his rights in the manufacture and sale of "Simmons' Liver Medicine," "under any name or style." Afterward he formed a partnership, and made and sold a compound called "M. A. Thedford's Liver Invigorator." *Held*, no defence that he had discontinued the use of the word "Simmons," and the symbols and literature intended to deceive.²

§ 788. The use of the word "Home," in connection with a make of sewing-machines used by complainant for over twenty-five years, entitles the manufacturer to protection against one who puts the words "Home Delight," in a similar way, on a machine offered for sale by him.³

§ 789. In 1866, one Johnston originated the title "Chatterbox" on a series of books which he caused to be compiled, containing illustrations and stories for the young. The distinctive appearance and names of the cover and printing were generally recognized in England and the United States, and were highly appreciated. Said Johnston afterwards assigned to complainant the exclusive use of title in the United States and Canada, and the publications were made simultaneously, in England by Johnston, and in this country by complainant. The defendant published juvenile books bearing the title "Chatterbox" on the cover, the books being similar in general appearance and style to complainant's books, but with different contents. Enjoined.⁴ — The Investor Publishing Company long published a paper called the United States Investor. The

words alleged to be an infringement, and the affidavits from which such decision was made, are irrelevant and inadmissible in an infringement suit in this country. 68 F. 794.

¹ *Feder v. Benkert*, 76 F. 613 ; 18 C. C. A. 549.

² *Chattanooga Medicine Co. v. Thedford et al.*, 66 F. 554 ; 14 C. C. A. 101.

³ *New Home Sewing-Machine Co. v. Bloomingdale et al.* [N. Y. 1893] (C. C.), 59 F. 284.

⁴ *Estes v. Worthington*, 81 F. 154. (See *Estes v. Leslie*, 29 F. 91. Preliminary Injunction.)

defendant had begun the publication of a paper called the Investor, and stated in its columns that it was published by the Investor Publication Company. Enjoined.¹

§ 790. Plaintiff and his predecessors have long used on their whiskey barrels the picture of a chicken cock standing upright, within a circle surrounded by the words "Old Bourbon Whiskey, Bourbon Co., Ky.," and below the picture the words "From J. A. Miller, Paris." For over thirteen years this brand has been known to the trade as "Miller's Chicken Cock Whiskey," or "Chicken Cock Whiskey." Defendant, doing business in Boston, adopted a like picture, including the circle, his brand being called "Miller's Game Cock Rye." On the label, in smaller type, are the words "The King of all Whiskeys, John Miller & Co., Sole Proprietors, Boston, Mass." *Held*, an infringement; and it is understood that defendant used the device both on barrels and bottles, while plaintiff has heretofore used it only on barrels; and that defendant's whiskey is a "blended whiskey," having but one stamp, while plaintiff's is a "straight whiskey," having two stamps.²

§ 791. The S. Howes Co. was organized in January, 1895; the Howes Grain Cleaner Co., in February, 1896, the latter being named for its president. Both companies manufactured the same class of machinery. *Held*, that the latter company should be enjoined from using its corporate name.³

§ 792. A real-estate auctioneer who for many years sold suburban property on the instalment plan, and who had always used in his business, and had printed in connection with his advertisements, the representation of a flag with stars on the upper and lower borders, is entitled to an injunction against the use of a like arrangement of stars or representation of flag used by another for the same business.⁴

§ 793. Although a servant after leaving his employment is entitled to carry on a business of the same character as that

¹ Investor Publishing Co. v. Dobinson, 72 Mass. 603.

² G. G. White Co. v. Miller (C. C.), 50 F. 227.

³ S. Howes Co. v. Howes' Grain Cleaner Co. (Sup.), 46 N. Y. S. 165.

⁴ Johnson v. Hitchcock, 3 N. Y. S. 680.

of his former employer, and to obtain the trade of the latter's customers, and to use trade-wrappers and other trade-papers, notwithstanding his former employer does so, and to employ the same printer, he can only exercise these rights in such a manner as not to represent that his business and goods are those of his former master; for if he does so represent, he may be restrained from so-doing by injunction.¹

§ 794. The plaintiff, a manufacturer of plug twist chewing-tobacco, marked the words "Golden Crown" on the boxes in which it was packed, and fastened four tin tags of a particular size, shape, lettering, and position on every bar of his tobacco, with the words "Golden Crown" on every one of them. Defendants used the words "Golden Chain" in connection with tin tags lettered and arranged in a manner similar to the plaintiff's. *Held*, that while the defendants' words "Golden Chain" might not be an infringement, their use in connection with the tags might be restrained.²

§ 795. Independent of any right of complainants to the exclusive use of a trade-mark of the name applied by them to their product, the sale by defendants of a deleterious substance, represented by the latter to be in part or in whole the same substance in which complainants are dealing, and of which they are the sole producers, and which is admittedly of a beneficial character, will be restrained.³ — To warrant injunction, it must be shown that statements were in disparagement of goods of plaintiffs' in particular, that they were untrue, and that they occasioned special damage.⁴

§ 796. Although the defendant be ignorant of the fact of another's ownership, the use of a trade-mark may be restrained; but if the owner of the same has had knowledge of the use of it by another, and through indifference or negligence has taken no steps to protect his rights, he is not entitled to an account of sales and profits.⁵

¹ Hart v. Colley, 44 Ch. Div. 193.

² Parlett v. Guggenheimer (Md.), 10 A. 81. (A doubtful authority.)

³ City of Carlsbad v. Tibbitts (C. C.), 51 F. 852.

⁴ White v. Mellin (1895), App. Cas. 154; 11 Reports, 141.

⁵ Low et al. v. Fels, 35 F. 361.

§ 797. Devices and methods working a dangerous semblance of the shape, color, designation, name, and general appearance resembling that of complainant, thereby calculated and intended to deceive and mislead probable purchasers generally, may be enjoined.¹

§ 798. The use by defendant of the name of plaintiff's hotel as a trade-mark for his cigars will be enjoined, though, at the time of the registration of such trade-mark by the plaintiff, he had not opened the hotel for business, but had it in process of construction, and it appeared that the prospective hotel was well known by the name in question.²

§ 799. The adoption by the defendant of a manufacturer's distinctive means of advertising his goods, by the use for similar goods of means which involve nothing original, and, though not identical at every point, including the use of a picture which, in general design and in the idea conveyed, is so like a picture used to advertise said manufacturer's goods as to be readily mistaken for it by the ordinary purchaser, though differing from it in details of arrangement, constitutes unfair competition, and should be enjoined.³

§ 800. The adoption of the term "The American Syrup of Figs" by an English company is a misrepresentation. *Held*, the plaintiff is entitled to injunction and to account, and is not disentitled to relief for misrepresentation.⁴

§ 801. The words "Six Big Tailors" are so similar to the trade-name "Six Little Tailors" as to warrant an injunction.⁵

§ 802. Complainant, who for several years in various places had done business, and advertised in other places, as the "United States Dental Association," may restrain the use by another, in the same business, in a place where such advertising is done, of placing on his signs "U. S. Dental Associa-

¹ *Hires v. Hires* (Com. Pl.), 6 Pa. Dist. R. 285; *Gail v. Wacherbarth*, F. 28, 286.

² *Kingsley v. Jacoby* (Sup.), 20 N. Y. S. 46; 28 Abb. N. C. 451.

³ *Hilson Co. v. Foster* (C. C.), 80 F. 896.

⁴ *The California Fig Syrup Co. v. Taylor's Drug Co. Ltd.* (Before High Ct. J. J., Ch. Div. Mch. 25 & 30, 1897.)

⁵ *Mossler v. Jacobs*, 65 Ill. App. 571; 1 Chicago L. J. Weekly, 643.

tion," the letters "U. S." having a tendency to lead persons to suppose it was the place of business of complainant.¹

§ 803. The Tribunal Civil of Douai in 1887, and the Court of Douai in 1888, and the Court of Cassation in 1890, had this question before them. In the case of *Descamps v. Balny and Morot et al.*, the industriel who has registered a mark for sewing-thread of linen, cotton, and other materials has the right to interdict the usage of this mark to a fabricant of sewing-cotton, although he himself has never employed the mark except for linen thread. The registrant has the right to enjoin the use in a similar industry. The manufacture of linen and cotton sewing-thread are incontestably two similar industries, if not even two branches of the same industry. Paris not being a city important for the manufacture of sewing-thread, a manufacturer of Lille may give to his products the denomination "Fil de Paris," or "Paris Peleton," and place on his boxes the arms of the city of Paris.²

§ 804. The Tribunal of Commerce of the Seine, in 1896, had the case of *Bruant v. Leclerc*, and decided on the following facts: For a number of years the complainant appeared in public clad in a conspicuous costume of velvet, peculiar boots, a broad-brimmed felt hat, and red foulard scarf about the neck. He was the author and vendor of a series of his popular songs, and dressed himself in this guise to attract attention. The defendant exhibited himself in an exactly similar costume, copying it from his former master. Complainant charged unfair competition by identity of dress, in a degree his personal sign and mark, deceiving the public into mistaking the wrong one for the right person. Restrained, with costs.³

§ 805. The Court of Paris, 1891, had the following: *Mme. Hudry v. Époux de Lisle*. The Dame de Lisle, whose husband is joined, had long before formed a house of fashion known

¹ *Cady v. Schultz* (R. I.), 32 A. 915.

² *Descamps v. Balny & Morot et al.*, 39 *Annales*, 333. (The propriety of this decision is doubted in a note (p. 334), with authorities.)

³ 43 *Annales*, 19.

under the name of "Maison Georgette." Madame Hudry had established beside Madame de Lisle another emporium of modes under the name of "Georgette." The complainant demanded that defendant be compelled to adopt as a sign "Ancienne Maison Gavard, Georgette Rostaing, Successeur." Defendant was forbidden to use the word "Georgette" for the commerce of fashions; and ordered that in eight days she should cease to use it under penalty of fifty francs per day. On appeal, the Court of Paris ordered that she should absolutely renounce the *prénom* "Georgette," which was but one of her first two names. — The Tribunal of Commerce of the Seine, in 1887, had the case of *Eugène Carcassonne, fils, et Cie. v. Veuve Martial Crémieux*. The house of A. Crémieux, fils, of which Carcassonne & Company are proprietors, was established anterior to that of Veuve Martial Crémieux, who had invented a speciality of vestment complete at thirty-five francs. She used only the name Crémieux, thereby creating confusion against interest of complainants. *Held*, that she must cease such use, and join the *prénom* "Veuve Martial" to "Crémieux," in the same letters and characters. Three days were given her in which to make said change on all notices, signs, and pictures, under penalty of ten fr. per day.²

§ 806. *Preliminary*. — At times the injunction is merely preliminary, as in the following cases "Insectine" for the destruction of noxious insects, was infringed by "Instantine." The bottles and labels were similar to those of plaintiff. Evidence showed that purchasers had frequently mistaken one for the other.³ — In an action to restrain infringement of a trade-mark, affidavits showed that large sums had been expended by plaintiffs in establishing the reputation of their flint-paper, for which they had adopted as their trade-mark the words "The Baeder Flint-Paper Co., New York;" that their first quality flint-paper bears the mark "Baeder's Flint-Paper Company, Flint-Paper," and is well recognized as of first quality and of established reputation; that it is the practice of manufacturers to brand paper of first quality with

¹ 38 Annales, 11.

² 37 Annales, 82.

³ *Arthur v. Howard* (Com. Pl.), 19 Pa. C. Ct. 81.

a firm name, while second quality is designated differently, as "Star Paper," and the like; that defendants manufacture flint-paper at Philadelphia under the name of Baeder, Adamson, and Co.; and for the purpose of deceiving the public, and of disposing of second-class paper, appearing to be made by plaintiffs as their first-class paper, marked their second-rate paper as "Baeder's Flint-Paper [Star]. Manufactured at Riverside Flint-Paper Mills, Philadelphia. No. 1 warranted." Preliminary injunction.¹

§ 807. A preliminary injunction is not granted unless the necessity is pressing, the right clear, and the apprehended injury grievous.

§ 808. This is a case of almost identical labels. Defendants swear that in selecting their box labels they had no intention to infringe complainants' trade-mark. The court could not escape the conviction that their mode of dressing up their goods was intended to deceive the purchasing consumer. "It is apparently so easy for one who honestly sells to sell his own goods as his own, to dress them up in such a way that they may be recognized as his own." Preliminary Injunction.²

¹ Baeder v. Baeder, 5 N. Y. S. 123; 52 Hun, 170; 5 N. Y. S. 124.

² Cuervo v. Owl Cigar Co., 68 F. 541.

CHAPTER VII.

INJUNCTIONS DENIED.

- § 809. Complaints too technical and unsubstantial.
- § 810. False representations may result in denial.
- § 811. Result of neglecting to protect one's trade-mark.
- § 812. Denials from different causes.
- § 813. "Sweet Caporal" cigarettes, "Jaegar" underwear.
- § 814. No deceptive similarity of labels.
- § 815. Alleged misuse of labels.
- § 816. Descriptive words do not create title.
- § 817. Deceit may defeat claim to redress.
- § 818. Name of protected article passes to the public.
- § 819. Use of one's own name with truth. See Wm. Roger's case, etc.
- § 820. Labels that do not deceive.
- § 821. Forfeiture of right to redress by fraud.
- § 822. Manufacturer cannot stop a rival from use of own name.
- § 823. When names of publications do not conflict.
- § 824. Non-conflicting names of goods.
- § 825. Equity cannot compel proprietorship to be designated by signs.
- § 826. Mottoes for underwear, non-conflicting.
- § 827. Mere indications of place of manufacture.
- § 828. Manner of packing tablets in boxes.
- § 829. Bronzed horse-shoe nails not a trade-mark.
- § 830. One using his own surname.
- § 831. Name of medicine not protected when false.
- § 832. Registration of different marks for foreign and domestic use.
- § 833. Conflicting corporations.
- § 834. Officer may say "late of," when leaving a corporation and entering in business for himself.
- § 835. Name of article honestly used.
- § 836. When name of corporation is a fraud.
- § 837. "Prince's Metallic Paint" case.
- § 838. Porous plasters — when injunction not violated.

§ 809. THE following are cases in which injunctions have been refused. The complainant alleged that by virtue of certain patents it had the exclusive right to manufacture "hot-forged and hammer-pointed" horse-shoe nails in imitation

of the old hand process; and that defendant, with intent to cheat and defraud, had advertised its nails as "hot-forged and hammer-pointed," when in truth they are neither, and yet this very defendant has palmed off its goods for those of complainant. *Held*, that, strictly speaking, neither nail is "hammer-pointed," and that in the absence of proof that defendant actually tried to deceive the public, no recovery could be had.¹ Complainant's was a machine by which the nail is subjected to the quick, percussive blows of two pair of dies in hammers operating alternately on the entire length of the nail. The nail is formed and pointed by this method, and does not require the removal of superfluous metal by clipping or shearing. The defendants' was a revolving hammer which acts only on the nail by a series of progressive blows drawing it out from head to point. A head is formed near the end of the nail by the stroke of the hammer or bevelling die; the surplus metal is then clipped off, and the nail is finished. The defendants' description may not contain the whole truth, but there is nothing fraudulent about it. On reading some of complainant's advertisements one would be justified in the conclusion that its nails are incomparably the best in the world, and that the defendants' nails are so liable to split and sliver in the heat that many of the ills that horse-flesh is heir to can be directly traced to their baleful influence. *Held*, that the complaints were technical and unsubstantial. Bill dismissed.²

§ 810. The manufacturer of uncooked pudding, put up under the trade-name "Puddine," could not enjoin a similar article described as "Pudding." The court *held*, that the manufacturer falsely represented the composition of his goods.³ — An injunction was refused on the ground that the statements made are calculated to induce the belief that the "He-No" tea of the plaintiffs' is of the kind called in China "He-No," and is the kind drunk by the Chinese, and is imported by plaintiffs directly from China, guaranteed to be the genuine article, and that there are various grades, of which theirs is

¹ Putnam Nail Co. v. Ausable Horsenail Co., 53 F. 390.

² Ibid.

³ Clotworthy v. Schepp, 42 F. 62.

the best; and that as the tea is not imported as sold, but is compounded of several varieties purified by the plaintiffs' secret process, and as there is no such variety of tea in China as "He-No," the statement is deceptive. And, though not deliberately so, plaintiffs have no equitable relief.¹ — On the label used by the plaintiffs on their compressed yeast, the several dates of registry are printed in fine type, in a circle, within which at the top are the words "Fleischmann & Co.'s," printed circularly, and at the bottom the words "Compressed Yeast," in two lines. Within these are the words "None Genuine," also printed circularly, and the words "Without our Fac-simile Signature," forming three lines, following which is the fac-simile of plaintiffs' signature. On defendant's label are marginal blank lines forming a square within which are the words "Atlantic Yeast Company," in comparatively large type, and the words "S. Newman, Prop.," in small script, form a circle, and within it are the words "None Genuine," printed circularly, and the words "Without my Signature, S. Newman, Prop. Compressed Yeast," in fine lines. Both labels are square, and tinted yellow. The form of package and label, and the color of the latter, have been in use by a number of persons for ten years, though the labels of plaintiffs and defendant are of lighter shade than those of other dealers. *Held*, that defendant is not guilty of an actionable simulation of plaintiffs' packages, or of infringement of trade-mark.² — On a bill to restrain infringement of a trade-mark, there being no charge that defendant was insolvent, and irreparable damage not being probable, and the question of imitation being for the jury, an interlocutory injunction is properly denied.³

§ 811. Where the owner, through a period of twenty-four years, during which he might have registered the word claimed as a trade-mark, takes no steps to interfere with its use by other persons in a particular country, while protecting it in other places, it may be presumed that it was his inten-

¹ *Kenny v. Gillet* (Md.), 17 A. 499; 70 Md. 574. (Bryan, J., dissenting.)

² *Fleischmann v. Newman*, 4 N. Y. S. 642.

³ *Lies v. Daniel* (Ga.), 8 S. E. 432; 82 Ga. 272.

tion to allow said word to become *publici juris* in that country.¹

§ 812. Packages of tea were imported by plaintiffs, with labels stating that their firm was the importer, and followed by an X-mark with the firm's initials in the angles, and a statement of the kind of tea, and that it was imported from Japan, where the packages were put up. Defendant's tea was in the same sized packages, except that the name of importer's firm and the initials in the X-mark were different. The defendant's tea was the superior, and it appeared that purchasers were influenced solely by the initials in the X-mark. Injunction refused.² — The D. Co. of New York sold vinegar for a number of years in Philadelphia, through its agent, the M. Co., as the "Gold Seal" vinegar, but did not adopt these words as an exclusive trade-mark. The M. Co. afterwards gave up its agency, adopted the words in question as a trade-mark, and sought to enjoin its use by the D. Co. *Held*, that an injunction must be denied, though the M. Co., which dealt in other vinegars, may have sold some of its own vinegar under such trade-mark before the agency terminated.³

§ 813. In a suit to restrain the use of a trade-mark, "Sweet Caporal," on cigarettes, the tobacco of which was treated by the "Hornbostel process," the evidence tended to show that the process was of no value, there being other and more approved means of obtaining the same end; that defendant had abandoned the use of said process, and notified plaintiff to that effect; that the word "Sweet" was prefixed to the word "Caporal" which had always belonged to defendant as a means of determining the amount of sales of tobacco subject to plaintiff's process, no agreement being made that the same should constitute a trade-mark. The court refused to find that the trade-mark "Sweet Caporal" had become widely known and valuable because of the use of said process in treating the tobacco, and in the manufacture of cigarettes.⁴

¹ Nat. Starch Mfg. Co. v. Munn's Patent Maizena & Starch Co., 6 Reports, 462; App. Cas. 275.

² Castle v. Siegfried (Cal.), 37 P. 210.

³ Miles Corson Co. v. Young (Pa. Com. Pl.), W. N. C. 256.

⁴ Hornbostel v. Kinney (N. Y.), 17 N. E. 666.

— One Jaeger originated and advocated in a foreign country the use of a distinctive kind of sanitary underwear. It was manufactured by various persons, and used before a certain firm began the manufacture in the foreign country under an arrangement with J., for its exclusive manufacture, and the use of his name, in connection with other terms used by him to designate his peculiar kind of underwear as a trade-mark. *Held*, that said firm did not have, seven years thereafter, any exclusive proprietary right in the name of Jaeger, as applied to underwear in the United States, which underwear having the same descriptive name had been sold by various dealers, even if it had acquired such right in the foreign country.¹—The plaintiff sold soap marked “B. T. Babbitt Trade-Mark, Best Soap;” and defendant sold soap marked “B. T. Buller’s Trade-Mark, Best Soap.” Defendant’s soap was sold in cakes of a somewhat different size and shape from those of plaintiff. The wrappers were of the same color, and about the same size, but different in general appearance. *Held*, that no one was misled.²

§ 814. A fruit-dealer cannot enjoin the use of a fruit-label which resembles his own in the color and arrangement of the fruit, where there is no similarity in those parts which might be claimed as a trade-mark, one being called “The Keystone Brand,” and the other “The Diamond Brand.” The name of each dealer appears on its label in large letters of different colors; and the evidence shows that no one has been deceived by the similarity, though both labels have been in use for some time in the same locality.³—The plaintiff’s trade-mark for flour manufactured by him was on a label containing the following words: “Ingersoll Roller Mills,” “Trade-mark Registered,” “196,” “Gold Leaf Flour,” and his name and address. *Held*, that it was not infringed by a label, of the same size and shape, containing the following words: “Patent Process, Gold Leaf, 196.” The term “Gold Leaf”

¹ *Dr. Jaeger’s Sanitary Woolen System Co. v. Le Boutillier*, 24 N. Y. S. 890; 5 Misc. Rep. 78.

² *Babbitt v. Brown*, 23 N. Y. S. 25; 6 Hun, 515.

³ *Heinz v. Lutz* (Pa. Sup.), 23 A. 314.

being generally used to designate a certain quality of flour.¹

§ 815. Complainant manufactured silk thread, and used on the best quality a particular device. Defendant, acting for a third person, sold a quantity of thread bearing this device, under the belief that it was the best quality of complainant's manufacture; but it was discovered afterwards that, although manufactured by complainant, the silk was of an inferior quality and had been re-dyed, when defendant took back the silk. *Held*, not sufficient ground to restrain defendant from selling an inferior silk with the device used for complainant's best quality.²— A firm composed of defendant and another was engaged in selling oil manufactured by plaintiff. The oil was put up in packages bearing a certain label, on the face of which was printed the firm name. Afterward, the firm was dissolved, and the property, including the label, was sold at auction, and was purchased by defendant, who thereon arranged to sell the oil of another manufacturer. He used the label of his late firm, except that the name of the manufacturer was substituted for that of the firm. He also issued a circular stating: "I shall continue to import the oil in the same style packages as heretofore, except that I have made a few slight changes in the label, by way of improvement. I have substituted the name of the producers," etc. *Held*, that there was no representation that the oil sold by defendant was manufactured by plaintiff. (The evidence did not show that plaintiff was ever entitled to the label.)³— A trade-mark consisting of the picture of a tobacco plant and the words "Fabrica Tobaccos," which had been used in the tobacco business, together with the words "El Cabio" above and beneath the words "De R. Solis," "Habana," "Copyrighted," "R. Solis, Manufacturer, Denver," is not infringed by a label having a similar picture, the words "El Cario," and beneath the words "D. Porzo & Suarez, Manufacturers, Denver,

¹ *Partis v. Todd*, 17 Can. S. C. R. 196.

² *Appeal of Wilcox (Pa.)*, 12 A. 578.

³ *Société des Huiles d'Olive de Nice v. Rorke*, 31 N. Y. S. 51; 82 Hun, 511. See *Listman Mill Co. v. Wm. Listman*, 6 N. W. 261; 88 Wis. 334.

Colo.," since, taken as a whole, they are not so similar that a purchaser using ordinary care and caution would likely mistake the one for the other.¹

§ 816. The "Elgin Butter Company" cannot, by using with its name the words "Proprietor of the Elgin Creamery," acquire such a property in the words "Elgin," "butter," and "creamery," that it can enjoin another company from using such words, if the latter actually deals in butter manufactured at Elgin, and has not used the words fraudulently.²— Where one sells his distillery, and agrees that during a short period, in which he does not propose to engage in the business, the purchasers may use his name in branding whiskey, there is no such suspension of the use on his part to continue his right to use it.³

§ 817. The rule is that the continuous use of a symbol for a series of years is sufficient to fix the right of a claimant therein; but right thereto may be defeated by deceit. Thus, where a label used by a defendant prior to 1871 contains statements that baking-powder sold by him was made by the A. & C. Co. in England, whereas in truth it was made by defendant in New York, it was *held*, that the word "Royal" on such label could not, in connection with such misrepresentation, perform the functions of a trade-mark.⁴ Even if the court is satisfied that a package was devised by defendant to simulate complainant's package, an injunction would not issue unless the similarity is such as will mislead ordinary purchasers; but where the defendant changed the color of package to that of complainant, and made other numerous changes, all which resembled complainant's, *held*, that they were manufactured to simulate.⁵

§ 818. The right to use the generic name of a patented article, in every form, passes to the public with its dedication

¹ *Solis Cigar Co. v. Porzo* (Colo.), 26 P. 556.

² *Elgin Butter Co. v. Sands* (Ill. Sup.), 40 N. E. 616; 155 Ill. 127; 51 Ill. App. 231, affirming.

³ *Mattingly v. Stone* (Ky.), 14 S. W. 47.

⁴ *Royal Baking Powder Co. v. Raymond*, 70 F. 373.

⁵ *N. K. Fairbank Co. v. R. C. Bell Mfg. Co.*, 77 F. 809.

resulting from the expiration of the patent even if the name is the surname of the inventor, or the original manufacturer.¹

§ 819. A circular published by W. R., Jr., in 1880, was in the following words: "Sectional plate spoons and forks [Eagle], Wm. Rogers x 12. Triple-plated on all points exposed to wear. Plated by the method invented by Wm. Rogers in 1855, who was original inventor of sectional plate. Wm. Rogers (since 1878), Wallingford, Conn., formerly of Hartford and West Meriden." *Held*, not an infringement of the rights of the successors of Wm. Rogers under his trade-marks, it not being misleading to a person familiar with the facts stated therein, and with the fact that Wm. Rogers, Sr., died in 1873. As between father and son, both having the same name, and both well-known to the trade as skilful manufacturers of plated silver-ware, the adoption and use by the son, after the father's death, of his own name as a trade-mark and stamp, is not, in the absence of fraud on his part, an infringement of the trade-marks so imitated. He may advertise that he is a manufacturer of "the celebrated Wm. Rogers, Sr., spoons, forks, and knives," which is not a violation of the rights of the complainant, when the advertisement is not intended to induce the public to believe that the goods are manufactured by the complainant, although the effect of the advertisement is to cause the goods of W. R., Jr., to be known in the market as Wm. Rogers' goods.² The U. S. Circuit Court of Appeal said that goods sold to the trade stamped with Rogers' name can and will be sold by dishonest dealers under a representation that they are manufactured by a company of established reputation, having a similar name, which manufactures a high class of goods. The mere fact does not justify an injunction against use of such stamp. Said the court: "There are some indicia of an unworthy purpose to gain an advantage from a name well known to the purchasers of silver-plated ware, but the affidavits do not convey sufficient facts to justify the conclusion that Rogers was

¹ *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; 41 L. ed. 118; 85 O. G. 1703; 16 Sup. Ct. R. 1002.

² *Wm. Rogers Mfg. Co. v. Simpson (Conn.)*, 9 A. 395.

using his name unfairly and dishonestly in the business in which he was entitled to use it.”¹ — The fact that a manufacturer uses a brand composed in part of his own name, which is of such similarity to that of another member of his firm as to indicate an intent to deceive, does not justify an injunction forbidding absolutely the further transactions of such business in his own name.² — The complainant made and sold “*Morse’s Compound Syrup of Yellow Dock Root*” in bottles with paper wrappers. The defendant subsequently set up a sale in bottles, without wrappers, of “*Dr. Morses’ Celebrated Syrup*.” These words being blown in the glass, with labels inscribed “*Dr. Morses’ Improved Yellow Dock and Sarsaparilla Compound*.” The bottles were exactly similar in size and shape, but the labels were different. The complainant made his preparation under one trade-name, and sold it under another, and advertised it as “sold only in quart bottles;” whereas the bottles, though known in the trade as quart bottles, held substantially less. *Held*, that complainant was not entitled to injunction and account of profits.³ — A foreign firm agreed to consign their wine exclusively to plaintiffs, for sale in the United Kingdom, or its colonies. *Held*, that plaintiffs could not maintain an action to restrain defendants, London wine-merchants, from selling wine under a name in colorable imitation of the trade-marks of such foreign firm, plaintiffs having no interest in the trade-marks, and no right to restrain the fraudulent use of them.⁴

§ 820. Plaintiff’s and defendant’s medicines were both put up in gallon jugs of similar shape and color. One was called “*Microbe Destroyer*,” the other “*Microbe Killer*.” One label had a conspicuous red symbol or figure in the centre, with printed matter in columns at each side, and a bright-red border. The other was printed on blue or yellow paper, and no columns of printed matter. *Held*, that the resemblance between them was not calculated to deceive.⁵

¹ *Rogers v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 575.

² *Rock Springs Distilling Co. v. Monarch (Ky.)*, 22 S. W. 1028.

³ *Alexander v. Morse*, 14 R. I. 153; s. c. 51 Am. Rep. 369.

⁴ *Richards v. Butcher*, 62 L. T. 867.

⁵ *Radam v. Capital Microbe Destroyer Co. (Tex.)*, 16 S. W. 990.

§ 821. Relief in equity was refused, on the ground that if plaintiff had had title, he had forfeited his equity by using his trade-mark in connection with paints made from ores dug from other than the original Prince's Mine. It was *held*, that the defendant in that litigation had always used the trade-mark in connection with paints from the Prince's Mine, but no equity for infringement was awarded to the complainant.¹

§ 822. The complainant left San Francisco, Cal., where he had been engaged in manufacturing rolled wheat, and came to Minneapolis, Minn. He leased a mill where, with his two brothers, he carried on a successful manufacture of rolled wheat. This product, called by them "Pettijohn's California Breakfast Food," was put on the market in small paper or pasteboard boxes, or parcels, as customary. The wrapper contained a trade-mark, the pictured representation of a bear, and words "P.'s Cal. B. Food, Prepared by Wm. A. Pettijohn, Sole Manuf'r, San Francisco, Cal., and Minneapolis, Minn., Mach. in'd for purpose, and shipped from Cal." Seven months later, one Beeman was admitted as a partner, and the firm name became Beeman & Pettijohn. In October, 1890, the three brothers caused a corporation to be formed, — the Pet. & B. Food Co. They succeeded to the business of B. & P., and carried it on until 1893, when said corporation leased mill to complainant, with all its tangible property, including its trade-marks. The mill was destroyed by fire in January, 1894. At the time of the fire, complainant was the owner of several other mills in different parts of the country; two in Ohio, one at Chicago, and another at Cedar Falls, Iowa. Complainant insists that retail dealers and travelling salesmen impose on the public by substituting defendant's rolled wheat for that made by complainant; and the fraud is made possible by the use of the name Pettijohn by the defendant, — the real name of both. The cause of action is unfair competition in trade. Injunction is prayed to stop use of Pettijohn in defendant's corporate name, and in the designation of defendant's product, and to stop the use of the

¹ Prince's Metallic Paint Co. v. Prince Mfg. Co., 57 F. 938; 6 A. C. A. 647.

name on wrapper. The court declined to declare complainant's right to have people believe that the "P. B. F." marketed by it was made at a Minneapolis mill. *Held*, that a manufacturer cannot prevent a rival manufacturer of the same surname from using such surname for his goods.¹

§ 823. The plaintiff issued a monthly periodical named "The Railroad and Engineering Journal," the result of a consolidation of two periodicals he had purchased, one of which was known as "The American Railroad Journal." The defendant published a weekly periodical called "Engineering News and American Railway Journal." In an action to enjoin defendant from using the words "Railway Journal," it appeared that the plaintiff's paper had but a limited circulation, and that there was no evidence showing actual confusing in any instance, from the claimed similarity in names; while the titles, as printed, indicated possibility of error from plaintiff's use of the term "Engineering" rather than from defendant's use of the words "Railway Journal." *Held*, that the relief sought was properly denied.² — In 1891, the plaintiff was publisher of "The Electrical World." In 1890, the defendant had published a newspaper styled "Electric Age." In 1891, the defendant changed the name of his paper to "The Electrical Age," and adopted a title-page similar in general to that of the plaintiff, and printed in, and on, other and different colors. *Held*, the facts were not sufficient to justify an injunction.³ The plaintiffs published a book called "The Good Things of Life," which consisted of pictorial illustrations and short dialogues taken from a serial owned by some of the plaintiffs, and called "Life." The defendants published a book called "The Spice of Life," containing illustrations and dialogues from a German paper. The word "Life" was in quotation marks on plaintiffs' book, but not on defendants', and the letters forming the

¹ American Cereal Co. v. Eli Pettijohn Cereal Co. (aff. by C. C. A.), 76 F. 372. This principle is fully concurred in by the U. S. C. C. A., Feb. 23, 1897, in Duryea v. Nat. Starch Mfg. Co., 45 U. S. App. 649.

² Forney v. Engineering News Pub. Co., 10 N. Y. S. 814 ; 57 Hun, 588.

³ W. J. Johnston & Co. v. Electric Age Pub. Co., 14 N. Y. S. 803.

word were double the size on plaintiffs' of those on defendants' book. The colors of the lettering were different, and, with the exception of a similarity in size and binding, the two books were dissimilar, including the contents. *Held*, that it was evident that plaintiffs used the word "Life" in a different sense from that in which it was employed by defendants, and that the use by the latter in no respect infringed upon its employment by plaintiffs.¹—The trade-mark acquired in connection with the title "Charley's Aunt," given to plaintiff's play, is not infringed by the title "Charley's Uncle," given to defendant's play. Posters used in advertising defendant's play, entitled "Charley's Uncle," though in the same style as those of the plaintiff, are not so similar as will entitle the plaintiff to injunction against their use, when plaintiff's posters have the device of a laughing cat, and the defendant's posters have the device of an owl.²

§ 824. The trade-mark "Magic Headache," used on packages labelled "Gessler's Magic Headache Wafers, a positive cure for headache and neuralgia," with directions as to taking; "Manuf'd by Max Gessler, M'f'g Chemist, Milwaukee, Wis. Price 35 cts.," is not infringed by the use of similar packages, with similar labels and directions, but reading "Brown's Alpha Wafers; a positive cure for headache and neuralgia;" "Manufactured at Brown's Pharmacy, Marquette, Mich."³

§ 825. A merchant erected a building of peculiar architecture, adjoining a similar building occupied by an old firm engaged in a similar business; and, for the purpose of deceiving the customers of such firm, adopted a similar name, and refrained from using any signs about the building to designate the proprietor. *Held*, that equity could not compel the merchant to designate by signs, within and without the building, who was the proprietor thereof, but should require him to distinguish his store from the other in some

¹ Stokes v. Allen, 9 N. Y. S. 846; 56 Hun, 526.

² Frohman v. Miller (Super. N. Y.), 29 N. Y. S. 1109; 8 Misc. Rep. 379.

³ Gessler v. Grieb, 48 N. Y. 1098.

other way that would be a sufficient indication to the public that his store is a different place of business from that of the other.¹ — A complainant is not entitled to enjoin the use by another, engaged in the same business, of signs of the same size, shape, and color as those used by complainant, the characteristics thereof not differing from those ordinarily on business-signs similarly placed.² — Nor is he, from long use in his business-signs and advertisements of words “Scientific Dentistry at moderate prices,” entitled to exclusive use.³ — The use of name in an advertisement, but failure to affix it to the article, is not the adoption of a trade-mark.⁴

§ 826. A trade-mark for underwear, consisting of a sun surrounded by rays, having a distinctly-marked human face, and frequently, though not necessarily, bearing words “Warmth is Life,” is not infringed by a symbol having an imperfect outline, somewhat resembling sun-rays, but the characteristic feature of which is a circle enclosing a monogram, the label never bearing the words “Warmth is Life,” but always having the name of the manufacturing company using it.⁵

§ 827. There was nothing in a certain trade-mark to indicate that the medicine was from a particular manufactory. Another person cannot be restrained from using it, as the only effect of the symbol is to indicate a class of goods which any one who knows how may manufacture.⁶

§ 828. The plaintiff manufactured a remedy called “No-To-Bac,” in the form of light-gray odorless tablets put up in dark red boxes, with plaintiff’s name, and the name of the remedy, in conspicuous black letters, with a description of the remedy and directions for use. The defendant man-

¹ *Weinstock, Lubin, & Co. v. Marks* (Cal.), 42 P. 142 ; 109 Cal. 529.

² *Cady v. Schultz* (R. I.), 32 A. 915.

³ *Ibid.*

⁴ *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* (Ill. Sup.), 30 N. E. 339.

⁵ *Underwear Co. v. Simons* (C. C.), 49 F. 276.

⁶ (Following *Chadwick v. Covell*, 23 N. E. 1068) ; *Covell v. Chadwick* (Mass.), 26 N. E. 856.

ufactured a remedy called "Baco-Curo," in the form of dark brown tablets, with an odor of licorice, and varying in size and weight from that of plaintiff's, and which were put up in boxes like plaintiff's, but white in color, with the defendant's name and the name of its remedy conspicuously printed in green, with a description which was similar to plaintiff's. *Held*, that there was no unfair competition.¹

§ 829. The manufacturer of horse-shoe nails coated them with bronze, for the sole purpose of making them popular; and defendant did the same, thereby imitating plaintiff's nails. *Held*, that there was no trade-mark in the bronze nail, and its use could not be enjoined.²

§ 830. The defendant withdrew from the firm of Marcus Ward & Co., Limited, which was engaged in the manufacture of linen papers, and established the firm Wm. H. Ward & Co. in the same business. Action to restrain from placing the words "Marcus Ward's Son" on their goods, and the expression "late of the firm of Marcus Ward & Co." on their letter-heads. *Held*, he, being the son of Marcus Ward, and lately a member of the firm named, could not be restrained.³

§ 831. The statement filed to obtain registration, and attached to the affidavits for a preliminary injunction, may be considered on the final hearing. "One Night Cure," used as a trade-mark for a cough-remedy, is not infringed by the use of the words "Beshore's One Night Cough Cure." Words are not protected which "assert a manifest falsehood and a physiological impossibility."⁴

§ 832. Although a trade-mark is registered for foreign commerce, one might adopt and use a different one for domestic trade. (The court cited Trade-Mark Cases, 100 U. S. 82; *Ryder v. Holt*, 128 U. S. 529; not inconsistent with the doctrine of *Richter v. Remedy Co.*, 52 F. 455.)⁵

¹ *Sterling Remedy Co. v. Eureka Chemical & Man'g Co.*, 70 F. 704.

² *Putnam Nail Co. v. Dulaney*, 21 A. 391; 27 W. N. C. 360; affirming 8 Pa. C. Ct. R. 595; 59 F. 909; 8 C. C. A. 227.

³ *Marcus Ward & Co. v. Ward* (Sup.), 15 N. Y. S. 913; 61 Hun, 625.

⁴ *Kohler Mfg. Co. v. Beshore*, 59 F. 572; 8 C. C. A. 215.

