

School of Business Law and Taxation

The Development of the Tort of Passing-Off

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Declaration

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgment has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

Signature: 

Date: 

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I THE DEVELOPMENT OF THE TORT OF PASSING-OFF

A Introduction

1 Abstract

This thesis investigates the historical development of the tort of passing-off. Morison said that the term “passing off” indicates the act of offering goods for sale with an accompanying misrepresentation, either by words or by conduct as to the origin of the goods, whereby the purchaser has been misled and business has been diverted from the plaintiff to the defendant.¹ It is called a strict liability tort because the plaintiff does not need to show any wrongful intention on the part of the defendant, fraud apparently having been abandoned as an element for proof in the tort of passing-off.

The composite research question of the thesis is in two parts, as follows: ‘Has the historical development of the tort of passing off resulted in the tort becoming a strict liability tort? If so, why and how did this development take place?’

The tort of passing-off derives from the direct rule by the English Kings of earlier times, and was developed both as a general regulatory instrument to control industry, and in particular to make industry more war-ready.² The tort of passing-off has a very substantial history in the jurisprudence of the medieval and late middle ages craft guilds and counties of the United Kingdom. The purpose of this thesis is to set out how the tort developed from the ordinances of gild and county jurisprudence into the royal courts, and to see whether, why and how from that form of development it developed as a strict liability tort.

The thesis will make these five suggestions. (i) The tort of passing-off was put together from strict liability prerogative writs, customary commercial laws and gild

¹ W L Morison ‘Unfair Competition and “Passing-Off” The flexibility of a formula’ (1956) 2 Sydney Law Review, 50-65, 56.

² See, for example, the development of the argument in F I Schechter *The Historical Foundations of the Law Relating to Trademarks* (Columbia University Press, 1925), chapters 1-6.

ordinances. (ii) A hierarchy of graphic marks signified commercial ranks, from royal seals down to artisan trademarks, inferring reverse onus liability for infringement of use. (iii) The *Gloucestershire Clothier's Case*³ failed because the case was pleaded in a reverse onus jurisdiction. (iv) The *classical trinity* of passing-off signalled re-emergent commercial customary law, a breach of which was characterized as commercial fraud, and dealt with on a reverse onus basis. (v) The thesis will suggest that passing-off is a strict liability tort.

2 Research Question and Objectives

The composite research question of the thesis is in two parts, as follows: 'Has the historical development of the tort of passing off resulted in the tort becoming a strict liability tort? If so, why and how did this development take place?'

The thesis research question developed from the following steps. Professor Wadlow wrote a detailed history of the tort of passing-off, first published in 1990.⁴ Laddie J cited in obiter Wadlow's account of the history of passing-off in the 2003 case of *Inter Lotto (UK) Ltd v Camelot Group Plc*.⁵ According to Wadlow's history of passing-off, Lord Parker's speech in *Spalding v Gamage*⁶ eliminated from the tort of passing-off a previous restriction to misrepresentation. This earlier restriction provided that the goods or business of the defendant must belong to the plaintiff. Also, in *Spalding v Gamage*,⁷ Lord Parker explained the tort of passing-off in terms of protecting a property right. His Lordship described this right as being the property the plaintiff owned in the goodwill of this business. Wadlow concludes from these two judicial statements that the tort of passing-off came to be treated as protecting a kind of property. He stated that this made it convenient for the courts to abandon the previous requirement proof of fraud in the tort of passing-off. Wadlow concludes

³ Later identified by Professor Baker as *J G v Samford* (1584) unrep, in J H Baker *An Introduction to English Legal History* (Butterworths, 4th ed, 1990), 459.

⁴ C Wadlow *The Law of Passing-off, Unfair Competition by Misrepresentation* (Sweet & Maxwell, 3rd ed, 2004), 21, et seq.

⁵ [2003] 3 All ER 191, 197-200.

⁶ (1915) 84 LJ Ch 449, 449-454.

⁷ (1915) 84 LJ Ch 449, 450.

that this elimination of any requirement for proof of fraud was what made passing-off a strict liability tort.⁸

Wadlow limits his history of passing-off to a time frame commencing after the 1584 *Gloucestershire Clothier's Case*.⁹ Wadlow's history suggests a research gap in describing the first entry of the tort into the royal courts. It did not seek to clarify the role of the tort's prehistory in the tort's development. The literature tended to dismiss the *Gloucestershire Clothier's Case*¹⁰ as of only passing significance, but still refers to this case as creating a conundrum about the tort's development. In this context, in order to address the research question, the thesis has the following objectives:

- (a) to provide an overview of the legal norms underlying the origins of the tort deriving from a hierarchy of guilds, counties and the crown, with restricted resort to the Royal Courts;
- (b) to discuss the seminal 16th Century Elizabethan *Gloucestershire Clothier's Case*,¹¹ in the context of how the later tort both began and completed the passage from gild and county jurisprudence into the royal courts system;
- (c) to examine the so-called completion phase and more protean nature of the tort of passing-off in the context of the character of good-will, fraud and causation and as set out in the case *Erven Warnick BV v Townend & Sons (Hull) Ltd*,¹² ('*Advocaat Case*').
- (d) to examine the original elements of the tort of passing-off within ancient legal custom and pleading narratives, to reveal a dynamic that influenced the shape of the law.¹³ This thesis sets out to identify these underlying elements, customs and narratives so that scholars can rethink and re-evaluate current views of the tort of passing-off to suit changing commercial and consumer needs.¹⁴

⁸ Wadlow, above 4, 32.

⁹ Later identified by Professor Baker as *J G v Samford* (1584) unrep, in J H Baker *An Introduction to English Legal History* (Butterworths, 4th ed, 1990), 459.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² [1979] AC 731, 739-748.

¹³ For the relevance of a qualitative legal historical study, see Jane Elizabeth Anderson, Ph D *The production of indigenous knowledge in intellectual property law* (Doctoral thesis at University of New South Wales, 2004).

¹⁴ For the relevance of a qualitative legal historical study, see the following. Ulla Secher, Ph D *A conceptual analysis of the origins, application and implications of the doctrine of radical title of the crown in Australia: An inhabited settled colony* (Doctoral thesis at University of New South Wales, 2003). For relevance based on ancient legend within the development of the common law, also see Ryan Muckerheide, Ph D *English laws and customs in Sir Thomas Malory's "Le Morte Darthur"* (Doctoral thesis at Arizona State University, 2010). For the relevance of a qualitative legal historical study, see Alan Verskin, Ph D *Early Islamic legal responses to living under Christian rule: Reconquista-era development and 19th-century impact in the Maghrib* (Doctoral thesis at Princeton University, 2010).

3 Background

According to Morison, the term *passing-off* indicates the act of offering goods for sale with an accompanying misrepresentation either by words or by conduct as to the origin of the goods, whereby the purchaser has been misled and business has been diverted from the plaintiff to the defendant.¹⁵ It is commonly called a strict liability tort because the plaintiff does not need to show any wrongful intention on the part of the defendant, fraud apparently having been abandoned as an element of proof of the tort of passing-off. The tort of passing-off is unlike other torts in that it has a very substantial history in the jurisprudence of the medieval and late middle ages craft guilds and County Courts of the United Kingdom. The purpose of this thesis is to set out how the tort developed and transferred from Guild and County jurisprudence into the Royal Courts jurisdictions, and to see whether why and how from within that style of development it developed as a strict liability tort.

In the nineteenth century, the courts of law generally agreed that passing-off actions were questions of fact rather than questions of law, while the courts of equity performed the work of discovering the legal right they would protect. If the reported cases can be relied upon to represent the development of the tort, then it appears from them that passing-off was successful in equity before the time of any successful cause of action in the common law courts.¹⁶

As the gist of passing-off came to be more understood in terms of damage to property, the fraud element was said to have dissolved. Lord Westbury's interpretation of the law in terms of property rights was based on a theory of common law trade mark infringement, which cause of action was not clearly distinguished from the tort of passing-off during his Lordship's time. Goodwill did not become a substantive element of the tort until much later, in the early 20th century, after almost 30 years in which hardly any court dealt with the tort of

¹⁵ Morison, above 1, 56.

¹⁶ Wadlow, above 4, 16.

passing-off on the basis of property rights.¹⁷ However, the sale of goodwill had been discussed and began its development in case-law as early as the 1620 case of *Broad v Jollyfe*.¹⁸

The action to restrain the defendant from passing-off his goods as the goods of the plaintiff is the generalized form of the action to restrain the infringement of a trade mark.¹⁹ Wadlow sets out the three essential elements of the tort of passing-off as misrepresentation, damage and goodwill, and, as well, the ostensibly obsolete element of fraud, inferring an *ad hoc* structure to the tort.²⁰

It is possible that an *ad hoc* nature of passing-off may be explained by examining how it had emerged as a distinct tort. Thus, the following passage was quoted by Lord Halsbury in *Magnolia Metal Co v Tandem Smelting Syndicate Ltd*²¹ to show not only the great antiquity of passing-off, but also to infer the emergence of the tort from the restrictive confines of Guild and County jurisprudence.

An action upon the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth, and by reason whereof he had great utterance to his great benefit and profit, and that he used to set his mark upon the cloth, whereby it should be known to be his cloth, and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him, it was resolved that an action did well lie.²²

The case referred to by Lord Halsbury in the above quote has been identified by Baker²³ as the *Samford* case,²⁴ also known as the *Gloucestershire Clothier's Case*, heard during the time of Elizabeth I, in which the plaintiff, a clothier, brought an action on the case for deceit and was apparently unsuccessful, because a majority of the Court held the matter to be *damnum absque injuria*.²⁵ This case seemingly demonstrated that the courts were not willing to recognize the common law action in passing-off.

¹⁷ Ibid.

¹⁸ (1620) Cro Jac 596, 597; 79 ER 509.

¹⁹ D M Kerly *The Law of Trade Marks and Trade Names* (Sweet & Maxwell, 1913), 529.

²⁰ Wadlow, above 4, 16.

²¹ (1900) 17 RPC 477, 477-486, HL.

²² (1900) 17 RPC 477, 484, HL.

²³ Baker, above 9, 459.

²⁴ *JG v Samford* (1584) (unreported).

²⁵ Loss without injury compensable at law.

The case is reproduced by Baker & Milsom²⁶ from contemporary manuscripts,²⁷ beginning with the meaningful designation of the plaintiff as a clothier, clothiers having been great adherents of exclusive Guild and County jurisprudence sustained by the force of Royal Charter.²⁸

Baker's translated record²⁹ of the case, at variance with the above statement of Lord Halsbury, reports that, although the eminent rival clothier action brought the action, no judgment was entered because the court was evenly divided. Peryam and Mead JJ had found it to be a case of *damnum absque injuria*, Wyndham J suggested that he would find for the plaintiff upon proof of a breach of an applicable statute regulating the use of marks by clothiers,³⁰ and only Anderson CJ held the defendant liable at common law. In consequence of this, Wadlow dismisses *Samford's Case*,³¹ without further analysis, as a mere isolated example, which he said did not appear to have contributed much to the development of passing-off, either then, or later.³²

Baker also found *Samford's Case*³³ in an alternate manuscript in the Harvard Law School collection,³⁴ reporting the facts and outcomes in slightly different terms. Also, Dodderidge J cited it in *Southern v How*.³⁵ Although it was known to later courts only from these early reminiscences,³⁶ *Southern v How*³⁷ has acquired weight as authority for the proposition that unauthorised use of a common law trade-mark is unlawful and could be subject to an action on the case for deceit.

²⁶ J H Baker and S F C Milsom *Sources of English Legal History – Private Law to 1750* (Butterworths, 1986), 617, citing HLS MS 2071, fo 86.

²⁷ Cory's entries, BL MS Hargrave 123, fo 168v.

²⁸ See *E Bain Merchant and craft guild : a history of the Aberdeen Incorporated Trades* (J and J P Edmond & Spark Aberdeen, 1887), where the author has included some relevant Royal Charters.

²⁹ Translated into English from what has been generally characterized as "Anglo-Norman", in Cory's entries, BL MS Hargrave 123, fo 168v.

³⁰ 27 Hen VIII c12.

³¹ *JG v Samford* (1584) (unreported).

³² Wadlow, above 4, 19.

³³ *JG v Samford* (1584) (unreported).

³⁴ HLS MS 2071, fo 86 at Harvard Law School.

³⁵ (1618) Cro Jac 468, 471; Poph 144

³⁶ See *Blanchard v Hill* (1742) 2 Atk 484

³⁷ (1618) Cro Jac 468, 471; Poph 144

Schechter's view was that any systematic attempt to trace the history of trademark law up to the time when it began to be administered by the King's Courts, or to consider modern trademark law in the light of this history, must be through channels and from sources regarded as somewhat unorthodox from a contemporary legal standpoint.³⁸ This includes usages from sources, which were not courts of record. Thus, for example, although the Leet courts³⁹ dealt with trademark matters up until the 16th century, these matters were confined to enforcement by periodic fines relying on the force of statutes providing for compulsory affixing of marks by specified trades.⁴⁰

In order to discover the early phases of modern trademark law and passing-off in medieval commerce, before their separation into distinct causes of action, one must consult the records of the merchant and craft guild organizations. Medieval trade was largely conducted through guilds,⁴¹ in which prevention of litigation among the guildsmen, outside the guild courts, was enforced by disciplinary punishment for litigation at law without guild consent.⁴² The guilds had practiced their own internal system of jurisprudence.⁴³

By 1870, there appear to have been at least three interconnected bodies of law. There was the common law action for passing-off, of little practical importance because fraud had to be proved and damages were the only remedy. There was the equitable action of passing-off, which could result in the grant of an injunction without proof of purpose to deceive or defraud. There was the more recent doctrine of property in trademarks by which infringement was a wrong, whether or not there was knowledge or intent. Although the law of passing-off was evolving quite rapidly in the 1870s, judges generally claimed that they were

³⁸ Schechter, above 2, 13.

³⁹ The Courts Leet were courts of record in England, presided over by the steward of the manor. Their jurisdiction was to view the freemen's oath of peacekeeping and good practice in trade, and also to try by jury, and punish all crimes committed within the jurisdiction. The courts leet were formally abolished in 1977.

⁴⁰ Schechter, above 2, 14.

⁴¹ An allusion to the governing system of commercial dispute resolution within the guilds.

⁴² Schechter, above 2, 30.

⁴³ Schechter, above 2, 16.

merely applying settled principles of law to the facts of each case.⁴⁴ In addition to this more natural evolution, came the *Judicature Act 1873* (UK) and the *Trade-Marks Registration Act 1875* (UK). The *Judicature Act 1873* (UK) was said to have had the ultimate effect of destroying the element of property, as it then was defined, in an action for passing-off.⁴⁵

Wadlow suggests that passing-off came of age in the last quarter of the nineteenth century, as during this time there were a series of cases, briefly set out as follows, which defined much of the law that still applies today.⁴⁶ *Singer v Loog*⁴⁷ settled that passing-off is based on misrepresentation of secondary meanings, rather than trade mark rights. *Johnston v Orr-Ewing*⁴⁸ is still cited in cases on instruments of deception, liability for exports and the “idea of the mark”. *Montgomery v Thompson*⁴⁹ confirmed that a place name could be distinctive and that it was no defence that the defendant produced his goods in a place of that name. *Reddaway v Banham*⁵⁰ extended the doctrine in *Montgomery v Thompson*⁵¹ to *prima facie* descriptive terms of every type and settled the modern law of secondary meaning. *Powell v Birmingham Vinegar Brewery*⁵² stated expressly that the plaintiff need not be known by name, and introduced the idea of passing-off by misdescription, later to be rejected in *Magnolia Metal v Tandem Smelting Syndicate*⁵³ wherein the court strongly indicated that only misrepresentation as to source was actionable. *Cellular Clothing v Maxton & Murray*⁵⁴ confirmed that *Reddaway v Banham*⁵⁵ was good law. *Lever v Goodwin*⁵⁶ in the Court of Appeal protected get-up in its own right for the first time. *Payton v Snelling, Lampard*⁵⁷ laid down much of the modern law for get-up cases.

⁴⁴ Wadlow, above 4, 32.

⁴⁵ Wadlow, above 4, 28

⁴⁶ Wadlow, above 4, 30.

⁴⁷ (1879) 11 Ch D 656, 656-662.

⁴⁸ (1882) 7 App Cas 219, 219-233.

⁴⁹ [1891] AC 217, 217-228.

⁵⁰ [1896] AC 199, 199-222.

⁵¹ [1891] AC 217, 217-228.

⁵² [1897] AC 710, 710-718.

⁵³ (1900) 17 RPC 477, 477-486.

⁵⁴ [1899] AC 326, 326-347.

⁵⁵ [1896] AC 199, 199-222.

⁵⁶ [1887] 36 Ch D 1, 1-8.

⁵⁷ (1900) 17 RPC 48, 48-67.

Although Wadlow said that Lord Parker's speech in *Spalding v Gamage*⁵⁸ gave the tort of passing-off its modern basis as a strict liability tort,⁵⁹ jurisprudence from medieval times suggests a much earlier source of strict liability. First, Lord Parker's speech in *Spalding v Gamage*⁶⁰ eliminated the previous restriction to misrepresentation that the goods or business of the defendant, were those specifically of the plaintiff. Second, he explained passing-off in terms of protecting a property right, the right being the property the plaintiff had in the goodwill of this business. With passing-off now treated as protecting property, the courts found it easy to abandon the requirement for proof of fraud even as a legal fiction. This was said to have made passing-off a strict liability tort.⁶¹ Wadlow states⁶² that the history of the tort of passing-off was substantially complete with the 1979 House of Lords decision in *Erven Warnick BV v Townend & Sons (Hull) Ltd.*⁶³ In this case, Lord Diplock described the tort of passing off as more protean than other actions.⁶⁴ His Lordship may have been referring to the multiform and undefined nature of the underlying issue of fraud.

As stated above, Wadlow notes that Lord Parker's speech in *Spalding v Gamage*⁶⁵ gave passing-off its modern basis.⁶⁶ Lord Parker's speech had the following two consequences: (a) passing-off was confirmed as a tort of misrepresentation and removed the previous restriction to misrepresentation that the goods or business were that of the plaintiff; (b) passing-off was now explained as protection of the property right of the plaintiff in the goodwill of its business.⁶⁷ The latter outcome adopted the following definition of goodwill as "the attractive force, which brings in custom". However, there is strong evidence that the general unifying concept for goodwill is *the value in the probability of the business continuing to maintain its authority to induce custom*. This unifying concept had developed over a series of cases beginning

⁵⁸ (1915) 84 LJ Ch 449, 449-454.

⁵⁹ Wadlow, above 4, 32.

⁶⁰ (1915) 84 LJ Ch 449, 449, 450.

⁶¹ Wadlow, above 4, 32.

⁶² Wadlow, above 4, 34.

⁶³ [1979] AC 731, 731-756.

⁶⁴ [1979] AC 731, 740.

⁶⁵ (1915) 84 LJ Ch 449, 449-454.

⁶⁶ Wadlow, above 4, 32.

⁶⁷ (1915) 84 LJ Ch 449, 449, 450.

in 1620 and becoming virtually settled by the time of Lord Eldon's definition of goodwill in *Cruttwell v Lye*.⁶⁸ This definition of goodwill meant that goodwill was uniquely prone to damage by that kind of misrepresentation, which was the substance of passing-off.

4 Significance

The significance of the thesis will be its clarification of the concept of strict liability as applied to the tort of passing-off. It examines the nature of consumers waiving their rights to pre-purchase inspection, and the crown stepping in for their protection. It is expected that the research will show that the tort of passing-off is a continuing residue from the age of direct control by the crown.

This thesis contributes to knowledge by adding to the pool of historical research into those legal issues affecting the relationship between buyers and sellers of goods. The thesis discusses re-emergent ancient customary laws, and their modes of metamorphosis from proscribed statutory criminal wrongs into civil actions, in the context of passing-off. It will suggest a relationship between common law prerogative actions and the tort of passing-off. It also will suggest the development of the law of graphical representations as a system cognate to the prevailing commercial/social structure and superintended by the crown.

The thesis will suggest a factual context to the *Samford Case*,⁶⁹ propose possible questions to be satisfied in a *mesne* judgment for it, and examine a common law doctrine of secondary meaning arising from it. The thesis will suggest the make-up of a bundle of property-related rights within business goodwill and propose a relevant relationship between damage to goodwill, fraud and strict liability.

Although this research is historical, it has continuing modern-day implications, because it seeks to provide a meta-discourse to the development of the law of passing-off, by means of narrative analysis. It continues to be an important gauge of

⁶⁸ (1810) 17 Ves Jr 334, 346.

⁶⁹ *JG v Samford* (1584) (unreported).

implied public consent for policy makers trying to get the balance right in protecting the rights of sellers to generate profits and protecting the rights of buyers not to be sold something that is not what they are expecting.

5 Research Method

This thesis is one of legal history by legal narrative analysis, where various historical sequences of events are presented only insofar as they relate to the facts of a state of affairs. According to D'Angelo, legal narrative analysis characteristically leads to propositions, which are either confirmed or refuted by inductive examples.⁷⁰ The research is literature-based and qualitative. The literature review necessarily is interwoven throughout the thesis, because the thesis is limited in scope by its task of identifying strict liability within the development of the tort of passing-off. In this context, the thesis seeks out nascent forms of modern legal concepts. The thesis style is from the Australian Guide to Legal Citation, 3rd edition. The research focuses on primary legal sources, such as the relevant case law, statutes and government documents. Because the thesis content is an exercise in legal historiography, it also builds on views expressed in secondary legal sources, such as scholarly journal articles, books and authoritative reports arising from certain old manuscripts. In all cases, it focuses on sources with the earliest possible publication dates, in order to enhance historical accuracy of interpretation. For old legal terms, the *Oxford English Dictionary* is used where possible, to avoid applying modern definitions. This is because the *Oxford English Dictionary* contains entries of specifically legal meanings annotated with the usage dates of the meanings.

Generally defined, law research exists within the two categories of primary and secondary sources. Primary sources are authoritative records of law made by law-making authorities. Secondary sources are all publications pertaining to law, which are not records of legal rules.⁷¹ Thus, primary sources are the law as stated, and

⁷⁰ Frank J D'Angelo, *Composition in the Classical Tradition* (Allyn and Bacon, 2000), 22, 23.

⁷¹ Enid Campbell, Lee Poh-York, Joyce Tooher *Legal Research Materials and Methods* (LBC Information Services, 4th ed, 1996), 1, 2.

secondary sources are discussions about the law.⁷² There may be grey areas between primary and secondary sources.

Thus, the thesis refers to old statutes and customs as primary sources. It also refers to old texts, and authoritative journal articles as secondary sources. In all cases, sources have been selected for their publication dates as close as possible to the thesis propositions for which they are cited sources. The thesis also refers to apparently secondary sources, which were authoritative treatises on commercial and legal usage. In this respect, they can be regarded as primary sources, limited by their age and susceptibility to interpretation. This is where the *Oxford English Dictionary* assists in interpretation. In this context, the chapter structure of the thesis is as follows.

(a) Chapter 2

Chapter 2 begins with a brief survey of the arguments constituting passing-off and the nature of strict liability in tort. Then, argument in this chapter sets out to identify the genesis of the tort of passing-off, by examining various aspects of public policy and regulation, as they existed in the early middle ages.

The king's power of *quo warranto* will be examined in order to determine whether a person's higher commercial position might have generated *locus standi* to sue a person of lower position, in the later tort of passing-off. Discussion deals with the nature of the jurisdiction of the courts of the City of London, to prioritise commercial ranks in relation to product source. An investigation of the City of London control over the economy will ask how the City of London might have used its county palatine-like⁷³ status to spread the influence of its old customary laws within England. The chapter investigates the relevance to passing-off of freedom of the City of London.

⁷² Bruce Bott, Ruth Talbot-Stokes *Effective Legal Research* (LexisNexis Butterworth, 4th ed, 2010), 9.

⁷³ A county palatine was one ruled by a petty sovereign who was not bound by the English Acts of Parliament and who held its own parliament, and civil and criminal courts. *Remains Historical and Literary Connected with the Palatine Counties of Lancaster and Chester, Volume XXXVII* (Chetham Society, 1856), 3.

The chapter will look at the development of the English guilds and the nature of their commercial ranks to see whether gild structure, gild rules for admission and exclusion, and gild jurisprudence might have been the regulatory genesis of the later tort of passing-off. The discussion seeks out a historical context for the element of misrepresentation of source in the future tort of passing-off.

The chapter will investigate the legal environment of setting up the positions and relative ranks of the masters and the wholesalers, to determine the limits of crown regulatory action against the trades.

(b) Chapter 3

Argument in Chapter 3 builds on both the idea of commercial ranks identified in chapter 2, and the proposition that a breach of commercial status was a strict liability issue, indicative of fraud. It asks when work might have been controlled by police action and when work might have been controlled by church supervision. Its structure is based on the following proposition: that commercial ranks are related to the differential levels of status, symbolised graphically on royal seals as the higher status, and symbolised as trademarks as the lower status.

Discussion will seek to relate the graphic representations on royal seals to a strict liability enforcement regime against passed off goods. The chapter will examine the various strata of administration used to enforce the application of royal seals. Then discussion will turn to the swan mark, to inquire into the nature of a customary crown administrative system. In examining regulation of publications, the discussion will seek out some relevant key consequences of breaches of use of marks in book licensing. The chapter examines how merchants used proprietary marks, and how they were related to product source and goodwill. Finally, discussion will turn to how certification marks were used to certify artisans' work.

(c) Chapter 4

Chapter 4 applies the propositions and customary background developed in chapters 2 and 3 to an historical examination of the *Gloucestershire Clothiers' Case*⁷⁴ and some of its consequences. The significance of this case was that Doderidge J said, in the 1618 case of *Southern v How*,⁷⁵ that what was later to be recognised as the *Gloucestershire Clothier's Case*⁷⁶ was the first recorded case of passing-off.⁷⁷ This chapter comprises analysis and interpretation of the reported pleadings in the *Gloucestershire Clothiers' Case*.⁷⁸ It also seeks to build a context in procedural law in which the *Gloucestershire Clothiers' Case* might be interpreted, in its relationship to the development of the tort of passing-off.

The chapter will investigate the various manuscript reports of the *Gloucestershire Clothiers Case*.⁷⁹ As background to this investigation, the chapter will examine the history of the regulatory mechanisms of seals to see how they might have created a strict liability enforcement scheme. The chapter asks how Star Chamber might have been the site of crown attempts to stamp out deceit in the trades. An *a priori* examination of classical styles in pleadings to the *Gloucestershire Clothier's Case*⁸⁰ will ask the question of whether the styles of pleading in the Court of Common Pleas might have implied a strict liability procedure for litigating passing-off. The chapter will investigate how an unsuccessful argument pleaded in *Southern v How*⁸¹ might have re-emerged as a strict liability doctrine of secondary meaning, that would allow a rival trader to sue when not directly damaged by a misrepresentation.

⁷⁴ Later identified by Professor Baker as *J G v Samford* (1584) unrep in Baker, above 9, 459.

⁷⁵ Cro Jac 468, 471.

⁷⁶ Later identified by Professor Baker as *J G v Samford* (1584) unrep in Baker, above 9, 459.

⁷⁷ Passing-off is concerned with misrepresentation made by one trader which damages the goodwill of another trader. Misrepresentation, damage and goodwill are therefore the three essential elements of the tort, and are sometimes referred to as its 'classical trinity'. Wadlow, above 4, 6.

⁷⁸ Later identified by Professor Baker as *J G v Samford* (1584) unrep in Baker, above 9, 459.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Cro Jac 468, 471.

(d) Chapter 5

In chapter 5, the question is asked as to whether old customary law, discussed in chapters 2 and 3, was reintroduced into the elements structure of passing-off, and whether a breach of a specified bundle of customs created the policy for the tort of passing-off by relating fraud and strict liability.

After a preliminary examination of the nature of fraud in commerce, there will be an investigation of the role of custom within goodwill, seeking to develop a workable description of goodwill, based on the case law. This is all in preparation to investigating how the court might have amended the scope of passing-off in the *Advocaat Case*,⁸² and if so, what the consequences were in assessing the kind of liability in passing-off. The chapter's argument addresses these issues by looking at fraud in commerce, goodwill, and amending the scope of passing-off.

The chapter builds on the chapter 4 discussion of deceit, and discusses how deceit might relate to fraud. The discussion on goodwill builds on the chapter 2 discussion of old local custom, and asks how it might interlock with damage to goodwill in the context of passing-off. The chapter investigates the doctrine of judicial reasoning by analogy so that it can be applied to developing a principle for understanding goodwill. The purpose of this is to try to identify how goodwill could be damaged in the context of passing-off and to uncover any strict liability in damage to goodwill. With these preparations completed, the chapter examines Lord Diplock's argument in *the Advocaat Case*,⁸³ to identify any strict liability in Lord Diplock's formulation of the elements of passing-off.

(e) Chapter 6

The conclusion summarizes the main points based in the literature at hand, based on satisfying the research objectives. It outlines balanced views of the various arguments, and inductively extracts principles from the thesis. It proposes

⁸² [1979] AC 731, 731-756.

⁸³ *Ibid.*

implications and limitations of the research. It outlines an analysis of the new knowledge synthesized within the thesis and proposes conclusions and recommendations.

II THE EARLY DEVELOPMENT OF THE TORT OF PASSING-OFF

A Introduction

In order to begin this investigation of whether the tort of passing-off is a strict liability tort, and if so, how and why it became a tort of strict liability, this chapter begins with a brief survey of the arguments constituting passing-off. Then it considers the nature of strict liability in tort. This is to brief the reader on the background of some basic assumptions made, and applied in the thesis. Then discussion moves to a historical account of the prehistory of what was to become the tort of passing-off. This account starts at a time before common law courts existed. It addresses a time before a discernable tort of passing-off existed as a consolidated state of affairs in any common law court.

Discussion in this chapter sets out to identify the genesis of the tort, by examining various aspects of public policy and regulation, as they existed in the early middle ages. After the initial surveys of passing-off and strict liability, the remainder of the chapter comprises four sections.

The first section, discussing aspects of the king's power, deals solely with the king's power of *quo warranto*, in order to examine whether a person's higher commercial position might have generated *locus standi* to sue a person of lower position, in the later tort of passing-off. The second section is on the City of London legal system, and deals with the nature of the jurisdiction of the City of London courts, the City of London control over the economy, and freedom of the City. The subsection on the nature of the jurisdiction of the courts of the City of London investigates the various aspects of the City of London legal system, to prioritise the commercial ranks in relation to product source. The sub-section on the City of London control over the economy investigates how the City of London might have used its county palatine-like¹ status to spread the influence of its old customary laws within England. The

¹ A county palatine was one ruled by a petty sovereign who was not bound by the English Acts of Parliament and who held its own parliament, and civil and criminal courts. *Remains Historical and Literary Connected with the palatine Counties of Lancaster and Chester, Volume XXXVII* (Chetham Society, 1856), 3.

subsection on freedom of the City investigates the relevance of freedom of the City of London.

The third section is on the relationship between commerce, the economy and the guilds. It deals with formation of guilds, guild ordinance structure, and a later collapse of guild independence. The subsection on guild formation investigates the development of the English guilds and the nature of their commercial ranks. The subsection on guild ordinance structure investigates whether guild structure, guild rules for admission and exclusion, and guild jurisprudence might have been the regulatory genesis of the later tort of passing-off. The subsection on the collapse of guild independence seeks out a historical context for the element of misrepresentation of source in the future tort of passing-off.

The fourth section is on the position of the workers. It deals with the City of London protection of the masters, and the pressing of the trades into a crown-controlled system of commercial ranks. The subsection on the City of London protection of the masters investigates the legal environment setting up the positions and relative ranks of the masters and the wholesalers. The subsection on the pressing of the trades into a crown-controlled system of commercial ranks investigates the limits of crown regulatory action against the trades.

The chapter will conclude there was arguably a system of customary commercial ranks, in matters of personal property. Londoners had a superior customary right over foreigners to sue in matters of representation of the source of manufactured goods. The crown brought the guilds under crown control to maintain commercial ranks among the masters and the artisans. Masters, and those of the same or higher commercial rank, were the only ones who could trade in their own names. In this context, insubordination of commercial rank by breaching the London custom against holding out oneself as a master was a strict liability matter.

B *A Brief Introduction to Passing-Off*

The first articulation of the legal term “passing-off” in litigation arose in the 1842 case of *Perry v Truefitt*.² This thesis refers to Wadlow’s historical account of the development of the tort of passing-off as a contemporary authority on the topic. This is because Wadlow wrote a detailed history of the tort of passing-off³ and Laddie J cited this historical account with approval in *Inter Lotto (UK) Ltd v Camelot Group Plc*.⁴

1 *Arguments Constituting Passing-off*

In this thesis, the hyphenated term “passing-off” will be used to indicate the tort of that name. The term “passing off”, without a hyphen, will be used to denote the *actus reus* of what would become the later tort. Wadlow sets out the three essential elements of the tort of passing-off as misrepresentation, damage and goodwill, and, as well, the ostensibly obsolete element of fraud.⁵

Wadlow argues as follows. In the nineteenth century, the courts of law generally agreed that passing-off actions were arguments based on questions of fact, rather than on questions of law. The courts of equity performed the work of hypothesizing the underlying legal right they would protect. It appears from the reported cases that passing-off was successful in equity before the time of any successful cause of action in the common law courts.⁶

As the gist of passing-off came to be more understood in terms of damage to property rights, the fraud element was said to have dissolved.⁷ Lord Westbury’s interpretation of the law in terms of property rights was based on a theory of common law trade mark infringement, which cause of action was not distinguished

² *Perry v Truefitt* (1842) 6 Beav 66.

³ C Wadlow *The Law of Passing-off, Unfair Competition by Misrepresentation* (Sweet & Maxwell, 2004), 21, *et seq.*

⁴ [2003] 3 All ER 191, 197-200.

⁵ Wadlow, above 3, 16.

⁶ *Ibid.*

⁷ *Ibid.*

from the tort of passing-off during his Lordship's time.⁸ Goodwill did not become a substantive element of the tort until much later, in the early 20th century, after almost 30 years in which hardly any court dealt with the tort of passing-off on the basis of property rights.⁹ However, the sale of and damage to goodwill had been discussed already in the case law as early as the 1620 case of *Broad v Jollyfe*.¹⁰

2 *Basis of Passing-Off in the Old Law*

Kerly said that the action to restrain the defendant from passing off his goods as the goods of the plaintiff was the generalized form of an action to restrain the infringement of a trademark.¹¹ There appears to have been some changes in the element structure of tort of passing-off. Wadlow set out the three essential and original elements of the tort of passing-off as misrepresentation, damage and goodwill, and, as well, the ostensibly obsolete element of fraud.¹² The first three of these elements were known together as the *classical trinity*.

Lord Diplock held, in the *Advocaat Case*,¹³ that five characteristics of a valid cause of action for passing-off could be identified. He identified the following five.

1. A misrepresentation;
2. made by a trader in the course of trade;
3. to prospective customers of his or ultimate consumers of goods or services supplied by him;
4. which is calculated to injure¹⁴ the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and,
5. which causes actual damage to business or goodwill of the trader by whom the action is brought or, in a *quia timet* action, will probably do so.¹⁵

An alternative analysis of passing-off, as a conjectural argument based on facts, was read to the House of Lords by Lord Fraser of Tullybelton, in the *Advocaat Case*.¹⁶

⁸ 1861-1865; Wadlow, above 3, 16.

⁹ Wadlow, above 3, 16.

¹⁰ Cro Jac 596, 597.

¹¹ D M Kerly *The Law of Trade Marks and Trade Names* (Sweet & Maxwell, 1913), 529.

¹² Wadlow, above 3, 16.

¹³ [1979] AC 731, 740.

¹⁴ The wordage "calculated to injure" appears to represent an interpretation of the natural consequences of the defendant's actions. It does not appear to imply that the defendant calculated anything.

¹⁵ [1979] AC 731, 739, 740.

His Lordship held that, in a passing-off action, it was essential for the plaintiff to prove at least the following facts.

- (1) that his business consists of, or includes, selling in England a class of goods to which the particular trade name applies;
- (2) that the class of goods is clearly defined, and that in the minds of the public, or a section of the public, in England, the trade name distinguishes that class from other similar goods;
- (3) that because of the reputation of the goods, there is goodwill attached to the name;
- (4) that he, the plaintiff, as a member of the class of those who sell the goods, is the owner of goodwill in England which is of substantial value;
- (5) that he has suffered, or is likely to suffer, substantial damage to his property in the goodwill by reason of the defendants selling the goods which are falsely described by the trade name to which the goodwill is attached.¹⁷

After the *Advocaat Case*,¹⁸ the Privy Council confirmed a return to the classical trinity, in the 1981 case of *Cadbury-Schweppes Pty Ltd v Pub Squash Co Pty Ltd*,¹⁹ ('*Pub Squash Case*'). The classical trinity was also reconfirmed in the 1990 House of Lords case of *Reckitt & Colman Products Ltd. v Borden Inc.*²⁰ The thesis will investigate the possible relevance of strict liability to this apparent instability in the element structure of the tort of passing-off.

As stated in chapter 1, this thesis terminates its analytic time frame at the 1979 *Advocaat Case*.²¹ This is due, in part, to subsequent development of consumer law statutes, an analysis of which is beyond the scope of this thesis.

It was possible that instability in the elements of passing-off might be explained by examining how it had emerged as a distinct tort. In 1900, Lord Halsbury quoted the following passage in his speech in *Magnolia Metal Co v Tandem Smelting Syndicate Ltd*.²² The passage suggested the great antiquity of passing-off. It also suggested the significance of looking at the emergence of the tort from the perspective of gild and county jurisprudence.

¹⁶ [1979] AC 731, 749-756. Note that the *Rhetorica ad Herennium* classified an argument based on facts as "conjectural". Cicero *Rhetorica Ad Herennium* (Harvard University Press, 2004), 35. Some arguments could be validly classified as arguments based on fact, per 1 Quintilian, *Institutio Oratoria*, 409.

¹⁷ [1979] AC 731, 755, 756.

¹⁸ [1979] AC 731, 731-756.

¹⁹ [1980] 2 NSWLR 851, 861.

²⁰ (1990) 17 IPR 1, 19, per Lord Jauncey of Tullichettle.

²¹ [1979] AC 731, 731-756.

²² (1900) 17 RPC 477, 477-486, HL.

An action upon the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth, and by reason whereof he had great utterance to his great benefit and profit, and that he used to set his mark upon the cloth, whereby it should be known to be his cloth, and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him, it was resolved that an action did well lie.²³

Professor Baker²⁴ identified the case, referred to by Lord Halsbury in the above quote, as the *Samford* case,²⁵ (*Gloucestershire Clothier's Case*). This 16th century case was heard during the time of Elizabeth I, in the Court of Common Pleas. In the case, the plaintiff was a clothier who apparently brought an action on the case for deceit. In the various manuscript accounts uncovered by Baker,²⁶ the plaintiff was apparently unsuccessful in its action. This was because a majority of the Court held the matter to be *damnum absque injuria*. The case arguably suggested that members of the court were not willing to recognize a common law action in passing-off.

The case is reproduced by Baker & Milsom,²⁷ from contemporary manuscripts.²⁸ They designate the plaintiff as a clothier. This was significant because clothiers were arguably great adherents of exclusive guild and county jurisprudence, sustained by the force of Royal Charter.²⁹

Baker's translated record³⁰ of the case was at variance with the above statement of Lord Halsbury in *Magnolia Metal Co v Tandem Smelting Syndicate Ltd*.³¹ Baker reported that, although the action was by the eminent rival clothier, no judgment was entered because the court was divided. Peryam and Mead JJ had found it to be a case of *damnum absque injuria*, and Wyndham J stated that he would find for the plaintiff upon proof of a breach of an applicable statute regulating the use of marks by

²³ (1900) 17 RPC 477, 484, HL.

²⁴ J H Baker *An Introduction to English Legal History* (Butterworths, 4th ed, 1990), 459.

²⁵ *J G v Samford* (1584) (unreported).

²⁶ Baker, above 24, 459.

²⁷ J H Baker and S F C Milsom *Sources of English Legal History – Private Law to 1750* (Butterworths, 1986), 617, citing HLS MS 2071, fo 86.

²⁸ Cory's entries, BL MS Hargrave 123, fo 168v.

²⁹ See Ebenezer Bain *Merchant and craft guild: a history of the Aberdeen Incorporated Trades* (J and J P Edmond & Spark, 1887), where the author has included some relevant Royal Charters.

³⁰ Translated into English from what has been generally characterized as "Anglo-Norman", in Cory's entries, BL MS Hargrave 123, fo 168v.

³¹ (1900) 17 RPC 477, HL.

clothiers.³² Only Anderson CJ held the defendant liable at common law. In consequence of this report, Wadlow suggests the *Gloucestershire Clothier's Case*³³ be cast aside without a requirement for further analysis. He says it did not appear to have contributed much to the development of passing-off, either then, or later.³⁴ This thesis will look behind and clarify Wadlow's determination of the case's significance, in chapter 4 below, to see how the reported issues of the case might be construed.

The *Gloucestershire Clothier's Case*³⁵ was also set out in an alternate manuscript.³⁶ Additionally, Doderidge J cited it in *Southern v How*.³⁷ Although it was known to later courts only from these early reminiscences,³⁸ *Southern v How*³⁹ acquired weight as authority for the proposition that unauthorized use of a common law trademark was unlawful and could be subject to an action on the case for deceit.

Schechter stated a view about any systematic attempt to trace the history of trademark law and passing-off before the tort succeeded in the king's courts, effectively as one combined kind of action. He stated that this attempt must be through somewhat unorthodox channels and sources from a contemporary legal standpoint.⁴⁰ As an example of this problem of orthodoxy, he stated that the Leet Courts dealt with trademark matters up until the 16th century, and these matters were confined to enforcement by periodic fines. They relied on the force of regulatory provisions of statutes, which provided for compulsory affixing of marks by specified trades.⁴¹

In order to ascertain the early phases of modern trademark law and passing-off in medieval commerce, before their separation into distinct causes of action, the thesis

³² The statute was likely to have been 27 Hen VIII c12.

³³ Later identified by Professor Baker as *J G v Samford* (1584) unrep in Baker, above 24, 459.

³⁴ Wadlow, above 3, 19.

³⁵ Later identified by Professor Baker as *J G v Samford* (1584) unrep in Baker, above 24, 459.

³⁶ HLS MS 2071, fo 86.

³⁷ (1618) Cro Jac 468, 471; Poph 144.

³⁸ See *Blanchard v Hill* (1742) 2 Atk 484, 485.

³⁹ (1618) Cro Jac 468, 471; Poph 144.

⁴⁰ F I Schechter *The Historical Foundations of the Law Relating to Trademarks* (Columbia University Press, 1925), 13.

⁴¹ Schechter, above 40, 14.

consults some records and other reports of the merchant and craft guild organizations. Schechter noted that medieval and middle ages trade was largely conducted through guilds. The guilds sought to restrict litigation among the guildsmen to the guild courts. This was enforced by disciplinary punishment for litigation at law without guild consent.⁴² According to Schechter, the guilds had practiced their own internal system of jurisprudence, in which certain ordinances prohibited the specific acts, which later would constitute passing-off.⁴³

Wadlow states that, by 1870, there appeared to have been at least three interconnected bodies of relevant law of passing-off. There was the common law action for passing-off, of little practical importance because common law fraud had to be proved and damages were the only remedy. There was the action of passing-off in a court of equity, which could result in the grant of an injunction *quia timet* without proof of *mala fides*. He states that there was the later statutory doctrine of property in trademarks, by which infringement was a wrong, whether or not there was knowledge or intent. Wadlow states that the law of passing-off was evolving quite rapidly in the 1870s. However, despite this, the judges generally claimed that they were merely applying settled principles of law to the facts of each case.⁴⁴

Wadlow proposes that passing-off came of age in the last quarter of the nineteenth century. He identified a series of cases, which defined much of the law that still applies today.⁴⁵ *Singer v Loog*⁴⁶ settled that passing-off is based on misrepresentation of secondary meanings, rather than trade mark rights. *Johnston v Orr-Ewing*⁴⁷ is still cited on instruments of deception, liability for exports and the “idea of the mark”. *Montgomery v Thompson*⁴⁸ confirmed that a place name could be distinctive and that it was no defence that the defendant produced his goods in a place of that name. *Reddaway v Banham*⁴⁹ extended the doctrine in *Montgomery v Thompson* to *prima facie* descriptive terms of every type and arguably settled the modern law of

⁴² Schechter, above 40, 30.

⁴³ Schechter, above 40, 16.

⁴⁴ Wadlow, above 3, 32.

⁴⁵ Wadlow, above 3, 30.

⁴⁶ (1882) 8 AC 15 HL.

⁴⁷ (1882) 7 AC 219 HL.

⁴⁸ [1891] AC 217; 8 RPC 361 HL.

⁴⁹ [1896] AC 199; [1895-9] All ER 313; 13 RPC 218 HL.

secondary meaning. In *Powell v Birmingham Vinegar Brewery*⁵⁰ the court held the plaintiff need not be known by name. It introduced the idea of passing-off by misdescription. This was later rejected in *Magnolia Metal v Tandem Smelting Syndicate*.⁵¹ In this case, the court strongly indicated that only misrepresentation of the product source was actionable. *Cellular Clothing v Maxton & Murray*⁵² confirmed that *Reddaway v Banham*⁵³ was good law. *Lever v Goodwin*⁵⁴ in the Court of Appeal protected get-up in its own right for the first time. *Payton v Snelling*, *Lampard*⁵⁵ laid down much of the modern law for get-up cases.

3 *The Modern Phase*

Wadlow says that Lord Parker's speech in *Spalding v Gamage*⁵⁶ gave the tort of passing-off its modern basis as a strict liability tort.⁵⁷ This thesis asks whether guild and county jurisprudence from the middle ages suggested a much earlier basis of strict liability. Wadlow's explanation of strict liability in passing-off runs as follows. Lord Parker's speech in the 1915 case of *Spalding v Gamage*⁵⁸ eliminated the previous restriction to misrepresentation that the goods or business of the defendant belonged to the plaintiff. Second, his Lordship explained passing-off in terms of protecting a property right, the right being the property the plaintiff had in the goodwill of this business. According to Wadlow, passing-off was now treated as protecting a kind of property. For this reason, he says, the courts found it easy to abandon the requirement for proof of fraud. Wadlow suggests that this was what made passing-off a strict liability tort.⁵⁹

Wadlow states that the history of the tort of passing-off was substantially complete⁶⁰ with the 1979 House of Lords decision in the *Advocaat Case*.⁶¹ In that case, Lord

⁵⁰ [1897] AC 710; 14 RPC 721 HL.

⁵¹ (1900) 17 RPC 477 HL.

⁵² [1899] AC 326; 16 RPC 397 HL.

⁵³ [1896] AC 199; [1895-9] All ER 313; 13 RPC 218 HL.

⁵⁴ [1887] 36 Ch D 1; 4 RPC 492, CA.

⁵⁵ (1900) 17 RPC 48, CA affirmed [1901] AC 308; 17 RPC 628, HL.

⁵⁶ (1915) 84 LJ Ch 449, 449-454.

⁵⁷ Wadlow, above 3, 32.

⁵⁸ (1915) 84 LJ Ch 449, 449-454.

⁵⁹ Wadlow, above 3, 32.

⁶⁰ Wadlow, above 3, 34.

Diplock described the tort of passing off as more protean than other actions.⁶² This thesis contains an examination, in chapter 5, of this judicial use of the word “protean”. By the use of the term “protean”, his Lordship could possibly have been referring to Lord Langdale’s view of fraud, expressed in the 1847 case of *Franks v Weaver*.⁶³ In that case, Lord Langdale stated that nobody had been able to define what fraud was, because it was so multiform. He stated that in the case before the court, “it consisted in the crafty⁶⁴ adaptation of certain words in such a manner, ordinarily and constantly, as to be calculated to make it appear to persons when he was selling the product that the thing sold was prepared by the plaintiff”.⁶⁵

As stated above, Wadlow notes that Lord Parker’s speech in *Spalding v Gamage*⁶⁶ gave passing-off its modern basis,⁶⁷ suggesting the following two consequences. The first was that passing-off was confirmed as a tort of misrepresentation, removing the previous restriction to misrepresentation that the goods or business were that of the plaintiff. The second was that passing-off was now explained as protection of the plaintiff’s bundle of rights in the goodwill of its business.⁶⁸ This latter outcome adopted a definition of goodwill as “the attractive force which brings in custom”.⁶⁹ However, the thesis will argue from the case law that a unifying concept for goodwill could be *the value in the probability of the business continuing to maintain its connection with customers of good disposition to it, to induce local custom by means of its own nostrums and reputation, in the same way as in the past*. This will be discussed in chapter 5, below. This unifying concept developed over a series of cases, beginning in 1620. Also, it seems that a workable legal description of goodwill was virtually settled by the time of Lord Eldon’s definition of goodwill in the 1810

⁶¹ [1979] AC 731, 731-756.

⁶² *Erven Warnink BV v Townend & Sons* per Lord Diplock [1979] AC 731, 740.

⁶³ (1847) 10 Beav 297, 303.

⁶⁴ Craft is arguably related to deceit. The word *craft* was explained in the *Rhetorica ad Herennium* as the topic of an argument considering security. Security is to provide some plan for ensuring the avoidance of a present or imminent danger, the two sub-headings for which are might and craft. Craft is exercised by means of money, promises, dissimulation, accelerated speed, deception and other similar means. Craft is only another name for strategy. *Rhetorica Ad Herennium* above 15, 161, 171.

⁶⁵ 10 Beav 297, 303, 304.

⁶⁶ (1915) 84 LJ Ch 449, 449-454.

⁶⁷ Wadlow, above 3, 32.

⁶⁸ *Ibid.*

⁶⁹ [1901] AC 217, 223, 224 HL.

case of *Cruttwell v Lye*.⁷⁰ The chapter 5 discussion will argue that goodwill was uniquely prone to damage by that kind of misrepresentation, which was the gist of passing-off.

C *Strict Liability*

Wadlow states that the courts eventually abandoned fraud in passing-off, even as a legal fiction, and that this made the tort of passing-off a strict liability tort.⁷¹

Therefore, this brief survey of the nature of strict liability is presented to clarify for the reader how the development of the tort of passing-off might be assessed as for strict liability. Strict liability in tort has been described in the following terms.

