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## Trade-Marks and Trade-Names--Jurisdiction--Goods of Different Classes

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will be more complex and expensive. The amendment will, moreover, as was pointed out in *Toothman v. Courtney*,<sup>15</sup> tend to complicate land titles and make them less secure. All of these difficulties would be much smaller were the amendment permissive.

The amendment is self-executing because it is obviously not addressed to the legislature and the duty which it imposes, that of entering in the land books by undivided interests land so held, may be imposed without the aid of legislative enactment, since the land books themselves are already provided for by statute and the amendment merely changes the manner of entry. Thus the amendment is now in effect; enabling legislation is not required.

—WILLIAM H. WALDRON, JR.

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TRADE-MARKS AND TRADE-NAMES — JURISDICTION — GOODS OF DIFFERENT CLASSES. — The plaintiff, a manufacturer of fountain pens and other similar writing instruments sold under the registered name "Waterman", enjoined the defendant, producer of drugs, perfumes and other similar articles, to which he had recently added razor blades, from using plaintiff's trade-mark thereon. The plaintiff had never been engaged in manufacturing razor blades. Both parties were citizens of the same state. The defendant contended that the court had no jurisdiction and that the goods were not of the same class. *Held*, the federal ground was substantial enough under *Hurn v. Oursler*<sup>1</sup> to warrant the court in retaining jurisdiction of the nonfederal ground, even though the federal claim was decided adversely; the owner of a trade-mark is protected on goods not only to which he has applied mark, but also on such other goods as might naturally be supposed to come from the owner. *L. E. Waterman v. Gordon*.<sup>2</sup>

In the principal case the plaintiff's trade-mark was properly registered under the Federal Trade-Mark Act.<sup>3</sup> This act requires the Commissioner of Patents to establish classes of merchandise for purpose of trade-mark registration.<sup>4</sup> If the registrant is not satisfied with such classification he may appeal to the Court of Ap-

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<sup>15</sup> N. 2, *supra*.

<sup>1</sup> 289 U. S. 238, 53 S. Ct. 586 (1933).

<sup>2</sup> 72 F. (2d) 272 (C. C. A. 2d, 1934).

<sup>3</sup> For the federal Trade-Mark Act generally see 25 STAT. 628 (1909), 15 U. S. C. A., § 81, *et seq.* (1927).

<sup>4</sup> 34 STAT. 169 (1906), 15 U. S. C. A., § 131 (1927).

peals of the District of Columbia.<sup>5</sup> The plaintiff's goods were of a different class than those of defendant, though it might be said they were of a "related class".<sup>6</sup> The defendant contended that since their goods were of a different class plaintiff's registered trade-mark was not infringed and, the parties being citizens of the same state, federal jurisdiction failed. This contention seems to have been upheld in numerous cases.<sup>7</sup> The Supreme Court, however, in *Hurn v. Oursler*<sup>8</sup> attempted to reconcile a fundamental conflict between two lines of cases<sup>9</sup> involving federal jurisdiction by holding that even though the federal claim be not established still the court could retain jurisdiction and try the nonfederal claim if there was a single distinct cause of action.<sup>10</sup>

If the classification of the trade-mark was controlling the court in the principal case had to invoke<sup>11</sup> the doctrine<sup>12</sup> of the

<sup>5</sup> 33 STAT. 727 (1905), 15 U. S. C. A., § 89 (1927).

<sup>6</sup> See n. 16, *infra*.

<sup>7</sup> *Stark Bros. Co. v. Stark*, 255 U. S. 50, 41 S. Ct. 221 (1921); *Lescher & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U. S. 166, 26 S. Ct. 425 (1906); *Elgin Nat. Watch Co. v. Ill. Watch Case Co.*, 179 U. S. 665, 21 S. Ct. 270 (1901); *Atlas Mfg. Co. v. Street & Smith*, 204 Fed. 398 (C. C. A. 8th, 1913); *Rosenberg v. Elliott*, 7 F. (2d) 962 (C. C. A. 3rd, 1925); *Beech-Nut Packing Co. v. Lorrillard Co.*, 7 F. (2d) 967 (C. C. A. 3d, 1925). In *Stark Bros. Co. v. Stark*, *supra*, at 73, Mr. Justice Holmes says: "It seems very plain that the plaintiff had a cause of action outside the statute, but that would have to be asserted elsewhere, as the suit was between citizens of the same State."

