her, until her crew were preparing to let go the starboard anchor. Isuard no doubt says that he never lost sight of her, and that she never changed her course; but it clearly appears from his evidence that he did not see her at all until just before she was observed for the second time by Delmas. Captain Paul's opportunities of observation were equally limited. He says, "It was perhaps a minute from the time I first saw her till the collision." Whilst their Lordships are prepared to acquit the *City of Peking* of having steered a straight course for the *Saghalien*, it does not necessarily follow that, in their opinion, she must be absolved of all blame in the matter. When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *primâ facie* evidence of fault; and she cannot escape liability for the consequences of her act, except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill. The appellants attribute the collision wholly to the effect upon their vessel of the current which caught her head, to counteract which they maintain that every reasonable precaution was used which ordinary skill and prudence could suggest. It appears to be an undoubted fact that, in certain states of the weather, at half ebb, the tide setting eastwards sweeps down the western shore of the promontory of Kowloon, and is thereby deflected, and runs with considerable force in a southerly direction across the fairway. These currents are exceptional, but that they do occasionally, although at distant intervals, occur, is known to mariners who frequent the harbour, and was known to the captain of the *City of Peking*. The evidence on both sides establishes that it is impossible to lay down any rule in regard to the recurrence of these exceptional tides; they may occur at any time, even when least anticipated, and a cautious mariner is therefore bound always to keep in view the possibility of their being met with. There can be no reason to doubt the statement of the captain that he did not expect to meet with a current of the force of that which he encountered; but, however little expected, it was his duty to be prepared for such a contingency. The fact that he had been compelled, by the apparent position of the two junks, to keep to the southern edge of the fairway made that duty the more imperative. Their Lordships are not prepared to hold that, using all due precaution, he was not entitled to steer upon the course which he proposed to follow. The liability or non-liability of his ship appears to them to depend upon this consideration—whether, at the time when she was caught by the current, he was prepared to use, and did actually use, all ordinary and proper measures for averting the collision? There is a serious conflict of testimony as to the actual force of the current at the time of the collision, some witnesses estimating it at half a knot, and others at nearly five knots, an hour. Their Lordships do not think it necessary to decide between these conflicting views, or to determine the precise strength of the current on the occasion in question. It appears to them that, assuming his statement on that point to be correct, the evidence nevertheless establishes that the captain of the *City of Peking* failed, in two particulars, to take proper steps for checking the way of his ship. In the first place, their Lordships have been advised by their nautical assessors, and they have no hesitation in holding, that the starboard anchor ought to have been dropped at the same time when the order to stop and reverse was given. That an appreciable interval of time must have elapsed between the giving of the second and third orders is made clear by the evidence of the captain and third officer; and the second captain of the *Saghalien* is probably not far wrong in his estimate of distance when he states that, at the time it was dropped, the two vessels were not more than 200 feet apart. Seeing that 60 fathoms or 180 feet of chain were payed out with the anchor, there must have been very little time for it to operate before the collision occurred. In the second place, their Lordships have been advised that, in the circumstances in which the *City of Peking* was placed, her port anchor ought also to have been in readiness, and ought to have been let go, so soon as the ship ceased to obey her helm in consequence of the current. In that opinion they entirely concur. In such circumstances, the keeping of both anchors in readiness is a safe and ordinary precaution, it being impossible to predict which of the two it may become necessary to drop or that both will not be required. That a second anchor, if dropped in time along with the first, would have had a material influence in averting the collision, or minimising its effects, can hardly be questioned by the appellants, whose third officer states in his evidence, "I dare say two anchors would have held her." The fact seems to have been that those in charge of the *City of Peking*, although they ought to have been aware of the possibility, thought there was no probability of danger from a current; and, acting on that speculation, they allowed the port anchor to be unshackled before the junks were reached. In other words, they took their chance, and the ship must bear the consequences. It is right to state that these views are in entire accordance with certain of the findings in the court below. Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellant must pay the costs of the appeal.

Solicitors for the appellant, *Trinders* and *Co.*

Solicitors for the respondents, *Gellatly* and *Warton*.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 17, 1888, *and March* 23, 1889.

(Before COTTON, LINDLEY, and BOWEN, L.JJ.)

Re LAMBERT'S TRADE MARK. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Trade mark—Sheffield marks—Opposition to registration—Duty of Cutlers' Company and comptroller—Marks—Calculated to deceive—Person aggrieved—Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57), *ss.* 81, 90.

W. and Sons were the registered owners of a trade mark of a tobacco-pipe (stamped on metal) in

(*a*) Reported by FRANK EVANS, Esq., Barrister-at-Law.

respect of class 12 *in the schedule to the rules under the Patents, Designs, and Trade Marks Act* 1883—*viz., cutlery and edge-tools. L. was the registered owner of a trade mark of a pipe and dart (stamped) in respect of class* 12, *and also in respect of other classes relating to machinery and metal goods. Both were old marks issued by the Cutlers' Company many years ago. L.'s mark had been regranted in* 1839 *to X., a freeman of the company, and this was the last entry in the books of the company. No registration of this mark had been made under the Trade Marks Registration Act* 1875 *in the London register established under that Act for Sheffield marks. X. had assigned the mark to J. and Co., and on their business being taken by L., the pipe and dart mark had been assigned to a trustee for him. Sub-sect.* 1 *of sect.* 81 *of the Patents, Designs, and Trade Marks Act* 1883 *provides for the establishment of a new temporary register of trade marks at Sheffield; sub-sect.* 2 *enacts that the Cutlers' Company shall enter in the Sheffield register, in respect of cutlery and other steel and iron goods, marks on the register established under the Act of* 1875 *belonging to persons carrying on business in Hallamshire or within six miles of it, and also enter in such register in respect of the same goods all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the commencement of the Act, but not registered under the Act of* 1875. *Other sub-sections provide for the registration of new trade marks by the Cutlers' Company. Sub-sect.* 12 *provides for an appeal to the comptroller by any person aggrieved by a decision of the Cutlers' Company, subject to a further appeal to the court. The marks on the Cutlers' register at Sheffield were to be put on the central register, and after a lapse of five years the new Sheffield register was to be closed. L.'s trade mark was not put on the register in the first instance by the Cutlers' Company, but on the* 16*th Sept.* 1887, *on application made by L., the Cutlers' Company entered the mark on the Sheffield register in the name of L. This application was opposed by W. and Sons, but the Cutlers' Company refused to consider their opposition, and the comptroller declined to interfere on the ground that he had no jurisdiction. W. and Sons then moved before North, J. to set aside the refusal of the Cutlers' Company and of the comptroller to hear their opposition to registration; or, in the alternative, to have the register rectified under sect.* 90 *of the Act of* 1883, *but North, J. dismissed the application on both points.*