Accountability without proven negligence or fault. Neither the intent of the defendant nor the presence or absence of negligence are relevant to the issue of a defendant's liability where strict liability for the defendant's conduct applies. A defendant may be held liable even though he or she took reasonable care to prevent the damage.⁷²

Epstein stated that it was likely that strict liability dominated the formative years of the common law. He added that the development of the common law of tort was marked by a divergence in the late nineteenth century between two key practices. At that time, the courts had not decided precisely where the principles of negligence as *mens rea* should dominate, and where they should not. The first theory held that a plaintiff should be entitled, *prima facie*, to recover from a defendant who has caused him harm, only if the defendant intended to harm the plaintiff, or failed to take reasonable steps to avoid inflicting the harm. The alternative theory was that of strict liability. It held that the defendant was *prima facie* liable for the harm caused, whether or not either of the two additional elements relating to the defendant's intent and negligence was satisfied.⁷³

Epstein said that the doctrine of strict liability stated that proof that the defendant caused harm created a presumption of liability. There was no room for the defendant to argue he had no intention to harm the plaintiff, as part of the *prima facie* case.

⁷⁰ (1810) 17 Ves Jr 334, 346.

⁷¹ Wadlow, above 3, 32.

⁷² *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

⁷³ Richard A Epstein 'A Theory of Strict Liability' (1973) 2(1) *Journal of Legal Studies* 151, 152.

Neither was there room to argue that the defendant could have avoided the harm he caused by the use of reasonable care. The choice was simply either the plaintiff or the defendant. The analysis and tracing of causation to the defendant was the sole measure by which responsibility fastened *prima facie* onto the defendant.⁷⁴

Pollock cited an example of this theory. He said the tort of breach of statutory duty was one of strict liability. This was because there was an external statutory determination of the *prima facie* wrongful conduct. The defendant did not determine wrongfulness. This arguably eliminated intent and negligence as elements.⁷⁵

Duff defined liability in crime as absolute if it required no proof of fault in any aspect of the offence, and liability in crime as strict if it required no proof of fault in one aspect of the offence.⁷⁶ Gardner stated that in general, private law cared about the wrongdoer's fault or blame, if and only if fault was a constituent of the wrong.⁷⁷

In the context of the civil law, Pollock stated that 'the commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury'. He added that where the harm ensuing from such an act was of the kind that the law specifically sought to prevent, then the justice and necessity of the rule would be self-evident.⁷⁸ This principle was illustrated in the following common law rule, as relevant to a discussion of the tort of passing-off. If a party took in hand anything requiring particular skill and knowledge, the law required of him/her a level of competence typically found in the people who usually undertook these matters. Anyone who professed a craft, held himself/herself out to have the common skill of that craft, and was answerable accordingly. If this person failed, it was no excuse that he or she merely did the best possible. The rule was that he/she must be reasonably skilled at his/her peril. The term "at his/her peril" was the

⁷⁴ Epstein, above 73, 151, 168, 169.

⁷⁵ F Pollock *The Law of Torts* (Banks & Brothers, 1895), 17.

⁷⁶ A P Simester (ed), *Appraising Strict Liability* (Oxford University Press, 2005), 125.

⁷⁷ Simester above 76, 70.

⁷⁸ Pollock, above 75, 17.

indicium of strict liability because it meant that the breach itself caused the punishment.⁷⁹

Pollock stated that strict liability appeared ancient and therefore prescriptive. His reasoning ran as follows. The policy was reflected in the convenient form of a maxim, as maxims facilitated long-term transmission of a rule. The Romans put it in the form of the maxim *imperitia culpa adnumeratur*, or, ‘the situation is governed by its own class’. This policy was expressed in the following hypothetical narrative, which illustrated the inevitable effect on a community of the commission of a civil wrong: ‘He went about to do harm, and having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end.’ The principle inhering within this narrative was illustrated within the following maxim: “a man is presumed to intend the natural consequences of his acts”, combined with the observation that the law naturally inferred intention and mostly the inference was correct.⁸⁰ This maxim referred only to acts. It did not say that a man was presumed to have intended the natural consequences of his state of mind.

Pollock stated that this procedural judicial policy came from a time when intention could hardly ever be a matter of direct proof, the thought of man being not triable.⁸¹ Further, it was normal for the presiding judge to have or project in his/her own mind the likely intentions of the defendant, so that the judge might infer either willfulness or recklessness of intention. This represented the perimeter of the term ‘natural’, in the maxim as above, or as it would have been embedded within the reasoning in the judge’s mind, ‘natural and probable’.⁸²

The 1875 criminal case of *R. v Prince*⁸³ presented to the Court an opportunity to discuss strict liability in crime. It was also open to discuss the circumstances in which a criminal breach of a statutory wrong might become a civil breach of a

⁷⁹ Pollock, above 75, 18, 19.

⁸⁰ Pollock, above 75, 23.

⁸¹ *Year Book 17 Edw. IV*, translated in Blackburn on Sale, 193, in 1st ed, 261 in 2nd ed by Graham.

⁸² Pollock, above 75, 24.

⁸³ *R v Prince* (1875) LR 2 CCR 154.

statutory duty. In this case a man carried away a girl who was under 16, knowing that she was in her father's sole lawful custody. This was a statutory criminal offence. He believed on reasonable grounds that she was 18. He was charged under the relevant Act and the court held that the state of his knowledge of her age was irrelevant. This case suggested that, by 1875, strict liability was already a feature of civil, or private, law. It arose in an application of the maxim, as stated as above, and applying to cases of tort liability "a man is presumed to intend the natural consequences of his acts". Illustrating the application of this maxim in *R. v Prince*,⁸⁴ Brett J referred to the prior 1859 case of *Hearne v Gareton*,⁸⁵ in which the respondents had been charged for having sent oil of vitriol⁸⁶ by rail without marking, or stating, the nature of the goods. The applicable statute was 20 & 21 Vict c 43, s 168. It provided 'every person who shall send or cause to be sent by the said railway any oil of vitriol, shall distinctly mark or state the nature of such goods, &c, on pain of forfeiting, &c.' Section 206 of that statute made the provision into an offence by giving the Court power to deal with such matters summarily, before justices with power to imprison. While the respondents in fact did the prohibited acts, the justices in *Hearne v Gareton*⁸⁷ found that there was no guilty knowledge, and they had acted with full diligence, under a reasonable belief that the goods had been correctly described.⁸⁸ On appeal, Lord Campbell CJ held that the presumption of guilty knowledge was rebutted by proof that a fraud had been practiced on the respondents. If so, they would be civilly liable instead of being criminally culpable. Earle J agreed that, in the circumstances, they would be civilly liable.⁸⁹

Piggott stated that negligence, recklessness and heedlessness as *mens rea* were distinguished from each other in that the latter two were intentional, such that it could be said that there was knowledge of the consequences and a deliberate intention that these consequences should follow the act. Recklessness was where there was knowledge of the consequences and a deliberate intention that they should

⁸⁴ (1875) LR 2 CCR 154.

⁸⁵ 2 E & E 16.

⁸⁶ Common name for sulphuric acid, since medieval times.

⁸⁷ (1859) 2 E & E 66.

⁸⁸ (1859) 2 E & E 66, 69, 70.

⁸⁹ (1875) LR 2 CCR 154, 166, 167.

follow the act. Heedlessness was where there was no knowledge of the consequences and no regard is paid to whether any consequences might follow.⁹⁰

Piggott added that negligence and heedlessness both inferred unconsciousness. In negligence, the person did not think of the act. In heedlessness, the person did not think of the consequence. When an act was done which should have been left undone, a negative duty was breached. Negligence could be regarded as a term describing a *mens rea*, under which is grouped all those acts or omissions that were not malicious, fraudulent, or named torts.⁹¹

Piggott concluded that *mens rea* in tort was divided therefore into involuntary acts, negligence and intentional acts, the last of which divided into fraud and malice.⁹²

Cases of absolute liability might be classified into three, as set out as follows. The first was liability for inevitable accident, in cases in which a person acted at his/her peril (*suo periculo*) and made by law an insurer of others against the harmful results of the act. Acts *suo periculo* were an essential precondition for absolute liability. The second was liability for inevitable mistake, where, although the act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that the circumstances justified the act. This was discussed in the 1829 case of *Glasspoole v Young*,⁹³ in which case it was stated that although a defamatory statement was not actionable if it were true, a mistaken belief in its truth was commonly no defence and he who attacked another's reputation did so at his peril (*suo periculo*). Also later, in the 1872 case of *Fowler v Hollins*,⁹⁴ the Court stated "persons deal with the property in chattels or exercise acts of ownership over them at their peril . . ." The third was vicarious liability for the wrongful acts of others. This was illustrated by the doctrine of *respondeat superior*, (let the principal answer). The Court applied this doctrine in *Limpus v London General Omnibus Co.*,⁹⁵ where a master was liable for the torts of his servant, (*suo periculo*). This was

⁹⁰ Francis Piggott *Principles of the Law of Torts* (William Clowes, 1885), 207.

⁹¹ Piggott, above 90, 208.

⁹² Piggott, above 90, 209.

⁹³ (1829) 9 B & C 696, 701.

⁹⁴ (1872) LR 7 QB 639.

⁹⁵ (1862) 1 H & C 526, 534-543.

provided they were committed in the course of the servant's employment. It applied even though the master did not authorize them, and even if the master expressly forbade them.⁹⁶

Concluding this discussion, liability in crime was strict if it required no proof of fault in one aspect of the offence. Therefore, it could be argued that liability in tort was strict, rather than absolute, if it required proof of *mens rea* in one or more aspect of the tort, the remaining aspects either requiring no proof of *mens rea* or that proof being provided by a presumption of the law. In other words, *mens rea* would be presumed for some aspects of the tort's elements, but not presumed for others. This would mean that *mens rea* would have to be proved for that aspect or those aspects of the tort where a presumption of legal negligence did not apply. Any aspect requiring proof of *mens rea* would be one where *suo periculo* did not apply, or in other words, an act where the actor was not necessarily acting at his/her peril, and negligence *mens rea* would have to be proved. If *suo periculo* applied to all elements of the tort, or if *mens rea* were presumed for all elements, it would be one of absolute liability.

It is suggested that Pollock indicated a more generic approach based on maxims. The issue of the legal context of maxims will be discussed in chapter 5. For the purposes only of this thesis, and to avoid arguments between defining strict liability and arguments defining absolute liability, it is suggested that that absolute liability be treated as a limiting form of strict liability.

⁹⁶ Ibid.

D *The King's Power*

1 *The King's Power of Quo Warranto*

This section seeks to synthesise what has just been discussed about strict liability with an apparently nascent form of passing-off. The King retained a paramount power of appointing people to key official positions. This would allow him to police and enforce the agreed terms of those appointive offices. This investigation of the early common law civil action in *quo warranto* is written to place in context the various positions of privilege among those in the various commercial ranks. This is in order to ascertain how *locus standi* by a person of higher commercial rank to sue one of lower rank might have played a formative role in the later tort of passing-off.

In the 1846 case of *Darley v The Queen*,⁹⁷ its judges were summoned to the House of Lords to give their opinion on the nature of *quo warranto*, at a time before the House of Lords possessed a judicial arm. Tindal CJ stated to the House of Lords the general rule as to the proper defendant in proceedings in *quo warranto*, as follows.

The procedure by *quo warranto* is appropriate wherever there has been an usurpation of any office, whether created by charter alone or by the Crown with the consent of Parliament; provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others.⁹⁸

This opinion assumed a usurpation of office had already been identified and traced to its source, suggesting an *indicium* of strict liability. Shortt collated the following list of guild officers, who had been held to be proper defendants in *quo warranto* proceedings, when the usurpation of office was inferred by improper performance in office. The list included the master of a city company, such as that of Merchant Taylors' Company, or the Coopers' Company, or the Patton Makers' Company. The list also included the master of the Company of Tailors at Lichfield, and, the assistant of the Saddlers' Company.⁹⁹ Any of these officers acting in derogation of the crown was therefore subject to a possible *quo warranto* judicial inquiry. In theory, this

⁹⁷ 12 C L & F 541, 542.

⁹⁸ John Shortt *Informations (Criminal and Quo Warranto) Mandamus and Prohibition* (The Blackstone Publishing Company, 1888), 148.

⁹⁹ Shortt, above 98, 150, 151.

perceived threat could colour the way these officials both structured their positions and executed their duties within their guilds. They would want to avoid an action in *quo warranto*.

The king maintained his positioning atop the goods manufacturing and mercantile hierarchies by means of proceedings in *quo warranto*. In this way the king could construct his own hierarchies. He could specify who would occupy the positions of lords, who would owe fealty or exact homage¹⁰⁰ or own in socage,¹⁰¹ from one to the other. It will be argued in this section that by this hierarchy a person higher up the order could maintain a right to sue a person lower in the order, in an action resembling in form the later tort of passing-off. In this way, any later tort of passing-off would depend upon the king maintaining the hierarchical social order.

In the same way, arguably the king could remove entire charters. After the Norman Conquest of 1066, manufactured goods were produced and sold by way of a power granted in a crown franchise. A franchise, created by royal charter, was always subject to the king's pleasure. No franchise could be relied upon as permanent.¹⁰²

The king had an ancient power in respect of the forfeiture of the charters and franchises of a corporation aggregate.¹⁰³ By this power, he could seize franchises and liberties and examine charters.¹⁰⁴ This power was based on the doctrine, similar to King John's doctrine of public deceit,¹⁰⁵ that when the King granted a franchise there was an ancient condition in law that he should do right to all parties concerned,

¹⁰⁰ Coke described homage as follows. "Homage is the most honorable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneele before him, on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and beare to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him." Eduardo Coke *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton* (J & W Clarke; Saunders & Benning; A. Maxwell; S. Sweet; H. Butterworth; Stevens & Sons; R. Pheney; and J. Richards, 1832), 64a.

¹⁰¹ For definitions and discussion of these concepts, see Sir Thomas Littleton *Littleton's Tenures in English* (John Byrne & Co, 1903).

¹⁰² J Kidgell *Power of the Kings of England to examine the charters of particular corporations and companies: exemplified by the statutes and laws of this realm* (John Kidgell Printer, 1684), 1.

¹⁰³ A corporation consisting of two or more persons.

¹⁰⁴ Kidgell, above 102, 1.

¹⁰⁵ To be discussed in context in chapter 4, below.

otherwise the franchise should be seized.¹⁰⁶ That condition in law derived from an ancient statement of the purpose of making corporations. In the time of William the Conqueror this had been implied as conditions into charters. It provided that corporations were erected for, first, the conservation of the dignities and pre-eminences of the crown and the laws of the land, second, for defence of the king's subjects and for keeping the king's peace in time of sudden uproars, and third, for defence of the realm against outward and inward hostility.¹⁰⁷

The single exception to this statement of law appears to have been in the case of the City of London. The liberties of the City of London could not be taken into the king's hands, but continued both its own customs¹⁰⁸ and the ancient Roman Imperial Law.¹⁰⁹ Stolte reported, from a telephone interview that he conducted with Professor J. H. Baker on 21 October 1997, that a "custom" was a type of legal action heard by local or municipal courts as opposed to common law courts.¹¹⁰ The common law courts frequently adopted the "customs" of prominent cities and counties such as London and incorporated them into the common law of the realm. Crown charters continued the ancient franchises and Customs of London. These crown charters were of gifts, grants and confirmations.¹¹¹ Although these grants of continuation might still be forfeited if they were somehow abused or misused, the king could never act summarily in this way.¹¹² The reason was that crown summary action would be ineffective against any local customary law already established by prescription, and thus, the crown got around the power of established custom by use of an administrative action in *quo warranto* against the Mayor and Commonalty and Citizens of the City.¹¹³

¹⁰⁶ Kidgell, above 102, 6, citing 20 E 4 fol 5, 6.

¹⁰⁷ Ibid. Without citing the stated record of William the Conqueror.

¹⁰⁸ Keith M Stolte 'How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter's Conundrum' (1998) 88 TMR 564, 592n.

¹⁰⁹ Kidgell, above 102, 9, citing Rot. Parl. I E. 3. *Authoritate Parliament, Injt. Part 4. Fol. 253.*

¹¹⁰ Stolte, above 108.

¹¹¹ It will be argued in chapter 3, below, that these grants were initiated typically at the request of the grantee.

¹¹² Kidgell, above 102, 9.

¹¹³ Ibid.

For example, during the reign of Edward I,¹¹⁴ the franchise of returning members to parliament was conferred on many towns, most of which were incorporated. This franchise was executed by writ of a bailiff or other chief officer, which by this process gained a certain regal authority. The crown saw the need to strengthen its control over franchise holders. It devised and implemented the common law writ of *quo warranto*. By this writ, the judges were empowered to inquire by what warrant all who claimed any franchise, in derogation of the crown, maintained their title to this franchise.¹¹⁵ This form of action assumed strictly that the claimant had wrongly claimed a franchise against the interests of the crown.¹¹⁶

The common law action in *quo warranto* was arguably analogous in form to the future tort of passing-off. Its operation was identifiable as one of strict liability as the term applied to the later tort of passing-off. An analogy of passing-off to *quo warranto* could be articulated ‘by what warrant did the specified artisan claim to be a master and maintain an independent right to offer his goods for sale, in derogation of the property rights in goodwill of the true masters, deriving ultimately from the agreement of the king?’

In theory, *quo warranto* proceedings also could overturn any ranking system of officials. In this way, it could control the commercial activities of anyone inferior in title to that of the king. This included those producing goods for sale at the lower levels of commercial ranks. It will be argued below in chapter 3 that the towns would regulate most manufacturing via the signification of approved seals. So in the statute 18 Edward I of 1290, entitled *Statutum De Quo Warranto Novum*, the king’s position over the towns was considerably strengthened by making *quo warranto* more specific. It was enacted in the following terms, implying both a reverse onus on the defendant and strict liability.

Concerning the writ that is called *quo warranto*, our lord the king at the feast of Pentecost, in the eighteenth year of his reign, hath established, that all those who claim to have quiet possession of any franchise before the time of king Richard, without interruption, and can show the same by lawful inquest, shall well enjoy their possession, and in case that such possession

¹¹⁴ 1272-1307.

¹¹⁵ J W Willcock *The Law of Municipal Corporations, together with a brief sketch of their history, and a treatise on mandamus and quo warranto* (John S Little, 1836), 4.

¹¹⁶ Willcock, above 115, 4.

be demanded for cause reasonable, our lord the king shall confirm it by title. And those that have old charters of privileges shall have the same charters adjudged according to the tenor and form of them: And those that have lost their liberties since Easter last past by the aforesaid writ, according to the course of pleading in the same way writ heretofore used, shall have restitution of their franchise lost, and from henceforth they shall have according to the nature of this present constitution.¹¹⁷

This statutory provision provided guidance for *quo warranto* proceedings. It allowed long-held claims to stand by confirmation of the king, it provided that old charters should be judged by their tenor and form, and it appeared to appease those who had more recently lost their franchises by restoring them with statutory force. The allowance of judging a charter by tenor and form apparently allowed the court more depth of examination, and suggested a presumption in favour of long-held office.

Proceedings in *quo warranto* commenced with the old common law writ were purely civil, and judgment against the defendant might include the remedy of the king seizing the franchise. The king could grant it out again, however he pleased.¹¹⁸ This was presumably only for public purposes, using the king's ancient power of forfeiture of charters and franchises, as discussed above.

E *The City of London Legal System*

1 *Nature of the Jurisdiction of the Courts of the City of London*

This section investigates the various relevant aspects of the City of London legal system. This is for a context in which the customary laws of London could have prioritised London-sourced personal property over foreign-sourced personal property. This prioritization of commercial ranks will be examined to see how it might apply to regulation of representation of product source within the later tort of passing-off.

The City of London had its own ancient jurisdiction, and therefore had its own courts of law within the walls of the City of London. The Court of Hustings was the

¹¹⁷ 1 *Statutes of the Realm* 1235-1377, 107.

¹¹⁸ Shortt, above 98, 138.

highest court of judicature in London, presided over by the mayor and sheriffs. This court had jurisdiction over all real and mixed actions except ejectment. It had jurisdiction in actions *in personam* only by appeal from the sheriff's court.¹¹⁹ In matters of appeal, the Town Clerk could make out orders in prohibition, certiorari and procendendo.¹²⁰ This effectively gave the Hustings control over the action in replevin. In theory, replevin could remove all passed off goods into the hands of the plaintiff at the outset of an action for unlawful possession of goods.¹²¹

Indicative of administrative reverse onus in property matters, the Court of Hustings maintained a register of all real and personal property in London.¹²² Arguably, this allowed it full administrative and supervisory control of all property in London. In theory, title to property could be changed administratively, just by amending the property register.

Both the procedural¹²³ and the substantive law in London were arguably customary law in character. It is argued in this chapter, below, that they were strict liability law. Pulling, speaking of the most ancient legal usages of London, stated that long before the court of chancery was established, the lord mayor's court, also called the court of aldermen, was a court of record of law and equity.¹²⁴ More relevantly, it had powers of the widest kind over property. The Recorder of the City of London was in fact the sole presiding judge. The Recorder's record of the oral customs of the court, rather than those of the community, became the authority for judging disputes.¹²⁵ In chapter 4, it will become evident that the Recorder's position was part of the pleadings in the *Gloucestershire Clothiers' Case*,¹²⁶ which is considered to have been the first passing-off matter in the royal courts.

¹¹⁹ Alexander Pulling *The Laws, Customs, Usages and Regulations of the City and Port of London* (William Henry Bond and Wildy and Sons, 2nd ed, 1854), 171.

¹²⁰ Pulling, above 119, 173.

¹²¹ The term "passed off" is used in this sense without the hyphen as a factual rather than legal circumstance.

¹²² Pulling, above 119, 176.

¹²³ Procedural rules of the court.

¹²⁴ Pulling, above 119, 177.

¹²⁵ Pulling, above 119, 177.

¹²⁶ Later identified by Professor Baker as *J G v Samford* (1584) unrep in Baker, above 24, 459.

This London system appeared to have been widespread in other English jurisdictions. For example, all people, freemen and non-freemen could sue in the court of aldermen. Later, litigants resorted to the court of chancery while the court of aldermen fully retained its equitable jurisdiction.¹²⁷ If for some reason the defendant did not appear, or was found to be outside the jurisdiction of the court, the remedy of foreign attachment applied. By this remedy, the plaintiff could instantly attach any property or debts owing to the defendant from any person within the jurisdiction.¹²⁸ An action previously commenced in the superior courts, however, acted as a bar to the remedy of attachment in the mayor's court.¹²⁹ This customary mode of commencing an action also applied in other ancient English cities and towns such as Bristol, Exeter, Lancaster, as well as in Scotland and Jersey.¹³⁰

Similarly, the court was seized of jurisdiction in the powerful remedy of sequestration. Suggesting how a creditor might out-rank an alleged debtor, if a debtor absconded leaving goods in a house or warehouse, a creditor could apply for the subject goods to be sequestered.¹³¹ The remedies of foreign attachment and sequestration were arguably open to abuse. Hypothetically, a debtor could either be chased away, or kidnapped, or worse, so that his goods could be either attached or sequestered or both. In this way, title to his working capital and stock could be transferred out of the debtor's hands.

Actions commenced in London were unlikely to be appealed or removed to royal courts in Westminster. Suggesting a procedure for perpetual investigation, and therefore permanent and continuing reverse onus, an action in the lord mayor's court remained in force forever. This could be so, even without the commencement of formal proceedings. In this way, the Court exercised a supervisory jurisdiction. Such actions could be removed to a superior court at Westminster only by the prerogative

¹²⁷ Pulling, above 119, 181.

¹²⁸ Pulling, above 119, 188.

¹²⁹ Pulling, above 119, 192, citing 2 Show 374; 1 Rol Abr 552, g.

¹³⁰ Pulling, above 119, 189.

¹³¹ Pulling, above 119, 192.

actions of *habeas corpus* or *certiorari*, except where the action lay by the custom of London, in which case they could not be removed at all.¹³²

Making removal to royal courts even more unlikely, the lord mayor's court was an appeal court, and in its equitable jurisdiction could stay all other kinds of action.¹³³ The lord mayor's power to stay actions was quite advantageous to many wealthy and privileged defendants. For example: in the sheriff's court, by ancient custom of London, a losing party might apply, at a time after verdict and before judgment, to have the matter "marked" by the lord mayor. This process was known as markment and allowed the mayor to bar the complaint and stay enforcement proceedings. The defendant entered into a mere recognizance¹³⁴ for double the amount of the verdict, rather than suffering a damaging judgment.¹³⁵ Chapter 5 will investigate the attributes of procedural and substantive custom within the future tort of passing-off.

2 *The City of London Control over the Economy*

This section investigates how the City of London might have used both its County Palatine form¹³⁶ over the weaker status of chartered cities, and its strict control over the guilds, to make the influence of its oral customary laws spread in England.

Royal Charter¹³⁷ declared the following ancient custom of London. "The mayor and aldermen for the time being ought to record all their ancient customs by word of mouth as often as anything should be moved in act or question before any judges or justices touching their customs."¹³⁸ An official holding the office and title of

¹³² Pulling, above 119, 193. This is another possible reason why the action in the *Gloucestershire Clothier's Case* failed. One pleader attempted to introduce London custom into the pleading, and it is unclear whether the pleading succeeded or not. See the discussion in chapter 4, below.

¹³³ Pulling, above 119, 198.

¹³⁴ Recognizance. A bond by which a person undertakes before a court or magistrate to observe some condition, especially to appear when summoned. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹³⁵ Pulling, above 119, 203.

¹³⁶ A County Palatine was one ruled by a petty sovereign who was not bound by the English Acts of Parliament and which held its own parliament, and civil and criminal courts. Chetham Society, above 1, 3.

¹³⁷ Charter of Edward IV of 9th November 1463.

¹³⁸ Pulling, above 119, 4.

Recorder performed this recording process.¹³⁹ The records of the Recorder were subject to being proved in Court, by the evidential procedure of judicial notice, with only the Recorder himself appearing at the bar of the Court.¹⁴⁰

Royal charters set up many counties and cities. London was the most significant exception to this rule, with law by ancient prescription being more powerful than royal charter. Charters were a species of letters patent from the crown. They conferred franchises and made regulations for local governments, such as the constitutional arrangements allowed the crown to grant.¹⁴¹ However, the main formal difference between charters and letters patent was that, while the letter patent usually bore a simple *teste meipso*,¹⁴² the charter declared itself to have been delivered by the king or by his chancellor. This was in the presence of many witnesses whose names were given within it. The charter was attended upon by a public gathering for the announcement and was emblematic of the king's will.¹⁴³ Arguably, this kind of will of the king was a public good.

Charters set up the constitutions of civic guilds or companies. Arguably, charters were based on accepted practice based on long-standing custom. Charters regulated the proceedings of local courts, and conferred upon the corporations their own power to administer justice, the privileges of holding markets, collecting tolls, fines, and forfeitures.¹⁴⁴ The London trading companies had charters of their own. These defined their powers over their members and their trade.¹⁴⁵ This suggested that the power of commerce was divided between the City and County corporations at the higher level of prestige as constituters of markets, and the companies or guilds at a lower level of prestige as regulators of their own members.

¹³⁹ Ibid.

¹⁴⁰ Year Book, 21 Edw IV 74, 78; 22 Edw IV 30; Co Litt 74; 2 Inst 126; 2 Roll Aor 579; Cro Car 516; *Player v Hutchins*, O Brid Com Dig *Exoins*, D. It appears that a former Recorder of London was one of the Serjeants-at-law in the *Gloucestershire Clothier's Case*, discussed in chapter 4, below.

¹⁴¹ Pulling, above 119, 9.

¹⁴² Medieval Latin *teste meipso* (or *seipso*), by my (or his) own witness, indicating the witnessing or concluding clause of an instrument. James Morwood (ed), *The Oxford Latin Mini Dictionary* (Oxford University Press, 1995).

¹⁴³ F W Maitland 'History from the Charter Roll' (1893) 8(32) *The English Historical Review*, 726-733, 726.

¹⁴⁴ Pulling, above 119, 10.

¹⁴⁵ Ibid.

The City of London had no guild-like form of charter of establishment. Its royal charters were confined to a mere continuing of its ancient system of government, recognized under the ancient Roman Imperial law. Its customary laws were not subject to desuetude, so that when the king's force to the contrary was removed, the ancient prescriptions automatically returned to operation.¹⁴⁶ Arguably, the king had to struggle to prevail in the City of London.

3 *Freedom of the City*

This section investigates the freedom of the City of London, to place in context the various restrictions and obligations placed on London freemen. The section seeks to determine how foreigners as non-freemen were restricted from trading in their own names, or at all, inferring that foreigners had a lower commercial rank than that of local freemen.

This section argues the following propositions. Freedom of the city was the administrative procedure that controlled the workplace. Any breach of it was dealt with without the requirement for proof of *mens rea*. It was equivalent to immigration status conferred on those people who had been either foreigners or strangers to the City. It created subservient ranks of master craftsmen, lawful journeymen and apprentices. This micro-hierarchy was subservient to the City and County, which in turn, was subservient to the king. The freedom system allowed those higher up in the hierarchy to take action against those of lower rank for misrepresenting their rank.

The freedom of the city was the device by which the right to make a living was enforced. Without it, the worker reverted to the ancient form of slavery. From early Saxon times, membership in the guilds depended on full citizenship. However, the exclusion of strangers could not be explained by any political activist tendency by the crafts. Non-citizens, whether they were aliens or mere strangers, occupied a precarious position in medieval England. On their arrival in town, they were required to lodge in the house of one of the burgesses assigned to them as host, and who would be responsible for their good behavior. The burgess answered for the stranger

¹⁴⁶ Pulling, above 119, 13.

and this situated the stranger in a lowly hierarchical position. The period of the stranger's sojourn was often limited by the immigration laws of the day to forty days. They were allowed to trade only with citizens or members of the applicable merchant gild.¹⁴⁷ At the trade fairs, strangers were subject to separate tribunals, such as the piepowder courts. In all cases, heavy fines were imposed.¹⁴⁸

A court of Piepowders was a special court in England arranged by a borough for a fair or market. This court's jurisdiction was for events taking place in the market, including disputes between merchants, theft, and acts of violence. Punishments typically included fines and the possibility of being held in a pillory or being drawn in a tumbrel in order to humiliate the offender. The court of Piepowder had its own position within the system of the common law. *Doctor and Student* situated the Court of Piepowder within the legal system, by noting that common law marketplace issues of a pre-statutory nature could be dealt with in courts of Piepowder.¹⁴⁹

Seligman noted that the distinction between freeman and foreigner was strongly accentuated in the general law. It was also accentuated in all the city regulations, such as those of Worcester, Bristol, Winchester, Ipswich, and the Cinque Ports.¹⁵⁰ He

¹⁴⁷ Edwin R A Seligman 'Two Chapters on the Mediaeval Guilds of England' (1887) 2(5) Publications of the American Economic Association, 9-113, 69, 70.

¹⁴⁸ Seligman, above 147, 69, 70.

¹⁴⁹ The Common law is taken three manner of ways. First, it is taken as the law of this realm of England, dissevered from all other laws. And under this manner taken it is oftentimes argued in the laws of England, what matters ought of right to be determined by the Common law, and what by the admiral's court, or by the spiritual court: and also if an obligation bear date out of the realm, as in Spain, France, or such other, it is said in the law, and truth it is, that they be not pleadable at the Common law. Secondly, the Common law is taken as the king's courts, of his Bench, or of the Common Place: and it is so taken when a plea is removed out of ancient demesne, for that the land is frank-fee, and pleadable at the Common law, that is to say, in the king's court, and not in ancient demesne. And under this manner taken, it is oftentimes pleaded also in base courts, as in Courts-Barons, the County, and the court of Piepowders, and such other, this matter or that, etc., ought not to be determined in that court, but at the Common law, that is to say, in the king's courts, etc. Thirdly, by the Common law is understood such things as were law before statute made in that point that is in question; so that that point was holden for law by the general or particular customs and maxims of the realm, or by the law of reason, and the law of God, no other law added to them by statute, nor otherwise, as is the case before rehearsed in the first chapter, where it is said, that at the Common law, tenant by the courtesy and tenant in dower were punishable of waste, that is to say, that, before any statute of waste made, they were punishable of waste by the grounds and maxims of the law used before the statute made in that point. But tenant for term of life, ne for term of years, were not punishable by the said grounds and maxims, till by the statute remedy was given against them; and therefore it is said, that at the Common law they were not punishable of waste. William Muchall (ed), *Doctor and Student* (James Moore, 18th ed, 1792), dialog 2, chapter 2.

¹⁵⁰ Seligman, above 147, 69, 70.

stated that the exclusion of non-freemen from the crafts was not so much the result of any independent action of the guilds, but was a principle of the early common law.¹⁵¹

Freedom was arguably a specious term. It did not really mean that the person was free. The meaning of this kind of freedom was far from today's meaning of the absence of necessity, coercion, or constraint in choice or action. From ancient times, freedom of the city of London could be acquired only by one of the original three pathways of patrimony, apprenticeship, or by redemption from the court of aldermen.¹⁵² Pulling wrote that from ancient Saxon times the power of conferring the freedom of the city was independent of the crown.¹⁵³ People not free of the city were designated as foreigners or strangers, in accordance with the ancient law of Rome.¹⁵⁴

The freedom of the City of London was essential for commercial activity and functioned as follows. Only city freemen could vote in Parliamentary elections, vote in civic elections for councilmen and alderman, be exempt from all tolls payable on animals brought into the City for sale, be exempt from all market tolls payable anywhere in the country, be exempt from naval conscription, and enjoy the right to claim freedom from prosecution except in the city's courts.¹⁵⁵

Up to 1835, every person who wished to become a city freeman first had to become a freeman of one of the City livery companies. These were mercantile successors to the medieval trade and craft guilds. The freedom of a livery company was merely an ordinary membership. A person wishing to become a senior member of a livery company had to be first a freeman both of that company and of the City of London. A person who was a freeman of both the City and a livery company was named, referred to, and thus identified as "Citizen and [Livery Company name] of London".¹⁵⁶

¹⁵¹ Ibid.

¹⁵² 2 Brownlow 286; 4 Inst 250; 2 And 276-7; 2 Bulstr 189-190; 3 Keb 225; 8 Co 112 b; 4 Mod 145.

¹⁵³ Pulling, above 119, 59.

¹⁵⁴ Cicero *De Offi* 1, 12.

¹⁵⁵ *Research Guide 1: City Freedom Archives*, Vivienne Aldous (1990, revised 1996, 1999) Publication by Corporation of London Records Office, <<http://www.cityoflondon.gov.uk/nr/rdonlyres/155d63ec-c7bf-4b8f-b7d2-9574c07fe071/0/cityfreedom.pdf>> accessed 24 November 2010.

¹⁵⁶ Ibid.

Freedom by servitude was when a person had to complete an apprenticeship of at least 7 years' duration to a City freeman. Freedom by patrimony was open only to the legitimate and natural children of a male freeman who were born after their parent's own freedom admission. Redemption, or purchase, was obtainable by "presentation" by a corporation officer or other person who had been granted the right of presenting a limited number of candidates in lieu of salary or as a reward for services. The intending freeman usually had to pay the officer for presenting him.¹⁵⁷

Livery was an underlying customary norm to public representation of commercial rank. A public breach of this customary arrangement was arguably a misrepresentation of fact, which would have been complete without *mens rea*. With these customs, those with the freedom of the city were represented publicly first by their livery. This meant their special uniform as worn by a servant, an official, or a member of a City company. People could have an honorary freedom acclaimed by the citizenry as a public act, a completed apprenticeship of 7 years, by lawfully recognized patrimony, or by paying an official essentially for recognition. In fact, to be admitted on the livery of a company was technically called 'having the clothing'.¹⁵⁸

Breaching the freedom of the city by non-freemen, or arguably passing oneself off as a freeman, was discussed in the following case. In this case, the defendants' pleadings were the sole basis for judgment, suggesting the reverse onus system of an administrative hearing.

31 Aug. 1306. Wednesday after the Feast of the Decollation of St John the Baptist [29 Aug.] before John de Wengrave, deputy of the Mayor. John de Coppedok, Geoffrey Giffard, John Brid, John de Rodbourne, and Hamo atte Barre, poulterers, were attached to answer the Commonalty, for buying poultry within the City to sell it outside, as though they were freemen, thus producing a scarcity of poultry to the damage of the citizens. The defendants pleaded that they bought poultry in the markets of Kyngeston, Berkingg, S^t Albans and other places far and near, paying custom there, and brought it to the City and sold it there to the profit of the City, and that they paid the bailiffs

¹⁵⁷ Ibid.

¹⁵⁸ William Herbert *The History of the Twelve Great Livery Companies, Vol I* (William Herbert, 1887), 60.

murage and other customs; and they demanded a jury. Afterwards John de Redbourne (*sic*) and Hamo atte Barre paid a fine to the Commonalty to have the freedom, and went quit. A jury of John Burel and others gave a verdict in accordance with the defendants' pleading. They were mainprised by John de Sabrichesworth, John atte Barre, John Burel and Roger Prior, poulterers, to hear judgment on Saturday. Afterwards the defendants made satisfaction to the Commonalty and were admitted and sworn to the freedom of the City.¹⁵⁹

The most significant privileges for the citizen with freedom of the city were two. Freeman enjoyed freedom from tolls throughout the realm, whenever they travelled outside their home city. There was also the freeman's right to claim freedom from prosecution, except in the city's courts. As this freedom was gained either by public honour, heredity, apprenticeship or redemption, admission to these privileges was a means by which the city could exercise control over the flow of trade immigrants. In order to formalize this control into an administrative methodology, the City needed a system of registration. It therefore turned to the misteries¹⁶⁰ for administrative support, because only they had control over their own membership registries.¹⁶¹

The freedom of the city was designed to identify foreigners and apprentices as prospective economic threats to both the master craftsmen and the taxation system. The meaning of this freedom within the administrative structure was suggested in the earliest surviving City of London Ordinance as to the freedom of London, dated circa 1230, as follows. It maintained the anti-vagrant policy devised and enacted under King Athelstan,¹⁶² apparently to deal with conflicts arising from the presence of unauthorised people. Under this rule, people were prohibited from travelling unless there was a Lord to answer for them.

Because many persons of the City travelling throughout England claim to belong to the liberty of London, whereby disputes and tumults arise, in order that it may be known whom of the City to defend as freemen, it is provided that no foreigner nor any apprentice departing from his lord shall enjoy the liberties of the City, nor sell retail in the City, unless they are found to have been enrolled. . . .

¹⁵⁹ *Calendar of Early Mayor's Court Rolls: 1298-1307, Calendar Roll H 12 December 1305 - 12 November 1306* (1924), 228 - 252 < [http://www.british-history.ac.uk/report.aspx?compid=31974&strquery=Freedom of the City](http://www.british-history.ac.uk/report.aspx?compid=31974&strquery=Freedom%20of%20the%20City)>.

¹⁶⁰ Also known as guilds, guilds, companies.

¹⁶¹ A F Sutton 'The Silent Years of London Guild History before 1300: the Case of the Mercers' (1998) 81 (175) *Historical Research*, 137.

¹⁶² Carl Stephenson 'The Anglo-Saxon Borough' (1930) 45(178) *The English Historical Review*, 177-207, 198, 199.

because by the taking of apprentices many contentions and discords arise owing to the ambiguity of their covenants, and in order that such ambiguities may henceforth be removed, it is provided that no one receive an apprentice unless they cause the covenant to be enrolled . . .

¹⁶³

Only masters with the freedom of the City could take on apprentices. Apprentices had to be sworn and enrolled as freemen before they could practice their craft as masters. Otherwise they would have to continue as a servant/employee to a master. Both master and apprentice were bound together by a private contract. Either the Chamberlain of the City or the mayor's court would enforce this contract. They could either specifically enforce it, or annul it. Thus, the outward representational sign of this guild power to identify and control members was the bestowing of a communal cognizance and livery.¹⁶⁴

Freedom of the City was enforced by the terms of an oath. These terms seemed to infer elements of an early form of passing-off. On 10 December 1830, the common council settled an amended form of the oath to be sworn upon being admitted to the freedom of the city of London. The oath was amended to accommodate contemporary variations in religious principles. Thus, any natural born subject became admitted to the freedom automatically at that date.¹⁶⁵ Otherwise, the oath wordage remained unchanged since former and ancient times. The oath was worded as follows.

Ye shall swear that ye shall be good and true to our Sovereign Lady Queen Victoria; obeysant and obedient ye shall be to the mayor and ministers of this city; the franchises and customs thereof ye shall maintain, and the city keep harmless in that in you is. Ye shall be contributing to all manner of charges within this city, as summons, watches, contributions, taxes, talliages, lot and scot, and to all other charges, bearing your part as a freeman ought to do. Ye shall colour no foreigner's goods under or in your name, whereby the Queen or this city might or may lose

¹⁶³ Corporation of London Records Office, *Liber Ordinacionum* fo 173 For other suits prosecuted in 1299 by the clerks of the chamber on behalf of the commonalty of the city against those who infringed the freedom, in the courts of the chamberlain and the mayor, see Arthur Hermann Thomas *Calendar of Early Mayor's Court Rolls, City of London (England) Lord Mayor's Court, City of London (England) Court of Common Council* (Library Committee, The University Press, 1924).

¹⁶⁴ Sutton, above 161. Cognizance and Livery. In Heraldry. a device by which a person or a person's servants or property can be recognized, such as by a badge or uniform; a special uniform worn by a servant, an official, or a member of a City Company. The original sense was 'the dispensing of food, provisions, or clothing to servants', and the sense of a special uniform arose because medieval nobles provided matching clothes to distinguish their own servants from those of others. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹⁶⁵ Pulling, above 119, 61.

their customs or advantages. Ye shall take none apprentices for any less term than for seven years, without fraud or deceit, and within the first year ye shall cause him to be enrolled, or else pay such fine as shall reasonably be imposed upon you for omitting the same; and after the term's end, within convenient time (being required) ye shall make him free of this city, if he have well and truly served you. Ye shall also keep the Queen's peace in your own person. Ye shall know no gatherings, conventicles, nor conspiracies made against the Queen's peace, but ye shall warn the mayor thereof, or let it to your power. All these points and articles ye shall well and truly keep, according to the laws and customs of the city, to your power.¹⁶⁶

The newly amended wordage of the oath contained the following key requirements. The first was a duty to carry out unspecified charges using language of the common good. The second prohibited the use of the freeman's name on the goods of a foreigner or stranger, thus restricting secondary meanings in product representations. The third conferred responsibility on the freeman for keeping the queen's peace and reporting any breaches to the mayor. The fourth ensured no freedoms to apprentices. The fifth required apprentices to be registered, forced to serve seven years, and, given freedom only if they well and truly served.

F *The Relationship Between Commerce, The Economy and The Gilds*

1 *Gild Formation*

This section investigates the development of the gilds in England and the nature of their commercial rank, in order to place in the context of the later tort of passing-off the various ancient regulatory prohibitions affecting work as an artisan.

'Gild', 'guild', 'mystery', 'company': all refer to the same concept in its historical development. Although the word *gild* shall be used throughout this thesis to refer to these other designations, each term implies its own meaning in the nature of a gild. The meaning of the word *gild* has passed through several phases.¹⁶⁷ First, it

¹⁶⁶ Pulling, above 119, 61,62.

¹⁶⁷ The word itself, less commonly, but more correctly, written *gild*, was derived from the Anglo-Saxon *gildan* meaning "to pay", whence came the noun *gegilda*, "the subscribing member of a gild". In its origin the word *guild* is found in the sense of "idol" and also of "sacrifice", which has led some writers to connect the origin of the gilds with the sacrificial assemblies and banquets of the heathen Germanic tribes. E Burton *et al* The Catholic Encyclopedia, *Guilds* Robert Appleton Company, 1910 New Advent <<http://www.newadvent.org/cathen/07066c.htm>>.

originally meant the sacrificial meal convened out of the common contributions. Later, it meant a sacrificial banquet in general, and lastly it came to mean a society. It was a socially cohesive force for its members.¹⁶⁸

Traces of old guilds were also found around the English countryside, importing a certain system of customary servitude. One was said to have existed in Winchester in 856 C.E., and although nothing was told about its nature, it was probably the same as the Cnighthen-gild mentioned in Domesday. Similarly, there were several other Cnighthen-gilds at Canterbury, London, and Nottingham.¹⁶⁹ However, Seligman suggested it might have been preserved in the Tenure by Knights Service, as explained in Littleton's Tenures. Littleton explained that tenure by homage, fealty and *escuage*, which were of heraldic origin indicating a right to form military structures, were all forms of holding title by knight's service. The obligations of Knight's service included strict control over the tenant's marital rights, inheritance and the holding of property by the lord before the age of becoming *sui juris*. It was uncertain what these Cnighthen or Knights were. However, it may be inferred that this kind of service, signified by its heraldic art, was part of the military structure of the realm. The word "Cnighthen" originally had the meaning of a servant, and frequently occurred in the sense of a subordinate member of a nobleman's retinue. It was apparently used in this sense in the gild statutes of Exeter and Cambridge, where the Knight contributed less money than the full member, and where his lord was responsible if he were to draw a weapon or wound another. The Knights' rank and importance, however, increased until at the Conquest they became the equals of the Thanes, or nobles.¹⁷⁰

Gilds began as groups for crown policing of some unlawful activities. Gross noted that Athelstan's gilds were units for the social control of property.¹⁷¹ This was done by classifying men either as riders or workers, and governing them by a church style of organization in the gilds and by military style of organization in the field. Under

¹⁶⁸ Toulmin Smith (ed), *English Gilds* (Oxford University Press, 1870), xviii.

¹⁶⁹ Littleton's Tenures, above 101, 39-111.

¹⁷⁰ Seligman, above 147, 15, 16.

¹⁷¹ *Athelstan was the first king of all England, and Alfred the Great's grandson. He reigned between 925 and 939.*

Athelstan there were statutes of a fully developed frithguild recorded in the *Judicia Civitatis Londoniae*.¹⁷² This was a combination of associations of one hundred men, subdivided into smaller groups of ten, subject to common rules, but otherwise independent of each other.¹⁷³ In the time of King Athelstan, the guilds had already developed their own very rudimentary system of justice against theft, administered by both the reeve and the bishop. The *Judicia Civitatis Londoniae*,¹⁷⁴ provided as follows. “This is the ordinance which the bishops and reeves who belong to Londonborough have agreed upon.” After repeating Athelstan's recent enactments concerning cattle thieves, the ordinance proceeded to describe the protective association, called the frithgild, formed to help in enforcing the enactments. Offenders were to be rigorously pursued. No pursuit was to be abandoned on either side of the Thames, before every guildsman with a horse had ridden out. The man who owned no horse was to keep at work until his lord returned. If any group members were to protect a thief and prove strong enough to defy the guild, then the presiding reeve was to call out the guild's full strength and send for aid from the reeves on both adjoining sides. When a trail was followed from one such district into another, the fullest co-operation of the reeves concerned was mandatory. In this way, people were classified as either men with horses or men as workers.¹⁷⁵

Thus, the ordinance was that one either protected property or tended to it. The only forms of property that were likely to be stolen, and for which compensation could be claimed, were horses, oxen, cows, pigs, sheep, and slaves.¹⁷⁶ King Athelstan's most important enactment controlled individuals who wandered around the country without either property or a lord to answer for them. These wanderers were a form of property held by relevant Lords. Two indicia of servitude together defined the qualifications for being a member of the state. They were property and status within an overlord system of rank. The close relatives of the wandering vagrants were commanded to place them under a lord, who, were they to be accused, should present them for justice.¹⁷⁷

¹⁷² Charles Gross *The Guild Merchant, Vol I* (The Clarendon Press, 1890), 178.

¹⁷³ Seligman, above 147, 13, 14.

¹⁷⁴ Gross, above 172.

¹⁷⁵ Ibid.

¹⁷⁶ Stephenson, above 162, 198, 199.

¹⁷⁷ Ibid.

Sutton stated that the 1200s were a pivotal period in the work-life of London. It was a century, which saw the growth of restrictive regulations by towns. It was a period witnessing the rise of closed shops and closed towns as privileges were gathered, written down and arrayed against competitors. Craft¹⁷⁸ guilds, such as for example the Weavers, coalesced as groupings of powerful craftsmen in English towns, from the early twelfth century.¹⁷⁹ These craft guilds were called *mestier*, *métier*, *ministerium*,¹⁸⁰ and from this, derived the English ‘mistry’, or ‘mystery’, simply meaning a handicraft or trade.¹⁸¹

Eventually, the guild system fractured into mercantile guilds and artisan guilds, the former with a higher commercial rank, or status, than that of the latter. Immediately prior to 1266, there appeared to be an economic transition where the classes of the poor coalesced with the classes of the craftsmen. The poor were excluded originally from merchant guild association for the lack of any property possession.¹⁸² This transition gave birth to a guild statute creating merchant guilds for the first time, merely by excluding practicing craftsmen coming from the artisan guilds. It provided that no person “with dirty hands or with blue nails”¹⁸³ or who hawked his wares in the streets such as peddlers could become a member of the guild, and that craftsmen must have foresworn their trade for at least a year before being admitted to the guild.¹⁸⁴ This suggested a tendency to populate these new mercantile guilds with those of higher status, rather than with artisans or salesmen of lower status. It suggested that artisans were limited in their ability to trade in their own name.

Toulmin-Smith illustrated this development with the instance of the Guild of Berwick. He reasoned inductively that they were representative of a national social

¹⁷⁸ The word ‘craft’ is related to the Latin *astus*, meaning astute or good at making shrewd judgments. James Morwood (ed), *The Oxford Latin Mini Dictionary* (Oxford University Press, 1995).

¹⁷⁹ Sutton, above 161, 126.

¹⁸⁰ From the Latin, meaning ‘service’. James Morwood (ed), *The Oxford Latin Mini Dictionary* (Oxford University Press, 1995).

¹⁸¹ Sutton, above 161, 126.

¹⁸² Toulmin Smith, above 168, cvii.

¹⁸³ The suggestion is that a person with dirty hands or with blue fingernails would have been a craftsman, rather than a merchant, and was so identified for purposes of exclusion of guild membership.