<sup>8</sup> *Supra* n. 1. Plaintiff alleged three claims: (1) copyright infringement, (2) unfair competition in an unauthorized use of plaintiff's copyrighted play, and (3) unfair competition as to uncopyrighted revision thereof. The lower court found the copyright not infringed and dismissed the other claims for want of jurisdiction. On appeal, the Supreme Court affirmed the lower court, but modified the decree as to dismiss the second claim, not for want of jurisdiction, but on its merits.

<sup>9</sup> In *Siler v. Louisville & Nashville Ry. Co.*, 213 U. S. 175, 191, 29 S. Ct. 451, 455 (1909), where jurisdiction was taken of a bill to enjoin state officers because of alleged violations of the federal Constitution as well as that of state constitutions or statutes, the rule is stated, the court saying that the circuit court having acquired jurisdiction by reason of the federal questions involved, "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." In the *Hurn* case, *supra* n. 1, at 245, the court recognizes the conflict between the trade-mark cases and the *Siler* and like cases, suggesting that the trade-mark cases might constitute an exception to the general rule, but then says: "The *Siler* and like cases announce the rule broadly, without qualification; and we perceive no sufficient reason for the exception suggested . . . we hold it to be . . . as controlling in patent, trade-mark, and copyright cases as it was in the cases announced."

<sup>10</sup> *Supra* n. 1, at 246.

<sup>11</sup> The court in the principal case says: "In point of jurisdiction we might find difficulty, were it not for the recent decision of the Supreme Court in *Hurn v. Oursler*."

<sup>12</sup> The doctrine, which really involves an extension of the federal court's jurisdiction, has been recently criticised. See Note (1933) 33 COL. L. REV. 699.

*Hurn* case to retain jurisdiction. The cause of action was based on the registered trade-mark infringement and there were two separate claims involved therein, — the federal, infringement of the registered trade-mark, and the nonfederal, infringement of the common law trade-mark. The court holds that although the former claim fails on its merits, still as a cause of action it is substantial enough to permit a ruling on the latter claim, and the application of federal law to the nonfederal claim.<sup>13</sup> The result reached on the nonfederal claim is in accord with the common law.<sup>14</sup>

If the court properly took jurisdiction in the principal case, it may be said to be in accord with modern authority in holding that although there was no actual competition, yet relief may be allowed if the goods are of the "same general class". The subject has undergone some development in the cases.<sup>15</sup> In some of the more recent cases where the products were not similar, relief was granted because the products were "related".<sup>16</sup> In another

<sup>13</sup> *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), would apply were there diversity of citizenship.

<sup>14</sup> *Northwestern Knitting Co. v. Garon*, 112 Minn. 321, 128 N. W. 288 (1910); *Omega v. Weschler*, 35 Misc. 441, 71 N. Y. Supp. 983 (1901); and *Victor Radio Corp. v. Radio-Victor Corp. of Am.*, 140 Misc. 198, 250 N. Y. Supp. 204 (1931).

<sup>15</sup> Some of the products held to be of the same general class are: axes and shovels, *Collins Co. v. Oliver Ames & Sons Corp.*, 18 Fed. 561 (C. C. A. 2d, 1882); baking powder and baking soda, *Church & Dwight Co. v. Russ*, 99 Fed. 276 (D. C. Ind. 1900); *Layton Pure Food Co. v. Church & Dwight*, 182 Fed. 35 (C. C. A. 8th, 1910); toilet soap and shaving soap, *Waltke & Co. v. Geo. H. Schaefer & Co.*, 49 App. D. C. 254, 263 Fed. 650 (1920); washing powder and sweeping powder, *Van Zile v. Norrub Mfg. Co.*, 288 Fed. 329 (D. C. N. Y. 1916); aluminum cooking utensils and tin wash boilers, *Aluminum Cooking Utensils Co. v. Sargoy Bros. & Co.*, 276 Fed. 447 (D. C. N. Y. 1921); toilet brushes and tooth brushes, *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 Fed. 73 (C. C. A. 2d, 1910); bread and flour, *Potter-Wrightington v. Ward Baking Co.*, 288 Fed. 398 (C. C. A. 1st, 1924); talking machines and radios, *Victor Radio Corp. v. Radio-Victor Corp. of Am.*, *supra* n. 14; gasoline and automobile polish, *Ethyl Gasoline Corp. v. Kilbanow*, 1 Fed. Sup. 584 (D. C. Tex. 1932); toilet preparations and hair dressing, *Ho-Ro-Co Mfg. Co. v. Malone*, 56 App. D. C. 60, 10 F. (2d) 625 (1925); and medicinal oil and medicinal figs, *Standard Oil Co. v. Cal. Peach & Fig Growers*, 28 F. (2d) 283 (D. C. Del. 1928).