⁵ *Ibid.*

§ 833. A corporation will not be enjoined from using a name similar to one previously used by an unincorporated association which was afterwards incorporated, since the assumption of a corporate name by the unincorporated society was illegal.¹ — The “Drummond Tobacco Company,” a corporation, sought to enjoin the incorporation of another company under the name of “Drummond & Randle Tobacco Company.” *Held*, in the absence of proof that injury to the plaintiffs would result, equity will not interfere.² — Outgoing stockholders of a corporation named the “Van Auken Company,” whose names were Van Auken, could not organize a corporation under the name of “Van Auken’s Specialty Company,” and compete in business with the older corporation.³ — A corporation engaged in the liquor trade, contrary to law, cannot sue to enjoin another corporation from using a name similar to its own.⁴

§ 834. The defendant, who was doing business under the name of the “Newark Coal Company,” unincorporated, on the formation of a corporation by that name, transferred to it his business and the good-will thereof, and was taken by the corporation into its employ, as an officer, for four years. *Held*, that defendant, on the dissolution of his connection with the corporation, and engaging in a rival business, would not be enjoined from advertising himself as formerly connected with such corporation.⁵

§ 835. One who sells a preparation which could be used only by dentists, cannot enjoin a dentist from using it, or advertising that he uses it, for a certain purpose, though the name under which it is sold is a valid trade-mark, when in selling it no restriction was placed on its use.⁶

§ 836. The defendant, owner of land known as “Milbrae Station,” formed a co-partnership with the plaintiffs to keep

¹ German-Hanoverian & Oldenberg Coach-Horse Ass’n, 46 Ill. App. 281.

² Drummond Tobacco Co. v. Randle, 114 Ills. 412.

³ Van Auken v. Van Auken Steam Specialty Co., 57 Ill. App. 240.

⁴ Portsmouth Brewing Co. v. Portsmouth Brewing and Bottling Co. (N. H.), 30 A. 346.

⁵ Newark Coal Co. v. Spangler (N. J. Ch.), 34 A. 932.

⁶ Sweezy v. McBrair (Sup.), 35 N. W. S. 11; 89 Hun, 155.

cows on said land, and to sell the milk therefrom under the trade-name of "Milbrae Dairy." Afterwards the partnership was dissolved, plaintiffs taking the milk-routes and business of selling milk, defendant, who owned the lands, agreeing to supply them with milk therefrom. Later, plaintiffs terminated contract with defendant, and took no more of his milk, but still conducted a business under the title of the "Milbrae Dairy," and formed a corporation under the name of "Milbrae Company." *Held*, that plaintiffs could not ask for an injunction to restrain defendant from using the name "Milbrae" in a competing business, since their own use of the name was a fraud on the public.¹

§ 837. An injunction granted in New York, restraining defendants from using the name "Prince" to designate or describe any article of paint, now or hereafter manufactured, or exposed for sale by them, or from inserting advertisements denying the rights of plaintiff to the use of the designation "Prince's Metallic Paint," is violated by affixing such name to car-loads of paint at Lehigh Gap, Pa. — Defendant advertised that the recent decision "in a suit brought against us by our competitors in trade is not a final disposition of the case," and, in reference to other decisions by the courts of another State, said: "In these cases our right to use our corporate name and trade-mark was fully sustained, and we are confident that upon the final hearing of the case upon its merits our rights in the city of New York will also be sustained." *Held*, a violation of injunction.²

§ 838. An advertisement of plasters manufactured and sold by defendant as "Benson's Porous Plasters; Benson's Capcine Porous Plasters; Benson's Plasters, the best Porous Plaster," does not violate an injunction restraining defendant from using the word "Porous" by affixing or applying it to any plasters manufactured, shipped, sold, or supplied by them, or to the boxes in which they are put up.³

¹ *Milbrae Co. v. Taylor* (Cal.), 37 P. 235.

² *Prince's Manufacturing Co. v. Prince's Metallic Paint Co.*, 4 N. Y. S. 348; 51 Hun, 443.

³ *Porous Plaster Co. v. Seabury*, 1 N. Y. S. 134.

CHAPTER VIII.

MISCELLANEOUS PRACTICE.

- § 839. Jurisdiction of State Courts not impaired by Federal Act, etc.
- § 840. Registration cannot impair *publici juris*, etc.
- § 841. "Somatose," not descriptive, etc., etc.
- § 842. Abandonment, good faith, etc.
- § 843. Imitations of sewing-machine symbols illegal, etc.
- § 844. License to use mark does not excuse non-compliance with contract, etc.
- § 845. Rights growing out of assignment of trade-mark.
- § 846. How right to trade-mark is lost, etc.
- § 847. Question of variance as to adoption of trade-mark.
- § 848. Question of disparagement by inferiority.
- § 849. Non-interference defeats claim to title, etc.
- § 850. False claim to a trade-mark.
- § 851. When intention to deceive may be proved or inferred.
- § 852. When Name of an Order may not be protected.
- § 853. Manufacturer's own portrait may be registered as legal trade-mark.
- § 854. Decision in a case of *initials*, etc.
- § 855. Right of manufacturer to use his own portrait as trade-mark.
- § 856. Nice distinction in "Bromo-Caffeine" case.
- § 857. A right to symbol passes with good-will. One's name.
- § 858. Trader cannot sell by misuse, even of correct name.
- § 859. Owner's name, etc., need not appear on trade-mark.
- § 860. Massachusetts Act as to foreign corporation using name of domestic corporation.
- § 861. "Magnolia" Metal Co.'s cases.
- § 862. Question of registered initials interference, etc.
- § 863. Registration in Argentine Republic does not give prior right to registration in France.
- § 864. *Tramway* not exclusive word and therefore not a trade-name.
- § 865. Not unfair competition for merchant to praise his own wares and omit mention of rival's wares in advertising in journal.
- § 866. When two labels on medicines did not conflict.
- § 867. Fraud may exist, in spite of differences in detail.
- § 868. Right to mark dispelled by proof of priority.
- § 869. Untrue representations do not always vitiate, etc.
- § 870. Unfair sale of goods under popular names, etc.
- § 871. "*Hunyadi Janos*," under what conditions sales allowed.
- § 872. Unfair and misleading *chicory* label.

§ 839. THE following are recent decisions affecting miscellaneous practice. The Act of March 3, 1881, conferring jurisdiction on United States Courts, does not impair the jurisdiction of State courts over suits for infringement of trade-marks.¹— A United States Circuit Court cannot interfere by injunction at the instance of a corporation organized under the laws of a State outside of its circuit, and prevent any necessary step being taken, under the statutes of said State, in the creation of a corporation bearing the same name as the foreign corporation.²— The United States Supreme Court has no jurisdiction to review a judgment of the Circuit Court of Appeals of the District of Columbia, denying a writ of mandamus to register a trade-mark; and even in a regular case of appeal its jurisdiction would fail unless the matter in dispute exceeds \$5000, exclusive of costs; or there is drawn in question the validity of a treaty, or statute, under an authority conferred and exercised by the United States.³— The Act of Congress, March 3, 1881, Sec. 7 (21 St. at Large, 502), relating to trade-marks used in commerce with foreign nations, which provides that any person who shall counterfeit “any trade-mark registered under this Act,” shall be liable to an action on the case, does not apply to any trade-mark that has not been registered, so as to oust the jurisdiction of a State court in a prosecution for counterfeiting a foreign trade-mark which is not registered under the Act of 1881.⁴— Since the adoption of the California Code, exclusive right to a trade-mark is acquired only by recording it.⁵— A sale of a case of liquors labelled with a certain device by a State Commissioner in Canada, is not authorized by the Act of South Carolina of Dec. 24, 1892 (Dispensary Act providing for the purchase and sale of liquors by the State); and the State is not thereupon entitled to have the device registered.⁶— In

¹ Re Keasbey Matteson Co., 16 S. Ct. 273; 160 U. S. 221.

² Lehigh Valley Coal Co. v. Hamblen, 23 F. 225.

³ U. S. *ex rel.* St. S. Car. v. Seymour, Com. Pats.

⁴ People v. Molins, 10 N. Y. S. 130; 7 N. Y. Crim. R. 51.

⁵ Whittier v. Dietz, 66 Cal. 78.

⁶ Seymour v. U. S., 2 App. D. C. 240.

1870, Congress passed a statute providing for the registration of trade-marks, and in 1876, a statute imposing penalties for trespass on the rights obtained by such registration. The Statute of 1870, having been declared unconstitutional, in 1881 a valid statute was enacted, touching registration, which did not re-enact the penal Statute of 1876, and made no reference thereto. *Held*, that the penal statute fell with that of 1870, and did not remain suspended, to become operative under the Statute of 1881.¹

§ 840. The adoption of a trade-mark ("La Normandie," for cigars) cannot take away any right previously acquired by the public.²—A party avowedly not the owner of a trade-mark for the use of which he had been sued under the allegation that it was the imitation of another's trade-mark, has no standing in court to sue for damages as a vindication of such trade-mark, after the dismissal of the plaintiff's action on his own motion.³—A certificate of registration, under the Act of 1876, must contain words to show that the alleged owner acquired an exclusive property in the mark claimed.⁴—An application for the registration of a trade-mark stated that it consisted "essentially of the illustration of a boy in a position indicating suffering from cramps." Immediately below the figure of the boy were the words "Cramp Cure," forming part of the expression "Cramp Cure for every ache or pain;" but the applicant stated that this descriptive matter might be altered or omitted at pleasure, without affecting the character of the trade-mark. *Held*, that the trade-mark consisted in the design of the suffering boy, which the application stated to be the essential feature, and that the words "Cramp Cure" formed no part thereof.⁵

§ 841. On the application in England to register the word "Somatose" as a trade-mark in respect of an article made from meats, and called a pharmaceutical product, its object

¹ United States v. Koch, 40 F. 250.

² Stachelberg v. Ponce, 128 U. S. 686. (L. ed. 32, 569.)

³ Lacroix v. Nodal (La.), 6 So. 195 ; 41 La. Ann. 1018.

⁴ United States v. Braun, 39 F. 775.

⁵ L. H. Harris Drug Co. v. Stachy, 46 Fed. 624.

being nourishment for the human body, *held* (Lindley, L. J., *dissentiente*), that "Somatose" was not an "invented word," but that, even if it were an invented word, it was not a "word bearing no reference to the character or quality of the goods," within Sec. 10 (Act of 1883), as amended in 1888, and consequently could not be registered.¹ — A declaration by a French citizen for infringement of a trade-mark, which fails to allege that he has deposited a copy of his trade-mark, as required by the convention of April 16, 1869, between the United States and France, is fatally defective.² — Under the English Act of 1883, the owner of a trade-mark can only sue for infringement thereof in connection with the particular classes for which his trade-mark is registered.³ — A suit in a Federal court between citizens of the same State cannot be maintained unless it be alleged that the goods covered by the mark are intended to be transported to a foreign country, or in lawful intercourse with an Indian tribe.⁴ — The word "Emolliolorum," used as a trade-mark to designate a preparation for rendering every description of leather waterproof and supple, could not be registered as a "fancy word" under the British Act of 1883, inasmuch as it would convey to the mind of an ordinary Englishman⁵ the idea that the preparation would act by softening the articles to which it was intended to be applied; and it is therefore descriptive, and would not come within the definition of "fancy word" laid down in *Re Van Duzer's Trade-Mark*, 34 Ch. Div. 623; nor could it be registered under Section 10, Patents, etc., etc., Act of 1888, as an invented word, or as a word having no reference to the character or quality of the goods.⁶

§ 842. The jury must be satisfied that the trade-mark was the exclusive property of the person alleged in the indictment to be the owner, that the alleged trade-mark was capable of

¹ *Farbenfabriken T. M. K.*, 7 Reports, 439; *Id.* [1894], 1 Ch. 645. (See also *Cohn v. People*, 149 Ill. etc., etc., cited in note.)

² *Lacroix v. Escobal*, 37 La. An. 533.

³ *Hart v. Colley*, 44 Ch. Div. 193.

⁴ *Luyties et al. v. Hollandeer et al.*, 21 Fed. 281.

⁵ Is this not a judicial stretch of fancy?

⁶ *In re Talbot's Trade-Mark*, 8 Reports, 149.

appropriation as such, that it has not been abandoned by acquiescence in the use by others.¹ — In a prosecution for selling cigars from a box bearing a counterfeit label, the fact that two strangers, who bought cigars at defendant's stand, told him that the label was counterfeit, is not sufficient to show guilty knowledge on his part.² — To warrant conviction it must appear that the goods sold were not entitled to bear the genuine label; but to establish such fact it is not sufficient to show that defendant sold the cigars knowing the label to be counterfeit.³ — A Federal court has no jurisdiction between citizens of the same State, unless the infringement is applied to goods to be transported out of the State.⁴

§ 843. The lettering "N. Y. S. M. M'f'g Co.," corresponding in style and size of letters with the lettering "The Singer Manuf'g Co.," on the brass plates of the latter company, cannot lawfully be used on sewing-machines similar to those of the Singer Company, by a company bearing the former name, although it does not employ the name "Singer," when the position and size, as well as the inscription found on the plate, are imitations of those used by the Singer Company, and are calculated to deceive the public.⁵ — The similarity need not be so close as to deceive the ordinary consumer, nor need it appear that any one was actually deceived, to entitle to relief.⁶ — A trade-mark consisting of a red Greek cross is not infringed by a Maltese cross having a red centre and dark projections with letters, etc., giving a more distinctive individuality than that of the plaintiffs'.⁷ — One who has the right to use the word "Hygeia," in connection with certain other words, and who makes that word more prominent than the rest of his trade-mark, does not

¹ *People v. Molins*, 10 N. Y. S. 130 ; 7 N. Y. Crim. R. 51. (*Ubi supra.*)

² *Vogt v. People*, 59 Ill. App. 684.

³ *State v. Berlinsheimer*, 62 Mo. App. 168.

⁴ *Schumacher v. Schwenke*, 26 F. 818.

⁵ *Singer Mfg. Co. v. Bent*, 163 U. S. 205 ; 41 L. ed. 131 ; Off. Gaz. 1713 ; 16 Sup. Ct. Rep. 1016.

⁶ *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10.

⁷ *Johnson v. Bauer (C. C.)*, 79 Fed. 954.

thereby infringe the rights of another, who also has the right to use the word "Hygeia" alone, as a trade-mark.¹

§ 844. It is no defence that defendant had a license for the use of a trade-mark, where the contract for the license requires defendant to keep books, make returns, and pay royalties, or forfeit the license, and it is shown that defendant failed to perform these conditions, and the plaintiff notifies him that the license is terminated.² Nor is it any defence that compensation may be made, for plaintiff is not seeking to enforce a forfeiture, but insists that the license is terminated by the terms of the contract.³

§ 845. In 1871, John Forrest, who had carried on in London the business of watchmaker, and had marked his watches "John Forrest, London," died; and a firm of watchmakers in London purchased the good-will of the business, but did not continue it, except that, until 1874, they put "John Forrest, London," on some of their watches. In that year they granted an exclusive license to another firm in Liverpool to use for seven years the name "John Forrest, London," on their watches; but after the license had expired, they did not use the name themselves, save only in a very few cases. In 1890, they assigned their assets to a trustee for their creditors, and, in 1891, he sold their business and the good-will and lease of the premises; and on the same day he sold to the plaintiff, a watchmaker in Coventry, the name, title, and good-will of the business, "John Forrest, London." *Held*, that the plaintiff, being a mere assignee in gross of the right to the name of "John Forrest," was not entitled to restrain the use of such name on watches made by the defendant, who was also a watchmaker in Coventry.⁴

§ 846. The complainants adopted a name, and applied it to small lots of cigars manufactured and sold by them, one

¹ Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co., 63 F. 438; 11 C. C. A. 277.

² Martha Washington Creamery Buttered Flour Co. of U. S. v. Marlieu, 44 F. 473.

³ *Ibid.*

⁴ Thorneloe v. Hill, 8 Reports, 718; *Id.* [1894], 1 Ch. 569.

lot in 1878, on a special order; one in 1884, with a trade-mark, for a limited market; one in 1885; and no more until 1889. Before the sale in 1885, the defendants, without knowledge of what had been done by the complainants, and in good faith, began the sale of cigars of their own manufacture under the same name, and continued extensive sales and advertisements thereof for five years without question. *Held*, that there was no appropriation for actual occupation of the market by the complainants to entitle them to assert a right to a trade-mark against defendants.¹—A cigar label containing these words, “opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship,” is not illegal, as being immoral or against public policy.²

§ 847. In a suit for infringing a trade-mark, the petition failed to state that the paper package adopted by the plaintiff as a trade-mark had on it the words “Kohlberg Bros.,” which by the evidence it appeared to have. *Held*, it was for the jury to determine whether this was a variance between the trade-mark declared on and that proved, since there was abundant evidence, outside the words referred to, identifying the trade-mark used by plaintiff as that described in the petition.³

§ 848. A manufacturer of goods familiarly known to the trade, and sold under the manufacturer's name, as “Priestley's Silk Warp Henrietta,” is entitled to an injunction against any person selling an inferior quality under that name, with intent to deceive the public.⁴—A declaration, alleging that plaintiffs are profitably engaged in the manufacture and sale of a certain valuable medicine; that the defendant fraudulently, and with intent to injure the plaintiffs' business, manufactured under a similar name a spurious and inferior medicine in imitation of that made by the

¹ *Levy et al. v. Waitt et al.*, 61 F. 100; 10 C. C. A. 227. (See Browne on Trade-Marks, § 677, as to instantaneous seizure of trade-mark after abandonment.)

² *Cohn v. People* (Ill. Sup.), 37 N. E. 60, criticising *McVey v. Brendel*, 22 A. 912, and directly opposite thereto.

³ *Goodman v. Bohls* (Tex. Civ. App.), 22 S. W. 11.

⁴ *Priestley v. Adams*, 13 N. Y. S. 41; 59 Hun, 380.

plaintiffs, and by simulating the wrappers used by plaintiffs in putting up their medicine, deceived the public, and thus sold large quantities of the spurious medicine as genuine, to plaintiffs' damage, was *held* to be sufficient on demurrer.¹

§ 849. In an action to restrain defendant from using a trade-mark which both parties claimed, an instruction that if both parties had used the trade-mark for one year, and afterwards without any attempt to interfere with each other's use, the jury should find for defendant; but if the plaintiff was the exclusive owner, and had done nothing which would lead defendant to believe that it had abandoned its right, and had always objected to defendant's use of it when such use came to the plaintiff's knowledge, they should find for the plaintiff, — such instruction is not open to objection on the part of the defendant.²

§ 850. The defendant showed that he abandoned the use of label before the hearing of the motion for injunction *pendente lite*, and that the plaintiff was misleading the public by falsely claiming that the form of cakes of soap on which the label was used, and the title, were secured by a trade-mark.³

§ 851. A man must be taken to have intended the reasonable and natural consequences of his own acts. If a mere comparison of the goods, having regard to the surroundings, is not sufficient, then evidence of an intention to deceive is admissible, — either oral or in writing, — or inferences from conduct. There should be an account of profits, although no evidence of mistake of goods.⁴

§ 852. In a suit to enjoin certain persons from organizing another association under the name of the "Order of Scottish Clans," *held*, that plaintiff could not maintain its bill under the Statute of 1888, on the ground that it was entitled to have its name protected as a trade-name.⁵

¹ M. A. Thedford Med. Co. v. Curry, 22 S. E. 661; 96 Ga. 89.

² Durham Tobacco Co. v. McElwee (N. C.), 5 S. E. 907.

³ Brown v. Doscher, 20 N. Y. S. 900; 66 Hun, 626.

⁴ [1887] 36 Ch. 1; Saxlehner Apollinaris Co., Kekewich, J.

⁵ American Order Scottish Clans v. Merrill, 151 Mass. 558 [1890].

§ 853. The portrait of a manufacturer of goods is a "distinctive device of Sec. 10, Sub-sec. 1, of the Patents, Designs, and Trade-Mark Act, 1888. Romer, J., below, has so decided and said, *inter alia*: "as to the case of Anderson's Trade-Mark, 26 Ch. Div. 409, which was cited as deciding that a portrait cannot be the subject-matter of a trade-mark. That case decided nothing of the kind. The chief part of the trade-mark was the portrait of Baron Liebig for Liebig's Extract of Meat. His name was *publici juris*, and as his name was applied to that substance, that name on the photograph of Baron Liebig was another method of describing the goods to which the trade-mark was to be attached.¹ That decision in nowise applies to this case. The plaintiff's name is not *publici juris*." The defendant appealed. The Lords Justices affirmed the decree and dismissed the appeal.²

§ 854. The mere use by defendants of their own former initials, "B. & S.," on articles sold by them, is not an infringement of a registered trade-mark for the two letters "S. B.," arranged in that order. Both parties were citizens of the same State. In this case a trade-mark was *not* involved. It is not understood how Federal courts had jurisdiction. *³

§ 855. The right of a fabricant to affix his portrait on his products is a right, in some sort, as natural as that of signing his name; but the fabricant who registers a mark containing his portrait cannot complain of a rival who equally employs a portrait of the maker.⁴

¹ See decision U. S. Sup. Ct. in *The Dr. Richmond Nervine Co. v. Richmond*, *ubi supra*, as to portrait being a valid trade-mark. See also *Lestarquit v. Carrette*, 34 *Annales*, 211, *infra*, also declaring portrait a valid trade-mark; *Rowland v. Mitchell* (C. A.), 1897, 1 Ch. 171; 66 L. J. Ch. N. s. 110; 75 L. T. Rep. 498; *Affg.* 75 L. T. Rep. 65; 65 L. J. Ch. N. s. 857.

² *Rowland v. Mitchell*, Ch. Div. [1897] 71.

* One of the judges said, *inter alia*, substantially, that registration had been obtained "by patents No. 20,907, March 29, 1892, and No. 22,294, Jan. 3, 1893." Certificates of registration must have been meant. A trade-mark never could have been patented. The phrase *patent* in such a case is a false term, and illogical as well as misleading. See § 340, *Browne on Trade-Marks*.

³ *Bart et al. v. Smith*, 71 F. 161. See *Johann Hoff v. Tarrant & Co.* (C. C.), F. 71, 163.

⁴ *Lestarquit v. Carrette*, 34 *Annales*, 211.

§ 856. The New York Court of Appeals has drawn a nice distinction between "Bromo-Caffeine," a term not in general use when the plaintiff applied it, and not descriptive of the articles used to make the medicines designated by it, and the noted case of "Ferro-Phosphorated Elixir of Calasaya Bark" (*Caswell v. Davis*, 58 N. Y. 223). The latter case indicated to druggists, and the public, the principal ingredients of the article. "Bromo-Caffeine" was used before for a certain chemical compound (the words a mere curiosity, having no known significance to the medical world); while "Bromo-Caffeine" appeared in a chemical journal in Leipsic, in 1868; the formula was also found in Watt's Dic. of Chemistry, ed. 1872. There is "no identity of substance between the 'Bromo-Caffeine' of chemistry and the 'Bromo-Caffeine' prepared as a medicine by the plaintiffs. The former is a worthless medical compound, while the latter is a valuable medicine." For this reason it was a valid trade-mark.¹

§ 857. A right to the symbol is inseparable from the right to sell the commodity. A trade-mark may pass with sale of the good-will;² and a trade-mark affixed to articles manufactured at a particular place may lawfully be sold with the establishment, though it consists simply of the name of the vendor;³ but a manufacturer cannot claim as a trade-mark exclusive use of his own name as against another bearing the same name, and whose business is conducted in the same place.⁴

§ 858. A trader is not entitled to pass off his goods as those of another, by selling them under a certain name, although in its primary meaning that name is merely a true description of the goods.⁵

¹ *Keasbey et al. v. Brooklyn Chemical Works*, 37 N. E. 476.

² *Atlantic Milling Co. v. Robinson*, 20 F. 217.

³ *Dant v. Head* (Ky.), 13 S. W. 1073.

⁴ *El Modelo Cigar Mfg. Co. v. Gato* (Fla.), 7 So. 23. (See §§ 819 and 822 on same subject.)

⁵ *Reddeway v. Banham* (H. L. E. 1896), A. C. 199; 65 L. J. Q. B. N. s. 381; 74 L. T. Rep. 289.

§ 859. The whole name of the registrant of a trade-mark containing his own name need not appear on the trade-mark, nor need the whole name of each partner in the firm, or the whole name of the firm, appear on the face of a trade-mark. It is sufficient if the name is used fairly and *bonâ fide* on the face of the trade-mark, in such a way that it cannot be mistaken for anything else than the name of the owner of the trade-mark, and the manufacturer of the goods to which it relates.¹

§ 860. The Massachusetts Statute of 1889 prohibits a foreign corporation from carrying on banking, mortgage, loan, or trust business, in and under a name previously used by a domestic corporation, so nearly identical as to be misleading. Enjoined.²

§ 861. *In re "Magnolia Metal Co.'s"* three trade-marks, Nos. 86,401, 90,573, and 180,551, on a motion to expunge from the register of trade-marks, the objection was made that "Magnolia" was a geographical name. That objection was overruled on appeal before the Lords JJ. Lindley, Lopes, and Rigby, June 3, 1897. *Held*, that the word "Magnolia," applied to anti-friction metal, or "Magnolia Metal," and formerly a purely fancy name, had become merely descriptive of an anti-friction metal, and could not be registered for that reason. It was said by the court that the objection made below, that "Magnolia" is a geographical name, is untenable; although it may coincide with the names of various unimportant places.³

§ 862. The letters "W. H. W.," printed in script, in white, in a horizontal line on a red background, on boxes of confectionery, do not infringe a trade-mark registered in the United States Patent Office as "P. C. W.," generally arranged to appear in script, printed in a horizontal line on a background of any suitable color, distinctly stating that other forms of letters may be employed, or that they may be differ-

¹ *In re Colman's Trade-Marks*, 8 Rep. 208; *Id.* [1894], 2 Ch. 115.

² *International Trust Co. v. International Loan and Trust Co.*, 153 Mass. 271.

³ Court of Appeal, June 3, 1897.

ently arranged, and that the essential features are the letters "P. C. W."¹

§ 863. In the Court of Riom, 1888 (*Veuve Grouze v. Chaput-Aurélien*), later in the Court of Cassation, was the following case. The Grouze house, important manufacturers of cutlery with an establishment at Thiers, owned a number of trade-marks affixed to products. The plaintiff complained of numerous counterfeits. The defendant responded that he had contented himself in good faith with executing orders for houses in South America only, and that the marks in question did not belong to the Grouze house, but to foreign merchants who had previously adopted them. He showed that, anterior to the registration of the marks in France, they had been duly registered in Buenos Ayres, in the Argentine Republic, which had not a diplomatic convention with France. The defence showed that his employer, the house of Kirchenbilder, Greenway, & Co., had previously adopted the mark, and that defendant had not been guilty of ill faith and fraudulent usurpation. *Held*, that inasmuch as registration in the Argentine Republic cannot take precedence of registrations in France, for lack of such diplomatic convention, therefore the marks of defendant were confiscated, with costs and damages.²

§ 864. In the Court of Nîmes, 1881 (*Compagnie de tramways de Nîmes v. Ericson*), *held*, inasmuch as the administrative act which authorizes the establishment in said city of a series of tramways, has not conferred the exclusive right of the name of *tramway*, therefore defendant has a right to call his coach "tramway de Nîmes à Bouillargues."³

§ 865. In the Court of Paris, 1894 (*Lippemann & Co. v. Arrault*), *held*, on appeal, not to be unfair competition in a merchant to publish, in a prospectus of an official report by a universal exposition, favorable comments on his own wares, while withholding similar praise for like wares of a rival.⁴

¹ *Lafeau v. Weeks*, 177 Pa. 412 ; 34 L. R. A. 172 ; 8 Kulp. 384 ; 3 A. 693.

² 34 *Annales*, 140.

³ 34 *Annales*, 37.

⁴ 41 *Annales*, 87.

§ 866. In the Tribunal Correctionnel of the Seine, 1885 (*Fremouze v. Lemeslier*), was a case of alleged simulation of a trade-mark. This consisted of two labels affixed to a box containing a pharmaceutical product called "Sirop de dentition du Dr. Delabarre." One label was of rectangular form, occupying the length of the box, and sealing the opening. The other label was divided into three compartments, one bearing a red cross, the other two being distinctive. *Held*, it is a fraudulent imitation of a trade-mark when the aspect of the whole is reproduced for a similar product, when above all the similitude is accentuated by the resemblance of the details. But this was not a case of the kind alleged.¹

§ 867. In the Court of Paris, 1885 (*Fournier & Co. v. Adam et al.*), and in the Court of Cassation, 1886 (*Fournier & Co. v. Laas*), it was said that the fraudulent imitation under the Law of 1857 results in the fact that the mark assailed as false, in spite of certain differences of detail, offers in its entire aspect a resemblance to the genuine mark confusing to the eye; especially so when the name of the imitator of the product to which is affixed the counterfeit mark is similar to that found on the genuine label.²

§ 868. In the Court of Cassation, 1884 (*Lanman & Kemp v. Rigard*), it was said, that the registration of a mark is intended to create a presumption of property, but that presumption is dispelled when it is shown that the registered mark has fallen into the public domain. The registration that has been effected by a foreigner in virtue of international legislation, notwithstanding such treaty, gives him no rights.³

§ 869. *Untrue representations* do not disentitle a trade-mark owner to equitable relief. Statements of complainant on his labels, not strictly accurate, but entirely immaterial, are not such false representations as will operate to the prejudice of the owner of the trade-mark.⁴ Leonard Hoff was forbidden to sell an extract manufactured by him as "Hoff's Malt Extract;" but was directed to affix a label

¹ 31 Annales, 17.

² 31 Annales, 115.

³ 32 Annales, 205.

⁴ *Tarrant & Co. v. Johann Hoff* (C. C. A.), 76 F. 959.

showing that said extract was made by *Leonard Hoff*.¹ — Use of the word “Magnetic,” in the title “Universal Magnetic Balm,” where there was no pretence that the liquid possessed any magnetic qualities, does not show any fraudulent intent to deceive the public, which would deprive plaintiff of right to redress.² — The defendant, in the preparation and sale of a medicine, imitated exactly the name of the medicine, the description of it, the direction for its use, and the design of the wrapper used by the plaintiffs. The inner wrapper of plaintiffs’ medicine described it as “prepared by Dr. M.,” who had originally made it and sold out his interest to plaintiffs, but the outer wrapper described it as prepared by plaintiffs. M. had either assumed, or acquired the title of Doctor. *Held*, that the statements as to its preparation were not a fraud on the public, and constituted no defence in a suit by plaintiffs to enjoin such use by defendant.³ — The trade-mark of plaintiff, a piano manufacturer, was “Weber, New York.” *Held*, that an injunction *pendente lite* against the defendant from putting on his pianos the word “Webster, New York,” was rightly refused, there being nothing to show any intention by defendant to sell pianos as the pianos made by plaintiff, or that the use of the word “Webster” had deceived any one.⁴ — Where the wrapper used by plaintiff for his soap contains the words “Blizzard Soap,” within an octagonal figure, in letters covered with snow, and the plaintiff’s name and address in another octagonal figure, and the picture of the Brooklyn Bridge during a blizzard; and the wrapper used by the defendant for his soap contains two octagonal figures, and the words “Leader Soap,” in close-cut block letters, and presents a scene in which the air is filled with snow, and contains defendant’s name and address, and a picture of his factory, — the similarity of his label is not sufficient to deceive the public.⁵

¹ *Tarrant & Co. v. Johann Hoff* (C. C. A), 76 F. 959.

² *D. Ransom, Son & Co. v. Ball*, 7 N. Y. S. 238.

³ *Ibid.*

⁴ *Foster v. Webster Piano Co.*, 13 N. Y. S. 338; 59 Hun, 624.

⁵ *Brown v. Descher* (N. Y. App.), 42 N. E. 268; 147 N. Y. 647.

§ 870. If a person sells his goods with the intention of inducing the public to believe that his goods are the goods of another, this is actionable, and entitles the latter to nominal damages, even though no special damage is proved. If an article has acquired a distinctive meaning in the trade, connecting it with a particular person's manufacture, and another advertises and describes, or makes up his goods so as to lead purchasers to believe, or to create a probability of their believing that they are buying the goods of the former, when in fact they are buying the goods of the latter, and this though there is no intention to deceive, and no special damage is proved, a court of equity will grant relief by way of injunction. The fraudulent intention is essential in the first case; it is unnecessary in the second.¹ — The use of the name "Yorkshire Relish," long employed by the maker of a sauce under a secret recipe, or a similar, but not identical sauce in similar bottles, in connection with the name of another maker, is not justified when the consumer may be misled into supposing that it is the genuine article.² — The complainant, a brewer of St. Louis, made and exported to Panama and South American ports beer in bottles with a label bearing the words "St. Louis Lager Beer." Defendant, shipper of beer from New York City, and a competitor in trade in Panama and other places in South America, labelled his bottles "St. Louis Lager Beer." *Held*, that although complainant could not have an exclusive property in the words "St. Louis Lager Beer," yet as his beer had always been made at that city, the designation on his labels was legitimate. Those of defendant quite to the contrary.³

§ 871. Defendant was importing and selling in this country the water of a certain mineral spring of Hungary, owned by Andreas Saxlehner, who had christened said water as "Hunyadi Janos." Defendant's exclusive right, which was under a contract, was questioned. His defence was that he

¹ Reddaway v. Bentham Hemp-Spinning Co. [1892], 2 Q. B. 639.

² Powell v. Birmingham Vinegar Co. (C. A.) [1896], 2 Ch. 54; 65 L. J. Ch. N. S. 563; 74 Law T. Rep. 509.

³ Anheuser-Busch Brewing Ass'n v. Piza, 24 F. 149.

could use the name, as he did it honestly, and had a right to sell. It was *held*: that it is not material whether he was actuated by a desire to annoy the complainant, or to promote his own pecuniary interests.¹

§ 872. A statement in a label that the contents of a package is "Chickorien Kaffee aus des Fabrick von E. B. M. & Co., in Roulers" (Belgian), is misleading and unfair, when the only thing done in the place indicated is to "harvest" the chicory root.²

¹ *Apollinaris Co. v. Scherr*, 27 F. 18. (The respective counsel were Roscoe Conkling, for complainant, and Wayne McVeigh, for defendants.)

² *Scheuer v. Muller* (C. C. A.), 74 F. 225 ; 20 C. C. A. 161.

CHAPTER IX.

MISCELLANEOUS PRACTICE (*continued*).

- § 873. "J O B," trade-mark for cigarettes, infringement of, at Stamboul.
- § 874. Lapsed trade-mark registration in Turkey.
- § 875. Ribbon infringement case in Barcelona, Spain.
- § 876. "Candilon," trade-name of house in Madrid.
- § 877. "Monopole," trade-mark for champagne, infringed in Switzerland.
- § 878. Richard Wagner trade-mark case in Austria.
- § 879. "Montebello," name of noble family as a wine-mark.
- § 880. Fictitious mark for wines under German law.
- § 881. "Grande Chartreuse" marks in Switzerland and Italy.
- § 882. Russian remarkable decision as to trade-mark.
- § 883. Swedish case — Benedictine "Munk Likör."
- § 884. Egypt — Mixed Tribunal judgment on trade-name.
- § 885. "Millennium" registration case in Austria.
- § 886. "The Saratoga," name for saloon.
- § 887. "Elastic Starch" case.
- § 888. "Matzoon" trade-mark, term in Armenian language.
- § 889. "Mazawattee," trade-mark word compounded from the Hindoo, Singhalese, etc.
- § 890. Canadian liquor trade-mark case.
- § 891. Violation of trade-mark by printing for third party.
- § 892. Supreme Court of Rome — Lenient view of trade-mark piracy.
- § 893. Foreigner in France, no more right to trade-mark than native.
- § 894. "Kneipp Malt Coffee" decision.
- § 895. "Columbia" tissue paper trade-mark litigation.
- § 896. "Aromatic Cocktail Bitters" case.
- § 897. "Poland Spring Water" case.
- § 898. Saxlehner's "Hunyadi János" case.
- § 899. Unfair competition by disparagement.
- § 900. Ehrmann's registrations, refusal of.
- § 901. Infringement of trade-mark "Oval Blue."
- § 902. Exclusive title to words not allowed to certain publications.
- § 903. "Compactum," as name for umbrellas, contested.
- § 904. "Kynite" allowed as trade-mark for an explosive.
- § 905. "Vitascope," contest over name of.
- § 906. "Red Cross" (Greek) not infringed by Maltese cross.

- § 907. "Chicago Waists," as an exclusive designation of origin, —
when.
- § 908. "Linotype Company's" right to its trade-name.
- § 909. Hostetter's Bitters, imitation and infringement of.
- § 910. Affixing owner's mark without authority, illicit.
- § 911. Cases under German law, Section 4, May 12, 1894.

§ 873. In February, 1895, the Tribunal of Commerce of Stamboul, presided over by Tevfik Bey, rendered a judgment as to paper for cigarettes bearing the trade-mark "J O B." The printing establishment of *Xénophon Nomisimatidis* at Stamboul, who manufactured the labels and the paper, had been complained of by the representative of the owner. A domiciliary visit had ended in the seizure of several reams of the stamped paper. The culprit was condemned in damages and costs (*Moniteur Oriental*).¹

§ 874. Recently, in the Tribunal of Commerce, of Constantinople, was the case of the trade-mark of the Count Thurn. The steel works of the Count at Streitleben had registered in Turkey, twenty years ago, a mark which is protected everywhere generally. The renewal of the deposit was accidentally omitted at the expiration of the statutory time of protection. A Greek profited by the circumstance to deposit in his own name the mark of the works in question, after which he interdicted the use of it in Turkey by the true owner; and he had confiscated the merchandise imported by the Count Thurn. A long suit sprang up before the tribunal above named. It ended by a judgment that the simple fact of having deposited a mark does not suffice to assure the proprietorship, but the registrant should be the veritable owner of the trade-mark. A registration obtained by one not the true owner is null and void. The Greek had deposited as a mark an anchor, accompanied by a written statement which was false, and which applied only to the mark of Count Thurn. The judgment directed the annulment of the registration made by the Greek, and ordered the false record to be erased. The defendant was

¹ La Propriété Industrielle, 1897, p. 180.

See also § 398, Browne on Trade-Marks, which gives a history of "J O B Paper," and of the origin of the trade-mark.

condemned to pay the costs of the suit, and 1000 Turkish *livres* per year, from the date of the formulated protestation by the injured party to the date of the erasure of the falsely obtained mark.¹

§ 875. In Spain (Section of the Government for the Protection of Trade-marks, of the Council of State, April 16, 1895), the house of *Garriga y Valls*, of Barcelona,² had deposited six trade-marks for ribbons of all kinds; and a notice concerning the registration had been published by the Administration in the *Boletín Oficial*. Señor *Felipe Campo*, also of Barcelona, demanded that the registration should be refused for five of these marks, in view of their resemblance to those of the opponent, registered by him for ribbons of thread, of silk, and of cotton. The Administration agreed with Señor Campo as to two of the marks, and allowed the others to stand. Campo appealed to the Council of State. Of the trade-marks in question belonging to the *Maison Garriga y Valls*, one of them has for a central part a sun placed in the centre of a frame in the form of a lozenge. About the lozenge floats a ribbon containing the indication of the street and the number of the establishment. Above the mark is found the commercial name of the house, in ornate letters disposed in the form of a horse-shoe. Below is the name "Barcelona," in the arc of a circle open near the top, and lower, in letters in a straight line, the year of the foundation of the house; from the sun spread rays prolonged to the horse-shoe. The corresponding marks of the new depositors distinguish themselves in the fact that the sun is substituted by an oval containing a *caduceus*, and in which the lozenge gives place to a frame-work in broken lines. The general proportions produce in the mark an effect equivalent to the aspect of the lozenge on the others. "All the parts of the two marks exactly correspond, — the ribbon with the address, even the inscriptions, and the rays parting from the centre above, and the inscription on the horse-shoe, below the word "Barcelona." There are the same characters for the inscriptions, which are varied only by the commercial names, the names of the streets,

¹ *La Propriété Industrielle*, 1897, p. 94.