Held, on appeal (without expressing any opinion as to how the case would have stood if any question had been raised as against L. by X.), that the Cutlers' Company and the comptroller had a mere ministerial duty to perform—viz., to enter on the new register the old corporate mark, and that their so acting was not a decision under sub-sect. 12 *of sect.* 8.

Per Bowen, L.J.: Even if the Cutlers' Company or the comptroller made a mistake, the court could not interfere on behalf of W. and Sons, unless some grievance had been thereby done them; and it was not shown that they had made out a right to ask for the interference of the court.

Held also, on the question whether W. and Sons were or were not entitled under sect. 90, *sub-sect.* 1, *of the Act of* 1883, *to have the register rectified by expunging or varying the entry, that this question depended on whether the mark registered in L.'s name was or was not calculated to deceive; that there was no reason to suppose that, when used fairly—and without considering any fraudulent user, which had not been alleged, and which the court apart from any question of trade mark could always deal with—L.'s mark was calculated to deceive; and that, even supposing that L. was not entitled to the old corporate mark, W. and Sons had failed to make out that they were persons entitled to relief under sect.* 90.

An old corporate mark of a tobacco-pipe, with a dart in line with the pipe at the end where the bowl was stamped, was in 1698 granted by the Cutlers' Company of Hallamshire to one Bradshaw.

In 1839 this mark was surrendered, and on the 7th Oct. 1839 it was reassigned to one Thomas Linley, a razor manufacturer; the last record in the books of the Cutlers' Company relating to this mark being the entry referring to this assignment.

Shortly before the issuing of the advertisement mentioned below, Arthur Lambert, trading at Sheffield as a razor manufacturer in the name of George Johnson and Co., applied verbally to the Cutlers' Company to have the pipe and dart registered in his name.

Lambert asserted that the mark was sold by Linley to George Johnson on the 17th Jan. 1842, for the sum of 35*l.*, for which a receipt was produced; that George Johnson died in 1867; that the mark passed under his will to his children; and that on the 7th March 1887 a son of George Johnson assigned it to Lambert in connection with the goodwill of the business of George Johnson and Co. The mark had been actually used (but on razors only) by Lambert and his predecessors in title up to the time of the application.

In consequence of Lambert's application, newspaper advertisements were, on the 26th March 1887, issued by the Cutlers' Company asking for claimants to the mark.

On the 14th April 1887 George Wolstenholme and Sons Limited, and William Nixon, of Sheffield, wrote to the Cutlers' Company, objecting to any regrant of the mark of the pipe and dart, on the ground that there was no legal owner of it, and that it was so similar to a mark of their own as to be calculated to deceive. The mark belonging to the applicants was a tobacco-pipe, which was originally assigned, in 1694, to Jonathan Birks, and, previously to the year 1875, had become vested in George Wolstenholme, a razor manufacturer (being actually entered in the name of Wm. Hutchinson, who held it as trustee). In Dec. 1875 G. Wolstenholme assigned his business and marks to the applicants, and the pipe mark was, on the 3rd Nov. 1876, reassigned by the Cutlers' Company to Nixon, as a trustee for George Wolstenholme and Sons, the Cutlers' Company not being able to assign a mark to a limited company. The pipe mark was also registered by the applicants in London, under the Trade Marks Registration Act 1875 in class 12, and later, in the new Sheffield registry, under the Patents, Designs, and Trade Marks Act 1883, in class 12, in respect of knives, razors, and cutlery.

The clerk to the Cutlers' Company replied by

letter that Lambert had made out a *primâ facie* title; that Lambert would be required to proceed in a strictly legal manner; and that the company would have no alternative but to allow the mark to be placed on the register if Lambert took the necessary steps to vest in him a mark already his by purchase and long user. In June 1887 Lambert applied formally for registration, and on the 13th July an advertisement of this application appeared in the *Trade Marks Journal*, in the list described as "List of applications for the registration of trade marks made to the Cutlers' Company" (a separate and distinct list from the list of ordinary applications for trade marks to the Patent Office). At the top of the first page of the journal there is a heading, which is as follows: "Any person who has good grounds of objection to the registration of any of the following marks must, within two months of the date of this journal, give notice at the Patent Office, in the form J, in the second schedule of the Trade Marks Rules 1883, of opposition to such registration."

On the 5th Aug. 1887 the applicants' solicitors wrote asking to know what steps had been taken in the matter by the Cutlers' Company, to which it was replied that the application of Lambert was to be placed on the new Sheffield register; that the usual steps had been taken; and that if the applicants were desirous of opposing, the object of the advertisement was to give the public notice, so that anyone whose rights were affected might take such action as he might be advised.

On the 9th Sept. 1887 the applicants gave notice of opposition to the comptroller, and on the 12th Sept. to the Cutlers' Company, on the ground that they were themselves the owners of a pipe trade mark, independently of the Cutlers' Company, by continuous user from Nov. 1876; that the only difference between their mark and the mark the subject of the application was a small dart; that such mark was calculated to deceive and to enable other persons' goods to be passed off as theirs; that Lambert was not entitled to be registered at all, or at any rate not for all the goods for which he had applied.

