

duct, I have no hesitation in arriving at the conclusion that the defender is entitled to absolvitor.

LORD JUSTICE-CLERK — I shall confine myself to a consideration of the question whether the pursuers took proceedings and carried them on in such circumstances and in such manner as can entitle them to succeed in the present action. The pursuers, without intimation to the defender, embarked on this litigation, and then in the course of it, again without intimation to the defender, entered into an agreement to take the case out of the hands of the official court and submit it to arbiters chosen, without the defender being consulted. Thus throughout the defender was afforded no opportunity for dealing with the matter as it might affect his interests. And what is now maintained by the pursuers is, that they having been held to be wrong in a case conducted entirely by themselves, and without the defender having any control whatever over the proceedings, or any voice as to their mode or their management, he, the defender, must make good all that has been lost to the unsuccessful parties in the litigation. I am entirely unable to assent to that. I think the Sheriffs have erred here in holding that the pursuers were entitled to a decree. I cannot assent to the proposition that parties to a contract are entitled to carry on a litigation at their own hand, and to submit the subject-matter of it to arbiters to decide, all without intimation to the agent who made the contract for them, and on being unsuccessful in the litigation, to demand payment of all they have lost from that agent, because before the litigation he had stated as a fact what they found they were afterwards unable to prove by sufficient evidence, and expressed an opinion as to its effect upon the contract. And I do not think that a refusal so to hold involves any hardship to a principal in such a case. Here the pursuers, if their agent was in fault, might have saved all this expense and kept themselves *indemnis* by taking delivery as the shipowners insisted, and then proceeding against the agent for any loss caused by the mode of discharge being different from that which he had led them to understand he had secured for them. It is plain that any such loss would have been of trifling amount and ascertainable in a less expensive manner than, first, an action in the High Court of Justice in Ireland, then an arbitration before two arbiters and an oversman, and lastly an action practically for relief before this Court. A real sum at issue of probably at the utmost £20 has by these litigations been swelled to what cannot be less now than £500—a result much to be deplored—and which I can see no just ground for imposing upon this defender.

LORD MONCREIFF was absent.

The Court recalled the interlocutor appealed against and assoilzied the defender.

Counsel for the Pursuers—H. Johnston—Hunter. Agent—J. Gordon Mason, S.S.C.

Counsel for the Defender—Ure—A. S. D. Thomson. Agents—Whigham & MacLeod, S.S.C.

Saturday, January 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COWIE BROTHERS & COMPANY v.  
HERBERT.

*Trade-Mark—Infringement—Resemblance—Interdict for Particular Locality.*

A firm of export merchants, whose registered trade-mark was a representation of the Glasgow Town Hall, raised an action to interdict a biscuit-maker from using their trade-mark, or any mark substantially the same as their trade-mark, in connection with the sale of biscuits not exported by them. The label used by the defender also displayed the Glasgow Town Hall, but from a different point of view. It was in the Burmese market alone that the pursuers averred infringement of their right. In addition to the pursuers themselves and certain of their employees, three independent witnesses appeared for the pursuers, and testified respectively that the two labels would go under the same name in the interior of Burmah, the natives calling both the picture of a palace, and that there was such a similarity as would mislead native buyers, especially up-country buyers. No evidence was led of actual deception.

*Held* that the defender must be assoilzied, on the ground that the pursuers had failed to prove such resemblance between the labels as would be apt to mislead purchasers.

Cowie Brothers & Company, export merchants, Glasgow, raised an action in the Sheriff Court of Lanarkshire to have George Herbert, biscuit manufacturer, Glasgow, interdicted from using, in connection with the sale of biscuits not exported or selected or prepared for exportation by the pursuers, the pursuers' trade-mark, or any mark substantially the same as, or only colourably different from, the pursuers' trade-mark.