² *Ibid.* 1896, p. 74.

and the numbers of the two establishments, and the dates of the foundation of the two houses; there are the same colors and the same general appearance. Two others of the contesting marks differ in various aspects. A prominent feature is the representation of the celebrated Virgin of Montserrat, resting on a foundation of rocks of the characteristic mountain of the name. In refusing these last, the Administration is not less guided by the resemblance than by the first, regard being had to the danger of confusion of another nature, to wit, the inducement given to the public to accept the packages with the picture delineations for those of the legitimate trade emblem.

The Section of the Council of State having the matter in charge, decided against the opponents of registration, and pronounced in favor of the registration of the contested marks. After an attentive examination, it concluded that the mark of the "Caduceus" and the "Virgin of Montserrat" do not resemble the sun and the "Virgin of Montserrat," registered by Felipe Campo. It said that it is not necessary to strive to establish the essential differences in the conflicting marks by bringing them directly under the eye, as the variations in the essential features are such as not to require a minute analysis; and the descriptions filed confirm this opinion. (A lengthy exception to, and weighty criticism of, the reasons assigned for making this decision follow the report of the case in the official journal (*La Propriété Industrielle*), which criticism reflects the sentiments on the law of this subject, of the principal nations of the world, united under the Treaty of 1883. This journal says substantially, in relation to the foregoing decision, that the ruling in this case supposes that every purchaser will make a minute and detailed examination, without having the conflicting marks simultaneously under inspection; for, in fact, the decision is in derogation of well-established rulings on the subject.)

§ 876. In the Supreme Court of Madrid (Spain), April 22, 1895, was presented the case of *D. Carlos Wicht v. Budia Brothers*. Wacht is owner of a trade-mark adopted for the use of his house of commerce, known as "El Candilon." The defendants, in their neighboring house, had inscribed on

the glass of their windows the word "Candilon," to announce the sale of certain objects of crystal of a special fabrication. Suit was brought by Wicht for restraint. It was *held*, that the act was not calculated to lead purchasers into error and to create confusion between the houses of the parties to the suit, nor to injure the industrial property of the plaintiff, as the word Candilon is a simple designation of the house of commerce of the plaintiff, and in its use by the defendants it designates only certain objects offered for sale by them.¹

§ 877. In Switzerland, in the Tribunal Fédéral, December 7, 1895 (*Walbaum Luling, Goulden & Co. v. Carl Hahn*), the following case was determined:²

The term "Monopole" is a denomination of fancy, which, after the Federal law of 1890, as also the French law (June 23, 1857), is constituted a trade-mark. — After a foreign mark has been registered in Switzerland, it is presumed that all the conditions precedent for registration have been complied with. — In June, 1886, the house of Heidsieck & Co., at Rheims, deposited in the Federal Bureau several marks for Champagne wines. With a single exception, they contained the word "Monopole," sometimes employed alone, at other times accompanied with the words "sec" or "dry," or of the firm-name, Heidsieck & Co. In February, 1890, Walbaum Luling, Goulden & Co., successors of Heidsieck & Co., modified their names, and had deposited new marks. September 29, 1894, Carl Hahn, then lately established at Basle, began the manipulation of *Vins Mousseux*, denominated wines of Champagne. He sold and delivered to A. Jeltsch-Heinzmann, at Basle, certain bottles of said wine. He himself had received the wine from one Rabenecker, of Coswiz, Saxony, who by Hahn's order had affixed to the bottles "Monopole" — "Jourdain frères, Rheims." There was no such house in Rheims. The wine was German, and of inferior quality. Walbaum Luling, Goulden & Co., who had seen one of the bottles sold to Jeltsch-Heinzmann, made complaint against Hahn. The defence was that "Monopole," a part of the mark of complainants, indicated mere quality, and that he

¹ La Propriété Industrielle, 1896, p. 127.

² Ibid. 1896, p. 148.

had not counterfeited the mark.—The complainants had registered their marks in Switzerland, under the treaty between the latter country and France, February 23, 1882, and of the International Convention of March 20, 1883. It was established that the marks were protected in France. The defendant insisted that no person could claim the exclusive use of the words of a general sense as “fin,” or of the words “*première qualité*,” or of words to express a mode or place of fabrication, etc. The judgment of the Court of Appeal of Bach-Ville was affirmed, and the defendant was adjudged to pay costs and damages.¹

§ 878. The Ministry of Justice, of Austria, on December 31, 1895, thus decided: A Viennese merchant, of the name of Richard Wagner,² had registered in his name a trade-mark consisting exclusively in the portrait of his namesake, the poet-musician of Bayreuth, accompanied by the notice, “Mark registered.” The wife and the son of the composer brought suit before the Ministry of Commerce, demanding the erasure of this mark. The decision of the Ministry was thus rendered: The demand is not granted, and the mark attacked is maintained in vigor for the reason that the action for erasure has no basis in the provisions of the law. The 10th section of the law of trade-marks is limited to interdict the use of a name of a producer, or of a merchant, made by the defendant without the consent of the party in interest, and does not contain, absolutely, a disposition forbidding the user, made under similar circumstances, of a private person.

§ 879. In the Court of Appeal of Paris (1st Cham.), January 2, 1896, the case of *Consorts de Montebello v. Epoux de Juge*³ was heard. The Duke Napoleon de Montebello, Alfred de Montebello, and Gustave de Montebello, all three sons of the Marshal Lannes, first Duke of Montebello, founded, under the firm-name of “*Alfred de Montebello et Cie.*,” an establishment for the exploitation of the demesne of Marcuil-sur-Ay, for the culture of grapes, and the sale of wines of Champagne. By the terms of the constituent act, it is provided that all the wines

¹ La Propriété Industrielle, 1896, p. 148.

² Ibid. 1896, p. 80.

³ Ibid. 1896, p. 140.

of the concern shall bear a seal inscribed with the name and title and the arms of the Duke of Montebello, which seal was to be the property of the firm, never to be used but by a member of the family bearing the name of the chief of the name of Montebello, or of a branch of the firm, of which it (the family) shall be the agent. The firm was established on the sixth of April, 1836, and reorganized in 1880. This case came up from the Tribunal of Commerce of Rheims, and had been defended there by the descendants and actual representatives of the three sons of Marshal Lannes.

Considering that the Dame de Juge, assisted by her husband, and acting in the capacity of *tutrice* (or guardian) of Napoleon-Barbe-Joseph-Jean Lannes, Duke of Montebello, a minor son, alleged that the firm Alfred de Montebello has not the right to use the title of the Duke of Montebello and his armorial bearings, as commercial marks, and demanded the annulling of every claim of said firm to such use. *Held*, that the right of the claimant below was properly refused. A title of nobility in commerce may, with the name, designate the product of merchandise as a trade-mark therefor. Conceding, indeed, that titles of nobility — despoiled to-day of every feudal privilege, and at the same time of every right accorded to rank — have only a personal character, and are simply honorary; and that in a judicial sense they are a complement of patronymic formality the better to distinguish persons. Although there is a right to the protection of the title, there cannot be conceded to it a special and privileged protection. . . . Conceding that the incorporation of the concern has existed ever since 1836, and that the title became popularized into a trade-mark, the title and name become simply elements of such trade-mark, and such mark constitutes a distinct right protected under the rules governing such property. . . . The claim below, against the Montebello firm, is disallowed, with costs.

§ 880. In the Landgericht of Strasbourg (Crim. Cham.), February 19, 1896, an accusation was made under the German trade-mark law, based on the fact that the defendant (tenant of the principal restaurant of the International Exposition of

Strasbourg) had put on sale in his restaurant *Vins Mousseux*, while the wine cards and the labels on the bottles were falsely furnished with the name of a locality, as well as an erroneous statement as to the value and quality of the merchandise. Fined one hundred and fifty marks. . . . The wine bore the name of Champagne in red, and indicated a certain number of sparkling German wines, and a species of foaming cider. The French wines indicated bore a number of names of wide reputation, as Heidsieck, Moët et Chandon, Pommery Greus, etc.¹

§ 881. In the Court of Justice in Geneva, June 13, 1896, was considered the case of *Grézier* (director) v. *Bonnet et al.*² Grézier, residing at the Grande Chartreuse (Isère), demanded of the court the authority to seize, in the hands of Bonnet & Company, merchants at Geneva, bottles, labels, and notices bearing the inscription "Véritable liqueur fabriquée au Grande Chartreuse de Pavie Giraud, Ignace-Marie, directeur." Grézier had registered the several marks of his house in France and in Switzerland, and the adverse label had also been registered in Switzerland. In Italy, the claim of Grézier had been repulsed in a suit in the Tribunal of Pavia, and by the Court of Appeal of Milan, which held that the act of Giraud was not illicit,* and that, as his labels differed in form and color from those of Grézier; that the bottles are of different form; that the inscriptions thereon indicate that the liqueur is fabricated at Pavia; that these are elements which show that all possibility of confusion is prevented thereby. The circumstance of the employment of the word "Chartreuse," or "Grande Chartreuse," does not constitute a contravention of the law. The decision of the Court of Appeal was further considered in the Court of Cassation of Turin, which adhered thereto. In Switzerland, appeal was taken to the Tribunal Fédéral (1st Section), October 10, 1896. The latter court confirmed the judgment of the Court of Justice of Geneva, which judgment was in favor of Grézier, the director of the Grande Chartreuse,

¹ La Propriété Industrielle, 1896, p. 74.

² Ibid. 1897, p. 61.

* There does not exist in Italy a law protecting names of men, or localities, as portions of trade-marks.

with costs. (Notes from the *Journal des Tribunaux*, tell that Giraud installed his manufactory in the Chartreuse of Pavia, which is a national monument, and is not used for industrial purposes. The intimation that he is a successor of the ancient monks, and will continue the simple fabrication of the liqueur, is deprived of all serious foundation. He has not designated the Chartreuse de Pavia under its Italian name, but under the French. The liqueur made by him is of the same color as that of the genuine Chartreuse. All the circumstances indicate an intention to deceive. Even the words "of Pavia" are placed in small, inconspicuous characters.) *

§ 882. In St. Petersburg (Russia), June 26, 1896, a prosecution was instituted against *Iwan Borodine*, for affixing on his merchandise trade-mark labels similar to those of the merchant *Henry Sturm*, on the complaint of the latter.¹ The subject-matter was vinegar, of which 100 bottles were seized by the police. The defence was that there was no resemblance calculated to deceive, and that the inscriptions were different. The defendant also alleged that his labels had been made, and the design had been chosen by a printer named Fieldmann, to whom he had not given explicit orders for form, but left that to the said printer. An expert deposed that he found little if any resemblance, and a number of witnesses concurred with him. The inscriptions on B.'s labels bore his name and also the denomination "Naturel." On those of Sturm were the words "Of the table." The colors of the labels were also different. The magistrate *held*, that all this demonstrates plainly a lack of imitation, and that the affixing of the same on the merchandise of B. was not fraudulent, and cannot injure the interests of S. No falsification was proved, but the case rested solely on the somewhat remote resemblance of

* By looking at §§ 407, 409, 410, and 582 of the book of which this is a supplement, may be found citations of suits involving the title of Liqueur de Chartreuse, a few of the very many contentions to which the monks of the Grande Chartreuse have been subjected. Although in France the law relating to the subject is well defined, the strife in other countries has been vexatious, avarice and chicanery having been aided by the contrarieties of the laws of the respective nations.

¹ *La Propriété Industrielle*, 1897, p. 10.

the labels. The criminal charge was dismissed, leaving without examination the right to a civil action to be brought by Sturm. (*La Propriété Industrielle*, 1897, p. 10, says that the decision of the magistrate was quite erroneous as to form, and is open to criticism. It is only to be regretted that the magistrate found himself favorably inclined to acquit, a tendency which unfortunately is too deeply rooted in the practice of the Russian Tribunals; when a choice is given between acquittal and punishment, for what may be deemed a mild offence, the punishment being generally for a short term. The writer speaks of having instituted a comparison between the labels in controversy, and of having established an imitation almost servile, as to ornaments and disposition of the inscriptions. He asks, "What difference is there for an illiterate purchaser to discriminate between 'Vinaigre de table' and 'Vinaigre Naturel,' borne on labels of the same form and character?" On appeal by Sturm, to the Assembly of Judges of the Peace of St. Petersburg, it was said: It is not proved that the labels of Sturm have served as models for imitation for those of Borodine. He had no knowledge of the exclusive right of Sturm, by reason of the registration made by S., nor proof that B. had acted with a guilty knowledge.)

§ 883. The Tribunal of First Instance, of Stockholm (Sweden), had the following case under consideration: *La Société Anon. des Benedictines de Fécamp v. Skandineviska Benedictine Kompaniet*.¹ La Société des Benedictines de Fécamp had adopted for the Scandinavian countries a trade-mark analogous to that employed for use in other countries, containing certain principal designations of "Benedictine" and other denominations of fancy, including the words "Munk Likör" (*liqueur* of the monks). This was registered in Sweden, July 8, 1885. For several years before this suit, the *Skandineviska* (etc.), having its seat at Stockholm, made a liqueur which it sold under labels containing the words "Benedictine," "Munk Likör," etc. The product was sold by the Swedish concern in bottles, labelled with diverse bands, with the mode of corking similar to that of the plaintiff con-

¹ *La Propriété Industrielle*, 1896, p. 129.

cern. In six suits that were brought, five of them were decided in favor of the plaintiff. The sixth chamber *held*, that the words "Munk" and "Munk Likör" were not illicit, and did not conflict with the genuine. In the successful suits 300 crowns (420 francs) were awarded.

§ 884. In the Mixed Tribunal of First Instance, at Alexandria, Egypt, June 20, 1896, was this case: *Cutlers' Company of Sheffield v. Levy and Cohen, Back and Co.*¹ The Count della Chiesa, as presiding judge, gave a decree authorizing the seizure of objects of cutlery fraudulently marked with the word "Sheffield," and of other distinctive words belonging to the Cutlers' Company. (It will thus be seen that the Mixed Tribunal protects trade-marks indicating origin.)

§ 885. Decision of the Minister of Commerce (Austria), October 8, 1896. The question was the removal from registration of certain trade-marks for matches. No. 658 consisted in the words "*Millennium Ezredéves*," registered August 28, 1895. The registrant demanded the erasure of the mark "*Millennium*," registered in favor of P. & Co., No. 379, September 9, 1895. Defendants made a counter-attack looking to the erasure of the mark 658, as constituting a counterpart of their mark 329, registered April 30, 1895. This last mark is composed of a ribbon displaying the ends, and showing the word "Millennium." This was registered before the law of July 30, 1895, went into force, after verbal marks on products were in all forms possible, and not only the figurative forms under which they had been deposited. S., the owner of the mark 658, registered under the new law, said that it was now a mark verbal, and that the mark 329, of P. & Co., should be construed as a figurative mark, having been registered under the old law. A verbal mark and a figurative mark, he contended, could not come into collision; it therefore results that the anteriority of 329 cannot be opposed to *Ezredéves*, and that therefore 658 should have priority over 379 of P. & Co., the two marks being of the same nature. The Minister of Commerce was not of the same opinion citing § 3, No. 2, of the law of 1890, which excludes

¹ La Propriété Industrielle, 1896, p. 113.

from protection of composite merchandise certain exceptions from protection as trade-marks: "Armorial bearings of States, or other armorial bearings, of letters, or of words." But this does not hinder the introduction of words as integral parts of figurative marks; and the words composed in such marks should fully enjoy the protection of the figurative elements of the latter. "Now, it is the word '*Millennium*' which gives to the figurative mark its characteristic seal, as it also constitutes the principal part of the verbal mark 658, which consists in the words *Millennium Ezredéves*. The characteristic word being the same in the two marks, a danger results therefrom of confusion to ordinary purchasers. In consequence, the Minister of Commerce has decided on the erasure of 658, which thereby renders unnecessary the erasure of 379."¹

§ 886. A saloon having been conducted for thirty-five years under the name of "The Saratoga," that name becomes a trade-name rather than the name of the building, and may be protected in use on removal to another location.²

§ 887. A label on which appears, on a white background in red and black letters, an advertisement of "Elastic Starch," made by the H. Company, with a large, red, prominent cut of a flatiron, used as a trade-mark for starch, is not infringed by another label, used as a trade-mark for starch, bearing on a red background, in white, yellow, and black letters, an advertisement of "E.'s New Process Starch," with a picture of a colored woman holding up prominently a freshly ironed shirt, underneath which, on a table, appears a small flatiron.³

§ 888. "Matzoon," a term in the Armenian language meaning "fermented milk," will be protected as a trade-mark for one who has used it for many years for such an article.⁴

§ 889. The fact that a word conveys an idea of the East generally, does not justify the court in holding that a trade-mark is not valid as being geographical, or as referring to a

¹ La Propriété Industrielle, 1897, p. 41.

² Dewitt v. Mathey (Ky.), 35 S. W. 1113.

³ J. C. Hubinger Bros. Co. v. Eddy (C. C.), 74 F. 551.

⁴ Dađirrian v. Theodorian (Sup.), 37 N. Y. S. 611; 15 Misc. R. 300.

particular locality, or to the quality or character of the goods, in the class in which it is registered.¹ — “Mazawattee,” a compound of the Hindostani “Mazadhar,” luscious, and Singhalese “wattee,” growth, or garden, as applied to tea or coffee, is neither descriptive of the character or local origin of the goods, nor deceptive, inasmuch as it conveys no meaning to Englishmen, or to any class of Englishmen, or to a Hindoo, or to a Singhalese.²

§ 890. In plaintiff's application, the trade-mark was claimed to consist of a device of an anchor in combination with the letters “J. D. K. & Z.” braided or stamped on barrels, etc., containing an article sold by the applicants. It was also stated in the application that on bottles was to be affixed a label shaped like a heart, a *fac-simile* of which was attached to the application, but no express claim to the label itself, as a trade-mark, was made. The defendant's trade-mark consisted of a heart-shaped label, with an eagle in the centre, having at its feet the letters “V. D. W. & Co.,” and medals on each side. *Held*, that the shape of the label did not form a feature of plaintiff's trade-mark, and therefore defendant's label was not an infringement.³

§ 891. Where a party, unwittingly violating a trade-mark by printing labels ordered by a third party, on being notified of the infringement promised to desist from further printing, and offered to surrender the lithograph stone, but an injunction suit was nevertheless brought, the complainant should pay his own costs.⁴

§ 892. The Court of Cassation of Rome, Italy, rendered a decision on January 20, 1897, as follows: Several persons had put on sale indigenous petroleum, originating in the Refinery of Fiorenzuola d'Arda, bearing the fanciful names of American proprietors, as follows: “*Atlantic*,” “*Splendor*,” and “*Royal*,” which had been registered in Italy by the for-

¹ *In re Densham's Trade-Marks* [1895], 2 Ch. 176; 12 Reports, 283.

² *Ibid.*

³ *De Kuyper v. Van Dulken*, 24 Can. S. C. R. 114; *Van Dulken v. De Kuyper*, *Id.*

⁴ *Bass, Ratcliff & Gretten v. Guggerheimer (C. C.)*, 89 F. 271.

oreign owners. The case came up from the Court of Parma, which had acquitted the defendants, because it was not deemed that an intention to deceive purchasers had been proved; and it at the same time declared the absence of any culpable act, because the sales were made with the declaration that they covered indigenous petroleum. The Court of Cassation rejected the charge of the public ministry, basing its decision principally on the circumstance that no fraud had been shown in fact, and affirmed the judgment of acquittal. It did not take into consideration the presumable fact that declarations of the first vendors, to ward off suspicion, would not be circulated among subsequent purchasers, but that the marks themselves would naturally beget confusion and fraud.¹

§ 893. In the Tribune of Commerce of the Seine, March 20, 1897, *Hugo Schneider v. Boisson et al.*,² it was held, that in trade-mark matters a foreigner has no more right than a private citizen. Consequently, when a foreigner prosecutes a Frenchman for counterfeiting a registered mark of which said foreigner claims the ownership, he is held to prove, as a condition-precedent, that in his own country he has the exclusive right to said trade-mark. Consequently, he should be denied redress when it is found that in his own country (in this instance Germany) his mark has been erased from registration for lack of renewal of deposit. In the interval between the two deposits of his mark, during which it fell into the public domain, it was counterfeited. Hugo Schneider was condemned to pay all the costs and expenses (*Gazette de Paris*).

§ 894. The U. S. Circuit Court of Appeals for the Seventh Circuit, in May, 1897, on appeal from the C. C., U. S., N. Dist., Ill., decided the case of *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung & Kneipp Malt Food Company v. The Pastor Kneipp Medicine Company*.³ A bill in equity was filed in the court below by the appellants, to restrain the use by defendant of certain trade-marks or trade-names, "Kneipp

¹ La Propriété Industrielle, 1897, p. 178

² Ibid. 1897, p. 79.

³ 82 F., C. C. A. 321.

Malt Coffee," "Kneipp Coffee," and "Kneipp Malz Kaffee," and to restrain the use of the picture and signature of the Rev. Father Sebastian Kneipp in connection with Malt Coffee, either on packages, or in advertisements, or announcements. . . . Sebastian Kneipp, a resident of Bavaria, and a priest, had interested himself in the subject of health, and had devised and formulated a system of dietetics, health preservatives, hygienic food, and sanatives, which he had explained and expounded through addresses, lectures, pamphlets, and books. Among other things, he deprecated the use of coffee, asserting it to be a deleterious beverage, and advocated as a substitute a drink prepared from roasted malt. The complainant firm placed the products on the market with the knowledge, consent, and approval of Father Kneipp, and designated this product as "Kathreiner's Kneipp Malzkaffee." They obtained for themselves, successors, and licensees, the right of so designating the product, and of the use of Father Kneipp's name, and the sole right to place on every package the portrait and *fac-simile* signature of Father Kneipp. The product became widely known in many countries, and the name, signature, etc., have been registered in connection with the same, in this as well as in almost every other important country. . . .

In April, 1892, John Blocki and Edward Heller, of Chicago, who had for a short time theretofore conducted a drug business at Chicago, and incorporated themselves, under the law of the State of Illinois, as "Pastor Kneipp Medicine Co.," and began the manufacture of medicines and articles recommended by Father Kneipp, without his consent or license. This corporation also manufacture and sell a malt coffee labelled "Kneipp Coffee," and which contains the portrait and the *fac-simile* signature of Father Kneipp. . . . The bill was dismissed below, and an appeal taken. The appellate court said, *inter alia*: "Upon the record we are constrained to believe that the Pastor Kneipp Medicine Company, the appellee, was 'conceived in sin and brought forth in iniquity;' that wrong attended at its birth, and that fraud stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear.

. . . Without dispute, the present German proprietor, one of the appellants, has the exclusive right, so far as the Rev. Father Kneipp could grant it, to the use of his name, portrait, and *fac-simile* signature in connection with the sale of malt coffee. . . . Craft and cunning, discerning the value of the product, and the profit to be acquired, would, at the inception of the business, flood the market with spurious and cheaper articles, or preparations of the similitude of the genuine, and strangle the trade in the genuine at its birth." . . . (The court cited well-known cases to show that the proprietor is entitled to protection from the time of beginning the use of the trade-mark.)

The order, or decree appealed from, was reversed, and the cause remanded to the court below, with directions to issue the writ of injunction as prayed for.

§ 895. U. S. Circuit Court, District of N. J. *Morgan Envelope Co. v. D. S. Walton et al.*¹—The complainant filed its bill, setting out that for more than ten years last past, continuously, it had manufactured a superior quality of tissue-paper, which has been known, identified, and called for as "Columbia," and which is known and referred to by such designation, "Columbia," in connection with a symbolic or allegorical representation of Columbia, and charging the defendants with the use of a similar design upon their wrappers of tissue-paper, in contravention of complainant's rights, and in such manner as to constitute an unfair and fraudulent competition in business, and asking for an injunction to restrain the defendants from making use of said wrapper, or label, or any colorable imitation, in connection with tissue-paper not made by complainant. The defendants filed a cross-bill asking for the same relief against complainant. In 1883 the defendants were manufacturers of tissue-paper, which, without other distinguishing mark, they placed upon the market, labelled "Columbia," and since have continued to so label and sell it; that it has been known to the trade, and has been called for as Columbia paper; that in 1885 or 1886 the complainant, being like manufacturers of tissue-paper,

¹ xxii. Trade-Mark Record, 8.

adopted and placed upon their produce, without other distinguishing mark, a figure of the goddess Columbia, with the name Columbia upon the shield, and the letters "Columbia" upon the sides of the package, which paper has also been known to the trade and called for by the name "Columbia;" that in 1893 the defendants were induced to place upon their package a figure of Columbia, which is similar in all respects to that used by complainant. It cannot be said that Walton & Company acquired a technical trade-mark in the word "Columbia," in view of the decision of *Columbia Mills Company v. Alcorn*, 150 U. S. 460, but that they were the first persons, so far as the record shows, to apply the word to this article of production cannot be disputed. By such application and continued use, their paper became known to the trade and the public generally; it acquired a reputation for quality, and the name was a distinctive mark of excellence. The figure of "Columbia," afterwards added by complainant, cannot be regarded as more than a mere amplification of the word Columbia previously appropriated; and it conveys no further or other idea than the word, and can be regarded only as a different way of expressing it. . . . *Held*, the prayer of the complainants' bill will be denied; and an injunction granted to the defendants on their cross-bill, as prayed for.

§ 896. In the Supreme Court of Louisiana, May 10, 1897, was considered *Handy et al. v. Commander*.¹

Per curiam: "Plaintiffs claiming to be sole and exclusive owners of a certain trade-mark which they adopted in 1893, and have since used, to distinguish their 'Aromatic Cocktail Bitters,' and to which they have at all times had the exclusive right of use, and alleging that the defendant has been guilty of an infringement thereof, prayed for a writ of injunction against him and his agents and employés from further using or attempting to use the same, directly or indirectly, or any trade-mark of similar design or device. . . . They also alleged a resulting injury from said infringement, and prayed for compensatory damages in the sum of \$2,500. On the trial there was judgment pronounced in favor of the plaintiffs for \$470

¹ 22 S. 230.

damages, perpetuating the injunction, and defendant prosecutes this appeal, after making an unsuccessful effort to have a new trial. . . . Defendant, Commander, was in plaintiffs' employ for several years; and, while his services were thus engaged and paid for by the plaintiffs, he learned the aforesaid formula for their Aromatic Cocktail Bitters. Commander left plaintiffs' employ in 1893, and soon after set up a rival establishment for the manufacture and sale of their aforesaid Aromatic Cocktail Bitters, and put the same on the market through solicitors and canvassers, under Handy & Co.'s trade-mark, and thereby did all in his power to deceive the public into the belief that he was selling plaintiffs' Aromatic Cocktail Bitters. In size, style, color, lettering, and execution, and word for word, not a point of difference exists between the trade-mark of Handy & Co. and the trade-mark thus put forth by Commander, except that the latter is styled 'Commander's Bitters,' while the former is styled 'Handy's Bitters.' . . . From a casual inspection, it is readily perceived that the two are identical in design and phraseology, and only differing in the name of the proprietors and their respective places of business. . . . The rule of law is universal that a *bona fide* possessor, presumably the owner, is not required to prove title as against a mere trespasser. Judgment affirmed."

§ 897. In the Supreme Judicial Court of Maine, June 2, 1897, the case of *Ricker et al. v. Portland & R. F. Ry.*¹ was heard on appeal. The plaintiffs alleged, in their bill praying for an injunction, that the use of the word "Poland Springs" by the defendant railway, to designate its station in the town of Poland, where the plaintiffs have a spring of water with the same name, besides a large hotel, endangered their trade-mark* in the name of "Poland Spring Water," and also alleged that water shipped from the defendants' station may be marked "Poland Spring Water," and sold in competition with the plaintiffs' water. The bill did not allege that this had been done, or was threatened to be done, by the defendant, or any one else. *Held*, that, conceding that the plaintiffs have a trade-mark, it has not been infringed upon, nor threat-

¹ 38 A. 338.

* Properly a trade-name.

ened, by the defendant. The latter is a railroad company, chartered for the transportation of persons and merchandise as a common carrier, and only for that. It would be *ultra vires* for it to enter on the business of bottling, shipping, and selling water, or to enter into commercial business not necessary and incident to its business of common carrier. Until it does, or threatens to do this, the plaintiffs are not injured, and have no cause for an injunction upon that ground.

Held, that because the plaintiffs for a series of years had run a stage-line from Danville Junction, a station on two other railroads, to their hotels, affords no legal right to exclude another stage-line over the same route, and much less from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of the plaintiffs, or by this means a fraud is perpetrated upon the traveller, or upon the plaintiffs.

From a long opinion of the Supreme Court, the following matter is condensed. Complainants allege that the name "Poland Springs," given to the defendant's station nearest complainants' property, tends to deceive the public, and induce the belief that the station is at the complainants' hotel property. . . . The station is called "Poland Springs," in the plural. The trade-mark claimed by complainants — "Poland Spring" — indicating one only. . . . Yet the complainants ask this court, sitting in equity, to aid in deceiving travellers desiring to visit its hotels into the belief that the only practicable approach thereto is by way of Danville Junction, and thus secure to it the profits on six miles of stage transportation. . . .

The case stated by the bill does not entitle the complainants to the relief prayed for. . . . Decree affirmed. Bill dismissed, with additional costs. "

§ 898. In the U. S. Circuit Court, Southern Dist. N. Y., June 17, 1897, was considered the case of *Saxlehner v. Graef et al.* This was a suit in equity by agents of the Apollinaris Co., to enjoin the use of certain alleged infringing labels and trade-marks in the sale of mineral waters. Many years ago, the markets of this country were flooded with dark blue and

red labels, lettered with variations of the name Hunyadi, and calculated to deceive the public. At that time the Apollinaris Company was the sole consignee of complainant's predecessor, Andreas Saxlehner, in the United States. Said company urged Saxlehner to unite with it in suit to stop such infringements, but he peremptorily refused. Thereupon the Apollinaris Company adopted a distinctive badge of its own, to wit, a red diamond on a yellow background, with the inscription, "The Diamond is the trade-mark of the Apollinaris Company, Limited," and is meant only to indicate that mineral waters so marked are sold by it.

So long as it continued to sell Saxlehner's Hunyadi János water, it pasted its individual mark on every bottle. It no longer sells such water, and it now affixes its individual red diamond label on another natural Hungarian aperient water which it now sells. Complainant has no right to this red diamond label, and her application for an injunction could be sustained only on the theory of unfair competition. Of course, having handled the original Hunyadi János water so long, and having become well known as the exclusive importer of it into this country, the Apollinaris Company, when it took up another variety of water, was bound in good faith to the public to offer the new water in a dress so different as to challenge the attention of the purchaser to the fact that it is some other mineral water to which the red diamond label is now affixed. This has been done; the label of the "Apenta" water, now sold by said company, is totally unlike the old Hunyadi János label. It fully sustains the proposition, repeatedly laid down in this court, that when there is an honest effort to accentuate differences in labels and wrappers, there need be no confusion as to the identity of competing goods. . . . Should defendant hereafter, and before final hearing, resume the use of the word "Hunyadi," the question can then be presented by a renewal of the motion which is now denied.¹

§ 899. *Sentence arbitrale* of June 8, 1897. — *J. A. Niclausse v. Delauny-Belleville & Co.*² An industriel cannot, in writ-

¹ xxii. Trade-Mark Record, 27.

² Annales (1897), p. 255.

ings destined for the public, cite by name a house manufacturing or selling products of a similar nature, for the purpose of instituting comparisons prejudicial to the latter, and for the purpose of pointing out the inferiority of a rival's goods. The necessity of responding to the allegations of a rival does not justify the publication of a diagram drawing comparisons between the products of such rivals, — the trials of steam-engines, without indicating the difference of combustion and of sustaining powers.

By the *Tribunal arbitrale*, the defendants were held to be guilty of unfair competition in business, for the following reasons :

1. In distributing with an album a sheet wherein the above complainant is named, indicating in figures the trial of speed of the cruiser *Letouche-Treville*, and also of the cruiser *Friant*, in which was made to appear the superiority of the boilers of Delaunay-Belleville over those of J. A. Niclausse.

2. In presenting on the diagram in in-exact figures representations intended to create belief in the inferiority of complainant's products.

3. In causing to be printed in a journal especially adapted to such a scientific matter, to wit, the publication named "Engineering," published in the city of London, disparaging comments on the rival's manufactures. Damages were awarded in favor of the complainant for 3,000,000 (fr.). The Tribunal said *inter alia*: In April, 1892, the State had adopted the Niclausse boiler for the cruiser *Friant*, and the engines Belleville for the iron-clad *Letouche-Treville*, the official trials of which had taken place about that time, in accordance with the respective specifications, for the purpose of determining the consumption of coal in diverse trials, according to square metres in the furnace room. After the trial above mentioned, the "Naval Architects" of London held their annual Congress in Paris, June, 1895. The defendants, by derogatory remarks and comparisons, endeavored to influence the minds of the several members of the Association mentioned against the interests of the complainant, thus giving cause for the suit referred to.

§ 900. *In re Ehrmann's Applications* for registration of trade-marks heard in Chancery Division, June 18, July 6, 1897.¹ A firm consisting of five partners, was dissolved by a deed which provided that the business should in future be carried on by two separate firms composed of various members of the old firm; that all the partners should be entitled to use the trade-marks formerly used by the old firm; and the members of the new firms should be exclusively entitled to the good-will of the old business. The new firms applied simultaneously for the registration of their respective marks which had been used by the old firm. Some of said marks had previously been registered in the name of the old firm, excepting one, which had not been registered in England at all. The new firms mutually consented to each other's application. Sterling, J., said, *inter alia*: It was laid down by the Court of Appeal in the *Australian Wine Importers*, in 1889,² that the court has (under similar circumstances) a discretion, but a disinclination, as to whether, though registration is not prohibited, it is such a registration as the court ought not to encourage by directing the comptroller to go on. It was then held that the registration of the mark of a golden fleece in respect to wine ought not to be permitted in the face of the opposition of the owner of the mark of the same kind, registered in respect of spirits, but not of wines, on the ground that the use of such a mark was calculated to deceive when applied to goods of a description similar to the goods in question, in respect of which registration had already taken place. *In re Dewhurst's Trade-Mark*, 1896,³ it was further held by the Court of Appeal that a mark which, in the judgment of the comptroller, had such a resemblance to one on the register as to be calculated to deceive, ought not to be registered, even if the owner of the registration consented thereto. It was held, therefore, in the present case, that the motions for registration ought not to be allowed.

§ 901. In the High Court of Justice, Chancery Division, before Mr. Justice Kekewich, June 30, 1897, *Ripley v. Bau-*

¹ 2 Ch. D. 495.

² 41 Ch. 278.

³ 2 Ch. 139.

*dey*¹ was heard. The plaintiff was a registered owner of an old trade-mark for laundry-blue, consisting of the words "Oval Blue;" and the evidence showed that "Oval Blue" had for many years meant the plaintiff's blue, which was sold in packets of an oval shape. R. brought an action against B. to restrain him from passing off his goods as, and for, the goods of the plaintiff. The court said, *inter alia*: "The plaintiff is the registered owner of the trade-mark 'Oval Blue,' which appears in the trade-marks' Journal of the 20th January, 1877. So long as that stands on the register, no man can properly use the words 'Oval Blue,' applied to the goods in the class in which that registration stands. . . . It is well known—I need not refer to authorities to show that—there may be such a common-law trade-mark, notwithstanding the statute, and side by side with a registered trade-mark." . . . The court said that, on the ground of neglect on the part of the plaintiff to assert his rights as to others, the action would be dismissed without costs.

§ 902. In the U. S. Circuit Court, S. D. Cal., July 9, 1897, this matter of trade-name of the *Investor Pub. Co. of Mass. v. Dobinson, et al.*² was decided, in a suit for an injunction and an accounting. The bill alleges: That the plaintiff is a corporation formed and existing under the laws of the State of Massachusetts, and the defendant company a corporation formed and existing under the laws of the State of California; that for more than five years last past, plaintiff has published, and still publishes in Boston, New York, and Philadelphia, a weekly trade and financial journal named "United States Investor," which has become widely and favorably known throughout the United States and other countries. That defendant, since about March, 1894, at Los Angeles, Cal., began the publication of a trade and financial journal under the name of "The Investor." The defence is that the title-page of defendant's journal in no way resembles the title-page of complainant's journal, and is in no way calculated to produce confusion between the two journals. . . .

¹ xxii. Trade-Mark Record, p. 31.

² 82 F. 56. (See substantially the same case 72 Mass. 603, § 789, *supra*.)

The presiding judge of the court said, *inter alia*: "After much consideration I am satisfied that the addition of the words 'of Los Angeles, Cal.,"' to the headline on the editorial page of defendant's journal, and the other above-mentioned distinguishing characteristics of said journal, together with the absence of any evidence, do present a case materially different from that made by the bill. . . . A name, whether of an individual or corporation, as well as any other mark or symbol, will be protected in a proper case; and that irrespective of whether such name is an arbitrary one, or not, if the other considerations entitling it to such protection are present. It is evident, on the other hand, that the use of the same name would not be enjoined where the parties were doing a business thereunder entirely dissimilar and distinct; as, for instance, where one represented a banking business and another locomotive works; nor could the first national bank established enjoin every other bank from using the name 'First National Bank,' nor could the 'Mechanics' National Bank' of New York enjoin the 'Mechanics' National Bank' of New Jersey, nor the 'Fulton Bank' of New York, the 'Fulton Bank' of Brooklyn. . . . For the reasons above indicated, I am satisfied that the stipulated facts do not entitle the plaintiff to any relief, and the bill will be dismissed."

§ 903. In the High Court of Justice, Chancery Division, before Mr. Justice North, July 23 and August 10, 1897, in the matter of *Davis' Trade-Marks*.¹

A. obtained a patent for improvements in umbrellas, which made them look more compact. He adopted the word "Compactum" to denote umbrellas so made, and such umbrellas were sold under that name. A. registered three "Trade-Marks," — one in 1882, consisting of a device with the word "Compactum" thereon, another in 1884, consisting of the word "Compactum" alone, and a third in the year 1890, consisting of certain devices and letter-press, including the word "Compactum," which word was disclaimed. The patent expired, and A. relinquished business. B., his son, began to manufacture and sell umbrellas of the kind above-mentioned,

¹ xxii. Trade-Mark Record, p. 50, January, 1898.

under the name "Compactum." An action having been brought against him by Y. and Z. to restrain him from using the word "Compactum," he moved to rectify the Register of Trade-Marks by expunging the first two trade-marks, and served the notice on A., Y., and Z., none of whom appeared on the hearing.

An order was made to expunge the two said trade-marks and for the costs to be paid by Y. and Z. Subsequently, on the motion of Y. and Z., the order was amended by adding A. as one of the parties to pay the costs.

