

*Fraudulent Marks on Merchandise.***No. 13 of 1888.***(As amended by No. 14 of 1892.)***An Ordinance to amend the Law relating to Fraudulent Marks on Merchandise.**

Preamble.

WHEREAS it is expedient to amend the law relating to fraudulent marks on merchandise: Be it therefore enacted by the Governor of Ceylon, by and with the advice and consent of the Legislative Council thereof, as follows:

Short title.

Commencement.

1 This Ordinance may be cited as "The Merchandise Marks Ordinance, 1888;" and it shall come into operation at such time as the Governor shall appoint by Proclamation* to be published in the *Government Gazette*.

Repeal of Ordinance No. 5 of 1865 and of certain sections of the Ceylon Penal Code.

2 The Ordinance No. 5 of 1865, intituled "An Ordinance relating to the fraudulent marking of Merchandise," so far as the same has not been repealed by "The Criminal Procedure Code, 1883," and sections 467 and 469 and so much of sections 471, 472, 474, and 475 of the Ceylon Penal Code as relate to trade marks, are hereby repealed; and any unrepealed enactment referring to any enactment so repealed shall be construed to apply to the corresponding provisions of this Ordinance: Provided that this repeal shall not affect—

- (a) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor
- (b) The institution or continuance of any proceeding or other remedy under any enactment so repealed for the recovery of any penalty incurred, or for the punishment of any offence committed, before the commencement of this Ordinance; nor
- (c) Any right, privilege, liability, or obligation acquired, accrued, or incurred under any enactment hereby repealed.

Offences as to trade marks and trade descriptions.

3 (1) Every person who—

- (a) Forges any trade mark; or
- (b) Falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or
- (c) Makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or
- (d) Applies any false trade description to goods; or
- (e) Disposes of, or has in his possession, any die, block, machine, or other instrument for the purpose of forging a trade mark; or
- (f) Causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Ordinance, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Ordinance.

* Proclaimed the 25th day of March, 1889.

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(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, shall, unless he proves—

- (a) That having taken all reasonable precautions against committing an offence against this Ordinance he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and
 - (b) That on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or
 - (c) That otherwise he had acted innocently;
- be guilty of an offence against this Ordinance.

2 (a) Every person who imports any piece-goods ordinarily sold by length or by the piece, manufactured beyond the limits of the colony, or who sells, or exposes for, or has in his possession for, sale, or any purpose of trade, any piece-goods ordinarily sold as aforesaid, whether manufactured within or beyond the limits of the colony, which have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, shall be guilty of an offence against this Ordinance.

Offences as to
trade marks
and trade
descriptions.

[§ 1, 14 of 1892]

Provided always that nothing in this sub-section contained shall apply to any piece-goods manufactured within the limits of the colony by hand labour only.

(3) Every person charged with an offence against this Ordinance may be tried by the district court or police court, and shall be liable—

- (i) On conviction by the district court, to simple or rigorous imprisonment for a term not exceeding two years, or to fine not exceeding one thousand rupees, or to both imprisonment and fine; and
- (ii) On summary conviction by the police court, to simple or rigorous imprisonment for a term not exceeding three months, or to a fine not exceeding one hundred rupees; and in the case of a second or subsequent conviction to simple or rigorous imprisonment for a term not exceeding six months, or to a fine not exceeding five hundred rupees; and
- (iii) In any case, to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4) The court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the court thinks fit.

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(5) It shall be lawful for a police court, in the case of a second or subsequent summary conviction, to inflict the full amount of fine hereinbefore provided, anything in section 16 of "The Criminal Procedure Code, 1883," to the contrary notwithstanding: Provided that a person charged with an offence under this section before a police court shall, on appearing before the court, and before the charge is gone into, be informed of his right to be tried by the district court, and, if he requires, be so tried accordingly.

Definitions.

4 (1) For the purposes of this Ordinance—

The expression "trade mark" means a trade mark registered in the register of trade marks kept under "The Trade Marks Ordinance, 1888," and includes any trade mark which is registered in the register of trade marks kept under "The Patents, Designs, and Trade Marks Act, 1883" (46 & 47 Victoria, chapter 57), and any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the 103rd section of "The Patents, Designs, and Trade Marks Act, 1883," are, under Her Majesty's Order in Council, for the time being applicable;

The expression "trade description" means any description, statement, or other indication, direct or indirect—

- (a) As to the number, quantity, measure, gauge, or weight of any goods; or
- (b) As to the place or country in which any goods were made or produced; or
- (c) As to the mode of manufacturing or producing any goods; or
- (d) As to the material of which any goods are composed; or
- (e) As to any goods being the subject of an existing patent, privilege, or copyright;

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Ordinance;

The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect; and the fact that a trade description is a trade mark or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Ordinance;

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise;

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The expressions "person," "manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate ;

The expression "name" includes any abbreviation of a name.

(2) The provisions of this Ordinance respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Ordinance respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description ; and for the purpose of this enactment the expression "false name or initials" means, as applied to any goods, any name or initials of a person which—

(a) Are not a trade mark, or part of a trade mark ; and

(b) Are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials ; and

(c) Are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods.

(4) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet, or inches than there are, contained therein, standard yards, standard feet, or standard inches, is a false trade description.

5 A person shall be deemed to forge a trade mark who either—

Forging trade mark.

(a) Without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that mark as to be calculated to deceive ; or

(b) Falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise ;

and any trade mark or mark so made or falsified is in this Ordinance referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

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Applying marks
and descriptions.