On the 14th Sept. 1887 the comptroller returned the notice with a letter stating that old corporate marks were only advertised for the information of the public, and were not, in the comptroller's view, liable to opposition under sect. 69 of the Act of 1883, which states what is to be done in case of opposition to registration of a trade mark.

On the 16th Sept. 1887 the Cutlers' Company acknowledged the notice sent to them, and on the same day registered Lambert as owner of the mark, pipe and dart, in respect of goods in classes 5, 12, and 13, and subsequently Lambert was registered in the same way in the London register. On the 30th Sept. the applicants' solicitors wrote to the Cutlers' Company asking for information on the matter, and were informed that the registration had been effected.

On the 21st Nov. the applicants appealed to the comptroller from the decision of the Cutlers' Company, and on the 20th Jan. 1888 the comptroller gave the following decision:

This is an application to me under sub-sect. 12 of sect. 81 of the Patents, Designs, and Trade Marks Act 1883. After careful consideration it appears to me that the provisions of that sub-section do not apply in the case of oppositions; but that the sub-section is intended to provide for an appeal to me as comptroller, from a decision of the Cutlers' Company in regard to applications addressed to them in the same way, and in the same kind of cases as sub-sects. (4) and (5) of sect. 62 of the Act provide for an appeal from the Comptroller to the Board of Trade in the case of refusal by the Comptroller to proceed with applications made to him. Oppositions to the registration of trade marks applied for at Sheffield appear to fall under sect. 69 of the Patents, &c. Act 1883. In the present case, however, as the Cutlers' Company have entered Mr. Lambert's mark upon the Sheffield register, and as the mark has also been entered upon the London register, the provisions of sect. 69 do not, of course, apply; and the only course open to Messrs. Wolstenholme for removing Mr. Lambert's mark from the register, if there be sufficient cause, is by an order of the court under sect. 90.

Wolstenholme and Sons and Nixon then moved before North, J. that the decision of the comptroller, affirming a refusal of the Cutlers' Company to hear the opposition of the applicants to the registration of Lambert's trade mark, might be set aside, or, in the alternative, that the registration might be expunged.

Cozens-Hardy, Q.C. and *C. Gould* for the applicants.—The application to reverse the comptroller's decision, and that the applicants may be heard in opposition, is made under sect. 81, sub-sect. 12, of the Act of 1883; the alternative application is made under sect. 90. Lambert's application was made under sub-sect. 3 of sect. 81, and not under sub-sect. 2, which imposes a merely ministerial duty on the Cutlers' Company to move a name from the old register to the new one. By 21 Jac. 1, c. 31, s. 8, two marks could not be granted to the same person, but Johnson had another mark of seven stars. 31 Geo. 3, c. 58, gave no right to assign a mark, but only certain privileges to widows. 41 Geo. 3, c. 97, first gave a power of bequest subject to the widow's rights. 23 Vict. c. 43, extended the earlier Acts to other goods. Sub-sect. 2 of sect. 81 of the Act of 1883 created a merely ministerial duty, and therefore all the Cutlers' Company could do under it was to put Linley's name on the register; and the moment Lambert applied the applicants had a right to be heard on the question whether he had proved his devolution of title. At any rate, so far as regards class 12, which is common to both marks, the applicants have a right to be heard (see sect. 81, sub-sect. 12). The Cutlers' Company are not the sole judges of what may be put on the register in respect of old marks. Lambert's title is bad. Johnson could not hold two marks. Notwithstanding 31 Geo. 3, c. 58, it has always been the custom and the practice of the company not to assign more than one mark to one person. Sub-sect. 10 of sect. 81 of the Act of 1883 provides that a person may be registered in respect of two marks; and that shows that it could not be done before. Neither Johnson nor his devisees ever applied to be registered, and we do not admit Johnson's title. There is nothing to show the mark was assigned with a business by Linley to Johnson. The mark was not assigned according to the special custom of Sheffield marks. Although it might be acquired by user independently of the register (*Bury* v. *Bedford*, 10 L. T. Rep. N. S. 470; 4 De G. J. & S. 352), and therefore could be assigned by common law, it should then have been assigned in conjunction with a business. The transfer to Johnson was not complete; the mark should have been surrendered and reassigned by

the company. Neither his widow nor the widow of George Johnson nor Linley is cleared off. Johnson, by his will, bequeathed his corporate mark of seven stars, but not this one. The mark should only be registered in respect of the goods for which it was used, viz., razors, and should only be registered for part of a class. Lambert has not used the mark in all the classes of goods for which he is registered. All that Lambert can be entitled to is registration so far as he is entitled by user as assignee. The applicants object to his being registered for the whole of class 12. In the alternative they ask for the entry to be expunged under sect. 90, or varied by limiting the mark to razors only in respect of class 12.

The *Attorney-General*, Sir *Horace Davey*, Q.C., and *Ingle Joyce* for the Cutlers' Company.—The company have nothing to do with the merits; if there is a grievance as to that, the court can decide the question under sect. 90. The company have, as to old marks, a mere ministerial duty. There would be an appeal, if the company registered an insufficient user, under sect. 90, if it was an old mark, and under sect. 69 if a new mark; the appeal would then be direct from the Cutlers' Company to the court. Mistakes, under sub-sect. 2 of sect. 81, do not go to the comptroller. Sub-sect. 2 and sub-sect. 3 of sect. 81 expressly extend and confine the class of goods in respect of which the marks are to be registered. A mark as to certain goods may be registered for certain others. Under the Act an old mark on the register may be entered by the Cutlers' Company on the new register for a new class of goods. Sub-sect. 3 deals with new applications for the same class of goods, and these go to the comptroller, who has a check on the Cutlers' Company. The language of sub-sects. 4, 5, and 6 does not apply to making a register of old marks. The first part of sub-sect. 7 applies to new applications, but the latter half applies only to the performance of a mere ministerial act. Sub-sect. 8 refers only to new applications. Sub-sect. 12 gives an appeal to the comptroller if the Cutlers' Company refuse to register. There may possibly be an appeal to the comptroller where an application to register an old mark is refused. But oppositions are dealt with by the court under sect. 90, not by the comptroller. Throughout the whole of part 4 application for registration is distinguished from the entry of old corporate marks. Sects. 62 and 63 do not apply to entries under sect. 81, sub-sect. 2, and sect. 68 contains no directions as to advertisements in reference to old marks. Sect. 70 does not refer to old marks. Sect. 72 refers only to new applications. The advertisement does not alter the construction of the Act; it was only intended to give notice of what was being done. Sub-sect. 12 of sect. 81 only enables the comptroller to deal with a decision of the Cutlers' Company, but there has been no such decision. The company have no discretion on the question of similarity, but only on that of user.