The pursuers averred that they had for several years exported goods to Rangoon and elsewhere, and had acquired an extensive and favourable reputation for the goods exported by them, of which biscuits formed a part. They further averred that in 1889, in order to protect themselves and the public from imposition, they adopted as a distinctive trade-mark a representation of the Glasgow Town Hall. In particular, they averred that they had used the said mark on tins of biscuits exported by them to Rangoon and elsewhere, and that the said mark was known in the Rangoon market as "El Musjid" or "The Palace." In July 1889 the pursuers were registered as proprietors of the trade-mark in question.

"(Cond. 4) The pursuers have recently

ascertained that the defender is using on tins or packages containing biscuits exported by him, or, at all events, not exported by the pursuers, nor selected for exportation by them, a representation of Glasgow Town Hall, in imitation of, and substantially the same as the complainers' trade-mark above mentioned. *Inter alia*, the defender recently consigned to Rangoon for sale a quantity of tins or packages containing biscuits and bearing such counterfeit trade-mark." . . . "(Cond. 5) The defender's use of the label complained of is calculated to lead buyers to believe that the goods consigned by him have been selected and consigned by the pursuers, and is injurious to pursuers' trade, and an infringement of their said trade-mark."

The defender averred—" (Stat. 4) One of the pursuers' firm, in 1888, requested the defender to give the pursuers' firm a sample of his biscuits along with quotations, as they stated that they intended to begin the exportation of biscuits to foreign markets. The defender submitted a box or boxes of biscuits to pursuers, which had a label or labels thereon containing a perspective view of the Glasgow Municipal Buildings, which defender had in use for some considerable time before that date. It is believed and averred that pursuers took the box containing the label to the defender's own printers, and desired them to make and print a label similar to the one adopted by the defender. The printers objected to do this until they had asked the permission of defender. Defender on being approached by the printers, cautioned them against making or printing labels for the pursuers which might be mistaken for his own, and this the printers undertook to do." . . . "(Stat. 5) Defender was not aware until immediately before the raising of the present action, that pursuers had appropriated and registered the design of the Glasgow Municipal Buildings used by them as a trade-mark. A copy of pursuers' label is now produced in process. The design in question was, at the date of registration by pursuers, incapable of registration, in respect that it was not the design of the pursuers; it was in common use, and specially a representation of the Glasgow Municipal Buildings had been used by the defender as a trade-mark for his biscuits; and further, that it did not come under the definition provided by the Trades Mark Acts. (Stat. 6) The pursuers, or one or other of them, were quite aware that the defender had adopted and used the label with the design now complained of, and exhibited in process prior to the registration by them of the trade-mark adopted by them. The defender, as stated, was unaware until recently of the registration of the pursuers' design or label, and pursuers have purposely avoided raising any objection to the defender's use of the label in question until the expiry of five years from the date of such registration."

The pursuers pleaded—" (1) The defender having infringed and still continuing to infringe the pursuers' trade mark as conceded on, the pursuers are entitled to the interdict craved with expenses."

The defender pleaded—" (3) The defender not having infringed any alleged trade-mark, is entitled to absolvitor with costs. (4) The pursuers' statements, so far as material, are insufficient to support the conclusions of the summons, and absolvitor should be granted with costs."

A proof was allowed.

For the pursuers Archibald Cowie, one of the pursuers, deponed—"Our first shipment to Rangoon under the Town Hall label was in October 1889. So far as I know, until October last year (1894) there were no other biscuits being sold in Rangoon or elsewhere under a similar label. We had no advice from Rangoon until the receipt of the telegram on 31st October 1894. . . . I think that [defender's labels] are likely to cause the goods under them to be mistaken for ours. . . . From my knowledge of the Eastern trade I say that goods are usually sold by mark. *Cross*.—I am not aware if any person in this country was deceived by the similarity of the two labels. We never sold a tin of biscuits in this country, and I cannot give an opinion. . . . I have no personal knowledge of anyone having been deceived, because I have never been in Rangoon. . . . Assuming that I was a stranger to the city of Glasgow, I most certainly say that I would be deceived by the two designs."