¹⁸⁴ Toulmin Smith, above 168, cvii.

movement.¹⁸⁵ Berwick was a merchant gild where its members only traded, rather than worked, in wool or hides. Formerly this trade was undoubtedly carried on with that of the butchers. After craftsmen had been excluded from the gilds, butchers working outside the purview of this gild were forbidden to carry on the trade practised by current gild members.¹⁸⁶ This was enacted into Article 25 of the Statutes of Berwick. The article said “No butcher, while he follows that calling, shall buy wool or hides”.¹⁸⁷ This meant that no butcher, while carrying on his trade of cutting and preparing meat, was allowed to deal in wool or hides unless he gave up cutting and preparing meat.¹⁸⁸

However, every artisan was permitted to carry on his trade provided he joined and submitted himself to the regulation of the relevant craft gild, but not a mercantile gild. The principal purposes of craft gild rules were to secure sound quality work, to act as a police authority on behalf of the public, and as well, to secure the welfare of the members. Admission to a trade was via a long apprenticeship typically of some seven years in duration. Admission of an apprentice was a public event of a contractual nature. It was held in the Guildhall and presided over by the Chamberlain of the City. They instructed the apprentice in his solemn moral and trade duties, and then publicly executed the indentures of apprenticeship.¹⁸⁹

2 *Gild Ordinance Structure*

This section investigates how gild structure, their rules for admission and exclusion, and their jurisprudence might have been the regulatory genesis of the later tort of passing-off. Gild ordinances seemed to be the genesis of the later tort of passing-off, a proscription against enticing away customers from the master, or from any gild brother, being the key unifying precept.

¹⁸⁵ Toulmin Smith, above 168, 343.

¹⁸⁶ Toulmin Smith, above 168, cviii.

¹⁸⁷ Toulmin Smith, above 168, 343.

¹⁸⁸ Toulmin Smith, above 168, cvii.

¹⁸⁹ Toulmin Smith, above 168, cxxix.

Toulmin-Smith indicated that the available records of the Guild of Tailors of Exeter gave an instructive example of the character, workings, and usefulness of a middle-ages craft guild in England.¹⁹⁰ This guild was erected by the Charter of Edward IV,¹⁹¹ in which the king commanded that guild members were to wear livery,¹⁹² hold feasts, make ordinances, be a body corporate and have a common seal. The charter also commanded that the master and wardens were to have control over tailors and others of the guild.¹⁹³ This suggested the creation of ever-tightening rules for the control of manufacture of goods.

Significant ordinances of this guild were set out as follows. The indenture of each apprentice had to be enrolled in a guild registry within 12 months, or else the master could lose his freedom permanently.¹⁹⁴ The registry was an effective means for controlling the apprentices and their work. Newly created freemen were limited in how many servants they could have.¹⁹⁵ Arguably, their capacity for production, and competition with senior masters, was limited by this provision.

Each craftsman tailor had to swear an oath to the fraternity. Perhaps, this oath illustrated the nature of guild covenants among the fraternity. Each element of the oath was a proscribed act, inferring strict liability methods of dealing with their breach.

The most significant elements of the oath were as follows.

- To be true to the fraternity;¹⁹⁶
- To obey the master and wardens, disobedience to authority suggesting insubordination;¹⁹⁷
- Not to disclose the affairs of the craft, suggesting a prohibition against making public the secrets of the craft;¹⁹⁸
- Not to counsel or to encourage any foreigner either to dwell within the franchises or to use the craft;¹⁹⁹
- To show the indentures of the apprentices and to bring them in at the end of their terms;²⁰⁰

¹⁹⁰ Toulmin Smith, above 168, 299.

¹⁹¹ Reigned 1461-1483.

¹⁹² A form of uniform, whose colours and style were unique to each guild. Note the signifying effect of uniform as similar in effect to that of a seal, heraldic shield or trademark. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹⁹³ Toulmin Smith, above 168, 301.

¹⁹⁴ Toulmin Smith, above 168, 316.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Toulmin Smith, above 168, 317.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

- Not to hire or entice any worker or apprentice away;²⁰¹
- Not to take a shop until admitted as a freeman;²⁰²
- Not to entice customers away, by any means, from the master of from any brother;²⁰³
- Not to leave the gild, but to uphold it according to the brother's estate;²⁰⁴
- Not to sue any brother of the craft without licence from the master.²⁰⁵

It is of note in these rules that failure to obey an authority suggested an act of insubordination. Toulmin Smith recorded that in the event of disputes among members of a gild, it was a requirement that gild-brothers had to bring their case before the gild court of the master and wardens for settlement, before considering a court of law. This was in order to attempt reconciliation before the matter went further. However, the gild only dealt with such matters by way of compensation, fines and expulsion, as it had never assumed either a right of members' life and limb, or a judicial role.²⁰⁶

3 *Collapse Of Gild Independence*

This section investigates the Evil May Day riots of 1517 and subsequent crown, court, city and gild responses to it, in order to place in this context the element of misrepresentation of source in the future tort of passing-off.

One version of the Evil May-day riot²⁰⁷ commences with an account by a chronicler named Edward Hall. Hall noted that anti-alien sentiments had been mounting in the capital for some time. In early April of 1517, a peddler²⁰⁸ named John Lincoln convinced a minister of religion called Dr. Bell to introduce his sermon at St Paul's Cross on Easter Tuesday with an exhortation stated in the following terms.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Toulmin Smith, above 168, ciii.

²⁰⁷ Steve Rappaport *Worlds Within Worlds: Structures of Life in Sixteenth-Century London* (Cambridge University Press, 1989), 15, 16.

²⁰⁸ Note the relationship between mercers and peddlers and the fact that peddlers were likely not subject to gild control.

“Englishmen to cherish and defend themselves, and to hurt and grieve aliens for the common weal”.²⁰⁹ Dr. Bell read the complaint to a crowd in the following terms.

To all you, the Worshipful Lords and Masters of this City, that will take compassion on the poor people, your neighbours; as also, of the great and insufferable hurts, losses, and hindrances, whereof proceedeth the extreme poverty to all the Kings Subjects that inhabit within this City and the suburbs thereof; for so it is, that the Aliens and Strangers eat the bread from the fatherless children, and take the living from the artificers, and the intercourse from all merchants, whereby poverty is so increased, that everyone bewaileth the misery of the other; for crafts-men be brought to beggary, and merchants to neediness; wherefore the premises considered, the redress must be of the Commons, knit and united to one part; and as the hurt and damages grieveth all men, that they set their willing power for the remedy, and not suffer the Aliens so highly in their wealth, and the natural born men of this kingdom to come to poverty.²¹⁰

Scattered attacks were mounted against aliens over the ensuing two weeks, and there were rumours that, on the very next May Day, a so-called spontaneous riot was expected to erupt. Aware of these rumours of impending riot, the aldermen imposed a 9.00 pm curfew on the eve of the expected riot. They did not announce the curfew until 8.30 pm. One hour before the curfew was to commence, one alderman John Mundy had a street altercation with a youth. This altercation precipitated a riot of about 1000 apprentices, in the ensuing 2 hours. The rioting apprentices descended upon the wealthy neighborhood of St Martin le Grand, where many aliens lived within the walls near St Paul’s Cathedral.²¹¹

The under-sheriff of London met them. He had almost succeeded in convincing them to return to their homes when the residents of St Martin le Grand began to throw stones at them. Residents poured hot water on them from their windows. An official was apparently wounded, at which he yelled ‘down with them’.²¹² This unleashed the mob on the alien community of St Martin le Grand. Three hundred people were arrested. The king later pardoned most of them. However, 13 rioters, including John Lincoln, were convicted of treason and were executed.²¹³

²⁰⁹ Rappaport, above 207, 15.

²¹⁰ *Forfeitures of Londons Charter or an impartial account of the several Seisures of the City Charter* (Daniel Brown at the Black Swan and Bible without Temple Bar and Thomas Benskin in St Brides Church Yard, 1682).

²¹¹ Rappaport, above 207, 16.

²¹² Ibid.

²¹³ Ibid.

Resolving the conflicts of Evil May Day did little to resolve the underlying cause of attacks on London's aliens. In April of 1518, the Merchant Taylors complained to the Common Council of London that strangers, who were licensed to work as only menders of clothing, were making clothes. The complaint was drafted in the following terms.

A great multitude of strangers and aliens born out of this realm, not being freemen of this city, daily resort, multiply, increase and inhabit within this city and liberties thereof and in the same presume to work and do work in houses, chambers, alleys and in other places, as well secret as open . . . in the name of botchers, which is only to amend old apparel and garments; by colour whereof they work and make new apparel to the great loss, hurt and damage of the freemen of the handicraft or mystery of Merchant Taylors.²¹⁴

The result came in 1523 through an Act of Parliament stopping all strangers from hiring as an apprentice any person not born in England. It placed further limits on the hiring of non-English born journeymen. For the companies of London, the third section of the Act was the most significant, because it gave them direct control of all strangers living in the city. It was drafted in the following terms.²¹⁵

All manners of persons being aliens born using any manner of handicraft, be they denizens or not denizens, and inhabited within the city of London or suburbs of the same . . . or within two miles compass . . . shall be under the search and reformation of the [companies'] wardens . . . with one substantial stranger being a householder of the same craft by the same wardens to be chosen.²¹⁶

In this way, the companies were given operational crown authority to regulate the economic activities of all Londoners practicing crafts and trades within a radius of two miles of the city. The wardens were given full power and authority to search, view and reform all kinds of wares and workmanship made by alien-born handicraftsmen.

In 1529, the crown intervened again, with an action in Star Chamber by a group of craftsmen. Henry VIII's Lord Chancellor Cardinal Wolsey instigated the action. He charged a group of Flemings with violations of the Act of 1523. The outcome was a

²¹⁴ Rappaport, above 207, 43.

²¹⁵ Rappaport, above 207, 45.

²¹⁶ Rappaport, above 207, 45; 3 *Statutes of the Realm* 1509-1545, 208-9.

decree against the Flemings and an Act of Parliament in the following year. The Act provided that no stranger, artificer, or handicraftsman should set up or keep any house, shop, shops, or chamber in England, in which they would exercise any handicraft. They were exempt from this if a denizen.²¹⁷ Denization occurred by a grant of letters patent, as an exercise of the royal prerogative. Denizens paid a fee and took an oath of allegiance to the crown. The denizen was neither a citizen nor an alien, but had a status akin to today's permanent residency. Sir William Blackstone stated the following. "A denizen is a kind of middle state, between an alien and a natural-born subject, and partakes of both."²¹⁸

In 1549, the terms of a new statute²¹⁹ apparently identified a likely wrong of passing off.²²⁰ It forbade conspiracies of handicraftsmen to sell their wares at unreasonable prices, in an apparent attempt to protect consumers from oppressive market behavior such as of over-pricing and poor identification of product sources. The Statute also proscribed intermeddling in each other's work, to finish another person's already-started work.²²¹ Taken together, this suggested an *actus reus* of passing off combined with an anti-consumer intent was proscribed by the statutory duty, and since the wrong was externally proscribed, it was strict liability.

In 1641 the apprentices petitioned Parliament pleading to restrict the activities and rights of settlement of foreign craftsmen.²²²

And first we beseech your honours to take into consideration the intolerable abuse of our apprentices, for where we by coercion are necessarily compelled to serve seven or eight years at least, before we can have the immunity and freedom of this city to trade in: those which are mere strangers do snatch this freedom from us, and pull the trades out of our

²¹⁷ Rappaport, above 207, 46; 3 *Statutes of the Realm* 1509-1545, 297-301.

²¹⁸ The denizen was not a citizen because he did not have any political rights: he could not be a member of parliament or hold any civil or military office. However, the status of denizen allowed a foreigner to purchase property, although a denizen could not inherit property. Historically, paying for letters patent was thus a requirement of foreign land ownership in England. Sir William Blackstone *Commentaries on the Law of England* (Childs & Peterson, 1860), Book 1, Chapter X, 374.

²¹⁹ Penalties on butchers, bakers, etc conspiring to sell victuals only at certain prices; and on artificers conspiring as to prices or times of work Act 2nd and 3rd Edw VI c 15; 4 *Statutes of the Realm* 1547-1624, 58, 59.

²²⁰ The term *passing off* is commonly used without the hyphen to mean a factual situation, and with the hyphen to denote the later tort of *passing-off*.

²²¹ Toulmin Smith, above 168, clvii.

²²² Toulmin Smith, above 168, cl.

hands, so that by these means, when our times are fully expired, we do then begin in a manner to suffer a second apprenticeship to them, who do thus domineer over us in our own trades, &c.²²³

Rappaport said that the issue was now fully clarified, saying it was as to who should and could lawfully dominate craftsmen in their own trade. One argument as to the methodology for resolution of this serious social problem, suggested that the crown, the City and the companies began an unprecedented cooperation by means of legislation and charters to limit the rights of Londoners without the freedom. He reported that these new crown restrictions had to be enforced by the City authorities, and through the City's powers, the companies were then given operational crown authority to regulate the economic activities of all Londoners.²²⁴

G *The Position of The Workers*

1 *City of London Protection of the Masters*

This section investigates how the positions and relative ranks of the masters and the wholesalers might have been relevant to plaintiff *locus standi*, in the later tort of passing-off.

It was considered a good custom in London for the governing officers of a trade to have the power to seize ill and unserviceable goods, which were exposed to sale, and then to remove them to Guildhall. This suggested that a breach of custom could be dealt with summarily as an argument based on fact. It also suggested the possibility of the exercise of an administrative discretion on a reverse-onus basis by the governing officers of a trade. At Guildhall, these officers could impanel a jury to render their verdict, and as a result, to restore or destroy these goods. This custom arguably served as the basis for city companies making by-laws for general regulation of their trades, and for the discipline of the individual members.²²⁵

²²³ Toulmin Smith, above 168, cl footnote.

²²⁴ Rappaport, above 207, 44.

²²⁵ Pulling, above 119, 388.

The City of London reacted with its customary jurisdiction to the king's exercise of power to allow the entry of foreign merchants. This was because it was not in the interests of the London inhabitants to be flooded with non-loyal and non-tax-paying foreigners. By the Act of common council of 15 April 1606,²²⁶ it was found that there was a custom from time immemorial that no person, not being free of the City of London, should either by himself or his agent, show or sell his wares by means of retail, within the city or its liberties. Thus, it was unlawful to pass off oneself as a freeman. The penalty for breach of this regulation was £5 for each offence. The act further provided as follows.

. . . that no person, not free of the city, could "by any colour, way, or means whatsoever, directly or indirectly, by himself or by any other" keep any shop or other place whatsoever, inward or outward, for show, sale, or putting to sale of any wares or merchandise whatsoever by way of retail, or use any art, trade, occupation, mystery, or handicraft whatsoever within the said city or the liberties thereof", under the same penalty.²²⁷

These were declared not to exclude the keeping of apprentices under 21 years of age, or employ strangers who were feltmakers, cap-thickers, carders, spinners, knitters, or brewers, or to employ non-freemen if freemen could not be found.²²⁸ The prohibitory part of these by-laws was stated in very remarkably similar terms to that set out in the *Wagoner's case*,²²⁹ extracted below.

In the 1610 Case of *Wagoner v Finch*, known as *Wagoner's Case, the Case of the City of London*,²³⁰ Mr Wagoner was already in custody for non-payment of a fine for unlawfully plying his trade and for keeping an unlawful shop. The fine was levied by the City of London as a reverse onus procedure. His legal representatives brought an action in *habeas corpus* as against the Mayor, Aldermen and Sheriffs of London regarding his incarceration.²³¹ The City of London submitted a reply to the action, making key arguments, as follows.

. . . where by the ancient charters, customs, franchises, and liberties of the city of London, confirmed by sundry acts of Parliament, no person not being free of the city of London, may or ought to sell or put to sale any wares or merchandizes

²²⁶ Priv Lond 160.

²²⁷ Ibid.

²²⁸ Pulling, above 119, 385, 386.

²²⁹ 8 Co 125; Cro Eliz 352, 353.

²³⁰ *Wagoner v Fish* Hil 7 Jacobi I, 4 Coke Rep 121b.

²³¹ 4 Coke Rep 122a.

within the said city, or the liberties of the same, by retail, or keep any open or inward shop, or other inward place or room, for show, sale, or putting to sale of any wares or merchandizes, or the use of any art, occupation, mystery, or handicraft within the same. And whereas also Edward, sometime King of England, of famous memory, the third of that name, by his charter made and granted to the said city in the fifteenth year of his reign, confirmed also by Parliament, amongst other things granted, that if any customs in the said city before that time obtained and used, were in any part hard or defective, or any things in the same city newly arising, where remedy before that time was not ordained, should need amendment, the Mayor and Aldermen of the said city, and their successors, with the assent of the Commonalty of the same city, might put and ordain thereunto fit remedy, as often as it should seem expedient to them, so that such ordinance should be profitable to the King, for the profit of the citizens, and other his people repairing to the said city, and agreeable to reason.²³²

The first key issue in the reply was that it cited certain charters, customs, franchises, and liberties of the city of London, apparently confirmed by several acts of Parliament.²³³ The Court stated that the following was evident from *The Prince's Case*.²³⁴ “[A] Charter having the authority and force of parliament is sufficient in itself without any other act”.²³⁵ The *Rhetorica ad Herennium* described legal custom as that which, in the absence of any statute, was endowed by usage with the force of statute law.²³⁶ Taken together, this raises the issue of whether the custom of London, as a species of statute, so cited might and should be read as good and operative law.

The second key issue was that the Court noted that one might become free of the city, or, a freeman of the City of London, in only three ways, as follows. The first was by service such as by an apprenticeship. The second was by birthright, such as for example the son of a freeman. The third was by redemption by way of allowance by the Court of the Mayor and Aldermen. These three methods were customary in character, and neither charter nor command of the king could create the status of the freeman of the City.²³⁷ Thus, passing off oneself as a freeman was arguably a breach of ancient customary law.

²³² 4 Coke Rep 122a,b.

²³³ Ibid.

²³⁴ *The Prince's Case* (1606) 8 Rep 1; 4 Coke Rep 168.

²³⁵ Ibid.

²³⁶ *Rhetorica ad Herennium*, above 16, 93.

²³⁷ 4 Coke Rep 126b.

The court held further that strangers and foreigners had devised and practiced, by sinister and subtle means, ways of defrauding the charters, liberties, customs, good orders and ordinances of London. From this might be inferred the possibility that a sinister and subtle breach of customary laws might have been indicative of fraud. The inference could run thus: people without a historical connection to a customary rule, or not bound by such a customary law, acted without proper approval or supervision as if they were of equal rank or status to those approved and properly supervised people paying their taxes, and damaged these properly approved and supervised people. This formulation contained the three elements of misrepresentation of status, damage and the public good. Arguably, this formulation is of the same genus as the classical trinity of the later tort of passing-off. The court's holding seemed to be a statement of alleged secret activities by foreigners. It inferred a presumption of reverse onus against those foreigners and strangers, and therefore strict liability. In its totality, it suggested the possibility that a strict liability genus of passing-off was an *indicium* of fraud.

The holding continued by particularising its suggestion of fraud. It was alleged they had sold and presented for sale their wares and merchandises in private and secret places, probably suggesting a failure to operate in market overt. The allegation also stated they had used arts, trades, occupations, mysteries, and handicrafts to the detriment and hurt of the inhabitants of the city. It added that the local inhabitants had to pay scot and lot, bore offices and underwent other charges, which foreigners and strangers did not have to do.²³⁸ This reasoning suggested that while all the locals had to pay burdensome taxes and circumscribe their lives with certain prohibitive rules, a foreign person not so constrained caused apparent detriment to the local inhabitants. Therefore the city made by-laws forcing strangers to become free of the city. These by-laws required them to show their wares in public, so that regulatory authorities could supervise them.

Coke's Reports wrote that the court held as follows.

In this case it was resolved, that the said custom of London, that no person whatsoever, not being free of the city of London, shall by any colour,²³⁹ way,

²³⁸ 4 Coke Rep 122a.

²³⁹ Colour of right *in equity*, to confer the impression that title in property, or goods, is held by

or mean whatsoever, directly or indirectly, by himself or any other, keep any shop or any other place whatsoever, inward or outward, for show or putting to sale of any wares or merchandizes whatsoever by way of retail, or use any trade, occupation, mystery, or handicraft, for hire, gain, or sale, within the City of London, is, upon the whole matter disclosed in the return, a good custom; and that such constitution made according to the custom alleged in the return, upon pain of forfeiture of 5l, was also good.²⁴⁰

Arguably, the holding in *Wagoner's Case* effectively re-stated a customary proscription against what was the essential character of the later tort of passing-off as an anti-competition law. By using the wordage 'by any colour', it arguably inferred that a species of fraud was an underlying component. This issue will be examined in chapter 4, below, as the doctrine of secondary meaning, and in 5, below, as a badge of fraud.

Morison's view was that the term "passing-off" indicated the act of selling goods with an accompanying fraudulent misrepresentation by words or conduct as to the origin of the goods, whereby the purchaser has been misled and business has been diverted from the plaintiff to the defendant.²⁴¹ The words "by any colour" seem to correlate to misrepresentation. The words "not be being free of the city" seem to correlate to the goods' origin, or propriety of custom. This suggested that strangers were considered as diverters of business away from lawful freemen. In other words, it could be argued as a corollary of forestalling of goods that strangers were unfair competitors.

The court also resolved that a city's custom and a charter granted to a city were different in effect. This was because customs could only be good by the very nature of custom. However, a custom could not be effective by grant, unless deemed so by an act of parliament,²⁴² because trade could not be maintained or enhanced without proper government. Therefore, the king could lawfully counteract a custom by erecting a new *guildam mercatoriam*, or, mercantile gild.²⁴³ All members of this

someone when that is not in fact the case. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

²⁴⁰ 4 Coke Rep 124b, 125a.

²⁴¹ W L Morison 'Unfair Competition and "Passing-Off" The flexibility of a formula' (1956) 2 Sydney Law Review, 50-65, 56.

²⁴² 4 Coke Rep 125a.

²⁴³ Ibid.

mercantile gild were to pay scot and lot. Seligman noted that freemen, or citizens, of the city and gild members were not the same. The freeman was the inhabitant householder who paid scot and bore lot. This meant that the freeman contributed his proportion to the taxes, bore his share of the civic burdens and was enrolled at the Court Leet. On the other hand, gild members were recruited from strangers as well as from local inhabitants. While the guild members might reside outside the city, the citizen in general could not. While the citizen needed to have a house, the guild member did not.²⁴⁴ This suggested a judgment establishing a superior commercial rank of the freemen over other citizens.

In practice, the city limited itself to restricting retail dealers or tradespersons in those trades requiring more than the ordinary surveillance of the civic authorities.²⁴⁵ Thus, when the power of the city and county corporations became more strictly exercised, the main wholesale transactions took place in fairs and markets, and it was in these venues that the city concentrated its control.²⁴⁶

In *Hutchins v Player, Chamberlain of London*,²⁴⁷ the court stated that the corporation of the City of London could generally restrain persons in places for public buying and selling, the times in which they could buy and sell, the trades with which they could meddle, and the trades with which they should not intermeddle.

Thus, in the 1675 case of *Hutchins v Player*²⁴⁸ the court considered the issue of the claim by non-freemen to deal by wholesale within the jurisdiction of the City of London. The reported facts referred to an Act for the better regulating of the old and new drapery in Blackwell Hall and Leadenhall. It appeared that Samuel Hutchins had been arrested and was in Sheriffs' custody in a London gaol, for an apparently unpaid fine. He was fined under an Ordinance of the City. It stated that all broad cloths should be pitched and harboured in Blackwell Hall and Leadenhall, and that

²⁴⁴ Seligman, above 147, 36, 37.

²⁴⁵ Pulling, above 119, 386.

²⁴⁶ Pulling, above 119, 387.

²⁴⁷ Hargr MSS No 26, 48, quoted in S Bannister (ed), from Hargraves Manuscripts *Reports of Judgments Delivered by Sir Orlando Bridgman when Chief Justice of the Common Pleas from Mich 1660 to Trin 1667* (Butterworths, 1823).

²⁴⁸ Hargr MSS No 55 fol 153.

they should be duly entered with both hallage²⁴⁹ and duty to be paid. It was also enacted that no person should be a broker, factor or buyer in those Halls unless first approved by the mayor and aldermen and entered into a recognizance in the King's Court.²⁵⁰

Sir Orlando Bridgman then stated, *inter alia*, the following holdings which are arguably relevant to the later tort of passing-off. They suggested that a *prima facie* case of a breach of City Custom was sufficient for the City to act by levying a fine and confiscating goods.

- i. A fuller statement of the relevant custom than that which is reproduced in *Wagoner's Case*²⁵¹ is as follows. The ordinance of Common Council had stated that many freemen pretended to be immediate buyers, but were really agents and brokers for strangers and foreign men. This was contrary to the custom of London and the privileges of the City, and that such practices were colouring of foreigners' goods and contrary to the oath of a freeman. Therefore all such commodities bought and sold were to be forfeit to the City.²⁵²
- ii. For the factors, buying is in the markets. Therefore he should not be permitted to exercise a by-trade²⁵³ of his own in the same commodities whereby he is the clothier's servant. If the factor buys for himself, it is in his power to undo the clothier. For example: a clothier sends twelve cloths to his factor to sell for him. The factor likes them and buys them all for himself, or he culls out the best colours and cloths, then leaves the refuse to an uncertain market. This factor may then make the clothier pay factorage for the cloths he has culled out for himself, thereby under-buying any other man. He might keep the cloths unsold until the rates are low so that he may buy them at his own price. If the factor trades for himself in this way, no man can buy goods except at second hand.²⁵⁴

The legislature enacted the Statute of Elizabeth²⁵⁵ specifically to adopt this custom of the City of London on a nation-wide basis. This statute enacted that a prior apprenticeship was required to carry on trade in any part of the kingdom,²⁵⁶ in the following terms.

²⁴⁹ Hallage. A fee or toll paid for goods sold in a hall. *Webster's Revised Unabridged Dictionary* (C & G Merriam Co, 1913).

²⁵⁰ Orlando Bridgman, above 247, 273, 274.

²⁵¹ 4 Coke Rep 121b.

²⁵² Orlando Bridgman, above 247, 289, 290.

²⁵³ Presumably a trade ancillary to that of the clothier.

²⁵⁴ Orlando Bridgman, above 247, 313, 314.

²⁵⁵ 5 Eliz C 4, s 24.

²⁵⁶ Pulling, above 119, 481.

AND bee it further enacted by the authoritee aforesaid, That after the first daye of Maie next coming, it shall not be lawfull to any person or persons, other then suche as nowe doo lafully use or exercise any Arte Misterye or Occupation, nowe used or occupied within the Realme of Englande or Wales, Excepte he shall have been brought uppe therin Seaven yeares at the least as Apprentice, in maner and fourme abovesaid, nor to set anye person on woorck in suche Misterye Arte or Occupation, being not a Worckman at this Day, excepte he shall have bene Apprentice as ys aforesaid, or els having served as an Apprentice as is aforesaid, shall or will become a Journeyman, or be hyred by the yere; upon payne that every person willingly offending or doing the contrary, shall forfeite and lose for every Defaulte fourtye shillinges for every monethe.²⁵⁷

Further, in accordance with an old custom of London, a person who had served a seven-year apprenticeship to a trade of buying and selling, might give up that trade and take up another.²⁵⁸ This custom was considered to apply to every trade in which the Statute of Elizabeth²⁵⁹ specifically required an apprenticeship.²⁶⁰

The principal crafts had become incorporated, during the time of Henry VI,²⁶¹ directly by the crown.²⁶² However, in the 1830 case of *Clark v Denton*²⁶³ it was held, citing the same principles enunciated in *Wagoner's Case*,²⁶⁴ that the real meaning of the custom that no person should keep a shop or place for use of any art or trade, was specifically that people should not carry on business as masters, unless they were masters. If the defendant could prove that he acted in the trade as a journeyman or apprentice only, it would be a defence.²⁶⁵ This suggested that a person of lower commercial rank than master was presumed legally incompetent to sell in market overt on his own account.

²⁵⁷ 4 *Statutes of the Realm* 1547-1624, 420.

²⁵⁸ *Allen v Tolley* BR 12 Jac I, Calth Rep 9, 48.

²⁵⁹ 5 Eliz, c 4.

²⁶⁰ *Allen v Tolley* BR 12 Jac I, Calth Rep 9, 48.

²⁶¹ 1547-1555.

²⁶² Pulling, above 119, 485.

²⁶³ 1 Barn & Ad 92; (1830) 109 ER 721.

²⁶⁴ 4 Coke Rep 121b.

²⁶⁵ *Clark v Denton* 1 Barn & Ad 92, 97.

2 *The Pressing of The Trades into a Crown System of Commercial Ranks*

This section investigates the limits of crown regulatory action against the trades, bringing the guilds under direct crown control in the context of the king's will in the public interest, and how this regulation might relate to the later tort of passing-off.

As for commercial rank, at the conclusion of the reign of Edward II²⁶⁶ it had been established that a certain twelve of the companies were the "wisest" and most self-sufficient, and therefore, they should be the most active in advising the city. These companies were, in descending order of precedence and therefore also presumably in descending order of wisdom and prerogative, or rank, as follows: mercers; grocers; drapers; fishmongers; goldsmiths; skimmers; merchant tailors; haberdashers; salters; ironmongers; vintners, and, the cloth workers.²⁶⁷

The London court of aldermen enacted an ordinance,²⁶⁸ probably in 1356, establishing and confirming the custom as follows.

. . . all the mysteries should be faithfully ruled and governed, each according to its nature, and in such a manner, that no deceit should be found in any of their works or trades; that in each mystery, there should be chosen four or six, or more, or less, according to the needs of the mystery; which persons, so chosen and sworn, should have full power from the mayor to will and faithfully to do and perform the same.²⁶⁹

This ordinance suggests that deceit in the trades was inconsistent with very powerful supervision. It could be expected, as a natural consequence, that the crown would want to be atop this hierarchy, should it have desired to control the stamping out of deceit.

The royal reaction to this ranking of the companies by the city appeared to have been to bring its tenets more under the king's jurisdiction, by enacting the following statute.²⁷⁰

²⁶⁶ 1307–1327.

²⁶⁷ Pulling, above 119, 78.

²⁶⁸ 39 Edward III.

²⁶⁹ 2 Rep MC 13.

²⁷⁰ 15 Henry VI c 6, probably in 1437.

. . . the Masters Wardens and People of every such Guild Fraternity or Company incorporate, betwixt this and the Feast of Saint Michael next coming, shall bring and do all their Letters Patents and Charters to be registered of Record before the Justices of Peace in the Counties, or before the Chief Governors of the said Cities, Boroughs, and Towns where such Guilds, Fraternities, and Companies be . . . no such Masters, Wardens, nor People make nor use no Ordinance which shall be to the Disherison or Diminution of the [King's Franchises] or of other, nor against the common Profit of the People²⁷¹

This situation was further clarified,²⁷² using a recital of the substance of 15 Hen. VI. c. 6, as above, and noting that 15 Hen. VI. c. 6 had expired. It provided as follows.

. . . divers and many ordinances had been made by divers and many private bodies corporate within their cities, towns, and boroughs, contrary to the king's prerogative, his laws, and the common weal of his subjects: it was therefore enacted, that no masters, wardens, and fellowships of crafts or mysteries, nor any of them, nor any rulers, or gilds, or fraternities, should make any acts or ordinances in disinheritation of the prerogative of the king, nor of none others, nor against the common profit of the people²⁷³

This statute explicitly set the prerogative of the king above anyone else's prerogative. It set the common profit of the people as being equal to a sole right in the king, and appeared to remove any management prerogative from within the gilds, unless approved by the crown.

H Conclusion

The chapter began with a brief survey of the tort of passing-off, suggesting that passing-off was a conjectural argument, and therefore one of reverse onus. It proceeded to review strict liability in tort, and set out the following six propositions as arguably defining strict liability in tort, for the purposes of the scope of this thesis. These were the six propositions. First, proof that the defendant caused harm created a presumption of liability. Second, the tort of breach of statutory duty was one of strict liability. This was because there was an external statutory determination of the *prima facie* wrongful conduct. Third, anyone who professed a craft, held himself/herself out to have the common skill of that craft, and was answerable accordingly. If this person failed, it was no excuse that he or she merely did the best possible. The rule

²⁷¹ 2 *Statutes of the Realm* 1377-1504, 298, 299.

²⁷² 19 Hen VII c 7, probably in 1504.

²⁷³ *Ibid.*

was that he/she must be reasonably skilled at his/her peril. Fourth, if the presumption of guilty knowledge in a crime were rebutted by proof that a fraud had been practiced on the defendant, then the defendant would be civilly liable instead of being criminally culpable. Fifth, *mens rea* in tort was divided into involuntary acts, negligence and intentional acts, the last of which divided into fraud and malice. Sixth, liability in tort was strict, rather than absolute, if it required proof of *mens rea* in one or more aspect of the tort, the remaining aspects either required no proof of *mens rea* or that proof was provided by a presumption of the law.

The chapter sought to identify the genesis of the tort of passing-off by examining various relevant aspects of public policy and regulation, in the early middle ages.

There was a system of commercial ranks, by which a higher rank could sue a lower rank in matters of personal property. The section on the king's power of *quo warranto* argued that accreditation and confiscation might arguably have been a reaction by those of lower supervisory commercial rank to the possibility of an action in *quo warranto*. This action could in theory be initiated by those of higher commercial rank against those of lower commercial rank. The crown controlled the power of the county by common law actions in *quo warranto*, the county controlled the power of the guilds by common law actions in *quo warranto* and the guilds controlled the work of the artisans and apprentices by inspection, accreditation and sometime confiscation of their work products. The process of certification will be examined in chapter 3 in the section on development of the law of certification marks.

Londoners had a superior right over foreigners to sue in matters of representation of the source of manufactured goods. The section on the nature of the jurisdiction of the courts of the city of London suggested that the London Town Clerk could make out several prerogative orders, and that the Hustings had complete control over all real and personal property. It could order attachment or sequestration. Foreigners had no local rights in the London courts and Londoners could not be sued outside the walls of London. London's customary jurisdiction appeared to give it complete power to prioritise the rights in London-sourced personal property over foreign-sourced

personal property. This suggested a superior *locus standi* to sue by the Londoner in matters of personal property. The section on the City of London control over the economy suggested that the customary laws of London were first oral, then stated by the Recorder and archived. London customary laws were not subject to desuetude. Thus, London might state its own laws in the common interest and, by its prestige, influence laws elsewhere in England. The section on freedom of the City argued that the system of freedom of the city controlled the right to make a living as an artisan. The oath of a freeman included prohibition of a freeman's name on foreign goods. By prohibiting the acts of passing off the goods of non-freemen, it appeared that foreigners suffered a disability making and selling their goods under any name in London.

The crown brought the guilds under crown control to maintain commercial ranks among the masters and the artisans. The section on guild formation argued artisan guild membership was both permission to and restriction on work, and, it was exclusion from the mercantile classes. Gross noted that as early as Athelstan's time, guilds were units for the social control of property. This was done by classifying men either as riders or workers, and governing them by both church organization in the guilds and by military organization in the field. The section on guild ordinance structure established that guild ordinances were structured to restrict entry into the trades through apprenticeship. It argued that guild jurisprudence contained a nascent form of the later tort of passing-off through prohibiting commercial insubordination. The section on the collapse of guild independence argued that companies/guilds were given rank by crown authority to regulate craft and trades activities. It suggests that the crown and parliament used the Evil May Day riot ultimately to implement regulations for prohibiting misrepresentation of source within the sale of goods.

This chapter argued that a nascent form of passing-off existed well before this action was taken in the royal courts. This was well before the national common law courts were established. Masters and those of the same commercial rank were the only ones who could trade in their own names. Those of lower status could not. Issues of status in disputes will be examined in chapter 4. The section on the protection of the masters argued that guild regulatory power of search and seizure of goods was

enforced nationally by the cities and guilds so that only masters could trade in their own names, and, wholesalers could trade in masters' goods only by consent of the king. The section on the pressing of the trades into a crown system of commercial ranks argued that the companies were arranged into higher and lower ranks based on so-called wisdom and self-sufficiency, ostensibly to stamp out deceit. On this basis, this suggests that insubordination was related to deceit. It argued further that the stamping out of deceit could not go so far as to derogate from the king's will or the common profit of the people. This suggested that deceit was somehow related to public opinion. Cited case law suggested that breaches of City customary law were dealt with on a strict liability basis, and were indicative of fraud. This suggestion will be investigated in chapters 4 and 5.

III THE LAW OF GRAPHIC REPRESENTATIONS

A Introduction

In chapter 2, there was argument for the existence of various commercial ranks, arising from customary law. A breach of this custom was dealt with on a strict liability basis, suggesting indications of fraud. Chapter 2 inferred a relationship between this customary law and a strict liability structure of a nascent form of passing-off. It noted that early guilds were supervised by a church-style regimen. Argument in Chapter 3 proposes to adopt and build on both the proposition of commercial ranks identified in chapter 2, and the proposition that a breach of commercial status was a strict liability issue indicative of fraud. It asks when work might have been controlled by police action and when work might have been controlled by church supervision. Therefore, its structure is based on the following proposition: that commercial ranks are related to the differential levels of status, symbolised graphically on royal seals as the higher status, and symbolised in trademarks as the lower status.

The first section is on the law of seals. The subsection on seals on royal documents seeks to relate the graphic representations on royal seals to a strict liability enforcement regime against passed off goods. The subsection on the administration of the seals examines the various strata of administration used to enforce the application of royal seals. The subsection on the swan mark inquires into a customary crown administrative system. The subsection on regulation of publications examines some relevant key consequences of breaches in book licensing.

The second section is on the development of trademarks. The subsection on crown regulation of proprietary marks examines how merchants used proprietary marks. The subsection on production marks examines how they were related to product source and goodwill. The subsection on certification marks investigates how marks were used to certify artisans' work.

This chapter will argue that the tort of passing-off has strict liability characteristics, because both seals and marks were controlled by an administrative registry system, resulting from a unilateral crown declaration of jurisdiction. It will be argued that, pursuant to this registry system, a misrepresentation in the registry, traceable to being caused by a defendant, inferred defendant liability at the time the registry entry became incorrect. Also, the chapter argues that since registries were operated by customary procedures, the identified administrative system continued to inhere within the strict policing of graphic representations. Consequently, passing off any mark controlled by such an administrative registry would be enforced as strict liability, due to what the mark symbolised.

B *The Law of Seals*

1 *Seals on Royal Documents*

This section asks whether the graphic representations on royal seals were related to a strict liability enforcement regime against passed off goods. It asks further that if this were so, how might seals' power have been enforced?

Deane explained that grants made in charters were made by the sovereign under the royal prerogative.¹ Each grant was surrounded by essential formalities. This was so that no detriment or injury might result to the property or persons of the king's subjects, or to the rights and possessions of the crown. Such formalities were pursuant to an ancient and customary principle, traceable back to the earliest period of the English constitution.² Custom provided that the sovereign's prerogative might not be exercised arbitrarily or without properly exercised discretion, and might only be exercised legally and for the general benefit of the Commonwealth, or, by consent of the people. This precept was applied directly to the process of issuing letters patent under seal from the crown, and was implied as a term into the charters so issued in the public interest.³

¹ Charles Deane *Forms in Issuing Letters Patent by the Crown of England* (Press of John Wilson & Son, 1870), 3.

² Most probably from the time of Athelstan, who reigned from 929 to 939 C E.

³ Deane, above 1, 3.

Royal seals appear to have followed certain symbolic rules, which had existed since ancient times.⁴ Each graphic element of each seal conveyed meaning. For example, Chaplais noted that all the great seals of the English kings were derived from the seal of Edward the Confessor,⁵ who reigned from 1042-1066 C.E. That seal was circular and double-sided with a diameter of about three inches. Each side of the seal was a seal of majesty representing the king with his various symbols of royal power, linking land to the power of the sword. On one side was a sceptre topped with a trefoil in the king's right hand and an orb topped with a cross on his left. On the other side was a *virga* topped with an eagle in his right hand and a sword in his left.⁶ Littleton explained the *virga* as derived from Latin, *twig* or *branch*. It was an observable streak or shaft of precipitation that fell from a cloud but evaporated before reaching the ground. Littleton explained tenants by the "verge" as in the same nature as tenants by copy or court roll. However, they were called tenants by the verge because when they surrendered their tenement into the hands of their lord for the use of another, they would have a little rod in their hand, which they would deliver to the steward or bailiff. The steward or bailiff would then deliver the rod to the person taking the land in the name of seisin. This taking was entered into the court roll pursuant to the custom of the manor.⁷

Chaplais reported that the seal of William the Conqueror was circular but slightly larger, with majesty on one side only. The other side was the baronial side representing the king as Duke of the Normans. The majesty side was William sitting on a throne holding a sword in his right hand and an orb surmounted by a cross in his left hand. All later kings retained this principal design, until as recently as early modern times.⁸

⁴ Since ancient times, kings had used mimetic symbols techniques to communicate their power and their laws to the illiterate populace by analogy to what the populace already believed and understood. Lillian B Lawler 'Proteus Is a Dancer' (1943) 36(10) *The Classical Weekly*, 116-117, 116, 117.

⁵ Pierre Chaplais *English Royal Documents King John – Henry VI, 1199 – 1461* The Clarendon Press, Oxford, 1971, 2.

⁶ *Ibid.*

⁷ Sir Thomas Littleton *Littleton's Tenures in English* (John Byrne & Co, 1903), 36.

⁸ Chaplais, above 5, 2.

Chaplais added that the royal seal had its own administrative apparatus. In the time of King John,⁹ custodianship of the great seal was in the hands of the chancellor, who was also an archbishop. The chancellor's two principal assistants were the vice-chancellor as keeper of the seal, and the protonotary supervising the clerical staff of the chancery, in their writing roles.¹⁰

Seals represented a substantial body of regulatory administration. During the reign of King John, the chancery had a great deal of work to do in order to prepare each document. First, a draft was prepared, and then this draft had to be checked and corrected. The checked and corrected document was then presented for the affixing of the seal and would only receive the seal if written in an aesthetically fair hand.¹¹ Presumably the keeper of the seal judged it aesthetically pleasing, an unpleasing writing not being appropriate for a royal document.

Chancery documents were the forerunners of the later injunctions in the court of chancery. At regular time intervals, it was customary for chancery documents to be sewn into chancery rolls, one roll for charters, one roll for letters patent and one roll for letters close.¹² The three styles of document, charters, letters patent and letters close, were all derived from the one document style, descending from the form of writ of Edward the Confessor in Old English. Every Old English writ was a transfer by way of declaration under the name of the king, indicating that he had made or confirmed a grant of land or a grant of rights on land. This declaration was an open letter sealed by the royal seal. It was addressed to the officials and suitors of the court of the shire, but in later times to the sheriff, setting out particulars of the land grant. The grantee caused the document to be written by the grantee's own scribes. The grantee presented it to the king for sealing, and then took it to the shire court to be read aloud in public. This secured both public notice and a measure of public interest. The writ was then handed back to the grantee.¹³ After William's conquest of

⁹ Reigned 1199–1216.

¹⁰ Chaplais, above 5, 3.

¹¹ Ibid.

¹² Chaplais, above 5, 3, 4.

¹³ Ibid.

England, the writs were used as a means of conveying an injunction. They were addressed to the specified individuals, enjoining them to perform only one action.¹⁴

Grants and injunctions were self-funding administrative devices under royal seal for direct crown control. Fees for the issue of chancery documents were charged pursuant to an ancient custom. However, by the close of the reign of Henry III,¹⁵ these fees were reserved for the benefit of the chancellor and his senior colleagues in the chancery. Whenever there was a vacancy in the office of chancellor, the fees accrued direct to the king. The great seal was used in this way as a tax farm, until the occasion of the death in 1244 of Chancellor Ralph de Neville. Neville had been appointed chancellor for life. After his death, the fees were collected for the sole benefit of the crown.¹⁶

During the reigns of William I and William II,¹⁷ writs of exemption from tolls and writs of protection were issued under the great seal. They conferred permanent rights on the addressees, and were written in the form of a prerogative order in prohibition.¹⁸ Merchants ascribed great value to such grants, as they were essential to a profitable business. This crown power could flow down through the commercial ranks. As argued in chapter 2, according to Pulling, in matters of appeal, the Town Clerk could make out orders in prohibition, certiorari and procendo.¹⁹ This effectively gave control to the London Court of Hustings over the action in replevin.²⁰

Arguably, replevin was a strict liability procedure by its presumptive nature. Its power seems to have flowed down using royal instruments. In theory, it could

¹⁴ Chaplais, above 5, 5.

¹⁵ 1216-1272.

¹⁶ Chaplais, above 5, 22, 23.

¹⁷ Together, 1066-1100.

¹⁸ Chaplais, above 5, 5, 6.

¹⁹ Alexander Pulling *The Laws, Customs, Usages and Regulations of the City and Port of London* (William Henry Bond and Wildy and Sons, 2nd ed, 1854), 173.

²⁰ Replevin. A legal remedy for a person to recover goods unlawfully withheld from his or her possession, by means of a special form of legal process in which a court may require a defendant to return specific goods to the plaintiff at the outset of the action. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

remove all passed off²¹ goods into the hands of the plaintiff, at the outset of an action for unlawful possession of goods.²²

2 *Administration of the Seals*

This section examines the various strata of administration used to enforce application of royal seals. The first king who had a privy seal was Richard I.²³ The king used the Privy Seal for his personal and secret correspondence. His successor, king John, began the practice of using his privy seal for official business such as for chancery writs. The privy seal was much smaller than the great seal, inferring its use for and on smaller documents. However, it appears that the king used his privy seal whenever he wanted the fees or other monies paid directly into his personal account, and not into the exchequer.²⁴ In consequence of this, a new department of state was set up in 1312 under Edward II.²⁵ His majesty named this department the privy seal office. It was set up by the ordinance of 5 Edw. II, stated in these words.

AND Forasmuch as the King hath been evil guided and counselled by bad Counsellors, as is aforesaid, We do ordain, that all evil Counsellors be put away and removed altogether, so that neither they nor other such be near him, nor retained in any Office of the King, and other more fit People be put in their Places; And in the same manner shall it be done of their Servants and People of Office, and of others who are in the King's Household, who are not fit. AND Forasmuch as many Evils have come to pass by such Counsellors and such Ministers, We do ordain that the King do make the Chancellor, Chief Justice of the one Bench and the other, the Treasurer, the Chancellor and Chief Baron of the Exchequer, the Steward of his Household, the Keeper of his Wardrobe, and Comptroller, and a fit Clerk to keep the Privy Seal, a Chief Keeper of the Forests on this Side of Trent, and another on the other Side of Trent, and also an Escheator on this Side of Trent, and another on the other Side of Trent, and the Chief Clerk of the King in the Common Bench, by the Counsel and Assent of his Baronage, and that in Parliament; And if it happen by any chance, that it be expedient to appoint any of the said Ministers before there be a Parliament, then the King shall appoint thereto by the good Counsel which he shall have near him, until the Parliament. And so it shall henceforth be done of such Ministers, when need shall be.²⁶

²¹ As stated in chapter one, the term “pass off” represents only the *actus reus* of the later tort of passing-off. The thesis adopts the protocol of writing the name of the tort with a hyphen.

²² The term “passed off” is used in this sense without the hyphen as a factual rather than legal circumstance.

²³ 1189–1199.

²⁴ Chaplais, above 5, 24, 25.

²⁵ 1307–1327.

²⁶ 5 Edw II Ordinances c 11-18, 1 *Statutes of the Realm* 1235-1377, 160.

It appears that the purpose was to keep the privy seal under the control of a permanent staff of four clerks.²⁷ This was under the guise of removing evil counsellors away from the king.²⁸

In 1312, Edward II lost control of the Privy Seal for a time. This was coincident with the above Ordinances, and with political trouble and civil unrest in the city of London. Consequently, the king acquired for himself a secret seal in 1312. He started to authorize the use of the privy seal either via an envoy, or in writing, using his secret seal.²⁹ Arguably, the king proved that he had an established customary power of inducing cooperation.

Trueman noted that in 1312, London was a source of very substantial trouble for the king.³⁰ Apparently the king linked seditious religious control of the people and the potential for civil war.³¹ In that year, there were several king's writs directed to the mayor and to the aldermen of the city. These writs charged them with safeguarding the City on the king's behalf and with preventing the barons-in-arms from entering the city. On 26 June 1312, the king ordered the mayor to seize all war horses and to prohibit their taking from the city. On 24 July 1312, the sheriffs were ordered to make a proclamation forbidding the holding of conventicles and the making of federations and bonds "to live and die together".³²

From the time of Edward I,³³ privy seal documents fell into four main categories: letters and writs close; letters and writs patent; bills; and, indentures. These styles were still current in the fifteenth century.³⁴ Letters and writs close were invariably administrative writs and personal letters. Letters patent were used for commissions to certain royal officers, receipts, acknowledgements of debts, letters of protection and safe-keeping, and orders for the collection and delivery of money or food supplies for the royal household. Bills were used mainly as warrants to the chancellor for the

²⁷ Chaplais, above 5, 26.

²⁸ Ibid.

²⁹ Chaplais, above 5, 45.

³⁰ John H Trueman 'The Privy Seal and the English Ordinances of 1311' (1956) 31(4) *Speculum*, 615.

³¹ Trueman, above 30.

³² Ibid.

³³ 1272-1307.

³⁴ Chaplais, above 5, 28, 29.

issue of routine documents under the great seal. Indentures were used as records of indented service such as military service.³⁵

In the Myers and Harris edited account, the privy seal created actionable warrants for the application of the great seal. A Bill submitted for sealing had to be approved first by a secretary of state. This officer had to make sure the Bill was a lawful and appropriate request, that it was prepared in the correct legal form. Finally, it was annexed to a summary docket that the monarch might be prepared to read.³⁶ The proper procedure under which a patent acquired the Great Seal was set forth in the 1536 statute of 27 Hen. VIII c. 11. This was described as an *Act Concerning Clerks of the Signet and Privy Seal*.³⁷ Under this procedure, according to the Myers and Harris edited account, the monarch first approved and signed a draft of the intended grant, and gave it to one of the principal secretaries, who kept it as evidence that the king had signed it. He ordered it to be copied by one of the four clerks of the signet as the warrant to the keeper of the privy seal. One of the clerks at the privy seal office retained this document, now called the Bill, had it copied again and had the copy sealed. The resulting writ of privy seal was conveyed to the chancery where it worked as the final warrant for the application of the great seal. One of the six clerks of chancery wrote out the actual patent and had the great seal affixed to it. This writ was once again copied, but this final time onto the patent roll. This was the registry's archival copy.³⁸

3 *The Swan Mark – Seals on Royal Birds*

To this point, this thesis has argued the existence of a royal system of administration, the various ranks of which were represented graphically by royal seals. This section on the Swan Mark inquires into how this kind of customary administrative system might have set up a jurisdiction and used it lower down the commercial ranks.