Hatfield Green for Lambert.—I adopt the argument on behalf of the Cutlers' Company as to the duty of the company.

Cozens-Hardy replied.

North, J.—The real question in this case, so far as I have had it argued, is whether the applicants here ought to have had notice of the proceedings to register the Lambert trade mark, and to have had the opportunity of appearing to resist that application. That seems to me to turn upon the question whether what has taken place has been done under sub-sect. 2 or sub-sect. 3 and the following sub-sections of sect. 81 of the Act of 1883. It seems to me what has been done has been done under sub-sect. 2, and not under sub-sect. 3. Looking at the correspondence which has passed, the first letter, that of the 14th April 1887, written on behalf of the present applicants to the company, calling attention to the advertisements which had been issued for persons claiming any interest in the mark to give notice of their claims, seems to me not to have been a notice given in pursuance of any application under the Act. It is not one of those applications which appear in the *Trade Marks Journal*. The letter goes on to say that, in consequence, the applicants gave notice to the company that they objected to a grant being made of the "pipe and dart" to the respondent, Mr. Lambert, giving their reasons, which were two. First of all, it was misleading; secondly, no title made to the mark. The answer of the 15th April 1887 is an indication from the first that the company considered they were acting under sub-sect. 2. [His Lordship further referred to the correspondence, and continued:] On the 13th July the advertisement appeared in the *Trade Marks Journal*, where there is a clear distinction taken between the applications with respect to the trade marks with which the Cutlers' Company have to do, and the ordinary applications for trade marks to the Patent Office; and they are distinguished by being put under a different head, one being described as the "List of applications for the registration of trade marks made to the Cutlers' Company." Then there is a note at the top of the first page of the journal which says: "Any person who has good grounds of objection to the registration of any of the following marks should within two months of the date of this journal give notice in duplicate, at the Patent Office, in the form 'J' in the second schedule to the Trade Marks Rules 1883 of opposition to such registration." That notice is more applicable to applications other than those in respect of Sheffield marks, but it could not have been intended to, and I hold that it does not, put any construction on what has been done at variance with what the Act requires. [His Lordship further referred to the correspondence, and continued:] I think it is clear, looking at those letters, that the Cutlers' Company were professing to do what they were bound to do, that is, to proceed under sub-sect. 2 of sect. 81, though I quite understand that the applicants thought the application was under sub-sect. 3, and not under sub-sect. 2. Of course their views about it cannot affect the construction of the Act, and that is the only thing we have to deal with. I come to the conclusion that the entry of the old mark is really a performance of a ministerial act under sub-sect. 2, and, that being so, it is not a case in which the company were bound to take, or could properly have taken, the proceedings indicated by the Act to be taken with reference to an application for a new mark to which opposition is or may be offered; and certain proceedings are contemplated by the Act, and the rules framed in pursuance thereof, as those to be