In 1881, Henry Albert Davis obtained letters patent for an improved rib-holder and umbrella-stick, and adopted the word "Compactum" to denote umbrellas manufactured under this patent. The word "Compactum" was adopted as being precisely descriptive of the compact appearance of an umbrella manufactured according to the patent.

On the 5th of December, 1881, he registered, under No. 27,178, a representation of his patent rib-holder, with the word "Compactum" thereon, in Class 13, for metal umbrella-ribs and metal umbrella furniture, and in Class 50, for umbrellas.

In 1882, Henry Albert Davis opened a shop at No. 13, Poultry, in the city of London, where he carried on the business of manufacturing and selling umbrellas made according to his patent, which he invariably described as "Compactum" umbrellas; and they became known and were referred to and described as the "Compactum." On September 19, 1884, H. A. D. registered "Compactum" by itself, for umbrellas, in Class 50; on June 26, 1890, he registered a third trade-mark, for umbrellas, in Class 50, which consisted mainly of the representation of three umbrellas and certain letter-press, including the word "Compactum," but said word was disclaimed. In 1892, the said patent lapsed, by reason of non-payment of the annual duty. In March, 1897, the premises, 13, Poultry, were taken possession of by a mortgagee, and the said H. A. D. relinquished business. He then sold to his son, Henry John Davis, the small remaining stock. Said H. J. D. thereon commenced to manufacture and sell umbrellas of the same

kind as those manufactured and sold by his father under the title of "Compactum." The premises formerly occupied by H. A. D. were reopened for the sale of umbrellas by a company called "Umbra, L'd," which claimed the exclusive right to use the word "Compactum;" and they and one W. B., a mortgagee of the business, required the said H. J. D. to desist from using the word "Compactum" in any way, and began action in court against him for this purpose.

The said H. J. D. subsequently gave notice of motion to rectify the Register of Trade-Marks by removing therefrom two trade-marks previously registered, and served the same on H. A. D., "Umbra, L'd," Walter Bartram, and the Comptroller-General. After much discussion, the court, on July 23, 1897, directed the marks to be expunged, and ordered "Umbra, L'd," and Walter Bartram to pay the costs. On August 10, 1897, the parties last above-named moved to vary the order by ordering the costs of the application by H. J. D. to be paid exclusively by him, as registered owner of said trade-marks. North, J., directed the order of July, 1897, to be amended by inserting the name of H. A. D. as one of the parties to pay costs; and directed that the costs of this motion should be paid by "Umbra, L'd," and Walter Bartram.

§ 904. In the High Court of Justice, Chancery Division, before Mr. Justice Kekewich, August 10, 1897, in the matter of *G. Kynoch & Co.'s Trade-Mark*,—"Kynite,"¹ in Class 20, which consists of explosives. The word was invented by taking the first syllable of Kynoch and adding the termination "ite," which is a common termination for explosives. The Comptroller refused registration on the ground that the word was capable of having reference to the character or quality of the goods. It appeared that there was in existence a word "Kainite," which was the name of a mineral substance, and also "Kinetite," the name of an explosive. It was also suggested that the word might be taken to have a reference to the root of "Kineite." On an appeal, the court *held*, that "Kynite" was an invented word, and had no reference to

¹ xxii. Trade-Mark Record, 57, January, 1898.

the quality or character of the goods, and the Comptroller was directed to proceed with the registration.

On December 22, 1896, G. Kynoch & Company, L'd, applied for registration in Class 20 (explosives) of said word, "Kynite," as a trade-mark.

On January 7, 1897, the Comptroller refused to proceed with the application, on the ground that the word "Kynite" was capable of having reference to the character or quality of the goods.

On March 5, 1897, the application was refused by the Comptroller.

On appeal to the Board of Trade, it was referred to the court.

An affidavit by the Registrar of Trade-Marks was filed in opposition to the appeal. Among other objections, it stated that the termination "ite" is very commonly used to denote that the article to which it applies is an explosive, and to any person in the trade would convey the notion of an explosive. One of the earliest examples of its use was the name dynamite. Explosives are sometimes named by adding "ite" to a descriptive prefix; and, as examples, he named "Ballistite," "Roburite," "Carbonite," "Panclastite," "Fulgarite," "Securite," "Ammonite," "Vigorite," "Cordite." . . . The pronunciation of the word "Kainite," given in the Standard Dictionary, published by Funk and Wagnalls, does not appear to confirm what is said by Mr. Clerk, one of the directors of the applicant in his affidavit, and the derivation of the word "Kainite" from the Greek kainos, mainly would go to show that the correct pronunciation of the word is identical with the ordinary pronunciation of the name "Kynite," which the applicants have given to their explosive. After protracted discussion, Kekewich, J., said: "In my opinion, this word 'Kynite' is an invented word, and not descriptive of the quality or character of the goods within the meaning of the Act of Parliament." (His Honor made a lengthy disquisition on the modern pronunciation of Greek words very possibly differing from the inflexion given by the ancient Greeks, and continued :) "I do not think it is fair to those who have

invented this word to say that it is presumably derived from kineo, or presumably descriptive of something which compels motion. Unless I come to that conclusion, I do not see how I can say that 'Kynite' is descriptive of the character or quality of the goods. I think, therefore, that the Comptroller, in his anxiety — which I always desire to uphold — to observe the provisions of the Act of Parliament, and prevent the registration of improper words, has here erred on the side of excessive caution." The Comptroller was directed to register.

§ 905. In the U. S. Circuit Court, N. J., September 4, 1897, was heard the case of *Vitascope Co. v. U. S. Phonograph Co.*¹ The bill of complaint sets out that Raff & Gammon, the assignors of the complainant, in January, 1896, began the manufacture of a certain machine or device, invented by Thomas A. Edison and Thomas Amart, to project upon a screen apparently living figures and scenes, in view of spectators, and that the said Raff & Gammon coined the word "Vitascope," and applied it to designate said machine; that afterwards said Raff & Gammon assigned to the complainants the right to manufacture the said machine or device, and to lease the same under the name of "Vitascope," and to sell territorial rights for giving public exhibitions with the said machine and device; and that in the exercise of said right the complainant has made a large number of such machines, and given thousands of exhibitions in all the large cities of the United States. The complainant agreed to take and pay for all said machines according to the contract; and subsequently Edison sold the machines not taken to reimburse himself for their cost. *Held*, that the purchasers from Edison, in offering their machines for sale as "Edison Vitascope," were not guilty of unfair competition with complainants, since there was no misleading or deception of the public, who, in fact, obtained the identical machines to which the name was intended to apply. Kirkpatrick, J., said, *inter alia*, in declining to grant the injunction applied for: The grounds on which unfair competition in trade will be enjoined are, either that the means used are dishonest, or that by false representa-

¹ 83 F. 30.

tions, or imitation of a name or device, there is a tendency to cause confusion in the trade, and commit fraud on the public, by inducing the acceptance of a spurious article. When these grounds are absent, and no trade-mark rights exist, injunction is not allowed. The case as presented comes clearly within the principle decided in *Apollinaris Co. v. Scherer*.¹ There, however, the complainant possessed an element of strength wanting here, in that it had the undisputed exclusive right, so far as it could be acquired, to sell the product in the territory sought to be occupied by the defendant. There is no proof in this case of an exclusive right to the use of the words "Vitascope" and "Edison's Vitascope" as connected with machines. (A number of cases hereinbefore cited were adduced by the court.)

§ 906. In the U. S. Circuit Court of Appeals, of the 7th Circuit, October 4, 1897, *Johnson & Johnson v. Bauer & Black*,² where medicinal and surgical plasters had long been put up in packages bearing a red Greek cross, so that they had become known, and were asked for as "Red Cross Plasters," held, that the use by another of a Maltese cross of somewhat different form, with a large red circle in the centre, was an infringement, though bearing on its face letters and marks not on the other, and although there was little resemblance in the packages or other *indicia* (79 F. 954, reversed). The court below said: "I do not think that the defendant so nearly imitates the trade-mark, or comes anything like so nearly imitating it, as to deceive the public who are looking for the complainant's goods." The Appellate Court was held by Woods, Jenkins, and Showalter, Cir. JJ., and it was said, *inter alia*: "The Maltese cross adopted by the appellee, in so far as it contains a red circle, has a tendency to promote confusion, and will interfere with the legitimate trade of the appellant. . . . The red cross speaks to the eye, and the article being known by that designation speaks also to the ear by that name. It is the one peculiar and commanding feature imposed on the package to designate its origin; and in the absence of critical examination, the one manufacture

¹ 27 F. 18.

² 82 F. 662.

may readily be imposed upon the purchaser desiring the other. This is peculiarly true where, as here, the mark is displayed upon the package containing the article, and not upon the article itself." The court cited *Pillsbury v. Flour Mills Co.*, 24 U. S. App. 395, 64 F. 841, and 12 C. C. A. 432, where it said: "Disguise defeats the very end and object of legitimate competition. . . . A specific article of approved excellence comes to be known by certain catchwords, easily tortured in meaning, or by a picture which the eye readily recognizes." The court cited § 449, of Browne on Trademarks. In that case, it was conceded by able counsel on each side, and found by the Patent Office, that the picture of a bouquet, with elaborate ornamentation, and the simple word "Bouquet," interfered with each other when used upon the same class of goods. "If vision were the sole guide, the lack of physical resemblance would have decided that no interference existed. One delineation could not possibly be mistaken for the other. Here is the test: Would the use by different houses of the two things cause confusion? The ear is the medium to mislead a purchaser. He might ask this question, 'Have you the Bouquet ham?' and either of the traders could truthfully reply in the affirmative. The picture and the word could not lawfully coexist as marks for rivals dealing in the same class of merchandise." — The court also cited *Reed v. Richardson*, 45 Law T. (N. S.) 54; the complainant's beer had acquired distinction because of the manner of its identification, the name of "Dog's Head Beer."

§ 907. In the U. S. Circuit Court, W. D. Michigan, S. D., October 27, 1897, *Gage-Downs Co. v. Featherbone Corset Co.*,¹ a motion was made for injunction in a case of alleged unfair competition. It was *held*, that one making corset-waists in Chicago and selling them as "Chicago Waists," so that this designation came to denote among purchasers the goods made by him, is entitled to an injunction against another who makes similar waists in a different State and city, and sells them as "Chicago Waists," with a manifest intention of availing himself of the reputation acquired by the other's goods.

¹ 83 F. 213.

The court said that the name of the place may acquire a secondary signification, and become, instead of merely denoting the place where the goods are manufactured, a mark denoting the manufacture itself, and for said trade-name the first adopter may obtain for it the right of exclusive use. Such a case depends entirely on the proof, and, if it appears that the name is used for the purpose of denoting the place of manufacture as the primary object, then it is not subject to be appropriated by any one person resident therein. All other residents have the like privilege of use. But if the circumstances show only that the use of the name is a means of appropriating the business advantages, the good-will, and the trade-name of the complainant, that is not lawful. This feature of the case would be much affected by the circumstance of the residence of the parties. The persons who confess the use of said trade-name in the business are residents of California (Buyer & Reich), and others residing at Kalamazoo, the Featherbone Corset Co. Under these circumstances of lack of good faith, a preliminary injunction was granted.

§ 908. In the High Court of Justice, Chancery Division, before Mr. Justice Kekewich, October 29, 1897.¹ In the matter of the *Linotype Company's* application for registration of a trade-mark, the word "Typograph," in Clause 5, — viz.: Unwrought and partly wrought metals used in manufacture, the Comptroller refused registration, and, on appeal to the Board of Trade, the appeal was referred to this court. On the evidence, it appeared that "typograph" was a dictionary word meaning a type-making and type-setting machine. The applicants manufactured machines of this nature. In opposition to the motion before the court, the Registrar of Trade-Marks made an affidavit, *inter alia*: —

1. For many years prior to the above-mentioned applications being made, machines were in use for the automatic composing of lines of type, and were commonly known as Typograph. In one class of such machines the operators' part was controlled by a series of keys, the depression of

¹ The Trade-Mark Record, January 19, 1898, vol. xxii. p. 50.

which caused an imprint corresponding to a letter in soft metal papier-maché, or other suitable material. When the metal or other material had upon it the imprint of a line, it was used as a stereotyped matrix in the ordinary way. In another kind of such machines, by depressing the keys, separate type matrices were brought into line, which, when completed, were transferred to another part of the machine, where it served as one side of the casting mould, into which suitable type-metal was forced. Speaking generally, the patents of The Linotype Company or Linotype Patents relate to machines of the latter.

2. The word "Typograph" is in common use, and is found in English dictionaries, e. g., The Imperial Dictionary, and The Standard Dictionary. In The Century Dictionary, published in New York and London in the year 1891, the meaning of the word is given as a type-making and type-setting machine.

For the applicants, it was contended that this is a word having no reference to the character or quality of the goods. In the Act of 1888, the term "fancy word" is omitted, and the acts now contemplate the registration of words that are not fancy words. Also, there is a contrast made between invented words and other words. . . . As regards quality, typograph neither praises nor blames. (Kekewich, J., said I do not think quality means praise or blame, but other characteristics such as hard, or soft, or pliable.)

Sir R. E. Webster, A. G., for the Comptroller, after reading the affidavit of the Registrar, continued: The company which makes printing machinery for the setting up of type and machines known as "Typograph" wish to get the monopoly of the common word "typograph" in connection with metal that may be used for the purpose of these machines. Without quoting cases, I may mention the "Solio," "Somatose,"¹ and "Satinine"² cases. The rule of the court is that it will decline to interfere if unable to see that the discretion of the Comptroller has been improperly exercised. Apart from this,

¹ 7 Rep. 439; 7 Ch. 645; § 841, *ante*.

² 43 Ch. D. 604; § 706, *ante*.

it would be a reversal of principles to allow the registration under the circumstances of this case.

Moulton, Q. C., in reply, said it would be strange if we could not be allowed to register, but other persons might be. Also, the fact that something within the class may be described by the word does not prevent registration for that class; the class must be considered fairly as a whole in reference to the question. Kekewich, J., responded: In considering the question whether a particular word has reference to the character or quality of the goods, one must not regard the word from an etymological point of view, such as the point from which a man of high education would regard it, but from the ordinary point of view, which would be the ordinary British subject dealing with the particular goods. . . . Now, is it possible that any man of ordinary education, seeing that the Linotype Company had registered Typograph, should not conclude that it is in connection with metal for the type-founding business? It seems to me that the question put in that way is an extremely simple one, and can only be answered by saying that this is a word having reference to the character and quality of the goods. Appeal dismissed with costs.

§ 909. In the U. S. Circuit Court, S. D., N. Y., on December 23, 1897, Townsend, J., decided the case, *Hostetter Company v. Sommers and Joseph*.¹

The bill alleged that the complainant was the compounder of "Hostetter's Bitters," and charged the defendants with fraud and unfair dealing in selling as its bitters another article so compounded as to resemble in taste, color, and smell, the genuine Hostetter's; and suggesting and advising intending purchasers to secure the Hostetter bottles, to fill them with the imitation and sell them as Hostetter's. The defence was a general denial; but the evidence sustained the bill. The court decided that infringement is shown on the facts, within the rule laid down in the case of *Hostetter Co. v. Bruggeman-Reinert Distilling Co.*² The judge said, *inter alia*: "The complainant is entitled to protection against

¹ xxii. Trade-Mark Record, 59, January, 1898.

² 46 F. 188.

the appropriation of its trade-mark by any and all unfair and dishonorable means, and a court of equity has power to grant such protection, whenever it is satisfied that an attempt has been made by ingenious subterfuges to invade the rights of an owner of a trade-mark, either by a conspiracy with others to deprive him of such rights, or by misrepresentation in the sale of a spurious article, so manufactured as to deceive the public.

“In the sharp contest between the individual manufacturer, who strives to acquire and retain the fruits of industry and honesty, and the field of keen rivals, seeking to wrest from him the prize of the public good-will, the inventive ingenuity of the infringer has conceived a great variety of devices for evading the established rules of fair dealing. Among the latter of these devices are acts professedly within legal limitations, but manifestly designed to be afterward so made available by other acts as to deceive the public. In such cases courts of equity, looking beyond the original acts, and finding that their ultimate object and effect are to enable and induce the retail seller of a fraudulent imitation to palm it off on an unsuspecting public for the genuine article, and thus to contribute to the infringement upon the rights of the original owner, have not hesitated to apply the remedy.”

The court *held*, that Joseph's claim, that he said that his bitters were not “Hostetter's Bitters,” was immaterial, as he labelled them “Hostetter's Bitters.” In either view of the case there was an illegal appropriation of complainant's right of property which should be enjoined. Decree for an injunction and accounting.

§ 910. Before the *Tribunal de Commerce, d'Anvers* (Belgium), in the case of *W. Pearson v. Van Neck*,¹ the following principles were established.

The affixing of a mark of an owner without his authority is illicit, even on products of his own manufacture. To decide otherwise would be to oblige the inspection by the owner of the mark, to seek in each particular case the sanction of his rights by chemical analysis of the product, or to have recourse to other difficult means of verification. The trade-

¹ *La Propriété Industrielle*, Dec. 31, 1897, pp. 192, 193.

mark "Créoline Pearson," which was registered April 23, 1890, in the Tribunal of Commerce of Brussels, was intended to be affixed in various sizes, and in characters of every form, on packets, envelopes, boxes, and bales of the product thus denominated, which trade-mark was protected by the law of April 1, 1879. The plaintiff sold a disinfecting product in bottles of different sizes, all the recipients having special forms and appearance. Van Neck, having bought quantities of the product, had retailed it in bottles dissimilar to those employed by the plaintiff, and bearing plaintiff's especial trade-mark, in conjunction with the defendant's name, place of business, etc. The trade-mark was affixed in writing.

It was *held*, that, it matters little whether the liquid sold by Van Neck emanated or not from the laboratory of the plaintiff. The product is not only a liquid, but is capable of being condensed into solid form, in both of which forms plaintiff has presented it to the public. The defendant pleads erroneously a tacit consent to his use of the mark, and says that he is justified in so doing by the fact of plaintiff's registration and his placing of the goods upon the market. Should it be otherwise, another dealer would be allowed to present it to the public under a number of indeterminate forms. The shape of the bottle is immaterial. One flask would not present more guarantees than another; and the public could not distinguish the difference between the two products. Consequently inevitable counterfeits might be produced with the greatest ease. The only safeguard would be a chemical analysis, which, of course, would be impracticable. It is for the purpose of avoiding indefinite inconveniences, as much in the interest of the public as for the manufacturer, that the rule should be rigidly observed that the right of the owner to affix his mark should be exclusive. Such is the only means of distinguishing the products of industry or the objects of commerce. The judgment was that defendant should pay 200 francs damages and costs. (*Revue Internationale de la Propriété Industrielle.*)

§ 911. In Germany, on December 17, 1896, and March 26, 1897, the trade-mark cases of *Maréchal Ruchon et Cie.*

and *Peugeot Frères* were decided before the Bureau of Patents.¹

By the terms of the first paragraph of section 4 of the German law of May 12, 1894, it is provided that trade-marks composed exclusively of numerals or letters should be refused registration. Foreign marks, if so composed, are not susceptible of protection in virtue of the present law. Marks registered in France before the annexation of Alsace-Lorraine are assimilated to marks registered in Germany anterior to Imperial legislation. Therefore, the mark "G. B. D." is rejected for the following reasons:

It must be considered that the mark in question is not composed of letters only. It also includes an external form, but that is without importance in the essentials of the mark. Conceding that simple figurative signs, words, letters, etc., are often accompanied by circles, ellipses, rectangles, etc., these external configurations have no bearing on the marks themselves, and, therefore, should not be deemed characteristic elements of the technical marks, as they form merely frames for them.

In response to the decision refusing registration, MM. Maréchal Ruchon et Cie. argued *inter alia*: It is incumbent on the Patent Office to accept the mark in question, as it can be demonstrated by section 24 of the German law of 1894, that registration can be peremptorily invoked. Said paragraph says that registration shall not be refused to marks already registered in virtue of an ancient provincial protection. . . . Every mark protected before the year 1874 by a local law, on condition that the demand for registration should be presented during the transitory period granted by the law before the first of October, 1878, shall be duly recognized. Besides, the Supreme Court of the Empire, on November 21, 1881, conceded that every mark registered in France before the annexation of Alsace-Lorraine should have the benefit of Articles 3 and 9 of the law of 1874. The judgment says in substance that every mark registered before 1871 is protected in all the territory (including Alsace and Lorraine). Even after the

¹ La Propriété Industrielle, Dec. 31, 1897, p. 193.

annexation by Germany, the French law of June 23, 1857, is a protection. A refusal of protection by virtue of the treaty of commerce between Germany and France in 1862 was accordingly reversed. (*Raynaud v. Hauer*, November 29, 1881.) *Grand Dictionnaire International de la Propriété Industrielle*, T. I., p. 342. Other decisions have been rendered conforming to the jurisprudence adopted by the Supreme Court, notably a decision of the Court of Colmar, of September 18, 1888, — *Menier v. Schyltz et Gobel* (*Grand Dictionnaire*), etc., p. 345. The same principles have also been applied by the French government, as was shown by a decision of the Director-General of Customs of June 5, 1887. *Ibidem*, p. 348.

In view of the authorities cited, the Imperial Patent Office at Berlin reversed the decision of the Bureau of Patents, and returned the case for action and registration.

In the case of *Fils de Peugeot Frères*, March 26, 1897, the decision of the Patent Office, made under similar circumstances, relative to the trade-mark “*à la main*,” was reversed.

CHAPTER X.

PATENT OFFICE TRADE-MARK DECISIONS.

- § 912. "Tivoli," as trade-mark for beer.
- § 913. "Cream of Wheat," as trade-mark for breakfast food.
- § 914. "Menlo Park," for time-keeping instruments.
- § 915. "Seal of Minnesota," words and picture for flour.
- § 916. "White Laurel," for medicine.
- § 917. "Yale," for locks.
- § 918. "Old Yorkshire Mills," for paper.
- § 919. "Peerless," for carbon black.
- § 920. "Black Horse," etc., for tobacco.
- § 921. Representation of crown, or the word "Crown," for cheese.
- § 922. "Imperceptible," for starch.
- § 923. "White Wrapper," for canned salmon.
- § 924. Representation of bundle of cigars, etc., for cigars.
- § 925. "Roman Punch," etc., for beverage.
- § 926. "Hopkins," etc., for hulled canned corn.
- § 927. "Squirrel," and picture of, for ammunition.
- § 928. "Sterling," for cereal products.
- § 929. "Kangaroo," for rubber tubing and tires.
- § 930. Appeal from refusal to transmit interference.
- § 931. "Old Fashion," for Louisiana molasses,
- § 932. Appeal from refusal to dissolve "Dr. Coderre" interference.
- § 933. Appeal from refusal to dissolve "Royal" interference.

§ 912. AMONG Interesting Decisions by Chief of the Patent Office, are the following: —

Ex parte Frederick A. Poth, application for registration for a trade-mark for beer.¹ The words claimed were "Tivoli Export," for pale beer. Registration was refused on the following grounds:

1. The matter claimed is geographically and ordinarily descriptive in character and incapable of appropriation as a trade-mark.

2. It cannot be registered in view of the registered trade-mark, No. 23,870, of Robert Portner Brewing Company for the word Tivoli, as applied to beer.

¹ 62 MS. Dec. 329.

The Examiner holds that the word "Export" is purely descriptive, and he is clearly correct, since the authorities cited by him in support of his holding leave no doubt as to the matter.

The trade-mark "Tivoli" of the Robert Portner Brewing Company was intended for use on beer which is to be exported, and the applicants' trade-mark differs from that of the registrant only in adding the descriptive word, "Export," which means only that it is beer possessing certain peculiarities adapting it to export trade. The beer of the registrant, being intended for exportation, might naturally and properly be called "Tivoli Export Beer," and, therefore, the trade-marks clearly interfere, the only part, if any, in either trade-mark constituting trade-mark matter, being the word "Tivoli."

The Examiner also holds that the word "Tivoli" is geographical in character, and as a consequence cannot be registered as a trade-mark. It is unnecessary, however, to decide this question in view of the above holding that the trade-mark is not registrable for other reasons. Decision of Examiner affirmed. (GREELEY, *Asst. Com.*, Oct. 11, 1897.)

§ 913. *Ex parte Cream of Wheat Co.*,¹ application for registration of words "Cream of Wheat," as applied to breakfast food, refused by Examiner, because of:

1. Prior registration of the same words.
2. The expression sought to be registered is descriptive, in that it conveys the idea that only the best part of the wheat berry is employed. He quotes the decisions of *Asst. Com. Fisher*, in *North Dakota Mills Co.*, 58 MS. Dec. 176, affirming decision of same words for same article. In that case, according to the original statement, the words were also intended to be applied to flour, among other things; and the then Assistant Commissioner held this fact to be significant in the consideration of the previously registered trade-mark. In the present case, the words are to be applied to "breakfast foods, such as rolled wheat, cracked wheat, etc." *Held*, that neither ground taken by the Examiner is sound. Breakfast food and flour are

¹ 62 MS. Dec. 329.

different commercial products, and the word "Cream" in this connection is merely fanciful, and does not imply, of necessity, the use of the best portions of the wheat berry. Decision of Examiner reversed. (GREELEY, *Asst. Com.*, Oct. 11, 1897.)

§ 914. *Ex parte Hampden Watch Co.*,¹ application for registration of words "Menlo Park" as a trade-mark for time-keeping instruments, which mark, as stated in the application, has been used at Canton, O., upon time-keeping instruments, and particularly watch movements, since April, 1880.

The particular ground for refusing registration, as set up in the Examiner's answer to the appeal, is that the words for which registration is sought, have no other than a geographical meaning, and do not, therefore, constitute a lawful trade-mark under the decisions of the court, and under the practice of this office.

While it is true that Menlo Park is the name of a small town in New Jersey, and is also the name of a town in San Mateo Co., Cal., it does not appear that either of these localities is a manufacturing town. Certainly in neither of these towns is the manufacture of watch movements carried on; and while it is true that if the business of manufacturing watch movements were to be established in either of these towns, those engaged in that business would have the right to put the name of the locality on the products made there, the contingency is too remote to bar the registration of a trade-mark which has been in use in a purely arbitrary and fanciful sense, by these applicants, for over seventeen years.

While it is true that Menlo Park is a geographical term, it does not, in my opinion, stand on the same footing as the word "Columbia," commonly used to designate the United States as a whole, or the word "Lackawanna," the name of a region of country in Pennsylvania, or "International," or "East Indian," all which have been held not to be lawful trade-marks, and all which are considered or referred to in the decision of the Supreme Court in "*Columbia Mills*" v. *Alcorn*, 65 O. G. 1916. In all these cases, the word on which suit was brought was one which was of such a nature, or cov-

¹ 62 MS. Dec. 333.

ered such an extent of territory, that it was necessarily to be presumed that there would be those who could employ the word with equal truth, and would therefore have an equal right to employ it for the purpose for which it was used by the person who brought suit.

The line is not easily drawn in all cases between those words of geographical nature which are registrable and those which are not, but where there is reasonable doubt registration should be permitted. Decision of Examiner reversed. (GREELEY, *Acting Com.*, Oct. 12, 1897.)¹

§ 915. *Ex parte New Prague Flouring Mill Co.*, application for registration of trade-mark for flour,—the pictorial portion of the seal² of Minnesota, with the words “Seal of Minnesota.” The Examiner’s position is that in view of certain authorities, which he cites, trade-marks consisting essentially of symbols, or coats-of-arms, are not registrable. The trade-mark has been registered in Minnesota, in which State no question of presumptive lawfulness can be raised as a prerequisite to registration. This does not seem to affect the question of registration in this office.

It has been distinctly held that the coat-of-arms of the United States, or of any State, should be refused registration as against public policy. (*Schmachtenberg Bros.*, 51 MS. Dec. 204.) There is no doubt that this applies equally to the seal of the State.

Further, even if it be admitted that the seal of a State may be properly used as a mark for merchandise, it is clear that its use as such is as much a public right as the use of the word “Minnesota,” or the name of any State. Decision affirmed. (GREELEY, *Asst. Com.*, Oct. 25, 1897.)

§ 916. *Ex parte Loring L. Cumings*, application for registration of words “White Laurel,”³ for medicine. Registration is refused by Examiner on the ground that the medicinal properties of the laurel are well known, and that the words applied to medicine are descriptive in character. He says that if laurel does not occur as an ingredient of the

¹ 63 MS. Dec. 375.

² 62 MS. Dec. 437.

³ 63 MS. Dec. 45.

medicine, the term is deceptive, and that the word "White" merely emphasizes the particular kind of laurel which the applicant employs.

The applicant contends that if the word "laurel" is used alone, it might properly be held descriptive, or, if the ingredient laurel were not used, deceptive; but the two words, "White Laurel," taken together, are wholly meaningless, and could be held either descriptive or deceptive.

As stated by the Examiner, the word "White," as indicating color, has repeatedly been refused registration. The words "White Laurel" would seem to indicate that the remedy in question is derived from a species of laurel. "I cannot agree with the contention of the applicant that the words themselves are meaningless." (GREELEY, *Acting Com.*, affirming Examiner, Dec. 3, 1897.)

§ 917. *Ex parte Yale & Towne Manufacturing Co.*, application for registration of the word "Yale" as a trade-mark for locks. Registration was refused on the following grounds:

1. It is public property, being descriptive of a lock of a certain kind.

2. Also as being a patented device.

No one has the right to the exclusive use of the word Yale as a trade-mark for locks, as any one who makes a lock disclosed by any of the expired patents taken out by the Yales, has a right to designate such lock as a "Yale lock;" and it would be the proper and true name for such lock. On appeal, it was *held* that the records of this office show that more than forty years ago one Linus Yale obtained several patents on locks. The nature of the invention is such as to make it applicable to many kinds and forms of locks. The Commissioner cites the history of several such patents, also from the American and English Encyclopædia of Law; and the latest authority quoted by him is from the U. S. Supreme Court, *Singer Co. v. June Co.* (75 O. G. 1703).

The public have the right, on the expiration of the patents, to make the patented article, and to use its generic name.

The result, then, of the American, the English, and the

French doctrine is this: that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created.

The Yale Company has no more right to the term Yale as a trade-mark for locks, invented by the Yales and manufactured by appellant, whether the well-known Yale pin-tumbler lock, or the Yale bank-lock, or other locks, than the Singer Company had to the word "Singer." On the other hand, any one who makes a lock of the type disclosed by any one of the expired patents of the Yales has a right to designate such a lock as a "Yale lock;" and it would be the proper and true name of such lock. Decision of Examiner affirmed. (BUTTERWORTH, *Com.*, Oct. 1, 1897.)

§ 918. *Ex parte The George C. Gill Paper Co.*, application for registration of the words "Old Yorkshire Mills," as applied to paper. The grounds for refusal to register are two:

1. The expression sought to be registered has for its most prominent word one of geographical signification.

2. A similar term, viz.: "York Mills," has previously been registered for the same class of merchandise.

Either of these grounds seems to be sufficient to justify the Examiner in refusing to register the words in question. Decision affirmed. (GREELEY, *Acting Com.*, Sept. 11, 1897.)

§ 919. *Ex parte The Peerless Carbon Black Co., Limited*, application for registration on appeal from Examiner for refusing the word "Peerless," as a trade-mark for carbon black. The refusal is on the ground that it is descriptive of the goods.

The word "Peerless" is defined by the dictionary as "unequaled, unmatched, matchless, unsurpassed." Peerless black, therefore, means a black of superior quality, a matchless black, superlative black, a black better than any other black. These adjectives are not fanciful words, that is, words which when used as trade-marks, are obviously meaningless to ordinary people. The word "Peerless" is such a word as is ordinarily

used by merchants in a laudatory sense to extol their goods. If appellant's black is of a superior quality, it is proper so to state. Any person, however, who thinks his black is superlative, or unsurpassed, or peerless, has as much right as appellant to so designate his goods. To give to one person the exclusive right to such a word as a trade-mark would be to deprive the public of its lawful use in language.

This word falls within the class of words, such as "incomparable," "sterling," "standard," "wonderful," "superior," "most excellent," "famous," "splendid," "unrivalled," etc., which have been properly refused registration. This word "peerless," in fact, has also been refused registration, *Ex parte Butler*, 54 MS. Dec. 130, on the ground that it is a word in common use describing quality. Decision affirmed. (BUTTERWORTH, *Com.*, Oct. 1, 1897.)

§ 920. *S. HERNSHEIM BROTHERS & CO., LTD. v. J. H. HARGRAVE & SON.* This is an appeal from the decisions of the Examiner of Interferences, rendered March 18, 1897, April 27, 1897, and June 2, 1897.

On June 18, 1896, HERNSHEIM BROS. & CO., the junior parties to this interference, filed an application for the registration as a trade-mark for leaf tobacco, manufactured tobacco, and cigars, of the words "Black Horse," or the representation of a black horse. Refused on the registered mark to HARGRAVE & SON, which consisted of the words "Dark Horse," and the pictorial representation of a blanketed horse. Interference was declared between the two parties, the issue being, "The words 'Dark' (or black) 'Horse,' and the picture of a horse applied to chewing tobacco."

Testimony was duly taken in behalf of H. Bros. & Co., there being no appearance for HARGRAVE & SON, who did not take any testimony in their own behalf.

"The record of HERNSHEIM BROS. & CO., Limited, the junior party, would seem to disclose that 'black horse' has been used by said junior party and their predecessors in business as a trade-mark for tobacco for about a quarter of a century; but there is not a word of testimony to show that they ever sold an ounce of chewing tobacco under this trade-mark, or that

they ever applied this trade-mark to a single package of this class of tobacco. The junior party has, therefore, entirely failed to show the adoption and use by them of the mark 'black horse' applied to chewing tobacco, and hence have not sustained the burden of proof resting upon them. Judgment of priority of adoption and right of the trade-mark in issue is hereby rendered in favor of J. H. Hargrave & Son, the senior party herein." On March 24, 1897, HERNSHEIM BROS. & CO., made a motion that the Examiner of Interferences suspend the interference and rehear the same, the ground for this motion being, substantially, that the Examiner erred in holding that the failure of HERNSHEIM BROS. & CO. to establish evidence that they used the trade-mark as defined in the issue on chewing tobacco at a date prior to the record date of HARGRAVE & SON, was the basis of a judgment that they were not the owners thereof, or that if this holding were not erroneous, then the Examiner erred in rendering a decision of adoption and use, and in not dissolving the interference. On April 27, 1897, the Examiner of Interferences denied this motion, stating that —

"All that the Examiner of Interferences has decided, or attempted to decide, was as to the ownership of this trade-mark used on the particular article of merchandise named in the issue; and in so doing he is of the opinion that he made no error. Being of that opinion, he must and hereby does refuse to disturb the decision already made, but reaffirms the same."

HERNSHEIM BROS. & CO. appealed on the ground that the issue of interference is narrower than their claim. *Held*, "that the action of the Examiner of Interferences awarding priority is set aside. The papers will be transmitted to the primary Examiner, who will re-form the issue and return the papers to the Examiner of Interferences for the purpose of considering the question of priority on the new issue." (BUTTERWORTH, *Com.*, Oct. 2, 1897.)

§ 921. *Ex parte Christine Baumert*, appeal from Examiner of Trade-Marks, refusing to register the representation of a crown, or the word "Crown," as a trade-mark for a certain

class of cheese. Refused, on the trade-mark of J. H. Hodgson, registered Oct. 2, 1879, which shows and claims as the essential feature a garter in an oval form, with a crown in the upper or centre portion.

The ground on which this action was based is that the salient feature of the registered mark is the crown, and that the cheese to which this mark is applied would probably be known to the ordinary class of purchasers as "crown," or "crown brand" cheese, and that, therefore, cheese bearing the applicants' mark would be mistaken for that of the registrant. Decision affirmed. (GREELEY, *Asst. Com.*, July 12, 1897.)

§ 922. *Ex parte E. R. Durkee & Co.*, appeal from Examiner of Trade-Marks, refusing to register the word "Imperceptible" as a trade-mark for starch. *Held*, that the word "imperceptible" is clearly not descriptive of the starch as put on the market, nor is it clear that it is descriptive of the starch as applied to fabrics. The starch as applied has not only ceased to be an article of trade, but has, in the process of applying it to the fabric, been subjected to chemical action. The trade-mark is registrable. Examiner's decision reversed. (GREELEY, *Acting Com.*, July 10, 1897.)

§ 923. *Ex parte William H. Lord*, appeal from refusal by Examiner of Trade-Marks to register the words "White Wrapper" as a trade-mark for canned salmon, on the ground that a wrapper of particular color cannot constitute a trade-mark. The Commissioner cited *Ex parte Landreth*, 31 O. G. 1441, the essential features of the mark for registration being a red bag in which the goods were packed for the trade; also the case of *Fleischmann et al. v. Starkey*, 25 F. 127, in which the yellow colored label was in question; also *Fisher et al. v. Blank*, 33 N. E. 1040, where "Black Package Tea" was considered. In all these cases, color was held to be simply descriptive and not lawful as trade-marks. Examiner affirmed. (BUTTERWORTH, *Com.*, June 8, 1897.)

§ 924. *Ex parte S. Rosenberger & Co.*, appeal from Examiner's refusal to register as a trade-mark for cigars "a representation of a bundle of cigars, with two transverse stripes across its face, one near the end, and these connected

by two diagonal stripes crossing each other at or near the centre of the length of the face of "the bundle." The essential feature was said to be "the stripes as presented on the face of a representation of a bundle of cigars." Refused for being purely descriptive in character. Cases cited by the Acting Commissioner were *Ex parte Spencer*, 14 MS. Dec. 132, where the picture of a lathe, with the overhead countershaft laid across its bed, with the words "John E. Spencer" above it and "Standard Lathes" below it, were held to be descriptive, and refused. Substantially the same ruling was made in the cases of *Ex parte Pratt and Farmer*, 10 O. G. 866, and *Ex parte Smith*, 16 O. G. 679. See also *Ex parte Silverman & Co.*, 59 MS. Dec. 76, where applicant sought to register as a trade-mark for suspenders "the representation of a hole formed in the front or back facing strip of a suspender or like article to show a wire gauze strengthening piece," etc. Examiner affirmed. (FISHER, *Acting Com.*, June 6, 1896.)

§ 925. *Ex parte C. J. Countie & Co.*, appeal from Examiner of Trade-Marks, refusing to register the words "Roman Punch" in connection with the words "non-alcoholic," or words of similar import. The Examiner cited *Ex parte Rowe*, 50 MS. Dec. 168, where it was held that the words "Cherry Cocktail" are descriptive, when applied to a non-alcoholic drink; and reference was made to "Cooling Drinks and Dainty Cups," Terrington, London, 1872, pp. 221-223, to show that Roman Punch is a beverage containing alcoholic liquor. The Century Dictionary defines Roman Punch as a water-ice, flavored usually with lemon, and mixed with *rum* or other spirit.

As was stated in the case of *Ex parte Metropolitan Watch Co.*, 44 MS. Dec. 272, "the essential feature of a trade-mark is not what the registrant elects to designate as such, but that which strikes the public as its most salient feature, and as lending character to the entire mark." Examiner affirmed. (FISHER, *Acting Com.*, June 6, 1896.)