³⁵ Chaplais, above 5, 28-34.

³⁶ Robin Myers and Michael Harris (eds), *The Stationers' Company and the Book Trade 1550-1990* (Oak Knoll Press, 1997), 15.

³⁷ 3 *Statutes of the Realm* 1509-1545, 542-544.

³⁸ Myers, above 36, 14.

In the 1592-3 *Case of the Swans*,³⁹ the Court of King's Bench decided that a person could acquire property *per industriam*, or, by virtue of having applied labour.

At common law, the swan was presumed to be a royal bird. It could not be killed without an express legal right. It was the property of the crown and could only be possessed by a subject under a special grant from the crown or its officials. Each licence granted for possession of a swan was registered administratively to a grant of a swan mark, which mark was cut by a knife into the upper mandible of the birds, specifically in order to show the level of possessory right of the owner.⁴⁰

Goble stated that there were many different kinds of swan mark, and the mark could be owned by a guild, suggesting that the crown might have a property interest in the personal property within the guild organisation.⁴¹ Wood listed the following several examples.⁴² The swan mark of the Vintners' Company contained a double chevron indicating acquisition of property by purchase for consideration.⁴³ The swan mark of Cambridge was three buckles,⁴⁴ and the swan mark of the Dyers' Company was a notch on one side of the bird's beak. Just as the privy seal was applied in a public ceremony, to give notice to the populace, so too was there a public ceremony for the marking of the swans.⁴⁵ One took place annually in the month of August,⁴⁶ when the markers of both the Dyers' and the Vintners' Companies took public account of all swans in the River Thames. At this time, they marked all the mature clear-billed birds.⁴⁷

³⁹ 4 Co Rep 82.

⁴⁰ Ibid.

⁴¹ Dale D Goble 'Three Cases/Four tales: Commons, capture, the Public trust, and Property in Land' (2005) 35 Environmental Law, 807, 813.

⁴² J G Wood *The Illustrated Natural History – Birds* (Routledge Warne and Routledge, 1864) 724.

⁴³ The word "chevron" is derived from the name of the ancient city of Hebron, which was the subject locale of arguably the first biblical account of real property acquisition by purchase.

⁴⁴ Buckles indicating a kind of binding.

⁴⁵ A notorious maiming of the animal without punishment.

⁴⁶ The word "august" has the following meanings as an adjective. **1.** Inspiring mingled reverence and admiration; impressing the emotions or imagination as magnificent; majestic, stately, sublime, solemnly grand; venerable, revered. **2.** Venerable from birth or position; of stately dignity; dignified, worshipful, eminent, majestic. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

⁴⁷ Wood, above 42, 724.

The swan mark was arguably a species of proprietary mark, flowing down from crown ownership. Giles noted that it was laid down in customary law that all white swans which were not marked, living in natural freedom, might be seized to the use of the king by virtue of the prerogative, because a swan was a royal bird. However, a subject might have property in white swans, which were not marked, and any man might have the property in swans not marked and which were in his private waters. To this end, a man could claim a prescriptive title in both swans and cygnets. However, no person could have a swan-mark unless by grant of the king, a grant by the king's authorized officers, or by prescription, at his or her peril.⁴⁸ The term "at his/her peril" was an indicium of strict liability, because it meant that the breach itself caused the punishment.⁴⁹ A limitation to this rule was enacted in the 1482-3 statute of 22 Edw. IV. c. 6,⁵⁰ such that no person could have a swan mark unless he had property in lands of the yearly value of five marks.⁵¹ Coke on Littleton stated that the statute of 22 Edw. IV. c. 6 was based on the common law rule that he who owned such a swan mark could grant it over to another person.⁵² 22 Edw. IV c. 6 was set out as follows.

That no Person, of what Estate, Degree, or Condition he be, other than the Son of our Sovereign Lord the King, from the Feast of Saint Michael next coming, shall have or possess any such Mark or Game of his own, or any other to his Use shall have or possess any such Mark or Game, except he have Lands and Tenements of Estate of Freehold to the yearly Value of Five Marks above all yearly Charges. And moreover, That every Person or Persons now having any such Mark or Game, shall sell or give the same betwixt this and the Feast of Saint Michael next coming, to the Use of them to whom they shall be sold or given; and if it happen any Person or Persons not having any Possession of Lands or Tenements to the said yearly Value, or any other, to have or possess Lands to his or their Use, to have or possess any such Mark or Game after the said Feast, that then it shall be lawful to any of the King's Subjects, having Lands and Tenements to the said Value, to seise the said Swans as forfeit; whereof the King shall have one Half, and he shall seise the other half.⁵³

The precedent for this was in the time of king Henry VI.⁵⁴ It stated that a grant of incorporeal things must be by deed. It probably could not be granted by a common

⁴⁸ T Giles *Game Law* (E & R Nutt and R Gosling, 1740), 152.

⁴⁹ F Pollock *The Law of Torts* (Banks & Brothers, 1895), 17, 18, 19.

⁵⁰ 2 *Statutes of the Realm* 1377-1504, 474.

⁵¹ Giles, above 48, 153.

⁵² Co Lit 47a.

⁵³ 2 *Statutes of the Realm* 1377-1504, 474.

⁵⁴ Henry VI reigned 1422-1461; Edward IV reigned 1461-1483.

man, but only by the king's royal prerogative.⁵⁵ This suggested that there was little possibility of the common person having these property rights. Arguably it would have linked the bundle of rights in the mark to that in real property rights. A common person representing him/herself as having property in a swan mark would, in theory, be strictly liable for misrepresentation, at the time the representation was recognised as not correlating to a registered title.

Giles explained that it was also provided that, if swans were marked and pinioned,⁵⁶ or unmarked and kept in a moat, pond, or private river, then to steal them was a felony.⁵⁷ The 1495 statute of 11 Hen. VII. c. 17 set out the status of swan eggs, and their taking by unauthorized persons, as follows.

Also it is ordained by the said authority that no person, of what condition or degree he be, take or cause to be taken, be it upon his own ground or any other, the eggs of any falcon, goshawk, laners, or swans out of the nest upon pain of imprisonment of a year and a day and a fine the one half thereof to the King and the other half to the owner of the ground where the eggs were so taken; and that Justices of the Peace have authority to hear and determine such matter as well by inquisition⁵⁸

The mere taking, the statutory setting up of the wrong of taking, and a hearing by inquisition all argue for a strict liability nature of this wrongful taking of swan eggs. The split nature of the fine suggests that the king was a continuing or radical holder of property rights in swan eggs. These issues were all illustrated and expanded in the Court's discussion, in the *Case of the Swans*.⁵⁹

The case was between the Queen, and the defendants Lady Joan Young and Thomas Saunger. It was heard before Sir Matthew Arundel and other commissioners of the Queen under the Great Seal. A writ had been directed to the Sheriff of the county of Dorset to summons all the unmarked white swans, and the Sheriff responded with a report that he had seised four hundred white swans. Lady Joan Young and Thomas Saunger complained against the Sheriff's response. She said that before the investigation, the Abbot of Abbotsbury had been seised in fee, and that at the time of

⁵⁵ Co Lit 47a.

⁵⁶ Pinioned. Of a bird: Having the wings maimed or confined. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

⁵⁷ Giles, above 48, 46, citing Hale's Pl C 68.

⁵⁸ 2 *Statutes of the Realm* 1377-1504, 581.

⁵⁹ 4 Co Rep 82.

the investigation, and from time immemorial, a game of wild swans had lived in the estuary. She added that the Abbot had the custom to cut off the pinion of one wing of each swan. Afterwards, the Abbot had surrendered the premises to King Henry VIII, who in the 35th year of his reign granted the estate to Giles Strangways, Esq. by way of his own letters patent. After Giles died, the estate descended to Giles Strangways his cousin and heir. He then transferred to the defendants his property in the subject game of swans for one year. The Queen's Attorney demurred in the law. The Court set out reasons for its decision as follows, resolving that all unmarked white swans, which having gained their natural liberty, and were swimming in an open and common river, might be seized to the King's use, by a natural liberty deriving from the king's prerogative. This was because a swan was a royal fowl, and all those swans without known owners belonged to the King by his prerogative. Similarly, whales and sturgeons were royal fish, and belonged to the King by his prerogative. To supervise and regulate the king's property rights in swans, there was an ancient office of the King called *Magister Deductus Cygnorum*. It was resolved also, that a person might have property in unmarked white swans. However, if they escaped out of private waters into an open and common river, the landowner might bring them back and retake property in them.⁶⁰ If they had gained their natural liberty, and were swimming in open and common rivers, the King's officer might seize them for the king in the open and common part of the river. When the property in a swan could not be determined, it belonged to the King as a royal fowl. This was arguably the essence of radical title in the crown.⁶¹ The court confirmed the taking of swans as personal property was a tortious act.⁶²

4 *Regulation of Publications*

This section examines printers' devices as marks, their modes of regulation and some key consequences of breaches of their use. The discussion will investigate several kinds of infringement and some of their trials. It will seek to outline any resulting state statutory responses, which possibly might have set up a strict liability procedure for dealing with passing off printers' devices.

⁶⁰ 4 Co Rep 82, citing Bracton, lib 2 c 1 fol 9.

⁶¹ 4 Co Rep 82.

⁶² Ibid.

Printers' devices were arguably highly significant. Bibliographers used them for ascertaining knowledge of their ownership at different times, any alterations made to them, and the various accidents in which they were involved. They helped the bibliographer to be able to trace, date and assign books to their true printers.⁶³

McKerrow characterised printers' devices with a somewhat cumbersome definition, by stating first a narrow definition and then adding certain classes of objects, which were not covered by it, but were used in a similar way. His definition was supposed to apply up to the year 1557, and was as follows.

Let us say, then, in the first place that any picture, design, or ornament (not being an initial letter) found on a title page, final leaf, or in any other conspicuous place in a book, and having an obvious reference to the sign at which the printer or publisher of the book carried on business, or to the name of either of them, or including the arms or crest of either of them, is – whatever its origin – that printer's or publisher's device.⁶⁴

In practice, if a person worked at the sign of the Sun and used a cut of the sun in his title pages or at the end of his books, it would be his device. It might have been nothing more than an old wood cut taken from a book on astronomy. After 1557, the emblematic form of device began to take over from that which referred to the sign. These emblems were chosen at the sole discretion of the printer or publisher. For example, William Leake dwelt successively at the Crane, the White Greyhound and the Holy Ghost. However, his device was a winged death-head.⁶⁵

One significant exception to the definition, above, was that many printers and publishers used common ornaments, such as a rose, a mermaid, or a cherub. None of these ornaments represented the sign of the house. They could have been purchased from a type-founder. McKerrow failed to find any one of these generic devices used by more than one person,⁶⁶ suggesting they were subject to underlying legal norms either as comity among the printers or as some species of subterranean regulation.

⁶³ Ronald McKerrow *Printers' & Publishers' Devices in England & Scotland 1485-1640* (The Bibliographical Society, 1913), xxxii.

⁶⁴ McKerrow, above 63, xii, xiii.

⁶⁵ McKerrow, above 63, xiii, xiv.

⁶⁶ McKerrow, above 63, xiv.

McKerrow set out a broad classification system of printers' devices in seven parts, as follows. This first was devices representing the sign at which the printer or publisher worked. The second was those devices, which represented a rebus or pun on the owner's name. The third was a device referring to an incident in the owner's career. The fourth was monograms or initials with or without a mark. The fifth was a portrait of the owner of the device. This sixth was heraldic devices, reviewed briefly, below. The seventh was an emblem of some kind, but not related to the owner's sign or a pun on his name.⁶⁷

Since the above definition of printers' devices referred in part to heraldic designs, a brief examination of the nature of heraldic graphic representations is in order. Rogers suggested that heraldic graphical representations were similar to trademarks in their public effect. He related armorial bearings to trade marks, in the following way.

There is a curious parallel between the marks of artisans and traders during the middle ages, and the heraldic devices in use at the same time. When knights were cased in plate and fought with visors down, features were concealed and some method of distinguishing the individual in battle or in the lists was imperative. Thus leaders for purposes of identification adopted characteristic devices by which they could be recognized. These devices, originally badges of personal identification, later became hereditary. The analogy between the heraldic device as originally employed and trade-marks is exact. Both are identifying symbols.⁶⁸

Like trademarks representing the work of artisans, heraldic graphical representations were the subject of licensing in the public interest. It appears that in former times, the accurate drawing up of coats of arms was so important that herald painters were formally licensed by the crown in order to continue in their vocation. They were liable to penalty in the Court of Chivalry if they practised their art without the authority conferred by licence. This Court of Chivalry, also known as the Earl Marshal's Court, operated as a civilian law court, and its procedure was limited to the civilian procedural system. The court continues to have jurisdiction to hear heraldic classes of action.⁶⁹

⁶⁷ McKerrow, above 63, xviii-xxviii.

⁶⁸ Edward S Rogers 'Some Historical Matter concerning Trade-Marks' (1910) 9(1) Michigan Law Review, 29-43, 38.

⁶⁹ George Seton *The Law and Practice of Heraldry in Scotland* (Edmonston and Douglas, 1863), 15.

An appeal from the Court of Chivalry would lie by way of a petition to the crown and directed to the Clerk of the Privy Council. The civilian procedure in the Court of Chivalry was illustrated in the 1631 case of *Rea v Ramsay*,⁷⁰ in which the Court of Chivalry convened to award a trial by duel, although later the king stopped the duel. Foreshadowing a civilian procedure, Chief Justice Fineux was said to have told king Henry VIII that the jurisdiction of the Court of Chivalry belonged to the law of arms, and not to the law of England.⁷¹

In *Rea v Ramsay*,⁷² the Earl Marshal disclosed the king's interest and role in this special court. The Earl Marshal commenced the proceedings by rising, making obedience to the Constable, meeting the kings of heralds, and presenting to the constable his commission, which was in words to the following effect.

That his majesty being informed by Donald lord Rey, how David Ramsay esq. Had plotted, and was privy unto divers Treasons and Conspiracies against his royal person, government and kingdoms. In the search whereof the king had used all ways and means for the discovery of the truth: the one of them accusing, the other denying, and so no certain security to his own person and his subjects: therefore he doth authorize the said Robert Bartie earl of Lindsey lord high constable, for to call unto him Thomas earl of Arundel earl marshal, and with him such other peers, sheriffs and officers as he thinks fit, to hold a marshal's court, for sifting the truth between the said parties, etc.⁷³

At the conclusion of the matter, the Constable and the Earl Marshal held as follows. First, David Ramsay was not guilty of treason, although he had made many attempts at treason. Second, both David Ramsay and Lord Rea had seditiously committed many acts of contempt against the king, reformation for which was reserved solely for his majesty. Third, both David Ramsay and Lord Rea were committed to the Tower of London until they could provide sufficient sureties to the satisfaction of the king.⁷⁴ These findings would have amounted to conduct or language inciting to rebellion against the constituted authority in a state and those printers' devices, which were armorial bearing, could have come under this jurisdiction.

⁷⁰ *Cobbett's Complete Collection of State Trials, Vol III* (Hansard, 1809), 483.

⁷¹ Cobbett's, above 70, 483n.

⁷² Cobbett's, above 70, 483.

⁷³ Cobbett's, above 70, 62, 106, 112, 142.

⁷⁴ Cobbett's, above 70, 62, 106, 112, 142.

This discussion of heraldry has shown that the grant of the design was an act of state. Further, Rogers argued that the analogy between heraldic devices and trademarks was exact in that they both were obligations to the community, inferring a public interest and honour inhering in heraldic designs. Following on from this, the crown issued licences to heraldic designs painters, and any breach of user could be heard properly in the Earl Marshal's Court. This court would apply the remedy of injunction in a civilian procedure, based on the underlying principle that all subjects were bound to discover treason. The 1631 Earl Marshal's Court case of *Rea v Ramsay*⁷⁵ noted such seditious acts of contempt against the king would only be dealt with by his majesty himself. Arguably, the court's procedure was focussed on the preference of the King.

Continuing the examination of printers' devices, many devices passed from one owner to another with little change in their designs. It appears that these transfers took place in order to signify the change in a right to print or publish a specific book. There is a record of John Day seizing control of a device from Gibson in 1569.⁷⁶ Day made changes to the initials T.G. so that they now appeared like his own.⁷⁷

King Henry VIII granted the earliest known royal privileges issued for books to Richard Pynson in 1518. None of these early grants has left any trace of proper process in the public records of patent rolls or Privy Seal warrants. In the Myers and Harris edited work, they were said to have been issued *cum privilegio regali*⁷⁸ in text and summary pages of the so-authorized books.⁷⁹ Henry VIII issued a proclamation concerning seditious and heretical books on 16 November 1538, which contained the following relevant clause.

That no person or persons in this realm shall from henceforth print any book in the English tongue unless upon examination made by some of his Grace's Privy Council or other such as his Highness shall appoint they have licence so to do and yet so having not to put these words *cum privilegio regali* without adding *ad imprimendum solum*, and that the whole copy, or else at the least the effect of his licence and privilege be therewith printed,

⁷⁵ Ibid.

⁷⁶ McKerrow, above 63, 172.

⁷⁷ McKerrow, above 63, xxxiv.

⁷⁸ *Cum privilegio regali*. As a royal privilege.

⁷⁹ Myers, above 36, 13, 14.

and plainly declared and expressed in the English tongue underneath them.⁸⁰

It appeared that the cause for the 1538 proclamation was publications containing added notes and margin comments, in works that had been already examined and cleared for publication. The proclamation required books printed abroad to have a special royal licence before their sale in England. Books printed in England had to have a licence after close examination by royal appointees.⁸¹ In this way, the publisher gained not only an exclusive licence to print, but also royal authority for the book's contents. The problem had been clarified in Venice in 1516, when the *Rituum ecclesiasticorum* was published carrying notice of a privilege from Pope Leo X. The contents created trouble, but legates pointed out that the book could claim no authority for its contents because Pope Leo X had not expressly approved the contents. He had only granted a privilege to protect the book against pirate reprinting.⁸² Myers and Harris reported that after the time of Henry VIII and his royal grants, most book privileges were granted by letters patent under the Great Seal and properly registered on the patent rolls.⁸³

Arber's record states that the book entries in that of the Company of Stationers of London were originally records of receipts for payment. However, as control of printing by the Bishop of London increased, these book entries gathered the same force during the period 1571 to 1576 as that of a registry of licences to print.⁸⁴ This development resulted in all prints being licensed by a full court of master wardens and Assistants of the Company of Stationers and as well by a licenser. Arber recorded that this licenser was also a member of the clergy.⁸⁵

According to Arber, the Stationers had existed as a guild from ancient times, but later procured a charter as a company. Queen Elizabeth's confirmation of this was

⁸⁰ Reprinted in Evelyn May Albright 'Ad Imprimendum Solum Once More' (1923) 38 *Modern Language Notes*, 129-140, 129.

⁸¹ Albright, above 80, 133.

⁸² Albright, above 80, 133n.

⁸³ Myers, above 36, 13, 14.

⁸⁴ Edward Arber (ed.) *A Transcript of the Registers of the Company of Stationers of London; 1554-1640 AD, Volume I* (Privately Printed, 1875, Reprinted Peter Smith, 1950), xvi.

⁸⁵ Arber I, above 84, xvii.

recorded in the Stationers' Register on 10 November 1559, along with certain small amendments made by the queen, the original of this confirmation having been burned in the great fire of London.⁸⁶ One of the key operative articles of this charter was as follows.

Besides we will, grant, ordain, and appoint for ourselves and the successors of us the foresaid Queen that no person within this our realm of England or the dominions of the same shall practise or exercise by himself or by his ministers, his servants or by any other person the art or mystery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his foresaid printing is or shall be one of the community of the foresaid mystery or art of Stationery of the foresaid City, or has therefore licence of us, or the heirs or successors of us the foresaid Queen by the letters patent of us or the heirs or successors of us the foresaid Queen.⁸⁷

Arber recorded that the first Master of the Company of Stationers, appointed under the 1559 arrangements, was not a printer or publisher, but was a Proctor of the Court of Arches, which Blackstone categorised under the heading of courts for private wrongs, as follows.

The court of arches is a court of appeal belonging to the archbishop of Canterbury. . . . His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London. . . . from him lies an appeal to the king in chancery, that is, to a court of delegates appointed under the king's great seal by statute 25 Hen. VIII, c. 19,⁸⁸ as supreme head of the English church, in the place of the bishop of Rome, who formerly exercised this jurisdiction⁸⁹

The Company sought, and was granted, heraldic arms by the King of Arms Sir Gilbert Dethick in May during September 1557. The general motif of the granted arms was light disseminating down through the three emblems of a heavenly dove, a flying eagle and three books.⁹⁰

Rushworth stated that the company had an ancient customary ordinance that forbade any member of the company from setting up, sustaining or supporting any private printing press. This was later strengthened in 1643 by an order of the Parliament. The

⁸⁶ Arber I, above 84, xxx, xxxi.

⁸⁷ Ibid.

⁸⁸ The margin heading of this statutory provision was in the following terms. "Appeals from Archbishop's Court to the Chancery, and to be determined by Commissioners to be appointed by the King." 3 *Statutes of the Realm* 1509-1545, 461.

⁸⁹ Sir William Blackstone *Commentaries on the Laws of England – III* (Robert H Small, 1825), 62.

⁹⁰ Arber I, above 84, xxxvi, xxxvii.

order stated that the Company's ancient ordinance had proven to be of little effect.⁹¹ Arber recorded that any apprentice, journeyman, foreigner or other employee who offended against the company's prohibitive ordinances was to be put out of work for up to three months.⁹²

When Queen Elizabeth I issued her *Injunctions* of 1559, her Majesty gave the power of licensing books to the two ecclesiastical authorities of the Bishop of London and the Archbishop of Canterbury.⁹³ Myers and Harris stated that these *Injunctions* were the sole foundation of all protestant episcopal licensing of books in England.⁹⁴ Gee and Hardy reproduced these significant Injunctions in full, as follows.

LI. Item, because there is a great abuse in the printers of books, which for covetousness chiefly regard not what they print, so they may have gain, whereby ariseth great disorder by publication of unfruitful, vain, and infamous books and papers; the queen's majesty straitly charges and commands, that no manner of person shall print any manner of book or paper, of what sort, nature, or in what language soever it be, except the same be first licensed by her majesty by express words in writing, or by six of her privy council; or be perused and licensed by the archbishops of Canterbury and York, the Bishop of London, the chancellors of both universities, the bishop being ordinary, and the archdeacon also of the place, where any such shall be printed, or by two of them, whereof the ordinary of the place to be always one. And that the names of such as shall allow the same to be added in the end of every such work, for a testimony of the allowance thereof. And because many pamphlets, plays, and ballads be oftentimes printed, wherein regard would be had that nothing therein should be either heretical, seditious, or unseemly for Christian ears; her majesty likewise commands that no manner of person shall enterprise to print any such, except the same be to him licensed by such her majesty's commissioners, or three of them, as be appointed in the city of London to hear and determine divers causes ecclesiastical, tending to the execution of certain statutes made the last Parliament for uniformity of order in religion. And if any shall sell or utter any manner of books or papers, being not licensed as is above-said, that the same party shall be punished by order of the said commissioners, as to the quality of the fault shall be thought meet. And touching all other books of matters of religion, or policy, or governance that have been printed, either on this side the seas or on the other side, because the diversity of them is great, and that there needs good consideration to be had of the particularities thereof, her majesty refers the prohibition or permission thereof to the order which her said commissioners within the city of London shall take and notify. According to which her majesty straitly commands all manner her subjects, and especially the wardens and company of Stationers, to be obedient.⁹⁵

⁹¹ John Rushworth *Historical Collections, Vol V* (D Brown, 1721), 335.

⁹² Arber I, above 84, 15.

⁹³ Henry Gee and W H Hardy (eds), *Documents Illustrative of English Church History* (MacMillan, 1914), 417-442.

⁹⁴ Myers, above 36, 13.

⁹⁵ Gee, above 93, 417-442.

Relevant points of the Injunctions were as follows. First, no person could print any kind of book unless licensed by her majesty by express words in writing, or by certain combinations of archbishops as prescribed in the injunction, or by the Queens commissioners of the City of London. Arguably, this implemented the strict liability rules of registry. Second, instructions to the commissioners advised that the penalty, when selling or uttering any kind of book without licence, should be a punishment by order of the commissioners according to the quality of the offender's fault.⁹⁶ This sounds like significant administrative discretion in the hands of the commissioners.

Hamburger stated that during the period until 1695, the printed press was controlled by a registration and licensing regime, rather than by trials for seditious libel. However, such trials were very similar to those for seditious libel, because judges tended to mention the legal basis for the prosecution only in passing, if at all, while articulating a strong denouncement of the accused as defamatory and seditious. Such denunciations were arguably legally irrelevant.⁹⁷ Such a trial took place in the Star Chamber case of *Day v Ward*,⁹⁸ in which a breach of licence to publish could be punished in the Star Chamber as for the underlying legal norm of sedition against the king.

In *Day v Ward*,⁹⁹ John Day had been granted a privilege for the printing of, among other things, the work *A.B.C. with a little catechisme*. According to Malcolm,¹⁰⁰ King James recorded later that the grant by Queen Elizabeth I of letters patent was granted to Verney Alley and his assigns. This grant was by her letters patent under the Great Seal of England, on 26 February of the 33rd year of her reign, at Westminster. It was the licence and privilege, in reversion for the term of thirty

⁹⁶ Arber I, above 84, xxxviii.

⁹⁷ Philip Hamburger 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37(3) *Stanford Law Review*, 674.

⁹⁸ Star Chamber 1581. The types of cases heard in Star Chamber were described by Crompton as follows. "The preamble explaining the causes properly belonging to the cognizance of the Star Chamber, namely, unlawful assemblies, routs, riots and forgeries, perjuries, cozenaging, libelling and other like misdemeanours not provided for expressly in the statutes." Richard Crompton *Star Chamber Cases* (The Lawbook Exchange, 2008), 1.

⁹⁹ *Ibid.*

¹⁰⁰ James Peller Malcolm *Londinium Redivivum or an Ancient History and Modern Description of London, Volume II* (Longman Rees Hurst, 1803), 388, 389.

years, commencing upon the death of John Day and Richard Day his son, to print by himself or by his assigns the Psalms of David in English metre and notes on how to sing them. This book was called *The ABC with the Little Catechisme* compiled by Alexander Nowell.¹⁰¹ Subsequently, these letters patent were assigned by the administrators of the estate of Verney Alley in trust to the use of the Master and Keepers or Wardens and Commonalty of the Mistery of Stationers of the City of London and their successors. The Queen had formalised this grant direct over to the Stationers, prohibiting anyone else from printing the book, and stated that publication should not be inconsistent with any laws of the church, nor of the state.¹⁰²

On 7 February 1582, John Day filed a bill in the Star Chamber against both Roger Ward and William Holmes, alleging that they had pirated *The ABC with a little catechism*, contrary to the Star Chamber decree of 1566.¹⁰³ This decree was worded to prohibit the publication of any book considered to be contrary to statute, injunction, ordinance and letters patents, as well as to ban the importation of such works. This provided the first occasion on which the proprietary interests of the Stationers' Company and the ideological control of the press become explicitly linked. The commentary by L. Bently & M. Kretschmer describes the background to the Decree and in particular the concern of Elizabeth's High Commission over the influx of Catholic texts from continental Europe. The commentary argues that the Decree was particularly significant in that it formalized, for the first time, the specific link between the interests of the government in regulating and censoring the press and the economic interests of the Stationers' Company. The formal inclusion of the category of 'letters patents' within the remit of the Decree ensured that works published under a printing privilege now attracted the formal protection of the Star Chamber.¹⁰⁴

In the Star Chamber, it was alleged that, in 1581 or 1582, Roger Ward printed an unlicensed edition of the *A.B.C. with a little Catechism*, and the right to print it

¹⁰¹ James Peller Malcolm *Londinium Redivivum or an Ancient History and Modern Description of London, Volume IV* (Longman Rees Hurst, 1807), 388.

¹⁰² Malcolm IV, above 101, 389.

¹⁰³ L Bently & M Kretschmer (eds), *Star Chamber Decree (1566) Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org>.

¹⁰⁴ Star Chamber Decree (1566), above 103.

belonged solely to John Day. At the end of the book was Day's mark, which it was alleged that Ward had arranged to have it imitated by a Frenchman living within the Blackfriars.¹⁰⁵ In this Star Chamber case, *Day v Ward*,¹⁰⁶ it was not alleged that Ward had misused Day's mark, but rather it was for the unauthorised setting of Day's name to the fraudulent edition of the *A.B.C. with a little cathechisme*.¹⁰⁷ Evidence was adduced that Ward had imitated Day's particular style of printers' type, and also had used one of Day's marks. John Day held the sole patent to print this book, the grant in letters patent being a species of property under the royal prerogative.¹⁰⁸

Ward admitted to having printed 10,000 copies of the *ABC*. His defence was that members of the Company of Stationers had all the best patents, so that other printers could barely make a living. In response to evidence as to Ward's use of Day's mark, Ward responded that it was not he who replicated the mark, but a Frenchman living in Blackfriars had made marks with the same "artificial" as those used by John Day.¹⁰⁹ In any event, Ward appears to have ignored the Star Chamber action against him and continued his printing.¹¹⁰

In 1586, Star Chamber decreed increasing and further strengthening the penalties for book printing licence offences.¹¹¹ Malcolm reported that this decree touching printers and booksellers was made in the Court of Star Chamber¹¹² on 23 June in the 28th years of Queen Elizabeth's reign, 1586.¹¹³ Arber recorded the decree with commentary as follows.

A decree prohibiting the publication of any book contrary to statute, injunction, ordinance and letters patents, as well as any ordinance set down by the Company of Stationers." The formal protection of the Star Chamber was extended not only to books protected under royal printing privileges but to

¹⁰⁵ McKerrow, above 63, 161, citing Edward Arber (ed), *A Transcript of the Registers of the Company of Stationers of London; 1554 – 1640 AD, Volume II* (Privately Printed, 1875, Reprinted Peter Smith, 1950), 760.

¹⁰⁶ Star Chamber 1581

¹⁰⁷ F I Schechter *The Historical Foundations of the Law Relating to Trademarks* (Columbia University Press, 1925), 75.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Arber II, above 105, 753-760.

¹¹¹ Hamburger, above 97, 676, 677.

¹¹² Star Chamber Decree (1586), Arber II, above 105, 807.

¹¹³ Malcolm IV, above 101, 395.

books printed in contravention of the internal regulations of the Stationers' Company itself, further enhancing the significance of 'stationers' copyright'. The commentary describes the background to the decree, in particular the religious controversies of the 1570s and 1580s, as well as the dissatisfaction within the general printing trade during this period at the manner in which a number of the printing privileges granted by Queen Elizabeth resulted in the monopolistic control of commercially lucrative works within the hands of a few stationers only. The commentary also details the efforts of the dominant members of the Stationers' Company to influence the substance of the decree and further augment their control over the internal operation of the book trade.¹¹⁴

Explaining what kind of law the Star Chamber might review and apply, Hamburger stated that in 1637, in the Star Chamber, Prynne, Bastwicke and Burton were charged with writing and having had printed various specified books “contrary to the wholesome lawes, Customes & Statutes of this . . . Realme”.¹¹⁵ This suggested that the Star Chamber reviewed, balanced and applied ancient custom against other forms of law.

Schechter stated that the 1662 Statute of 14 Charles II, c. 33,¹¹⁶ was arguably a statutory formulation of the modern tort of passing-off.¹¹⁷ It forbade the printing, forging or counterfeiting the name, title, mark or vinnet¹¹⁸ of the Company of the Society of Stationers, or of any other person who had lawful privilege, without due consent.¹¹⁹

That no private¹²⁰ person or persons whatsoever shall at any time hereafter print or cause to be printed any book or Pamphlet whatsoever unless the same Books and Pamphlet together with all and every of the Titles Epistles Prefaces Proems Preambles Introductions Tables Dedications and other matters and things thereunto annexed be first entered in the Book of the

¹¹⁴ Star Chamber Decree (1586), Arber II, above 105, 807.

¹¹⁵ Hamburger, above 97, 678n.

¹¹⁶ An act for preventing the frequent abuses in printing seditious treasonable and unlicensed books and pamphlets and for regulating of printing and printing presses.

¹¹⁷ Wadlow set out the three essential elements of the tort of passing-off as , damage and goodwill, and, as well, the now obsolete element of fraud. C Wadlow *The Law of Passing-off, Unfair Competition by Misrepresentation* (Sweet & Maxwell, 3rd ed, 2004), 16.

¹¹⁸ Vinet. A running or trailing ornament or design in imitation of the branches, leaves, or tendrils of the vine, employed in architecture or decorative work. An ornamental border on a page. An ornamental title-page or similar production containing various symbolical designs or figures. Now spelled vignette, meaning An ornamental or decorative design on a blank space in a book or among printed matter, especially at the beginning or end of a chapter or other division, usually one of small size or occupying a small proportion of the space; *spec.* any embellishment, illustration, or picture unincluded in a border, or having the edges shading off into the surrounding paper; a head-piece or tail-piece. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹¹⁹ Schechter, above 107, 75, 76, 77.

¹²⁰ Suggesting some kind of damage or harm to the dignity of a public entity.

Register of the Company of Stationers of London . . . and unless the same Booke and Pamphlet and also all and every the said Titles Epistles Prefaces Proems Preambles Introductions Tables Dedications and other matters and things whatsoever, thereunto annexed or therewith to be imprinted shall be first lawfully licensed and authorized to be printed by such person and persons only as shall be constituted and appointed to license the same according to the direction and true meaning of this present Act. . . .¹²¹

Suggesting a cognate link between the publishing of information and the manufacturing of goods, Hamburger reported that between 1680 and 1685, seditious libel trials were set up as trials for publishing news, without a licence and contrary to the declared prerogative of the king. In 1680, Henry Carr was charged with causing to be published the *Weekly Packet of Advice from Rome*. Although the information stated that the accused had acted maliciously and had intended to scandalise the crown, at trial the crucial issue of intent was not canvassed. Rather, only the issue of publishing without licence was canvassed. Despite Carr's good intentions, the jury was instructed to find him guilty if they could find that he caused the publication of an unlicensed book. Carr's good intentions only applied to, and were canvassed at the hearing for, mitigation of the inevitable sentence, inferring the offence to have been strict liability.¹²²

C *Development Of Trademarks*

1 *Crown Regulation of Proprietary Marks in the Middle Ages*

Schechter noted that the courts treated the functions of trademarks as either that of origin or ownership of the associated goods, deriving from how the marks were used in the middle-ages. He stated that marks designating ownership were not trademarks in the technical sense, but were mere proprietary marks. In the middle ages, it was the proprietary mark rather than the merchant's personal mark that had acquired legal significance.¹²³ Building on prior argument in this thesis, this section suggests that the legal significance was most likely an administrative matter, subject to the strict

¹²¹ 5 *Statutes of the Realm* 1625-1680, 429.

¹²² Hamburger, above 97, 687-689.

¹²³ Schechter, above 107, 20, 21.

rules of the registry. In the *Case of the Swans*,¹²⁴ the registry was set up directly by the crown. In the case of product marks, this section asks whether registries were set up by a variety of statutes, merchants' customs and international regulations.

Schechter stated that in the English law of the fourteenth and following centuries, merchant's marks afforded almost conclusive evidence of proprietary right in the goods on which they were affixed. For example, prior to the time of Edward III,¹²⁵ when a ship was lost at sea and the cargo washed up onto land, the goods belonged to the king as a wreck unless a dog or other living animal escaped by which the owner might be discovered, or unless there was a merchant's mark affixed to the goods.¹²⁶ This example of a kind of escheat suggested an underlying crown interest in the title in manufactured goods. It gives rise to the question as to how goods could be identified on board ship to prevent conversion or theft.

During the reign of Edward III,¹²⁷ it appeared that shipping was in continual danger from piracy on the high seas. The 1353 statute of 27 Edward III, c. 13 was passed to provide that foreign merchants who had been robbed of their goods at sea or on shore should have recovery of the goods upon proof of their property, without having to sue at common law. It stated thus.

We will and grant, That if any Merchant, Privy or Stranger, be robbed of his Goods upon the Sea, and the Goods so robbed come into any Parts within our Realm and Lands, and he will sue for to recover the said Goods, he shall be received to prove the said Goods to be his own by his Marks, or by his Chart or Cocket or by good and lawful Merchants, Privy or Strangers; and by such Proofs the same Goods shall be delivered to the Merchants, without making other Suit at the Common Law: And in case that any Ships, going out of the said Realm and Lands, or coming to the same, by Tempest or other Misfortune, break upon the Sea Banks, and the Goods come to the Land, which may not be said Wreck, they shall be presently without fraud or evil device delivered to the Merchants to whom the Goods be, or to their servants, by such proof as before is said, paying to them that have saved and kept the same, convenient for their Travel; that is to say, by the discretion of the Sheriffs and Bailiffs, or other our Ministers, in places guildable, where other Lords have no franchise, and by the advice and assent of four or six of the best or most sufficient discreet men of the country; 2nd, if that be within the franchise of other Lords, then it shall be done

¹²⁴ 4 Co Rep 82.

¹²⁵ 1327–1376.

¹²⁶ Schechter, above 107, 27.

¹²⁷ 1327–1376.

by the Stewards and Bailiff, or Wardens of the same Franchises, and by the Advice of four or six discreet Men of the Country¹²⁸

Prescribed by this statute as the three methods of proof of ownership were the marks appearing on the goods, the chart, or evidence of good and lawful merchants. Either one could trigger this summary procedure for recovery. The so-called “chart” suggests a reference to the *book of lading*, which was the precursor to the bill of lading.¹²⁹

The Selden Society reported that the proper jurisdiction for this summary procedure for recovery was in the Court of Admiralty.¹³⁰ During the Elizabethan and Stuart reigns, the Admiralty Court was the chief commercial court. Matters of bills of lading, bills of exchange, general average, insurance, and other matters strictly of the law merchant were litigated very rarely in the common law courts at Westminster during these times. However, the Admiralty Court began to fall into decay after the restoration, beginning in 1660, and by 1697, the common law courts were making definite pronouncements in matters of the law merchant.¹³¹

In the 1771 case of *Hamilton and Smythe v Davis*,¹³² the plaintiff invoked the 1353 statute of 27 Edward III, c.13.¹³³ It sought to recover hogsheads of tallow cast ashore from a wreck, which bore the plaintiff’s marks identical to those indorsed on the bill of lading. Gaskell stated that a bill of lading is literally a document that records certain goods as having been “loaded” on board a ship. In modern times, bills of lading are documents of title, and the bill itself may be transferred.¹³⁴ In *Hamilton and Smyth v Davis*,¹³⁵ Lord Mansfield preferred the summary procedure of the statute of 27 Edward III, c.13¹³⁶ to a claim of wreck, and found for the plaintiff.¹³⁷

¹²⁸ 1 *Statutes of the Realm* 1235-1377, 338.

¹²⁹ W P Bennett *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (Cambridge University Press, 1914), 5, 6.

¹³⁰ *Select Pleas in the Court of Admiralty, Vol. 1* (Selden Society Pub, 1894), introd 1.

¹³¹ Bennett, above 129, 13.

¹³² 5 Burr 2732; 98 ER 433, 434-436.

¹³³ 1 *Statutes of the Realm* 1235-1377, 338.

¹³⁴ Nicholas Gaskell *Bills of Lading: Law and Contracts* (LLP Professional Publishing, 2000), 2.

¹³⁵ 5 Burr 2732, 2737-2739.

¹³⁶ 1 *Statutes of the Realm* 1235-1377, 338.

¹³⁷ 5 Burr 2732, 2737-2739.

Schechter stated that the municipal authorities of the period continued to view merchants' marks as presumptive evidence of ownership.¹³⁸ However, this area of law began to move slowly into the common law courts, because of difficult evidential issues of events on the high seas.¹³⁹ The common law courts were slow to recognize the bill of lading as a legal document, because the merchants dealt with their own disputes according to their own customs. While there were a number of early references to the bill of lading or the book of lading, they were mere references and not definitions.¹⁴⁰ What appeared to be the first court decision on a bill of lading appeared in the 1791 case of *Evans v Martlett*.¹⁴¹ The case did not define it. However, the court held, *per curiam*, that a bill of lading meant that the consignee had property in the consignment. Additionally, Holt CJ held this property to comprise a bundle of rights of a kind allowing the consignee to freely assign its property in the goods.¹⁴²

Leggett said that the bill of lading referred to a document produced under the law merchant, and as such, was in the nature of international law.¹⁴³ Bennett stated that the bill of lading might be corroborated by the rules of the *Customs of the Sea*. This was a 14th century manuscript preserved at Paris, but probably drawn up at Barcelona sometime in that century.¹⁴⁴ Chapter LVII of the *Customs of the Sea* stated that every covenant, which the merchant entered into with the managing owners of the ship had to be fulfilled, if it was entered into the ship's book.¹⁴⁵ This book later became known as the *book of lading*.¹⁴⁶ Chapter XV stated that this register was stronger evidence than a private writing, and could not be contested.¹⁴⁷ It seems that this

¹³⁸ Schechter, above 107, 31.

¹³⁹ *Ibid.*

¹⁴⁰ *Chapman v Peers in Select Pleas in the Court of Admiralty, Vol 1* (Selden Society Pub, 1894), 44.

¹⁴¹ 1 LD Raym 272, also known as *Evans v Martell* 12 Mod 156, 156.

¹⁴² 1 LD Raym 272, also known as *Evans v Martell* 12 Mod 156, 156.

¹⁴³ Bill of Lading. A negotiable document transferable by endorsement, and is made singly, or in sets of two, three, four, or six, or even eight, and is signed by the master or purser of the vessel, or by an agent or clerk of the owners or charterers, or by a broker *per procuration* and in such cases the person so signing must be authorised to do so, either expressly or impliedly. Jurisdictions sought to ensure that the law merchant was the same everywhere so that merchants could rely on their ancient trade rules. Eugene A Leggett *Treatise on the Law of Bills of Lading* (Stevens & Sons, 2nd ed, 1893), 146.

¹⁴⁴ Bennett, above 129, 4.

¹⁴⁵ *Ibid.*

¹⁴⁶ Bennett, above 129, 5, 6.

¹⁴⁷ *Ibid.*

register created a reverse evidential onus, and as an apparently customary administrative device, a breach might have been indicative of fraud.

Sustaining this stance, in the 1534 case of *Chapman v Peers*,¹⁴⁸ the Court held as follows.

. . . suits between merchants of London that owners and masters or charterers of ships or their pursers are not bound and ought not nor is any one of them bound nor ought he to be bound to answer for goods or things carried or laden in their ships that are not entered mentioned or inserted in the book of lading.¹⁴⁹

Lawes stated that the original bill of lading was designed as conclusive evidence of agreement, not only that the goods had been received by the carrier, but also that a certain disposition had been made of them, that they had been laden or loaded, on board the ship.¹⁵⁰ This suggested that any wrongful dealings in the property rights in the transported goods were dealt with on a reverse onus, or strict liability, basis, and might have been indicative of fraud.

2 *Production Marks in the Regulation of Trade by the Gilds and Companies*

This section asks how production marks were related to product source and goodwill. It investigates how this goodwill was secured. It will examine also how artisans were regulated in the market by a system of seals and international regulations.

Damage to gild goodwill appeared to have been at the peril of its artisans. In this respect, Rogers said as follows. “The modern trade-mark is goodwill symbolised.”¹⁵¹ Schechter stated that while the modern trademark is an asset, the medieval mark which indicated source or origin was a distinct liability, no doubt because of its draconian and strict liability regime of administration. For medieval craftsmen, the trademark was a police mark, which was compulsory to have and to apply.¹⁵² The

¹⁴⁸ Bennett, above 129, 8, 9, citing *Select Pleas in the Court of Admiralty, Vol I* (Selden Society Pub, 1894), 44.

¹⁴⁹ Ibid.

¹⁵⁰ Edward Lawes *An Elementary Treatise on Pleading in Civil Actions* (Brooke and Clarke, 1806), 315, 316.

¹⁵¹ Rogers, above 68, 43.

¹⁵² Schechter, above 107, 38.

following statutes provided for compulsory sealing of all cloths manufactured in England, and these seals were signs of police-style regulation.

that then a Seal of Lead therefore ordained, and by the Treasurer of England for the time being provided, shall be set and hanged in the lowest part of the Edge of the same Cloth Streit or Kersey, for perfect knowledge to be had to All Cloth the Buyer thereof¹⁵³

This provision appears to have been supervised by the Treasurer of England for the benefit of the buyers. The reference to “perfect knowledge” appears to regulate product source, and arguably, that perfect knowledge could only have been inferred from a seal.¹⁵⁴

Cloth made within every such City Burgh and Town of this Realm; and of that Seales for every Shire of this Realm for the sealing of all manner Cloth made within every Shire, out of the said Cities Burghes or Townes of the same Shire, having on the one side your said armes and on the other side the name of the Shire therein inprinted.¹⁵⁵

This provision appears to have been designed to locate the manufacturing source of the cloth to a specific city or shire. This could have been for identifying someone who would have the obligation of answering for problems.

There were two aspects of economic history providing context for this discussion. The first was that until the latter part of the 15th century, so large a percentage of manufacturing was arranged on the gild system that it could be described as the whole organisation of industry.¹⁵⁶ Holdsworth said that even when the gilds became subject to national regulation, rather than municipal control, they were relied upon by the crown and parliament to supervise manufacturing and trade.¹⁵⁷ The second aspect was that crown grants of monopoly were widespread in gild charters. They were enforced with high standards of production.¹⁵⁸ Evans had reported “work must be good and legal . . . an infraction of the regulations must be reported that the gild may

¹⁵³ 4 Edward IV c 1 in 2 *Statutes of the Realm* 1377-1504, 404.

¹⁵⁴ Note the adduction by Socrates in Plato’s *Theaetetus* that information and knowledge are not the same. John M Cooper (ed), *Plato – Complete Works* (Hackett Publishing Company, 1997), 157, 158.

¹⁵⁵ I Richard III, c 8, in 2 *Statutes of the Realm* 1377-1504, 486.

¹⁵⁶ Schechter, above 107, 40.

¹⁵⁷ W S Holdsworth *History of English Law Vol IV* (Little Brown, 1922), 321.

¹⁵⁸ Schechter, above 107, 40.

not secure a bad reputation.”¹⁵⁹ This suggested the gild exercised a kind of property interest in the reputation of its artisans.

According to Schechter, seals arose to regulate markets.¹⁶⁰ Arguably, regulating a market was a way of regulating production. It appears that this style of regulation was by international commercial custom. At least since 1900, when the English city of Bristol published a volume of its medieval municipal records, traditionally called *The Little Red Book of Bristol*,¹⁶¹ historians had known of the existence, among other documents recorded in this book, of a Latin treatise entitled *Lex Mercatoria*.¹⁶² Carus-Wilson reported that Bristol boomed as a city of foreign trade in the 15th century. There was a busy industrial suburb of Bristol, situated by the River Avon, where there was the Weavers' Hall, Weavers' Chapel and Tucker Street. These signified Bristol's status as one of the leading manufacturing cities of England. *The Little Red Book of Bristol* recorded the ordinances, customs and liberties made for the commonalty of Bristol. It was Bristol's reference treatise of the *Lex Mercatoria*.¹⁶³

However, the name of Bristol appeared nowhere in the body of the *Little Red Book of Bristol* itself. The names used in certain examples of official correspondence included London, Boston, York, etc., in England, and Paris in France, but never Bristol. This suggests that the treatise may have been written elsewhere. Teetor stated that no copy has been found elsewhere, that dating of the treatise could be only approximate, and that the examples of inter-municipal correspondence recorded in it contained various dates, ranging from 10 Edward I in 1282 to 14 Edward I in 1286.¹⁶⁴

¹⁵⁹ A P Evans 'The Problem of Control in Medieval Industry' (1921) 36 *Political Science Quarterly*, 610-611.

¹⁶⁰ Schechter, above 107, 40.

¹⁶¹ F B Bickley (ed), *The Little Red Book of Bristol, Vol II* (W Crofton Hemmons, 1900).

¹⁶² Paul R Teetor 'England's Earliest Treatise on the Law Merchant: The Essay on *Lex Mercatoria* from The Little Red Book of Bristol (circa 1280 AD)' (1962) 6(2) *The American Journal of Legal History*, 178-210, 178.

¹⁶³ E M Carus-Wilson 'An Industrial Revolution of the Thirteenth Century' (1941) 11(1) *The Economic History Review*, 39-60, 62, 63.

¹⁶⁴ Teetor, above 162, 179.

The *Little Red Book of Bristol* stated that the law merchant was understood to have its source in the customs of the market place. Such market places were held only in five locales: in cities, fairs, seaports, market towns and boroughs, and the law merchant or law of the market place was always followed in those places.¹⁶⁵

Teetor described the market environment as follows. It was normal for apprentices and employee merchants to trade publicly and openly under the purview of their masters such that money, goods and merchandises were borrowed and lent for the use of their masters. The lenders would hand over no goods at all if they thought the apprentices and employee merchants were borrowing on their own accounts and not for their masters. An ordinance about ostensible authority, but also a preventative measure against the act of passing off, provided that the masters of such apprentices and employee merchants were to answer in the same manner for such goods and merchandises when delivered to them by the hands of their apprentices and employee merchants, as if they had received those same goods and merchandises by their own hands. This applied if both the apprentices and employee merchants were understood to have served openly under the authority of their masters. It also required that they were dealing with the goods of their masters.¹⁶⁶

Teetor stated that it was an established procedure that every market had a common seal. This seal was handed over for safekeeping to the lord or steward of the market and four persons of the same market, or more or fewer, as the community of the market might agree. The seal was guarded in the church or in another safe place where the community had ordered. It was always to be used under the private seals of two or three other people. These people had to be different from those who had the keys of the coffer or chest in which the market seal was guarded. The wordage on the impression of this seal, if it was for a city that had a mayor, was to be such as the following: "Seal of the mayor and community of the city of London for fairs and markets". If they did not have a mayor but a lord, their lord was not to be named in the wordage in the impression of their seals. This was because a mayor was one within his community, but a lord was above his community. The wordage of the

¹⁶⁵ Teetor, above 162, 181.