taken under those circumstances. Looking at sub-sect. 2 of sect. 81 it seems to me beyond all question that the first part points to a mere ministerial duty and nothing else. The company are required to enter in the Sheffield register, in respect of certain goods, the trade marks which were entered in respect of goods under the Act of 1875. That is a thing as to which there could be no possible question. They might, of course, overlook it by accident, but the Act says they are to do it, and there is nothing in respect of which opposition could be offered. Then it goes on to say: "Shall also enter in such register, in respect of the same goods" (meaning the same articles as were referred to before), "all the trade marks which shall have been assigned by the Cutlers' Company, and actually used before the commencement of this Act, but which have not been entered on the register under the Trade Marks Registration Act of 1875." Therefore, the difference between the two classes is this: In the one case, the *sine quâ non* was registration under the Act of 1875. In the other case, what was required was that they should have been assigned by the Cutlers' Company, and actually used. Now the question of assignment is a matter which could not be in dispute, because that would appear in the books of the company. Then as to the actual user, no doubt that is a point with respect to which some evidence might be wanted. It may be that it was notorious that the marks had been used, and I apprehend that, if the Cutlers' Company had knowledge of that fact, it would be their duty to enter the trade mark upon the register without calling for evidence of actual user. If, on the other hand, there was any doubt about it, they might call for evidence. If there was nothing to bring the matter before their attention, they might possibly abstain from taking any step until their attention was called to it. But the section provides in both parts of it, as I hold, that they are to perform a ministerial duty. I do not think that it is less their duty to perform it, or that it is less an act under that sub-section, if they are put in motion by a person who calls their attention to his right to be registered, and asks them to register, as they are bound to do. That does not seem to me to be an application like the application contemplated by sub-sect. 3, which, in my opinion, relates to an application for a new mark, with respect to which there is nothing existing, either on the register or in the records of the company. Sub-sect. 3 refers to an application for registration of a mark, used on certain sorts of goods described in the section, if made after the commencement of the Act by a person carrying on business within the district. That seems to me clearly to apply to new marks, and nothing else. I do not think it is disputed that the 4th, 5th, and 6th sub-sections apply to such applications as are made under sub-sect. 3. It is said they apply to the present application, but that is only because it is said to be an application that comes under sub-sect. 3. Then we come to the 7th sub-section, and I confess I feel great difficulty in understanding the exact effect of that. It is not necessary for me to decide what that means, because, assuming Mr. Cozens-Hardy's view of it to be right, it does not seem to me to bring him home to the conclusion at which he wishes to arrive. The first part is: "The provisions of this Act, and of any general rules made under the Act, with respect to application for registration in the Register of Trade Marks, the effect of such registration, and the assignment and transmission of rights in a registered trade mark, shall apply in the case of applications and registration in the Sheffield register." Whether that applies to all entries made under this Act in the Sheffield register, either on an application or not, I do not think it necessary to decide, but, as I read the word "applications," it means such applications as result in registration. Then come words which are, I think, necessarily applicable to entries made under sub-sect. 2 as well as to other entries: "And notice of every entry made in the Sheffield registry must be given to the comptroller by the Cutlers' Company, save and except that the provisions of this sub-section shall not prejudice any life estate and interest of a widow of the holder of a Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register." The words "notice of every entry made in the Sheffield registry must be given," seems to me to be of general application. "Every entry" means, of course, every entry in whatever way made, and if the words were not large enough of themselves, the subsequent words referring to the widow show that the enactment refers to old marks as well as to others. I do not think that the final words are really an exception out of the preceding words, and the sub-section must be read as if the words were, "Notice of every entry made must be given to the comptroller, but so that this shall not prejudice any right the widow may have." The subsequent sub-sections do not, I think, throw much light upon the matter until we come to sub-sect. 12, and far be it from me to say that even that throws much light, but it is a material sub-section, and one, no doubt, with which one must deal. Sub-sect. 12 is as follows: "Any person aggrieved by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner, appeal to the comptroller, who shall have power to confirm, reverse, or modify the decision, but the decision of the comptroller shall be subject to a further appeal by the court." In connection with that, sub-sect. 1 of sect. 90 must be read. It provides that "The court may, on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry as the court thinks fit." That seems to me to point to a person being aggrieved by the omission of something that ought to be there, or the insertion of something that ought not, and it provides for correction by inserting what should be there or expunging what should not. That seems to me to apply. That provision seems to apply to every case in which the entry is improperly made or improperly omitted, and I do not see any case to which that provision would not apply so as to give a right of application to the court. The case of *Re Normal Trade Mark* (56 L. T. Rep. N. S. 246) was referred to, in which Chitty, J. ruled that a particular application ought not to be made to the court, but to the Board of Trade; but, if I recollect rightly, that deci-

sion proceeded entirely upon this, that under the section of the Act a particular formal mode of application was directed, and the requirements of that section, and not of sect. 90, were to be complied with, especially as they did not interfere with the requirements of sect. 90, and merely necessitated an application to the Board of Trade, not instead of, but before, an application to the court. I have therefore to endeavour to construe—and I confess I do not feel able to do it satisfactorily—sub-sect. 12 of sect. 81, and to arrive at its meaning, having regard to sect. 90, and it seems to me that the best construction I can put upon it is to treat sub-sect. 12 as relating to cases in which a decision has been arrived at by the Cutlers' Company. In the present case I do not think they have arrived at a decision under sub-sect. 12. They have not to decide anything, but to perform merely a ministerial duty. Under these circumstances I am of opinion that the Cutlers' Company were right in proceeding to do what they did, without leaving it open to the applicants to bring in an opposition, and that the company have not decided anything with respect to which there is an appeal to the comptroller. Therefore the motion as regards the Cutlers' Company must be dismissed with costs, but nothing I have said is intended to touch Mr. Lambert.

Hatfield Green for Lambert.—As regards the application under sect 90, Lambert is on the register, and *primâ facie* properly. [North, J.—Yes; and the effect of the Act seems to be that the right conferred by registering a trade mark extends over more goods than the registered owner practically uses; that is, the class of goods described by reference in sub-sect. 2.] Then, as to user, the title clearly passed to Lambert. Lambert is not confined to one mark. [He was stopped on this point.]

Cozens-Hardy replied.

North, J.—I am content to decide this case on the simple ground that no grievance is shown to the applicant. I am not satisfied in any way that this mark is calculated to deceive. I have seen what Mr. Nixon says about it. He is an interested party, and he is the only person who makes any affidavit on the subject. As against that there is this: that these marks have been existing side by side for 180 or 190 years, or something like it. They were granted very nearly at the same time, and they were granted as two distinct things. The one was a pipe; the other was a pipe with an arrow. The requirement of the Act existing at the time being that separate and distinct marks should be granted, these two marks were issued as separate and distinct marks. Further than that, there is an interval of a very long period, coming down to the present time, during which it is not shown that anyone has been deceived; and though I do not hold for a moment that proof of actual deception is essential, yet the absence of it when it might have been proved is a matter deserving consideration. Then I have this further: that it is said by a person who professes to know it of his own knowledge, in an affidavit that is not contradicted, that a predecessor of the applicants did this—I will read the words of the affidavit—"During my father's lifetime, George Wolstenholme marked in addition to his mark of a pipe upon certain razors the figure 1, which was struck lengthwise in the direction of the stem of the pipe, and was marked like a dart, with one of the barbs cut off, and my father took proceedings in the magistrates' court against the said George Wolstenholme, who, in consequence, desisted from using his mark." Therefore, I have not only no evidence whatever of any deception arising out of the use of the two marks during this long period of time, but I have evidence which shows an act done by the owner of the mark without the dart, which was addressed to acquiring, apparently, the reputation attaching to the use of the mark with the dart; that is to say, the two were not sufficiently alike to be calculated to deceive, and to the one consisting of one element a second element is added for the purpose of resemblance to the other mark. Under those circumstances, and looking at the marks, I am not satisfied by the evidence of Nixon, that there is any such probability of deception, as to lead me to interfere on that ground. I do not decide against Mr. Lambert's argument on the ground that he failed on the other points; I abstain from going into that part of the case, because I do not think it necessary for the purposes of my judgment. Under these circumstances the motion altogether is dismissed with costs.