§ 926. *Ex parte The Western New York Preserving and Manufacturing Co.*, appeal from the Examiner of Trade-Marks, refusing to register the word "Hopkins" on a white rectan-

gular background, surrounded by a white bronze border, for "Canned Hulled Corn" or steamed hominy. The refusal was based on the previous registration of "Hopkins' Improved Prepared Flour," in 1873, used on "a compound of flour made of wheat, or other grain, and other substances, prepared so as to be self-raising when used in cooking." The word Hopkins is the salient part of each mark, and may be said to be the "essential feature." The question to be decided is whether "Canned Hulled Corn" (or steamed hominy) is included in the class of goods named by the registered mark. The Examiner holds that under the doctrine of *Ex parte North Dakota Milling Co.*, 58 MS. Dec. 176, canned hulled corn and "a compound of flour made of wheat and other goods" are the same class. It seems evident that these goods are of the same class, and the appellant in said case so considered them, as in his application as originally filed he included "flour" in the class of goods on which his mark was used, and which were put up in the same kind of packages.

In the present case, however, it is thought that the goods are not of the same class, and that the appellant or registrant did not intend to include in his statement as to the class of goods on which his mark was used, the class of goods named by the other. There is no similarity between the packages. The ordinary purchaser would not mistake one class for the other, or be led to believe that the ingredients of the registrants' goods were used or put up in the goods of the applicant, as was the case in *Eno v. Dunn*, Cox's Man. T. M. Cases, p. 488. Examiner's decision reversed. (FISHER, *Acting Com.*, June 19, 1896.)

§ 927. *Ex parte Frank C. Fowler*, appeal from action of Examiner of Trade-Marks, refusing to register as a label for ammunition the word "Squirrel," and the pictorial representation of a squirrel. The appellant states that "in use the label is printed, stamped, or otherwise affixed generally to the outer face of the top wad of a shell containing a 'squirrel' load." Refused, on the ground that the Act of June 18, 1874,* excluded trade-marks from the benefit thereof, and

* The Copyright Act.

that a label cannot be registered as such, if it contains trade-mark matter, until after such device is registered as a trade-mark.

The question of the registry of labels was considered at length by the "Supreme Court, in the case of *Higgins v. Keuffel*, 140 U. S. 428. In that decision it was said that the eighth section of Article I. of the Constitution of the United States, which declares that

'the Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,'

does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value, separated from the articles, and no possible influence upon science or the useful arts."

From the appellants' statement in the record, it is evident that the sole purpose of his label is to designate what the packages to which it is attached contain, and that it is valuable only when connected with such packages. The label of itself is not intended to instruct the reader, and has not by itself value as a composition. Decision of Examiner affirmed. (FISHER, *Acting Com.*, June 23, 1896.)

§ 928. *Ex parte Maria A. Hall*,¹ application for registration of a trade-mark, consisting of the word "Sterling" applied to cereal products. The objection was:

1. That the registration of said word has heretofore been refused by the Commissioner. "In his statement the Examiner bases his refusal on the ground that the word 'Sterling' has hitherto been used in connection with a similar product. He calls attention to the recent decision in the case of *Beaumort*, 62 MS. Dec. 15. . . . It appears that the pound sterling mark, if made the sole essential feature of the trade-mark, would be registrable. It also appears that the pound sterling mark is the feature of this mark which is most prominent, and is calculated to attract attention from the ordi-

¹ 62 MS. Dec. 438.

nary purchaser." The decision of the Examiner is reversed. (GREELEY, *Acting Com.*, Oct. 26, 1897.)

§ 929. *Ex parte Consolidated Rubber Works*,¹ application for registration of the word "Kangaroo" for rubber tubing and tires, which had been refused by the trade-mark Examiner, from whom this appeal was made. It was urged by the applicant that the registration that had been made of the word "Kangaroo" for velocipedes or bicycles is no bar to this application. *Held*, the applicant is clearly right in this contention. Pneumatic tires and tubing for tires are recognized in the market as distinct articles of trade from the bicycles on which the tires may be used. The decision of the Examiner is reversed. (GREELEY, *Acting Com.*, Oct. 30, 1897.)

§ 930. *Oberhaeuser and Landauer v. Pastor Kneipp Medicine Co.*,² appeal from the Examiner of Interferences refusing to transmit to the primary Examiner the motion to dissolve the interference between the above parties. The statement of the Examiner of Interferences is:

The gist of the contention made is that since Oberhaeuser and Landauer alone have the exclusive right to the use of the mark in issue, the Pastor Kneipp Medicine Company did not and could not comply with the statutory requirements prerequisite to the granting of the certificate of registration; and, as it is claimed, having shown that the Pastor Kneipp Company has not used the trade-mark in lawful commerce, etc., the certificate issued to them is invalid, and the Commissioner of Patents is without jurisdiction to determine the question of ownership; and, that being so, the interference must, of necessity, be dissolved without judgment upon the question of ownership. . . . *Held*:

"It may be that the Pastor Kneipp Medicine Company was not entitled to registration for the reason that it had not complied with the statute relating to foreign trade; but it does not follow from that that Oberhaeuser and Landauer are entitled to registration.

¹ 62 MS. Dec. 457.

² 63 MS. Dec. 61.

“It is just as important that the office determine from the testimony whether Oberhaeuser and Landauer were the first to adopt and use the mark as it is to determine whether the Pastor Kneipp Medicine Company has complied with the law; and this can be done by letting the case proceed to final hearing on priority.”

The decision of the Examiner of Interferences is affirmed. (GREELEY, *Acting Com.*, Dec. 6, 1897.)

§ 931. *Ex parte G. W. Dunbar's Sons*, appeal from the Trade-Mark Examiner's refusal of the registration of the words “Old Fashion” applied to Louisiana molasses.¹

Refusal is based on the deceptive character of the term, as implying that the preparation is manufactured in an old style or method, and, consequently, superior in grade; and that the words, accordingly, lack the arbitrary and fanciful character which should authorize the symbol to be registered as a distinguishing mark of origin. Examiner's decision affirmed. (GREELEY, *Acting Com.*, Dec. 6, 1897.)

§ 932. *McGale v. Simard & Mignault*,² this is an appeal on motion from the Examiner of Trade-Marks refusing to dissolve an interference between said parties. The issue is “The name ‘Dr. Coderre’ applied to medical preparations.” The basis of the appeal was that the interference was void for irregularity. McGale is seeking registration for a *fac-simile* of the signature of “J. Emery Coderre.” Each of the trade-marks registered by Simard & Mignault consists of the name “Dr. Coderre,” together with certain other words. Neither of them contains the *fac-simile* of the signature of *Dr. Coderre*, or of *J. Emery Coderre*. Simard & Mignault cannot, by reason of the registration of their trade-marks here mentioned, prevent the use by McGale of the trade-mark which he seeks to register. Nor would the registration of the *fac-simile* sought to be registered by McGale — which *fac-simile* does not appear to be used by Simard & Mignault — confer any right on him to prevent the use by them of the registered trade-marks. Examiner reversed. (GREELEY, *Acting Com.*, Dec. 9, 1897.)

¹ 63 MS. Dec. 65.

² 63 MS. Dec. 99.

§ 933. *Debnam v. O'Meara*,¹ this is an appeal on motion from the decision of the primary Examiner refusing to dissolve the above-entitled interference. The grounds of the motion set up by O'Meara are —

1. Want of interference in fact.
2. Irregularity in declaring.

“The issue of the interference is the word ‘Royal’ as applied to headache powders in tablets. O'Meara has obtained registration for the word Royal in connection with the words Headache Powders. Debnam is seeking registration of the word Royal with the words Headache Tablets, and in connection with the words Headache Powders. . . . That the tablets and powders are considered equivalents by Debnam is evidenced by his statement.”

The grounds of this motion are equally untenable. O'Meara contends that, in view of his position as an applicant for registration, Debnam should have been required to show his use in foreign countries prior to O'Meara's date of registration. This is a matter that should be left to the discretion of the primary Examiner. The Examiner of Interferences at the proper time will make his report. The decision of the primary Examiner is affirmed. Affirmed by GREELEY, *Acting Com.*, Dec. 15, 1897.

¹ 63 MS. Dec. 122.

CHAPTER XI.

TREATIES, CONVENTIONS, LAWS, DECREES, ETC., FOR PROTECTION
OF TRADE-MARKS.

- § 934. Portugal, decree as to Concurrence Déloyale.
- § 935. France and Roumania, treaty between.
- § 936. Great Britain and Roumania, treaty between.
- § 937. Switzerland and Greece, treaty between.
- § 938. Italy and Columbia, treaty between.
- § 939. Italy and Paraguay.
- § 940. Morocco, no special laws in.
- § 941. Sweden — law for modification of former law in.
- § 942. France — circular of Minister of Commerce of.
- § 943. Sweden and Norway, similar protection awarded in.
- § 944. Mexico — Decree of Minister of Finance of.
- § 945. Brazil — as to counterfeiting labels and foreign marks in.

§ 934. IN Portugal, the execution of the decree of December 15, 1894, is rigidly enforced. As to Concurrence Déloyale (Art. 255), it is provided that every time that the proprietor of a patent, of a mark, of a name, etc., shall be injured by the Act of Unfair Competition, and the chief of the Division of Industry shall obtain knowledge thereof, whether directly by complaint of the party in interest, — who shall have furnished all the elements of appreciation required, — or indirectly through other channels, said officer shall make the necessary communication to the Director General of Customs, or to the representative of the public ministry near the Tribunal of Commerce, according to the facts of the case.

1. The said chief of the Division of Industry shall embrace in his communication a report of the facts of the case, and indicate the nature of the title possessed by the injured party.

2. The intervention of said chief of Division, etc., shall be the same, whether the complainant is a citizen or a foreigner.

By Art. 258, the said Chief, etc., shall refuse to effect the registration of trade-marks or names, or the deposit of designs

when by such means a *concurrency déloyale* might ensue, or a false indication of the origin of goods might be made, etc.¹

§ 935. By the treaty between France and Roumania of February 27 to March 11, 1895, Art. I., it is provided: Every product bearing a false indication of origin in either of the two countries, or in a place subject to one of them, which shall, directly or indirectly, indicate the country or place of origin, shall be seized in either of the two countries, on proper information. The seizure shall be effectuated in the state where the false indication shall be affixed, or in that in which the product shall have been furnished with such false information.

If the legislation of either country shall not permit the seizure or importation, the seizure shall be substituted by prohibition of importation. (Provision is made for ample judicial redress.)²

§ 936. Great Britain and Roumania, by treaty, March 20 to April 1, 1895, Art. 1, has substantially the same provisions as the foregoing (between France and Roumania). Art. 2 provides that: The seizure shall be made at the request of the party in interest or in conformity with the order of the public ministry, in accordance with the interior legislation of each state. The authorities shall not be held responsible for effecting the seizure of the products *in transitu*. . . . Art. 4. The present dispositions shall not be an obstruction to the vendor — including his name or his address — of products coming from a country different from that of sale; but in that case the address, or the name, shall be accompanied by the precise indication of the place or country fabricating the product. Art. 5 gives the tribunals of the respective countries full judicial cognizance. Art. 6 applies to all the colonies of Great Britain and her foreign possessions, except India, Canada, Newfoundland, Cape of Good Hope, Natal, New South Wales, Victoria, Queensland, Tasmania, and other colonial parts of Australia,³ etc.

¹ La Propriété Industrielle, 1896, p. 1, *et seq.*

² Ibid. 1896, p. 20.

³ Ibid. 1896, p. 21.

§ 937. Switzerland and Greece, by treaty of November 21 to December 3, 1895, have substantially the same provisions for the mutual protection of trade-marks.¹

§ 938. Italy and Columbia adopted essentially the same provisions October 27, 1892.²

§ 939. Italy and Paraguay, by convention of October 27, 1892, have incorporated the same provisions.³

§ 940. In Morocco there do not exist special laws for the protection of trade-marks; but by virtue of a sovereign decree of the Sultan, October 24, 1892, protection to France, England, Germany, and Belgium is accorded.⁴

§ 941. (Sweden, etc.) Law for the modification of certain parts of the law of July 5, 1884, for the protection of marks of fabric and of commerce.

We, Oscar, by the grace of God, King of Sweden, of Norway, of the Goths, and the Vandals, make known that with the concurrence of the Diet, we have found good to decree that the Articles 4, 7, and 16 of the law (above mentioned), shall have the following tenor: —

ART. 4. There shall not be registered marks composed only of ciphers, of letters, and of words, not distinguished by form particularly technical, which may be considered as figurative marks. Registration, however, shall not be refused if a mark is composed of words that can be considered as a denomination especially created for special merchandise, indicated in conformity with Article 3, and if the said denomination has for its object only to designate the origin, the nature, the quantity, and the price of the merchandise,⁵ or —

2. Marks which improperly contain a peculiar commercial name other than that of the registrant, or an inscription belonging to a third person.

3. A mark embracing public arms, or stamps.

4. Designs or other reproductions of a scandalous nature.

5. A mark identical with that of another previously registered, or in its nature calculated to mislead.

Other provisions follow of a similar nature, etc.

¹ La Propriété Industrielle, 1896, p. 21.

² Ibid. 1896, p. 36.

⁴ Ibid. 1896, p. 36.

³ Ibid. 1896, p. 36.

⁵ Ibid. 1897, p. 1.

§ 942. The Minister of Commerce (France), on January 28, 1897, issued a circular wherein he treats of the counterfeits of French trade-marks in foreign nations, and he points out to his fellow-citizens a much needed protection. He says that on April 14, 1891, at Madrid, an Arrangement was signed with Belgium, Brazil, Spain, Italy, Netherlands, Portugal, Switzerland, and Tunis, where, by a single registration at Berne, Switzerland, as an intermediary, protection is assured in all those countries.¹

§ 943. In Sweden and Norway, the same protection was given to the latter as to the former, in accordance with the law of April 1, 1885, as to marks of trade and of commerce, and to all in Norway engaged in manufacture, in agriculture, in mining, in commerce, or any other industry. All trade-marks must be duly registered in order to insure protection.²

§ 944. In Mexico, a notice has been given and especial attention called in regard to the law of 1889, which required foreign owners of trade-marks applying for registration to appoint a special agent in the Republic with power to deposit the mark with the Ministry of Finance. It is stated therein, that a large number of Europeans and Americans have registered their marks in Mexico. The country is inundated with counterfeits of foreign specialities having no registered marks, above all fire-arms, alimentary conserves, cutlery, and perfumery. To remedy this evil the Minister of Finance has published a decree obliging Mexican manufacturers of articles, to which are given a foreign appearance by reason of simulated trade-marks and labels, to deposit with him, in future, said marks and labels; that it may be understood that they do not counterfeit foreign trade-marks already registered. Domestic products bearing marks not registered shall be considered as foreign products, and treated as such in the bureau of customs, in ports, and in the interior.³ (*Revue Diplomatique.*)

¹ La Propriété Industrielle, 1897, p. 41. NOTE. — In a communication coupled with the above is a statement that nearly 8,000 trade-marks are annually registered in France.

² La Propriété Industrielle, 1897, p. 10.

³ Ibid. 1897, p. 80.

§ 945. A recent decree in Brazil puts into vigor the new registration law of trade-marks and indications of origin, applied to Brazilian manufactures. By the terms of the regulation, the counterfeiting of labels and foreign marks on native products is punished, and the importation of foreign goods bearing false marks and labels is prohibited. There is equally prohibited the sale of drugs without the indication of origin of name and price, and labels bearing misleading foreign language. . . . There is authorized the exceptional use of denominations such as “*bitter*,” “*brandy*,” “*cognac*,” “*fernet*,” “*kirsch*,” and “*rhum*,” which have not equivalents in the Portuguese language; and the indication must also be given of the names of makers, or originators, if they are foreigners.¹ (*Le Soleil*.)

¹ La Propriété Industrielle, 1897, p. 149.

APPENDIX.

EXCHANGE OF NOTES BETWEEN THE NETHERLANDS LEGATION AND THE DEPARTMENT OF STATE.

Dated February 10, 1883, and February 16, 1883.

THE United States Secretary of State had transmitted to him an official edition of the Dutch Law relative to trade-marks, bearing date of May 25, 1880.

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The Secretary of State responded, *inter alia*:

“I have taken due note of your statement that this law makes no distinction between Netherlanders and foreigners, so that the citizens of the United States are treated in the Low Countries on the same footing as the natives thereof in all that concerns the registration and protection of their commercial and trade marks.”

This simple interchange of civilities fixed the law of the case.

EXCHANGE OF NOTES BETWEEN THE SWISS LEGATION AND THE DEPARTMENT OF STATE.

Dated April 27, 1883, and May 14, 1883.

SWISS LEGATION, Washington, April 27, 1883.

To the MINISTRY OF FOREIGN AFFAIRS, Washington.

MR. SECRETARY OF STATE, — The undersigned, Minister of the Swiss Confederation, has this day had the honor to receive your note of the 24th instant, whereby you had the kindness to acquaint him with your views concerning an exchange of de-

clarations between the United States and the Swiss Confederation, relative to the mutual protection of trade-marks.

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As regards the question whether the principle of reciprocity is embodied in the Federal Law of December 19, 1879, the undersigned has the honor to invite your attention to the text of Article 7, paragraph 2, of the Federal Law of December 19, 1879, and also to the contents of the message of the Federal Council relative thereto. In the aforesaid paragraph of the law of December 19, 1879, it is expressly provided that producers and merchants, whose business is carried on in a State *which accords the right of reciprocity to Swiss citizens*, may have their marks registered in the same manner as Swiss citizens. But one condition is added, viz., that foreigners shall be obliged to prove that these marks are *already* protected in the State to which they belong, the sole object of which reservation is to prevent foreigners from depositing, with fraudulent intent, under the protection of reciprocity, marks for which they cannot claim protection in their own country. The Federal Council, moreover, in its message of October 13, 1879, whereby it transmitted to the Federal Chambers a bill for the protection of trade-marks, made the following declaration touching trade-marks: "As regards foreign trade-marks we are of opinion *that Switzerland should stand upon the ground of reciprocity*, and that this is the only position that should be taken by us in the interest of our industry."

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The undersigned thinks that he has, by the foregoing, furnished proof that the Confederation recognizes the principles of reciprocity, as regards the international protection of trade-marks, as an integral part of its public law, and that the United States may, with the most perfect confidence, enter into such an arrangement with the Confederation.

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CONVENTION AND FINAL PROTOCOL BETWEEN THE UNITED STATES AND MANY OF THE NATIONS FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Concluded at Paris, March 20, 1883.

Exchange of Ratifications by Signatory Powers, June 6, 1884.

Adhesion to the Convention advised by the Senate, March 2, 1887.

Ratified by the President, March 29, 1887.

Accession of the United States to the Union announced by the Minister Resident and Consul-General of the United States at Berne to the Federal Council of Switzerland, May 30, 1887.

Proclaimed, June 11, 1887.

The following are Articles especially relating to trade or commercial marks :

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ARTICLE II.

The subjects or citizens of each of the contracting States shall enjoy, in all the other States of the Union, so far as concerns patents for inventions, trade or commercial marks, and the commercial name, the advantages that the respective laws thereof at present accord, or shall afterwards accord to subjects or citizens. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each State.

ARTICLE III.

Are assimilated to the subjects or citizens of the contracting States, the subjects or citizens of States, not forming part of the Union, who are domiciled or have industrial or commercial establishments upon the territory of one of the States of the Union.

ARTICLE IV.

Any one who shall have regularly deposited an application for a patent of invention, of an industrial model or design, of a trade or commercial mark, in one of the contracting States, shall enjoy for the purpose of making the deposit in the other States, and

under reserve of the rights of third parties, a right of priority during the periods hereinafter determined.

In consequence, the deposit subsequently made in one of the other States of the Union, before the expiration of these periods cannot be invalidated by acts performed in the interval, especially by another deposit, by the publication of the invention or its working by a third party, by the sale of copies of the design or model, by the employment of the mark.

The periods of priority above-mentioned shall be six months for patents of invention and three months for designs or industrial models, as well as for trade or commercial marks. They shall be augmented by one month for countries beyond the seas.

ARTICLE VI.

Every trade or commercial mark regularly deposited in the country of origin shall be admitted to deposit and so protected in all the other countries of the Union.

Shall be considered as country of origin, the country where the depositor has his principal establishment.

If this principal establishment is not situated in one of the countries of the Union, shall be considered as country of origin that to which the depositor belongs.

The deposit may be refused, if the object, for which it is asked, is considered contrary to morals and to public order.

ARTICLE VII.

The nature of the production upon which the trade or commercial mark is to be affixed cannot in any case be an obstacle to the deposit of the mark.

ARTICLE VIII.

The commercial name shall be protected in all the countries of the Union without obligation of deposit, whether it forms part or not, of a trade or commercial mark.

ARTICLE IX.

Every production bearing, unlawfully, a trade or commercial mark, or a commercial name, may be seized upon importation into those of the States of the Union in which such mark or such commercial name has a right to legal protection.

The seizure shall take place either at the instance of the public prosecutor or of the interested party, conformably to the domestic legislation of each State.

ARTICLE X.

The provisions of the preceding article shall be applicable to every production bearing falsely as indication of origin, the name of a stated locality when this indication shall be joined to a fictitious commercial name or a name borrowed with fraudulent intention.

Is reputed interested party every manufacturer or trader engaged in the manufacture or sale of this production when established in the locality falsely indicated as the place of export.

ARTICLE XI.

The High Contracting parties engage between themselves to accord a temporary protection to patentable inventions, to industrial designs or models as well as to trade or commercial marks for the productions which may figure at official or officially recognized International Exhibitions.

ARTICLE XII.

Each one of the High Contracting parties engages to establish a special service of Industrial Property, and a Central Dépôt, for giving information to the public, concerning patents of invention, industrial designs or models and trade or commercial marks.

ARTICLE XIII.

An International Office shall be organized under the title of "International Bureau of the Union for the Protection of Industrial Property."

This Bureau, the cost of which shall be supported by the Governments of all the contracting States, shall be placed under the high authority of the Superior Administration of the Swiss Confederation, and shall work under its supervision. Its powers shall be determined by common accord between the States of the Union.

FINAL PROTOCOL.

4. Paragraph 1 of Article 6 is to be understood in the sense that no trade or commercial mark shall be excluded from protection, in one of the States of the Union, by the mere fact that it may not satisfy, in respect to the signs composing it, the condi-

tions of the laws of this State, provided that it does satisfy, in this regard, the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each of the States shall receive its due application.

In order to avoid all misinterpretation, it is understood that the use of public armorial bearings and decorations may be considered contrary to public order in the sense of the final paragraph of Article 6.

NOTE. — So far as concerns this country, legislation is necessary for the enforcement of the foregoing. See opinion of the Attorney-General, in the Preface to this Supplement.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND
DENMARK FOR THE RECIPROCAL PROTECTION OF TRADE-
MARKS AND TRADE LABELS.

Concluded at Copenhagen, June 15, 1892.

Ratification advised by the Senate, July 21, 1892.

Ratified by the President of the United States, July 29, 1892.

Ratified by the King of Denmark, September 23, 1892.

Ratifications exchanged at Copenhagen, September 28, 1892.

Proclaimed, October 12, 1892.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the Kingdom of Denmark for the reciprocal protection of Trade-Marks and Trade Labels was signed by their respective Plenipotentiaries at the City of Copenhagen, on the fifteenth day of June, one thousand, eight hundred and ninety-two, the original of which Convention, being in the English and Danish languages, is word for word as follows :

CONVENTION.

With a view to secure for the manufacturers in the United States of America, and those in Denmark, the reciprocal protec-

tion of their Trade-Marks and Trade Labels, the Undersigned, duly authorized to that effect, have agreed on the following dispositions.

ARTICLE I.

The subjects or citizens of each of the High Contracting Parties shall in the Dominions and Possessions of the other have the same rights as belong to native subjects or citizens, in everything relating to Trade-Marks and Trade Labels of every kind.

Provided, always, that in the United States the subjects of Denmark, and in Denmark, the citizens of the United States of America, cannot enjoy these rights to a greater extent or for a longer period of time than in their native country.

ARTICLE II.

Any person in either country desiring protection of his Trade-Mark in the Dominions of the other must fulfil the formalities required by the law of the latter; but no person, being a subject or citizen of one of the contracting States, shall be entitled to claim protection in the other by virtue of the provisions of this convention, unless he shall have first secured protection in his own country in accordance with the laws thereof.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE
EMPIRE OF JAPAN.

COMMERCE AND NAVIGATION.

Concluded at Washington, November 22, 1894.

Ratification advised by the Senate, February 5, 1895.

Ratified by the President, February 15, 1895.

Ratified by the Emperor, February 27, 1895.

Ratifications exchanged at Washington, March 21, 1895.

Proclaimed, March 21, 1895.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, a Treaty of Commerce and Navigation between the United States of America and the Empire of Japan was concluded

and signed by their respective Plenipotentiaries at the city of Washington on the 22d day of November, 1894, which treaty, being amended by the Senate of the United States, and being in the English language, is word for word as follows :

The President of the United States of America and His Majesty the Emperor of Japan, being equally desirous of maintaining the relations of good understanding which happily exist between them, by extending and increasing the intercourse between their respective States, and being convinced that this object cannot better be accomplished than by revising the Treaties hitherto existing between the two countries, have resolved to complete such a revision, based upon principles of equity and mutual benefit.

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ARTICLE XVI.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trade-marks, and designs, upon fulfilment of the formalities prescribed by law.

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PROTOCOL.

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But nothing contained in this Protocol shall be held to limit or qualify the right of the Japanese Government to restrict or to prohibit the importation of adulterated drugs, medicines, food, or Leverages ; indecent or obscene prints, paintings, books, cards, lithographic or other engravings, photographs, or any other indecent or obscene articles ; articles in violation of the patent, trade-mark, or copy-right laws of Japan ; or any other article which for sanitary reasons, or in view of public security or morals, might offer any danger.

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CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND
THE EMPIRE OF JAPAN.

PATENTS, TRADE-MARKS, AND DESIGNS.

Concluded at Washington, January 13, 1897.

Ratification advised by the Senate, February 1, 1897.

Ratified by the President, February 2, 1897.

Ratified by the Emperor, March 6, 1897.

Ratifications exchanged at Tokyo, March 8, 1897.

Proclaimed, March 9, 1897.

The President of the United States of America and His Majesty the Emperor of Japan, being desirous of securing immediate reciprocal protection for patents, trade-marks, and designs, have resolved to conclude a Convention for that purpose, and have appointed as their Plenipotentiaries:

Article XVI of the Treaty of Commerce and Navigation between the United States of America and Japan concluded at Washington on the twenty-second day, the eleventh month, the twenty-seventh year of Meiji, corresponding to the twenty-second day of November, eighteen hundred and ninety-four of the Christian Era, shall have full force and effect from the date of the exchange of ratifications of this Convention.

The Bureau of Commerce, of the DEPARTMENT OF STATE, at Washington, D. C., January 11, 1898, has issued the following on

LABELS AND TRADE-MARKS IN CHINA.

Commercial missions must bring large results to nations who take intelligent methods to ascertain the needs of the world's markets and adjust their manufactures to the demands of distant peoples. . . . The establishment of a commercial museum in Philadelphia and the projecting of another in San Francisco is the first organized effort of the United States business men to supply needful information and illustration of the world's products and demands. One of the most valuable uses of such museums is the exhibition of samples of the kinds of goods used in foreign

lands and illustrations of the methods of preparing and putting up such goods as command the favor of the purchasers.

A writer in a recent number of an English commercial paper says: "Closely allied to the previous grounds of the success of foreign producers is the question of packing, as to which there is a general consensus of opinion that our (England's) foreign competitors, and in particular, perhaps, the United States, take much more trouble than we do. The following instance is cited: Hong-kong—candles. British makers absolutely decline to alter their system of packing to that adopted by continental markets; consequently, they have lost the whole trade. The personal factors which enter into successful competition must not be ignored. It is important that our manufacturers of textile fabrics should know what are the desires or prejudices of purchasers in the different markets of the world, as regards quality, weight, sizing, dressing, and the finish which will often sell low-priced goods; preferred lengths and widths, and the manner of putting up and packing, freight charges, etc. An unfortunate trade-mark will often doom an otherwise desirable product to failure. This is particularly true in China."

Mr. Gardner, English consul at Amoy, says: "It has not unfrequently occurred that the sale of foreign goods has been greatly crippled by having some label placed upon it that was offensive to Chinese superstition or tastes. Many colors have peculiar recognition by the people; some offend their tastes and others their superstitions. Some are all right on some kinds of goods and all wrong on others. The Chinese will often buy biscuits, needles, thread, matches, soap, medicine, scent, sweets, etc., for the sake of getting a lucky label. Some colors and combinations of colors are to the Chinese unlucky." The same gentleman has furnished his Government with some four hundred designs for trade-marks and labels which, in his judgment, would be popular with the Chinese people. I have no means of knowing what he has furnished, but from my own observation of what is displayed in shops and what is manifestly pleasing to the people, I give herewith a few specimens of things most frequently seen, and which, I therefore think, must be popular.

Simply naming these things will not supply sufficient data from which to prepare them. It must be remembered that Chinese art is very peculiar, and a tiger, as ordinarily represented by foreign artists, would not meet with favor with these people. It must be

a tiger according to Chinese imagination and art, of unreasonable length of body or bigness of head or curve of tail, and impossible attitudes. On a popular Japanese match box is displayed a monkey standing on its front feet, head nearly touching the ground, with hind feet up in the air, and tail whipping the skies. The grotesque and even hideous, to the American mind, tickles the fancy of the dwellers in Far Cathay. No description can supply adequate information to an engraver or colorer by which he could produce the real thing, and any departure from the Chinese fancy in such things would brand the goods at once as the product of a "foreign devil" and doom it to defeat.

A Chinese dragon differs from a Japanese dragon in its contortions. A royal dragon must have five claws, while the plebeian beast has only four. A stork must always stand on one leg or, flying, must present an enormous spread of wings and trailing long legs. All Japanese birds, when flying, must have a tendency downward, never up or on a straight course. To a Japanese, nothing is preferable to the representation of snow-capped, sacred Fusi-yama, as seen on nearly all Japanese fans, screens, etc.

The following are some of the labels, trade-marks, etc., which would be useful in the trade of the Far East:

Animals. — Lion, tiger, deer, fawn, leopard, ape, elephant, camel, dragon, buffalo, man plowing with water buffalo, boy riding water buffalo, woman in bright robes holding a long-necked vase on her shoulder while on one side of her is a monkey holding up a chrysanthemum in its mouth. Many of these animals are represented in various attitudes — leaping, running, standing on hind legs — some with enormous heads out of all proportion to the body, while some have a long body out of all proportion to the other parts.

Trees. — Banyan, fir, pine, olive, palm, fern, yucca, cactus, tea plant, tea field, orange, banana, pineapple, etc.

Fish. — Dolphin, double dolphin, reversed, carp, double carp, crab, lobster, etc.

Birds. — Pheasant, peacock, paddy bird, stork, cormorant, duck, goose, cock, generally represented flying.

Flowers. — Chrysanthemum, sunflower, lily, rose, twining vines, jessamine, wisteria, etc.

Objects. — Women, archer, trident spear, umbrella, fans (open and shut), open fan with quotations from the classics written on them, long fans (oblong, square, and round, all having figures of

flowers, animals, birds, or butterflies painted on them), houses, temples, books, arches, coolies carrying chests of tea or other articles suspended from ends of bamboo, soldier, flags, banner, ships, junks, sampans, battle ship, men fishing with cormorants, tobacco pipe, opium pipe, abacus or Chinese calculating machine, dragons, a long dragon lantern borne aloft on poles by eight or ten men, kites of many shapes, men flying kites, men playing with shuttlecock with feet, wedding chair, wedding procession, lanterns in scores of different shapes, Chinese hats with different colored buttons, mountains, rivers, bridges of granite slabs with high, sharp arch, and canal boats in canal.

Geometrical Figures. — Square, triangle, circle, octagon, square enclosing circle, triangle or octagon and *vice versa*, a circle with triangles pendant, circle with triangles above and below, large octagon enclosing two smaller ones with figures between the lines and a circle in the centre and other combinations of figures, Chinese characters for good luck, happiness, longevity, health, prosperity, double happiness; checkered figures, stripes in bright yellow, green, blue, and red.

Fruit. — Pear, orange, pumalo, banana, grapes, lichee, mango, pineapple, arbutus, persimmon.

Insects. — Caterpillar, dragon fly, cricket, butterflies of many shapes and colors.

SAMUEL L. GRACEY, *Consul.*

FUCHAU, November 30, 1897.

GERMAN MERCHANDISE MARK LAW

OF MAY 12, 1894.

SECTION 1. Any person who desires to employ in his business a merchandise-mark to distinguish his merchandise from that of others, may declare it for registry in the Roll of Marks (*Zeichen Rolle*).

SECTION 2. The Roll shall be kept at the Patent Office. The declaration of a mark shall be made in writing to the Patent Office. Every declaration must be accompanied by a statement of the enterprise for which the mark is to be employed and a specification of the merchandise for which it is intended, as well

as a distinct representation of the mark and a description thereof so far as it may be necessary.

The Patent Office shall prescribe rules concerning other requirements of the declaration.

A fee of 30 marks (about \$7.50) shall be paid with the declaration of each mark, and at each renewal of the declaration a fee of 10 marks. If registration does not result from the first declaration, 20 marks of the fee shall be refunded.

SECTION 3. The Roll of Marks shall contain, first, the date of receipt of the declaration; second, the facts required to accompany the declaration by the first paragraph of section 2 of this law; third, the name and domicile of the proprietor of the mark and of his proxy, if any, as well as changes in the person, the name or the domicile of the proprietor of the mark or his proxy; fourth, the date of renewal of the declaration; fifth, the date of cancellation of the mark.

The Roll shall be free to public inspection.

Every registration and cancellation will be officially published. The Patent Office will publish periodically abstracts of registrations and cancellations.

SECTION 4. Registry on the roll will be refused for free marks (*Freizeichen*) as well as for those merchandise marks, first, which consist exclusively of letters or numerals, or of words containing indications of the mode, time or place of production; or of the quality, destination, price, quantity or weight of the merchandise; second, which contain the arms of German or foreign States, or those of a locality, parish, or union of towns situated in the country; third, which contain scandalous representations, or indications evidently at variance with the facts and liable to cause deception.

Cancelled marks cannot be registered anew in favor of another than the last proprietor for merchandise identical or analogous with that for which they were registered, until after two years from the date of cancellation.

SECTION 5. If the Patent Office shall regard that any declared mark is in conflict with one previously declared for similar merchandise under the law of November 30, 1874, or under the present law, it shall advise the owner of the earlier mark. If within a month he shall make no opposition to the registry of the new declared mark, it may be registered. In the contrary case the Office shall determine whether there is an actual conflict.

The omission of the notice contemplated in the preceding paragraph shall not constitute claim for indemnity.

SECTION 6. If the decision (sec. 5, par. 1) be that there is no conflict between the marks, the new declared one may be registered. If the decision be that conflict exists, registration shall be refused. In case the declarant shall desire to establish his right to registry notwithstanding the conflict, he must do so by action against the opposing party. Registry effected by virtue of a decision in his favor shall be effective as of the date of his original declaration.

SECTION 7. the rights resulting from the declaration or registry of a merchandise-mark pass by inheritance, and can be transmitted to other persons by testamentary disposition. They cannot however pass to others but with the business to which the mark appertains. The transfer shall be entered on the Roll of Marks at the instance of the successor, provided the assent of the original owner is satisfactorily established. If the original owner is deceased the successor must establish his title.

The new owner cannot benefit by the rights accruing from registration until the transfer has been recorded in the Roll of Marks.

Decisions and judgments of the Patent Office which require to be notified to the proprietor of a mark must be addressed to the proprietor of record. If he is deceased the Patent Office may, at its discretion, consider the notice as given, or cause search to be made for the heirs, in order to notify them.

SECTION 8. A mark can be cancelled from the Roll at any time on the demand of the owner.

Cancellation will take place by Office action, first, when ten years shall have expired since the declaration or renewal of the mark; second, when the registration should have been refused.

When there is a question of cancellation without the request of the owner, the Office shall give him notice. If he does not reply within a month the mark shall be cancelled. If he replies the question shall be decided by the Office. If such cancellation is under consideration by reason of expiration of the term of ten years, it will not take place, if, within one month from the notice, the owner of the mark shall renew it by the payment of 10 marks in addition to the renewal fee, when the renewal shall be regarded as having taken place at the expiration of the preceding term.

SECTION 9. A third party may demand the cancellation of a merchandise-mark, first, if by virtue of a prior declaration the mark has been registered in his name for similar merchandise in the Roll of Marks or in the registers of marks kept under the law of November 30, 1874; second, if the enterprise to which it appertains has not been maintained by the owner of record; third, if facts establish that the contents of the mark do not agree with actual conditions, and are liable to mislead.

When a mark, excluded from registry under the law of November 30, 1874, has been considered in commercial circles up to the enactment of this law as the distinctive sign of the merchandise of a particular concern, and this mark has been entered in the Roll of Marks in the name of another person under this law, the owner of said concern shall have until October 1, 1895, to demand its cancellation. If the demand is granted the mark may be registered in the Roll in the name of the applicant before the expiration of the period fixed by section 4.

The demand for cancellation is to be made in the form of an action at law against the record owner, or against his heirs if he is deceased.

If, before or after the beginning of the action, the mark has been assigned, the decision shall be effectually operative as regards the assignee. The provisions of sections 63-66 and 73 of the Code of Civil Procedure apply to the right of the assignee to intervene in the suit. In the second case contemplated in the first paragraph of this section, the demand for cancellation may be addressed in the first place to the Patent Office, which shall give notice thereof to the person registered as proprietor. If he makes no opposition in one month the mark shall be cancelled. If he makes opposition, the applicant may prosecute his demand for cancellation by an action at law.

SECTION 10. Declarations, assignments for record, and objections to cancellation, will be despatched by a summons and a decision, as in the procedure concerning patents. In the case contemplated in section 5 there will be no summons.

An appeal is open to the applicant from a rejection of his application, and also to the owner of a mark from a decree of cancellation in the face of his protest. These appeals are to be filed in the Patent Office within a month of notice.

Notifications concerning registry, assignment or cancellation of marks shall be given by registered letter. If notification can-

not be given in Germany, it shall be sent by mail as provided in sections 161 and 175 of the Code of Civil Procedure.

SECTION 11. The Patent Office shall give opinions upon questions concerning registered merchandise-marks on request of the courts, when the inquiry relates to a legal proceeding in which experts differ.

SECTION 12. The effect of registration of a mark shall be to confer on the registrant the exclusive right to affix the mark to merchandise of the species named in the declaration, or to its wrappers or envelopes; to put on the market goods so marked; and to employ the mark on advertisements, price-lists, business-letters, press-notices, invoices, and analogous matter.

In case of cancellation no right shall be inferred from registration for the period during which the cause of cancellation existed.

SECTION 13. Registration of a mark shall not prevent any person from employing, even in an abridged form, on his goods or on their inclosure, his name, firm-name, or residence, nor indications concerning the mode, time or place of manufacture, or the quality, destination, price, quantity or weight of the goods, nor from making use of similar indications in trade.

SECTION 14. If any person shall knowingly or by gross carelessness illegally apply to his goods or their inclosures, or to his advertisements, business-letters, price-lists, and the like, the name or firm-name of another or a mark protected under the present law, or shall put in circulation or on sale merchandise thus illegally marked, he shall be bound to indemnify the injured party. If he shall commit this act knowingly he shall be further punished by a fine of 50 to 5,000 marks, or imprisonment not exceeding six months. Penal action shall not proceed but on complaint, and it may be withdrawn.