Charles Rennie Cowie deponed—"The first shipment of biscuits was in October 1889. I frequently heard of Herbert's biscuits in Rangoon under a label giving his name and his works. The first intimation I got of Mr Herbert's use of the Town Hall label was the date of the telegram, October 1894. I only arrived home at that time. At the time I left Rangoon in September I did not hear of the Town Hall label being used by Mr Herbert. By a subsequent mail we received a copy of the label said to be used out there. That label was likely to cause confusion of our goods and Mr Herbert's. I think there is such a resemblance between the label complained of and ours that buyers are likely to be deceived. That class of trade is entirely in the hands of native buyers. The goods are known by the trade-marks entirely. Our design is known out there as a mesjid or mosque, or a girgo or church. The label complained of is known by the same name. We had a case of candles and other goods where we had a view a little like this, and it was a mesjid. We took proceedings against the people using it in Rangoon, and were successful. He was found liable to pay a fine of 200 rupees or go to prison for three months."

Andrew Symington, Indian Civil Service, and Assistant Commissioner in Burmah, deponed—"It is eight years since I went out to Burmah. I come a great deal in connection with traders. I have seen Cowie's Town Hall label and Guthrie & Company's Town Hall label. I think there is a similarity between these two marks which might deceive a native buyer. In Burmah goods are known by the brands on them. The brand appears on Cowie & Company's label as the Glasgow Town

Hall. In Burmah the Town Hall would be known as a palace, and in India as a temple. A native that bought goods under Cowie's label might in a subsequent purchase take by mistake goods under Guthrie & Company's label."

Thomas Purdie, general assistant of Cowie & Company, Rangoon, deponed—"I am in the employment of C. R. Cowie & Company, merchants, Rangoon. . . . Last October a box was brought into the place bearing the Town Hall label. That was the first time I had ever seen the Town Hall label except on our own goods. That same day I caused a lawyer out there to take proceedings against the man who had been selling them. I was in Court when the evidence was taken and sentence pronounced. He was fined 200 rupees or three months' imprisonment. He paid the fine. Out in Rangoon and Burmah goods are known by the trade-mark. The goods bearing our Town Hall label are known by the mark. That is a natural result from the fact that the natives don't read English. I don't think a native who was buying under Cowie & Company's mark would notice the difference between it and Guthrie & Company's mark. When I was in Court one of the natives was asked to distinguish between the two labels, and he was unable to do so. I have tested some of the natives in the office, and they could not tell the one from the other. They call our mark *girgo* or church, and *mesjid* or mosque. They would also call Guthrie & Company's mark a *mesjid* or mosque ticket. *Cross*.—I tested the natives by putting one tin of Guthrie's before them and another of ours, and asking them to select which was which. I asked them to tell me which was ours, and they said they were both ours."

James Galbraith, sole partner of James Galbraith & Sons, East Indian merchants, Glasgow, deponed—"I was in Burmah for about eighteen years. I came home in 1876, and since then I have been in business in Glasgow and connected with Burmah. The natives as a rule distinguish one maker's goods from another by the trade-mark. The principal trade-marks in use in the East are photographs or designs. Letterpress would be of no use to them out there. I have seen the labels in question. I consider that there is a similarity between Guthrie & Company's labels and Cowie & Company's labels. The similarity is such as would deceive a native buyer in Rangoon. The natives are in the way of giving the different tickets names of their own. I think the labels in question would go under the same name, and confusion would arise between the two. (Q) If a native who had been buying under Cowie & Company's Town Hall mark ordered goods, how do you think he would order them?—(A) He would order them in the native language as a house or palace or large building."