¹⁶⁶ Teetor, above 162, 191.

latter kind of impression was to be per the following example: "Seal of the town of St. Albans for markets".¹⁶⁷ This suggested that seals with wordage were for those of lower commercial/social rank, while wordless seals were for those of higher rank. Higher rank was represented by graphic symbols, arguably imitative of this attribute of royal seals.

Schechter said that "custom", "common profit" and artisan personal character appeared to be elements of gild reputation. Many of the gilds had regulations designed to prevent the taking of custom by one craftsman from another by the inducing or enticing of customers away or by displaying wares in an open street or in booths.¹⁶⁸ Development of individual custom was repressed in this way among the members of the gild. There was, however, a collective custom. It was enforced by prohibiting guildsmen from using a mark or sign of greater prominence than another, or to exploit improperly the gild seal affixed to goods, which conformed properly to gild standards.¹⁶⁹ Lipson noted that shoddy wares or products imperfect in workmanship often constituted a police offence or a violation of police regulations, and also an injury to the collective goodwill of the gilds.¹⁷⁰ It appeared to cover misrepresentation of fact as to product quality, and damage to goodwill. The Little Red Book of Bristol illustrated this police character.

Whereas complaint is made that where diverse ordinances have been made on the working of woollen cloths to the intent that good and true cloth shall be made in the town, as well for the preservation of the good fame of the same as for the profit which they shall take on the sale of their cloth, the weavers exercising their craft in narrow instruments which men call "Osetes" have greatly defamed the said craft by the fraudulent cloths which they have made both from the small pieces of thread which men call thrums and thread which is called "ab" in place of thread which is called Warp, and other defaults, it is ordained by the Mayor and good people aforesaid that henceforth there shall be living in the said town or suburb but five men only exercising the said craft of Osetes on pain of half a mark when any one is convicted thereof¹⁷¹

¹⁶⁷ Teetor, above 162, 201, 202.

¹⁶⁸ Schechter, above 107, 43.

¹⁶⁹ Schechter, above 107, 44.

¹⁷⁰ E Lipson *An Introduction to the Economic History of England* (A & C Black Ltd, 3rd ed, 1923), 297-299.

¹⁷¹ Bickley, above 161, 40, 41.

Lipson noted that the ideal of the common profit was arguably a statement of collective goodwill. It was policed by sanctions against bad workmanship, in the illustrative instance of the Pewterers of London, as follows:

At the first default the offender was condemned to lose the defective ware, at the second he was also punished, and at the third he was expelled from the craft for ever: he had sullied the reputation of the gild and damaged its good name in the eyes of the public, upon whose favour the craftsmen were dependent for their market.¹⁷²

An example of a customer complaints process at Bristol was as follows:

If any tailor lose [spoil] by his evil working a cloth or garment to him delivered to be cut, and the possessor complain to the master and wardens, the latter shall examine into the matter and the customer's loss be made good, so every tailor shall be better advised to cut well and sufficiently the cloth that is delivered to him.¹⁷³

Such a process description suggested a pre-determined outcome to the investigation. As an aside, a predetermined outcome would be strong evidence of a presumption against the defendant. To sustain this proposition, the following passage records a 1316 complaint by the Potters of London to the Mayor and Aldermen, concerning certain practices.¹⁷⁴

[Those who] buy in divers places pots of bad metal and then put them on the fire so as to resemble pots that have been used, and are of old brass; and then expose them for sale . . . to the deception of all those who buy such pots: for the moment that they are put on the fire and become exposed to great heat they come to nothing, and melt. By which roguery and falsehood the people are deceived and the trade aforesaid is badly put in slander.¹⁷⁵

The following early case dealing with allegations of *de facto* passing off was recorded in two entries in the Rolls of the Mayor's Court of London for 1303.¹⁷⁶

A jury of the venue of St Clement's Lane, consisting of Thomas de Wynton and others, said on oath that Stephen de Wynton did not make the brown bread (*panum bissum*) which was seized in the bakehouse of Thomas de Wrotham in St Clement's Lane, for which he was arrested on the ground that the bread weighed 20s 8d less than it ought to do, but that a certain Thomas de Bedeford, oven-man (furnator) of Thomas de Wrotham, made it and sealed it with the seal belonging to the house of his master, to his master's

¹⁷² Lipson, above 170, 296, citing C. Welch, *History of the Pewterers' Company*, 1902, i. 4.

¹⁷³ Lipson, above 170, 296, citing Fox, *Merchant Tailors*, 35, 50 (1401).

¹⁷⁴ Schechter, above 107, 46.

¹⁷⁵ H T Riley *Memorial of London and London Life, In the Thirteenth, Fourteenth, And Fifteenth Centuries* (Longman's Green & Co, 1868), 118.

¹⁷⁶ Schechter, above 107, 53.

profit. Judgment that Stephen go quit, and that Thomas de Wrotham be distrained to answer what may be charged against him.¹⁷⁷

The following entry was recorded in the Rolls of the Mayor's Court of London for 1303, four days later.

A jury was summoned from the venue of St. Clement's Lane by Candelwyk strete to say whether Thomas de Wrotham made a certain brown loaf &c . . . Finally a jury consisting of Stephen le Potter and others said on oath that the above Thomas had no profit from bread made in his bakehouse, except 4d the quarter, which was the rent for the use of the bakehouse and utensils, and that a certain Thomas de Bedeford made the bread and sustained judgment for the same. Judgment that the defendant be acquitted.¹⁷⁸

Noting that the trial was purely for the act, it appeared that the customary penalty for "false bread" was the hurdle, or later, the pillory. Thomas recorded that the law was that the baker of defective bread was to be drawn upon a hurdle from the Guildhall to his own house, through the great streets where the people were assembled, in the dirtiest of streets, with the faulty loaf hanging from his neck.¹⁷⁹ This suggested that faulty artisanship, where the production mark did not correspond to bread quality, would convict the artisan on a strict liability basis, purely by extrinsic evidence of the quality of the bread.

3 *Development of the Law of Certification Marks*

The chapter 2 discussion of quo warranto suggested a commercial ranks system, enforced at its base by certification and accreditation. This section investigates how marks were used to certify artisans, to trace and police their work.

The history of certification marks is based on regulation, namely the process by which governments imposed requirements on enterprises, citizens, and the government itself, by way of laws, orders and other rules to protect values such as the quality or quantities of goods, public health or safety.¹⁸⁰

¹⁷⁷ Arthur Hermann Thomas *Calendar of Early Mayor's Court Rolls, City of London (England) Lord Mayor's Court, City of London (England) Court of Common Council* (Library Committee, The University Press, 1924), 152.

¹⁷⁸ Thomas, above 177, 153.

¹⁷⁹ Schechter, above 107, 55.

¹⁸⁰ Jeffrey Belson *Certification Marks* (Sweet & Maxwell, 2002) 6.

Belsen defined the certification mark as follows.

A certification mark is a mark, which indicates that certain characteristics of goods or services, in connection with which the mark is used, are certified. Whereas the legal perception of ordinary trademarks is primarily one of individual source designation, certification marks are upheld as indicia of conformity of goods or services to particular standards, which are stipulated by the proprietor. Thus a certification mark is a guarantee that goods or services, in connection with which the mark is used, conform to certain standards¹⁸¹

The guilds controlled the markings on products, so that they could control, police and enforce standards of workmanship, the quality of merchandise, and weights and measures. Therefore, these marks were described as liability marks, police marks or regulatory marks. Enforcement was by seizing noncompliant or nongild wares. There was a right to punish offenders in the guild's own court of justice.¹⁸²

Craftsmen had their own marks, and guilds had their own marks. The craftsman's mark would represent a control and regulatory trace to an offending craftsman. However, the guild mark, as a mark of the association as a whole, would represent an assurance that the so-marked goods were the outcome of authorized guild workmanship. In this way, the guild mark identified and distinguished the goods from those of other sources.¹⁸³

As a descriptive example, because of the prominence of their products, the Goldsmiths were subject to significant regulatory legislation, in the fourteenth and fifteenth centuries. Craftsmen, dealers, assayers and wardens of the craft could each be held liable for unauthorized marking and selling of wares. The craft was held responsible at all levels for properly marking, or failing to mark, or deal in compliant goods.¹⁸⁴

The first statute regulating the standard of silver and gold was enacted in 1300, as 28 Edw I, c 20, stated as follows.

¹⁸¹ Belsen, above 180, 1.

¹⁸² Belsen, above 180, 6.

¹⁸³ Belsen, above 180, 7.

¹⁸⁴ Ibid.

IT is Ordained, That no Goldsmith of England, nor otherwhere within the King's Dominion, shall from henceforth make, or cause to be made, any Vessel, Jewel, or any other Thing of Gold or Silver, essayed and touched, except it be of good and true Allay, that is to say, Gold of a certain Touch, and Silver of the sterling Allay, or of better, at the Pleasure of him to whom the Work belongeth; and that none work worse Silver than Money; and that no Manner of Vessel of Silver be marked depart out of the Hands of the Workers, until it be essayed by the Wardens of the Craft; and further, that it be marked with the Leopard's Head; and that work no worse Gold than of the Touch of Paris; And that the Wardens of the Craft shall go from Shop to Shop among the Goldsmiths, to essay if their Gold Business or be of the same Touch that is spoken of before; and if Goldsmiths they find any other than of the Touch aforesaid, the Gold shall be forfeit to the King¹⁸⁵

The key points of the full version of this provision were as follows. First, the alloy should be of a certain touch.¹⁸⁶ Second, silver should not be worse than money. Third, the workers should not be trusted on their own but should be supervised by Wardens of the Craft. Fourth, finished work must be marked with the Leopard's Head. Fifth, if any Goldsmith were to be attainted¹⁸⁷ he should be imprisoned. Each of these key points is highly subjective and therefore subject to an administrative discretion. However, the fifth point prescribed mandatory prison after the discretionary disciplinary penalty had been suffered. These presumptions against the workers, including that of attainder, were arguably indicia of a strict liability regime based on commercial ranks.

Later, in 1363, a statute of 37 Edward III, c. 7 enacted that each Goldsmith must have his own mark, for which he was to be held responsible. That mark was to be struck into his work next to the king's mark. The provision stated thus.

ITEM, It is ordained, That Goldsmiths, as well in London as elsewhere within the Realm, shall make all Manner of Vessel and other Work of Silver well and lawfully of the Allay of good Sterling: And every Master Goldsmith shall have a Mark by himself, and the same Mark shall be known by them which shall be assigned by the King to survey their Work and Allay: And that the said Goldsmiths set not their Mark upon their Works till the said Surveyors have made their Assay, as shall be ordained by the King and his Council; and after the Assay made, the Surveyors shall set the King's Mark, and after the Goldsmith his Mark, for which he will answer: And that no Goldsmith take for Vessel White and full for the Weight of a Pound that is to say, of the Price of

¹⁸⁵ 1 *Statutes of the Realm* 1235-1377, 140, 141.

¹⁸⁶ This presumably meant a certain quality to the touch.

¹⁸⁷ Attainder. A bill of attainder was a law that punished a person without permitting a trial or fair hearing in a court of law. It was punishment by legislation. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

Two Marks of Paris Weight, but Eighteen Pence, as they do at Paris; and that no Goldsmith making White Vessel shall meddle with gilding, nor they that do gild shall meddle to make White Vessel: And they which shall be so assigned in every Town, shall make their Searches as oftentimes as shall be ordained; and for that which shall be in the Goldsmith's Default, they shall incur the Pain of Forfeiture to the King the Value of the Metal which shall be found in Default.¹⁸⁸

The key points of this provision were as follows. First, each master was to have a mark assigned to him by the king. Second, private marks were not to be applied until the king's mark was administratively approved for application. Third, private marks were answerable to officials on a reverse onus basis. Fourth, meddling was proscribed. Fifth, searches could result in an instant forfeiture to the king. This suggested indicia of a strict liability regime.

In contravention of this legislative regime, a 1468 case illustrated the typical passing-off style of mischief of the time. In that case, Derek Knyff and Thomas Gomercy were imprisoned for five days and fined 20 shillings, by the Guild of Goldsmiths, for manufacturing substandard silver spoons. These bore counterfeit Leopard's Head marks, and were found on the premises of John Fabian in Coggeshall, Essex.¹⁸⁹

Belsen continued that despite strict enforcement, unscrupulous traders continued to evade the law and sell substandard silver. Consequently, the 1423 statute of 2 Hen. VI. c. 14 tightened the law, and was stated as follows.

ITEM, That no Goldsmith, nor Worker of Silver, sell any Workmanship of Silver, unless it be as fine as the Sterling, except that of Silver, unless the same need Souder in the making, which shall be allowed according as the Souder is necessary to be wrought in the same. And that no Goldsmith nor Jeweller, nor any other that worketh Harness of Silver, shall set any of the same to sell within the City, before that it be touched with the Touch of the Leopards Head, if it may reasonably bear the same Touch, and also with the Mark or Sign of the Workman of the same, upon Pain of Forfeiture of the Double, as afore is said; and that the Mark and Sign of every Goldsmith be known to the Wardens of the same Craft. And if it may be found, that the said Keeper of the Touch touch any such Harness with the Leopard's Head, except it be as fine in Allay as the Sterling, that then the Keeper of the Touch, for every Thing so proved not as good in Allay as the said Sterling, shall forfeit the Double Value to the King and to the Party, as is above recited in Manner and Form as before is recited within the City of London. And the Justices of Peace, Mayors and Bailiffs, and all other having Power as Justices of Peace, shall hear, inquire,

¹⁸⁸ 37 Edw III c VII in 1 *Statutes of the Realm* 1235-1377, 380.

¹⁸⁹ Belsen, above 180, 16-24.

determine by Bill, Plaint, or in other Manner, of all that do contrary to the said Ordinances, and thereof to make due Execution by their Discretions¹⁹⁰

This statutory provision created the position of a Keeper of the Touch. This task was the company warden's duty. Another member of the company was to assist him, if required.¹⁹¹

The key points of this provision were as follows. First, silver work had to be as fine as Sterling or the maker forfeited double value. Second, there was a prohibition against selling within the City before the product was marked with the Leopards Head and with the mark or sign of the workman. The penalty for breaching this was forfeiture of double the product's value. Third, Justices of the Peace were to hear matters of breach of these rules and make execution by their discretion. Arguably, through the absence of assessment of guilty *mens rea*, this was a strict liability regime.

Under the 1478 statute of 17 Edward IV, c.1, an additional mark was created, as an assay mark. It was introduced to identify the assayer. The assay mark appeared next to the king's mark and the maker's mark. It was changed every year with the annual change of the wardens of the guild. This statute held the goldsmiths' company liable. They were fined if inspectors found substandard silver to be marked as good.¹⁹² It was stated as follows.

Nor that no Goldsmith, Jeweller, nor other Worker of Harness of Silver, shall set no Harness of Silver Plate, nor Jewel of Silver to sell, from the said Feast of Easter, within the said City of London, or within Two Miles of London, before it be touched with a Touch of the leopard's head crowned, such as may bear the same Touch, and also with a Mark or Sign of the Worker of the same so wrought within the City of London, or Two Miles of the same, upon Pain of Forfeiture of the Double Value of any such Silver wrought and sold to the contrary. And that the Mark or Sign of every Goldsmith be committed to the Wardens of the same Mystery; and if it may be found that the said keeper of the Touch of the leopard's Head crowned, aforesaid, do mark or touch any such Harness with the Leopard's Head, if it be not as fine in Allay as the Sterling, then the said keeper of the said Touch, for everything proved not of as good allay as the Sterling, shall forfeit the double Value; the same Forfeitures to be divided into Two.¹⁹³

¹⁹⁰ 2 *Statutes of the Realm* 1377-1504, 224, 225.

¹⁹¹ Belson, above 180, 8.

¹⁹² *Ibid.*

¹⁹³ 2 *Statutes of the Realm* 1377-1504, 457.

The key points of this provision were as follows. First, products could not be sold within the City of London, or within two miles of London, before it was marked with the leopard's head crowned. Second, there was a provision for fining the Keeper of the Touch for false certification. This was arguably a strict liability regime. Also, the Leopard Head mark had been amended by the statute to include a crown. This suggested a symbolic crown interest in regulating these wares.

In the London Coopers' trade, compulsory marking was implemented to suppress the sale of oil and soap barrels to brewers. These barrels were to be used for containing ale and authorities no doubt wanted to preserve the ale's quality. Marking was also designed to stop the use of inferior materials in the barrels, such as unseasoned wood. The Court of Aldermen decreed¹⁹⁴ that all coopers must bring all their goods into the Chamber of London to be marked. A duplicate of the barrel maker's mark was recorded there against a register of the maker's name. In addition, the authorities inspected places of business, seized unapproved vessels, and fined the holders.¹⁹⁵

D *Conclusion*

This chapter sought to build on the proposition in chapter 2 that commercial ranks were related to the differential levels of commercial status, by arguing that these ranks were represented graphically on royal seals as the higher status, and represented as strata of trademarks for the lower levels of status.

There was argument that the graphic representations on royal seals were related to a strict liability enforcement regime against passed off goods. Grants made in charters were made by the sovereign under the royal seal, followed certain symbolic customary rules. Thus, a royal seal had its own administrative apparatus, which flowed down through the commercial ranks, using the devices of prerogative orders. With prerogative orders, the Court of Hustings had complete control of matters resembling the later tort of passing-off.

¹⁹⁴ At 9 Hen IV (1407-8).

¹⁹⁵ Belson, above 180, 8.

There was argument that various strata of administration were used to enforce application of royal seals. The king had an administrative system to use the privy seal to create actionable warrants for the application of the great seal. Seals existed in a system of ranks, passing through four levels of public administration before validating a grant or charter.

The discussion of the swan mark set forth a schema as to how its customary administrative system might have manifested lower down the commercial ranks. Administrative rules were applied by the king's officials to the operation of an administrative registry, by which any derogation by the common man from these administrative rules would render him strictly liable in tort. Should this theoretical common man represent that personal property that he made *per industriam* were his own property, then this would be a legal misrepresentation.

The investigation of printers' devices suggested a wrongful use of another's printers' device might be heard in the Star Chamber, by inquisitorial process, gathering and applying all the existing ancient customs and applicable statutes. In the alternative, a breach could be tried in the reverse onus civilian Court of Chivalry, if the device was heraldic. Printers' devices represented crown licence to publish, administered by the clergy. A breach of licence to publish could be punished in the Star Chamber as for the underlying legal norm of sedition against the king.

Crown regulation of proprietary marks in the middle-ages offered an explanation of how merchants might have used proprietary marks to recover stolen property using registries. Since stolen property could be rebranded and passed off as the products of another manufacturer, registries in various forms were set up by a variety of statutes, merchants' customs and international regulations. This meant it was arguable that any wrongful dealings in the customary property rights in the transported goods, which could result in passing off, was dealt with on a reverse onus strict liability basis, and were indicative of fraud.

Production marks in the regulation of trade by the guilds and companies suggested that damage to guild goodwill appeared to have been at the peril of its artisans. Each market operated under its own seal. Seals with wordage were for those markets of lower social rank, while wordless seals were for those of higher rank. Higher rank was represented by seals with graphic symbols, mimetic of a cognate attribute of royal seals. Thus, faulty work would be traced to the offending artisan via a product seal. The artisan was convicted on a strict liability basis, purely by evidence of product quality, which it might be alleged caused scandal to the guild.

The law of certification marks suggested that the guild mark would represent an assurance to the public that the so-marked goods were the end result of authorized guild workmanship and properly authorized inspection. Building on this, any breach of an assurance to the public would be complete at the time of public perception of breach, regardless of the defendant's intent. This would be so, because the mark was a public mode of communication to the consumer.

There was an administrative system controlling graphic marks from royal seals down through various commercial ranks to individual artisan marks. Both seals and marks were controlled by an administrative system based on the underlying rules of registry. In this kind of system, a defendant's misrepresentation in the registry inferred defendant liability at the time the registry entry became a misrepresentation. Also, registries were operated by customary procedures. The customary nature of registry procedure was why the identified administrative system continued to inhere within the policing of graphic representations. In consequence of this, passing off any mark controlled by such an administrative registry could be enforced by a strict liability jurisdiction. By further inference, it was argued that passing off any goods represented by such a mark would be sanctioned with strict liability due to the public nature of the mark, coinciding with suggestions of fraud.

IV THE GLOUCESTERSHIRE CLOTHIER'S CASE

A Introduction

In this chapter, the argument builds on the argument in chapter 2 that guild business norms, and other customary norms, were strict liability when enforced, and breaches of them might have been indicative of fraud. There is also argument building on the proposition, expressed in chapter 3, that printers' devices were not subject to a passing-off regime, but instead, were subject to crown-controlled administrative regulation via the clergy, through the Stationers Company, Star Chamber and the Earl Marshal's Court.

This chapter is structured to address the thesis central question of whether or not passing-off is a strict liability tort, and if so why and how, by conducting an historical examination of the *Gloucestershire Clothiers' Case*¹ and some of its consequences. The significance of this case was that Doderidge J said, in the 1618 case of *Southern v How*,² that what was later to be recognised as the *Gloucestershire Clothier's Case* was the first recorded case of passing-off.³ Stolte noted that *Southern v How* was first published in Popham's Reports in 1656 at 79 Eng Rep 1243. The second report of the case was in J. Bridgeman's Reports in 1659 and cites the case as decided in 1616. A third report of the case was published in Croke's Reports in 1659 indicating that the case was heard in 1618. Two later abstracts of the case appeared in Rolle's Reports published in 1676. The one is inconsistent with the other in several ways, including disagreement as to the date of hearing. Therefore, this chapter comprises analysis and interpretation of the reported pleadings in the *Gloucestershire Clothiers' Case*. It also seeks to build a context in procedural law in which the *Gloucestershire Clothiers' Case* might be interpreted, in its relationship to the development of the tort of passing-off.

¹ Later identified by Professor Baker as *J G v Samford* (1584) unrep in J H Baker *An Introduction to English Legal History*, (Butterworths LexisNexis, 4th ed, 2002), 459.

² Cro Jac 468, 471.

³ Passing-off is concerned with misrepresentation made by one trader which damages the goodwill of another trader. Misrepresentation, damage and goodwill are therefore the three essential elements of the tort, and are sometimes referred to as its 'classical trinity'. C Wadlow *The Law of Passing-Off – Unfair Competition by Misrepresentation* (Sweet & Maxwell, 2004), 6.

This chapter is divided into the following three sections of Seals on Cloth and the Gloucestershire Clothier's Case, Pleading the *Gloucestershire Clothier's Case* and the Doctrine of secondary meaning 1838 – 1896

The section Seals on Cloth and the *Gloucestershire Clothier's Case* comprises the subsections of fraud and deceit in the *Gloucestershire Clothiers Case*, the mis-use of product seals, and Passing-off in Star Chamber. The subsection on fraud and deceit in the *Gloucestershire Clothiers Case* investigates the various manuscript reports of the *Gloucestershire Clothiers Case*. The subsection on the misuse of product seals examines the history of their regulatory mechanisms to see how they might have created a strict liability enforcement scheme. The subsection on Passing-off in Star Chamber investigates the outcomes of continuing crown attempts to stamp out deceit in the trades. The section on applying classical styles in pleadings to the *Gloucestershire Clothier's Case* asks the question of whether the styles of pleading in the Court of Common Pleas might have created a strict liability procedure for passing-off. The section on the doctrine of secondary meaning 1838 – 1896 will investigate how an unsuccessful argument pleaded in *Southern v How* might have reemerged as a strict liability doctrine that would allow a rival trader to sue when not directly damaged by a misrepresentation.

In this chapter, the proposition is argued that the crown resisted the *damnum absque injuria* determination of the *Gloucestershire Clothier's Case*, in part, by means of the Jupp case in Star Chamber. Later, Lord Herschell deduced in *Reddaway v Banham*⁴ that no man might make a direct false representation to a purchaser that enabled that purchaser to tell a lie to someone else who would be the ultimate customer.⁵ There is argument in this chapter that this deduction would suggest an implication of strict liability into the actions of subsequent sellers passing off goods while unaware of the lie, but continuing the fraud of another.

⁴ [1896] AC 199, 207-215.

⁵ [1896] AC 199, 212, 213.

B *Seals on Cloth and the Gloucestershire Clothier's Case*

1 *Fraud and Deceit in the Gloucestershire Clothiers Case*

This section investigates the various manuscript reports of the *Gloucestershire Clothiers Case* and then seeks to place in context the various allegations of fraud and deceit in the case. Doderidge J referred to the case in the 1618 case of *Southern v How*,⁶ in the following context, in the Hilary Term of 15 Jac. 1.⁷ The case might be summarised as follows.⁸

In *Southern v How*,⁹ it appeared that the plaintiff was the principal's agent, in his action against the merchant principal. A merchant consigned jewels to his factor to sell. The factor appointed an agent to dispose of them, and received from him the net proceeds of the sale. The purchaser discovered afterwards that the jewels were counterfeit. He had the agent arrested, and recovered the purchase money. It was argued for the plaintiff that where a person was party to a fraud, the court should presume that all following that fraud was his, even though this party might be unaware of the fraud. The defendant was the first actor in this fraud, first by his knowing they were counterfeit, and secondly by sending his factor and selling the counterfeit goods in Barbary. Doderidge J cited an un-named case in *Southern v How*,¹⁰ which he placed in the year of 33 Elizabeth, and heard in the Court of Common Pleas. In that case, a clothier of Gloucestershire sold very good cloth. In London, if they saw any cloth with his mark, they would buy it without any further investigation. Another clothier made poor quality cloth and put the first clothier's mark upon it without a legal arrangement to do so. The customer who bought the cloth brought an action on the case for this alleged deceit. According to Doderidge J, the court judged this action as maintainable. The Court, in the principal case, inclined in their opinions against the plaintiff agent. The court held that an action would not lie by the agent against the merchant, even though the agent was ignorant of the

⁶ Cro Jac 468, 471.

⁷ But alternatively in 1618, by one of several conflicting reports, as noted above.

⁸ Cro Jac 468, 471.

⁹ Ibid.

¹⁰ Ibid.

fraud when he made the sale. This would be especially so if the jury did not find that either the merchant directed the factor to employ the agent, or he ordered him to conceal the fact of the jewels being counterfeit.¹¹

The argument in *Southern v How*¹² ran as follows. A *prima facie* theory was argued for the plaintiff agent that where one was party to a fraud, all which followed by reason of that fraud should be presumed as his. In support of this pleading, *Sander's Case*¹³ and *Agnes Gore's Case*¹⁴ were cited by counsel. Each was apparently an explanation and illustration of how fraud could arise without proof of *mens rea*.

In *Sander's Case*,¹⁵ the defendant gave his wife an apple, which he had poisoned with arsenic. He wanted to kill her so that he could marry another woman. The wife took a bite from the apple then gave it to their daughter. The daughter died. The Court held that the defendant was liable for the murder of his daughter. His intention to kill his wife was transferred to the daughter. In *Agnes Gores Case*,¹⁶ "A" put poison into a pot intending to poison "B" and then put the pot in a place where she thought "B" might come and drink it. However "C" came by the pot, and "A" had no malice to "C", and "C" drank the poison and died from it. The Court resolved that this was a case of murder. The court reasoned that the law itself coupled the event with the intention, and it coupled the end with the cause. However, if a person laid down rat poison only to kill rats, then if anyone ate the rat poison it would not be a felony, unless the person had a felonious intent.

The court held against these two arguments in the substantive case. This was because the deceit on the plaintiff was practised solely by the servant/agent without his master's authority.

¹¹ Ibid.

¹² Cro Jac 468, 468-471.

¹³ 1 Wms Saund 263, 263.

¹⁴ 9 Co 81 b from Sir Thomas Ireland *An Exact Abridgment in English of the Eleven Books of Reports of the Learned Sir Edward Coke Knt* (I Riley, 1813), 275.

¹⁵ 1 Wms Saund 263, 263.

¹⁶ 9 Co 81b from Sir Thomas Ireland *An Exact Abridgment in English of the Eleven Books of Reports of the Learned Sir Edward Coke Knt* (I Riley, 1813), 275.

In support of the court's holding against the plaintiff in *Southern v How*¹⁷, Doderidge J cited the 1584 *Gloucestershire Clothier's Case*. He placed this case in the year of 33 Elizabeth,¹⁸ and noted that it was heard in the Court of Common Pleas. In this reported version of that case, a clothier of Gloucestershire used to sell very good cloth.

It was alleged that if London customers saw any cloth with his mark on it, they would buy it without any further investigation as to quality or source. This apparently ignored the operation of the common law doctrine of *caveat emptor*, and thereby tended to limit any remedy to one in equity, where equitable fraud was strict liability, explained by Finlayson as follows.

. . . the maxim, at law is, *caveat emptor*: let the buyer take care and inquire. If he is told falsehoods, then he has a right of action; but if he makes no inquiries, at law he has no remedy, though he may in equity. This is the distinction between fraud in the legal and equitable sense, though even in equity there is no fraud in mere non-disclosure unless there is a duty to disclose, which there is not if the parties are in a position of equality in the transaction – that is, of equal knowledge and means of knowledge; and the doctrine of equitable fraud would only apply to matters in the knowledge only of the vendor, which he ought to disclose to the vendee.¹⁹

Another clothier made poorer quality cloth and put the first clothier's mark on it. The manuscripts recorded that this was with neither the privity²⁰ nor the warranty of the first clothier. The purchaser brought an action on the case for deceit against the clothier who sold the poor quality cloth.

Doderidge J did not recall, in this version of the case, whether the court was divided as to whether or not this form of action was maintainable. The same Professor Baker, mentioned in the introduction chapter to this thesis, maintained that the various

¹⁷ Cro Jac 468, 468-471.

¹⁸ This year, 1591, is not consistent among the various manuscripts, and should therefore not be taken as authoritative.

¹⁹ W F Finlayson *A Report of the Case of The Queen v Gurney and Others in the Court of Queens Bench: The Summing Up revised by the Lord Chief Justice with an Introduction Containing a History of the Case and an Examination of the Cases at Law and Equity applicable to it; or Illustrating the Doctrine of Commercial Fraud* (Stevens and Haynes, 1870), introduction, 12.

²⁰ Privity. A relation between two parties that is recognized by law. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

manuscripts²¹ showed that this case was one of deceit to the original user of the common law trademark. There was no written record either of any final or any mesne judgment in the *Gloucestershire Clothier's Case*.

Baker & Milsom reproduced the facts of the *Gloucestershire Clothier's Case* in the first of three manuscripts they cited.²² It began with the arguably significant designation of the plaintiff as a clothier. This was significant because it suggested the parties might have been subject to the ordinances of the various guilds of cloth workers, or to the strict liability doctrine of *suo periculo*, discussed above in chapter 2. Unwin's report that the London Guild of Cloth-Workers had its own Court in the years 1537-1639,²³ also suggested by the circumstances that the parties might have been subject to the strict liability doctrine of tradesman's peril, *suo periculo*.²⁴

In the *Gloucestershire Clothier's Case*, the plaintiff ran his business for 12 years at a place called "T" in a specified county. He was said to have used the art and mystery of making woollen cloths, called Reading kerseys, 'halfes' cloths and Bridgwaters. All those cloths that he made at T were said to be good, and without either fraud or deception. For the 12 years, he was accustomed to marking the cloths with the two letters "J.G.". Also he affixed onto them a sign called a tucker's handle.²⁵ This was apparently pursuant to the 1536 statute of 27 Hen. VIII, c. 12. This provision required every clothier to weave his token or mark into every cloth, before it could be sold lawfully. It stated as follows.

²¹ Baker cited three manuscripts, each of which reported the case at slight variants, J H Baker and S F C Milsom *Sources of English Legal History* (Butterworths, 1986), 615 *et seq*, citing Cory's Entries, BL MS Hargrave 123, fo 168v; J H Baker *An Introduction to English Legal History*, (Butterworths LexisNexis, 4th ed, 2002), 459.

²² Baker and Milsom, above 21, 615 *et seq*, citing Cory's Entries, BL MS. Hargrave 123, fo. 168v.

²³ George Unwin *Industrial Organization in the 16th and 17th Centuries* (The Clarendon Press, 1904), 228 *et seq*. Moreau reported that a charter had been granted to weavers in Gloucestershire in the time of Henry IV, which was 1399-1413. Simeon Moreau *A Tour to Cheltenham Spa or Gloucestershire Display'd* (R Cruttwell, 1788), 98.

²⁴ Pollock stated this doctrine as follows. Anyone who professes a craft, holds himself/herself out to have the common skill of that craft, and is answerable accordingly. If this person fails, it is no excuse that he or she merely did the best possible. The rule is that he/she must be reasonably skilled at his/her peril. The term "at his/her peril" is the index of strict liability because it means that the breach itself causes the punishment. Frederick Pollock *The Law of Torts* (Banks & Brothers, 1895), 18, 19.

²⁵ Probably the fuller's club. See the discussion below.

. . . cause to be woven his or their seal, token or mark in all and the cloth kersey and other clothes of their said seals, than every of the said Clothiers.²⁶

Also, by another statute, 3 & 4 Edward VI, c. 2, a clothier was required to set his seal of lead into the cloth.

That every clothier and clothmaker shall from the feast of clothiers from the Annunciation of our Lady next coming set his seal of lead to his cloth, declaring thereby the just lengths their cloths.²⁷

In both statutory provisions, there is arguably a missing logical step in an argument linking the word “his” with a form of sole use or ownership. Both were criminal provisions attended by punitive penalties. Applying criminal provisions in civil actions will be discussed in chapter 5, below.

To continue the facts of the case, the plaintiff sold these cloths throughout the 12 years at T, and at C within the same county. He also traded them in other places within England, at M in Wales, and overseas. At the wholesale level, he traded them to both English and foreign merchants. The Sergeant-at-law pleaded that the buyers were accustomed for the previous eight years to buy these cloths from J G in the specified places as “good and substantial”. The plaintiff pleaded that they were in fact “good and substantial”. This pleading was based on the affirmations of the plaintiff, his servants and factors. The plaintiff said that he made much gain from these sales, with which he supported his family.

The plaintiff alleged that the defendant was aware of all facts pleaded. He alleged that the defendant schemed and plotted to both hinder his sales and worsen his product’s reputation. He alleged that the defendant made and marketed cloths that were “ill, insufficient and unmerchantable, deceitfully marked with the letters ‘J G’ and the sign of the tucker’s handle”. It was further alleged, apparently by inference, that buyers purchased these cloths thinking they were cloths made by the plaintiff, and therefore, buyers bought them without further inspection. However, afterwards, buyers realised that the cloths were “deceitful, insufficient and unmerchantable”, in

²⁶ 3 *Statutes of the Realm* 1509-1545, 544, 545.

²⁷ 4 *Statutes of the Realm* 1547-1624, 101, 102.

size, quality and substance. It was alleged that this reversed the buyers' opinion and esteem of J G cloths, and as a result of this alleged deceit, other merchants began to refuse to buy J G cloths.

The *Gloucestershire Clothier's Case* was also set out in a second manuscript.²⁸ As stated above, it was also cited by Doderidge J in *Southern v How* at both (1618) Cro Jac 468, 471, and in Poph 144. Baker & Milsom regarded the previous and first-cited manuscript as inaccurate, as it reported that the action was brought by the buyer of the bad cloth for deceit, rather than by the aggrieved J G.²⁹ Arguably, later courts knew the case only from these imperfect citations. For example, see the 1742 case of *Blanchard v Hill*,³⁰ in which Lord Hardwicke stated as follows.

Every particular trader has some particular mark or stamp; but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it. Mr. Attorney-General has mentioned a case where an action at law was brought by a cloth worker against another of the same trade for using the same mark, and a judgment was given that the action would lie. But it was the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier; and there is no difference between a tradesman's putting up the same sign, and making use of the same mark, with another of the same trade. An objection has been made that the defendant, in using this mark, prejudices the plaintiff by taking away his customers. But there is no more weight in this than there would be in an objection to one innkeeper setting up the same sign with another.³¹

In this second version, J S made good cloth and J D made bad cloth. They were both clothiers. J D then put J S's mark on his own cloth and in this way obtained good business, referred to as *utterance*.³² J D's cloth was found to be bad. Because of this, J S's cloth was discredited and his business suffered. J S brought an action on the case against J D. Anderson CJ held that the action lay, even although the act complained of was a lawful act. Peryam J held that there was no action because it was *damnum absque injuria*.

²⁸ Baker & Milsom, above 21, 617, citing HLS MS 2071, fo 86.

²⁹ Fitzherbert is authority for the proposition that the buyer would have a cause of action in deceit. Anthony Fitzherbert *The New Natura Brevium of the Most Reverend Judge Mr Anthony Fitzherbert* (Savoy, 6th ed, 1718), 217.

³⁰ (1742) 2 Atk 484, from Lewis Boyd Sebastian *A Digest of Cases of Trade Mark, Trade Name, Trade Secrets, Goodwill, &c* (Stevens & Sons, 1879), 2, 3.

³¹ (1742) 2 Atk 484, from Sebastian, above 30, 2, 3.

³² Utterance. To go beyond; violating convention or propriety -- Middle English 15th Century. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

Weeks' 1879 treatise proposed that the doctrine of *damnum absque injuria* might be understood as follows. A tort was a civil wrong for which compensation in damages was recoverable. This was in contradistinction to a crime, which was punished by the criminal law system in the interest of society-at-large. Every invasion of a legal right, such as the right of property, or the rights incident to the possession of property or the right of personal security, constituted a tort. So also may an injury to the person, character or reputation of another, constituted a tort. In order to constitute a tort, two things must occur: actual or legal damage to the plaintiff; and, a wrongful act committed by the defendant.³³ In as much as a tort implied damage coupled with a wrongful act, *damnum absque injuria* was damage without a wrongful act, as the law understood the term.³⁴ The literal definition of the term *damnum absque injuria* was damage without injury. However, it was difficult to conceive of a damage done without a corresponding remedy to the party alleging itself to have been damaged. Thus, enlarging the above definition, still confined to the definitions of Latin transliterators, the term might be better explained as damage, loss, harm, injury, or hurt without wrong or injustice.³⁵ *Damnum*, in the civil law, was the diminution of a person's property and was either *factum*, already done, or *infectum*, apprehended or threatened. The former might arise from either mere accident or free will of another. The latter might have arisen during the exercise of a right enjoyed by the person causing it. In either case no reparation had to be made for causing it unless it was done wrongfully. In that case, the person injured was entitled to compensation. *Injuria*, in the civil law, was a broad term signifying every action contrary to law. In a specific sense, it meant the same as *contumelia*, outrage.³⁶ Strictly speaking, *injuria* was a wrongful act or tort that related to the defendant, and *damnum* was the loss sustained, or harm done, by an injury, and related to the plaintiff. The injury done must be a violation of a right to which the plaintiff was entitled. Also, the plaintiff must suffer legal damages from it.³⁷ Damage was defined as the loss caused by one person to another or to his property either with the design of injuring him or with

³³ Edward P Weeks *The Doctrine of Damnum Absque Injuria considered in its relation to the Law of Torts* Sumner (Whitney & Co, 1879), 2.

³⁴ Weeks, above 33, 4.

³⁵ Weeks, above 33, 6, 7.

³⁶ Weeks, above 33, 7n.

³⁷ Weeks, above 33, 7, 8.

negligence and carelessness or by inevitable accident. He who had caused the damage was bound to repair it, and if done with malice, might be compelled to pay beyond the actual loss. If damage was caused by accident without anyone's blame, the loss must be borne by the owner of the thing injured.³⁸ However, there were certain acts done, accidents and casualties occurring, by which there was a lawful use of one's own property occasioning loss to others. For such acts, the law afforded no remedy and they were designated as *damnum absque injuria*.³⁹

There was also a third manuscript identified by Baker & Milsom.⁴⁰ In this third version, Mr Sergeant Fenner pleaded that a clothier gave a slightly different version of the mark of another clothier. The difference was hardly noticeable. He put the bad mark on bad and false cloths, and the good cloths of the other were thereby discredited. Former London Recorder Mr Sergeant Fletewood submitted to the Court that an action on the case lay by the custom of London⁴¹ for counterfeiting another's mark.⁴² It is unclear from Baker & Milsom which representative roles Fletewood and Fenner held, only that they were Serjeants-at-law in the case.

Of relevance to this pleaded custom was the discussion in the 1675 case of *Hutchins v Player*,⁴³ which referred to an ancient custom of the City of London. The Court stated as follows.

To preserve trade, there is a necessity of order and government for regulation of it to prevent deceits and confusion. Cloths are one of the chief staple commodities and if every man might make whatever cloths he will, and make sale of cloth in substance, or in length, or mixed with false materials, it would bring slander upon us, and refuse upon our commodities and an impoverishment of the nation.⁴⁴

³⁸ Weeks, above 33, 7.

³⁹ Weeks, above 33, 8.

⁴⁰ Baker & Milsom, above 21, 617, 618, citing HLS MS Acc 704755, fo 118v.

⁴¹ In chapter 2 it was argued that enforcement of the customs of London was by strict liability procedures, the accused first being gaoled. It was also argued there that a breach of a London custom was indicative of fraud.

⁴² Baker & Milsom, above 21, 617, 618, citing HLS MS Acc 704755, fo 118v.

⁴³ *Hutchins v Player* Harg MSS No 55 fol 153, reported in Bannister, S (ed), from Hargraves Manuscripts *Reports of Judgments Delivered by Sir Orlando Bridgman when Chief Justice of the Common Pleas from Mich 1660 to Trin 1667* (Butterworths, 1823), 291, 292.

⁴⁴ *Ibid.*

Arguably, Fletewood submitted that this particular London custom was also the law of Gloucestershire, in the absence of any statute,⁴⁵ and should be held as such by the Court. In this respect, Noy defined custom as a second law, which could be either of the following two kinds. The first was general customs, in use throughout the realm, called maxims. The second was particular customs used in some certain county, city, town or lordship. He added that every maxim was a sufficient authority to itself, and only the courts could finally determine what operated as a maxim. This was because maxims were known only to the learned. He stated that a maxim should be construed strictly. However, a particular custom should be pleaded and tried by twelve men, unless it was a record in some court. He also stated that Cr Jac 80 was authority for the rule that a custom should not be construed so as to allow a person to do a wrongful act, and the rules for the requirements of a good custom could be found at Co Lit 110, 113b, 1 Bl Com. 77, Dav 31 B.⁴⁶

To reinforce Fletewood's credentials, Stolte stated that Winfield had identified William Fletewood as having been at one time the Recorder of London, and also, as the indexer of the Year Book series for the reigns of Edward V, Richard III, Henry VII and Henry VIII.⁴⁷ It is noted at *British History Online* that William Fletewood was Recorder of London in 1571, and was made a Serjeant in 1580. In 1592, he was made Queen's Serjeant.⁴⁸

To explain the office of Recorder, by the Royal Charter of Edward IV dated 9 November 1463, it was declared to be the ancient custom of London that the mayor and aldermen record all their ancient customs by word of mouth as often as anything was mentioned before any judges or justices touching their customs. This was done by an official holding the office of Recorder, and the records of the Recorder were

⁴⁵ The *Rhetorica ad Herennium* sets out six sources of law: nature; statute; custom; previous judgments; equity; and, agreement. Custom is defined in it as that which in the absence of any statute is by usage endowed with the force of statute law, which it defines as law set up by the sanction of the people. Cicero *Rhetorica Ad Herennium* (Harvard University Press, 2004), 91, 93.

⁴⁶ William Noy *The Grounds and Maxims and also an Analysis of the English Laws* (Middletown, 1808), 39-41.

⁴⁷ Keith M. Stolte, *How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter's Conundrum*, (1998) 88 TMR 564 at 590n, citing Percy H. Winfield, *The Chief Sources of English Legal History* 1925, 23.

⁴⁸ *British History Online*. < <http://www.british-history.ac.uk/report.aspx?compid=46798>> accessed 18 December 2010.

subject to being proved in Court, uniquely, by the evidential procedure of judicial notice, with only the Recorder himself appearing at the bar of the Court.⁴⁹

The question before the Court was whether or not an action on the case lay.

Anderson CJ said that the action did lie. Wyndham J agreed, provided the statute law⁵⁰ could be construed such that no clothier should give the mark of another.

Fletewood submitted that it had been adjudged in this way in *Longe's Case*⁵¹ in parliament. In that case, the counterfeiter was apparently a member of the House of Commons. Peryam and Mead JJ said that anyone might give whatever mark he wished, and it was *damnum absque injuria* to the other, and there was no action for deceit against a person who did a wholly lawful act.⁵²

Bower stated that deceit had its own contemporary meaning at the time of the *Gloucestershire Clothiers' Case*. He stated that an action in deceit was maintainable only at the suit of the representee to recover damages in respect of misrepresentation, the action being founded in tort.⁵³ He stated that this action was known at common law either as an action on the case for deceit, or an action for deceit. A bill for the same purpose in equity used to be called an equitable claim for damages. It had always been recognised in all courts that the principles of substantive law that applied to the two forms of proceedings, and the nature of the relief, were the same.⁵⁴ The action required proof of the following elements. If the plaintiff failed to establish any one or more of them, the action would fail utterly.⁵⁵ The elements were, first, that the alleged representation consisted of something said, written, or done, which amounted in law to a misrepresentation; second, that the defendant was the

⁴⁹ Alexander Pulling, *The Laws, Customs, Usages and Regulations of the City and Port of London* (William Henry Bond and Wildy and Sons, 2nd ed, 1854), 4; Year Book, 21 Edw IV 74, 78; 22 Edw IV 30; Co Litt 74; 2 Inst 126; 2 Roll Aor 579; Cro Car 516 *Player v Hutchins*, O Brid Com Dig *Exoins*, D, See Chapter 2.

⁵⁰ 27 Hen VIII c 12 at 3 *Statutes of the Realm* 1509-1545, 544, 545 and 3 & 4 Edward VI c 2 at 4 *Statutes of the Realm* 1547-1624, 101, 102, reproduced as above.

⁵¹ Stolte stated that this was possibly during the 1558 session of Parliament. Stolte was unable to find any records of this case. Stolte, above 47, 592.

⁵² The matter was heard in the Court of Common Pleas, a common law royal court, which was not seized of an equitable jurisdiction.

⁵³ George Spencer Bower, *The Law of Actionable Misrepresentation*, Butterworth & Co, London, 1911, 196.

⁵⁴ Bower, above 53, 196.

⁵⁵ Bower, above 53, 197.

representor; third, that the plaintiff was the representee; fourth, inducement and materiality; fifth, falsity; sixth, alteration of position; seventh, fraud; and eighth, damage.⁵⁶ However, a representee who knew the truth of the alleged misrepresentation was not deceived. In this way, the representee's knowledge of the truth was a good defence to the allegation of deceit.⁵⁷

In actions for passing-off, arguably no misrepresentation is made direct to the competitor. Nevertheless, the competitor's proprietary rights and interests are invaded, giving the competitor a cause of action either for an injunction or for damages. Bower noted that the *Gloucestershire Clothier's Case* was therefore not really an action in deceit, because it did not satisfy the deceit element that the plaintiff was the representee. He added that to succeed in an action of passing-off, the plaintiff had to prove that the public, and not the plaintiff, was deceived, and that damage and fraud were in concurrence.⁵⁸

In his history of the common law action of deceit, Bower traced the action through three historical threads. The first apparently existed at the time of King John,⁵⁹ and continued to exist, as meaning a variety of contempt for the crown.⁶⁰ The second was from the time of Henry VI⁶¹ until the nineteenth century, as a time of transition in the meaning of deceit. He said the third had the same meaning as it has in modern times.⁶² Of these, the first and second heads will be examined now in respect of their relevance to the court's treatment of the *Gloucestershire Clothier's Case*.

The first kind of deceit described the common law rule applying whenever the crown, or an officer or department of the state had been induced, by a misrepresentation of material matters, to grant any privilege to a subject. Where the rights and interests of any other subject would be curtailed, then that grant could be

⁵⁶ Ibid.

⁵⁷ Bower, above 53, 200.

⁵⁸ Bower, above 53, 197.

⁵⁹ 1199-1216.

⁶⁰ Bower, above 53, 381-402.

⁶¹ 1422-1461.

⁶² Bower, above 53, 381-402.

revoked, withdrawn, repealed or avoided, or even treated as void *ab initio*.⁶³ This was stated as follows.

If the king is deceived by misinformation of his interest his grant will be void, 9. Hen. VI. 28, for example, if the king granted a fair or market or similar on the same day on which there was an ancient fair, the grant would be void. Even if the king made the grant with certainty of knowledge and he was deceived, then the grant would be void because certainty of knowledge does not help a falsity.⁶⁴

This rule had been applied to charters of incorporation, privileges and monopolies in respect of inventions, trademarks and other exclusive rights and licences, such as a right to take a wreck.⁶⁵ In the 1820 case of *Alcock v Cook*,⁶⁶ Best CJ stated the principle in strict liability terms apparently similar to a process of vitiation of contract by fraud. His honour stated the rule in the following form, arguably conjectural.

We take it to be a principle of the common law of this country, that if the king makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the king has been deceived in that grant, and, therefore, that the grant is void.⁶⁷

This form of misrepresentation was illustrated in the 1853 case of *The Eastern Archipelago Company against The Queen on the Prosecution of Sir James Brooke*.⁶⁸ In that case, the charter issued by the crown contained a proviso that, should the grantee not comply with the directions and conditions contained in the charter, it would be lawful for the Queen, by any writing under the great seal or under the sign manual, to revoke and make void the charter either absolutely or under any terms as the Queen might think fit. It appeared that the company, which was the beneficiary of the charter, was required to obtain and pay for a certain certificate from the Board of Trade before commencing its trading operations. The company had procured a false certificate. The court held that the Attorney-General's fiat for a *scire facias*⁶⁹ to repeal a charter for abuse or for breach of an express or implied condition was the

⁶³ Bower, above 53, 307, 309.