SECTION 15. If any one, with the intent to cause deception in commerce, shall without authority use upon goods, or their inclosures, or on advertisements, price-lists, business-letters, press-notices, invoices, etc., a device considered in commercial circles as the distinctive sign of another person's similar merchandise; or if any one, with the same intent, shall put in circulation or offer for sale goods so marked, he shall be bound to indemnify the injured party, and shall be liable to a fine of from 100 to 3,000 marks, or imprisonment not exceeding three months. Penal action shall only take place on a complaint, and it may be withdrawn by the plaintiff.

SECTION 16. Any one who, with intent to cause deception as to the quality or value of goods, shall have falsely affixed thereto, or to their wrappers or envelopes, or used in his advertisements, price-lists, business-letters, press-notices, invoices, etc., the arms of a State, or the name or arms of a locality, community, or more extended communal union, and any one who with the same object shall have put in circulation or offered for sale goods so marked, shall be liable to a fine of from 50 to 5,000 marks, or imprisonment not exceeding six months.

The employment of names, which by the usages of trade serve to designate certain goods without indicating their origin, does not come within the scope of this provision.

SECTION 17. Foreign goods unlawfully marked with the name of a German firm or place, or with the merchandise-mark registered in the Roll of Marks, shall be liable to seizure and confiscation upon entry into Germany for importation or transit, on the demand of the injured party, who shall give security. Seizure may be effected by the officers of custom and revenue. Confiscation shall be adjudged by a penal decision of the executive authority (section 459, Code of Penal Procedure).

SECTION 18. In lieu of the damages contemplated in this law, on the demand of the injured party, there may be awarded in excess of the penalty an indemnity to be paid to him not exceeding 10,000 marks. Persons condemned to pay this indemnity are held for it jointly. The allowance of this indemnity excludes all other claims for damages.

SECTION 19. On a condemnation under sections 14, 15, 16, or 18, the judgment shall order the illegal mark effaced from all articles in possession of the condemned. If it cannot be otherwise done, the destruction of the goods may be ordered.

In case of a penal condemnation there shall be accorded to the injured party in the cases contemplated in sections 14 and 15 the privilege of publishing the judgment at cost of the convicted party. The judgment shall determine the nature of the publication and the period within which it shall be made.

SECTION 20. The application of the provisions of this law shall not be prevented by any modifications that may be employed in the reproduction of foreign names, firms, marks, arms, and any other distinctive signs of merchandise, if, in spite of such modifications, the possibility of mistake is not avoided.

SECTION 21. In civil suits in which by complaint or rejoinder

a claim is made founded on the provisions of this law the hearing and final decision shall be referred to the Imperial Court under section 8 of the introductory act to the judicature law.

SECTION 22. Whenever German goods introduced into a foreign country, either as imported or in transit, shall be required to be marked to show their German origin, or shall be treated less favorably by officers of customs than the goods of any other country in respect to the marks they are required to bear, the Federal Council is empowered to impose a corresponding charge upon foreign goods on importation into Germany or introduced for transit, and it may ordain the seizure and confiscation of the goods in case of contravention. Seizure shall be made by the customs and revenue officers. Confiscation shall be adjudged by a penal decision of the executive authorities (section 459, Code of Penal Procedure).

SECTION 23. A person not having an establishment in Germany can have a claim to the protection of this law only when according to a publication in the *Reichs-Gesetz-Blatt*, the State in which his establishment is situated accords to German merchandise-marks protection to the same extent as to domestic marks.

The protection of a merchandise-mark and the rights resulting from registry can be claimed only through the medium of a proxy residing in the country. Such proxy shall have power to represent his principal in the procedure before the Patent Office under this law, as well as in civil actions concerning the mark; he shall also be empowered to institute penal actions. Either the court within whose protection the proxy is domiciled or that of the place where the Patent Office is situated is competent to try suits against the registered owner of a mark.

Any one who shall make declaration of a foreign mark, will have to show at the same time that he has applied for and obtained legal protection for it in the State where his establishment is situated. Unless otherwise provided in international conventions, registration cannot take place if the mark does not satisfy the requirements of this law.

SECTION 24. The provisions of the law of November 30, 1874, for the protection of marks, shall up to October 1, 1898, continue applicable to merchandise-marks registered in conformity with said law. At any time up to October 1, 1898, these marks may be declared for registry in the Roll of Marks as provided in this law, and shall be subject to all its provisions. Registry cannot

be refused to marks inserted in the Register of Marks under an ancient provincial law. The registration shall be made without expense and as of the date of the first declaration. With respect to the contents of the first registration a certificate must be produced from the authority formerly presiding over registration.

Protection hitherto assured to merchandise-marks shall expire when registry has been effected on the Roll of Marks, or, in default of registry, on October 1, 1898.

SECTION 25. Necessary rules for the execution of this law in matters concerning the organization and conduct of business at the Patent Office, as well as the procedure to be followed therein, shall be established by an imperial ordinance with the assent of the Federal Council.

SECTION 26. This law shall go into force the 1st of October, 1894.

From that date declarations of merchandise-marks will no longer be accepted under the law of November 30, 1874, for the protection of marks.

ADDENDA.

THE Act of June 23, 1857, was modified as follows by the President of the French Republic on May 3, 1890:

ARTICLE 1. Article 2 of the law of June 23, 1857, relative to marks of trade and commerce are modified as follows:

No one can claim the exclusive property of a mark who has not deposited the same with a clerk of the Tribunal of Commerce of his domicile;

1. Three copies of the *fac-similes* of said mark;
2. The stereotype plate of said mark.

In case of the deposit of several marks belonging to the same person, a single application only is required; but there should be deposited for every trade-mark three *fac-similes*, or as many stereotypes as there are different variations of the mark. One of the copies deposited shall be retained by the depositor, with the signature of the clerk attached, and bearing the indication of the day and the hour of deposit.

The dimension of the stereotype must not exceed 12 centimetres each way. The stereotypes shall be returned to the depositor on the official publication of the mark.¹

¹ 36 Annales, 154.

INDEX.

[References are to sections. Sections 1 to 691 are in the original volume ;
Sections 692 to 945 are in the Supplement.]

A.

ABANDONMENT, (see Chapter XV.)

- sometimes an affirmative defence, 674.
- error in arguing from supposed analogies, 675, 676, 679.
- of mark differs from that of other property, 675.
- discarded symbol may be adopted by others, 677.
 - resumed by original proprietor, 677, 690.
- when extinguishment of trade-mark, 678.
- permitting others to use is not, 681.
- patent cases do not furnish precedents, 679.
- what amounts to, 680, 681.
- giving necessary name to a product is, 220, 252.
- intention* is the criterion of, 498, 681, 686, 690.
- mere lapse of time is not conclusive of, 681.
- is a fact, and not a conclusion of positive law, 681.
- must be established by the strongest proof, 681.
- may arise by express declaration, or by conduct, 681.
- non-resistance to registration by another, not fatal, 682.
- what neglect operates as forfeiture, 681.
- forbearance to sue is not abandonment, 685.
- distinguished from neutralization of symbol, 686-689.
- in one country is in law *total* abandonment, 689.

ABRAHAM, dealt in money current with merchants, 10.

ABSTRACT SYMBOL,

- there is no property in an, 46, 52, 61, 66, 129, 301, 302, 384, 450.
- reasons why it cannot be transferred, 363, 379, 380.

"A. C. A." case (*Amoskeag Manuf. Co. v. Spear*), 93, 94, 153-156.

ACCIDENTAL USE by others of same emblem, 383.

ACCOUNT IN EQUITY,

- an accounting of profits required, 506, 507, 517.
- not ordered where complainant negligent, 497.
- innocent vendor of spurious goods not to keep, 471.

"ACID PHOSPHATE," a mere medical description, 706.

[REFERENCES ARE TO SECTIONS.]

- ACQUIESCENCE IN USE OF MARK,**
 may not amount to abandonment, 681.
 defeats right to call for account in equity, 497.
- ACQUISITION OF TITLE** to mark, 53.
 by assignment, 57, 361-364.
- ACTION AT LAW,** as remedy for infringement, by statute, 346.
 at common law, 356.
 on the case for false representations in the Patent Office, 385.
 for slander of a trade-mark, 473.
- ACTS OF CONGRESS** in relation to trade-marks, (see Chaps. VI., VII.)
 that of July 8, 1870, considered, 26, 280 *et seq.*
 August 14, 1876, to punish counterfeiting of marks, 26, 371.
 March 3, 1881, providing for registration, 26, 282.
 August 5, 1882, amendatory thereof, 366.
- ADOPTION OF SYMBOL AS A TRADE-MARK,**
 is foundation of title, 45 *et seq.*, 301, 324, 361-364.
 by affixing to merchandise, 52, 54.
 title of, instantly perfected, 52, 306.
 avowal of intention to adopt is not adoption, 52.
 registration is not adoption, 48-52, 379, 380.
 must be in connection with a specific class of goods, 300 *et seq.*
 propriety must be observed in, 602.
- ADVERTISING,** distinctive means of, protected, 799.
- AFFIXING OF MARK TO MERCHANDISE,**
 what amounts to, 304, 305.
- AGENT** is civilly and criminally responsible, 58.
- “AKRON” case (*Newman v. Alford*),
 principle of that case applied, 182, 533.
- “AKRON DENTAL RUBBER,” infringed by “Dental Vulcanite,”
 771.
- ALDUS MANUTIUS,** his mark for books, Dolphin and Anchor, 14.
- ALIENAGE,** no bar to protection, 21, 287, 288, 689.
- ALLEGATIONS** in applications for registration, 576.
 must be clear and distinct, 583 *et seq.*
 not conclusive on Patent Office, 607.
- ALLUSIVE DEVICES,** standing for names, 198.
- ALTERNATE FORMS,** the doctrine of, 588, 606.
- AMENDMENTS,** of application papers, limited, 577, 578.
 enlarging claim require supplemental oath, 578.
 must not substitute other symbols, 578.
 to be made on sheets separate from the original, 579.
- “AMERICAN” for beer not a trade-mark, yet sign, &c., protected,
 721.
- AMERICAN CITIZEN,** may commercially be a foreigner, 294, 297.
- AMERICAN OIL CO.,** infringement on in France, 698.
- “AMERICAN SARDINES,” not a valid trade-mark, 134, 610.
- AMERICAN WATCHES,** etc., piracy on, 26, 369.

[REFERENCES ARE TO SECTIONS.]

- ANALOGUES OF THE TECHNICAL TRADE-MARK**,
 discrimination necessary, 83, 90, 100, 521.
 trade-names, 91, 521.
 labels, wrappers, advertisements, signs, 537, 538.
 names on conveyances, 560, 561.
 titles of publications, 546.
- “**ANATOLIA**” case (*McAndrew v. Bassett*), 184, 191.
- “**ANGOSTURA BITTERS**” case, 194.
- ANIMATE PROPERTY**, with owners’ marks, 16.
- ANTIQUITY** of proprietary marks, 1, 2, 11.
- “**ANTI-WASHBOARD SOAP**,” a trade-mark, not being descriptive,
 697.
- APPEAL** from Trade-Mark Examiner, 649.
 to Supreme Court, without regard to amount involved, 337.
- APPLICANT’S OWN NAME**, merely, is not a trade-mark, 326.
 use of, may be only a cover for fraud, 420, 420 *a*.
- APPLICATION FOR REGISTRATION**, (see Chapters VI., VII.)
 preliminaries to, 565.
 necessity for forms, 568.
 substance more important than technical form, 569.
 system of examination, 571.
 Office may plead in abatement, 572.
 papers serve purpose of declaration in an action, 573.
 issue joined, and law questions argued, 575.
 drawing and filing of application papers, 576.
 limited power of amendment, 577, 578.
 manner of making amendments, 579.
 design of oath, 580.
prima facie title of applicant to his mark, 581.
 essence of the mark to be presented, 582.
 indefiniteness of description, 583–585.
 breadth of claim, 586–590.
 degree of specificness, 591, 596, 600.
 hypothetical false models of application papers, 592–594.
 mere descriptive terms not valid marks, 596, 600.
- APPLICATION OF MARK TO MERCHANDISE**,
 is essential to title, 143, 304.
 mode of making application, or affixing, 305.
- “**ARAMINGO MILLS**” case (*Colloday v. Baird*), 186.
- ARBITRARY SYMBOLISM**, misconception as to nature of, 138.
- ARGENTINE REPUBLIC’S** registrations cannot take precedence of
 French registration, 863.
- ARMS**, national, not valid trade-marks, 261.
 of family may be essential features, 261.
- ART**, trade-mark not deemed a work of, 110.
- ARTICLE**, proper name of, not a trade-mark, 165–177.
 injurious in itself, not protected, 350.

[REFERENCES ARE TO SECTIONS.]

- ARTIFICIAL PERSON** may own trade-mark, 55, 317.
 but not so unless a trader, 55.
- “**ASEPSIN**,” antiseptic salt from wintergreen, 694.
- “**ASPHALTE DE SEYSSEL**,” being geographical, not a mark, 598.
- ASSAY MARKS** in England, France, and Switzerland, 19.
- ASSESSMENT OF DAMAGES**, (see Chapter XI.)
 direct and immediate consequences to be regarded, 504 *et seq.*
 one cannot avail himself of his own neglect, 504, 510.
 actual damages to be recovered, 503.
 plaintiff not held to exact statement, 504.
 plaintiff's loss, not defendant's gain, the criterion, 504.
 rule varies from that in patent cases, 515, 516.
 accounting in equity for profits, 507, 517.
 wrong-doer not allowed to be the judge, 504, 518.
- ASSIGNMENT**, 57, 361-363.
- ASSOCIATION** of cigar-makers, no trade-mark in common, 707.
- ASSOCIATIONS**, unions, etc., 735.
 of working-men, labor, trade, 736.
 to protect labels, marks, etc., 736.
 fair wages, 737.
 not traders, 738.
- “**ASTRAL**,” for oil-burning lamp, old, not a trade-mark, 711.
- ATTORNEY-GENERAL'S** opinion as to treaty to protect Industrial Property, Preface to Supplement.
- AUSTRIAN** registration law, 26, Appendix, p. 678.
 decision relative to registration, 885.
 trade-mark decision, Richard Wagner, 878.
- AUSTRO-HUNGARIAN CONVENTION**, Appendix, p. 673.
- AUTOGRAPH**, one's own may be a valid trade-mark, 87, 204.
 and so also a fac-simile thereof, 87, 207.

B.

- BABBITT'S**, B. T., soap not infringed by Buller's, 813.
- BADGE**, as a proprietary mark, 5.
- “**BAEDER'S FLINT PAPER COMPANY**” protected against fraud, 806.
- “**BALL'S HEALTH-PRESERVING CORSET**,” not a trade-mark, 706.
- “**BALM OF THOUSAND FLOWERS**” case, 148, 241, 213.
- BANKRUPTCY**, trade-mark included in assets. (See Chapter XII.)
- BASS & CO.'S** case, 448.
 the placing of genuine mark on genuine goods not piracy, 448.
- BELGIUM**, registration law of, Appendix, p. 680.
 treaty and convention between the United States and, Appendix, p. 674.
- “**BELLE JARDINIÈRE**,” a valid trade-mark, 699.

[REFERENCES ARE TO SECTIONS.]

- BENEDICTINE LIQUEUR** case, 768.
- “**BENGALINE**,” etc., infringement on “**Kabiline**,” 705.
- “**BISMARCK**,” a valid trade symbol, 68.
- “**BLACK DIAMOND**,” a valid trade-mark for scythe-stones, 695.
- “**BLACK HORSE**,” as trade-mark for tobacco, etc., 920.
- “**BLACK PACKAGE TEA**,” being descriptive, is not a trade-mark, 706.
- “**BLANCHARD CHURN**” case discussed, 377.
- BLASPHEMOUS ALLUSIONS** condemned, 602.
- BLENDING** of trade-mark and other rights, 418.
unfair competition involves, 43, 44, 418.
- “**BLIZZARD**,” etc., not infringed by “**Leader**,” etc., for soap, 869.
- “**BLONDIN**” protected as a pseudonym, 213.
- “**BLÜCHER**,” a man’s name to designate boots, 181.
- “**BLUE LICK WATER**,” a trade-name, protected, 697, 727.
- BOOKS**, trade-marks for, 14, 15.
protected as merchandise, not as literature, 116.
titles of, sometimes perfect trade-marks, 546 *et seq.*
- BORDERING**, in red, yellow, and white threads, a valid trade-mark for cloth, 699.
- “**BORWICK’S BAKING POWDERS**” case, criminal, 452.
- “**BOUQUET**” case, picture of bouquet and word “**Bouquet**” held to conflict, 449, 661, 906.
- “**BOVILENE**” and “**BOVINA**” case, 397.
- BRAND**, as a mark of ownership, 5.
- BRAZIL**, agreement between the United States and, Appendix, p. 674.
registration law of, Appendix, p. 681.
as to counterfeiting foreign marks and labels, 945.
- BREACH OF FAITH**, in disclosing secret process, 562.
- BREADTH OF CLAIM**,
most likely to be founded in simplicity, 586-588.
mistake, by claiming too much, 588, 590.
- “**BRICK POMEROY**,” a valid personal designation, 214.
- BRITISH “MERCHANDISE MARKS ACT”** of 1862, 85, 102.
- “**BROMIDIA**,” sufficiently arbitrary and fanciful, 697.
- “**BROMO-CAFFEINE**,” nice distinction, 693, 856.
- BRONZE FIGURES** suit, 760.
- BRONZED** horse-shoe nails, not a trade-mark, 710.
- “**BROSELEY**” **PIPE** case, 17.
- “**BROUGHAM**,” a man’s name to designate a carriage, 181.
- “**BROWN’S IRON BITTERS**,” infringed by “**Iron Tonic Bitters**,” 779.
- “**BULL’S COUGH SYRUP**,” infringed by similar labels, 771.
- “**BURGESS’ ESSENCE OF ANCHOVY SAUCE**,” not valid, 432.
- “**BURROWE’S LEXINGTON MUSTARD**” case, 718.
- BUSINESS**, names protected. (See Chapter XII.)
names and styles, in signs and labels, 521 *et seq.*
place of, must be stated in application for registration, 296.
use of mark for unlawful, defeats remedy, 348 *et seq.*
- BUYERS OF GOODS**, falsely marked, suit by, 63.

[REFERENCES ARE TO SECTIONS.]

C.

- "CABLE-STITCHED KID GLOVES," merely descriptive, 134.
 "CABLE-TWIST TOBACCO" case discussed and rejected, 167-175.
 CÆSAR, JULIUS, the first to stamp his image on coin, 9.
 "CALCULATED TO DECEIVE," oath that mark is not, 309, 328.
 "CALENDAR WATCH" rejected, as merely descriptive, 376.
 CALIFORNIA, definition of trade-mark, in Political Code of, 164.
 CANADA, trade-mark, law of, Appendix, p. 682.
 timber-marks, 16, note.
 CANADIAN decision on "J. D. K. & Z." case, 890.
 "CANADIAN RYE WHISKEY" infringed by Canadian Club Whiskey,
 771.
 "CARLSBAD SPRUDEL SALTS" infringed by "Improved," etc.,
 785½.
 containing only 10 per cent of genuine ingredients, no fraud, 785½.
 cannot be said that C. does not come into court with clean hands,
 785½.
 "CARTE BLANCHE," champagne-wine case, 438.
 CARTHUSIAN MONKS' trade-mark suits, 407-410, 582.
 CASĒ, action on the. (See ACTION AT LAW.)
 CAVEAT *emptor*, 11, 64, and *venditor*, 64.
 CELLULOID, being a new and arbitrary word is a valid trade-mark, 693.
 although so generally known as to be common appellation, 693.
 infringed by "Cellonite," 770.
 "CENTENNIAL," trade-mark interference, 340, 638.
 CERTIFICATE, of officer to affidavit, 314.
 of Commissioner of Patents, to be evidence, 330.
 of registration, is not a *patent*, 340.
 CERTIFICATE OF REGISTRY, 330, 331.
 CHARACTERISTICS, essential, of a trade-mark, 143.
 "CHARIVARI," French journal case, 551.
 "CHARLEY'S AUNT" not infringed by "Charley's Uncle," 823.
 "CHARTER OAK," a valid trade-mark for stoves, 148, 150.
 "CHARTREUSE" has all essential elements of trade-mark, 410, 582.
 "CHAT NOIR" protected as a valid trade-mark, 702.
 CHATTEL, history of word, 3.
 "CHATTERBOX," title of books protected, 789.
 CHAUDON ET CIE., Champagne case, 754.
 "CHEMICAL PAINT" case considered, 251, 259.
 CHEMICAL PRODUCTS, name of, not a valid mark, 166.
 "CHICAGO WAISTS" trade-mark infringed on, 907.
 "CHICKEN COCK WHISKEY," infringed by "Miller's Game Cock,"
 790.
 although plaintiff used only on barrels, 790.
 "CHICORÉE AU MOUCHOIR," protected against infringement, 704.

[REFERENCES ARE TO SECTIONS.]

- “CHICORY,” label deceptive and misleading, 872.
- CHINA, labels and trade-marks in, Supplement, pp. 167, 168.
- CHINESE, antiquity of their trade-marks, 13, 215.
 perfect system of marking goods, 42.
 imitation of marks in England, 232.
 citizen of the United States held to be commercially Chinese, 294.
- “CHINESE LINIMENT” case (*Coffeen v. Brunton*), 460, 462, 538.
- “CHIROPLAST,” inventor of, lost a good trade-mark in name, 601.
- “CHLORODYNE” held not to be a valid mark, 252.
- CHRISTIAN NAME, law recognizes but one, 196.
- CIGAR LABELS, when not illegal by use of strong words, 846.
- CIGARS, representation of, not valid for cigars, 924.
- “CIMENT DE SAINT-QUENTIN” case, 755.
- CIPHER, as a distinctive sign or mark, 87, 262.
- CIRCULATING MEDIUM, its origin, originally cattle, then coin, 9.
- CITIZENSHIP, not necessary to entitle to registration, 297–299.
 yet must be divulged in application, 283.
- CITIZENS OF THE SAME STATE, suits between, under Act of 1881, 358.
- CLAIMANT does not register mark, but a *copy* thereof, 382.
- “CLASS OF GOODS,” restricted meaning of phrase, 66–70, 300, 706.
 protection given only in connection with, 66–70, 300, 450, 590.
 particular description of goods must be alleged, 300.
 definition of “class” sometimes strained to do justice, 66, 67.
- “CLEAN HANDS,” (see “DEFENCES,” Chapter X.)
 indispensable to complainant in equity, 71, 348–354, 474 *et seq.*
 inconsistent with unlawful business, 475.
 with laches in lying by, without suit, 497.
 with deceit of the public, 475, 476, 478, 479.
 as to manufacturer, 474.
 as to place of manufacture, 71, 481–483.
 as to intrinsic excellence, 485–488.
 by misuse of another’s name, 474.
 as to quack medicines, 491.
 as to origin, 488, 491.
 a lack of, not necessarily indicated by harmless statement, 492.
 by fictitious name of manufacturer, 490, 495.
- “CLUB SODA,” etc., no deception under circumstances stated, 778.
- “COCOINE” case (*Burnett v. Phalon*), 237–239, 450, 612.
- COINER of new word may use same as trade-mark, 219.
- COINS, marks on, 9, 10, 27.
- COLOR, as an essential element of a trade-mark, 263–267, 585, 603.
 one color may neutralize another, 264, 585.
 must be definite and certain, if essential, 266 *et seq.*, 585.
 an important circumstance in infringement case, 267, 413.
 as means of deceiving the public, 268.
 independent of *form*, cannot be a trade-mark, 138, 269–272.

[REFERENCE ARE TO SECTIONS.]**COLOR**, — *continued*.

as national proprietary signs, 74.

uncertainty in describing, 585.

color alone not a trade-mark, 720.

COLORABLE infringements, 385 *et seq.***COLORABLE VARIATION** exemplified, 33, 385 *et seq.*

no fixed rule as to, 33.

COLTON DENTAL ASSOCIATION, sign case, 540.**"COLUMBIA,"** trade-mark for tissue paper, case, 895.**COMBINATION**, improper application of patent theory, 368.**COMITY OF NATIONS**, 21, 22, 286 *et seq.*

demands the protection of all commercial rights, 21, 22.

courtesy due to all friendly strangers, 21.

disregarded at times by France, 23.

COMMERCE and trade-marks of equal antiquity, 2.

required its hieroglyphics, 12.

COMMERCE AND MANUFACTURE, twin-sisters, 78.**COMMERCIAL CHARACTER**,imparted by residence in foreign country, 295, 297 *et seq.***COMMERCIAL SIGNATURE**, a trade-mark is one's, 130, 280.

and should be valid all over the world, 260, 689.

COMMISSIONER OF PATENTS,

to make regulation for registration of marks, 308.

not to receive or record marks not lawful, 325.

nor merely the name of the applicant, 325.

nor a mark improperly claimed, 325.

to issue certificate of registration, 330.

to prescribe regulations, and forms for transfer, 361.

strictly to follow statutes in ministerial acts, 329.

has not power to cancel certificates, 624.

may place two parties on same footing, 624.

COMMON-LAW REMEDIES FOR INFRINGEMENT, (see ACTION.)not affected by Act of March 3, 1881, 357 *et seq.***"COMPACTUM,"** trade-mark for umbrellas, 903**"COMPAGNIE DES PROPRIETAIRES DE VIGNOBLES,"** 599.**COMPLAINANT** compelled to pay costs although successful, 891.**COMPOSER'S PORTRAIT**, etc., used with impunity as trade-mark, 878.**COMPULSORY** testimony, 639.**CONCESSION** of priority of adoption. Now made, 634.**"CONCURRENCE DÉLOYALE,"** 43, 719.**CONFEDERATE STATES'** notes counterfeited, 76.**CONFIDENCE** indispensable to social compact, 580.

is the object of applicant's oath, 580.

"CONFORMATEUR DU TAILLEUR," sign infringement, 535.**CONGRESS**, provision to protect American watch-makers, 74, 369.

marks on foreign manufactures, 369.

[REFERENCES ARE TO SECTIONS.]

CONGRESS, — *continued*.

act of, in relation to registration of trade-marks, 283-366.

does not pretend to create trade-marks, 317.

has authority to legislate on trade-marks, 281.

"CONGRESS WATER" trade-mark case, 146 *et seq.*, 598.**CONSTITUTION**, power conferred on Congress by, 109, 281.**CONTEMPT** of witness before Patent Office, how punished, 639.**CONTINUED** use by father and son, no misrepresentation, 786.**CONVENTION**, meaning of term as used, explained, 286.**CONVENTION AND FINAL PROTOCOL FOR PROTECTION OF INDUSTRIAL PROPERTY**, inoperative in the United States, Preface to Supplement.

"CONVEYANCE COMPANY" case (name of coach), 413.

COPIES, ten fac-similes of mark to be filed, 304.

of testimony, printed preferred, 641.

COPYRIGHT cannot protect a trade-mark, 109-112.

not analogous to trade-mark, 112.

protects book as work of intellect, not as mere merchandise, 117.

difference from a trade-mark or a patent, 109, 129.

"CORAL BAKING POWDER," infringement on Royal B., etc., 720.

CORPORATION, protected in use of lawful mark, 309, 317-323.

entitled to trade-mark only as a trader, 55, 317-320.

meaning of term "corporation" sometimes misunderstood, 323.

oath to be made by officer of, 309.

who is such officer, 323.

mere name of, not a trade-mark for itself, 321, 322.

loan of one's name to, unfairly, 728.

one does not lose right to his name by loaning to, 728.

imitation of name of junior corporation restrained, 732.

on dissolution of, former officer may advertise, 834.

COSTS in infringement cases. 469, 471, 472.

winner compelled to pay costs, 891.

"COUGH CHERRIES," for confection, sufficiently fanciful, 677.

COUNSEL, selection of, before Patent Office, 566, 567.**COUNTERFEITING**,

consists, generally, in actual affixing of false mark, 337, 343, 344.

may consist in applying mark to mere box or envelope, 440.

may sometimes be complete without actual use, 456.

workmen not allowed to plead his own good faith. 456.

he is guilty who causes act to be done, 341, 441.

"CRAMP CURE," design of suffering boy, failure of claim, 840.

"CRAYONS POLYGRADES" case (*Faber v. Faber*), 421.

"CREAM OF WHEAT," as trade-mark for breakfast food, 911.

"CRÈME D'ARGENT," as applied to a chemical product, 236.

CRIMINAL LAW, Act of August 14, 1876, 371, 381.

and the Civil Act of March 3, 1881, in effect one, 372.

see list of penal statutes of States, 452, note.

[REFERENCES ARE TO SECTIONS.]

CRIMINAL PROSECUTION for simulating mark, 371, 452.
 CROWN, representation of, or word "Crown" as trade-mark for cheese, 719.
 "CROWN SEIXO WINE" case, 405, 406.
 "CRYSTAL CHAMPAGNE" case, innocence of retailer, 745.
 "CUNDURANGO OINTMENT, C. O.," rejected, as descriptive, 276.
 "CUTICURA" infringed by "Curative," 772.

D.

DAMAGES, (see Chapter XI.)

statutory provision for, in case of infringement, 337.
 of fraudulent registration, 355 *et seq.*
 depends upon substantial loss to plaintiff, 343 *et seq.*, 499, 504.
 upon actual affixing of mark to goods, 337, 500.
 though not technically a trade-mark, 780.
 sometimes given without proof of specific injury, 501, 870.
 no fixed and certain rule for measuring, 502.
 compensatory, should be given, 503, 507, 870.
 special, are not presumed, 43, 504, 509.
 must be proved, not based upon mere conjecture, 505, 795.
intent is a prominent element in fixing, 508.
 amount of, not dependent on defendant's profits, 507.
 plaintiff's negligence may defeat claim to, 510.
 difficulty in fixing amount in trade-mark case, 512-515.
 patent and copyright cases no standard, 513, 516.
 exemplary, when allowed, 519, 520.
 wrong-doer not allowed to apportion his wrong, 518.
 a threat to injure is not ground for, 500.
 mere possible injury no ground for, 500.

DAMNUM *absque injuria*, 384, 420, 431, 499, 500.

DANGER in superficially reading Trade-Mark Law, 279 *et seq.*

"DAY & MARTIN'S BLACKING" case, 423.

"DEAD RED BALL" as a mark for a base-ball, 585.

DECEIT, protection of public from, 30, 36-39, 309, 328, 775.

DECEIVE, "calculated to," mark must not be, 328.

Patent Office will judge for itself on this point, 329, 352, 580 *et seq.*

DECLARATION, under oath, of exclusive right to use of mark, 309 *et seq.*

to be made by person, or officer of corporation, 309.

strictness of verification of, 313.

of interference, in what cases, 622, 633, 638.

DEFENCES, (see Chapter X.)

that complainant has been guilty of deceit. (See CLEAN HANDS.)

of bad faith in lying by, 497.

of negligence, 510.

to bill for injunction in the "Durham Tobacco" case, 660.

no defence that spurious goods are equal to genuine, 344, 496, 505.

that plaintiff's advertisements are exaggerated, 492.

[REFERENCES ARE TO SECTIONS.]

DEFENCES, — *continued*.

that manufacturer's name is fictitious, 494, 495.

that complainant delayed, when delay necessary, 498.

may be either affirmative or negative, 474.

false statement in foreign language no defence, 481.

DEFINITION AND NATURE of a trade-mark. (See Chapter III.)

necessity for, 1, 80, 136.

English, French, German, etc. definitions, 85, 87, 102.

of the term "owner," Act of March 3, 1881, 284.

"interference," 621.

"*laisser tomber dans le domaine public*," 681.**DEMARCATIION**, line of, between trade-marks and analogues, 136.

"DEMOCRATIC REPUBLICAN NEW ERA" case, 550.

DENMARK, Convention between United States and, Supplement, pp. 164, 165.

registration law of, Appendix, p. 683.

DEPOSIT of mark, not necessary to acquire and conserve title, 48 *et seq.***DESCRIPTION** of mark must be filed with application, 303.

of color in application, 585.

DESIGN, is not the question, but adoption is, 54, 661.

patent for, explained, 111.

if patented, cannot be registered as a trade-mark, 113.

DEVICE for trade-mark is a matter of fancy, 87, 102.

propriety must govern, 602.

DEVICES and methods for mischief enjoined, 797.

dangerous semblance, of shape, color, designation, etc., 797.

"DE YOUNGS," infringed by Young on similar signs, etc., 721.

"DIAMOND GLEN" infringes "Black Diamond," for scythe-stone, 695.

DICTA not authorities, 82, 84, 99, 391.**DILIGENCE**, "race of," not inquired into, in registration, 384, 661.**DISAGREEMENT** of judicial minds, 149, 658-660.**DISCOVERY**, usually an equitable remedy, 469 *et seq.*

under Judiciary Act of 1789, in actions at law, 470.

in aid of forfeiture, not favored in equity, 470.

DISSOLUTION OF PARTNERSHIP, in absence of stipulation, each can use old firm-name, 524 *et seq.***DISTINCTIVE**, package and label protected, 780.**DOMICILE**, (see Chapter VI.)

owner, in United States, may register mark, 283.

term commented on, and explained, 292-295.

an essential allegation, in certain applications, 291, 591.

forensic, 294.

national and commercial, may not be identical, 294 *et seq.*

and residence not convertible terms, 299.

"DRAPER," trade-name for oilers, 731.

"DR. CODERRE," as trade-mark for medical preparations, 930.

"DR. SPENCER'S QUEEN OF PAIN," etc., enjoined, 723.

[REFERENCES ARE TO SECTIONS.]

- “DRUMMOND TOBACCO COMPANY,” no right to prevent another, 833.
 DURATION of trade-mark, life unlimited, 109, 143, 333.
 “DURHAM” may or may not be a geographical name, 192.
 interference case, three opinions, 658-660.
 opinion of Examiner, 658.
 Commissioner, 659.
 Judge Rives, 660.

E.

- “EAU DE LA FLORIDE,”
 infringed by “*Eau de la Fluoride*,” 397, 450, 612.
 “EDGERLINE” (from Edgerley, the owner), a valid mark, 217.
 EGYPTIAN decision relative to “Sheffield” for cutlery, 884.
 EGYPTIANS, ancient, sign-boards of, emblem, etc., 6.
 “ELASTIC STARCH,” trade-mark not infringed, 887.
 “EL CABIO” not infringed by “El Cario” for tobacco, 815.
 “EL CANDILON,” trade-name in Madrid, 875.
 ELECTION of remedies, 506.
 “ELECTRICAL WORLD,” not infringed by “Electrical Age,” 823.
 “ELGIN BUTTER CO.” cannot exclusively use that name, 816.
 “ELK,” in large letters, with descriptive words, a valid trade-mark, 697.
 EMBLEMS OF OWNERSHIP, (see TRADE-MARKS.)
 coeval with birth of traffic, 2.
 had origin in general ignorance of reading language, 3.
 as signs of ancient Egyptians, Greeks, Romans, 6.
 used in all ages, among all races of men, 11.
 of old-time booksellers and printers, 14, 15, 116.
 pipe-makers in England, 17.
 goldsmiths in England, 19.
 variety of, 87.
 nondescript vignettes, groups of flowers and fruits, not legal, 89.
 comprehensiveness of British Act of 1862, 102.
 “EMOLLIORUM” refused registration in England, for being descriptive, 841.
 EMPLOYEE’S NAME assumed to get trade, 728.
 EMPLOYEES have a right to compete with old employers, 751.
 “ENGLISH EMBASSY CHEMIST,” shop-sign case, 529.
 ENGLISH ROYAL ARMS, as water-marks upon paper, 7.
 “ENGLISH’S BROOMS” case considered* and criticised, 162, 163, 597.
 ENJOINED, catching device, used to deceive, 769.
 trade-mark, though defendant uses his own name in connection with, 769.
 wrongful use of another’s initials, 770.
 although a new company took its name from a family, enjoined, 732.
 simulation of another’s goods placed for sale with retailers, 771.
 peculiar method of preparing and boxing medicines, 772.

[REFERENCES ARE TO SECTIONS.]

ENJOINED, — *continued*.

- “ Spinal Paste or Salt Rheum Cure,” enjoined, 723.
- all packages similar in size, shape, color, lettering, etc., 773.
- an innocent representation may be, 774.
- on proof of deceit of two persons, and defendants’ increased sales, enjoined, 775.
- when act of defendant works injury, 777.
- party selling goods, etc. to injury of another, 777.
- without question of trade-mark, 779.
- palming off goods by use of similar labels, 779.
- a proper name, fraudulently used, 779.
- American Grocery Co. enjoined from using monogram “A. G.,” 779.
- use of imitative labels on inferior articles, 779.
- defendant advising customers to use another’s bottles, 779.
- box-maker, for furnishing boxes to simulate another’s, 780.
- use of “St. Louis White Lead,” by Chicago manufacturer, 780.
- use of geographical name for purpose of fraud, 780.

EQUALITY in value of spurious with genuine goods, no defence, 344, 496, 505.

EQUITY, (see **CLEAN HANDS** ; **PROTECTION**.)

acts only when legal title is clear, 31, 462.

ESSENTIAL CHARACTERISTICS of a trade-mark, 143.

ESTIMATING DAMAGES. (See Chapter XI.)

ESTOPPEL by reason of previous declarations, 627, 631.

where corporation has changed name at suggestion of another corporation, 777.

“**ETHIOPIAN**” trade-mark case, 612.

EVIDENCE,

- of false use of unessential elements may be important, 33, 132.
- fraudulent intent deduced from slight circumstances, 268, 387 *et seq.*
- sources of, before the Patent Office, 645.
- certificate of registration to be, 330.
- registry, *prima facie*, of title, 337 *et seq.*

EXAGGERATED STATEMENTS, in advertisements, not conclusive evidence of fraud, 492.

EXAMINATION of application for registration of mark. (See Chapter XIII.)

EXAMINER OF TRADE-MARKS, judicial functions of, 574.

EXAMPLES OF TRADE-MARKS, (see Chapter V.)

- autograph may be a valid mark, 204.
- or fac-simile of signature, 207, 211.
- pseudonyms may be valid marks, 213, 214, 217, 218.
- fancy names of men, 216.
- names of products, 236 *et seq.*
- words, 33, 273-275.
- letters of the alphabet, 234 *et seq.*
- devices, including name, 246-248.

[REFERENCES ARE TO SECTIONS.]

EXAMPLES OF TRADE-MARKS, — *continued.*

from heraldry, 260.

in which color is essential, 263-270.

monograms, ciphers, etc., 262.

necessary name of one's exclusive product, 251.

picture of public building, 258.

national arms combined with other things, 261.

EXCLUSIVE USE of symbol the foundation of title, 143, 309, 324.

cannot be claimed of a mere geographical name, 182-185.

of designations of trades or occupations, 161.

of necessary name of thing, 164.

of one's surname, 202, 423.

EX-SERVANT may obtain his former employer's business, 793.

but will be enjoined if he misrepresents, 793.

EXTINGUISHMENT of trade-mark. (See **ABANDONMENT.**)

"**EXTRACT OF NIGHT-BLOOMING CEREUS,**" a deception, 484.

F.

FABRIKZEICHEN, the German equivalent of "trade-mark," 85.

FAC-SIMILES, ten to be filed except in case of drawings, 304.

must be attested by oath of applicant, 283.

of autographs are valid trade-marks, 87, 207.

definition of term "fac-simile," 304.

FALSE models of application papers, 592-594.