Francis Park, Glasgow representative of Sir Jacob Behren & Sons, East Indian merchants, deponed—"From my experience of the Eastern market, goods are known by the brand or mark almost entirely. The natives ordered goods by the ticket. That

is how imitations are got up sometimes. I have seen the labels of Cowie & Company and Guthrie & Company. I think there is a similarity between these labels such as would deceive native buyers, especially up-country buyers. In ordering Cowie's biscuits or Guthrie & Company's biscuits they order them by the native name. (Q) A native who has been in the habit of getting goods under Cowie's label might get goods under Guthrie's label passed on him as the same goods he had got before?—(A) Very easily; and it is almost certain it would pass. The native would expect them to be the goods that he had got before."

For the defender, Hugh Peter Buchanan, merchant, Glasgow, deponed—" (Q) If a dealer was wanting to order goods, having once seen them under this label of Cowie & Company's, and if he wished to renew the order, how would he describe it?—(A) Messrs Cowie Brothers and the natives would have a name for it in their own office. (Q) Supposing the name was a church or a mosque, would not another label which came under the same category be apt to be confused?—(A) There are so many buildings on biscuit labels that a dealer would not be such a fool as to specify loosely what he wanted, nor would the merchant be foolish enough to have any doubt on the subject. It is the case that these labels go by a name in the market. They sometimes go by an elevation, sometimes a mosque, and sometimes a church. (Q) If a native buyer was ordering it by the name of mosque, church, or palace, might there not be confusion between these two labels?—(A) They are too wide-awake to leave any doubt. They have an elevation in fifty different forms, and it might be twenty different houses. They are quite accustomed to the difference in buildings, of formation, or names of firms. It is the case that the native dealer does not read English. A native dealer would not be able to read letterpress; in a case of this kind he would go by the label and mark. I am familiar with Guthrie & Company's label. (Q) From your recollection of Guthrie's label can you tell me what is the difference between Herbert's and that one of Cowie's you see before you, No. 19, as regards the building?—(A) I am fully convinced in my own mind that even an up-country native would not be confused between them. [Question repeated]—(A) For my part I could not recollect that. There is the difference that Cowie's building is facing and Guthrie's is from the corner. I think that is a kind of distinction that a native would carry in his mind. (Q) Supposing he had only seen Cowie's label once before, could he recollect that difference?—(A) I expect he would. (Q) Is it not a thing that is doubtful?—(A) It might be."

Lewis Osborne Smith, merchant, Glasgow, deponed—" (Q) Do you think from your experience that the people out in Rangoon are liable to be deceived?—(A) No. I would say no. (Q) They are pretty well up in the matter of design?—(A) I don't think there is any question. They are both buildings. I think a native could carry in his mind pursuers' building, and

would not be liable to confuse that with No. 6/2. *Cross*.—I never resided for any length of time in Rangoon. The last time I was there I stayed for six or seven weeks, and the previous time not so long. (Q) Did you sell any goods out there?—(A) I went out with our salesman, but I could not deal with the dealer because I could not speak the language. I think that the man who is selling the biscuits for pursuers would know that we were using that label. I presume that the design on the labels represent the same building. That is obvious to anyone looking at the two. I don't pretend to know anything about buildings. I understand they are both taken from the Municipal Buildings, Glasgow."

On 9th November 1895 the Sheriff-Substitute (GUTHRIE) granted interdict as craved.

Note.—"The pursuers' title to their trade-mark having formerly been sustained, the only question is whether the trade-mark used by the defender is so like it as to have a tendency to mislead. It is not necessary to the pursuers' case that they should show that the defender had an intention to deceive, and I do not think that is alleged or proved. Neither have I anything to do, as has already been held, with the question whether the pursuers are properly registered. They are registered, and that is conclusive for the present purpose.

"Further, an attentive consideration of the question of similarity satisfies me that purchasers are likely to be deceived by the resemblance of the one label to the other. A good deal is said about the greater probability of uneducated (?) Orientals being deceived, but it does not seem at all unlikely that an average English buyer might mistake the one picture for the other. It must be observed that deception occurs, not when the two pictures are presented at the same moment for comparison, but when the defender's picture is seen by itself, and can only be compared with the representation of the registered trade-mark which the intending buyer carries in his memory."