⁶⁴ Ibid.

⁶⁵ Bower, above 53, 307, 309.

⁶⁶ (1820) 5 Bing 340, 340-354; 130 ER 1463.

⁶⁷ (1820) 5 Bing 340, 348; 130 ER 1463.

⁶⁸ [1853] Eng R 42; (1853) 2 El & Bl 856-915; 118 ER 980, 982. (1 January 1853).

⁶⁹ *Scire facias*. A reverse onus proceeding directed at a person to show cause why crown grants, charters, and franchises should not be rescinded or repealed. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

right of every aggrieved subject. Platt B held,⁷⁰ that the crown could not, in derogation of the right of the public, limit and fetter its own exercise of the royal prerogative.⁷¹ Although Bower stated that the case involved a public fraud, he viewed no mention in the court's decision of any requirement for fraud for the charter to be repealed.⁷² Arguably, this procedure required no proof of intent.

Fitzherbert's *Natura Brevium* referred to a the writ of deceit, as applicable in the times of Henry VI and Elizabeth I to the specific instance of sale of cloth, as follows.

If a man sell cloths, and warrant them of a certain length, if they be not of such length, he who bought them shall have a writ of deceit against him upon his warranty, although the warranty be only by word. But if the warranty be made at another time after the bargain made, then it ought to be in writing, otherwise he shall not have an action upon that warranty, for he shall not have an action of deceit therefore, if the warranty be not made upon the bargain and at the time of the bargain.⁷³

Arguably, there was no room for proof of *mens rea* in this formulation. Bower suggested that a reputation, the seller's goodwill, or a trademark could amount to an implied warranty. Also, he stated that in chancery, fraud had always been treated as denoting any transgression of equitable rules. This included nondisclosure, unaccompanied by misrepresentation in contracts and agreements *uberrimae fidae*, abuse of the influence arising from a dominant position on the one side and incapacity or distress or necessity on the other, unconscionableness, or oppression. In all these instances actual dishonesty was not required to make the acts actionable in equity.⁷⁴

2 *The Mis-Use of Product Seals*

Arguably, the action in the *Gloucestershire Clothier's Case* appeared similar in effect to a private action for an alleged breach of a personal monopoly right. This regulation by private monopoly arguably reduced the need for consumers to conduct

⁷⁰ (1853) 2 El & Bl 856, 884, 885.

⁷¹ [1853] Eng R 42; (1853) 2 El & Bl 856, 884, 885; 118 ER 988 (1 January 1853).

⁷² Bower, above 53, 360.

⁷³ Fitzherbert, above 29, 217.

⁷⁴ Bower, above 53, 387.

prepurchase inspections. This section investigates regulatory mechanisms, which might have tended to diminish consumer prepurchase inspection.

Unwin stated that monopolies were used by the Stuarts⁷⁵ for raising money without the consent of Parliament. They provided the monarch with money, and furnished salaries, pensions and rewards to the monarch's friends and servants. The public face of their rationale was to encourage native industries, reduce foreign dumping of goods, protect local manufacturers from capitalist domination, and guarantee good quality goods to the consumer at reasonable prices.⁷⁶

Unwin also stated that in a similar way to many other guilds of the time, the Tallow Chandlers obtained a monopoly by letters patent from Queen Elizabeth in 1576 for them to be searchers, examiners, viewers and tryers of soap, vinegar, butter, hops and oils. The crown letters patent authorised the extension of these activities beyond the City of London into various other geographic areas.⁷⁷ Arguably, this widened the geographical impact of any London customs under which the Tallow Chandlers might have operated.

This species of monopoly arguably had far-reaching effects on the operation of the old common law principle of *caveat emptor*.⁷⁸ The guild monopoly meant that guild officials would act as presale inspectors of goods instead of the consumers. No person was allowed to sell these products before they were searched and taxed by the Tallow Chandlers. The Mayor and Aldermen of the City of London resisted this competing system of taxation as feared competition to their lords' Leet Courts.⁷⁹

⁷⁵ From James I, 1603, and Charles I, 1625, to the commencement of the Commonwealth.

⁷⁶ Unwin, above 23, 293, 294.

⁷⁷ Ibid.

⁷⁸ . . . the maxim, at law is, *caveat emptor*: let the buyer take care and inquire. If he is told falsehoods, then he has a right of action; but if he makes no inquiries, at law he has no remedy, though he may in equity. This is the distinction between fraud in the legal and equitable sense, though even in equity there is no fraud in mere non-disclosure unless there is a duty to disclose, which there is not if the parties are in a position of equality in the transaction – that is, of equal knowledge and means of knowledge; and the doctrine of equitable fraud would only apply to matters in the knowledge only of the vendor, which he ought to disclose to the vendee. Finlayson, above 19.

⁷⁹ Unwin, above 23, 294.

Unwin stated that in 1601, Queen Elizabeth⁸⁰ succumbed to the pressure of various powerful interests against monopolies and proclaimed the abolition of the most widespread patent monopolies. The Queen left the remainder of the monopolies to the decisions of the judges, signifying movement of monopoly control from the crown to the court.⁸¹ A monopoly in playing cards held by Edward Darcy was made into the test case *Darcy v Allin*, known as the *Case of Monopolies*.⁸² In this case, the crown patent was condemned as a dangerous innovation contrary to common law. Fuller put to the court the key part of the defence argument. He submitted that the only role of the crown in labour was strictly limited to preventing deceit through “commutative justice by the way”, inferring an application of natural law.

But arts and skill of manual occupations rise not from the King, but from the labour and industry of men, and by the gifts of God to them, tending to the good of the commonwealth, and of the King, the head thereof, and do meet with commutative justice by the way, to see that there be just measure and just weight in things to be measured and weighed, and that no deceit or fraud be used therein, to the deceit of the subjects, and for that purpose the office of the clerk of the market, gager, and garbler, &c. are used; but to restrain men from any lawful trade whereunto they are inclined, is unnatural and unmeet.⁸³

Unwin argued that, despite the defeat of the monopoly in the *Case of Monopolies*, it was a mere temporary setback for monopolists. However, it would prove to be a severe defeat for the monopolies of the incorporated guilds, as direct crown regulation became more pervasive.⁸⁴ This development was by no means new. The office of the Aulnager, acting as another form of regulation,⁸⁵ had been in operation for a long time, and will now be discussed.

It appeared that crown prevention of deceit in the cloth trade was achieved through the Office of Aulnager. Zupko stated that with the Aulnager’s seal on cloth, purchasers could feel satisfied that the product had passed government inspection.

⁸⁰ 1558 – 1603.

⁸¹ Unwin, above 23, 294.

⁸² *Edward Darcy Esquire Plaintiff Thomas Allin of London Haberdasher Defendant*, [1599] EngR 186; (1599) Noy 173; 74 ER 1131.

⁸³ *Darcy v Allin* Noy 173, 181.

⁸⁴ Unwin, above 23, 300.

⁸⁵ Aulnage was the measuring of cloth to determine whether its length and breadth violated any of the specifications laid down by statute. . . . An Aulnager was an official stationed in a port or town who measured the cloth brought in by merchants and textile manufacturers to determine whether its length and breadth conformed to statutory specifications. Ronald Edward Zupko *A Dictionary of Weights and Measures for the British Isles: The Middle Ages to the Twentieth Century* (American Philosophical Society, 1985), xxxvi.

This office was originally subject to a grant of tenure. It remained essentially in the king's hands, by the 1394 statute 17 Ric. II. c. 5,⁸⁶ and also the 1453 statute 31 Hen. VI. c. 5.⁸⁷ These provisions voided all letters patent appointing any Aulnager except by the consent of the King or Treasurer of England. This suggested that forging or otherwise mis-using an Aulnager's seal would be deceitful, in the sense stated above from King John's time.

The duties of the office of Aulnager were let to farm by the 1403 statute of 4 Hen. IV. c. 24.⁸⁸ This provided that the Aulnage could be set to farm at the discretion of the Treasurer of England. This suggested the creation of a private monopoly in the hands of a public official. Finally, the office of the Aulnager was abolished with the 1700 statute of 11 William III. c. 20. §2.⁸⁹ After the 1632 Star Chamber case of Jupp, discussed below, it seems the Aulnager became an unnecessary office.

By the 1323 statute of 16 Edward II, c. 6,⁹⁰ the Warden of the Aulnage was ordered to deliver to the Exchequer the rate rolls of his office containing all the defaults which he had found in cloths throughout the realm. This suggested that the crown officials might have been aware of who produced faulty cloth. It also suggested the prior existence of crown control of the cloth industry through an administrative system.

And the Warden of the Aulnage shall deliver yearly to the Treasurer of the Exchequer the Estreats of his Office, wherein shall be contained all the Defaults which he hath found of Cloths throughout the Realm, and also where, and when, and to whom the Cloths did appertain, which he found contrary to the Assize, and the Price, and to whom he hath delivered them, where and when, and by what Warrant.⁹¹

This provision of 16 Edward II, c. 6 arguably inferred the necessity for tracking the cloths, under suspicion of official corruption. Lipson noted that the Aulnager tested measurements and quality in each piece of cloth. He affixed his seal if it was found to be sound. Otherwise, he had the power to confiscate the cloth. In this way, his

⁸⁶ 2 *Statutes of the Realm* 1377-1504, 88.

⁸⁷ 2 *Statutes of the Realm* 1377-1504, 364, 365.

⁸⁸ 2 *Statutes of the Realm* 1377-1504, 140.

⁸⁹ 7 *Statutes of the Realm* 1695-1701, 610, 611.

⁹⁰ 1 *Statutes of the Realm* 1235-1377, 192.

⁹¹ *Ibid.*

office ensured uniformity of length, breadth, weight and goodness of the cloth, in accordance with the Assize.⁹² By the time of the 1353 statute of 27 Edward III, c. 4, the Aulnager's powers were further clarified, expressly empowering and mandating him to mark the cloth, as follows.

. . . the King's Aulneger shall measure the Cloth, and mark the same, by which Mark a Man may know how much the Cloth containeth.⁹³

However, this must not have solved the problem of prepurchase inspection. In the 13th year of Richard II,⁹⁴ a complaint was submitted to parliament. Fosbrooke recorded that it stated that cloths made in Somerset, Dorset and Gloucester were tacked and folded together before they were shown for sale. These cloths were alleged to be defective because they were broken and damaged. They had different colours and widths on the outside and were falsely made with a range of different kinds of wools. It was ordained that no cloth should be shown for sale unless it was untacked and opened up so that purchasers could fairly examine it. It was also ordained that the weavers and fullers should affix their seals to every piece of cloth that they had worked.⁹⁵ The reasoning for this enactment was stated in the statute.⁹⁶ It was stated as a general presumption as being for stamping out the deceit of the public and its inevitable consequences in international trade.

. . . to the great deceit, loss, and damage of the people, in so much that the merchants that buy the same cloths, and carry them out of the realm to sell to strangers, be many times in danger to be slain, and sometime imprisoned, and put to fine and ransom by the same estrangements, and their said cloths burnt or forfeit, because of the great deceit and falsehood that is found in the same cloths when they be untacked and opened, to the great slander of the cloths of the Realm of England.⁹⁷

⁹² E Lipson *An Introduction to the Economic History of England* (A & C Black Ltd, 3rd ed, 1923), 406. Also, An assize was an enactment that regulated the quality, quantity, weight, measure, and price of articles for sale. An example of this type of assize was the *Assisa Panis et Cervisiae* of Henry III, issued in 1266. The assize was also the name for a session at which the examination and authentication of local weights and measures took place. Merchants and producers broke the assize when they adulterated their goods, sold defective merchandise, or employed false weights and measures. Zupko, above 79, xxxvi.

⁹³ 1 *Statutes of the Realm* 1235-1377, 330.

⁹⁴ 1390.

⁹⁵ Thomas Dudley Fosbrooke *Abstracts of Records and Manuscripts Respecting the County of Gloucester Formed into a History, Vol I* (Jos Harris, 1807), 38.

⁹⁶ 13 Ric II Stat 1 c 11 at 2 *Statutes of the Realm* 1377-1504, 64.

⁹⁷ *Ibid.*

The 1391 statute of 15 Richard II c 10⁹⁸ provided for mandatory sealing of cloths, stated as being to prevent the wrong of *deceit of the people* by artisan fullers, and suggesting a presumption of deceit by fullers.⁹⁹ The statute also covered other people who were drawing out the size of cloth, to misrepresent it to consumers. The arguably strict liability prohibition stated in the statutory provision was purely regulatory, punishing only the act of buying the cloth prior to fulling by others.¹⁰⁰ The provision linked derogation from product reputation with deceit. It may have acted as a kind of statutory *quia timet* injunction.

At the Complaint of the Commons made in the Parliament, because that of old Times divers Cloths were made in the Town of Gilford, and other Places within the Counties of Surrey, Sussex, and South, called Cloths of Gilford, which were of good making and of good Value, and did bear a great Name: And now because that Fullers and other of the same Country, do use to buy the Cloths of the said Countries before that they be fulled and performed, and in making, for Covetousness to have the said Cloths of greater Measure over the common Assise that late was used, do draw the Cloths more longer and more large than they were wont or ought to be, to the great impairing of the said Cloths, and great Deceit of the People: For to eschew such Damages and Deceits in Time to come, It is agreed and assented, That from henceforth no Fuller nor other Person, whatsoever he be, shall buy within the said Towns and Counties any Cloth before the same Cloth be fulled and fully performed in his nature, and also sealed under the Seal thereto ordained, upon Pain of Forfeiture of the same.¹⁰¹

Thus, the subject cloth in *the Gloucestershire Clothier's Case* was duly sealed with the sign of the tucker's handle.

The word 'fulling' appeared in different forms in various parts of England. For example, during the period between 1273 and 1888, in the west country of England,

⁹⁸ 2 *Statutes of the Realm* 1377-1504, 81.

⁹⁹ Fullers. Those practicing the trade of fulling, which was the art or act of cleansing, scouring and pressing cloths, stuffs and stockings, to render them stronger, closer and firmer. Thomas Tegg *The London Encyclopaedia or Universal Dictionary of Science Art Literature and Practical Mechanics, Vol IX*, (London, 1839), 673.

¹⁰⁰ In the early middle ages, there were four chief stages in the manufacture of cloth: initially the wool was carded or combed by hand; it was then spun on the rock or distaff; thirdly the yarn was woven on a hand-operated loom; and, fourthly this product called a loose web was fulled either by hand or by foot. . . . The process of fulling was one of beating or compressing the cloth in water which served to shrink the cloth by anywhere from a fifth to a half. This increased the density of the cloth giving it greater resistance to both cold weather and wear. Fulling also felted the cloth so that the pattern of weaving was no longer visible. This gave the cloth the merchantable characteristics of a smoother and softer surface, and also imparted greater fabric strength. The fulling process also scoured and cleansed the cloth using various detergents to remove the oil which had been put into the cloth during the earlier stage of spinning. E M Carus-Wilson 'An Industrial Revolution of the Thirteenth Century' (1941) 11(1) *The Economic History Review*, 39-60, 40.

¹⁰¹ 2 *Statutes of the Realm* 1377-1504, 81.

of which Gloucestershire was a part, fulling was called ‘tucking’. Tuckers¹⁰² performed it either by hand or in a tucking mill.¹⁰³ So, the fuller’s work implement was likely to have been the same tool as the tucker’s work implement.

A method of crown control of product reputation was by implying a church-associated reputation into an artisan seal. Carus-Wilson stated that in respect of the fulling business, either hand fulling or fulling with hand-wielded clubs was probably used for the smaller articles. Water-powered fulling mills were built on manors, to achieve scale of production. Local bishops owned many of these fulling mills. The fuller’s club, very probably the same in effect as the tucker’s handle, became the emblem of St James and was cast into stained glass in the east window of the Gloucester Cathedral.¹⁰⁴ In this way, arguably, this tool had become integrated into the community’s mind as a substantial icon within the religious symbols of Gloucester. Therefore, it might have acquired a certain solemnly revered meaning, beyond that of a mere artisan’s tool, giving rise to the question as to whether it could have been an exclusively personal symbol. If not, the *damnum absque injuria* argument could be given force in the *Gloucestershire Clothier’s Case*, arguably by a similar mechanism as to that applying to printers’ devices, discussed above in chapter 3. On this basis, the *Gloucestershire Clothier’s Case* may have been heard in the wrong jurisdiction, with the parties lacking *locus standi* to litigate to either final or mesne judgment in the Court of Common Pleas.

In the 1483-4 statute of 1 Richard III, c. 8, the crown mandated the sealing of all cloth with a lead seal. The seal should have the Royal Arms of England on one side, and the Arms sign or token of the city or town on the other side. It had to be sealed at the time when the cloth was made. The statute provided for strict monetary penalties for failure to seal manufactured cloth.¹⁰⁵ It appeared to be in operation as late as 1518, explained by example as follows.

¹⁰² Tucker. One whose occupation is the fulling and dressing of cloth; a fuller; a cloth-finisher originally one who burlled or teased the cloth. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹⁰³ E M Carus-Wilson ‘The Merchant Adventurers of Bristol in the Fifteenth Century’ (1928) 11 *Transactions of the Royal Historical Society, Fourth Series*, 61-82, 43n.

¹⁰⁴ Carus-Wilson, above 100, 41, 42; St James was a religious identity in the Christian tradition.

¹⁰⁵ 2 *Statutes of the Realm 1377-1504*, 486.

Harris recorded that the merchants of Coventry built up a large trade in the buying and selling of wool and the weaving of cloth. Coventry thus became a very wealthy part of England. Until a depression in 1518, Coventry had been very prominent among cloth-making towns for over 100 years. In the middle of Coventry stood the Searching-House, where all locally made cloth was examined. There were two weavers and two fullers specially appointed to conduct these examinations. Six drapers were appointed to superintend the weaver and fuller inspectors, in order to guard against any bias in the inspections. If the cloth was sufficiently fulled and well woven, the inspectors set the city seal on the cloth. This was as a token of genuine quality. Otherwise, defective cloth was returned to the weavers unsealed, and therefore unsaleable.¹⁰⁶

The Leet Court of Coventry passed an order in 1518 providing precise instructions for the searching process. This was so that the industry could grow to the larger scale manufacture of better quality cloth. In that order, the Leet Court determined that the seal should be the Elephant and Castle, which was the seal of the City of Coventry,¹⁰⁷ suggesting that artisan reputation resided effectively in hands of the city. These provisions add to the suggestion that either the *Gloucestershire Clothier's Case* was heard in the wrong jurisdiction, or that the defendant's act was wholly lawful.

3 *Passing-off in Star Chamber*

An action in what amounted to passing-off apparently did not succeed in the *Gloucestershire Clothiers' Case*. Arguably, the crown resisted the *damnum absque injuria* determination of the *Gloucestershire Clothier's Case* by means of the Jupp Case in the Star Chamber. The crown had implemented various regulatory systems to work against deceit in the trades. These regulatory systems had worked against consumer prepurchase inspection. Therefore, this section examines the consequence

¹⁰⁶ Mary Dormer Harris *Life in an Old English Town* (Swan Sonnenschein & Co Lim, 1898), 253-255.

¹⁰⁷ Leet Book, fo 166.

in the Star Chamber to see how it examined all the relevant laws to reach a unified outcome.

In the 1632 Star Chamber trial of Thomas Jupp of London, a cloth-worker was prosecuted in the Star Chamber by the Attorney-General. Jupp admitted his fraud, and admitted smuggling inferior cloth with Colchester seals out of the country. He was fined £1000 and condemned to the pillory. The court took evidence of user and goodwill. Also, the Court examined the actions of the accused, and simply characterised them strictly as fraudulent.¹⁰⁸ Schechter explained the facts and holdings of the case as follows.¹⁰⁹

Thomas Jupp was brought to the bar of the Court of Star Chamber and was examined before Mr. Noy the Attorney General of England. The record of the examination was read to the court, to the following effect. Jupp had bought several pieces of Bocking bayes for Goddard, and he put a seal on them. These seals were like the seal put on Colchester bayes which were somewhat more expensive cloths, and which sold better overseas than did Bocking bayes. He sealed them with iron stamps. Some were engraved in Foster Lane, and others were delivered to him by Thomas Downs, then in Ireland. It was well known that the buyers of Colchester Bayes bought these bayes without further enquiry, after having viewed the seal. Jupp displayed for sale two pieces of actual Colchester Bayes. One had the whole seal and was not faulty, and the other one was marked as faulty by cutting off a piece of it and affixing the seal at an angle. This faulty one was still of a better quality than the Bocking bayes, all of which he had sealed with the whole seal. He admitted that he had often made faulty bayes with the whole seal. He did this by cutting off the puckle of the bay at an angle and drawing it and then fixing the seal in another place, so that it appeared to have been sealed with the whole seal. He admitted doing this a hundred times, on the request of merchants. The Court reviewed all the laws then in existence for true draping of wool, for searching, measuring, marking, affixing seals of various places, as well as those laws relating to the Aulnager's public seals on cloths. The Court took into account that the town of Colchester received a very large part of its income

¹⁰⁸ F I Schechter *The Historical Foundations of the Law Relating to Trademarks* (Columbia University Press, 1925), 91.

¹⁰⁹ Schechter, above 108, 96-100.

from making bayes, and that every one of these bayes were manufactured to completion and sealed with a seal attesting their goodness. The court recognised that if, upon search, any were identified as of insufficient quality, the searchers marked accordingly. The buyers all relied on the seal alone. The Court characterised Jupp's offence as a false cozenage, which would discourage buyers from relying on the credit of the seal. The Court of Star Chamber added that any merchants, or other tradesmen, who had employed Jupp or any other person to seal bayes fraudulently should be discovered and identified. This was in order to receive the sentence of the Court. However, those who delivered the offenders to the Court should receive the mercy of the Court.¹¹⁰

From this case, the Star Chamber had inferred the importance of maintaining buyers' reliance on the public meaning inhering in seals, rather than buyers conducting their own prepurchase inspections. The damaged party was the City of Colchester, rather than the representee purchaser. Finally, the Star Chamber was concerned about those who were complicit with Jupp, stating that they would receive the sentence of the court.

C Styles of Pleadings in the Gloucestershire Clothier's Case

It was suggested in chapter 2 that passing-off was a conjectural argument based on facts, an inference from which might be that the tort was strict liability in character. Throughout this thesis, the argument has been advanced that common law decision-making might be subject to underlying legal norms, and that if these underlying norms were strict liability in character, so might be the substantive law which they underlie. Therefore, this section examines the nature of those conjectures used in the *Gloucestershire Clothier's Case*. The Sergeants-at-law conjectured through their skill in pleadings. This was arguably part of the procedural law during the English Renaissance. In the second part of this section is an examination of the *Gloucestershire Clothier's Case*, in the context of the identified character of the pleadings of its time.

¹¹⁰ Ibid.

1 *Pleadings during the English Renaissance*

This investigation is to characterise the style of pleadings at the time of the *Gloucestershire Clothier's Case*. This is so that conclusions may be drawn later, to see if it was structured as a strict liability case on the basis of a strict liability style of pleading.

Since all that is available in today's surviving reports of the *Gloucestershire Clothier's Case* is the pleadings in the Court of Common Pleas, an analysis of the case may put an understanding of these pleadings in an English Renaissance context, in order to assess the character of the conduct of the case. This is significant because, as stated by van der Poel, during the English Renaissance scholarship returned to classical texts and this ancient style was reembedded into styles of pleading.¹¹¹

Frost stated that classical rhetoricians approached the creation of legal argument according to a well-established method. First, they began by categorizing legal arguments into their appropriate status, sometimes also called *stasis*. The word "status" meant "position" or "answer to an action".¹¹² In Quintilian's view, a cause of action arose strictly from the fact that the first collision between the parties was based on matters of status within the case, and that this collision between the parties created the issue of the case.¹¹³ Quintilian used to teach his students the heuristic procedures of the *status* doctrine as a means of penetrating to the core of a particular rhetorical situation.¹¹⁴ In this doctrine of *status causae*,¹¹⁵ Quintilian wrote that there were four kinds of legal argument: those based on fact; those based on definition; those based on justice or quality; and those based on procedural issues.¹¹⁶ He also wrote that there were four ways of defensive argument open to the defendant, as follows.

¹¹¹ Marc Van der Poel 'The Latin Declamatio in Renaissance Humanism' (1989) 20(3) *The Sixteenth Century Journal*, 471-478.

¹¹² Michael H Frost *Introduction to Classical Legal Rhetoric – A Lost Heritage* (Ashgate, 2005), 25.

¹¹³ Frost, above 112, 25, citing 1 Quintilian, *Institutio Oratoria*, 409.

¹¹⁴ Michael Mendelson 'Declamation, Context, and Controversiality' (1994) 13(1) *Rhetoric Review*, 92-107, 96.

¹¹⁵ Apparently this was originally a Hermagorean doctrine.

¹¹⁶ Frost, above 112, 25, citing 1 Quintilian, *Institutio Oratoria*, 409.

By Far the strongest method of self-defence was, if possible, to deny the charge.

The second best was when it was possible to reply that the particular act with which you were charged was never committed.

The third and most honourable was to maintain that the act was justifiable.

If none of these uses of defence was feasible, there remained the last and only hope of safety: if it was impossible either to deny the charge or justify the act, we must evade the charge with the aid of some point of law, making it appear that the action had been brought against us illegally.¹¹⁷

Vickers stated that in the medieval period of England, 426-1416 C.E., classical rhetoric had survived apparently in the two basic texts of Cicero's *De Inventione* and of the anonymous *Rhetorica ad Herennium*,¹¹⁸ which some attributed to Cicero. He stated that throughout England, during the English Renaissance, classical rhetoric was linked with the study of law. For example, he recorded that King Edward VI, who reigned 1547-1555 wrote Latin legal compositions using the classical approach.¹¹⁹ Shoek noted that by the middle of the sixteenth century,¹²⁰ the Inns of Court were training lawyers in classical rhetoric and slanting their pedagogy with a heavy emphasis on Senecan tragedy. He concluded there was a close union between classical rhetoric and the law at that time.¹²¹ Shoek cited Sir Thomas Elyot's characterization of lawyers' training in the Inns as an exercise incorporating the style of the ancient pleadings rhetoric. According to Elyot, this was so, both in court and in Chancery pleadings. They were student exercises in the form of heads of declamation, called *thema*. Students were asked to use Quintilian's *stasis causae* to outline the nature of the cause of action.¹²²

Cicero asserted that every controversy was either about a fact and its inferences, about a definition when people described the deed in different ways, about the nature

¹¹⁷ Antoine Braet 'The Classical Doctrine of Status and the Rhetorical Theory of Argumentation' (1987) 20(2) *Philosophy & Rhetoric*, 79-93, 82, 83.

¹¹⁸ Brian Vickers *In Defence of Rhetoric* (Clarendon Press, 1998), 216.

¹¹⁹ Vickers, above 118, 263.

¹²⁰ A generation before the *Gloucestershire Clothiers Case*.

¹²¹ R J Shoek 'Rhetoric and Law in Sixteenth-Century England' (1953) 50(2) *Studies in Philology*, 110-127, 110, 111.

¹²² Shoek, above 121, 114, citing Sir Thomas Elyot *The Boke Named the Governour* (Everyman, 1970), 65.

of an act, or about legal processes.¹²³ Cicero further developed status theory by discussing the qualitative issues arising in causes of action as dividing into two categories, namely the equitable and the legal. The equitable category arose where there was a question about the nature of justice and right or the reasonableness of reward or punishment. The legal category was that in which the court examined what the law was according to the custom of the community and according to justice.¹²⁴ In the *Gloucestershire Clothier's Case*, the court only examined the qualitative issue of the law. The Court of Common Pleas had no jurisdiction to examine the nature of justice and right or the reasonableness of reward or punishment. It was solely a common law court. Arguably, the case was based on acts, which were pleaded as facts, and stated as propositions and their inferences.

Mendelson stated that classical pleaders structured their arguments as declamations. Practitioners of the declamation style would analyse either an historical or a legal problem and develop a pragmatic argument in response to the identified problem. They adapted their argument to a specific audience with a definite need to know.¹²⁵ Declamations were of two kinds, the *suasoria* or deliberative speech about history or politics, and the *controversia* or forensic speech on a specific legal case. Thus, the argument in a declamation was carefully cobbled together by an expert pleader trained in judicial rhetoric.¹²⁶ Mendelson added that in most of the Senecan *controversiae*, the declamation was structured beginning with a brief statement of the operative law, then a short narration of the facts and circumstances of the particular case, then arguments for and against, which were typically drawn from memory.¹²⁷ For example, in the 1584 *Gloucestershire Clothier's Case*, Fletewood used this declamatory device of arguments from memory to introduce a custom of the City of London, as representing the prevailing law.¹²⁸

Van der Poel stated that during the 16th century there was a kind of humanist revolution throughout Europe. Arguably, it spread more widely by the advent of the

¹²³ 2 Cicero *de Inventione*, 21.

¹²⁴ Frost, above 112, 25, citing 2 Cicero, *De Inventione*, 23, 31.

¹²⁵ Mendelson, above 114, 92.

¹²⁶ Mendelson, above 114, 93.

¹²⁷ Mendelson, above 114, 104n.

¹²⁸ Baker & Milsom, above 21, 617, 618, citing HLS MS Acc 704755, fo 118v.

printing press. It took hold in England a little later in the English Renaissance, during the 1558 to 1603 reign of Queen Elizabeth.¹²⁹ The English Renaissance scholars were most interested in recovering and studying Latin and Greek literary, historical, and oratorical texts, then applying them to contemporary problems.¹³⁰

The English Renaissance period saw a humanist introduction of new educational curricula, concentrating again on ancient sophistical teachings. For example, according to van der Poel, students would learn their way through and master the sophistical *progymnasmata*,¹³¹ then begin the practice of declamation,¹³² at the pinnacle of their rhetorical skill.¹³³ Van der Poel stated that the ancient didactic declamation and the humanist form of the declamation were linked by Cicero's rhetorical exercise of *thesis*.¹³⁴ *Thesis* was originally a philosophical and dialectic exercise mainly in the *a priori* prelegal field of ethics, from which could arise arguments about negligence, negligence being about a *de facto* moral or ethical state of affairs. The exercise would argue *pros* and *cons* theoretically without reference to a given person, time, or place. Cicero's modification to this format had been to interweave concrete circumstances involving persons, places and times, so as to make the exercise into one of better utility in legal pleadings and in public orations.¹³⁵

Van der Poel stated that Agrippa¹³⁶ defined the form of declamation of the time of the English Renaissance, during the time of Elizabeth I, in purely tactical terms. This

¹²⁹ Van der Poel, above 111, 473.

¹³⁰ Van der Poel, above 111, 473, 474.

¹³¹ Progymnasmata. Oratorical exercises, arranged from the simplest to the most complex and difficult. There were several versions of the *progymnasmata*, devised by various ancient sophistical scholars. In most versions, the chreia was characterised as the most basic element. The second most difficult was the thesis and the most complicated lesson was the highest oratorical exercise on the *progymnasmata* scale: "make a law". George Kennedy catalogued the various schools of progymnasmata lessons in ancient classical rhetoric. George A Kennedy *Progymnasmata – Greek Textbooks of Prose Composition and Rhetoric* (Society of Biblical Literature, 2003), 97.

¹³² Also called *declamatio*.

¹³³ Van der Poel, above 111, 477.

¹³⁴ Ibid.

¹³⁵ Van der Poel, above 111, 473.

¹³⁶ Heinrich Cornelius Agrippa von Nettesheim (1486–1535) was the author of a sweeping attack on every field of human learning, in *De incertitudine et vanitate scientiarum et artium, atque excellentia Verbi Dei, declamatio invectiva / On the Uncertainty and Vanity of the Arts and Sciences: An Invective Declamation*, 1530. Agrippa provided a clear demonstration that the eagerness of Renaissance humanists to recover the works of the ancients included a vast body of

suggested that its power was in the imaginable inferences drawn from its various propositions by a court influenced primarily by persuasive rhetoric.¹³⁷ The following was Agrippa's definition of declamation.

The declamation does not formulate a definitive judgment, nor a dogma. Instead, the propositions of the declamation are alternately put in a jocular or in a serious form, are formulated in a deceiving or a straightforward way. Sometimes it voices my own opinion, sometimes those of others, some things it declares to be true, others to be false, still others to be dubious. Sometimes it takes the form of straightforward reasoning, at other times of admonishing talk. It does not continually condemn, nor instruct, nor assert. It does not at all places declare my own ideas and it brings to the fore many invalid arguments, so that he who takes the counterpart will have something to reject and to refute. If the censor who wrote against me is not able to discern these different elements, he cannot but pronounce a stupid judgment on them.¹³⁸

To which elements did Agrippa refer? Possibly, his elements might have been: first, propositions framed in a context of often-unstated inferences; second, personal opinion; third, either reasoning or admonition; and fourth, deliberate provision of a weak argument for the bench to refute. It remains now to gather evidence from the *Gloucestershire Clothier's Case*, to decide inductively whether its pleadings were in a declamatory style. If they were declamations, it could be argued that the case was an attempt to discover the law by rhetorical persuasion. If the argument were by rhetorical persuasion, arguably it relied on underlying elemental norms.

2 *Examining the Gloucestershire Clothier's Case in this Context*

The section now looks at two manuscript reports of the *Gloucestershire Clothier's Case*, in which the pleadings are reported, along with some judicial responses. The objective is to see if the case was pleaded in a declamatory style, and if so, draw appropriate conclusions.

The second manuscript excerpt in Baker and Milsom¹³⁹ stated that the good clothier's business had been discredited. The underlying norm to this legally-charged

ancient texts that claimed to offer wisdom going back to the very origins of human civilization. *Stanford Encyclopedia of Philosophy* < <http://plato.stanford.edu/entries/agrippa-nettesheim> >

¹³⁷ Van der Poel, above 111, 477, 478, citing H Agrippa von Nettesheim *Apologia adversus calumnias* . . . Iv^v.

¹³⁸ Ibid.

¹³⁹ Baker & Milsom, above 21, 617.

fact was arguably a corollary of the London custom of taking away a brother artisan's customers by selling unaccredited goods.¹⁴⁰ Anderson CJ said in this second manuscript version that the action merely *seemed* to lie.¹⁴¹ However, Peryam J said that the bad clothier had committed no wrong, because he did a wholly lawful act.¹⁴² Anderson CJ rejoined that commissioning a lawful act, such as using another clothier's seal, causing indirect damage, nevertheless could infer the commission of a wrong.¹⁴³

In the third manuscript excerpt in Baker and Millsom,¹⁴⁴ Sergeant-at-law Fenner pleaded that the defendant used a slightly altered version of the plaintiff's mark and thereby discredited the plaintiff's cloths. In response, Sergeant-at-law Fletewoode pleaded that an action on the case lay for such a fact pattern by the custom of London. Fletewoode would have known that, were the case being heard in Gloucestershire, a custom of London might not be operative law within that geographical jurisdiction. However, Anderson CJ accepted Fletewoode's submission and said that the action lay. Wyndham J agreed, provided only that the statute could

¹⁴⁰ If any freeman of the city avouched the goods of foreigners to be theirs he would lose the liberty of the city. Article xlii *Customs of London Otherwise Called Arnold's Chronicle* (Rivington, 2nd ed, 1811), fo 4; Writing of the period 1066 – 1166, Hudson stated that in medieval times the case recorders who were the narrators of the court stories appeared less interested in forms of pleading and reasons for decisions than in the subject of the dispute, form of proof and the case outcome. Their writing styles favoured the sensational over the routine, more like the newspaper stories than modern law reports, and informed the then and later forms of pleadings. The courts of the period comprised suitors presided over either by a lord or by an official. The action began with a formal accusation followed by a formal denial. Then there was wide-ranging activity of pleading using evidence and different kinds of argument. This activity drew on various underlying norms, either explicitly or implicitly. The parties' reputations, their supporters and the attitude of the person presiding over the court could all play a part in the form of the pleadings. Typically, the matter could terminate during the pleadings phase, but if not, there would be a *mesne* judgment as to the required form of proof. After a suitable pause in the proceedings, proof was presented by one or both parties and final judgment was reached on that basis. Often, the pleadings included full explanations of what underlay the claim, sometimes with each unit of pleading interwoven with strong evidence. Hudson called these discrete narrative elements 'legally-charged facts'. Thus, cases could be presented to the court as a choice between two arguments, each of which was based on the premises of legally-charged facts. Since the underlying appeal in the arguments was to norms rather than argument by syllogism, the legally-charged facts tended to imply prevailing norms, such as the strict liability customs, maxims, or *dicta* from the king. For example, consider the following as a legally-charged fact containing the legal fortification of some evidence given from the bar table: "neither of them could sell because their lands always lay in alms in the time of King Edward and all of his ancestors, so the shire testifies," with its implicit appeal to the norm of inheritance. John Hudson 'Court Cases and Legal Arguments in England, circa 1066–1166' (2000) 10 *Transactions of the Royal Historical Society, Sixth Series* 91-115, 94, 95, 100, 104, 105.

¹⁴¹ Baker & Milsom, above 21, 617.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Baker & Milsom, above 21, 617, 618.

be construed such that no clothier could give the mark of another. Fletewoode rejoined with an oral pleading that a similar fact pattern had been adjudged as a valid case of an unlawful use of another's mark in a case at the Bar of Parliament. Such a Parliamentary case arguably would have had wider geographic persuasion. However, Peryam and Mead JJ said that, possibly either in *obiter* or in dialectic with counsel or another judge, deceit did not lie against a person who did a wholly lawful act.

The above suggests that the *Gloucestershire Clothier's Case* was pleaded as a conjectural argument based on facts, as propositions and their often-unstated inferences. Many of these inferences were in the nature of oral recollections of custom. The defence was arguably weak within Quintilian's stasis theory, suggesting the defendant was of lower status than the plaintiff. There were opinions of the pleaders and there were fact statements resembling admonition. There was no available record of a deliberately weak argument especially framed for the court to refute. However, it appears arguable that the pleadings were declamatory in style.

Therefore, the following questions arise from the above discussion of the *Gloucestershire Clothier's Case*. The first is whether a custom of London had been breached. If one such custom had been breached, then as has already been argued in chapter 2, the litigation of this breach would be treated as strict liability and be indicative of fraud. The second was whether the wrong inferred from a statute could be litigated as a civil matter. In Chapter 5, there will be a discussion of this procedural issue, within an analysis of the *Advocaat Case*.¹⁴⁵ It will address the issue, *inter alia*, in the context of the old common law doctrine of the *equity of the statute*.¹⁴⁶ The third is whether an apparently wholly lawful act could be deceptive, by means of the indirect nature of the damage it caused. This third question will be examined in this chapter in the section on the doctrine of secondary meaning, below.

¹⁴⁵ [1979] AC 731, 731-756.

¹⁴⁶ There appeared to be a principle that the courts, guided by the dictates of conscience and natural justice, could modify the rigor of a statute or apply its rules to cases not provided for, to avert hardship or injustice. W H Loyd 'The Equity of a Statute' (1909) 58(2) University of Pennsylvania Law Review and American Law Register, New Series, 76-86, 82, citing Henry Campbell Black *Handbook on the construction and interpretation of the laws* (West Publishing Co, 1911), 42.

D *The Doctrine Of Secondary Meaning 1838 - 1896*

In *Southern v How*,¹⁴⁷ it was argued for the plaintiff that where one was party to a fraud, the court should presume that all following that fraud was done by him, for which he would be liable. It was reported further that the court inclined against this argument. This section will ask whether this unsuccessful argument in *Southern v How*¹⁴⁸ might have reemerged as a strict liability doctrine that might be relevant to a future tort of passing-off.

In the 1838 case of *Millington v Fox*,¹⁴⁹ the plaintiffs Crowley Millington and Thomas Isaac Millington carried on for many years beforehand a business manufacturing steel products. They made steel products by a unique process. It involved the rolling together of more than one bar of steel. Each of their manufactured pieces of steel had stamped on them the word “Crowley” or “Crowley Millington”, as well as the initials “I H”. They were said to have been initials of Millington’s chief workman John Heppel. The defendants James Fox and Samuel Fox had carried on a steel business for some years. They had stamped their steel products with the plaintiff’s marks alongside the mark “Fox Brothers”. The defendants pleaded the existence of a secondary meaning. They said that they used the plaintiff’s marks as a generic symbol. This was because the market understood those marks to designate a particular method of manufacture, rather than the source of the manufacture. It was pleaded for the defendants that they had not knowingly and wilfully used the marks of the plaintiff.

Lord Chancellor Cottenham stated even the absence of fraud would not prevent the injunction from being granted. This was because certain secondary meanings could still damage the plaintiff. His Lordship’s reasoning was stated in the following terms.

There was sufficient in the case to shew that the plaintiffs had a title to the marks in question; and they undoubtedly had a right to the assistance of a Court of Equity to enforce that title. At the same time, the case is very different from the cases of this kind, which usually occur, where there has been a fraudulent use, by one person, of

¹⁴⁷ (1618) Cro Jac 468, 469; Poph 143; 2 Roll Rep 26 (Doderidge J).

¹⁴⁸ Ibid.

¹⁴⁹ 3 MY & Cr 338, 338-344; 40 ER 956.

the trade-marks or names used by another trader. I see no reason to believe that there has, in this case, been a fraudulent use of the plaintiff's marks. It is positively denied by the answer; and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for although there is no evidence to show that the terms "Crowley" and "Crowley Millington" were merely technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and therefore, I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual.¹⁵⁰

In the 1847 case of *Franks v Weaver*,¹⁵¹ the court teased out something of the nature of fraud. The report extracted the case as follows.

The Plaintiff invented and sold a medicine under his own name. The Defendant also made and sold a similar medicine, and on his labels, he used the Plaintiffs name and certain certificates given of the efficacy of the Plaintiffs medicine, in such an ingenious manner, as, *prima facie*, though not in fact, to appropriate and apply them to his own medicine. Held, that, although there were other differences in the mode of selling, the proceeding was wrongful, and the Defendant was restrained by injunction.¹⁵²

Lord Langdale MR held that nobody had been able to define what fraud was, because it was so multiform, suggesting that fraud was a concept as a form rather than as a state of affairs. He stated that in the present case it consisted in the crafty¹⁵³ adaptation of certain words in such a manner, ordinarily and constantly, as to be calculated to make it appear to persons when he was selling the product that the thing sold was prepared by the plaintiff.¹⁵⁴ Craftiness in words arguably meant knowingly arranging a secondary meaning without prior public usage. The suggestion arises that this would have to be an inference made by the court as a finding of fact. Thus, arguably, the judgment would have been essentially unappealable as a finding of fact.

¹⁵⁰ 3 MY & Cr 338, 352.

¹⁵¹ 10 Beav 297, 297-304.

¹⁵² 10 Beav 297, 297.

¹⁵³ The word *craft* was explained in the *Rhetorica ad Herennium* as the topic of an argument considering security. Security is to provide some plan for ensuring the avoidance of a present or imminent danger, the two subheadings for which are might and craft. Craft is exercised by means of money, promises, dissimulation, accelerated speed, deception and other similar means. Craft is only another name for strategy. *Rhetorica ad Herennium*, above 39, 161, 171.

¹⁵⁴ 10 Beav 297, 303.

In the 1896 case of *Reddaway v Banham*,¹⁵⁵ the plaintiff manufactured and sold a product it called “camel hair belting”. The defendant, seeking to establish the existence of a secondary meaning to the term “camel hair belting”, also designated its product as camel hair belting. This was without saying that it was not manufactured by the plaintiff, but was manufactured by the defendant. Lord Herschell confirmed the holding of Turner LJ in *Burgess v Burgess*¹⁵⁶ that it was a question of evidence in each case as to whether there had been a false representation.¹⁵⁷ Turner LJ also held, thus.

Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he intends it to represent the *goods* made by himself as the goods of the person whose name he uses.¹⁵⁸

The jury in *Reddaway v Banham*¹⁵⁹ found that the defendants had described their belts as camel hair belting to mislead their customers into thinking that they were buying Reddaway’s belting. His Lordship held that the governing principle was that it was not a question of property, but, it was a right to protection from having another man’s goods passed off as his goods. His Lordship also held that Banham’s describing their belts as camel hair belting would deceive purchasers into the belief that they were getting something that they were not getting, namely belting made by Reddaway.¹⁶⁰

On this basis, Lord Herschell had incorporated a dominant purpose test to outline the fallacy¹⁶¹ of a defence, which overlooked the fact that a word may acquire in a trade a secondary signification differing from its primary one.¹⁶² He said that if it was communicated to people in that trade, who would understand it in its secondary

¹⁵⁵ [1896] AC 199, 200-201.

¹⁵⁶ 3 D M & G 896, 896-905.

¹⁵⁷ 3 D M & G 896, 905.

¹⁵⁸ *Ibid.*

¹⁵⁹ [1896] AC 199, 200-201.

¹⁶⁰ [1896] AC 199, 208.

¹⁶¹ A fallacy is a violation of one of the criteria of a good argument. Any argument that fails to satisfy one of the following four criteria is a fallacious one. Fallacies, then, stem from the irrelevance of a premise, from the unacceptability of a premise, from the insufficiency of the combined premises of an argument to establish its conclusion, or from the failure of an argument to give an effective rebuttal to the most serious challenges to its conclusion or to the argument itself. T Edward Damer *Attacking Faulty Reasoning* (Wadsworth, 4th ed, 2001), 42.

¹⁶² [1896] AC 199, 212, 213.

sense, it could be a falsehood even though it would be true in its primary sense.¹⁶³ Thus, a man who conveyed a particular idea which was false and who knew and intended this to be the case could not be absolved from a charge of falsehood, merely because another sense existed which was neither conveyed nor intended to be conveyed. Therefore, no man might make a direct false representation to a purchaser that enabled that purchaser to tell a lie to someone else who would be the ultimate customer.¹⁶⁴ This lie could be told without wrongful intent, since the teller might well have been deceived. Arguably, this represents a reemergence of the failed argument in *Southern v How*,¹⁶⁵ in which the argument was stated in words to the following effect ‘where one was party to a fraud, the court should presume that all following that fraud was done by him, for which he would be liable’.¹⁶⁶

E Conclusion

This chapter argument set out to build on the propositions in chapter 2 that guild business norms, and other customary norms, were strict liability when enforced and were indicative of fraud. It also sought to build on the proposition in chapter 3 that printers’ devices were not subject to a passing-off regime, but instead, were subject to direct crown administrative regulation via the clergy. This chapter argument addressed the thesis central question of whether or not passing-off was a strict liability tort, and if so why and how, by conducting an historical examination of the *Gloucestershire Clothier’s Case* and some of its consequences.

In the 1618 case of *Southern v How*,¹⁶⁷ a *prima facie* theory was argued for the plaintiff that where one was party to a fraud, all which followed by reason of that fraud would be taken to have been done by him.¹⁶⁸ This argument was held to be

¹⁶³ [1896] AC 199, 213.

¹⁶⁴ *Ibid.*

¹⁶⁵ Cro Jac 468, 471; 79 ER 400. The case was first published in Popham’s Reports in 1656 at 79 Eng Rep 1243. The second report of the case was in J. Bridgeman’s Reports, in 1659. It cited the case as decided in 1616. A third report of the case was published in Croke’s Reports in 1659 indicating that the case was heard in 1618. Two later abstracts of the case appeared in Rolle’s Reports published in 1676. The one is inconsistent with the other in several ways including disagreement as to the date of hearing. Stolte, above 47, 568-573.

¹⁶⁶ Cro Jac 468, 469.

¹⁶⁷ Cro Jac 468, 471; 79 ER 400.

¹⁶⁸ Cro Jac 468, 469.

ineffective, on the basis of the old *Gloucestershire Clothiers' Case*. In the various manuscripts of the *Gloucestershire Clothier's Case*, the court held that the action on the case did not lie because it was *damnum absque injuria* to the other. The court stated that there was no action for deceit against a person who did a wholly lawful act.

Regulation by private monopoly greatly reduced the need for consumers to conduct prepurchase inspections. It was argued that the crown acted against the customary legal norm of *caveat emptor*, leading to the creation of consumer-based actions against product misrepresentation at the point of sale. The consequences in the Star Chamber suggested continuing crown attempts to prohibit deceit in the trades. In the Star Chamber, the Court characterised the offence of Jupp as a false cozenage, which would discourage buyers from relying on the credit of the seal. Arguably this adds force to the argument on royal seals and trade marks in chapter 3 that a mis-use of a seal or mark was dealt with on a strict liability basis. Thus, Star Chamber acted in favour of seals representing product quality, and punished Jupp for using a false seal. This suggested a crown interest in stamping out any rhetorical act that derogated from the symbolic meaning of an authorised seal, and, it appeared to agree with the failed argument in *Southern v How*.¹⁶⁹

The chapter investigation asked the question of whether the styles of pleading in the *Gloucestershire Clothier's Case* created strict liability procedures. There was argument that it was likely that the pleadings in the *Gloucestershire Clothier's Case* were declamatory. This was significant because, if true, it would confirm the importance and practical effect of underlying unstated legal norms of custom and status. Thus, the following questions flowed from the notion of a declamatory form of pleadings. The first was whether a custom of London had been breached, because if so, building on what was suggested in chapter 2, litigation of this breach would have been treated as strict liability. The second was whether the wrong inferred from a statute could be litigated as a civil matter and was indicative of fraud. In Chapter 5, below, there will be a discussion of this issue, within an analysis of the *Advocaat*

¹⁶⁹ Cro Jac 468, 471.

Case.¹⁷⁰ The third question was whether an apparently wholly lawful act could be deceptive, by means of the indirect nature of the damage it caused. This was addressed as an examination of the doctrine of secondary meaning.

There was discussion of how the unsuccessful argument in *Southern v How*¹⁷¹ might have reemerged as a strict liability doctrine. In the 1896 case of *Reddaway v Banham*,¹⁷² Lord Herschell deduced that no man might make a direct false representation to a purchaser that enabled that purchaser to tell a lie to someone else who would be the ultimate customer.¹⁷³ It was argued that this suggested a reemergence by restatement of the failed argument in *Southern v How*.¹⁷⁴ It suggested that when, non-gild members engaged in subsequent product resale, they were nevertheless bound by ancient custom, an action for a breach of which was strict liability and indicative of fraud.

