

Registration — Brands — Dairies — Creameries—Trade Marks.

The first person to register a butter brand, as required by section 2629, acquires the right to the use of the same.

Questions of priority in right to the use of a recorded dairy or butter brand are for the courts to determine and should not be passed upon by the department of agriculture.

November 15, 1927.

G. A. Norris, Esq.,
Chief, Dairy Division,
Department of Agriculture,
Helena, Montana.

My dear Mr. Norris:

You have submitted the following statement of facts and request for opinion:

“On August 24, 1927, a certificate of registry of the “Arcade” butter brand was issued to the Missoula Creamery Company of Missoula under the provisions of section 2629 of the code as amended by section 4 of chapter 35 of the session laws of 1923. Thereafter, the Thomas F. Farley Company, of Missoula, informed your office that it had used the “Arcade” brand in connection with the Arcade Grocery in Missoula constantly since 1923.

You ask which of the two concerns have the prior right to the use

of the "Arcade" brand of butter. Section 2629, above referred to, reads as follows:

"When any dealer in dairy products wishes to retain for himself a name, brand or trademark, the same may be registered with the state department of agriculture, labor and industry and on no account shall that name, brand or trade mark be used by another, unless duly consigned, given or sold to him by the originator or by the one to whom it belongs."

Independent of the above statute, the general rule appears to be that a trademark can be acquired by mere adoption and use, as such. (38 Cyc. 690-691.) In the absence of any statutory provision I am inclined to think that the same rule would apply in the use of a butter brand such as is involved in your inquiry.

By the enactment of section 2629 the legislature of Montana has apparently imposed upon any person desiring the exclusive use of a name, brand or trademark for a dairy product the duty of registering the same with the department of agriculture. Failure to comply with this requirement of statute would appear to me to constitute a waiver of the exclusive right to the use of such name or brand as against a person who registers it, as required by law.

It is further my opinion that so far as your department is concerned you have no option in the matter other than to register the brand upon the request of the first applicant for registration.

It is also my opinion that the controversy presented in your letter involves a matter concerning which neither your department nor mine has any authority to determine the question involved. That is a matter for the interested parties to submit to the courts.

Very truly yours,

L. A. FOOT,
Attorney General.