The Sheriff (BERRY) having adhered, the defender appealed.

The defender also presented a petition to the Court of Session under section 90 of the Patents Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57), and the amending Act of 1888 (51 and 52 Vict. cap. 50), sec. 23, craving an order for the rectification of the Register of Trade-marks by expunging therefrom Messrs Cowie & Company's trade-mark. This application is alluded to in Lord M'Laren's opinion, and was refused by the Lord Ordinary (KINCAIRNEY), against whose interlocutor the petitioner reclaimed, but it was ultimately not insisted in by the petitioner.

Argued for the defender—The Sheriffs were wrong. The pursuers had completely failed in their proof. To begin with, there was no similarity between the labels. They represented the building from totally different points of view and could not be mistaken for one another. But even assuming that there was a superficial resemblance, the

pursuers had not proved a single case of actual deception. It was quite true that, as a general rule, actual deception need not be proved; but when the rival trade-marks had been circulating side by side in the market where deception was alleged to be probable, the fact that no one appeared to have been misled was very material—*Kerly on Trade-Marks*, p. 206; *Rodgers v. Rodgers*, 31 L.T. 285; *Estcourt v. The Estcourt Hop Essence Company*, L.R., 10 Ch. 276; *Lambert*, 5 Reports Patent Cases 536; *Baker v. Rawson*, 45 C. D. 519; *Talbot*, 11 R. P. C. 77. In view of the dissimilarity of the labels, this was eminently a case where deception must be proved. Even if it were not, the pursuers' evidence was of the vaguest description, and failed to establish the probability of deception. The distinction they attempted to draw between an Englishman and an Oriental was rejected even by the Sheriff-Substitute who had decided in their favour. In any event, no probability of deception had been proved except in Burmah, and the interdict sought by the pursuers was of universal application.

Argued for the pursuers—The Sheriffs were right. The principle relied on by the pursuers was this, that no trader had a right to use a trade-mark so nearly resembling that of another trader, as to be calculated to mislead the incautious—*Sykes v. Sykes*, 3 B and Cr. 541, *Sebastian's Digest* No. 40; *Perry v. Truefitt*, 6 Beav. 66, *Seh. Dig.* 73; *Orr, Ewing & Company v. Johnston & Company*, 7 A. C. 219. When a trade-mark had been exclusively appropriated by some one for a series of years, and had obtained a certain exclusive meaning in the trade, then it was his property as a trade-mark—*Singer Manufacturing Company v. Kimball & Morton*, January 14, 1873, 11 Macph. 267, per L. P. Inglis at p. 272. The pursuers here had used the representation of a house as a trade-mark for more than five years after the date of registration in 1889, before the defender first employed the representation of a house as his trade-mark, and such use was, under section 76 of the Patents Act of 1883, conclusive evidence of an exclusive right to that mark. There was no evidence of the defender's use of the representation of a house prior to October 1894, but in any case the question of use by the pursuers before 1889 was immaterial—*Hudson*, 32 C. D. 311. It was unnecessary for the pursuers to aver or prove fraud on the part of the defenders—*Singer Manufacturing Company v. Wilson*, 3 A. C. 376, per Lord Cairns at p. 391. Nor, in order to entitle the pursuers to relief, must the identity between the labels be absolute or such as would deceive persons seeing them together side by side—*Seixo v. Provezende*, L.R., 1 Ch. 192. Again, it was unnecessary for the pursuers to prove absolute deception. Proof that deception was liable or likely to occur was sufficient, especially when the witnesses would have to be procured from a distant foreign market, and there was ample evidence to that effect here—*Kerly*, p. 206. It was no justification for the de-