The applicants appealed, and the appeal came on for hearing on the 17th Dec. 1888.

Cozens-Hardy, Q.C. and *C. Gould*, for the appellants. — The applicants are parties aggrieved, because they are registered for the same classes in respect of which Lambert is said to now have a right to use his mark, and his mark is similar to ours, and there is a question of title. The question, who is a person aggrieved, was considered in *Re Rivière's Trade Mark* (50 L. T. Rep. N. S. 763; 26 Ch. Div. 48), but it was not disputed below that the appellants were persons aggrieved. The evidence that the mark now registered for Lambert is not the same as Linley's, and more nearly resembles the appellants' mark, and so closely as to be calculated to deceive, was not disputed. The applicants are in the same class, and can put their mark on all goods in the class, and if Lambert is registered, he can do the same; whereas now he can only use his mark on razors. We wish to argue the question of title. Lambert's mark was not registered under the Trade Marks Registration Act 1875; therefore the first part of sub-sect. 2 of sect. 81 does not apply. Whether the Cutlers' Company have acted under the second part of sub-sect. 2, or, as we say, under sub-sect. 3, they came to a decision within sub-sect. 12, from which there is an appeal to the comptroller. If the registration was under sub-sect. 2, there must have been a question of user, and it cannot in such a case be a mere ministerial Act to give the holder of an old mark a new and extended right, in this case to extend the old right as to razors to classes 5, 12, and 13. The advertisement asked people to come in and say whether they had any rights touched by this registration. There has been no grant of this mark since 1839. The sale in 1842 was a sale in gross, and no mark could be assigned without a business:

Edwards v. *Dennis*, 54 L. T. Rep. N. S. 112; 30 Ch. Div. 454;

Bury v. *Bedford*, 10 L. T. Rep. N. S. 470; 4 De G. J. & S. 352.

Where there have been mesne assignments other than by the Cutlers' Company, sub-sect. 2 does not apply. If the Cutlers' Company had only put Linley's name on the new register, that might have been a mere ministerial act, but what has been done comes under sub-sect. 3. The Act of 1875 merely provided that the old corporate marks should be put on the London register in respect of the goods on which they had been used. The Patents, Designs, and Trade Marks Act 1883 creates a register of enlarged classes. Sub-sect. 2 of sect. 81 only refers to existing trade marks; if anything more is wanted the application must come under sub-sect. 3. The Cutlers' Company is not now an authority to grant corporate marks. Lambert has really applied for a new mark, and the mark can only be registered for the goods on which it is actually used (sect. 65), and was therefore advertised under sect. 68. Whenever a mark has lapsed, and a person wishes to be registered on the ground of user, the act of the Cutlers' Company is a decision from which an appeal lies to the comptroller under sect. 12. By the custom of the company, and by necessary inference from sect. 81 (sub-sect. 10) no person can have more than one mark, but George Johnson, who was not a freeman, had another mark. To decide such a point is not a ministerial act. Sub-sect. 12 applies equally, whether the application is under sub-sect. 2 or sub-sect. 3. Secondly, we apply under sect. 90. The marks so closely resemble each other as to be calculated to deceive. There is no evidence to contradict Nixon's evidence for us. The mark may easily lead to confusion; the dart might not be seen owing to imperfect striking:

Re Worthington's Trade Mark, 42 L. T. Rep. N. S. 563; 14 Ch. Div. 8.

[BOWEN, L.J. referred to *Re Lyndon's Trade Mark*, 54 L. T. Rep. N. S. 405; 32 Ch. Div. 109; 3 R. P. C. 102.] Lambert ought not, at any rate, to be registered in such a way as to extend his rights beyond razors. We can adduce further evidence if it is required.

Moulton, Q.C. and *Hatfield Green*, for Lambert, did not object to further evidence being adduced on behalf of the appellants, if a like privilege was given to Lambert.

COTTON, L.J.—We have grave doubts as to the regularity of what has been done here; namely, the registration for new classes of goods, and the registration of a person as grantee of a corporate mark when he has not proved his title; but we hardly think the appellants show themselves to be persons aggrieved. As Mr. Moulton does not object, we think they ought to have an opportunity of giving further evidence.

The appeal accordingly stood over till the 23rd March 1889, when it was again brought on, and the following fresh evidence was adduced:

Appellants' fresh evidence.—Mr. Nixon and Mr. Wing, a director of the applicants' company, and also an official searcher of the Cutlers' Company, deposed that their pipe mark was also registered in Australia; that it was used for razors and butchers' knives; that the pipe and dart mark when put on articles, and especially small cutlery, would be likely not to show the dart, even without any intention to deceive; that the appellants had a legal right to use this mark on all articles in class 12, and were aggrieved by another person putting on the register this new mark; that the stamping was very often imperfect, and that the grinding was often excessive, especially operating at the ends; that many people were likely not to notice the dart, or to think it a mere variety of the pipe mark; that goods were often ordered from the appellants as pipe knives or pipe brand knives; that the dies for marking were often rubbed and become indistinct; that their full name was often struck on razors, but it would be difficult to do this on smaller articles; and that the pipe mark had already been infringed in Germany by a pipe and star mark, the star being concealed; also (Wing) that if an application were made for a grant of a new mark—pipe and dart—it would not be granted; that the whole practice was different, as formerly marks were used, not for the public, but so that each workman might know his own work. Several steel manufacturers in Sheffield deposed that they were conversant with the way in which marks were impressed on cutlery; that stamping was the most general form, either by a falling weight or a die and hammer; that the impression was often imperfect; that metal goods, after being impressed, often went through a further process of grinding or polishing, which further destroyed the mark, the destroying process taking place most at the extremities; that the pipe and dart mark so nearly resembled the pipe mark as to be calculated to deceive, especially on razors; and that, without intention to deceive, the mark would often be obliterated or defective. Mr. Atkinson, another searcher, deposed that no doubt the pipe and dart mark would be refused if new.