There was argument that the crown resisted the *damnum absque injuria* determination of the *Gloucestershire Clothier's Case* by means of the Jupp Case in the Star Chamber. Later, Lord Herschell deduced that no man might make a direct false representation to a purchaser that enabled that purchaser to tell a lie to someone else who would be the ultimate customer.¹⁷⁵ There was argument that this deduction would imply strict liability into the actions of subsequent sellers unaware of the lie. Chapter 5 examines fraud and applies its suggestions to apparently re-emergent custom within the tort of passing-off.

¹⁷⁰ [1979] AC 731, 731-756.

¹⁷¹ (1618) Cro Jac 468, 471; Poph 143; 2 Roll Rep 26 (Doderidge J).

¹⁷² [1896] AC 199, 212, 213.

¹⁷³ *Ibid*.

¹⁷⁴ Cro Jac 468, 471; 79 ER 400.

¹⁷⁵ [1896] AC 199, 212, 213.

V THE COMPLETION PHASE OF PASSING-OFF

A Introduction

In this chapter, the question is asked as to whether old London custom was reintroduced into the elements structure of passing-off. If so, this could raise the issue of whether a breach of a specified bundle of customs generated the tort of passing-off by relating fraud and strict liability.

Wadlow stated in his history of the tort that passing-off was essentially complete,¹ with the House of Lords judgment in the 1979 House of Lords case *Erven Warnink BV v Townend & Sons*² ('*Advocaat Case*'). This suggests that some aspect of the scope of passing-off was dealt with in that case, in order for it to become "completed". After a preliminary examination of the nature of fraud in commerce, there will be an investigation of the role of custom within goodwill. The section seeks to develop a workable description of goodwill, based on the case law. This is all in preparation to investigating how the court might have amended the scope of passing-off in the *Advocaat Case*,³ and if so, what the consequences were in assessing the kind of liability in passing-off. The chapter's argument addresses these issues in three main sections. The first is entitled fraud in commerce. The second is entitled goodwill. The third is entitled amending the scope of passing-off.

The first section on fraud in commerce has one subsection entitled deceit and fraud, building on the chapter 4 discussion of deceit, and relating deceit to fraud. The second section is on goodwill and it builds on the chapter 2 discussion of old local custom, asking how it might interlock with damage to goodwill in the context of passing-off. The subsection on judicial reasoning by analogy conducts an analysis of this analogic doctrine, so that it can be applied to developing a principle for understanding goodwill. The purpose of this is to try to identify how goodwill could be damaged in the context of passing-off and uncover any strict liability in damage to

¹ C Wadlow *The Law of Passing-Off – Unfair Competition by Misrepresentation* (Sweet & Maxwell, 3rd ed, 2004), 34.

² [1979] AC 731, 731-756.

³ *Ibid.*

goodwill. The section on amending the scope of passing-off has one subsection examining Lord Diplock's argument in *the Advocaat Case*,⁴ which chapter one had noted as representing the completion phase of passing-off. This final analysis is to identify any strict liability in Lord Diplock's formulation of the elements of passing-off.

This chapter will suggest that fraud, as a genus, appeared to amount to a very serious breach of commercial custom. Thus, as soon as another trader exposed a trader's business nostrums⁵ as no longer secret to one business, purchasers' custom with the trader might be immediately affected, with or without intent. In the *Advocaat Case*,⁶ Lord Diplock's process of reasoning by analogy amended the common law of passing-off, so that damage depended on a trader's interest in business goodwill.

B *Fraud in Commerce*

1 *Deceit and fraud*

Wadlow stated that the courts abandoned the element of fraud in passing-off, even as a legal fiction.⁷ Therefore, a brief examination of the nature of civil fraud in commerce will ask the question of whether fraud could have been abandoned within the development of the tort of passing-off.

In the context of his extensive treatise on passing-off, Narayanan proposed that injury to goodwill could take various forms, including any apprehension of diversion of sales, injurious association, misappropriation of business reputation or misappropriation of personality.⁸ He stated that each of these was a species of the one genus of unfair trading or unfair competition. He called them "badges" of

⁴ Ibid.

⁵ Nostrum. A means or device for accomplishing something; a pet scheme or favourite remedy, esp. for bringing about some social or political reform or improvement. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

⁶ [1979] AC 731, 739-748.

⁷ Wadlow, above 1, 32.

⁸ P. Naraynam *Law of Trade Marks and Passing Off* (Eastern Law House, 6th ed, 2007).

common law fraud. He proposed that badges of fraud were not species of fraud, but were *indicia* of fraud, or put another way, they were indicative of fraud.⁹

The 1601 Twyne's Case¹⁰ dealt with badges of fraud. Smith recorded that the circumstances in Star Chamber of *Twyne's Case*¹¹ were as follows.¹² There was a Bill of Information filed in the Star Chamber by the Queen's Attorney-General Coke against Twyne of Hampshire for the making and publishing of a fraudulent gift of goods. Pierce was indebted to Twyne in the amount of £400 and was also indebted to C in the amount of £200. C brought an action in debt against Pierce who, being in possession of the goods to the value of £300, executed a secret deed of gift of all of his goods and chattels real and personal to Twyne, pending the resolution of the writ. This was to be in satisfaction of his debt, even though he remained in possession of the transferred goods. Sir Thomas Egerton, Lord Keeper of the Great Seal, Chief Justice Popham, Anderson J and the whole Court of Star Chamber resolved that this gift was fraudulent.¹³

The Court stated the following six points.¹⁴ The first was that the gift had the signs and marks of fraud because the gift was general and did not exclude his clothes or anything else of personal necessity, because it was commonly said that *quod dolosus versatur in genrealibus*.¹⁵ The second was the donor continued in possession, used them as his own property, traded them, and therefore defrauded and deceived those with whom he traded. The third was the gift was made in secret, and *et dona clandestine sunt semper suspiciosa*.¹⁶ The fourth was that it was made pending the writ. The fifth was there was a trust between the parties because the donor possessed all the property and fraud is always clad in trust and trust is a cover for fraud. The

⁹ Naraynam, above 8, 699.

¹⁰ (1601) 3 Co Rep 80b ; 76 ER 809.

¹¹ Ibid.

¹² Digested in John William Smith *A Selection of Leading Cases on Various Branches of the Law with Notes, Vol I* (A Maxwell, 2nd ed, 1841), 1-14.

¹³ 3 Co Rep 80a, 80b, 81a.

¹⁴ 3 Co Rep 80a, 81a.

¹⁵ 3 Co Rep 80a. *dolosus versatur generalibus*. A deceiver deals in generalities. James Morwood (ed), *The Oxford Latin Mini Dictionary* (Oxford University Press, 1995).

¹⁶ 3 Co Rep 80a. *Clandestine gifts are always to be regarded with suspicion*.

sixth was there was a clause in the deed that the gift was made honestly, truly and *bona fide*.¹⁷

Consider this argument to contextualise *Twyne's Case*.¹⁸ Ram categorised the sources of law contained within judicial opinions as at 1835.¹⁹ His third category was the customs of some cities and places, such as a hamlet, town, burgh, city, manor, honour, hundred or county.²⁰ This infers that some customs might become operational law in counties, cities, towns or lordships. He stated that customs in use throughout England were called maxims. Noy stated that they were interpreted strictly, meaning that they had to be tried by a jury of twelve men and they operated as oral rules.²¹ Thus, the court in *Twyne's Case*²² based its badges of fraud on maxims,²³ suggesting that a badge of fraud was based on customary law.²⁴

According to Smith's account, the Star Chamber also resolved that, since they were of the view that fraud and deceit abounded in those days more than in former times, all statutes made against fraud should be expounded liberally and beneficially to suppress the fraud.²⁵ However, Kerr noted that the tendency of the subsequently established courts of equity was to hold that a seller remaining in possession of sold goods was not conclusive evidence of fraud. Instead, it was only a badge of fraud. In other words, it was a *prima facie* presumption of fraud, which might be rebutted by explanation, showing the transaction to be fair and honest. From this, Kerr concluded that the question of fraud, inferred from of badges of fraud, was not a question of law, but one of fact for the jury.²⁶ In this view, the question arises as to how appellable a finding of fraud could really be.

¹⁷ Smith, above 12, 2.

¹⁸ 3 Co Rep 80a.

¹⁹ James Ram *The Science of Legal Judgment* (John S Littell, 1835), 10-16.

²⁰ Ram, above 19, 11, 12, citing Hob 225; 4 Burr 2368; Litt S 165; Co Litt 110b 115b; William Muchall (ed), *Doctor and Student* (James Moore, 18th ed, 1792) dial, i. ch. 10; Hale's Hist Com L ch II; 1 Bl Com Introd S 3; *the case of Tanistry Davy's Rep* 28b.

²¹ William Noy *The Grounds and Maxims and also an Analysis of the English Laws* (Middletown, 1808), 39-40.

²² (1601) 3 Co Rep 80b ; 76 ER 809

²³ Smith, above 12, 2.

²⁴ Noy, above 21, 39-40.

²⁵ Smith, above 12, 5.

²⁶ Robert Malcolm Kerr *An Action at Law Being an Outline of the Jurisdiction of the Superior Courts of Common Law* (William Henry Bond, 1854), 154.

A similar situation was demonstrated in the 1852 case of *Graham v Chapman*,²⁷ in which fraud was found by virtue of policy expressed in a bankruptcy statute.²⁸ In *Graham v Chapman*,²⁹ a trader, in consideration of a past debt of £240, and a present advance of £200, conveyed by deed substantially the whole of his property. He gave the transferee a right to seize and take all future acquired property, even though it should be purchased with the money, which was alleged to be the consideration for the transfer. The court held that, inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily defeated and delayed his creditors, though without fraud in fact, it still constituted an act of bankruptcy within the statute 12 & 13 Vict c 106, s. 67.³⁰

Jervis CJ delivered the judgment of the court,³¹ stating the maxim that every person must be taken to intend that which is the necessary consequences of his own act, and, if a trader make a deed which necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent. However, according to Jervis CJ, such a deed with such an effect was, by the policy of the law of bankruptcy, an act of fraud. Therefore the transfer, to be accomplished by the deed, was a fraudulent transfer.³² From this judgment fraud was not inferred, but found by the policy of the law of bankruptcy. This was arguably circuitous reasoning, suggesting that fraud was a form of denunciation of status, and therefore reverse onus. Thus, the mere allegation of fraud raised a presumption of defendant liability, and it could be said from this that fraud was implication of strict liability by denunciation of status.

Confirming the lasting rhetorical significance of badges of fraud, in the 1870 case of *Allen v Bonnett*,³³ Elias Bonnett was a brick manufacturer, who made an indenture conveying all his property to another person in consideration of £300. The

²⁷ 12 CB 85.

²⁸ Arguably, policy is the outcome of a weighed synthesis of several current practices, or customs, of stakeholders.

²⁹ 12 CB 85, 85.

³⁰ 12 CB 85, 85.

³¹ 12 CB 85, 103.

³² *Ibid.*

³³ (1870) LR 5 Ch App 577.

arrangement included a provision for redemption for £750 and interest. More than a year later he became bankrupt. The creditors sought to have the indenture declared void, because they had suspicions concerning the advancing of the money. Lord Hatherley, LC, stated that in such cases where there is an absence of distinct proof of positive fraud, there are two relevant badges, or *indicia*, of fraud. He added that these badges of fraud have always induced the court to hold that such deeds could not be sustained against the creditors under a bankruptcy, when such *indicia* were found.³⁴ The Lord Chancellor cited these two instances as follows.³⁵ The first was one where the whole of a person's property, who afterwards becomes bankrupt, has been assigned to an antecedent debt and no further advances have been made. He stated that this kind of transaction was of no advantage to the bulk of the creditors. The second was where an assignment was made by a trader just upon the verge of bankruptcy of such frame and form as to indicate clearly and plainly on the face of the deed and the face of the transaction, without any further proof of fraud or arrangement between the parties, that the purpose was fraudulent.³⁶

Both fraud and deceit were discussed in chapter 4, in the section on fraud and deceit in the *Gloucestershire Clothiers Case*. In that section, an early form of deceit from the time of King John was identified as deriving from breaching an agreement with the crown. It is arguable that fraud can be inferred from deceit. For example, Lord Herschell stated the following in the 1889 case of *Derry v Peek*,³⁷ confirming deceit as indicative of fraud.

Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly and carelessly whether it be true or false . . . if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was intention to cheat or injure the person to whom the statement was made.³⁸

From this, Lord Herschell appeared to say that intention to cheat or injure is irrelevant to a finding of fraud. In the later 1896 civil case of *Reddaway v Banham*,³⁹

³⁴ (1870) LR 5 Ch App 577, 579.

³⁵ (1870) LR 5 Ch App 577, 580.

³⁶ *Ibid.*

³⁷ (1889) 14 AC 337, 374-376.

³⁸ *Ibid.*

³⁹ [1896] AC 199, 221.

Lord Macnaghten characterized fraud as follows. Suggesting fraud's policy basis, his characterisation of fraud leads all the way to, but stops short of, honesty.

Fraud is infinite in variety; sometimes it is audacious and unflinching; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same, and it is the fraud, not the manner of it, which calls for the interposition of the court.⁴⁰

Finally, equity was able to articulate fraud and deceit as distinct states of affairs.

Thus, in the 1903 case of *In re London and Globe Finance Corp'n, Limited*,⁴¹

Buckley J defined "intent to defraud" as follows.

To deceive is, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.⁴²

It appears that fraud was not procedural, but was qualitative. There were two chronological steps to fraud. The first was deception by person A directed at person B, followed by a self-injurious action by person B. These steps were discussed in the 1950 case of *Kat v Diment*,⁴³ arising under the Merchandise Marks Act 1887 (UK). This statute was one in a series of criminal statutes, ultimately used and interpreted by Lord Diplock in the *Advocaat Case*,⁴⁴ discussed later in this chapter. It will be argued later in this chapter that Lord Diplock used this statute, within a series of developing criminal laws, to make over its anti-fraud criminal provisions into a civil action within the tort of passing-off.

From this, it appeared that fraud in commerce was a successful use of persuasive rhetoric. To induce a course of action leading to damage to the actor suggested inducing a breach of acceptable behaviour. Put another way, fraud appeared to be inducing a change in a person's thoughts, so that person adopted a false position, leading to that person breaching acceptable, or customary, behaviour. Explained this

⁴⁰ Ibid.

⁴¹ [1903] 1 Ch 728, 732-733.

⁴² Ibid.

⁴³ (1950) 67 RPC 158, 162.

⁴⁴ [1979] AC 731, 743.

way, fraud could not be abandoned, as it existed in dialectic with customary behaviour.

C *Goodwill*

1 *Local Custom*

This section investigates the scope of meaning for the term “local custom” as it might apply to goodwill. It was argued in chapter 2, in the 1675 case of *Hutchins v Player*,⁴⁵ that a breach of a City of London custom was heard as a criminal matter. It was treated as a strict liability offence. It was also argued in chapter 2 that a custom of London was operational as the local common law. In chapter 2, it was also argued that in certain circumstances, custom could operate as the common law of England. Its breach was tried on a strict liability basis. Therefore, this investigation will be in three parts. First it is necessary to describe the nature of custom. Then, a formal record of operative customs will be consulted to identify customs arguably relevant to passing-off. Finally, the section examines how customs could be formed and how this mechanism for formation might relate to a strict liability aspect to their enforcement.

(a) *Describing Local Custom*

In this chapter, the word “custom” has its basic dictionary meaning as “a habitual or usual practice; common way of acting; usage, fashion, habit, either of an individual or of a community”. This meaning developed *circa* 1200 C.E.⁴⁶ in England. However, in this chapter, this basic meaning of the word “custom” will often have an additional legal meaning. This meaning apparently developed *circa* 1400 C E, as “an established usage which by long continuance has acquired the force of a law or right, especially the established usage of a particular locality, trade, society, or the like”.⁴⁷

⁴⁵ Harg MSS No 55 fol 153.

⁴⁶ Custom *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

⁴⁷ *Ibid.*

Within this latter meaning, two further dictionary refinements are available. The first is “the practice of customarily resorting to a particular shop, place of entertainment, etc. to make purchases or give orders; business patronage or support”, and then more specifically, “designating articles made to measure or to order, or places where such articles are made, or people producing work of this kind”.⁴⁸ Thus, according to its dictionary meaning, custom infers regular resort to a particular business to buy articles meeting a buyer’s established or agreed purchase requirements.

Potts described London custom as follows.

The ancient city of London, being the metropolis and chief town for trade and commerce within the kingdom, it was necessary, that it should have certain customs and privileges for its better government, which though derogatory from the general law of the realm, yet being for the benefit of the citizens, and for the advantage of those who trade to, and from the city, have not only been allowed good, by the judgments in the superior courts, but have also been confirmed by several acts of parliament. The customs of London differ from all other in point of trial, for if any of the customs be pleaded, and denied, and issue be taken thereupon, the existence of such customs shall be tried a by a writ directed to the Mayor and aldermen, to certify whether there is such a custom or not, and they shall make their certificate by the mouth of the recorder. These customs of London relate to diverse particulars with regard to trade, apprentices, widows, orphans and a variety of other matters⁴⁹

Trying a breach of custom has arguably always been strict liability in nature, as was discussed in chapter 2, in the 1675 case of *Hutchins v Player*.⁵⁰ Suggesting the scope of custom, Potts described it in 1815 as follows.

A custom is a law or right, not written, which being established by long use, and the consent of the ancestors, hath been, and is daily practised. If it is to be proved by record, the continuance of an hundred years will serve. Custom is either general or particular. General when allowed through all England. Particular is that, which belongs to this or that county, as *gavelkind* to Kent. General customs which are used throughout England, and are the common law, are to be determined by the judges: but particular customs, such as are used in some certain towns, boroughs, cities, etc., shall be determined by a jury. But the judges of the courts of kings bench and common pleas can overrule a custom, though it be one of the customs of London, if it be against natural reason.⁵¹

This suggested that customary laws were a species of natural law, breaches of which should be tried as a finding of fact by a jury. Arguably, a limiting form of the above

⁴⁸ Ibid.

⁴⁹ Thomas Potts *A Compendious Law Dictionary* (Walker & Edwards, 1815), 185.

⁵⁰ Harg MSS No 55 fol 153.

⁵¹ Potts, above 49, 184, 185.

description, as might apply to goodwill as an element of passing-off, would substitute ‘long-standing consent of buyers’ for ‘consent of ancestors’. The description also suggests that the more local is a custom, the more it is a matter for the jury, and therefore, an issue of fact rather than of law.

Pulling stated that the distinction between general laws and those observed only on a local basis dates back to the ancient Imperial Roman Law, once operative in England.⁵² Species of local laws in England, recognised by the common law, included ancient customs,⁵³ privileges and franchises sanctioned by royal charters and acts of parliament.⁵⁴

Noy stated that there was an obligation inherent in a custom, or any usage voluntarily adopted, which was founded on principles of natural justice.⁵⁵ Noy classified custom as natural law. He specified the following in respect of custom. “. . . the force of nature is the greatest” and “. . . natural affection, or brotherly love, are good causes or considerations to raise an use”.⁵⁶

Part of the City of London Recorder’s job was to appear at the Bar of the Court and recall ancient custom for the court’s consideration. This was discussed in the chapter 2 discussion of the nature of the jurisdiction of the courts of the City of London. Pulling said that these customs were said to be different to the customs of other localities because they could never become obsolete by disuse, or in other words, subject to desuetude.⁵⁷ The crucial ones tended to be confirmed by statute. This arguably made important London mercantile customs into national business laws.⁵⁸ Cunningham noted that London customs were also given over to Oxford and many other affiliated towns in England.⁵⁹

⁵² Alexander Pulling *The Laws, Customs, Usages and Regulations of the City and Port of London* (William Henry Bond and Wildy and Sons, 2nd ed, 1854), 1.

⁵³ Legal Custom is that which, in the absence of any statute, is by usage endowed with the force of statute law. Cicero *Rhetorica Ad Herennium* (Harvard University Press, 2004), 93.

⁵⁴ Pulling, above 52, 1.

⁵⁵ Noy, above 21, 39-41.

⁵⁶ Noy, above 21, 17.

⁵⁷ Pulling, above 52, 3.

⁵⁸ Pulling, above 52, 3, 4.

⁵⁹ William Cunningham *The Growth of English Industry and Commerce, Vol 1* (Cambridge University Press, 4th ed, 1882), 541.

(b) Formal Record Of London Customs

*Arnold's Chronicle*⁶⁰ was a formal written record of the customs of London. The following identifies those entries, which appear to be relevant to the later tort of passing-off. Their relevance will be assessed as they might appear to be either nascent elements of the later tort of passing-off, or forms of law which might have preceded passing-off.

From the preface to *Arnold's Chronicle*,⁶¹ it appears that the data in it reflected correct information as at the year 1502. However, there is material in *Arnold's Chronicle* written as early as 1473.⁶² This suggested that the following customs of London were extant long before the *Gloucestershire Clothiers' Case*.⁶³ The articles of the Charter and Liberties of the City of London⁶⁴ containing the customs most relevant to passing-off, were the following five, plus the record of a mandatory oath.

The first was an article apparently preventing the act of forestalling.

That no merchant or other go against merchants coming by land or by water with their merchandise or vitals toward the city to buy or to sell until they come to the said city, and their wares have been put to sale.⁶⁵

This was where all the arriving goods could be intercepted and purchased before they arrived at the market. Then, prices could be raised at market by the forestaller. Arguably, forestalling could have the dual effect of damaging the custom of all merchants except the forestallers, and raising a public confusion as to the products' sources of manufacture. In theory, it also provided an opportunity for the forestaller to deal with the goods deceptively, such as for example altering their trademarks or trade names to manipulate their market value. Arguably, this deception would make buyer prepurchase inspection of goods very difficult. In theory, passing-off had the same net effect as forestalling. This theory would run as follows. It could facilitate a

⁶⁰ *Customs of London Otherwise Called Arnold's Chronicle* (Rivington, 2nd ed, 1811).

⁶¹ Arnold's, above 60.

⁶² Arnold's, above 60, v-xii.

⁶³ Professor Baker identified the *Gloucestershire Clothiers Case* as *J G v Samford* (1584) unrep in J H Baker, *An Introduction to English Legal History* (Butterworths, 4th ed, 1990), 459.

⁶⁴ Arnold's, above 60, fo 1-11.

⁶⁵ Article xxvii, Arnold's, above 60, fo 3.

monopolistic gathering of goods from multiple sources and then deceptively selling them at prices inflated from their natural value, as if they were all from the same proper source.

The second was another custom limiting the qualifications and accreditation of those selling their goods.

That every person admitted into the liberty of the city must be a member of a specified craft or office accredited by the authority of 6 men of the same craft or office.⁶⁶

This gave discretion over craftsmen to the wardens of their guild, thereby creating commercial rankings as to source of manufacture. In this way the public would look up the commercial ranks to form their pre-purchase impressions of the quality and probity of the goods. For example: if certain goods were from the guild of clothiers, they might have a better reputation than goods from artisans who did not have the status of freedom of the city.

The third was a custom that was arguably a proscription against a nascent form of passing-off, because it recognised a regulatory problem in correctly representing the source of the goods for sale.

If any freeman of the city avouched the goods of foreigners to be theirs he would lose the liberty of the city.⁶⁷

This article prohibited the selling of goods as having an accredited manufacturing source, when they were really made by unaccredited artisans. It aimed to stop people selling their good as having been made by freemen of the City, when in fact they were not.

The fourth was a custom regulating sales of goods by non-citizens of London and its suburbs.

That citizens dwelling outside the liberty of the said city and exercising merchandises in the same must pay taxes in the city or else lose their right to sell.⁶⁸

⁶⁶ Article xxxix, Arnold's, above 60, fo 4.

⁶⁷ Article xlii, Arnold's, above 60, fo 4.

⁶⁸ Article xliiii, Arnold's, above 60, fo 5.

This article suggested those from outside London were at a financial disability in selling their wares in London.

The fifth was a custom seeking to stamp out foreign economic activity in unsupervised places.

That no merchant stranger should sell any merchandise within the liberties to another merchant stranger otherwise their merchandise shall be forfeit.⁶⁹

This article was designed to restrict business between merchant strangers.

Finally, there was a customary oath demanded of every freeman in the city. Its wordage indicates how these freemen were to be bound, and was expressed as follows.

You shall swear that you shall be good and true to our sovereign Lord the King and to his heirs Kings of England and you shall be obedient to the Mayor of the City of London and you shall maintain the franchise freedom and custom of the city to your power. And the same city in all that is in you without danger you shall keep and you shall be partner of all charges touching the city and . . . you shall not avow the goods of foreigners as for yours whereby the king shall lose his custom . . . and if you know any foreigner using any merchandise in the city you shall warn the Chamberlain or the officers, and you shall not plead with any freeman outside the city if you have the right of the Mayor⁷⁰

Embedded within the form of the oath was a requirement prohibiting the presentation of any goods at market, sourced from a foreigner, and whereby the king would lose his custom.

(c) Establishing Custom

Having described custom, and having described those customs of London as arguably relevant to passing-off, it remains to see how customs could be formed.

The above customs of London, set out in *Arnold's Chronicle*, must have had wide force because of London's pre-eminence as a central city of trade and commerce. In

⁶⁹ Article ci, Arnold's, above 60, fo 10.

⁷⁰ The Oath of Every Freeman Made in the City, Arnold's, above 60, fo 96.

this respect, Ayliffe described custom in the following terms. He styled custom as a species of immemorial right, introduced by the tacit consent of the people. It would be established by a long course of practice in such matters only as the people were enabled to do by expressly consenting to it. He added that this practice or usage would substitute for a law deficient in any specific point.⁷¹ The length of time of usage was to be regarded as being the equivalent of the people's consent to the custom. In this way customs were similar to statutes. Customs might be either general or special. They would be general where they were of the majority of the people of the state, and in this instance had the force of unwritten law.⁷² They would be special when they were more of a local character. He noted that a general custom had the effect of the law of the state and could not be introduced by individual persons. It was a species of right, originated by the manners and usage of the whole people of a state.⁷³ However, a prescription⁷⁴ between two people established the existence of a private custom between individuals. The required period of usage appeared to be 40 years by Canon Law and 10 years by the civil law.⁷⁵ Thus, it might be inferred that a custom is a conjectural argument based on fact that has the force of a statute, when there is no actual statute covering its subject matter.

Ayliffe stated four things as required in order to introduce a custom.⁷⁶ The first was a lawful prescription. The second was a frequency of repetition of acts, such as, for example, two acts within ten years and which were notorious in the community. The

⁷¹ John Ayliffe *Juris Canonici Anglicani* (D Leach, 1776), 194.

⁷² Also known as a maxim. Noy, above 21, 39-41.

⁷³ Ayliffe, above 71, 194.

⁷⁴ Prescription, in contemporary times, a means of acquiring an interest in land by long-standing use. At common law in the United Kingdom, a prescriptive right could be acquired if it could be presumed that it existed before 1189, the date of legal memory: (UK) Statute of Westminster 1275 I. Since this became more difficult to prove over time, the courts were satisfied that the right existed if there was at least 20 years' undisturbed enjoyment of the right and no proof that it must have been acquired after 1189. If it was clear that the right was acquired more recently, the doctrine of the lost modern grant applied as a means of acquiring a prescriptive right. Prescriptive rights could also be obtained under the (UK) Prescription Act 1832. Common law prescription does not apply in Australia, although prescriptive rights can be acquired under the doctrine of the lost modern grant and under the (UK) Prescription Act 1832 where it still applies or equivalent legislation is in force. Certain rights may no longer be acquired by prescription, for example easements for light and, in most States, easements for air. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

⁷⁵ Ayliffe, above 71, 194.

⁷⁶ Ayliffe, above 71, 195.

third was the tacit consent⁷⁷ of the people evidenced by long and repetitive usage. The fourth was that the custom had to be founded on equity or right reason.⁷⁸

Ayliffe continued that when a person based intent to act on a custom, there was a legal obligation to prove the custom. This was because a custom was strictly a matter of fact, and facts could not be merely presumed without proof. Witnesses were brought to prove that the custom was both notorious and long standing.⁷⁹ Ayliffe stated that customs were adjudged the same way as the private law established in contracts,⁸⁰ breach of which required no proof of intent.

2 Judicial Reasoning by Analogy

This section investigates the theory of Lord Diplock's judicial reasoning by analogy, as it was used in the *Advocaat Case*,⁸¹ to see if this process might have affected the structure of the tort of passing-off in such a way as to have made it strict liability in character. It asks if any relationship might exist between judicial reasoning by analogy and a possible re-emergence of old customary law into the tort of passing-off.

In his 1997 paper on judicial reasoning by analogy, Farrar explained judicial reasoning by analogy as part of the doctrine of precedent.

Reasoning by analogy is fundamental to Common Law method and yet until recently has received relatively little analysis except as part of the Doctrine of Precedent. In this article we shall attempt an analysis of the nature of analogy in general, its relationship to logic and its place in reasoning with cases, statutes and codes. We shall then review some theoretical discussions of analogy and the link between reasoning by analogy and justificatory reasoning, ending with an analysis of justification in terms of principle, policy and considerations of fairness underlying the Doctrine of Precedent.⁸²

⁷⁷ However, a statute has the express consent of the people. Ayliffe, above 71, 195.

⁷⁸ The Law rests on equity when it seems to agree with truth and the general welfare; for example a man who is more than sixty years old, and pleads illness, shall substitute an attorney for himself. Thus according to circumstances and a person's status virtually a new kind of law may well be established. *Rhetorica ad Herennium*, above 53, 95.

⁷⁹ Ayliffe, above 71, 196.

⁸⁰ Ayliffe, above 71, 195.

⁸¹ [1979] AC 731, 739-748.

⁸² John H Farrar 'Reasoning by Analogy in the Law' (1997) 9(2) *Bond Law Review*, 149, 149.

He explained how judicial reasoning by analogy forms part of the doctrine of precedent.

The method used by Common Law judges in deciding cases is a form of practical reasoning, combining reasoning by analogy with reasoning by rule and principle.⁸³

By the term ‘rule’, he meant a standard in the form of ‘If circumstances X apply, then consequence Y shall (or ought) to follow.’⁸⁴ However, he explained the principle as a less precise, more general standard and often ethical in content. Principle was to be distinguished from policy, as policy set out a social goal. Analogy involved both a comparison and a weighing process. If the similarities outweighed the dissimilarities, then the earlier case was to be followed. If not, then the earlier case was to be distinguished.⁸⁵ However, it was not so much the earlier case as the rule or principle implicit in the earlier case to be followed. This introduced and inferred the term *ratio decidendi*,⁸⁶ by which the first case was followed.⁸⁷

The term *ratio decidendi* did not appear in James Ram’s book *The Science of Legal Judgment* published in 1834, which was the first published systematic work on the case law method. Farrar regarded the omission as likely to be significant because the phrase had found favour with jurists, but not yet with the Bench. Farrar argued that Ram’s book was written for a judicial audience.⁸⁸

However, in fact, Ram’s view was that the judicial holdings were express on the face of the record, rather than implicit in the judge’s reasons for decision. According to Farrar’s interpretation of Ram, there was no room for interpreting another judge’s words in depth. Farrar suggested that, instead, the judge must be taken at face value.⁸⁹ Thus, in Ram’s 1835 edition of *The Science of Legal Judgment*,⁹⁰ Ram linked opinion with judicial decision making. This would admit the possibility of

⁸³ Farrar, above 82, 151.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Farrar, above 82, 151, note 7.

⁸⁹ Farrar, above 82, 151.

⁹⁰ Ram, above 19.

judicial reasoning by analogy. He divided opinions from the bench into first, judicial opinion and second, extra-judicial opinion. The former was an opinion on the question before the court and was a resolution or determination, a direct solemn opinion, a formed decisive resolution, an adjudication, or a professed or deliberate determination. The latter was an opinion given on a question unnecessary to decide in the given case, one kind of which was called *obiter dictum*. It was not to be taken as a resolution of the court.⁹¹

Farrar exemplified the process of judicial reasoning by analogy⁹² by examining Lord Diplock's speech on the duty of care in negligence in the 1970 House of Lords case of *Home Office v Dorset Yacht Co.*⁹³

*Home Office v Dorset Yacht Co.*⁹⁴ was decided in 1970, some nine years before Lord Diplock's speech in the 1979 House of Lords decision in *The Advocaat Case*.⁹⁵ In *Home Office v Dorset Yacht Co.*,⁹⁶ Lord Diplock began by discussing judicial reasoning by analogy to extend common law tort liability in negligence. He suggested that the House of Lords would be deciding whether the English law of civil wrongs should be extended to impose legal liability not yet recognised by the courts. He stated that this function, which judges hesitated to acknowledge as law making, played only a minor role in the decision of most cases. He added that little conscious thought had been given to analysing its correct methodology.⁹⁷

His lordship disclosed his 5-step procedure for application of judicial reasoning by analogy. The first step was to analyze all the previous cases looking for the common characteristics. Lord Diplock put it this way.

In all the decisions that have been analyzed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc. and has not so far been found to exist when any of these characteristics were absent.⁹⁸

⁹¹ Ram, above 19, 36, 37.

⁹² Farrar, above 82, 154.

⁹³ [1970] AC 1004, 1004-1071.

⁹⁴ [1970] AC 1004, 1004-1071.

⁹⁵ [1979] AC 731, 739-748.

⁹⁶ [1970] AC 1004, 1057-1071.

⁹⁷ [1970] AC 1004, 1058.

⁹⁸ [1970] AC 1004, 1059.

The second step was to convert the analysis into a statement of law that the doctrine existed when all of the discovered characteristics were proved in evidence. Lord Diplock put it this way.

For the second stage, which is deductive and analytical, that proposition is converted to: In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc. a duty of care arises. The conduct and relationship involved in the case for decision is then analyzed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision.⁹⁹

The third step was to analyze the conduct and relationships in the case at hand. This was to see if it demonstrates the said characteristics. Lord Diplock put it this way:

But since *ex hypothesi* the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will take at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration.¹⁰⁰

The fourth step was that if extending the law by analogy, then the conduct in the case must possess at least one of the said characteristics. If so, a policy decision of a judge could be taken by re-defining the characteristics in more general terms. Lord Diplock put it in the following way.

The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition, which are considered to be inessential.¹⁰¹ In all cases where the conduct and relationship possess each of the characteristics A, B, C, and D, etc but do not possess any of the characteristics Z, Y, or X etc which were present in the cases eliminated from the analysis, a duty of care arises.¹⁰²

Step five was to prevent the law being stated in too general terms. For this, the judge should take care to consider only reported cases where the actual decision alone carried authority, proper weight, and was stated within the ambit of the *dicta* of the judges. Farrar argued that in the early history of English and Scots Law, the courts

⁹⁹ [1970] AC 1004, 1059.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

used statutes as the basis of argument by analogy.¹⁰³ The old *equity of the statute* approach recognized the possibility of statutory analogies such as extending the meaning of a statute using equitable procedures. Farrar said that this approach, which was perhaps necessitated by the fact that many early statutes were not so well written and were excessively terse, has now been discredited. Nevertheless, Farrar noted that one could still identify some relatively modern examples where courts seemed to have used statutory provisions by analogy,¹⁰⁴ such as in the *Advocaat Case*,¹⁰⁵ per Lord Diplock.

Farrar's view was that the *equity of the statute* appeared to derive from a principle that the courts, guided by the dictates of conscience and natural justice, could modify the rigor of a statute or apply its rules to cases not provided for, to avert hardship or injustice.¹⁰⁶ This procedure was embedded deeply into jurisprudence. For example, Sir John Doderidge commented on St. Germain's Doctor and Student,¹⁰⁷ saying that equity is "triple in our law". By this he explained that equity either kept the common law in conformity, or expounded statute law, or gave a remedy in the court of conscience, in cases of extremity which otherwise were unredressed by the law.¹⁰⁸

Farrar also cited Francis Bacon as having explained the theory of the *equity of a statute* in his general view of judicial reasoning by analogy. Bacon set this out in a letter to the Earl of Rutland, in which he stated as follows.

The observation of proportion or likeness between one person or one thing and another, makes nothing without example, nor nothing new; and although *exempla illustrant non probant*, examples may make things plain that are proved, but prove not themselves; yet when circumstances agree, and proportion is kept, that which is probable in one case is probable in a thousand, and that which is reason once is reason ever.¹⁰⁹

¹⁰³ Farrar, above 82, 157.

¹⁰⁴ Farrar, above 82, 154, 157.

¹⁰⁵ [1979] AC 731, 739-748.

¹⁰⁶ W H Loyd 'The Equity of a Statute' (1909) 58(2) University of Pennsylvania Law Review and American Law Register, New Series, 76-86, 82, citing Henry Campbell Black *Handbook on the construction and interpretation of the laws* (West Publishing Co, 1911), 42.

¹⁰⁷ Dialogue I, Ch. XVII.

¹⁰⁸ Loyd, above 106, 78, citing Doderidge's English Lawyer, 211.

¹⁰⁹ Farrar, above 82, 163, citing Francis Bacon *Letters and Life Vol. II* (Longman, Green, Longman and Roberts, 1862), 196.

In other words similarities achieve nothing by themselves. Strictly, argument by example proves nothing. However, it raises a presumption of a probable or rational connection, which is arguably an *indicium* of strict liability. According to Bacon, this would not be subject to desuetude. The presumption would then have to be either verified or falsified by observation.¹¹⁰ In this way, the conclusion of an argument by analogy effected a conclusion of reverse onus, which was arguably an *indicium* of strict liability.

Farrar considered the general approach of modern courts. He said judges regarded the legislative categories as closed categories and did not view statute law as a source of legal principle. He stated that statutes could be interpreted and reinterpreted but not reworked or extended. Nevertheless, this general position had some exceptions. First, a recognized exception was where the statute referred to a common law concept and there the concept was capable of further analogical development within the common law.¹¹¹ Arguably, this could include an ancient local custom filling a lacuna in the law, or a custom of the City of London operating as the common law. Second, occasionally legislation was used as an expression of public policy in the common law world. This kind of expression of public policy was relatively rare in the United Kingdom and Australia, *The Advocaat Case*¹¹² being one such exception.¹¹³

3 *Understanding Goodwill*

This section examines goodwill, so that it can be understood in the context of Lord Diplock's speech in the *Advocaat Case*,¹¹⁴ below. It seeks to apply Lord Diplock's schema for judicial reasoning by analogy, to develop a description of goodwill that might explain goodwill's unique susceptibility to damage by acts of passing off.

¹¹⁰ Farrar, above 82, 153, 154.

¹¹¹ Farrar, above 82, 154, 158.

¹¹² [1979] AC 731, 739-748.

¹¹³ Farrar, above 82, 154, 158.

¹¹⁴ [1979] AC 731, 739-748.

Allen explained the absence of a unified definition of goodwill by the fact that it was a thing incapable of a separate existence. This was because its nature varied with the nature of the business to which it attached. It was also from the fact that the word was a commercial term used by mercantile practitioners. He said that frequently they had no clear appreciation of what they meant when they used it.¹¹⁵ In 1889 Allen described goodwill in the following terms.

The task of establishing a business or a professional practice is generally a matter that requires the expenditure of time, labour and money. The general public are slow to purchase a new comer's goods – to test or rely upon a stranger's skill. Perseverance and industry are, however, not unusually successful, and our commercial or professional man who has worked steadily through the weary period of probation finds, sooner or later, that his goods or services are in fairly constant demand. This is seldom due, however, to the number of his promiscuous customers or clients, but rather to the fact that certain persons go to him regularly. These persons have found that he is honest and trustworthy; that his goods are of high quality, or that his skill and knowledge are commendable; they have been satisfied with the treatment they have received in the past, and are loath, in the absence of some reliable recommendation or other special circumstances, to run the risk of transferring their custom to another. They have, in fact, a confidence in the man, and a good will towards him. These regular customers constitute what has been well called his "connection", commercial or professional, and they afford him the security of a fairly constant income. If he is obliged to carry on his work in such a manner that these customers can no longer resort to him, as, for instance, if he has to leave their neighbourhood, he loses this connection and is thereby seriously prejudiced.¹¹⁶

As such, goodwill was a valuable form of property. It had no separate existence of its own, apart from the business being run. It might be subject to sale, mortgage, or bequest. Or it might be an asset available to a trustee in bankruptcy.¹¹⁷ Arguably, this meant that it might be dealt with fraudulently, and subject to a sequestration order.¹¹⁸

Allan said there were two classes of legal rights allowing a person to acquire the goodwill of a business, exclusive of any agreement with the previous trader. The first was the possession of the premises and of the old stock. The second was the right to

¹¹⁵ Charles E Allan *The Law Relating to Good Will* (Stevens and Sons, 1889), 4.

¹¹⁶ Allan, above 115, 1, 2.

¹¹⁷ Allan, above 115, 2.

¹¹⁸ In chapter 2, above, this kind of order was shown to be a customary power of the Court of the City of London, used to seize property to satisfy alleged debts. The remedies of foreign attachment and sequestration were arguably open to abuse, such that, hypothetically, a debtor could either be chased away or kidnapped or worse, so that his goods could be either attached or sequestered or both, and thereby title to his working capital and stock was transferred out of the debtor's hands.

carry on the old business and to represent that it was the old business that was carried on.¹¹⁹ The word “goodwill” usually meant the second of these classes of rights. It included the following three specific rights. The first was the sole right to use the old trade name or firm name. The second was the sole right to the trademarks connected with the business. The third was a right to the benefit of contracts entered into by the assignor with third parties, for the protection of the business.¹²⁰

This exclusive class of right was discussed in the 1879 case of *Levy v Walker*.¹²¹ In that case, James LJ stated that the right to use the partnership name, as a description of the articles sold in that trade, was an exclusive right against all the world. This was so that no other person could represent himself as carrying on the same business. From this, Allen stated that the reason why a person using a firm name used by others could be restrained from so doing was because the public might be or were deceived by this use. The consequence of the deception would be that the person, whose business name had the reputation, suffered an injury to the property in the business.¹²² For this, fraud was not a necessary requirement for proof. Rather, it was assumed by pleading merely that the wrongful act was calculated to deceive.¹²³

In 1922 Foreman noted that goodwill had been defined by economists as the reputation, business standing or favour, which the entrepreneur enjoyed in the eyes of the public. He also explained goodwill as the habit or custom, which led men to deal with a definite or particular enterprise in preference to others of the same kind. He speculated that the legal definitions of goodwill were not as cogent as the economics-based theories, and instead were clustered under several sub headings. In respect of the early English cases, Foreman’s argument suggests that the descriptions of those sub headings were per the following five heads.¹²⁴

¹¹⁹ Allan, above 115, 13.

¹²⁰ Allan, above 115, 18, 19.

¹²¹ [1879] 10 Ch D 436.

¹²² Allan, above 115, 18, 19.

¹²³ This may only have meant that it was very widely persuasive, judged by assessing the effect of the rhetoric inherent in the firm’s name.

¹²⁴ C J Foreman ‘Conflicting Theories of Good Will’ (1922) 22(7) Columbia Law Review, 639-653, 638.

Foreman's first head was the concept embodied or inherent in the grounds, buildings, productive processes and stock of an enterprise.¹²⁵ This was illustrated by Lord Eldon's definition in 1810 in *Cruttwell v Lye*¹²⁶ as follows. "The good-will, which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." In the later 1842 case of *England v Downs*,¹²⁷ Lord Langdale MR held the goodwill of a seller of victuals to be incident to the stock and the licence, but not to the premises on which the business was established.

Foreman's second head was that goodwill of a business may be established and held permanently through effort within the business.¹²⁸ This was illustrated in the following two cases. In *Cooper v Metropolitan Board of Works*,¹²⁹ Cotton LJ held that if goodwill depended on personal skill of the person who parted with it, it was not transferred to others merely through a sale of the premises.¹³⁰ In *England v Downs*,¹³¹ Lord Langdale MR held goodwill to be the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business had been run previously.¹³²

Foreman's third head was that goodwill is simply nothing more than value.¹³³ This was illustrated by a supposition put forward by the members of the court in *Cook v Collingridge*:¹³⁴ goodwill might be defined as the value of the chance that the customers of partners retiring altogether would deal with those who purchased from such retiring partners and succeeded to their establishment. Lord Eldon agreed and drafted this wordage into his order of the Court.¹³⁵

¹²⁵ Foreman, above 124, 639.

¹²⁶ (1810) 17 Ves Jr 334, 346.

¹²⁷ (1842) 6 Beav 269, 276.

¹²⁸ Foreman, above 124, 642, and see the discussion in chapter 3 on title to personal property *per industriam*, represented notoriously by the Swan mark, discussed in the *Case of the Swans* 4 Co Rep 82.

¹²⁹ (1884) 25 Ch D 472, 472-482.

¹³⁰ (1884) 25 Ch D 472, 479-480

¹³¹ (1842) 6 Beav 269, 269-283.

¹³² (1842) 6 Beav 269, 276.

¹³³ Foreman, above 124, 645.

¹³⁴ (1825) 27 Beav 456, 458-459.

¹³⁵ *Ibid.*

Foreman's fourth head was that intangible connection between an enterprise and the public.¹³⁶ It was explained by Sir John Romilly in *Wedderburn v Wedderburn*,¹³⁷ as, "it seems to be that species of connection in trade which induces customers to deal with a particular firm".¹³⁸

Foreman's fifth head was the form of fixed impressions or conceptions on the part of the consuming public.¹³⁹ Sir W. Page Wood VC described this in the 1859 case of *Churton v Douglas*,¹⁴⁰ as follows. It appears that *Churton v Douglas*¹⁴¹ reported the strength of the business name as an element of goodwill. In this 1859 case there was a sale of a business, and the question for the court was whether the person selling the business was entitled to set up in competition. The Vice-Chancellor, Sir W. Page Wood, was prepared to grant a temporary injunction, and stated that, it was in the nature of goodwill that the public had more regard for the name of the firm than they had for its trading address. In support of this proposition, the Vice-Chancellor noted that the word "firm" was derived from the Italian word, which simply meant "signature". His conclusion was that when one parts with the goodwill of a business, one means to part with all of the good disposition which customers entertain towards the house of business. The name or firm identifies this good disposition. It may induce customers to continue giving their custom to it.¹⁴²

Taking these five separate headings together, goodwill can be argued as ***the value in the probability of the business continuing to maintain its connection to buyers to induce custom in the same way.***

In his 2008 paper, Tregoning conducted a detailed survey of the relevant cases.¹⁴³ The process of limiting the general rule for goodwill will now be applied by reference to Tregoning's survey of the operative case law. As such, Tregoning

¹³⁶ Foreman, above 124, 646.

¹³⁷ (1855) 22 Beav 84, 104.

¹³⁸ Ibid.

¹³⁹ Foreman, above 124, 650.

¹⁴⁰ *Churton v Douglas* (1859) 1 Johns. Eng Ch 174 reported the strength of the business name as an element of goodwill.

¹⁴¹ 1 Johns. Eng Ch 174, 188.

¹⁴² Ibid.

¹⁴³ Ian Tregoning 'What's in a Name? Goodwill in Early Passing-Off Cases' (2008) 34(1) *Monash University Law Review*.

determined that the first case in which goodwill was expressly mentioned by name was the 1743 matter of *Gibblett v Read*.¹⁴⁴ Before this, he argued that goodwill appeared to have been referred to by the synonym of “custom”.¹⁴⁵ For example, in the 1859 case of *Churton v Douglas*,¹⁴⁶ Wood VC emphasized that custom was what was meant by goodwill. He noted that references to custom, as a synonym for goodwill, appeared in the 1620 case of *Broad v Jollyfe*.¹⁴⁷

In the 1620 case of *Broad v Jollyfe*,¹⁴⁸ the defendant was trading as a mercer. He had a shop at Newport, selling old and sullied wares. The plaintiff had a shop there selling new and fresh wares. The plaintiff bought all of the defendant’s old wares for their original prices. He assumed that the defendant would no longer run the shop. The defendant then furnished his shop with new wares and maintained his business in his shop. Houghton J held that this was a case of good *assumpsit*.¹⁴⁹ This was because one might restrain oneself not to trade at a particular place, and the person who gave the consideration expected the benefit of the customers. The judge referred to the local custom in London of letting his shop and wares to his servant when he completed his apprenticeship and to covenant that he should not trade in the let shop or in the same street. Thus, the court held that it was customary that a person might voluntarily agree for valuable consideration not to use his trade, because *volenti non fit injuria*.¹⁵⁰ Arguably, this was explainable as the selling of his custom and leaving another person to gain it, having impliedly waived a right of action in tort to regain

¹⁴⁴ (1743) 9 Mod 459, 459-461; 88 ER 573. Extracted in this chapter, below.

¹⁴⁵ Custom. The Oxford English Dictionary explained the word “custom” as a habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community); the practising of anything habitually; the being or becoming accustomed; in law, an established usage which by long continuance has acquired the force of a law or right, especially the established usage of a particular locality, trade, society, or the like; the practice of customarily resorting to a particular shop, place of entertainment, etc. to make purchases or give orders; business patronage or support. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹⁴⁶ (1859) 1 Johns Eng Ch 174, 188.

¹⁴⁷ (1620) Cro Jac 596, 597; 79 ER 509.

¹⁴⁸ Cro Jac 506, 597.