fender to show that his trade-mark was ambiguous, or that it might not mislead a person who carefully and intelligently examined it—*Singer Manufacturing Company v. Loog*, 8 A. C. 15. A distinction must be drawn between the educated European and the Oriental purchaser, for whose consumption the goods in question were intended. It was urged by the defender as a reason for refusing interdict that there was no evidence of probability of deception except in the Rangoon market. That was quite true, but the pursuers were nevertheless entitled to a remedy co-extensive with their right. Even if they were not, there were precedents for granting interdict restricted in its operation to a particular locality or otherwise—*Carver v. Bowker*, Seb. Dig. p. 350; *Barber v. Manico* 10 R. P. C. 93 per A. L. Smith, J.; *Rodgers v. Rottgen*, 5 Times Reports, 678.

At advising—

LORD PRESIDENT—I am unable to agree with the Sheriffs. My confidence in the judgment received a serious shake, from which it has never rallied, when the pursuers' counsel rested their whole argument on a distinction which the Sheriff-Substitute expressly repudiates, and which goes deep into the case. The pursuers' counsel did not maintain that "an average English buyer" was at all likely to be misled, and they relied solely on the evidence of the probability of Burmese buyers being deceived.

This is a question of fact, and what we have to determine is, whether the pursuers have established that the defenders' labels so resemble the registered trade-mark of the pursuers as to be apt to mislead purchasers into taking the defender's goods for the pursuers.' There is no evidence that anyone has actually been so misled, but such direct evidence, while it is the best, cannot be held to be in all circumstances indispensable. I am quite willing to make allowance for the distance of the market in question, and for the difference in race of the probable purchasers as making it intelligible that the evidence should not be of the best or be copious. Still we cannot grant interdict unless we are satisfied by adequate evidence.

Now, reverting to what I referred to at the outset, the pursuers make a difficult beginning when it has to be admitted that they have no case about the British market. This implies and leads one to remember that the two labels, to anyone accustomed to the buildings of Europe and to the labels of commerce, are not like one another. In fact, but for the circumstance that they are known to have both been intended to present views of the same building, I do not believe that this question would ever have arisen. But then it is always to be remembered that on the face of the labels they do not purport to depict the Glasgow Town Hall at all, and the fact that they are both views of that building is therefore, as I have said, a mere circumstance which does not of itself really affect the dispute. They are, on the face of them, as unlike, as if,

instead of being different views of the same building, they had been intended to represent different buildings. Nor is there anything in the surroundings or get up of the two labels which contributes to assimilate them.

But then it is said that in Rangoon a very crude view is taken of such things. Indeed, the pursuers' case is a bold one, for it really comes to this, that the native purchaser will draw no distinctions between one large building and another, but will take each and all as depicting a mosque or palace, and will so call the label. As applied to British trade-marks this would seem to prove, if not too much, at least a good deal. It would practically strike all large edifices out of the region of lawful trade-marks, giving a monopoly to the pursuers or some one else. It is curious also to note that, applying the pursuers' contention to the interdict which he has obtained, and now defends, this rule would apply to British as well as to Oriental markets, although in the British market the reason for the rule is not alleged to exist. I do not forget that late in the day, and not spontaneously, the pursuers avowed that rather than have no interdict they would be content with an interdict applicable to the Rangoon market, but this subject was not very fully developed.

These being the conditions of the argument, it is surely necessary that the proposition in fact that (let it be in Burmah) the resemblance of the two labels is such that that of the defenders is apt to mislead should be clearly made out. Now, when the evidence is examined it turns out to be small in amount, and (what there is of it) very thin and general. The drastic proceedings taken by the pursuers in Rangoon on the appearance of the defenders' label can hardly affect our judgment on the evidence now before us. When the evidence is considered, it appears that, apart from the pursuers and their servants, there are only three witnesses who speak to this matter. Of these, one is not a commercial man, and he expresses the opinion that there is a similarity which "might" deceive a native buyer. Again, Mr Galbraith "thinks the labels would go under the same name"—the natives would call them both a palace. But this gentleman's opinion, such as it is, is most confident about what he calls "the interior" of Burmah, which makes the matter still more remote and hazy. In like manner Mr Park thinks there is a similarity such as would deceive native buyers, especially up-country buyers.