Respondent's fresh evidence: Lambert and Joseph Johnson deposed that the pipe and dart mark had the dart lengthwise at the end of the bowl; that the mark had been used continuously on razors since 1842, was always struck with one punch, and always with the bowl away from the handle, and never with the dart to the handle end so as to be covered; that the two marks were not so similar as to cause deception; and that, in fact, the two marks had been used side by side for forty-six years without anybody ever having been deceived; that George Wolstenholme had attempted to strike a mark with a figure 1 at the end, and was brought up before the police-court, and restrained from so doing; and that the pipe and dart mark would be perfectly distinct on small articles, and the dart would not be defaced or obliterated as suggested; that marks were sometimes blurred, but chiefly details surrounded by an outline, but that where, as in the present case, the mark was simply outline, it would not be blurred; that one Williams used a pipe mark for butchers' knives; that the appellants had another mark besides the pipe; that Wing only became a searcher in 1888; that as to the joint affidavit on behalf of the appellants no one of the deponents was in the cutlery trade; and that the appellants only used their mark in Australia on razors. There was also evidence by several persons engaged in the cutlery trade, who deposed that the marking was always done by a die and hammer, or by etching; that it would be impossible, if the striking were fairly done, to leave out the dart: that the witnesses had known the marks many years as

entirely distinct marks, the dart being as important as the pipe; that persons wishing to obtain Lambert's goods would reject goods marked with the pipe only; and that they had never heard of any person being deceived by the two marks. One witness also deposed that George Nixon, in applying for the pipe mark, had declared that that mark had been used on all cutlery goods, which was not the case.

In an affidavit, in reply, it was deposed that Williams only used the pipe mark by licence from the appellants.

Cozens-Hardy, Q.C. and *C. Gould*, for the appellants, contended that on the evidence it was clear the appellants were parties aggrieved; and they repeated their arguments on the first point.

The *Attorney-General* (Sir R. Webster), Sir *Horace Davey*, Q.C. and *Ingle Joyce* for the comptroller.—The Cutlers' Company have nothing to do but perform a ministerial act; they are not concerned whether the appellants are aggrieved or not. They referred to the Patents, Designs, and Trade Marks Act 1888, s. 20.

Cotton, L.J.—We will dispose now of the question whether the comptroller can be interfered with in any way. We are of opinion on that part of the case that the appeal fails. This is simply an application to the comptroller under sub-sect. 2 of sect. 81 of the Act of 1883. There was at the time when the application was made to him a corporate trade mark which was on the books of the Cutlers' Company. The only objection there could be to not proceeding under that sub-section was that Lambert, who is now applying under sub-sect. 2, was not the person who had a proper title to it. If an application was made by Linley, who is said not to have properly parted with this corporate trade mark to Lambert or the predecessors in the title of Lambert, then I do not think I should venture to decide what ought to be done—whether both parties ought to be entered on the register, or whether the comptroller should take upon himself to decide which of the two might be properly treated as assign of that corporate trade mark. That question does not arise here. No objection at all having been raised by any person claiming to be entitled to this corporate trade mark as against Lambert, in my opinion the Cutlers' Company and the comptroller simply had a ministerial duty to perform to see that the corporate mark which was on the old books of the Cutlers' Company was transferred to the new; the corporate mark was for all the goods of Linley, and the comptroller has transferred it for all the goods of Lambert. In my opinion, we have not to enter into the question which may hereafter arise between Lambert and Wolstenholme, as to whether Wolstenholme could in any way raise the objection that this mark ought not to have been entered on the trade marks register, having regard to sect. 90. In my opinion, the Cutlers' Company and the comptroller acted simply in discharge of a ministerial duty to transfer from the old to the new register.

Lindley, L.J.—I am of opinion that so far as the comptroller is concerned, the view he has taken of the construction of sect. 81 is the correct one. If he finds an old mark actually in use as this was for forty-five years, or close on fifty years, his duty is to register it. It seems to me that is plain. Of course there might be a question in whose name it was to be entered. If you have two people both claiming to be registered—both claiming under the first assignee of the mark, Linley—there would be a difficulty, and he would have to settle that difficulty somehow or other. That is not this case. What we have to deal with is somebody who is objecting to the mark being registered at all as anybody's. That is the substance of the objection. Whether the appellants do anything under sect. 90, I do not know.

Bowen, L.J.—I agree with the other members of the court in the construction they place on sub-sect. 2 of sect. 81; but I wish also to add this, that I do not see myself how, if the construction were different, or if the comptroller had made a mistake as to the sub-section under which he was to proceed, we could interfere to assist the appellants in this case, unless they could show there was some grievance done to them. Now, I am at the present moment not satisfied that they have got as far as that. We are not going to express an opinion until we have heard the whole of the case, as to whether they are parties aggrieved or not; but at the present moment, if I were to stand on the materials already arrived at, I am not satisfied that Mr. Gould's client has made out his right to ask for the interference of the court. As far as the Cutlers' Company and the comptroller are concerned, the appeal will be dismissed with costs.

Moulton, Q.C. and *Hatfield Green* for Lambert.—As to the second part of the application under sect. 90, there are two questions: (1) title, and (2) similarity. If there is no similarity, the question of title does not come in. There is no similarity. The affidavits put in by the applicants do not support their case. There is strong evidence in our favour that the marks have both been used for over forty years on razors without a mistake. As to the small cutlery, the appellants' evidence is valueless as to danger in the future. Our exhibits show there is no chance of deception. The appellants object to our mark on small cutlery, but they have never used their own on such articles. Under the Act of 1875 they were only entitled to register in respect of goods they actually used the mark on. If we can show there has been no user by them, they cannot protect their registration for the whole class:

Edwards v. *Dennis* (*ubi sup.*).