¹⁴⁹ Assumpsit. *Latin* – he or she promised or undertook. The common law action developed in the 14th century, *Skyrne v Butolf* YB Pas 11 Ric II (Ames series), 223, for breach of an undertaking, which replaced the earlier action of trespass on the case. Assumpsit was a general contractual remedy arising from a promise where a person assumed and took it on himself or herself to perform some act or pay something for another. It was subsequently abolished by the (UK) *Judicature Act 1873*. The term is now used mainly to refer to an action that lay where a party claimed damages for breach of simple contract. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

¹⁵⁰ *Volenti non fit injuria*. *Latin* – there can be no injury to the willing. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, Sydney [2012], online.

it. The court held that a prescription, or private agreement, to restrain a person from using a trade in a specified place was good.¹⁵¹

Tregoning argued that the following five passing-off style of cases were central to the development of the law of goodwill.¹⁵²

The first case, the 1742 case of *Blanchard v Hill*¹⁵³ contrasted local custom with a crown grant as the source of goodwill. This suggested that, at common law, a crown grant of monopoly was not a source of goodwill. In *Blanchard v Hill*,¹⁵⁴ the plaintiff sought to restrain the defendant from using the *Mogul* stamp on his playing cards. He argued that he owned the sole right. He submitted had he had appropriated the stamp for himself pursuant to the terms of the charter of King Charles I previously granted to the Cardmakers' Company. Lord Hardwicke held that the monopoly intention of the charter was illegal, unless duly confirmed by an act of parliament. His Lordship added that, a court of equity would never establish a right of such a kind claimed under a charter from the crown, unless there had been first an action to try the right at law. There was an objection that the defendant, in using the *Mogul* mark, had taken the plaintiff's customers away. Lord Hardwicke held that there was no more weight in this than if an innkeeper displayed the same sign as another innkeeper.¹⁵⁵ This was arguably reminiscent of the law of printers' devices, discussed above in chapter 3.

In the second case of *Gibblett v Read*,¹⁵⁶ the court considered nostrums¹⁵⁷ as an element of goodwill. In this 1795 case, Hardwicke LC considered that although it might be difficult to define sufficiently the nature of property, that property could still be transmissible to representatives of the testator's estate. In this case, the deceased had purchased shares in a newspaper from such representatives. The court held, *a priori*, that all things of this sort ought to be taken according to the known

¹⁵¹ Cro Jac 506, 597.

¹⁵² Tregoning, above 143.

¹⁵³ (1742) 2 Atk 484, 484-487.

¹⁵⁴ (1742) 2 Atk 484.

¹⁵⁵ (1742) 2 Atk 484, 487.

¹⁵⁶ (1795) 9 Mod 459, 459-461.

¹⁵⁷ Nostrum. A means or device for accomplishing something; a pet scheme or favourite remedy, esp. for bringing about some social or political reform or improvement. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

nature of the dealing.¹⁵⁸ Thus, the case was put in terms of physical secrets, or nostrums, where the nostrums could be part of the personal estate of the testator. Were the business to have been one of great trade, the executor would have to account for the value of what was called the goodwill of it, explained as follows. If anyone had thought of the nostrums, in the absence of a patent, then any such discoverer might have simply sold them. The court held that the value of these nostrums was that, since the business was a partnership, there were kinds of secrets in the business between the partners. It held that there was a certain expense in having procured the required intelligence to develop these secrets.

The third case of *Hogg v Kirby*¹⁵⁹ considered trade comity¹⁶⁰ between traders as a possible element of goodwill. In this 1803 case, there was an application to dissolve a restraining injunction. It was to restrain Kirby's magazine, which appeared to be a continuation of the plaintiff's magazine. This was in its volume and page numbers and which was published under a similar title.¹⁶¹ Mr Richards and Mr Wetherell argued, on behalf of Kirby, against dissolving the injunction by noting that the injunction had been based on property at law, agreement and trust. They argued, by analogy to newspapers, that it had been established that property existed in a newspaper and that an action lay for another person publishing under the same title. They also argued that a court of equity had jurisdiction to apply the remedy of specific performance, under the heads of agreement. This remedy gave the court jurisdiction to call upon a person not to do an act, which he had covenanted not to do, or to compel a person according to his covenant to forego the use of a legal right or privilege, such as in a restraint of trade. They also argued that an author's copyright, after the copyright expiry, might still become property by virtue of an agreement. Lastly, they argued that under trust law a property arose in a publication according to the usage of booksellers, on the ground that when a person contracted with another person in the same trade they were bound to conform to the customs and usages of the trade.¹⁶²

¹⁵⁸ (1795) 9 Mod 459, 460.

¹⁵⁹ 8 Ves 215, 215-228.

¹⁶⁰ Comity. Courtesy, civility, urbanity; kindly and considerate behaviour towards others. *Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

¹⁶¹ 8 Ves 215, 215.

¹⁶² 8 Ves 215, 217-221.

The Lord Chancellor, Lord Eldon, started his reasoning by seeking the genus for magazines and newspapers.¹⁶³ He apparently decided the genus was books.¹⁶⁴ He held, in *obiter*, that by the usage of booksellers, which arose from comity between them, if one worked on and produced a certain work, he would be considered as its proprietor. However, their dealings consequently based on that comity, unless specifically sanctioned by the law of England, were not of a species, which was very necessary to encourage.¹⁶⁵ The Lord Chancellor directed that the parties apply to try the matter at law, and then use any favourable outcome at law to dissolve the injunction.¹⁶⁶

The fourth case of *Cook v Collingridge*¹⁶⁷ dealt with the balance between the business reputation and the reputation of the individual partners as an element of goodwill. In this 1825 case, Lord Eldon provided a definition of goodwill as “. . . the value of the chance that the customers of partners retiring altogether will deal with those who purchase from such retiring partners and succeed to their establishment”¹⁶⁸ His Lordship held that the chance of a purchaser of the partnership property retaining the old customers could not be treated as of no speculative value.¹⁶⁹ He held that this value could be determined by resort to the previous 3 or 4 years profits.¹⁷⁰

The fifth case was that of *England v Downs*.¹⁷¹ It linked the custom of past business behaviour with the likelihood of it continuing into the future. In this 1842 case, Lord Langdale MR defined goodwill as follows: “It is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on.”¹⁷²

¹⁶³ 8 Ves 215, 221.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ 8 Ves 215, 228.

¹⁶⁷ 27 Beav 456, 456-459.

¹⁶⁸ 27 Beav 456, 458, 459.

¹⁶⁹ 27 Beav 456, 458.

¹⁷⁰ 27 Beav 456, 459.

¹⁷¹ 6 Beav 269, 269-283.

¹⁷² 6 Beav 269, 276, 277.

At the beginning of this section, a general principle for goodwill was argued to be ***the value in the probability of the business continuing to maintain its connection with buyers to induce custom in the same way***. This principle was necessarily general. However, it may now be limited by the following: issues of local custom as opposed to a crown grant of monopoly, nostrums, trade comity, business reputation, and, likelihood of continuing custom. This process of limitation can particularise the sources of damage in passing-off. Arguably the general principle may now be limited to ***goodwill is the value in the probability of the business continuing to maintain its connection with customers of good disposition to it, to induce local custom by means of its own nostrums and reputation, in the same way as in the past***.

For the purposes of the thesis, this particularisation of sources of damage to goodwill might be used to uncover areas of strict liability within passing-off. This newly-limited principle suggests that goodwill was an interest uniquely susceptible to damage by misrepresentations as to the ownership of business nostrums and reputation. Arguably, these nostrums, and the business reputation together, could affect the business's ability to induce local custom, by affecting purchasers' better disposition towards the business than to its competitors. It was suggested, in the above discussion of local custom, that custom within goodwill was to be treated like contract, breach of which required no proof of intent. Therefore, damage to goodwill of this kind would require no proof of intent.

The *Advocaat Case*¹⁷³ confirmed goodwill as the interest damaged in passing-off. Having discussed custom within goodwill, and ways in which goodwill could be damaged within the context of passing-off, the discussion now turns to an analysis of the *Advocaat Case*.¹⁷⁴

¹⁷³ [1979] AC 731, 731-756.

¹⁷⁴ *Ibid.*

D *Amending the Scope of Passing-Off*

1 *The Advocaat Case*

The investigation in this chapter centres around the House of Lords *Advocaat Case*,¹⁷⁵ because Wadlow stated in his history of the tort that passing-off was essentially complete with the House of Lords judgment in that case.¹⁷⁶ This section examines *The Advocaat Case*,¹⁷⁷ looking for whether this process of completion might have been related to any strict liability structure within the tort of passing-off, and if so, how.

In the *Advocaat Case*,¹⁷⁸ the plaintiffs, Erven Warnink BV and Victoria Wine Co Ltd, appealed against a decision of the Court of Appeal of 19 April 1978 allowing an appeal by the defendants, J. Townend & Sons (Hull) Ltd and H. Keeling & Co., from the judgment of Goulding J given on 29 July 1977. Warnink had been granted an injunction restraining Townend from advertising, offering for sale, selling or distributing any product under the name or description of 'advocaat'. The appeal was allowed.¹⁷⁹

In *The Advocaat Case*¹⁸⁰ the facts were stated by Lord Diplock, and paraphrased thus. The plaintiffs manufactured and distributed an alcoholic drink known as 'advocaat'. It was made out of a mixture of eggs and spirits. Advocaat was a distinct and recognisable drink made almost exclusively in the Netherlands by a number of other manufacturers as well as the plaintiffs. It was sold in England for many years. After heavy advertising, it became a popular drink in England, where the name 'advocaat' had acquired a substantial reputation and goodwill. The defendants manufactured an alcoholic drink in England out of dried eggs and Cyprus sherry, properly called an egg-flip, which they marketed as 'Old English Advocaat'. Because their product contained sherry rather than spirits less excise duty was payable on it and it could

¹⁷⁵ [1979] AC 731, 731-756.

¹⁷⁶ Wadlow, above 1, 34.

¹⁷⁷ [1979] AC 731, 731-756.

¹⁷⁸ [1979] AC 731, 733.

¹⁷⁹ [1979] AC 731, 756.

¹⁸⁰ [1979] AC 731, 734, 735.

therefore be sold at a lower price than Dutch advocaat. The two drinks were not so different than an inexperienced or casual drinker would think they were different. Even though the defendants had not passed off their product as that of the plaintiffs, the plaintiffs applied for an injunction restraining the defendants from selling or distributing under the name 'advocaat' any product, not made out of eggs and spirits without the addition of wine. They claimed they were members of a class consisting of all those who had a right to use the name and as such were entitled to protect the name by a passing-off action. The judge granted the injunction, but on appeal by the defendants the Court of Appeal discharged the injunction and dismissed the action on the ground that the name 'advocaat' was purely descriptive and not distinctive. The plaintiffs appealed.¹⁸¹

From this, the key facts were three. First, the name “advocaat” had acquired a substantial reputation and goodwill through advertising. Second, it was unlikely that the defendant’s product could be confused with the plaintiff’s product at the time of purchase. Third, the plaintiffs were members of a class consisting of all those who claimed a right to use the name “advocaat”. The defendants appeared to have found a way of using the name “advocaat” and paying less excise taxes than the rightful claimants of that name. The House of Lords allowed the appeal and Lord Diplock’s speech represented the majority view of the House. His argument ran in 13 substantiated propositions, analyzed as follows.

Lord Diplock’s first proposition might be restated this way. His Lordship stated that this was an action for passing-off. It was not in its classic form of a trader representing his own goods as the goods of somebody else.¹⁸² Rather, it was the extended form first recognized and applied by Danckwerts J in the 1959 *J Bollinger v Costa Brava Wine Co Ltd* (the *Spanish Champagne Case*).¹⁸³ In the *Spanish Champagne Case*,¹⁸⁴ the facts were stated.

On the hearing of preliminary points of law in an action by the plaintiffs (suing on behalf of themselves and all other producers of wine from grapes grown in the Champagne district of France) for an injunction to restrain the defendants

¹⁸¹ [1979] AC 731, 734, 735.

¹⁸² [1979] AC 731, 739.

¹⁸³ [1960] Ch 262, 262-288.

¹⁸⁴ [1960] Ch 262, 265, 266.

from applying the description "Spanish Champagne" to wine made in Spain or made from grapes grown there, for a declaration that "Spanish Champagne" was a false trade description of such wine and for damages, the court made the following assumptions of fact. The plaintiffs carried on business in the Champagne district of France. For many years their wine had been known in the trade as "Champagne" and had a high reputation. Members of the public or in the trade ordering or seeing wine advertised as "Champagne" would expect to get wine produced in Champagne from grapes grown there. The defendants were marketing a wine not produced in the Champagne district and were selling it under the name of "Spanish Champagne". The plaintiffs alleged, in addition to other causes of action, breach of statutory duty under s 2(2) of the Merchandise Marks Act, 1887, as amended by s 4 of the Merchandise Marks Act, 1953.¹⁸⁵

The Court held that it was unlawful competition for a trader to associate with his product a name or description, without any natural association, to use the reputation and goodwill of other traders who genuinely indicated the product origin.¹⁸⁶

Lord Diplock's second proposition was essentially thus. The question of law was whether the House of Lords should approve this extended concept of the cause of action for passing-off. His Lordship said that this question was one of legal policy.¹⁸⁷ Arguing for this approval, Lord Diplock argued that no purchaser of Keeling's Old English Advocaat thought or would be likely to think it to be goods supplied by Warnink or to be any make of Dutch advocaat. Thus, Warnink had no cause of action for passing-off in its classic form.¹⁸⁸

However his Lordship noted that the trial judge was satisfied of the following five points. First, the name 'advocaat' was understood by the public in England to denote a distinct and recognisable species of beverage.¹⁸⁹ Second, Warnink's product was genuinely indicated by that name and had gained reputation and goodwill under it.¹⁹⁰ Third, Keeling's product had no natural association with the word 'advocaat'. It was an egg and wine drink properly described as an egg-flip. However, advocaat was an egg and spirit drink. These were different beverages and known as different to the

¹⁸⁵ [1960] Ch 262, 265, 266.

¹⁸⁶ [1960] Ch 262, 283, 284.

¹⁸⁷ [1979] AC 731, 739.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

public.¹⁹¹ Fourth, members of the public believed and had been deliberately induced by Keeling to believe, without confusion, that in buying their Old English Advocaat they were in fact buying advocaat.¹⁹² Fifth, Keeling's deception of the public had caused and, unless prevented, would continue to cause, damage to Warnink in the trade. It would also cause damage to the goodwill of their business, both directly in the loss of sales and indirectly in the debasement of the reputation attaching to the name 'advocaat'. This was if it was permitted to be used for alcoholic egg drinks generally, rather than only to those that were spirit based.¹⁹³

Thus the judge found a species of goods, reputation and goodwill, use of a name without a natural association, that the public was misled and that there was damage to Warnink caused by this deception of the public. This was arguably not dissimilar to the classical trinity for passing-off.¹⁹⁴

Lord Diplock's third proposition was to the following effect. His Lordship recalled that unfair trading as a wrong actionable at the suit of other traders who thereby suffered loss of business or goodwill might take a variety of forms. These would be such as conspiracy to injure a person in his trade or business, slander of goods, or that described as passing-off.¹⁹⁵ He described passing-off as most protean among the other forms of unfair trading.¹⁹⁶ In considering Lord Diplock's use of the term 'protean', his Lordship may have meant merely that the tort was more chameleon-like, or variable, than other torts.

Lord Diplock's fourth proposition ran this way. Arguably continuing his Proteus analogy, his Lordship added that the forms that unfair trading took would change depending upon how trade was carried on and on how business reputation and goodwill were acquired.¹⁹⁷ His Lordship remarked as follows.

¹⁹¹ Ibid.

¹⁹² [1979] AC 731, 740.

¹⁹³ Ibid.

¹⁹⁴ Passing-off is concerned with misrepresentation made by one trader which damages the goodwill of another trader. Misrepresentation, damage and goodwill are therefore the three essential elements of the tort, and are sometimes referred to as its 'classical trinity'. Wadlow, above 1, 6.

¹⁹⁵ [1979] AC 731, 740.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

Emerson's maker of the better mousetrap if secluded in his house built in the woods would today be unlikely to find a path beaten to his door in the absence of a costly advertising campaign to acquaint the public with the excellence of his wares.¹⁹⁸

Lord Diplock's fifth proposition proposed as follows. Lord Diplock stated that someone who sold goods correctly described as manufactured by him or her, in fact as an inferior class or quality, but misrepresenting those goods as a superior class or quality, might well injure the goodwill of another manufacturer's business.¹⁹⁹ Such a form of misrepresentation was held in the 1915 case of *A G Spalding & Bros v A W Gamage Ltd*²⁰⁰ to be actionable. In that case, reported Lord Diplock, Lord Parker regarded extending this form of misrepresentation to the action in passing-off, as a consequence of recognizing that what the law protected by a passing-off action was a trader's property in his business or goodwill.²⁰¹ Arguably, this proposition distinguished an inferior class of goods from an inferior quality of goods. It suggested that an inferior class might be related to the concept commercial rank discussed in chapter 2, above.

Lord Diplock's sixth proposition made these determinations. His lordship held that the significance of this decision in the law of passing-off was that misrepresenting one's own goods as the goods of someone else was not really a separate genus of actionable wrong. Instead, it was a particular species of wrong included in a wider genus.²⁰² Lord Herschell had discussed this in the 1896 case of *Reddaway v Banham*,²⁰³ as follows:

I am unable to see why a man should be allowed *in this way more than in any other* to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival.²⁰⁴

Lord Diplock's seventh proposition stated thus. Deploying the early phase of judicial reasoning by analogy, Lord Diplock then noted that *A G Spalding & Bros v A W*

¹⁹⁸ Ibid.

¹⁹⁹ [1979] AC 731, 741.

²⁰⁰ (1915) 84 LJ Ch 449, 449-450.

²⁰¹ [1979] AC 731, 740.

²⁰² [1979] AC 731, 741.

²⁰³ [1896] AC 199, 199-222.

²⁰⁴ [1896] AC 199, 211. Italicised words per the original.

*Gamage Ltd*²⁰⁵ and the later cases made it possible to identify five characteristics of a valid cause of action for passing-off. These five were expressed as follows.

. . . a misrepresentation; made by a trader in the course of trade; to prospective customers of his or ultimate consumers of goods or services supplied by him; which is calculated to injure²⁰⁶ the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and which causes actual damage to a business or goodwill of the trader by whom the action is brought or, in a *quia timet* action, will probably do so.²⁰⁷

Lord Diplock's eighth proposition explained the following. His lordship warned that in formulating general propositions of English law, there was a need to beware of the logical fallacy of the undistributed middle.²⁰⁸ Schuyler wrote that the fallacy of the undistributed middle is a logical fallacy occurring in syllogisms. For example: All P is M, All S is M, therefore all S is P. The fallacy of the undistributed middle consists in the fact that only a part of the middle is compared with the extremes in the two premises, and it is not certain that it is the same part. The extremes are not compared with the same thing, and there is no reason for inferring their relations to each other.²⁰⁹

The effect of this would be arguably as follows. It did not follow that because all passing-off actions could be shown to present the above five characteristics, that all factual situations, which displayed these characteristics, gave rise to a cause of action for passing off.²¹⁰ A market example of this breadth of behavior included what the common law described as mere puff,²¹¹ dealt with in the 1866-7 matter of *Dimmock v Hallett*.²¹² The doctrine underlying puffery was embodied in the civil law rule

²⁰⁵ (1915) 84 LJ Ch 449, 449-456.

²⁰⁶ The wordage "calculated to injure" arguably represents an interpretation of the natural consequences of the defendant's actions. It does not appear to imply that the defendant calculated anything.

²⁰⁷ [1979] AC 731, 742.

²⁰⁸ *Ibid.*

²⁰⁹ A Schuyler *The Principles of Logic* (American Book Company, 1869), 50-53.

²¹⁰ [1979] AC 731, 742.

²¹¹ Puff. It is known also as "puffery". Puffery is a representation, statement, or conduct that overtly over-exaggerates the attributes or characteristics of some product or service and is not intended to be an offer to be relied upon. Puffery consists of statements commending particular subject matter and not statements of fact or promissory statements. The non-specific language of a puff fails to satisfy the criteria of contractual obligation for the reason that no contract was intended. *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; [1891-94] All ER Rep 127.

²¹² (1866-67) LR 2 Ch App 21.

simplex commendation non obligat,²¹³ inferring its genesis from customary law. In *Dimmock v Hallett*,²¹⁴ Turner LJ held as follows.

Thus I think that a mere general statement that land is fertile and improvable, whereas part of it has been abandoned as useless, cannot, except in extreme cases — as, for instance, where a considerable part is covered with water, or otherwise irreclaimable — be considered such a misrepresentation as to entitle a purchaser to be discharged. In the present case, I think the statement is to be looked at as a mere flourishing description by an auctioneer.²¹⁵

This suggested that the puffery must be quite extreme before the court would regard it as a misrepresentation. However, since extreme puffery was purely a judicial determination as to misrepresentation, necessarily extrinsic to the intentions of the parties, this was arguably an *indicium* of strict liability.

Lord Diplock's ninth proposition ran this way. Lord Diplock noted that parliament had progressively intervened on behalf of consumers. He stated that this intervention was to impose on traders a higher standard of commercial candour than the legal maxim *caveat emptor*²¹⁶ required of them. Parliament did this by criminalizing misleading descriptions of the character or quality of goods. He noted this was realized in the *Merchandise Marks Acts* 1887 to 1953,²¹⁷ as well as in even more rigorous later statutes.²¹⁸ However, no civil action arose from this series of statutes. He cited *London Armoury Co Ltd v Ever Ready Co (Great Britain) Ltd*²¹⁹ as authority for this determination. In that case, Tucker J stated that, in order to

²¹³ *Simplex commendation non obligat*. Simple commendation can only be regarded as a mere invitation to a customer without any obligation as regards the quality of goods. James Morwood (ed), *The Oxford Latin Mini Dictionary* (Oxford University Press, 1995).

²¹⁴ (1866-67) LR 2 Ch App 21.

²¹⁵ (1866-67) LR 2 Ch App 21, 23.

²¹⁶ . . . the maxim, at law is, *caveat emptor*: let the buyer take care and inquire. If he is told falsehoods, then he has a right of action; but if he makes no inquiries, at law he has no remedy, though he may in equity. This is the distinction between fraud in the legal and equitable sense, though even in equity there is no fraud in mere non-disclosure unless there is a duty to disclose, which there is not if the parties are in a position of equality in the transaction — that is, of equal knowledge and means of knowledge; and the doctrine of equitable fraud would only apply to matters in the knowledge only of the vendor, which he ought to disclose to the vendee. W F Finlayson *A Report of the Case of The Queen v Gurney and Others in the Court of Queens Bench: The Summing Up revised by the Lord Chief Justice with an Introduction Containing a History of the Case and an Examination of the Cases at Law and Equity applicable to it; or Illustrating the Doctrine of Commercial Fraud* (Stevens and Haynes, 1870) Introduction, 12.

²¹⁷ Beginning in 1862, the *Merchandise Marks Act* of the United Kingdom made it a criminal offence to imitate a trademark of another person with intent to defraud or to enable another to defraud.

²¹⁸ [1979] AC 731, 743.

²¹⁹ [1941] 1 KB 742, 742-754.

determine whether the intention of the statute is to preclude private remedy, the court must decide whether the harm the plaintiff sought to be remedied by the statute was the kind which the statute was intended to prevent. He stated that it was insufficient merely to plead that the plaintiff's harm was due to a breach of the statute.²²⁰

Lord Diplock's tenth proposition disclosed a process of reasoning by analogy. Lord Diplock stated as follows.

Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed on a parallel rather than a diverging course.²²¹

Lord Diplock's eleventh proposition stated that it was required to identify reasonably precisely the members of a relevant class of traders. They ought to be those whose products bore a particular word or name so distinctive that their right to use it truthfully as a descriptive term of their product became a valuable part of the goodwill of each of them.²²²

Lord Diplock's twelfth proposition stated that goodwill was generated by the market reputation that species of product has gained by its distinctive qualities. Therefore, if the type of product that had acquired the reputation could be identified, then the members of the class entitled to share in its goodwill could be ascertained.²²³

In order to do this, Lord Diplock required the following three steps to be taken. First define the type of product. Second, establish that it had recognizable qualities and distinguish it from every other type of product that competed with it in the market and which had gained for it in that market a reputation and goodwill. Third, establish that the plaintiff's own business would suffer more than minimal damage to its goodwill by the defendant's misrepresenting his product as being of that type.²²⁴

From this formula, it appeared arguably that the boundary between puffery and fraud

²²⁰ [1941] 1 KB 742, 748, 749.

²²¹ [1979] AC 731, 743.

²²² [1979] AC 731, 744.

²²³ This was arguably the same in effect as the old London custom of preventing business of and with merchant strangers.

²²⁴ [1979] AC 731, 747-748.

was situated at somewhat more than minimal damage to the plaintiff's goodwill.

Lord Diplock's thirteenth proposition determined that, in the subject case, *prima facie*²²⁵ as the law then stood, the presence of those characteristics set out in the previous paragraph, above, was enough to prove passing-off. This was unless there was also present some exceptional negating feature. His lordship found no such exceptional features of the case.²²⁶ Thus, Warnink's appeal was allowed and the injunction restraining Townend was permitted to stand.

It is arguable that Lord Diplock appeared to have described by analogy a corollary of the old custom prohibiting the false avouching the goods of foreigners, where the term 'foreigners' meant people without specific entitlement to trade in their own name. Arguably, this had been a proscription against a nascent or preceding form of passing-off. The rationale for this was because it recognised a regulatory problem in correctly representing the source of the goods for sale.²²⁷ Such prohibition was effected by prescribing who could, and who could not, use certain trade names to induce customer good disposition towards the business. This article prohibited the selling of goods as accredited goods, when they were really made by unaccredited people. As such, the custom was a nascent form of regulating entitlement to be a member of a class using a trade name with customary authority.

E Conclusion

In order to conduct this chapter's investigation into whether the tort of passing-off was a strict liability tort, and if so, how and why it became a tort of strict liability, the chapter's focus was to follow the concept of fraud, as an underlying concept, through breach of custom, and then to an analysis of damage of goodwill in the context of the law of passing-off.

²²⁵ This is arguably an *indicium* of strict liability.

²²⁶ [1979] AC 731, 748.

²²⁷ If any freeman of the city avouched the goods of foreigners to be theirs he would lose the liberty of the city. Article xlii, Arnold's, above 60, fo 4.

The outcomes of this chapter might be argued as follows. Fraud as a genus was likely characterized as an injurious breach of commercial custom. In this respect, as soon as a product's nostrums were exposed as not secret to one business, purchasers' good disposition to deal exclusively with the trader would be immediately affected, with or without intent. Passing-off would amount to improper dealing in a competitor's nostrums, and therefore would be fraudulent. Certain customs of London had maintained privileged trade groups where nostrums could be shared, controlled and kept secret from non-Londoner strangers, or non-freemen. In the *Advocaat Case*,²²⁸ Lord Diplock worked a process of reasoning by analogy to amend the law of passing-off. Arguably, he used the doctrine of the *equity of the statute*, which was a mode of applying judicial policy to create common law by analogy, and the outcome of which was a rebuttable conclusion. Thus, the form of passing-off reasoned by Lord Diplock had a rebuttable elemental structure.

The form of passing-off before the time of Lord Diplock's reasoning by analogy was, per Wadlow's argument,²²⁹ that the statements of Parker J (as he then was) in the 1909 case of *Burberrys v Cording*²³⁰ contained the classic statement of the principles of passing-off in its traditional form. It was stated such that a trader must not represent his goods as the goods of somebody else.²³¹ After the time of Lord Diplock's reasoning by analogy, the tort arguably took the following amended form, confirmatory of the *Spanish Champagne Case*.²³² It was unlawful for a trader to seek to attach to his product a name or description with which the product had no natural association, to make use of reputation and goodwill of other traders of which the origin was genuinely indicated by the name or description.²³³ Because of its dependance on goodwill, this raised the issue of reemergent old London custom, as to proper source, to the tort of passing-off, a breach of which arguably would be characterized by inherent policy as fraud, requiring no proof of intent.

²²⁸ [1979] AC 731, 739-748.

²²⁹ Wadlow, above 1, 32.

²³⁰ (1909) 100 LT 985, 986-993.

²³¹ (1909) 100 LT 985, 987.

²³² [1960] Ch 262, 283, 284.

²³³ *Ibid.*

VI CONCLUSION

A Introduction

The research question of the thesis is in two parts. ‘Has the historical development of the tort of passing off resulted in the tort becoming a strict liability tort? If so, why and how did this development take place?’ In order to address the research question, the thesis objectives:

- (a) provided an overview of the legal norms underlying the origins of the tort deriving from a hierarchy of guilds, counties and the crown, with restricted resort to the Royal Courts;
- (b) discussed the seminal 16th Century Elizabethan *Gloucestershire Clothier’s Case*,¹ in the context of how the later tort both began and completed the passage from gild and county jurisprudence into the royal courts system;
- (c) examined the so-called completion phase and more protean nature of the tort of passing-off in the context of the character of good-will, fraud and causation and as set out in the *Advocaat Case*;²
- (d) examined the original elements of the tort of passing-off within ancient legal custom and pleading narratives, to reveal a dynamic that influenced the shape of the law. The thesis identified these underlying elements, customs and narratives so that scholars could rethink and reinterpret current views of the tort of passing-off to suit changing commercial and consumer needs.

By way of definition, and as already stated above in chapters 1 and 2, above, Morison wrote in 1956 that the term *passing off* indicated as follows.

. . . the act of offering goods for sale with an accompanying misrepresentation, either by words or by conduct as to the origin of the goods whereby the purchaser had been misled and business had been diverted from the plaintiff to the defendant.³

Although this characterization of the tort represented what was known commonly as the *classical trinity*,⁴ it appears that the elemental structure of the tort exhibited some instability. The thesis suggested this instability was due to an underlying and re-emergent bundle of trade customs, which when breached, amounted to a strict liability tort of passing-off. These customs were discussed in chapters 2 and 3. It also

¹ Later identified by Professor Baker as *J G v Samford* (1584) unrep, in J H Baker *An Introduction to English Legal History*, (Butterworths LexisNexis, 4th ed, 2002), 459.

² [1979] AC 731, 731-756.

³ W L Morison ‘Unfair Competition and “Passing-Off” The flexibility of a formula’ (1956) 2 *Sydney Law Review*, 50-65, 56.

⁴ C Wadlow *The Law of Passing-off, Unfair Competition by Misrepresentation* (Sweet & Maxwell, 3rd ed, 2004), 6.

suggested that, in the same way, fraud remained as an underlying and re-emergent aspect of the tort. Chapter 4 dealt with the *Gloucestershire Clothier's Case*, building on those aspects of chapters 2 and 3, which provided an understanding of the background issues in that case. It sought to clarify the common law consequences of that case on passing-off.

The thesis limited its analytic time frame to end essentially at the 1979 *Advocaat Case*.⁵ This limitation to thesis scope was due to complexities introduced by the subsequent statutory development of the consumer law. The *Advocaat Case*⁶ arguably represented a judicial amendment to the scope of the tort of passing-off. It was analyzed in some detail in chapter 5, building on Farrar's discussion of judicial reasoning by analogy within the doctrine of precedent.⁷ Thesis discussion suggested that passing-off was amended by the incorporation of those criminal wrongs previously proscribed in a series of certain trademark criminal statutes. Further, this thesis has suggested that the *Advocaat Case*⁸ allowed earlier customary laws to re-emerge into the tort of passing-off, by confirming goodwill as the principal aspect of a business damaged by the act of passing off. The thesis also conducted in chapter 5 a detailed investigation into the historical development of the law of goodwill, to try and identify what aspects of goodwill might have been uniquely subject to damage by passing off.

B Chapter 2

Chapter 2 dealt with research objective "a", which was to provide an overview of the legal norms underlying the origins of the tort deriving from a hierarchy of guilds, counties and the crown, with restricted resort to the Royal Courts. The chapter found that passing-off was a conjectural argument based on facts, and therefore one of reverse onus. Its review of strict liability in tort set out six propositions circumscribing strict liability in tort, for the purposes of the scope of this thesis. This review suggested that absolute liability in tort be regarded as no more than a limiting form of strict liability, for the purposes of the thesis.

⁵ [1979] AC 731, 742.

⁶ *Ibid.*

⁷ John H Farrar (1997) 'Reasoning by Analogy in the Law' 9(2) *Bond Law Review*, 149.

⁸ [1979] AC 731, 742.

The chapter identified the norms of commercial ranks, by which a person of higher rank could have *locus standi* to sue a person of lower rank, in matters of personal property. Powers of accreditation and confiscation might have been protective reactions by those of lower supervisory commercial rank to the possibility of a reverse onus action against them in *quo warranto*. The crown controlled the power of the counties by common law actions in *quo warranto*, the counties controlled the power of the guilds by common law actions in *quo warranto* and the guilds controlled the work of the artisans and apprentices by inspection, accreditation and sometimes confiscation of their work products. This process of certification, at the base of the commercial ranks system was left for later discussion in chapter 3, because certification used marks and seals.

The chapter found that a nascent form of passing-off existed well before this action was commenced in the royal courts. Londoners had a superior right over foreigners to sue in matters of misrepresentation of the source of manufactured goods, where foreigners were seen as anyone not accredited as free of the City. The examination of the nature of the jurisdiction of the courts of the city of London showed that the London Town Clerk could make out several prerogative orders, and that the Court of Hustings had complete control over all real and personal property. It could order attachment or sequestration. The cumulative effect of these prerogative orders in the London jurisdiction represented an old or nascent form of passing-off.

Foreigners had no local rights in the London courts and Londoners could not be sued outside the walls of London. London's customary jurisdiction appeared to give it complete power to prioritise the rights in London-sourced personal property over foreign-sourced personal property. This inferred a superior *locus standi* to sue by the Londoner freemen in matters of personal property, making the Londoner the plaintiff and the foreigner the defendant in old-style passing-off actions.

The ancient customary laws of London were transmitted orally, then later, submitted to court by the Recorder, recognised by judicial notice, recorded and archived. London customary laws were not subject to desuetude. Thus, London might state its

own laws in the common interest and, by its prestige, influence laws elsewhere in England. This was how a nascent form of passing-off might have spread from London throughout England, and ultimately came to be considered in the later royal courts. The examination of the law of freedom of the City showed that the system of freedom of the city controlled the right to make a living as an artisan. The oath of a freeman included prohibition of a freeman's name on foreign goods. By prohibiting the acts of passing off the goods of non-freemen, it appeared that foreigners suffered a disability making and selling their goods under any name in London. This was a key underlying reverse onus norm to a nascent form of passing-off.

The crown brought the guilds under crown control to maintain commercial ranks among the masters, journeymen and apprentices. Artisan guild membership was both permission to and restriction on work, and as well, it was exclusion from the mercantile classes.

Gild ordinances were structured to restrict entry into the trades through long apprenticeships and gild jurisprudence contained a nascent form of the later tort of passing-off, through the prohibition of commercial insubordination. The companies/gilds were given rank by crown authority to regulate craft and trades activities. It was very likely that the crown and parliament used the Evil May Day riot of 1517 ultimately to implement regulations for prohibiting misrepresentation of source within the sale of goods.

Masters, and those of the same commercial rank, were the only ones who could trade in their own names. Those of lower commercial status could not. Gild regulatory power of search and seizure of goods was enforced nationally by the cities and guilds so that only masters could trade in their own names, and, wholesalers could trade in masters' goods only by consent of the king. The companies were arranged into higher and lower ranks based on so-called wisdom and self-sufficiency, apparently to stamp out what was called deceit.

The meaning of deceit and its relationship to fraud included an inference that insubordination was related to deceit, and the systematic stamping out of deceit

could not go so far as to derogate from the king's will, or from the common profit of the people. Thus, deceit was somehow in dialectic with public opinion. Cited case law held that breaches of City of London customary law were dealt with on a strict liability basis, and were indicative of fraud by a process of vituperative public rhetoric.

C Chapter 3

Chapter 3 dealt with research objective "a". This chapter built on the chapter 2 finding that commercial ranks were related to the differential levels of commercial status, as well as *locus standi* to sue in matters of personal property, and that such acts of insubordination constituted a nascent form of the later tort of passing-off. These commercial ranks were represented graphically on royal seals at the higher level of status, and represented as strata of trademarks at the lower levels of commercial status.

The graphic representations on royal seals were related through symbolic representation to a strict liability enforcement regime against passed off goods. Grants made in charters were made by the sovereign under the royal seal, and these seals and the grants followed certain symbolic customary rules. Thus, a royal seal had its own administrative apparatus, based on these old customs, which flowed down through the commercial ranks, using the enforcement devices of prerogative orders. Various strata of administration were used to enforce applications of royal seals. The king had an administrative system to use the privy seal to create actionable warrants for the application of the great seal. Seals passed through four levels of public administration before validating a grant or charter.

With prerogative orders, the Court of Hustings had complete control of matters resembling the later tort of passing-off. Since these administrative procedures were based on old customary law, a breach of the administrative rules imported strict liability.

The swan mark schema showed how the crown seal customary administrative system, set up by the crown, might have manifested lower down the commercial

ranks. Administrative rules were applied by the king's officials to the operation of an administrative registry, by which any derogation by the common man from these administrative rules would render him strictly liable in tort. Should this theoretical common man represent that personal property that he made *per industriam* were his own property, then this would be a legal misrepresentation, because he could never claim property in what belonged to someone of a higher commercial status.

The chapter's examination of printers' devices found that a wrongful use of another's printers' device might be heard in the Star Chamber, by inquisitorial process, gathering and applying all the existing ancient customs and applicable statutes. In the alternative, a breach could be tried in the reverse onus civilian Court of Chivalry, if the printer's device was heraldic. Printers' devices were indicative of express crown licence to publish. The clergy administered these licences and a breach of licence to publish could be punished in Star Chamber as for the underlying legal norm of sedition against the king. In general, breaches of printers' devices were not subject to a common law tort regime of passing-off, because printers' devices were regulated by the crown, and this system of regulation was operated by the clergy on behalf of the crown.

Merchants would use proprietary marks to recover stolen property using registry systems, a registry system being a bundle of customary legal norms. Since stolen property could be rebranded and passed off as the products of another manufacturer, registries in various forms were set up by a variety of statutes, merchants' customs and international regulations. This meant that any wrongful dealings in the customary property rights in the transported goods, which could result in passing off, were dealt with on a reverse onus strict liability basis, and were indicative of fraud.

Damage to gild goodwill was at the peril (*suo periculo*) of its artisans. This common law doctrine of *suo periculo* was outlined previously in the section on strict liability, in chapter 2. Each market operated under its own seal. Seals with wordage on them were for those markets of lower social rank, while wordless seals were for those of higher rank. Higher rank was represented by seals with graphic symbols, mimetic of a cognate attribute of royal seals. Thus, faulty work would be traced to the offending

artisan via a product seal, and the power of enforcement was traceable to its source through symbolic means. The artisan was convicted on a strict liability basis, purely by evidence of product quality, which it might be alleged caused scandal to the gild, scandal being a certain vituperative rhetoric already creating damage in the public domain.

Properly certified gild marks would represent an assurance to the public that the so-marked goods were the outcome of authorized gild workmanship and properly authorized inspection. Building on this concept of corporate propriety, any breach of an assurance to the public would be complete at the time of public perception of breach, regardless of the defendant's intent. This would be so, because the mark was a public mode of symbolic communication to the consumer.

D Chapter 4

Chapter 4 dealt with research objective “b”, which was to discuss the seminal 16th Century Elizabethan *Gloucestershire Clothier's Case*,⁹ in the context of how the later tort both began and completed the passage from gild and county jurisprudence into the royal courts system. The chapter also dealt with research objective “d”, which was to examine the original elements of the tort of passing-off within ancient legal custom and pleading narratives, to reveal a dynamic that influenced the shape of the law.¹⁰

This chapter built on the propositions in chapter 2 that gild business norms, and other customary norms, were strict liability when enforced and were indicative of fraud. It also built on the findings in chapter 3 that printers' devices were generally not subject to a common law passing-off regime, but instead, were subject to direct crown administrative regulation via the clergy.

⁹ Later identified by Professor Baker as *J G v Samford* (1584) unrep, in J H Baker *An Introduction to English Legal History* (Butterworths, 4th ed, 1990), 459.

¹⁰ For the relevance of a qualitative legal historical study, see Jane Elizabeth Anderson, Ph D *The production of indigenous knowledge in intellectual property law* (Doctoral thesis at University of New South Wales, 2004).

In the 1618 case of *Southern v How*,¹¹ a *prima facie* theory was argued for the plaintiff that, where one was party to a fraud, all which followed by reason of that fraud would be taken to have been done by him.¹² This argument was held to be ineffective, on the basis of both pleadings and opinions by the judges, in the old *Gloucestershire Clothiers' Case*. In the various manuscripts of the *Gloucestershire Clothier's Case*, the court held that its action on the case did not lie, because it was *damnum absque injuria* to the other. The court stated that no action for deceit lay against a person who acted entirely lawfully.

Regulation by private monopoly greatly reduced the need for consumers to conduct prepurchase inspections. The crown acted against the customary legal norm of *caveat emptor*,¹³ leading to the creation of consumer-based reverse onus actions against product misrepresentation at the point of sale. The consequences in Star Chamber inferred continuing crown policy attempts to prohibit widespread deceit in the trades. In Star Chamber case of Jupp, the court characterised the offence of Jupp as a false cozenage, which would discourage buyers from relying on the credit of the seal. Arguably, this added force to the argument on royal seals and trade marks in chapter 3 that a mis-use of a seal or mark was dealt with on a reverse onus, and therefore strict liability basis. Thus, Star Chamber acted in favour of seals representing product quality, and punished Jupp for using a false seal. This suggested a crown interest in stamping out any rhetorical act that derogated from the symbolic meaning of an authorised seal. It also appeared to agree with and restore the failed argument in *Southern v How*.¹⁴

The pleadings in the *Gloucestershire Clothier's Case* were of a classical declamatory style. This was significant because it would confirm the importance and practical effect of pleading various underlying legal norms of customary law and status. It

¹¹ Cro Jac 468, 471; 79 ER 400.

¹² Cro Jac 468, 469.

¹³ . . . the maxim, at law is, *caveat emptor*: let the buyer take care and inquire. If he is told falsehoods, then he has a right of action; but if he makes no inquiries, at law he has no remedy, though he may in equity. This is the distinction between fraud in the legal and equitable sense, though even in equity there is no fraud in mere non-disclosure unless there is a duty to disclose, which there is not if the parties are in a position of equality in the transaction – that is, of equal knowledge and means of knowledge; and the doctrine of equitable fraud would only apply to matters in the knowledge only of the vendor, which he ought to disclose to the vendee. Finlayson, above 19.

¹⁴ Cro Jac 468, 471.

adds further support to the chapter 2 finding that passing-off was argument by conjectural facts rather than only of elemental structure, and thus, a strict liability style of action. The following questions flowed from the notion of a declamatory form of pleadings in the *Gloucestershire Clothier's Case*, setting out the areas in which a hypothetical mesne judgment could have been formed. The first was whether a custom of London had been breached, because if so, building on what was suggested in chapter 2, litigation of this breach would have been treated as strict liability. The second was whether the wrong inferred from a criminal statute could be litigated as a civil matter and indicative of fraud. In Chapter 5, below, there was to be a discussion of this issue, within an analysis of the *Advocaat Case*.¹⁵ The third question was whether an apparently wholly lawful act could be deceptive, by means of the indirect nature of the damage it caused. This was addressed and investigated as the doctrine of secondary meaning.

In the 1896 case of *Reddaway v Banham*,¹⁶ Lord Herschell discussed the doctrine of secondary meaning when he deduced that no man might make a direct false representation to a purchaser that enabled that purchaser to tell a lie to someone else who would be the ultimate customer.¹⁷ The chapter showed that this deduction would imply strict liability into the actions of subsequent sellers unaware of the lie. This represented a re-emergence by restatement of the failed argument in *Southern v How*.¹⁸ It suggested that when non-gild members engaged in subsequent product resale, nevertheless they were bound by the same ancient commercial customs as had bound gild members, an action for a breach of which imported strict liability and was indicative of fraud.

E Chapter 5

Chapter 5 dealt with research objective “c”, which was to examine the so-called completion phase and more protean nature of the tort of passing-off in the context of the character of good-will, fraud and causation and as set out in the case *Erven*

¹⁵ [1979] AC 731, 731-756.

¹⁶ [1896] AC 199, 212, 213.

¹⁷ *Ibid.*

¹⁸ Cro Jac 468, 471; 79 ER 400.

Warnick BV v Townend & Sons (Hull) Ltd,¹⁹ ('*Advocaat Case*'). Chapter 5 built further on the finding in chapter 2 that commercial ranks were related to the differential levels of commercial status, as well as to *locus standi* to sue in matters of personal property, and that such acts of commercial insubordination constituted the clash of interests in a nascent version of the later tort of passing-off. It also built on the chapter 3 finding that marks and seals were controlled administratively in registries, by a clergy-based administration, an administrative breach of which would be cognate to strict liability misrepresentation.

This chapter showed that civil commercial fraud was a genus of law rather than either a tort or a crime. Thus, fraud in commerce was not a law, but a doctrine of sorts. In the context of passing-off, fraud was likely characterized as a seriously injurious breach by insubordination of commercial custom in a context of established commercial ranks. Certain customs of London had maintained privileged trade groups, where artisan nostrums could be shared, controlled and kept secret from non-Londoner strangers, also called non-freemen. When non-freemen engaged in commercial activity as if they were freemen, this would be an act of impropriety inferring damage. In this respect, as soon as a product's nostrums were exposed as no longer secret to one specific business, purchasers' good disposition to deal exclusively with that trader would be immediately affected, with or without the specifically-directed intent of the person causing the exposure. Passing-off would amount to an apparent improper dealing in a competitor's nostrums, and therefore would be inherently fraudulent. The underlying theory was that since development and maintenance of these nostrums involved significant prior investment, damage caused by their dissipation could be quantified on an accounting basis.

In the *Advocaat Case*,²⁰ Lord Diplock worked a process of reasoning by analogy apparently to amend the elemental structure of the law of passing-off. He used the doctrine of the *equity of the statute*, which was a mode of applying judicial policy to create common law by analogy, and the structural outcome of which was a rebuttable conclusion. His Lordship converted criminal statutory provisions from a series of

¹⁹ [1979] AC 731, 739-748.

²⁰ *Ibid.*

Mercantile Marks Acts into civil wrongs using this judicial technique. Thus, the form of passing-off reasoned by Lord Diplock in the *Advocaat Case*²¹ had a rebuttable elemental structure - characterising the tort as more protean than other torts with stable definitions of their elements. This lent substantial force to the earlier finding in the thesis that passing-off was, rather, a tort based on conjectural arguments of fact, based on breaches of custom, and implying fraud. In this vein, chapter 5 showed a return to the *classical trinity*, after the *Advocaat Case*,²² demonstrating either residual instability to the tort's elemental structure, or homeostasis. This lent even further weight to the thesis argument that passing-off was more likely an argument constituted by conjectural facts, such as for example within pleadings by classical *declamatio*, and as such, could only be reverse onus, and thus strict liability.

The form of passing-off before the time of Lord Diplock's *Advocaat Case*²³ reasoning by analogy was, per Wadlow's argument,²⁴ that the statements of Parker J (as he then was) in the 1909 case of *Burberrys v Cording*²⁵ contained the classic statement of the principles of passing-off in its traditional form. It was stated that a trader must not represent his goods as the goods of somebody else.²⁶ After the time of Lord Diplock's *Advocaat Case*²⁷ reasoning by analogy, the tort took the following amended form, confirming the decision in the *Spanish Champagne Case*.²⁸ It was unlawful for a trader to seek to attach to his product a name or description with which the product had no natural association, to make use of reputation and goodwill of other traders of which the origin was genuinely indicated by the name or description.²⁹ Because of its dependance on goodwill, this change suggested a re-emergence of old London customary law, as to proper product source, to the tort of passing-off, a breach of which arguably would be characterized by inherent policy as fraud, requiring no proof of intent.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Wadlow, above 4, 32.

²⁵ (1909) 100 LT 985, 986-993.

²⁶ (1909) 100 LT 985, 987.

²⁷ [1979] AC 731, 739-748.

²⁸ [1960] Ch 262, 283, 284.

²⁹ Ibid.

F Significance and Key Findings

This thesis contributed to knowledge by adding to the pool of historical research into policy issues affecting the legal relationship between buyers and sellers of goods. It acted to infer this knowledge within a historical study of the tort of passing-off. The thesis discussed re-emergent ancient customary laws concerning buyers and sellers of goods. It told of a metamorphosis of these customs from proscribed criminal wrongs into civil actions, relying on a classical view of customary law, as comprehending implied public consent.³⁰

The main thesis contributions to knowledge are a series of outcomes, described thus. First, the tort of passing-off was effectively cobbled together from prerogative writs, customary commercial laws and gild ordinances, including an old gild requirement for obedience to authority. It appeared that a nascent form of passing-off existed within gild ordinances of the middle-ages. All these inferred sources of law were strict liability in character.

Second, commercial ranks were represented symbolically by a hierarchy of graphic marks. At the top were royal seals. At the bottom were individual artisan trademarks. A remedy for misuse of any of these marks would depend on its relative commercial rank. Each mark was somehow enforced by an administrative system, inferring reverse onus for infringement of use.

Third, the *Gloucestershire Clothier's Case* failed as *damnum absque injuria* because the tucker's handle mark indicated too low a commercial rank to generate *locus standi* to sue for its breach. The church controlled it, probably without a requirement for licensing. Old commercial customary law in the *Gloucestershire Clothier's Case* was pleaded as conjectural legally-charged facts in declamatory form, inferring a reverse onus jurisdiction.

³⁰ The *Rhetorica ad Herennium* sets out six sources of law: nature; statute; custom; previous judgments; equity; and, agreement. Custom is defined in it as that which in the absence of any statute is by usage endowed with the force of statute law, which it defines as law set up by the sanction of the people. [Cicero] *Rhetorica ad Herennium* (Loeb Classics Library, Harvard University Press, 2004), 91, 93; John Ayliffe *Juris Canonici Anglicani* (D Leach, 1776).

Fourth, the *classical trinity* of passing-off represented re-emergent a bundle of commercial customary law, a breach of which was characterized as commercial fraud, and dealt with on a reverse onus basis.

The thesis concludes with a view that the tort of passing-off was cobbled together from old laws in which intention was mostly inferred. Otherwise stated, the onus of proof of innocence was reversed onto the defendant. The tort deals with disputes between people of different commercial status, inferring superior *locus standi* to sue by the person of higher commercial status. This ranking partially explained the plaintiff's loss in the *Gloucestershire Clothier's Case*, in which both the parties' low commercial status was probably subsumed by church jurisdiction. The reverse onus nature of commercial fraud, as an underlying norm to passing-off, could not be abandoned as it was an inherent part of the passing-off argument. The thesis stated the operative old customary laws breached within the tort's required elements and facts. In the result, the tort of passing-off is a strict liability tort.

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