Now, if this evidence were supported by the labels themselves or by facts about other markets it would stand in a more favourable position than it does now with no antecedent or surrounding probability. Standing by itself, and being at best more or less conjectural, it forms an insufficient substitute for direct evidence of deception. The case for the defenders would certainly have been strengthened on this matter if they had been able to show that their label had actually been for some time in the Rangoon market, for this would have made the

absence of evidence of deception still more important. I do not think, however, that they have succeeded in making good this point.

On the whole matter, I am, in the first place, wholly unable to affirm the Sheriff's finding in fact. Read along with the note of the Sheriff-Substitute, it means that all the world over, or at least in the British as well as in the Rangoon market, the one label so resembles the other as to be apt to mislead purchasers. This wide proposition is unsupported by evidence, and was not maintained by the pursuers in the debate before us. As regards the Burmese markets I think the case is not proved. Accordingly, I am for recalling the interlocutors of 9th November 1895 and 24th June 1896, and for finding in fact that the pursuers have failed to prove that the defenders' labels so resemble the pursuers' trade-mark as to be apt to mislead purchasers, and for finding in law that the rights of the pursuers to the trade-mark have not been infringed. This leads to absolvitor.

LORD ADAM concurred.

LORD M'LAREN—It is not immaterial in considering questions of this nature to remember that the primary use of a trade-mark is to distinguish goods of a certain description or quality. It is not a substitute for a signature on a label. The same firm may have different trade-marks, each appropriated to a particular article of manufacture. Still if the goods of a trader have acquired a reputation under a certain trade-mark, the law will give protection to the trader using the trade-mark by restraining the sale of other goods under that mark or one so like it as to be calculated to deceive. It appears to me that the statutory law of trade-marks depends on the same principle—and the principle is carried into effect by a system of registration which is intended *prima facie* to establish a right to the exclusive use of the registered mark. The provision is that during the period of five years the registry shall be *prima facie* evidence of an exclusive right, and that after that time it shall be conclusive evidence. I should not be disposed to read that provision as meaning that after five years it would be too late to have an amendment of the register. The way the matter has been presented to us is that Mr Herbert being, as he says, the first user of a representation of the Glasgow Town Hall, does not lose that right by the mere fact that a rival trader has registered a picture of the same object as his trade-mark, and has made use of it for more than five years. Neither at common law nor by statute is it within the power of any person to appropriate the trade-mark used by another so as to exclude the first user of the mark from his rights. Therefore if it should be established that Mr Herbert was the first to use a picture of the Glasgow Town Hall as his trade-mark, his claim is alternative; if the two pictures are identical, his claim would be to have the trade-mark of Messrs Cowie expunged from the register. But if the two representations are not identical, and

if they are not so much alike that the one might be mistaken for the other, then the application for interdict against them fails, and his application to have the register rectified is unnecessary. After hearing the argument in both cases I am satisfied that the second alternative is the true one. These pictures which we find upon the biscuit boxes of the respective traders, although they are said to be representations of the same building, are so unlike that it is impossible to treat the one as a counterfeit representation of the other. The interdict applied for is one in perfectly general terms restraining Mr Herbert from selling goods bearing a representation of the Glasgow Town Hall on boxes of biscuits supplied by him. But the only evidence produced is that of persons resident in Burmah or who are connected with the Burmese trade, and who say that in that important though relatively small part of the civilised world, in their judgment the one picture might be mistaken for the other. Your Lordship has pointed out that there was some proposal for amending the prayer for interdict so as to confine it to Burmah, but we did not entertain the proposal, and if an interdict confined to Burmah was desired, the proper course would be to apply to the Superior Court of that territory. But we are asked to grant an interdict which is to have a universal operation, on evidence which applies solely to Burmah. There might be cases where interdict might be granted without any evidence on the question of identity, *e.g.*, if the one label was a facsimile of the other, or if it differed only in some minute detail which could not possibly serve to distinguish the one mark from the other. In such a case the Sheriff, upon an inspection of the labels, might grant interdict. But that is not the case here. The one picture is a diagrammatic representation of the front of the building, in which the whole design is perfectly symmetrical; the other is a perspective representation taken at an angle, and so taken as to bring other features of the building into view. Unless one happened to see the building from different points of view, he would not know that these two were pictures of the same building. I cannot say, in the absence of evidence, that the one picture is so like the other as to be liable to be mistaken for it. That is enough for the decision of the case. In the absence of any evidence that the mark complained of is calculated to deceive, the judge must go by his own impression, and I am prepared to hold that there is no such similarity as to be likely to deceive traders. My opinion therefore, upon the whole case is that interdict should be refused, and as the labels are not proved to be identical, it follows that there is no ground for an application to have the entry of the registration of Messrs Cowie's trade-mark expunged from the register.