If we took this mark and used it on penknives, the appellants would fail if they sought to restrain us. They cannot be aggrieved if they have no rights which they can legally defend.

Gould replied.

Cotton, L.J.—We now come to the question whether we can grant the appellants relief in the application made under sect. 90 for the purpose of rectifying the register—that is to say, treating Mr. Lambert now as having been put on the register properly by the comptroller. That would be on the ground that the marks which Lambert is going to use are calculated to deceive. These marks have been used for a great many years on razors, and there is no evidence that there has been any deception, or that anybody has been deceived by taking the one for the other. Although, no doubt, if the mark were put in a certain position on the razor and the dart put in the way described by the appellants, there might be a possibility of deception, yet that is

not the ordinary position of a razor when it is in action, or when it is being bought. Then it is turned back, and anyone who bought a razor would not take it in the position of the razor being straight out. Then we find that in practice what has been done is this—the dart being always opposite the bowl, that bowl is turned away from the axis on which the razor turns. That would not render it possible to conceal the dart, so as to make the pipe and dart look like the pipe only. And I must say that, in considering whether it is calculated to deceive, we must consider what would be the ordinary use of the mark without fraud, and not go into the question of what might be done by a fraudulent user. If there was a fraudulent user, then the court would interfere, not because the man had not got the trade mark, but because he was using that trade mark fraudulently so as to pass off his goods for those of another. That suggestion of fraud is not to be considered in dealing with the question whether the mark is so like another as to be calculated to deceive. In dealing with that question you must assume that it is fair and right. There is a very long period here during which there has been no confusion between the two marks. It is only with regard to class 12 that, in my opinion, Messrs. Wolstenholme and Co. can complain, because that is the only class in which they are on the register. If we deal with this in a way most favourable to them—treating it not simply as a transfer of an old corporate mark, but as an application by a person who used the mark independently of those transfer sections—then, if fairly used, I can see no reason to suppose there would be any confusion. On razors there never has been any. We have seen the small goods which have been brought before us, as used by Messrs. Wolstenholme and Co., and although there is a great variety of evidence on one side and the other, one side saying it would be certain to deceive, and the other side saying it would not, we must form our own judgment; and, as far as I can see, if used fairly, this mark will not be calculated to deceive. The strong point in favour of Messrs. Wolstenholme and Co. is this, that marks by the wearing of the steel and the grinding of it are liable to be a little effaced, and also they are liable to be not correctly stamped. I think, as far as one can see, goods of this kind would be stamped by a die being driven down by a hammer upon them. Of course, if that is done unfairly, there may be a part of the mark not properly shown. But Mr. Cozens-Hardy very properly says: "I do not suggest that anything would be done fraudulently or unfairly, but that is done from the accidents of the trade, and from the accident of a workman not attending properly to his business." For a great many years that has not happened, as far as I can see, and I do not see that it is at all more likely that in these more delicate things workmen would be more careless than they would be in stamping the marks on a thing more substantial, such as a razor. Therefore, in my opinion, the appellants have failed to make out (even treating the case most favourably to them, and as one where a man is not entitled to a corporate mark) that the marks are so alike as to be calculated to deceive. In my opinion, therefore, the appeal fails.

Lindley, L.J.—I am of the same opinion. If I were to look at this pipe mark and the pipe and dart mark without any evidence as to experience, or anything else, I should think that the two might be so mistaken for one another that both ought not to be registered. But we are not in that position. The pipe and dart mark has existed for now close on fifty years. It has existed side by side with the pipe mark. Both have been put on articles of the same description, to wit, razors. All the evidence is clear that one has not been mistaken for another; and if you add to that the little incident that Mr. Moulton mentioned that the dart itself has been imitated by the rival, it speaks volumes. I feel convinced, not by any clear demonstration, but by the experience of fifty years, that these two marks are distinguishable, and that one is not likely to be mistaken for another as applied to the same class of goods. On those grounds I think the appeal fails and ought to be dismissed with costs.

Bowen, L.J.—I am of the same opinion.

Appeal dismissed with costs.

Solicitors for the appellants, *McKenna* and *Co.*, for *B. Wake* and *Co.*, Sheffield.

Solicitors for the Cutlers' Company, *Solicitor to the Board of Trade.*

Solicitors for Lambert, *Cattarns, Jehu,* and *Hughes*, for *Younge, Wilson,* and *Co.*, Sheffield.

May 13 *and* 14.

(Before Lord Esher, M.R., Cotton and Fry, L.JJ.)

Re Salmon; Priest *v.* Uppleby. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Third party—Judgment for defendant—Appeal—Service of notice of appeal on third party—Order LVIII., r. 2.

An action was brought against a trustee to compel him to make good a loss occasioned by an improper investment. The trustee claimed to be indemnified by a third party whom he served with a third party notice.

Kekewich, J. held the defendant was not liable (86 *L. T.* 333), *and the plaintiff appealed, but did not serve the third party with notice of the appeal.*

Held (*dissentiente Cotton, L.J.*), *that the third party was not a party directly affected by the appeal within Order LVIII., r.* 2, *and therefore it was not the duty of the plaintiff to serve the third party with notice of the appeal, but that the defendant ought before the hearing of the appeal to have applied to the Court of Appeal for leave to serve the third party with notice.*

In 1881 Mr. Uppleby, then the sole trustee of a will, invested 1300*l.* of the trust money on a mortgage of some freehold houses, valued at 1750*l.* In 1884 he retired from the trust, appointed two new trustees, and assigned the trust property to them. In 1887 the new trustees, with the concurrence of the plaintiff (who had purchased the interest of one of the beneficiaries), but without informing Mr. Uppleby, sold the mortgaged property for about 840*l.* It was alleged that the investment on the mortgage was improper, and this action was brought to make Mr. Uppleby liable for the deficiency so far as the plaintiff's share in the estate was concerned.

(*a*) Reported by W. C. Bass, Esq., Barrister-at-Law.