<sup>16</sup> Relief has been granted, in applying this test where products involved were beer and malt syrup, *Anheuser-Busch v. Budweiser Malt Products Corp.*, 287 Fed. 243 (D. C. N. Y. 1921); automobiles and tires, *Hudson Motor Car Co. v. Hudson Tire Co.*, 21 F. (2d) 453 (D. C. N. J. 1927); *Willys-Overland Co. v. Akron Overland Tire Co.*, 273 Fed. 674 (C. C. A. 3rd, 1921); pancake flour and syrup, *Aunt Jemima Mills Co. v. Rigner & Co.*, 274 Fed. 407 (C. C. A. 2d, 1917); men's suits and men's hats and caps, *Rosenberg Bros. v. Elliott*, *supra* n. 7; magazines and hats, *Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509 (C. C. A. 6th, 1924); automobiles and radio tubes, *Wall v. Rolls-Royce*, 4 F. (2d) 333 (C. C. A. 3rd, 1925); small combustion engines and spark plugs, *Duro Co. v. Duro Co.*, 27 F. (2d) 339 (C. C. A. 3d, 1928); pneumatic pressure pumps and wall board, *Duro Pump & Mfg. Co. v. Cal.*

group of cases relief has been refused even though the products were quite similar.<sup>17</sup>

The tendency in the trade-mark cases is to give the owner of the trade-mark a limited "monopoly". Its application in the principal case reflects a recognition by the courts that in this day of ever-increasing competition protection must be granted to the owner of the mark on all goods which he might naturally be supposed to produce.

—HOUSTON A. SMITH.

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WILLS — INFORMAL REVOCATION. — On an issue of *devisavit vel non*, the instrument offered was in proper form but upon the back of the manuscript cover, in the handwriting of the attorney, was the inscription, "This will null and void and to be only held . . . as a memorandum for another will . . .", followed by the date and the signature of the testatrix. Admitting this to be ineffectual as a revocation by subsequent writing, the contestants claimed it to be a revocation by cancellation and the intent to revoke was established by the evidence. The jury found it to be a valid will and error was brought. *Held*, affirmed. The notation could not be a revocation by "some writing declaring intention" for it was unattested. It was not a revocation by cancellation for there was no physical mutilation. *Thompson v. Royal*.<sup>1</sup>

"Cancellation", in its original and proper meaning is the annulment of a writing by drawing lines across it in the form of lattice work.<sup>2</sup> Today the same legal effect could be accomplished by scratching out or erasing the signature of the testator,<sup>3</sup> by obliterating or erasing a material clause,<sup>4</sup> or, by writing the words "can-

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Cedar Products Co., 11 F. (2d) 205 (App. D. C. 1926); and cigars and drugs, Peninsular Chem. Co. v. Levinson, 247 Fed. 658 (C. C. A. 6th, 1917).

<sup>17</sup> The cases, while seemingly conflicting with those in the preceding note, are not necessarily inconsistent since other factors entered into the decisions. The products were ice cream and milk, Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510 (C. C. A. 7th, 1912); canned salmon and canned fruits, George v. Smith, 52 Fed. 330 (C. C. A. 2d, 1892); character in detective story magazine and character in motion picture, Atlas Mfg. Co. v. Street & Smith, *supra* n. 7; wheat flour and prepared pancake and buck-wheat flour, France Milling Co. v. Washburn-Crosby Co., 3 F. (2d) 321 (D. C. N. Y. 1925); and food products and tobacco, Beech-Nut Packing Co. v. Lorrillard Co., *supra* n. 7.

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<sup>1</sup> 175 S. E. 748 (Va. 1934).

<sup>2</sup> Warner v. Warner's Estate, 37 Vt. 356, 362 (1864).

<sup>3</sup> Sanderson v. Norecross, 242 Mass. 43, 136 N. E. 170 (1922); *In re Kuntz*' Will, 140 Misc. 598, 251 N. Y. Supp. 403 (1931). This signature must be the one, or only one, attested to. Bethell v. Moore, 19 N. C. 311 (1837).

<sup>4</sup> Dammann v. Dammann, 28 Atl. 408 (Md. App. 1894); Oetjen v. Oetjen,