6 (1) A person shall be deemed to apply a trade mark, or mark, or trade description to goods who—

- (a) Applies it to the goods themselves ; or
- (b) Applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed, or had in possession for any purpose of sale, trade, or manufacture ; or
- (c) Places, encloses, or annexes any goods which are sold or exposed, or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied ; or
- (d) Uses a trade mark, or mark, or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark, or mark, or trade description.

(2) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper ; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description shall be deemed to be applied whether it is woven, impressed, stamped, branded, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3) A person shall be deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of a trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive ; but in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant.

Exemption of
certain persons
employed in
ordinary course
of business.

7 Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

- (a) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in this colony, and was not interested in the goods by way of profit or commission dependent on the sale of such goods ; and

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- (b) That he took reasonable precautions against committing the offence charged; and
- (c) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and
- (d) That he gave to the prosecutor all the information in his power with respect to the person on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

8 Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall, *primâ facie*, be deemed to be a description of that country within the meaning of this Ordinance; and the provisions of this Ordinance with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for, or having in possession for, sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly; and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case.

Application of Ordinance to watches.

9 In any indictment, charge, proceeding, or document in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Trade mark how described in pleading.

10 In any prosecution for an offence against this Ordinance—

Rules as to evidence.

- (1) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness.
- (2) In the case of imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced.

11 Any person who, being within this colony, abets the commission, without this colony, of any act which, if committed in this colony, would under this Ordinance be an offence, shall be deemed guilty of that offence, and be liable to be indicted, proceeded against, tried, and convicted in any district or place in this colony in which he may be, as if the offence had been there committed.

Punishment of accessories.

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Search warrant.

12 (1) Where, upon information of an offence against this Ordinance, a magistrate has issued either a summons requiring the defendant charged by such information to appear to answer to the same, or a warrant for the arrest of such defendant, and either the said magistrate on or after issuing the summons or warrant, or any other magistrate, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of, or in relation to, which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control, in any place, such magistrate may issue a warrant under his hand, by virtue of which it shall be lawful for any police officer, or other person named or referred to in the warrant, to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a police court for the purpose of its being determined whether the same are or are not liable to forfeiture under this Ordinance.

(2) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Ordinance, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a police court may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the court, unless the owner or any person on his behalf, or other person interested in the goods or things, shows sufficient cause to the contrary, may order such goods or things or any of them to be forfeited; and every such order shall be subject to appeal.

(3) Any goods or things forfeited under this section, or under any other provision of this Ordinance, may be destroyed or otherwise disposed of in such manner as the court by which the same are forfeited may direct; and the court may, out of any proceeds which may be realized by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

Costs of defence and of prosecution.

13 On any prosecution under this Ordinance the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by, and the conduct of, the defendant and prosecutor respectively, and the sum so awarded as costs shall be recoverable as if it were a fine.

Limitation of prosecution.

14 No prosecution for an offence against this Ordinance shall be commenced after the expiration of three years next after the commission of the offence or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.

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15 Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Ordinance : Be it therefore enacted as follows :

Prohibition on importation.

- (1) All such goods, and also all goods made or produced beyond the limits of the United Kingdom and this colony, and having applied thereto any name or trade mark being, or purporting to be, or being a colourable imitation of, the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom or this colony, unless such name or trade mark is accompanied by a definite indication, indicated in letters as large and conspicuous as any letter in the name or trade mark, of the place and country in which the goods were made or produced, *and also all piece-goods such as are ordinarily sold by the length or by the piece, which have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece,* are hereby prohibited to be imported into this colony, and, subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were referred to in section 36 of the Customs Ordinance, No. 17 of 1869, and included in schedule C to the Ordinance No. 14 of 1871.

[§ 2, 14 of 1892]

- (2) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the customs, the collector of customs, or other officer specially appointed in this behalf by the Governor, may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the goods are such as are prohibited by this section to be imported.
- (3) The Principal Collector of Customs may from time to time, with the sanction of the Governor in Executive Council, make, revoke, and vary regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture; and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.
- (4) Where there is on any goods a name which is identical with, or a colourable imitation of, the name of a place in the United Kingdom or this colony, that name, unless accompanied in equally large and

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conspicuous letters by the name of the country in which such place is situate, shall be treated, for the purposes of this section, as if it were the name of a place in the United Kingdom or this colony.

- (5) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.
- (6) The regulations may provide for the informant reimbursing the collector of customs all expenses and damages incurred in respect of any detention made on his information and of any proceedings consequent on such detention.
- (7) All regulations under this section shall be published in the *Government Gazette*.

Implied
warranty on sale
of marked goods.

16 On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark, and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Ordinance, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to, and accepted by, the vendee.

Provisions as to
false description
not to apply in
certain cases.

17 Where, at the passing of this Ordinance, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Ordinance with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

Savings.

18 (1) This Ordinance shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Ordinance, be brought against him.

(2) Nothing in this Ordinance shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Ordinance.

(3) Nothing in this Ordinance shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in this colony who *bond fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

19 Any person who falsely represents that any goods are made by a person holding a royal warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government Department, shall be liable, on summary conviction, to a penalty not exceeding one hundred rupees.

False representation as to royal warrant.

20 All offences under this Ordinance are hereby declared to be "cognizable" and "bailable," within the meaning of those terms as defined in section 3 of "The Criminal Procedure Code, 1883."

Offences cognizable and bailable.

22nd December, 1888.