FALSEHOOD, in mark cuts off right to protection. (See **CLEAN HANDS.**)

FALSELY MARKED GOODS, to induce trade, a fraud, 783.

as "a palpable trick," will be enjoined, 783.

FAMILY NAMES, considered, 196, 197.

FANCY NAMES, judicially approved. (See 33, 547 *et seq.*)

"**AINSWORTH,**" thread, 199; "**Alderney,**" oleomargarine, 71;

"**American Sterling,**" silver, 352; "**Anatolia,**" licorice, 66,

191; "**Annihilator,**" medicine, 273; "**Apollinaris Water,**"

mineral water, 191; "**Arctic,**" soda-apparatus, 273.

"**B. B. B.**" medicine, 721; "**Bell of Moscow,**" wine, 89; "**Benedic-**

tine (La)," liqueur, 137; "**Bethesda,**" mineral water, 191;

"**Bismarck,**" cement, paper collars, 68; "**Blood Searcher,**"

medicine, 135; "**Blue Lick Water,**" 697; "**Bockar's Stomach**

Bitters," medicine, 135; "**Bouquet,**" hams, 449, 661, 906;

"**Bromo-Caffeine,**" medicine, 856; "**Brown Dick,**" tobacco,

218.

"**CAFÉ DES GOURMETS,**" coffee, 236; "**Carte Blanche,**" cham-

pagne wine, 438; "**Cashmere Bouquet,**" toilet soap, 273;

"**Celluloid,**" 693; "**Centennial,**" clothing, alcoholic spirits, 68,

340, 613, 638; "**Champion,**" flour, 150; "**Charbon Agglom-**

érée," charcoal, 221; "**Charley's Aunt,**" a play, 823;

"**Charter Oak,**" cooking-stoves, 148; "**Chartreuse,**" liqueur,

[REFERENCES ARE TO SECTIONS.]

FANCY NAMES, judicially approved, — *continued*.

- 408, 582; "Chat Noir," sign, 702; "Chatterbox," books, 789; "Chicago Waists," 907; "Chinese," liniment, 243, 538; "Climax," stoves, 150; "Cocoaine," cocoanut oil, 150, 237, 397, 450; "Compactum," umbrella, 903; "Congress Water," natural product, 146; "Cough Cherries," medicine, 697; "Cream of Wheat," cereal, 823; "Crème d'Argent," a chemical product, 236; "Crystal," castor-oil, 274.
- "DAMASCUS BLADE," scythes, 249; "Daniel," bridle bits, etc., 326; "Daylight," oil, 274; "Deer Tongue," tobacco, 273; "Diamond," soap, 273; "Dolly Varden," fancy paper, 218; "Dublin," soap, 191; "Durham," smoking-tobacco, 658.
- "EAU DE LA FLORIDE," toilet preparation, 397; "Eau de toilette de Lubin," toilet-water, 135; "Electro-Silicon," polishing compound, 71, 220; "Elk," cigars, 697; "Empire," stoves, 150; "Ethiopian," stockings, 150, 612; "Eureka," fertilizer, shirts, 68, 219; "Everlasting," pills, 273; "Excelsior," stoves, 150.
- "FALSTAFF," cigars, 218.
- "GASLIGHT," illuminating oil, 274; "German," soap, 191; "Glenfield," starch, 136; "Gold Dust," whiskey, 273; "Golden Crown," tobacco, 694; "Grande Chartreuse," liqueur, 407; "Grande Grille," mineral water, 699; "Green Mountain," scythe-stones, 695; "Gulliver," cigars, 218.
- "HARVEST VICTOR," harvesting-machine, 275; "Heliotype," prints, 66; "Home," sewing-machine, 788; "Hoosier," agricultural implement, 191; "Hôpital," mineral water, 699; "Hunyadi-Janos," mineral water, 191; "Hygeia," mineral water, 843.
- "IMPERCEPTIBLE," starch, 922; "Indian Pond," scythe, 695; "Insectine," poison for insects, 806; "Iron-clad," boots, 66; "I X L," cutlery, axes, scythes, 69, 70.
- "JOB," cigarette paper, 212, 398.
- "KABILENE," complexion-powder, 705; "King of the Field," agricultural implements, 275.
- "LA BENEDICTINE," liqueur, 137; "La Cronica," newspaper, 108; "La Flor del Tropico," cigars, 273; "Lamartine," an elixir, 216; "Lamoille," scythe-stones, 695; "La Normandie," cigars, 672; "Leopold," woollen cloths, 191; "Lightning," hay-knives, 771; "Liverpool," woollen cloths, 191; "Lone Jack," smoking-tobacco, 66, 218; "Lubin," toilet perfumes, 135.
- "MAGIC," scythe-stones, 695; "Magnetic Balm," medicine, 71, 869; "Magnolia," gin, whiskey, 68, 672; "Maizena," corn-flour, 785; "Marieland," whiskey, 193; "Marvel," milling, 696; "Medicated Mexican Balm," 243; "Meloroma," beverage, 273; "Menlo Park," time-pieces, 914; "Mesdames," mineral

[REFERENCES ARE TO SECTIONS.]

FANCY NAMES, judicially approved, — continued.

- water, 699; "Mineral Sperm," illuminating oil, 273; "Moniteur," newspaper, 415; "Monticello," whiskey, 193; "Mount Carmel," liqueur, 184, 191.
- "NEW ERA," newspaper, 105; "Nickel-In," tobacco, 697; "No-To-Bac," remedy, 828.
- "OUR FRITZ," smoking-tobacco, 218.
- "PAIN KILLER," medicine, 273; "Papier Goudron," cigarette paper, 71, 135; "Papier hygienique," cigarette paper, 135; "Paragon," umbrellas, 219; "Paul Jones," whiskey, 218, 664; "Perles d'Ether," ether pills, 166, 236, 383; "Phil Sheridan," tobacco, 218; "Portland," stoves, 729; "Poudre Brésilienne," toilet article, 236.
- "QUEEN OF THE MEADOW," agricultural implement, 275.
- "RED RACER," agricultural implement, 275; "Rip Van Winkle," whiskey, 218, 613; "Roger Williams," cotton cloth, 216; "Royal Bats-wing," corsets, 273.
- "SAMSON BRACE," suspenders, 273; "Sapolio," soap, 776; "Saponifier," concentrated lye, 693; "Sardines Jockey-Club," sardines, 703; "Savon de Paris," soap, 135; "Serpent of Pharaoh," chemical toy, 166; "Siccatis brilliant," paint dryer, 135; "Six Little Tailors," clothing, 801; "Star of the West," pump, 274, agricultural implement, 275; "Star Shirt," shirts, 606; "Star," shirts, 693; tobacco, 781; "St. James," cigarettes, 68; "Sunlight," illuminating oil, 273; "Sunny South," stoves, 273; "Sweet Caporal," cigarettes, 694, 813.
- "THE GOOD THINGS OF LIFE," books, 823; "Tip Top," agricultural implement, 275; "Trappistine," liqueur, 236.
- "UNCLE BOB LEE," tobacco, 218.
- "VALLEY GEM," piano-fortes, 273; "Veloutine," toilet-powder, 135; "Vieille Montagne," paints, 193; "Vitascope," pictures on screens, 905; "Vulcan," The, matches, 694.
- "WATER WHITE," refined petroleum, 274; "Western Dutchman," agricultural implement, 275; "Willoughby Lake," scythe-stones, 695; "Wisconsin Wood-Chopper," axes, 193.
- "YANKEE," shaving-soap, 125, 136, 191; "Young America," writing ink, 218.
- "ZERO," water-cooler, 273.

FANCY NAMES, judicially rejected, for being descriptive, deceptive, or other cause.

- "ACID PHOSPHATE," medicine, 706; "Albany Beef," (slang term for sturgeon,) 89 a; "Allcock's Porous Plasters," 134; "American Sardines," 134, 352, 610; "Anglo-Portugo," (oysters,) 71; "Angostura," (bitters,) 134, 194; "Antiquarian Book Store," 161; "A. Richardson's Patent Union Leather Splitting Machine," 221, 611; "Astral," lamp, 711.

[REFERENCES ARE TO SECTIONS.]

FANCY NAMES, judicially rejected, — *continued.*

- “BALM OF THOUSAND FLOWERS,” 242, 488; “Beeswax Oil,” 164, 276; “Black Package Tea,” 706; “Bloom of Youth, or Liquid Pearl,” 71, 475; “Braided Fixed Stars,” 221.
- “CABLE-STITCHED KID GLOVES,” 133; “Cable Twist Tobacco,” 167; “Cachemere Milano” (etc.), 134; “Calendar Watch,” 276; “Charbon de Paris,” 220; “Charter Oak,” 221; “Chloro-dine,” 134, 220, 252; “Club-House Gin,” 134; “Coral, baking-powder, 720; “Cough Remedy,” 134; “Crack-Proof,” 134, 597; “Croup Tincture,” 134; “Crystalline,” 89 a; “Cundurango Ointment, C. O.,” 164; “Cylinder,” 157.
- “DESICCATED CODFISH,” 134; “Durham,” 134, 659.
- “EGG MACARONI,” 134; “Emolliolorum,” waterproofing, 842.
- “FAILLANTINE,” 601; “Ferro-phosphorated Elixir of Calisaya Bark,” 220; “French,” (paints,) 192.
- “GALEN,” 157; “Geysers Spring,” 276; “Glendon,” (iron,) 134, 192; “Golden Ointment,” 134; “Gold Medal,” 133; “Granite,” kitchen-ware, 715; “Green Mountain,” grapes, 714.
- “HAMBURGER TROPFEN,” 609; “Health-preserving,” corsets, 706; “Highly Concentrated Compound Fluid Extract of Buchu,” 134; “Homœopathic Medicines,” 89 a; “Howqua’s Mixture,” 478; “Hygienic,” underwear, 711.
- “IMPERIAL,” beer, 706; “Indurated Fibre,” fabrics of wood pulp, 706; “International,” banking-company, 706; “Invisible,” 164; “Iron Bitters,” medicine, 711; “Iron Stone,” 597.
- “JOHNSON’S AMERICAN ANODYNE LINIMENT,” 133, 367.
- “KAISER,” beer, 711; “Kathairon,” 491; “Kidney and Liver,” 721.
- “LACKAWANNA COAL,” 134; “Lake,” 157; “La Maison de l’Aluminium,” 535; “La Normandie,” cigars, 840; “Lawrence Fine Family Flannel,” 134; “Liebig’s Extract of Meat,” 134; “Lieutenant James’ Horse Blister,” 134; “Linoleum,” 220, 221; “Loch Katrine Whiskey,” 192; “Lucilene,” 220, 252; “Lunch Milk Biscuits,” 276.
- “MACASSAR OIL,” 134; “Masonic,” 89 a; “Meen Fun,” 485; “Moline,” 134, 597; “Musical Note Paper,” 133.
- “NEW MANNY HARVESTER,” 134; “New York,” 157; “Night-Blooming Cereus,” 71, 134, 484; “Nourishing Stout,” 134, 597.
- “OLD LONDON DOCK GIN,” 134, 597.
- “PARAFFIN OIL,” 134; “Parchment Deed,” 276; “Parson’s Purgative Pills, P. P. P.,” 134, 367; “Peerless,” carbon black, 917; “Post-Office Directory,” 134; “Prize Medal,” 133; “Propriétaires de Vignobles,” 599; “Puddine,” a pudding, 810.
- “RALEIGH,” 192; “Razor Steel,” 134; “Rye and Rock,” 134.
- “SARSAPARILLA AND IRON,” medicine, 706; “Schiedam Schnapps,” 134, 137, 596; “Singer,” 220 a; “Sliced Animals,” 134; “Snowflake,” 136, 174; “Somatose,” 841; “Straight-cut,” 134; “Swing,” 89 a.

[REFERENCES ARE TO SECTIONS.]

FANCY NAMES, judicially rejected, — *continued*.

“**TAFFY TOLU**,” chewing-gum, 706; “**Tasteless**,” 134; “**Trommer**,” 220 *b*; “**True-fit Shirts**,” 133; “**Tucker Spring Bed**,” 221; “**Tycoon**,” tea, 706.

“**VIENNA**,” 191; “**Vineyard Proprietors**,” 599.

“**WATER OF AYR STONE**,” 532; “**Wayne**,” 157; “**White Laurel**,” medicine, 914; “**Wistar’s Balsam of Wild Cherry**,” 491; “**Wolfe’s Aromatic Schiedam Schnapps**,” 475; “**Worcestershire**,” 136; “**Woven Wire Mattress**,” 277.

“**YALE**” locks, 915.

FEDERAL COURT, no jurisdiction when, under Act of 1881, 842.**FEDERAL TRADE-MARK LEGISLATION**, (see Chaps. VI., VII.)

misconception as to power of Congress in, 278.

act of registration of 1870 discussed, 280.

Congress has authority to legislate on trade-marks, 281, 282.

FEE, payable on application for registration, 283.

is not a pledge or deposit, but an unconditional payment, 307.

cannot be reclaimed, unless paid by mistake, 307, 615, 616.

credit for fee, or part of fee, heretofore paid, 334.

FEEES of witnesses in interference cases, 639.“**FERRO-PHOSPHORATED ELIXIR OF CALISAYA BARK**,”

as a new name, held not to be a valid trade-mark, 220.

FICTITIOUS NAME of manufacturer, innocent use of, 494.**FIRM**, may register a trade-mark, 283, 316.

definition of the term “firm,” 316.

FIRM NAME on signs protected in equity. (See Chapter XII.)

by whom used, on dissolution, 524–527.

purchaser of, must be cautious in use, 715.

“**FISH BROS.**” wagon case, 733.**FLAG** with stars protected against similar flag, 792.“**FLEISCHMAN’S COMPRESSED YEAST**,” not infringed, 810.**FOREIGN COMMERCE**, law of March 3, 1881, 283, 285, 360.**FOREIGN COUNTRY**, resident of,

upon what conditions allowed to register here, 283, 285.

deemed a citizen of that country commercially, 287, 297.

before whom to verify application, 312.

FORENSIC DOMICILE, 294.**FORGERY** at common law defined, (see Chapter IX.)

or counterfeiting of labels, etc., punished by local laws, 452.

of will, detected by means of water-mark, 7.

FORM, or peculiar disposition of letters, a valid personal sign, 87, 165.

of natural object, given by chemical means, 166.

is implied in the use of the term “mark,” 269.

of a product cannot be a trade-mark, 89 *b*.

mere, not a trade-mark, 706.

FOUNDATION of title to trade-mark, discussed generally, 45–57.

rests upon mere adoption and use, 46.

[REFERENCES ARE TO SECTIONS.]

FOUNDATION, — *continued*.

does not depend on statutory law, 47–51.

is in immutable law of nature, 1 *et seq.*, 86.**FRANCE**, trade-marks optional in, as a rule, 18.

trade-mark, law of, Appendix, p. 686; Addenda of Supplement.

convention between the United States and, Appendix, p. 675.

circular of Minister of Commerce of, 940.

and Roumania, treaty between, 933.

“FRASER’S AXLE GREASE” infringed by original inventor, 773.

FRAUD, committed in the use of one’s own true name, 200, 388–390.

of the word “patent,” 72, 340.

in assigning use of one’s name, 363.

committed in perversion of mark, 443–447.

not fraud for stranger to place genuine mark on genuine goods, 448.

to use another’s symbol for different class, 450.

question of, judged of as between immediate parties, 38.

in using similar capsules on bottles, 784.

buying complainant’s old bottles with name, 784.

means used by, should be enjoined, 768.

“successor,” after corporate name, avoids suspicion of, 777.

cannot be predicated of trivial inaccuracies, etc., 777.

imitation of trade-mark in general appearance and details, a, 866.

resemblances such as to confuse the eye, a, 867.

FRAUDULENT representations in Patent Office, action for, 355, 356.intent precludes registration, 348 *et seq.*, 592, 607, 612.**FRENCH** definition of term “trade-mark,” 85.**FRENCH ACT** of 1857 punishes usurpation on a prospectus, 698.**FRENCH CITIZEN** (in Louisiana), in suit for infringement, fails unless he registered, 841.**FRENCH DECISION** on trade-mark of foreign infringement, 893.**FRENCH LAW** of June 23, 1857, modified; Addenda of Supplement.

G.

“GAUNTLETT PIPES,” marks upon, 17.

“GAZETTE NATIONALE,” or “Moniteur Universel,” case, 415.

GENERAL TYPE of objects cannot be exclusively appropriated, 89 *d.***GENERIC** name of patented device not protected, 709.**GENERIC TERMS**,cannot be trade-marks, 89 *a*, 134, 164, 167–177, 253.

men’s names may become, 178, 181, 203.

fancy names of things may become, 252.

examples of rejected cases, 276, 277, 367, 368, 596 *et seq.*

“GENESEE” not enjoined, as name is geographical, 779.

GEOGRAPHICAL NAME, when not merely such, may be valid trade-mark, 182, 184, 185, 191, 193.

when is a name merely such? 192.

[REFERENCES ARE TO SECTIONS.]

- “GEORGETTE,” forbidden to dishonestly use her name, 805.
 GERMAN definition of term “trade-mark,” 85.
 GERMAN CITIZEN does not necessarily gain title in United States to trade-mark, 712.
 GERMAN DECISION on false wine-marks, 880.
 GERMAN EMPIRE, registration law, Appendix, p. 688.
 Convention between the United States and, Appendix, p. 676.
 GERMAN MERCHANDISE MARK LAW, Supplement, pp. 170-177.
 “GERMEA” imitated by Germ., color, type, etc., 722.
 “GESSLER’S HEADACHE WAFERS” not infringed by B.’s “Alpha Wafers,” 824.
 “GEYSER SPRING,” not a trade-mark, 276, 598.
 “GOLDEN CROWN,” etc., in contest with “Golden Chain,” etc., 794.
 although words might not be an infringement, the tin tags were, 794.
 “GOLDEN CROWN CIGARS” case (*Palmer v. Harris*), 481, 483.
 “GOLD-SEAL” vinegar case, 812.
 GOLDSMITHS’ company mark, 18, 19.
 hall mark, 19.
 “GOLSH’S FRICTION MATCH” case (*Partridge v. Menck*), 35, 256, 489.
 GOODS “to be transported,” phrase discussed, 360.
 if mere comparison of goods is not enough, evidence may prove deceit, 851.
 when trader may not sell goods, although descriptive, 858.
 “GOOD THINGS OF LIFE” not infringed by “The Spice of Life,” 823.
 GOOD-WILL, difficulty in defining accurately, 522.
 may be sold, bequeathed, or become assets of an estate, 522.
 sale of business is sale of, 522.
 not applicable to professional business, 522.
 not necessary to name in sale of business, 522.
 on dissolution of partnership, 524.
 name of firm important part of, 524-526.
 when understood to be conveyed, 524.
 as implied in the use of signs of houses, 525 *et seq.*
 equity will protect name of inn, hotel, or other place of business, 528.
 colorable imitation of name will be enjoined, 528 *et seq.*
 false representations on signs, 531.
 comprises attack on trade-mark, trade-name, etc., of rival, 536.
 labels, wrappers, and advertisements comprised in, 537, 538.
 improper use of word “original” prohibited, 542, 543.
 trade secrets protected, 545.
 may be sold, 545.
 instance of violation of, 767.
 “GOODYEAR RUBBER COMPANY,” mere indication, 707.

[REFERENCES ARE TO SECTIONS.]

- GOVERNMENT FEE for registration, 307.
 credit for fee, or part of fee, heretofore paid, 307.
- “GRAND HÔTEL DE LA PAIX,” case of unfair competition, 529.
- “GRANDE CHARTREUSE,” trade-mark cases, 407-410, 582, 881.
 trade-mark, protected in Switzerland, 881.
 refused protection in Italy, 881.
- “GRANDE GRILLE,” a valid trade-mark, 699.
- “GRANITE,” for kitchen ware became public with end of patent, 715.
- GREAT BRITAIN, declaration between the United States and, Appendix, p. 676.
 registration-law, of 1883, Appendix, p. 691.
 and Roumania, treaty between, 936.
- GREAT LIGHT(E)NING INK ERASER” case, 600.
- GREEKS, ancient, sign-boards of, 6.
 had cattle for currency, 9.
- GREEN BUSH, as vintner’s sign, 6.
- “GREEN MOUNTAIN,” a valid trade-mark, for scythe-stones, 695.
 being nearly geographical, is not a trade-mark for grapes, 714.
- GREEN SEAL for bottles, held to be a valid trade-mark, 170.
- GUILDS, in olden times maintained high character of goods, 74.
- GUTENBERG, mark of himself and associates, 14.

H.

- HAGGAI, seal of, found in exploration of Jerusalem, 8.
- “HALL MARKS,” on gold and silver products, 18, 19.
- “HALL’S VEGETABLE SICILIAN HAIR RENEWER” case, 425.
- HAMILTON, Sir William, cited as to definition, etc., 82.
- “HARDWARE,” too indefinite to describe a class of goods, 300.
- HAREBOTTLE, a hare and a bottle as his rebus, 6.
- HARMLESS UNTRUTH not regarded as fraudulent, 71.
- “HARVESTERS,” a class of agricultural machines, 601.
- HAYTIAN COIN, counterfeited, 76.
- “HE-KO TEA” deceptive, as no such species exists, 810.
- HENNESSY, JAMES, name used fifty-five years in commerce, rejected, 134.
- HERALDRY, a science with system, classification, language, 5.
 trade-marks frequently borrowed from mediæval, 260.
 caution to be observed in copying devices, 260.
 colors of English, — blue, red, black, green, purple, 263.
- HERCULANEUM, emblematic signs in, 6.
- HEREDITARY DIGNITIES, seal importing, 5.
- “HEROINE” trade-mark infringement case, 612.
- “HIGGINS,” a family-name for soap, yet was restrained, 732.
- HINDOOS, 1200 or 1300 years B. C., had merchandise marks, 11.
- HISTORY of proprietary marks. (See Chapter I.)
- HOFF (Leonard), required to use full name on his Extract of Malt, 869.

[REFERENCES ARE TO SECTIONS.]

- "HOLLOWAY'S OINTMENT" case, similarity of names, 430.
 "HOME," protected against "Home Delight," for sewing-machine, 788.
 HOMER mentions brass money as existing twelve centuries B. C., 9.
 "HÔPITAL," a valid trade-mark, 699.
 "HOPKINS," as trade-mark for canned hulled corn, 926.
 HORSE-SHOE NAILS, bronzed, no protection as trade-mark, 829.
 "HOSTETTER'S BITTERS," infringement of, 768, 909.
 HOTEL, name of, not a trade-mark, 83, 90-92, 95-97.
 protected in equity court, 528, 529.
 though not yet opened plaintiff may enjoin use of name, 798.
 "HÔTEL DE LA PAIX" case, unfair competition by signs, 529.
 HOT-FORGED and hammer-pointed horse-shoe nails, 809.
 "HOWE'S BAKERY," good-will case, sign of business, 98 *et seq.*, 525.
 HOWE'S (THE S.) CO., machine manufacturers infringed by another corporation, 791.
 "HOWQUA'S MIXTURE" case, 480.
 HOXIE'S (A. N.) Mineral Soap, etc., trade-name, 723.
 "HUDSON G. WOLFE'S BELL SCHNAPPS" case, 596.
 "HUNYADI JANOS" case, 871.
 "HYGEIA" is not infringed by another having right to name, 843.
 "HYGIENIC," for underware, not a trade-mark, 711.

I.

- "IDEAL," a valid trade-mark, for fountain pens, 696.
 IDEM SONANS, 392, 527, 600, 661.
 IGNORANT MISUSE of word "patent" not penal, 72, 310.
 ILLOGICAL USE of term "trade-mark patent," 310.
 IMITATION in part, may be a colorable infringement, 33, 58, 388.
 of packages, and color, design, style, and lettering enjoined, 720.
 "IMPERCEPTIBLE," for starch, allowed, 922.
 "IMPERIL," not a valid trade-mark for beer, 706.
 IMPOSITION on public, not ground for private action, 36, 37.
 incidentally considered by court, 30, 43.
 cause for refusing registration, 348 *et seq.*
 "IMPROVED FIG SYRUP," infringed by "Syrup of Figs," 785.
 INCORPORATED COMPANY may register trade-mark, 317-320.
 INCREASED IMPORTANCE of trade-marks, 28.
 INDEFINITENESS of allegation may defeat application, 303, 583 *et seq.*
 "INDIAN POND," a valid trade mark for scythe-stones, 695.
 INDIAN TRIBE, commerce with, 283, 285.
 whether member of, can register, 285, 289.
 INDICATION of origin or ownership, (see Chapter IV.)
 is the office of trade-mark, 144 *et seq.*
 of mere trade or occupation not a trade-mark, 161.
 INDICTMENT for simulating marks. (See Chapter IX.)
 INDIVIDUALITY an essential characteristic of trade-mark, 143.

[REFERENCES ARE TO SECTIONS.]

- “INDURATED FIBRE,” for wood-pulp, not a trade-mark, 706.
- INFERIOR MEDICINES sold as genuine to injure plaintiff, 848.
- INFRINGEMENT, (see Chapter VIII.)
- frequently difficult to determine, 33.
 - exact similitude not essential to, 33, 228, 385.
 - actual physical resemblance not the only question, 385.
 - criterion of, the probability of deceiving purchasers, 43, 309, 328.
 - sufficient if ordinary purchasers are misled, 33.
 - principle on which prohibited, 34, 395.
 - wherein consists the wrong of, 42.
 - comparative quality of goods not necessary question, 35, 344, 401, 496, 505.
 - by what is it constituted, 385, 440.
 - fraudulent intent not essential to, 386.
 - by deceiving eye or ear, 449.
 - by colorable variations, 33, 388.
 - by using small words as instruments of fraud, 387.
 - by affixing mark to receptacle of unmarked goods, 440.
 - by misuse of genuine labels, 443-446.
 - genuine bottles, bags, etc., 443, 768, 909.
 - genuine parts of manufactures, 443.
 - minor details, 33, 388-391.
 - numerals, 226-230, 401, 446.
 - sometimes to use mark originated by one's self, 437.
 - in causing another to imitate mark, 441.
 - in making false labels to be affixed in foreign country, 400.
 - but mere imitation of abstract symbol is not, 42.
 - discovery by analysis of unpatented secret is not, 562, 563.
 - nor using symbol on another class of goods, 66-70, 300, 450, 590.
 - of a symbol “N & S” for cigars, 744.
- INFRINGER, who is, 58.
- may be the pirate himself, or innocent vendor, 56, 468.
 - agent, 472.
- “INGERSOLL ROLLER MILLS,” etc., not infringed, 814.
- INITIAL LETTERS may by accident become valid mark, 212, 398.
- not sufficient for legal signature, 290.
- INJUNCTION, (see REMEDIES, Chapter IX.) definition, 768.
- against use of another's name, 527, 531, 539-541, 554, 556.
 - an old firm title, 525-527.
 - title of publication, 546-553, 557.
 - name of place of amusement, business, etc., 528.
 - actual deceit not required to be shown for an, 780.
 - not refused to one not original owner or designer of trade-mark, 774.
 - nor when defendant has made no sales, 774.
- INJURIA SINE DAMNO, 499.
- “INJURIOUS in itself,” meaning of phrase in statute, 350.

[REFERENCES ARE TO SECTIONS.]

- INNOCENT VENDOR** may be an infringer, 58.
 not compelled to account, or pay costs, 471.
- "INSECTINE,"** infringed by "Instantine," 806.
- INSTANT PERFECTION** of title to trade-mark, 52, 54.
- "INSTANTANEOUS"** not a valid trade-mark, 706.
- INTENT**, express or implied, an element in fixing damages, 508, 520.
- INTENTION** to adopt is not adoption, without use, 52-54, 384, 661.
- INTERFERENCE**, subject generally considered. (See Chapter XIV.)
 when may be declared, 325, 622.
 demands skilful management, 617-619.
 practice in, modelled on equity practice, 617, 618.
 defined to be an interlocutory proceeding, 621.
 preliminary, first declared, 625.
 object of, 626.
 declaration and dissolution of, 633.
 judgment based on written concession of priority, 634.
 grounds of, 325, 638.
 access to testimony, 640.
 printed copy of testimony, when required, 641.
 postponement of taking testimony, or of hearing, 642.
 information of opponent's case, 644.
 sources of evidence, 645, 646.
 hearing, rule as to, 648.
 appeal from Examiner, 649, 658, 659.
 decision of Commissioner final, 650, 651.
 examples of actual trials and opinions, 653 *et seq.*; Supplement,
 Chapter X.
- INTERLOCUTORY INJUNCTION** not granted, when? 810.
- "INTERNATIONAL BANKING COMPANY,"** merely descriptive, 706.
- INTERNATIONAL CONFERENCE** for protection of industrial property, 22.
 inoperative in United States, Preface to Supplement.
 list of the nations taking part therein, 22 note.
- INVARIABILITY** is an essential attribute of a trade-mark, 143.
- INVENTOR** alone has right to apply word "original" to product, 542, 543.
- "INVESTOR PUBLISHING CO."** infringed by "Investor Publication Co.," 789.
- "IRON BITTERS,"** mere indication of article, not a trade-mark, 711.
- IRREGULARITY** in making oath, etc., fatal to protection, 313, 580.
- "IRVING HOUSE"** case (see *Howard v. Henriques*), 95, 96.
- ITALIAN** decision relative to American trade-marks, 892.
- ITALY**, declaration between the United States and, Appendix, p. 676.
 registration law of, Appendix, p. 697.
 and Columbia, treaty between, 938.
 and Paraguay, convention between, 939.
- "I X L,"** instance of same symbol for different owners, 69, 70, 450.

[REFERENCES ARE TO SECTIONS.]

J.

- JACOB'S CATTLE distinguished by their marks, 3.
 "JAEGER," not a trade-mark for sanitary underwear, 813.
 not a trade-mark for woollen garments, 708.
 JAPAN, treaty between United States and, Supplement, pp. 165, 166.
 Convention between United States and, Supplement, p. 167.
 JAPAN, EMPIRE OF, registration law of 1883, Appendix, p. 697.
 JAPANESE MARKS pirated in England, 74.
 "JOB," originally formed of initials J. B. and lozenge, 398.
 trade-mark for cigarettes, 873.
 JODOCUS BADIUS, caution against pirate of book-mark, 14.
 JOHN FORREST'S case, watch-making, assignee, 845.
 "JOHNSON'S AMERICAN ANODYNE LINIMENT," rejected,
 133, 367.
 a long-established label, 696.
 JUDGMENT BY DEFAULT,
 when defendant in action fails to make discovery, 470.
 in interference case, 630.
 based upon concession of priority, 634.
 of commissioner in interference is final, 650, 651.
 JUDICIAL OFFICERS,
 sometimes confound technical terms, 43, 90 *et seq.*, 98, 108, 222.
 disagreements of, in conclusions, 65, 149, 244.
 JURAT, valid although not dated, 314.
 JURY instructed to find as to exclusive right to trade-mark, 849.
 on point of abandonment, 849.
 "JUSTINUS ET FLORUS," of Bernard Hector, caution in, against
 piracy of trade-mark for book, 14.

K.

- "K" within two concentric circles, decision examined, 149.
 "KABILENE," and woman in Kabyle costume, a trade-mark, 705.
 "KAISER," as applied to beer, valid in the United States, 693.
 for mineral waters, not valid in Germany, 711.
 "KANGAROO," for rubber tubing and tires, allowed, 927.
 "KATHAIRON" case (*Heath v. Wright*), 491.
 "KEYSTONE BRAND" not infringed by "Diamond Brand," 814.
 KNEIPP MALZ-KAFFEE case, 894.
 KNIGHTS TEMPLARS' renowned banner *Beauseant*, 263.
 "KNYITE" trade-mark for explosive, 904.
 ite a general terminal to names of explosives, such as dynamite,
 ballistite, etc., 904.

[REFERENCES ARE TO SECTIONS.]

L.

- LABEL**, fails to insure success for lack of proof, 815.
 on medicine, three columns of letter "B.," protected, 721.
 etc. used without acquiescence of owner, 697.
 (counterfeit) proof of guilty knowledge, 842.
- LABELS**, when not disentitled to protection, 782.
 not technical trade-marks, but mere vehicles for them, 83, 133, 155.
 mere analogues of trade-mark, 81, 537.
 and wrappers, connecting link between good-will and trade-mark property, 537.
 made instruments of fraud, 538, 541-544.
 cannot be copyrighted, 109.
- LACHES**, what not deemed, as when one is seeking evidence, 498.
 bad faith in plaintiff to lie by for a long time, 497.
 as applied to question of abandonment, 684, 685.
- "**LA CIVETTE**" sign-infringement case, 534.
- "**LACKAWANNA COAL**" case (*Canal Co. v. Clark*), 144, 189, 598.
- LACK OF TRUTH** debars from protection, 71. (See **CLEAN HANDS**.)
 but that is where fraud is a predicate, 71.
 intention to deceive not always inferred from untrue statements, 475.
- "**LA CRONICA**" newspaper case, 550.
- "**LA FAVORITA**," for flour, is protected, 693.
- "**LA FLOR DEL TROPICO**," a valid trade-mark for cigars, 273.
- "**LAMARTINE**," valid as fanciful denomination, 216.
- "**LAMOILLE**," a valid trade-mark for scythe-stones, 695.
- LANGUAGE** of trade-marks easily read, 3.
 of heraldry speaks forth in many trade-marks, 5.
- "**LA NORMANDIE**," for cigars, right acquired by public, 840.
- LA NOUVELLE REVUE** case, 756.
- "**LA PRESSE**" infringed by "La Presse libre," 416.
- LA SOCIÉTÉ DE BERLIN**, publication, 756.
- LA SOCIÉTÉ DE LONDRES**, " 756.
- LA SOCIÉTÉ DE VIENNE**, " 756.
- LATIN** merchants, distinctive signs of trade, 6.
 language, in Middle Ages, effect of, on men's names, 197, 213.
- "**LA VALENTINE CEMENT**" not a valid mark, 190.
- "**LA VENEZALANO**," so inconsiderable in use as not a trade-mark, 711.
- "**LAWFUL TRADE-MARK**," as used in Act of March 3, 1881, 367, 368.
- LAWS OF VARIOUS COUNTRIES**. (See Appendix and Supplement.)
- LEGAL DEPOSIT** of marks simply declarative, not attributive, 48-51, 379, 380.
- LEGISLATION** necessary to enforce treaty for Protection of Industrial Property, Preface to Supplement.

[REFERENCES ARE TO SECTIONS.]

LEGISLATION, — *continued.*

on subject of trade-marks in various nations, 26.

of the United States, 26. (See Chapters VI. and VII.)

LEGITIMATE vendors injured by deceit and fraud, 766.

LE PAGE glue case, original corporation's rights, 730.

"LES OISEAUX DE PROIE," a publication case, 552.

LETTERS, initial, as marks for painters, designers, sculptors, etc., 15, 234.

for fabrics of gold and silver in England, 19.

sometimes designations of products, 87.

LIBELS cannot be valid marks, or libellous matter, 602.

"LIGHTNING," not merely descriptive of quality of knives, 771.

"LIKÖR" ("Munk") in Stockholm, 883.

LIMITATION OF PROTECTION, under Act of March 3, 1881, generally is fixed at thirty years, 333.

when goods manufactured abroad, may expire at any time, 333.

LION, independent of every attitude, not exclusive, 700.

LIQUEUR, Grande Chartreuse case, 881.

"LIST OF HOUNDS" not exclusive property, 559.

"LIVER MEDICINE," not a trade-mark, 706.

LIVERY of coachmen, and painting on vehicles enjoined, 746.

LIVY OF ALDUS, of 1518, piracy of trade-mark, 14.

"LL," on sheetings not a trade-mark because indicating quality as, 706.

"LOCATION" of business of owner must be alleged, 283.

defined under law of March 3, 1881, 296.

"LONDON CONVEYANCE COMPANY," name on coach, 560.

"LONDON DISPENSARY" case, shop-sign, 529.

"LONE JACK," a valid trade-mark of fancy, 66, 218.

infringement case, 66.

LUTHER represented by symbol of a swan, 6.

LYDIANS, inventors of gold and silver coin, 9.

M.

"MACASSAR OIL" case, in France, 23.

"MAGALE'S MONARCH WHISKEY" case, 743.

MAGIC, a valid trade-mark for scythe-stones, 695.

"MAGNETIC," for "Balm," does not imply magnetic qualities, etc., 869.

no pretence of fraud, to deceive the public, 869.

"MAGNOLIA," a valid trade-mark for alcoholic liquors, 68, 672.

"MAGNOLIA METAL" case in England, 861.

"MAIZENA" infringed by "Maizharine" for corn-flour, 785.

MANDAMUS, proceedings to enforce Label, etc. Act, 381.

MANUFACTURER,

has right generally to place his name on his products, 420.

may use his name as instrument of fraud, 420 *a, et seq.*

[REFERENCES ARE TO SECTIONS.]

MANUFACTURER, — *continued*.

of quack medicines not entitled to invoke aid of equity, 475.
unlawfully engaged, or deceiving public, etc., refused protection,
348 *et seq.*

MANUFACTURING AND TRADING CORPORATIONS, the only
kind of corporations that can have trade-marks, 317-320.

“**MARIELAND**” held not to be merely geographical, 193.

MARKS, generally. (See **TRADE-MARK**.)

upon animate property, 3, 16.
registration of swan-marks in England, 16.
seals, the most sacred proprietary marks, 4.
of sovereign upon coin, a guaranty of genuineness, 76.
of trade, etc., property under law of nations, 22.
 assuming increased importance, 28.
may resemble each other and essentially differ, 33.
of workmen in quarries of Solomon’s temple, 8.
on ancient bricks, tiles, pottery, 8, 13.

“**MARK TWAIN**,” as a trade-mark, 548, note.

MARQUE DE FABRIQUE ET DE COMMERCE of France,
Belgium, etc., means same as “trade-mark” in English, 85.

“**MARVEL**,” to designate output of a certain mill, 696.

“**MARYLAND CLUB WHISKEY**” case, 782.

MASONIC SYMBOLS,

not calculated by their nature to serve as trade-marks, 367.
impossible to divest them of ordinary signification, 367.
liable to misinterpretation, and to deceive public, 367.

MASSACHUSETTS prohibits foreign corporation from using name, 860.
of domestic banking corporation, etc., 860.

“**MATZON**,” trade-mark protected, 888.

MAXIMS cited :

Boni judicis est ampliare jurisdictionem, 67.
Caveat emptor, 11, 64. Caveat venditor, 64.
Contra non valentem agere non currit prescriptio, 686.
Debitum et contractus sunt nullius loci, 22.
De minimis non curat lex, 499.
Ex turpi causa non oritur actio, 71.
Ex turpi contractu non oritur actio, 349.
In pari delicto, potior est conditio defendentis, 349.
Jus et fraus nunquam cohabitant, 685.
Lex non cogit ad impossibilia, 362.
Lex semper dabit remedium, 345.
Non nostrum tantas componere, 491.
Noscitur a sociis, 132, 332.
Potior est conditio defendentis, 495.
Qui facit per alium, facit per se, 628.
Quod ab initio non valet in tractu temporis non convalescit, 225.
Sic utere tuo ut alienum non lædas, 420.

[REFERENCES ARE TO SECTIONS.]

MAXIMS, — *continued.*

Ubi jus, ibi remedium, 345.

Vigilantibus, non dormientibus leges subveniunt, 64.

