remained so till the fusion of law and equity by the Judicature Acts.

The effect of Lord Cottenham’s decision in the case of *Millington* v. *Fox* clearly was to recognize a right of property in trade marks, and the action for infringement became a familiar species of litigation. Under the then existing law, however, the plain­tiff in such actions generally found himself in a very disadvantageous and unsatisfactory position. The basis of his action was the reputed association between his trade mark and his goods. This association the defendant—often a person of no means— would deny, and it had to be proved as a fact by witnesses at a cost to the plaintiff which there was little hope of his recovering. Moreover, even if the trade mark proprietor secured a judgment in his favour, it carried with it no immunity from the obligation of again establishing his right to the mark against any subsequent infringer who chose to dispute it. Thus—to take an interesting and pertinent illustration given in *Kerly on Trade Marks* (p. 6) —the case of *Rodgers* v. *Nowill* (22 L. J. Ch. 404) lasted five years and cost the plaintiff £2211, without giving him in the end any security that he might not have to incur equal delay and expense in proving his title to the exclusive use of the trade mark in proceeding against other defendants. To complete this statement of the shortcomings of the law before the Merchandise Marks Act 1862, it should be noted that the infringement of trade marks—except in cases where the seller of spuriously marked goods cheated the buyer—was not a criminal offence. The remedies obviously needed were the establishment of a system of registration of trade marks which would simplify the proof of a plaintiff’s title, and the creation of a criminal law of false marking.@@1 The first step in the accomplishment of the latter object was taken by the Merchandise Marks Act 1862.

II. *Under the Registration Acts.—*Provision was first made for the registration of trade marks by the Trade Marks Registration Act 1875. That statute made registration in the register of trade marks which it established prima facie evidence of the right of the registered proprietor to the exclusive use of the trade mark in connexion with goods of the class for which it was registered and used, and enacted that it should after the expiration of five years be conclusive proof of such right, provided that the proprietor of the mark remained the owner of the goodwill of the business in which it was used. This provision was carried as to the act of 1883 (s. 76). The act also provided that a person should not be entitled to institute any proceeding to prevent the infringement of trade mark until it was registered, or (a later statutory modification) until, in the case of a mark in use before the passing of the act of 1875, registration of the mark as a trade mark had been refused. The act of 1875 was a con­siderable success, but no provision was made under it for the registration of words unless they either were old marks or were registered in combination with one or more of the “ essential particulars ” prescribed by the act, such as a distinctive device, heading, mark, label or ticket. These limitations excluded from registration most of the trade marks ordinarily in use.

The Patents Designs and Trade Marks Act 1883 remedied this defect besides altering the law in other important respects. The act of 1883 was amended in 1888 on the recommendation of a committee presided over by Lord Herschell. Neither the act of 1875 nor those of 1883 and 1888 altered the common law definition of a trade mark, nor contained any definition of the term. The description in the acts of what was registrable as a trade mark led to much litigation, and the interpretations of the judges left commercial men dissatisfied on three points : (1) the number of good and valuable trade marks which were not registrable; (2) that on allowing registration the patent office insisted on disclaimers which hampered the owner in obtaining protection in the colonies and foreign countries; (3) that there was no effective period of limitation to attacks on

registered trade marks, because though registration for five years was declared conclusive by s. 76 of the act of 1883, the powers of the court to rectify the register could be invoked even after the lapse of the five years *(re Gestetner's Trade Mark,* 1907, 2 Ch. 478). In re-enacting and enlarging the provisions of the act of 1875 the act of 1883 laid down certain essential particulars of one at least whereof a trade mark must consist to be regis- trable. These particulars will be considered later in dealing with the present law. The act of 1883 first provided for “ word marks,” and included among them “ a fancy word or words not in common use ” [s. 64, (1) (c)].

The expression “ fancy word,” used in the act of 1883, gave rise to considerable difference of opinion. It was interpreted by the court of appeal as equivalent to “ obviously meaningless as applied to the article in question,” or “ obviously non- descriptive.” In accordance with this interpretation, the words “ gem ” for guns, “ melrose ” for a hair restorer, “ electric ” for velveteen, and “ washerine ” for a soap were all held not to be registrable. On the recommendation, however, in 1887, of a committee appointed by the board of trade, and presided over by Lord Herschell, the expression “ invented word ” was substituted for “ fancy word ’’ by the act of 1888.

In 1905 and 1907 the legislation as to trade marks was amended and remodelled. A bill was introduced in 1905 at the instance of the London Chamber of Commerce, and after consideration by a select committee became the Trade Marks Act 1905. This act repeals the bulk of the provisions of the Patents, &c., Acts of 1883 and 1888 with respect to trade marks, and embodies them with amendments (to be noticed later) in a separate statute. The only portions of the earlier acts left standing with respect to trade marks were ss. 83 and 84 (as amended in 1885 and 1888) with reference to the administration in the patent office of the law as to trade marks (1905, s. 74); ss. 103 and 104 of the act of 1883 (as amended in 1885) relating to registration of trade marks, both as enacted in the acts of 1883 and 1885 and as applied by orders in council, are to be read as applying to trade marks registrable under the act of 1905 (s. 65). The sections of the Patents Acts of 1883, 1885 and 1888, thus preserved as to trade marks, were repealed by the Patents and Designs Act 1907. Sections 62 seq. of this act replace ss. 83 and 84 of the act of 1883, and retain the administration of trade mark law in the patent office; and s. 91 replaces ss. 103 and 104 of the act of 1883 as to international and colonial arrangements for mutual protection *(inter alia)* of trade marks. According to the rule laid down by the Interpretation Act 1889 the refer­ences in the act of 1905 to the acts of 1883, &c., are to be read as applying to the above-stated sections of the act of 1907.

The act of 1905 differs from the preceding acts in containing a definition of trade mark for the purposes of the act unless the context otherwise requires; viz. that it “ shall mean a mark used or proposed to be used upon *or in connexion* with goods for the purpose of indicating that they are the goods of the proprietor of such mark by virtue of manufacture, selection, certification, dealing with or offering for sale and "mark" is defined as *including* “ a device, brand, heading, label, name, signature, word, letter, numeral or any combination thereof ” (s. 3). The act, modifying to the extent indicated in italics the acts of 1883 and 1888, prescribes (s. 9) that a trade mark to be registrable must contain or consist of at least one of the following essential particulars

1. The name of a *company,* individual or firm represented in a *special* or particular manner (under the act of 1883 it has been held that the name must be in the nominative case, and that ordinary printing is not representation in a particular manner),

2. The signature of the applicant for registration or some ρrede- cessor in his business. It is not clear that this includes descriptive trading styles.

3. An invented word or words.

4. A word or words having no *direct* reference to the character or quality of the goods, and not being *according to its ordinary signifi­cation* a geographical name *or a surname.*

5. *Any other distinctive mark; but a name, signature, or word or words other than such as fall within the descriptions in the above para­graphs I, 2, 3 and 4, shall not, except by order of the board of trade or of the court, be deemed a distinctive mark.* By distinctive is meant "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons ”: and “ in determining whether a trade mark is so adapted the tribunal may in the case of a trade mark in actual use take into consideration the extent to which such

@@@1 Further reference may be made, in regard to the subject of trade marks before the Registration Acts 1883-1888, to aft admirable introductory chapter in *Κerly on Trade Marks,* and also to the report of the Merchandise Marks Committee 1862, and the annual reports of the commissioners and the comptroller-general of patents from 1876 to 1884 (2nd report).