“MAYOLINE,” (from Mayo, the owner,) a valid mark, 217.

“MAZAWATTEE,” trade-mark protected, 889.

MEANING OF PHRASES AND TERMS,

“lawful trade-mark,” 367, 368, 693.

“merely the name of the applicant,” 325, 326.

“origin or ownership,” indication of, 144 *et seq.*
publici juris, 676.

registrant, 325, note.

“unfair competition in business,” 43.

“word-symbol,” 89 *a.*

MEASURE OF DAMAGES FOR INFRINGEMENT, (see Chap. XI.)

nominal damages, at least, always given, 501 *et seq.*

“MECHANICS STORE”— words, a trade-mark, 725.

“MEDICATED MEXICAN BALM” case (*Perry v. Truefitt*), 245,
479.“MEEN FUN” case (*Hobbs v. Français*), 485.

MELANCHTHON, change of surname into Greek, 213.

“MENLO PARK,” for time-keeping instruments, 912.

MERCHANDISE,

definition of term as used in Registration Acts, 139–142, 300.

books protected by trade-mark merely as, 116, 117.

natural products protected as such, 147.

symbol not a trade-mark unless affixed to, 143.

class must be specified, 300.

“MESDAMES,” a valid trade-mark, 699.

“METCALFE’S LEXINGTON KENTUCKY MUSTARD” case, 718.

MEXICO, decree of Minister of Finance of, 942.

MICHAEL ANGELO signed paintings by monogram, 262.

“MICROBE DESTROYER,” not infringed by “Microbe Killer,” 820.

“MICROBE KILLER,” merely descriptive, 707.

“MILBRAE DAIRY,” name a fraud on public, no redress, 836.

defendant truthfully so called his dairy, 836.

“MINERAL SPERM” as fancy name for illuminating-oil, 273.

“MINNIE, DEAR MINNIE” case, name of song, 55.

MISCONCEPTION as to nature of arbitrary symbolism, 138.

as to power of Congress, 278 *et seq.*

MISREPRESENTATIONS. (See CLEAN HANDS; PROTECTION.)

MODE of affixing mark to be stated in application, 305.

MODELS of vicious application papers, 592–594.

MOËT’S CHAMPAGNE case, 754.

“MOLINE PLOUGH” case, qualifying marks, 597.

MONEY paid as fee, when returnable, 615, 616.

“MONITEUR” of Paris, newspaper infringement, 415.

MONKS OF BORDEAUX marked wine as mineral water, 77.

[REFERENCES ARE TO SECTIONS.]

- MONKS OF LA GRANDE CHARTREUSE, suits for infringements of their trade-marks, 407-410, 582, 881.
- MONOGRAMS, used as marks for many centuries, 15, 262.
Dictionnaire des Monogrammes Marques, etc., 15.
- "MONOPOLE," trade-mark for champagne, 877.
- "MONTEBELLO," trade-mark for wine, 879.
- "MONTICELLO" not merely a geographical name, 193.
- MORALITY must be inviolate in mark, 64, 348 *et seq.*, 602.
- "MORISON'S UNIVERSAL MEDICINE" case, 429, 562.
- MOROCCO has no special trade-mark laws, 940.
- "MORSE'S INDIAN ROOT PILLS," 563.
- "MOUNT CARMEL" held not to be merely geographical, 184.
- "MRS. MARPLE'S SALVE" case, 246.
- MUMM'S "EXTRA DRY," infringed by various devices, 772.
fraud on by labels, capsules, etc., etc., 772.
- MUNK LIKÖR case in Stockholm, 883.
- "MUSICAL NOTE PAPER" not a trade-mark, 133.

N.

- NAME, what is a, 196.
- of person, firm, etc., not a trade-mark, for owner, or owners, 195, 202.
 - of fancy, of famous living or dead person, 216, 426.
 - a country may be a valid trade-mark, 184, 193.
 - product solely made or sold by inventor of name, 251.
 - divorcée no right to former husband's, but must adjoin family, 764.
 - of patented device not a trade-name, 709.
 - corporation unlawfully in liquor trade has no redress as to, 833.
 - of new article, when christened, becomes public property, 706.
 - indication of deceit by similar name does not warrant injunction, 819.
 - one selling his distillery, his name reverts, 816.
 - one may sell goods by name under which it is commonly sold, 835.
 - one must not fraudulently use proper, 805.
 - not geographical, though Oriental, 889.
 - of fancy, of books, 116, 547-549, 553.
 - a song, "Minnie," 557.
 - to be a valid mark must not be generic. (See Chapter III.)
 - of a man may lose all personality, 178, 181, 220 *a*, 496.
 - cannot be assigned as a mark for another, 57, 420 *a*, 435.
 - sometimes illegal for himself, in trade, 420, 420 *a*, 749.
 - frequently changed in Middle Ages, 213.
 - of applicants to be written in full, 290.
 - may generally be attached to goods, *bona fide*, 420 *a*, 421, 427.
 - fraud may be inferred from usurping another's, 396.
 - one's name sometimes usurped without redress, 393, 556.

[REFERENCES ARE TO SECTIONS.]

NAME, — *continued*.

- of old commercial house protected, 524 *et seq.* (See Chapter XII.)
 - of a trader or firm protected, 524 *et seq.*
 - of firm, on dissolution of partnership, 524 *et seq.*
 - of coach, or other conveyance, 560 *et seq.*
 - but if necessary cannot be protected, 166, 220.
 - of a machine or product, patent expired, 221.
 - no exclusive right to same name, in same place, 857.
 - of wife, when used in fraud, forbidden, 749.
 - own name must not be used for fraud, 762.
 - name cannot be borrowed, after selling good-will, 765.
- NAMES** of places are in the public domain, etc., 758.
- NATIONAL** bonds and bills, colored threads in paper, 7, 74.
- arms, not susceptible of private use as marks, 261.
 - flags blended with other objects to catch eye, 265.
 - comity regarded by the courts, 287, 288.
- NATIONALITY**, commercial, may differ from political, 297.
- “**NATIONAL POLICE GAZETTE**” case (*Matsell v. Flanagan*), 550.
- NATURAL LAW**, foundation of trade-mark rights, 1, 46–51.
- NEGLIGENCE**. (See **LACHES**.)
- NEOLOGISM**, coiner of, may have title thereto, 219 *et seq.*
- NETHERLANDS, THE**, trade-mark law of, Appendix, p. 700, Supplement, p. 159.
- “**NEW ERA**” *omnium gatherum* case, 590.
- NEWSPAPER NAME**, as trade-mark, discussed, 103–115, 415–417.
- “**NEW YORK DENTAL ROOMS**,” trade-name in St. Louis, 725.
- “**NICKEL-IN**,” for brand of cigars, protected, 697.
- “**NIGHT-BLOOMING CEREUS**,” not a valid mark, 484.
- NINEVEH**, ancient, bricks with marks, 8.
- NOMISINATIDIS**, Xénophon, in “**JOB**” trade-mark case, 873.
- NOMS DE PLUME**, 213.
- NONDESCRIPT** picture, vignette, etc., not valid marks, 89.
- NON-RESIDENT CITIZEN** regarded as a foreigner, 294.
- NORWAY**, trade-mark law of, Appendix, p. 701, Supplement. 11.
- NOTARY PUBLIC**, may administer oath to applicant, 312.
- must in all cases affix official seal, 312.
 - certificate of, to affidavit, how made, 314.
- “**NO-TO-BAC**” not infringed by “**Baco-Curo**,” unlike in looks, 828.
- NUMERALS**, merely, not legal trade-marks, 225–233.
- use of, as an element, 442.

O.

- OATH**, or its equivalent, required of applicant for registration, 309 *et seq.*
 - design of, is confidence, 580.
 - perverted by applicant or solicitor, 580.

[REFERENCES ARE TO SECTIONS.]

- OFFENCES**, against morality or good faith, defeat remedy, 348 *et seq.*
 against public policy in any wise, 349.
 in fraudulently procuring registration, 353.
 affixing "patent" or equivalent term, 72.
- OFFICER OF CORPORATION**, to make oath, 309.
 mere director is not such officer, 323.
- "**OLD-FASHIONED**," misleading as trade-mark for Louisiana molasses, 929.
- "**OLD LONDON DOCK GIN**" not a valid mark, 597.
- "**OLD MOORE FAMILY PICTORIAL ALMANAC**" case, 257, 549.
- "**OLD YORKSHIRE MILLS**," trade-mark for paper, refused, 918.
- "**ONE NIGHT CURE**" not infringed by "Beshore's One Night Cure," 831.
- OPINIONS**, contrariety of, 136, 658-660.
- ORCHESTRA'S**, is trade-name not assignable, 726.
- "**ORDER OF SCOTTISH CLANS**," name not protected, 852.
- "**ORIGINAL**," or equivalent term, may be enjoined, 542 *et seq.*
 proprietor takes precedence independent of registration, 47, 50, 357.
- ORIGIN OR OWNERSHIP**, indication of, (see Chapter IV.)
 a phrase not always understood, 2, 144, 145.
 what may be deemed such indication, 145, 147.
 particular maker need not be indicated, 144.
 simple name of article may be, 146-148, 150-152.
 essential characteristic of trade-mark, 143.
 name originally geographical may suffice, 184 *et seq.*, 191, 193.
- "**OU, the old man who lives in solitude**," old Chinese mark, 215.
- "**OWNER**" of trade-mark may register, 283.
 definition of term, 284, 565, note.
- OWNERS**, there may be many of a mark, 604.

P.

- PACKAGES** intended to simulate will be enjoined, 817.
- "**PAIN KILLER**" (Perry Davis') case, 273, 563.
- "**PAPIER CRÈME DE RIZ**," held to be valid mark, 224.
- PARTNERSHIP**, (see Chapter XII.)
 title to trade-marks on dissolution of, 57.
- "**PASTOR KNEIPP MEDICINE CO.**" case, 930.
- "**PATENT**," or "patented," untrue use of term, 72.
 may sometimes be used when patent expired, 72, 73.
 penalty of misuse of, 340, note.
 cannot be applied to trade-mark 340.
 on expiration of patent, name is public property, 715.
- PATENT CASES**,
 do not furnish rule for trade-mark cases, 513-515, 676, 679.
- PATENT MONOPOLY** cannot be extended under guise of trade-mark, 710.

[REFERENCES ARE TO SECTIONS.]

- PATENT OFFICE OF THE UNITED STATES**,
 place of deposit of foreign marks, 332, note.
 registration, under Act of March 3, 1881, 283.
 does not grant a "patent" for trade-mark, 340.
 decision of. (See Chapter X., Supplement.)
- PATRONYMIC**, etc., constitute a property, 754, 759.
 one may use his patronymic without charge of fraud, 819.
 one cannot be restrained if like another's, 822.
- "**PAUL JONES**" may be a valid trade-mark, 218, 664.
- "**PAYSON'S INDELIBLE INK**" case, curious, 271.
- "**P. C. W.**" does not infringe "**W. H. W.**" (U. S. Patent Office), 862.
- "**PEARLS OF ETHER**," a valid fanciful mark, 166, 236.
- PECULIAR ARCHITECTURE** imitated by similar building, 825.
 should be required to be distinguished, 825.
 but not to use signs of same kind and size, 825.
- PECULIAR COSTUME**, to attract attention, protected from copy, 804.
- PECULIAR MANNER** of arranging soap not a trade-mark, 710.
- PECULIARITY OF PACKAGE** not *per se* a trade-mark, 137.
- PEERLESS** trade-mark for Carbon black, 919.
- PENAL STATUTE** of 1876 fell with that of 1870, as to counterfeiting, 839.
- PENAL STATUTES OF STATES**, 451, 736, 737, 739, 741.
- PENALTIES**, for infringement of mark, Act of 1876, 58, note, 370, 371.
 Act of March, 1881, 337 *et seq.*, 355 *et seq.*
 for fraudulent representations, or registry, 355 *et seq.*
 by indictment at common or local law, 451 *et seq.*
 under treaties and conventions. (See Appendix.)
 laws of various countries. (See Appendix.)
- PERSONALITY**, a man's name may lose all. (See **NAME**.)
- PERVERSION** of mark by transference to spurious goods, 443-447.
 misapplication may turn genuine to counterfeit, 443.
 by adulterating goods, 443.
 by filling casks, etc. with inferior articles, 443, 768, 909.
 by uniting false to genuine parts, 443-447.
- "**PESENDEDE**" was *not* decided to be a trade-mark, 222 *et seq.*
- "**PETIT JOURNAL**" newspaper case, 417.
- PETTIJOHN'S "CALIFORNIA BREAKFAST FOOD"** case, 822.
- "**PHARAOH'S SERPENTS**" case, 166, note.
- "**PHARMACIE DE L'AMBASSADE D'ANGLETERRE**," sign, 529.
- PHRASES** explained. (See **MEANING OF PHRASES AND TERMS**.)
- "**PICTORIAL ALMANAC**" case, 257.
- PICTURE**, as a trade-mark, 255-259.
- PIRACY ON TRADE-MARKS**, (see **INFRINGEMENT ; REMEDIES**.)
 may be committed by part-imitation, 33, 185 *et seq.*
 is sometimes a trade, 5.
- "**POLICE GAZETTE**" case, 550.
- POMMERY'S** (Alfred) Champagne case, 754.

[REFERENCES ARE TO SECTIONS.]

- POMPEII, ancient, commercial signs in, 6.
- POROUS for plasters not violated by using it adjectively, 838.
- "PORTLAND," protected as name of stoves, etc., 729.
- PORTRAIT of a distinguished man part of valid trade-mark, 853.
 of Richard Wagner used by another of same name as trade-mark, 878.
 one's own, a good trade-mark for himself, 853.
- PORTUGAL, decree as to Concurrence Déloyale in, 932.
- POSSESSION, which one remains in, on dissolution of partnership, 763.
- PRACTICE IN THE PATENT OFFICE, (see Chapter XIII.)
 interference cases exemplified, 652-671. (See Chapter X., Supplement).
- PREDECESSOR, who is, 742.
- PRELIMINARY, injunction not granted except necessity is pressing, etc. 807.
- PRELIMINARY INTERFERENCE,
 detailed sworn statement required, 625.
- PRELIMINARY STATEMENT, serves as a pleading, 627.
 when open to inspection of adversary, 629.
 adjudication upon preliminary statement, 630.
 not evidence for party filing it, 631.
- "PRIESTLEY'S SILK WARP HENRIETTA," protected against inferior goods, 848.
- PRIMA FACIE right to mark by registry, 338, 339.
 right of applicant, 581.
- "PRINCE'S METALLIC PAINT" case, 837.
- PRINTED COPIES of testimony, 641.
- PRINTED PUBLICATIONS, books protected by trade-marks, 14, 15.
 as merchandise, not literature, 116.
 by titles as trade-marks, 546 *et seq.*
 newspaper headings may be valid trade-marks, 103-115, 558.
 infringed by part-imitation, 415 *et seq.*
 name of song may be protected, 557.
- PRINTS OR LABELS, Act of June, 1874, discussed, 381.
 no claim of Act to constitutionality, 381.
 meaning of words "prints," "labels," etc., 382.
 proceedings on mandamus under said Act, 381.
- PRIORITY OF ADOPTION, as ground of title, 45 *et seq.*, 301, 324, 361-364.
 concession of, on interference, 634.
- PROBLEMATIC CIRCUMSTANCE defeats title, 821.
- PROCURING REGISTRY of mark by fraud, penalty for, 355.
- PROFITS, account of, although no evidence of mistake, 851.
- PROPERTY IN A TRADE-MARK. (See TRADE-MARK.)
- PROPRIETARY MARKS, (see EMBLEMS ; MARKS ; TRADE-MARKS.)
 not to be confounded with technical trade-marks, 16, note.

[REFERENCES ARE TO SECTIONS.]

- PROSPECTUS, one publishing in, need not name rivals, 865.
 PROTECTED "Kidney & Liver Bitters," label and wrapper, 721.
 one whose goods have acquired a reputation, 725.
 PROTECTION OF TRADE-MARK PROPERTY, (see Chapter II.)
 right to, 20, 60, 62, 63.
 growth of law of, 20.
 foreigners have the same right to, as citizens, 21.
 general widening of moral sense, 22-24.
 grounds of, 30, 36, 74, 392, 393.
 mere imposition on public does not entitle to, 30, 31.
 is ground for consideration, 30.
 harmless untruth does not defeat right to, 71.
 "PUDDINE" not infringed by pudding, 810.

Q.

- QUACK MEDICINES, discountenanced, 475 *et seq.*
 QUALITY, mere indication of, not a trade-mark, 29.
 of spurious goods not necessarily an element in suit, 35, 344, 401,
 496, 505.
 may properly be suggested in a trade-mark, 135.
 QUARRY-MARKS in ruins of Solomon's Temple, 8.
 QUASI TRADE-MARKS. (See Chapter XII.)
 "QUINA LIQUEUR," property of first user of name, 701.

R.

- "RACE OF DILIGENCE," not applicable to registration, 384, 661.
 "RAILROAD AND ENGINEERING JOURNAL" not infringed by
 "Engineering News," etc., 223.
 RAPHELENGIUS, bookseller at Leyden, trade mark, 15.
 "RAZOR STEEL" not a valid trade-mark for cutlery, 164.
 "READING SAUCE" label case, 542, 543.
 REBUSES as symbols of men, 5.
 RECIPROCITY in protection of trade-marks, 287, 288.
 RED GREEK CROSS in conflict with Maltese Cross (C.C.), 843.
 same case reversed on appeal to C. C. A., 843.
 REGISTRANT, definition of term, 325, note.
 REGISTRATION, does not create title to a trade-mark, 48-51, 379, 380.
 by whom and how obtained, 283.
 why limited to marks used in foreign commerce, 285.
 depends on lawful use, 325.
 refused when mark calculated to deceive, 328.
 prima facie evidence of ownership, 338, 339.
 when renewable, 333.
 is not the grant of a patent, 340.
 of fraudulent marks, 348 *et seq.*

[REFERENCES ARE TO SECTIONS.]

REGISTRATION, — *continued.*

- common-law rights are not impaired by, 357-359.
- in Department of the Treasury for certain purposes, 369.
- advantages of federal, 373.
- effect of, 374.
- a prerequisite to judicial redress in most countries, 131, note.
- falling into public domain, final, 868.
- is evidence of what is claimed, 868.
- by one, not true owner, void in Turkey, 874.
- of prints or labels for articles of manufacture, 381.
- in Europe has not a retroactive effect, 689.
- of prints or labels, Act of June 18, 1874, 381.

REGULATIONS, Commissioner of Patents to prescribe, 308.

REISSUE, after surrender, 614.

REMEDIES, — LAW AND EQUITY, (see Chapter IX.)

- may be threefold, 451.
- at law, 452-461.
- by criminal prosecution, 452-455.
- action on the case for deceit, 457-461.
- in equity, 462-468.
- discovery, account, and costs, 469-472.
- injured party has his election of, 506.

REMEDY, a figurative expression, 345.

- at common law, 346.
- denied in unlawful business. etc., 348-352.

"REVALENTA ARABICA," infringement on "Ervalemta-Warton," 439.

"REVERE HOUSE" coach case, 458.

"RICHARDSON'S PATENT LEATHER SPLITTING MACHINE," not a trade-mark, 611.

RIGHTS ANALOGOUS TO THOSE OF TRADE-MARKS, (see Chapter XII.)

- several species of incorporeal property, 521.

"RIP VAN WINKLE," a valid trade-mark, 218, 613.

RODGERS' CUTLERY spuriously imitated, 74, 428. 684.

"ROGER WILLIAMS" a valid trade-mark of fancy, 216, 426.

ROGERS (William, Sr.), not infringed by William Rogers, Jr., 819.

"ROMAN PUNCH" not valid trade-mark for beverage, 923.

ROMANS, ancient, signs and trade-emblems, 6.

- coined money 578 years B. C., 9.

"ROQUEFORT CHEESE" case in France, 748.

"ROSEBAUME," (from Rose, the owner,) a valid mark, 217.

"ROSENDALE CEMENT" cannot be exclusive, 711.

ROUMANIA, trade-mark law of, Appendix, p 701.

"ROYAL" as a trade mark for headache powders, tablets, etc., 933.

- not descriptive of baking powder, 693.
- untrue use of "Royal" symbol for baking powder, 817.

[REFERENCES ARE TO SECTIONS.]

- “ROYAL VICTORIA” a valid trade-mark, 216.
 RUSSIA CEMENT CO. case, 730.
 RUSSIAN decision showing lenity to defence, 882.
 RUSSIAN EMPIRE, treaty between the United States and, Appendix,
 p. 677.
 trade-mark law of, Appendix, p. 702.

S.

- SAINT-YORRE PRÈS DE VICHY capsules, 757.
 “SAPOLIO,” infringed by false representations, 776.
 “SAPONIFIER,” a technical trade-mark for concentrated lye, 694.
 “SARDINE JOCKEY CLUB,” trade-mark infringement by, 703.
 “SARDINE ROWING CLUB,” 703.
 “SARSAPARILLA AND IRON,” generic and merely descriptive, 706.
 “SATININE,” for starch, glue, etc., not invented word, 106.
 “SAVON DE THRIDACE,” for soap, not a trade-mark, 717.
 “S. B.” not infringed by initials “B. & S.,” 854.
 “SCHENCK WATER-PROOF TAGS,” etc., not a valid mark, 133.
 “SCHIEDAM SCHNAPPS” case, 596.
 “SCIENTIFIC DENTISTRY AT MODERATE PRICES,” not exclusive, 825.
 SCYTHE-STONE PATTERNS still belong to plaintiff although used by others, 696.
 “SEAL OF MINNESOTA,” words and picture for flour, 913.
 SEALS of ownership coeval with traffic, 2.
 most sacred of proprietary marks, 4, 5.
 SECRET PROCESS, breach of faith in divulging, 562 *et seq.*
 SERBIA, treaty between the United States and, Appendix, p. 677.
 “SERPENT,” not a trade-mark for artificial serpent, 166.
 “SERPENT OF PHARAOH” case, 166.
 SEWING THREAD of linen, cotton, etc., trade-mark right to interdict cotton, although owner has never used his mark except for linen, 803.
 SIGNATURE, an authenticating mark, 1 *et seq.*
 a trade-mark is one’s commercial signature, 130.
 itself as a trade-mark, 204–206.
 fac-simile of, as a trade-mark, 207–211.
 SIGN-BOARDS, ancient, 6.
 are not trade-marks, 96–101, 535.
 are protected by courts of equity. (See Chapter XII.)
 “SIMMONS’ GENUINE LIVER MEDICINE” case, 418.
 SINCERITY, an essential requisite of mark, 71, 143, 242, 348 *et seq.*
 “SINGER,” not a trade-mark for sewing-machines, 220 *a.*
 “SINGER MANUFACTURING CO.” case against Bent, sewing-machine, 843.
 SIR JAMES CLARK’S name usurped with impunity, 393, 555, 556.

[REFERENCES ARE TO SECTIONS.]

- “SIROP DE DENTITION” du Dr. Delabarre, 866.
 “SIX BIG TAYLORS” enjoined by “Six Little Taylors,” 801.
 SLANDER OF TRADE-MARK PROPERTY, 473.
 by selling inferior goods bearing genuine mark, 473.
 or using mark for false illustration, 473.
 or by making false oral statements, 473.
 SMECTYMNU-US, initials of five men’s names, 118.
 “SMOKE AND CHEW,” etc., infringed by like devices, 771.
 “SNOW-FLAKE STARCH,” not valid because descriptive, 174.
 “SNUFF STORE,” in Swedish, not a valid trade-mark, 706.
 “SOMATOSE” refused registration in England, 841.
 SONG, name of, protected as *quasi* mark, 557.
 “SONMAN,” being merely geographical, cannot be protected, 711.
 SPAIN, convention between the United States and, Appendix, p. 678
 SPANISH trade-mark decision, 875.
 SPECIAL DAMAGES,
 not recoverable unless pleaded. (See Chapter XI.)
 SPECIFICATION OF APPLICANT FOR REGISTRATION,
 considerable degree of accuracy required, 565 *et seq.*
 must be written in the English language, 570.
 essence of mark must be evolved on papers, 587, 588.
 indefiniteness defeats protection, 583-591.
 breadth of claim, how best attained, 586-589.
 simplicity and breadth go together, 587.
 too great breadth defeats object, 586-589.
 degree of specificness required, 591 *et seq.*
 difficulty in describing colors, 585.
 rules of propriety in selecting emblems, 602.
 allegations true in letter false in spirit, 607.
 but *one* class of merchandise in certificate, 66-70, 300, 450, 590.
 hypothetical cases analyzed, 592-594.
 amendment, how made, 577 *et seq.*
 requiring supplemental oath, 578.
 “SPIEGELMACHERS,” assumed name of early printers, 14.
 the speculum their symbol, 14.
 “SQUIREL” and picture of, as trade-mark for ammunition, refused,
 925.
 “STAR” and symbol of a Star, valid trade-mark for shirts, etc., 693.
 “STAR” tobacco infringed by “Buzz Saw” and “Star Light,” 781.
 STATE COURT may prosecute for counterfeiting foreign trade-mark,
 839.
 STATE of South Carolina is not made a trader by Dispensary Act, 839.
 cannot register a trade-mark for that reason, 839
 of California, exclusive right to trade-mark only by recording, 839.
 “STERLING” as trade-mark for cereal products allowed, 928.
 “ST. LOUIS LAGER BEER,” infringement of, 870.
 STOCKHOLDERS (outgoing) cannot organize by stealing name, 833.

[REFERENCES ARE TO SECTIONS.]

- “STONEBRAKER’S MEDICINES,” etc. case, 435 *et seq.*
 “STONE OF THE FOREST OF MORLEY” case, 747.
 STYLE, or peculiarity of package, not *per se* a trade-mark, 137.
 “SUCCESSOR,” attached to corporate name, may avoid suspicion of fraud, 777.
 SUGGESTION OF QUALITY, a valid trade-mark may contain, 135.
 SUIT in England for infringement contingent on registration, etc., 841.
 in United States Court between citizens of same State, etc., 841.
 when one dismisses his suit, he has no further redress, etc., 840.
 “SUN LIFE ASSURANCE CO. OF CANADA” case, in London, 734.
 “SUPREME LODGE KNIGHTS OF PYTHIAS” case, 740.
 SURNAME, subject considered, 196, 213.
 dispensed with, or changed at pleasure, 196.
 translated into foreign tongue, 196, 197.
 SURRENDER and reissue, 614.
 SWAN-MARKS, 16.
 SWEDEN, trade-mark law of, Appendix, p. 703.
 modification of former law in, 941.
 SWEDEN AND NORWAY, similar protection awarded in, 943.
 SWEDISH decision relative to Benedictine, 883.
 “SWEET CAPORAL,” trade-mark for cigarettes, 694.
 tobacco injunction denied, 813.
 “SWEET OPOPANAX OF MEXICO” case, 493.
 SWITZERLAND, registration law of, Appendix, p. 704.
 law of, for marking gold and silver manufactures, 19.
 and Greece, treaty between, 937.
 exchange of notes between the United States and, Supplement, p. 155.
 SYMBOLS of ownership. (See MARKS; TRADE-MARK.)
 SYNDICATE may intervene to claim damages, 761.

T.

- “TAFFY TOLU,” for chewing-gum, not valid trade-mark, 706.
 TECHNICAL MARK, (see TRADE-MARK.)
 must be distinguished from its analogues, 80 *et seq.* 130-133.
 TERMS EXPLAINED. (See MEANING OF PHRASES AND TERMS.)
 “THE AMERICAN SYRUP OF FIGS,” used by English Company,
 enjoined, 800.
 not disentitled to relief for misrepresentation, 800.
 “THELLAR’S CELEBRATED STOMACH BITTERS” case, 771.
 “THE SARATOGA,” trade-name for saloon, 886.
 “THOMSONIAN MEDICINE” case, 459.
 TICKETS OR LABELS to be sold are *merchandise*, not *marks*, 141,
 142.
 TIMBER-MARKS, 16, note.
 “TIN TAG” without color, shape, etc., not a trade-mark, 710.

[REFERENCES ARE TO SECTIONS.]

- “TIVOLI,” as trade-mark for beer, 912.
- TRADE-MARK, optional in this and some European countries, 18.
- old as commerce itself, 26.
 - must identify and distinguish article to which affixed, 29.
 - foundation of title to, 45-47, 384.
 - registration does not give title to, 48-51, 340, 376.
 - time required for perfection of title, 52, 129.
 - who may acquire, 53-57.
 - may be acquired by assignment, 57.
 - not to be confounded with analogues, 83, 90, 93-100, 521 *et seq.*
 - of what it may consist, 87, 398.
 - must be well defined and certain, 89, 127.
 - word-symbol as, 89 *a*, 219.
 - on books, 116-118.
 - on printed publications (titles of), 547, 558.
 - a picture may be a, 258, 259.
 - may be valid although suggestive of quality, 135, 249-251.
 - line of demarcation difficult to draw, 136.
 - mere form of vendible commodity not a, 89 *b*, 137, 706, 710.
 - style or peculiarity of package is not *per se* a, 137.
 - general type of objects cannot be a, 89 *d*, 254.
 - label, notice, or advertisement cannot be a, 133, 825.
 - color cannot be a, 138, 269.
 - may be an essential element, 263-267, 603.
 - indication of quality not a, 156-160.
 - designation of trade or occupation cannot be a, 161.
 - necessary name of product cannot be a, 166-171, 220.
 - essential characteristics of, 143.
 - fac-simile of signature may be a, 172.
 - pseudonym may be a, 213-215.
 - fancy name of man may be a, 216-218.
 - product may be a, 236-244.
 - family crest or arms may be essential element of a, 260.
 - monogram and cipher may be a, 262.
 - office of a, 692, 697.
 - foreign and domestic registration of a, 832.
 - advertisement is not adoption of a, 825.
 - one's ignorance of another's ownership of a trade-mark, no defence, 796.
 - if owner of trade-mark has knowledge of its use by another and fails to protect his rights, not entitled to account of sales and profits, 796.
 - lashes of trade-mark owned for 24 years, 811.
 - one not purchaser of trade-mark no right to enjoin, 723.
 - protected if it truly states name, etc., 859.
 - minute analysis not required in conflicting marks, 875.
 - title of nobility as a, 843, 879.

[REFERENCES ARE TO SECTIONS.]

TRADE-MARK, — *continued.*

deceit may vitiate title to, 817.

may be assigned, even if it bears owner's portrait, 743.

assignment of business carries, 743.

assignment in bankruptcy does not pass one's name, 743.

valid trade-mark cannot be acquired for mere indication of quality,
706.resemblance need not be such as to be seen only by experts or
other persons, when conflicting marks are side by side, 781.fact that owner of a trade-mark allows dealers to place their names
on his labels, no deception, 697.

defendant shows plaintiff's claim false to right of a, 850.

registrant must allege exclusive right in, 840.

right to symbol inseparable from right to sell commodity, 857.

case of alleged simulation of a, 866.

license to use trade-mark must strictly comply with conditions, 844.

license may be terminated by terms of contract, 844.

materials not subject of appropriation as a, 710.

symbol of a trade-mark depends on its reason and circumstances,
693.

no rigid rules can be laid down for guidance, 693.

registered trade-mark, both parties citizens of same State, 854.

actual physical resemblance not sole question in infringement of a,
730.

may pass with sale of good-will, 857.

when whole aspect of trade-mark reproduced, evidence of fraud, 866.

appropriation to entitle to a right to a, 846.

intermitted sales sometimes insufficient, 846.

right in trade-mark, and not abandoned, question for jury, 842.

mark resembling genuine trade-mark confusing to the eye, 867.

discontinuance of deceiving symbols by defendant, no defence, 787.

form of sticks of chewing-gum, not a, 710.

only effect of symbol to indicate class, 827.

colored threads in woven goods may be a, 268, 603.

one's own name merely cannot be a, 326.

fac-similes must be furnished for registration, 304.

title not defeated by accidental prior use of emblem, 383.

no power in Congress to grant a, 568.

right of user exclusive in its nature, 324, 840.

blended with other rights, 418.

with unfair competition, 43, 44, 418, 473.

right to a trade-mark does not depend on novelty or invention, 697

TRADE-NAME, as contradistinguished from trade-mark, 91.

is properly allied to good-will, 91.

 " *bona fide* " owner of trade-name may use it, 742.

may be of men, of places, of vehicles, 91.

" TRAMWAY," no exclusive right to name, in France, 864.

[REFERENCES ARE TO SECTIONS.]

TRANSFER OF A TRADE-MARK, (see ASSIGNMENT.)

Commissioner of Patents to make regulations for, 361.
at common law, 361, 362.

as affected by law of domicile, 295.

TREATIES, CONVENTIONS, etc., on trade-marks, 285, 286, 288. (See Appendix to Supplement.)

list of nations with whom we have, 283, note.

definition of terms, 286-288.

TREATY FOR PROTECTION OF INDUSTRIAL PROPERTY,

Preface to Supplement.

TRICKS OF TRADE, not always guarded against, 448.

"TUERK WATER MOTOR CO." protected in its name, 721.

TURKEY, trade-mark law of, Appendix, p. 705.

"TYCOON" for tea is old, and therefore not valid, 706.

"TYPOGRAPH," as a trade-mark, refused registration, 908.

U.

UNCERTAINTY OF DESCRIPTION bewildering to courts, 713.

UNFAIR COMPETITION IN BUSINESS, 43, 89 c, 719, and Chapter V., Supplement.

principles of, discussed, 43, 44.

examples of, 137, 223, 224, 392-396, 521.

by truthful signs of ex-employees, 532.

by untruthful suggestions on signs, 529, 531.

by usurping name of rival's commerce, 533.

shop-sign, 534.

industrial product, 535.

UNITED STATES, trade-mark laws of, Appendix, p. 705.

convention between Denmark and, Supplement, pp. 164, 165.

convention between Japan and, Supplement, p. 167.

exchange of notes between Netherlands and, Supplement, p. 159.

exchange of notes between Switzerland and, Supplement, p. 159.

protocol between various nations and, Supplement, pp. 161-164.

treaty between Japan and, Supplement, pp. 165, 166.

registration, does not impair State jurisdiction, 839.

cannot prevent formation of corporation bearing same name, etc., 839.

Supreme Court cannot review judgment refusing to register, 839.

prosecution by Federal Court when dependant on registration, 839.

UNITED STATES DENTAL ASSOCIATION protected against sign "U. S.," 802.

UNPATENTED MEDICINE known by name of original maker, not exclusive, 715.

UNTRUE REPRESENTATIONS not necessarily fatal, 869.

UNTRUTH, (see CLEAN HANDS.)

in use of word "patented," or its equivalent, 72.

as to place of manufacture, 483, 487.

[REFERENCES ARE TO SECTIONS.]

UNTRUTH, — continued.

name of manufacturer, 489.

fictitious name of manufacturer may be innocent, 494 *et seq.*

harmless, is not deemed fraudulent, 71.

UNWITTING VIOLATION of trade-mark, 891.**USE OF PROPRIETARY MARKS, (see TRADE-MARK.)**

by ancients, 1-13.

lawful business essential to. (See **ABSTRACT SYMBOL.**)

V.

"VALLÉE D'AURE," a mere geographical name, 187.

VALS, (Garriga y) six trade-marks in Spain, 875.

"VALVOLINE," trade-mark for lubricating oils, protected, 769.

VAN AUKEN case, attempt to incorporate, 833.

VARIANCE of identifying words in petition, for jury, 847.

"VEGETABLE SICILIAN HAIR RENEWER" case, 425.

VENDIBLE COMMODITY, only object of trade-mark, 54, 66-70, 129, 130, 300 *et seq.*, 680.

VENDOR of place of business, compelled to fulfil contract, 753.

VENETIAN PRINTERS' MARKS, 14, 15.

"VENEZALANO" ("LA") so inconsiderable in use as to void trade-mark, 711.

"VIBRATORS," a class of agricultural machines, 601.

"VICHY," a trade-name, enjoined, 724.

VICHY, City of, general name for locality, 757.

"VICHY" COMPANY case, 699.

VINTNERS' SYMBOL, a green bush, 6.

VIOLATION OF INJUNCTION of another State, 837.

"VITASCOPE," trade-mark for machine throwing moving pictures on a screen, 905.

"VULCAN" over a globe, for matches, etc., 694.

"VULTURE" infringement of "Vulcan," 694.

W.

"WARD'S" (MARCUS) "SON," truthfully used, 830.

"WARMTH IS LIFE," for underwear, not infringed by imperfect symbol, 826.

WATER-MARK on paper detects forgery, 7.

WEHELENSÉS' marks on publications, 15.

"WEBER" not infringed by "Webster" for pianos, 869.

WEDGWOOD'S reliance on trade-marks, 29.

family name, as mark, for centuries, 216.

"WHAT CHEER HOUSE" case, 92.

WHISKEY bottled at distillery, and relied on, infringed by similar bottle, 721.

label not invalidated by proof that it has been diluted, 782.

"Canadian Rye," infringed by "Canadian Club Whiskey," 771.

[REFERENCES ARE TO SECTIONS.]

WHISKEY, — continued.

- “Chicken Cock,” infringed by “Miller’s Game Cock,” 790.
- “Magale’s Monarch” case, 743.
- “Maryland Club” case, 782.
- “WHITE LAUREL,” as trade-mark for medicine, refused, 916.
- “WHITE WRAPPER,” as trade-mark for canned salmon, refused, 923.
- “WILLOUGHBY LAKE,” a valid trade-mark for scythe-stones, 695.
- “WILLOUGHBY RIDGE” infringes “Willoughby Lake,” for scythe-stones, 695.
- “WILLOW SPRING ICE” merely descriptive, 247.
- WINE, false trade-marks on, German decision on, 880.
 - “Monopole,” trade-mark for champagne, 877.
 - “Montebello,” trade-mark for, 879.
- “WINSLOW’S (Mrs.) SOOTHING SYRUP” case, 201, 426.
- “WISTAR’S BALSAM OF WILD CHERRY” case, 491.
- “WOOD TAG,” not a trade-mark, 710.
- WORDS asserting manifest falsehoods, not protected, 831.
- WORDS AS TRADE-MARKS,
 - must be specific and distinctive in meaning, 29.
 - indicating character, kind, or quality, not appropriable, 29.
- “WORD-SYMBOL” as trade-mark, 89 *a*.
 - term defined, 89 *a*, note.
 - examples of, 33, 219.
- WOSTENHOLM & SON’S “I X L” case, 69, 70, 450.
- WRAPPERS as *quasi* trade-marks, 537 *et seq.*
- WRONG-DOER cannot qualify his own wrong, 518.
 - restraint of. (See REMEDIES.)
- WRONGFUL INTENT, inquiry into, in fixing damages, 508.

X.

- “X” formed of two fishes crossed, as mark for fish, 250.
- “X,” “XX,” “XXX,” mere indications of degree, not trade-marks, 162, 163, 597.
- “xXx,” registered for bottled lager beer, 597, note.
- X-MARK on tea, not infringed by similar mark, 812.

Y.

- “YALE,” trade-mark for locks, refused, 917. *
- “YANKEE SOAP” case, 119-125.
- “YELLOW MOSS CHEWING-TOBACCO,” not descriptive, 173.
- “YORKSHIRE RELISH” not a trade-mark, 706.
 - infringement of, 870.
- “YOUNG AMERICAN,” a valid trade-mark for ink, 218.

Z.

- “ZERO,” a valid mark for water-coolers, 273.

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7/8/07