LORD KINNEAR concurred.

The Court recalled the interlocutors of the Sheriffs; found in fact that the pur-

suers had failed to prove that the defender's labels so resembled the pursuers' trade-mark as to be apt to mislead purchasers; found in law that the rights of the purchasers to the trade-mark had not been infringed, and assolized the defender.

In the reclaiming-note in Herbert's petition for rectification of the register, the Court dismissed the petition in respect that the pursuer had intimated at the bar that he no longer desired to insist therein.

Counsel for the Pursuers—Balfour, Q.C.  
—Burnet. Agents—J. W. & J. Mackenzie,  
W.S.

Counsel for the Defender—Ure—Findlay.  
Agents—Simpson & Marwick, W.S.

Friday, January 22.

## FIRST DIVISION.

[Sheriff of Ayrshire.

### THE MAGISTRATES OF KILMAR- NOCK v. REID.

#### *Process—Proof—Remit—Competency.*

A accepted a tender of X to execute certain excavation and drainage work in a cemetery to the satisfaction of A's engineers. Some years after the completion of the work, which was certified by the said engineers, A raised an action in the Sheriff Court against X, averring that the work performed by X was disconform to the engineers' specification in many important respects duly set forth, and that X had conspired with the engineers to defraud him. The conclusions of the action were that the Sheriff should remit to some one to inspect X's work, to value the same, and to report upon its present state, and also what was necessary to bring it into conformity with the specification, and that upon receiving such report the Sheriff should grant warrant to A to carry out whatever work might require to be done in accordance with the report.

*Held* that the action was incompetent, and must be dismissed, on the ground that the facts proposed to be inquired into being of a highly contentious nature and involving a question of fraud, did not bring the case within that limited class in which such a remit without consent of both parties is a competent mode of proof.

This was an action raised by the Provost, Magistrates, and Town Council of the burgh of Kilmarnock, and the Parish Council of the parish of Kilmarnock, as the parties empowered to carry into execution the Purposes of the Burial Grounds (Scotland) Act 1855, against William Andrew Reid, contractor. The action was raised in the Sheriff Court of Ayrshire at Kilmarnock, and the conclusions are fully set forth below.

The pursuers averred that some time ago they acquired additional ground for their

cemetery at Kay Park, Kilmarnock; that they employed Messrs Mitchell & Langholm, civil engineers, to prepare plans and specifications for the work in connection with this extension; that in June 1892 the defender made a tender for the execution of the work, and that the pursuers accepted the same in terms of the specification. The work was of the nature of excavation and drainage, and the specification contained provisions, *inter alia*, that after the pipe-track was excavated no pipes were to be placed therein until they had been examined by the engineers; that all the materials used—pipes, cement, rope-yarn, sand, ashes, &c., should be of the best description; and that the whole of the work should be executed to and under the directions of the engineers, and to their entire satisfaction.

The pursuers proceeded to aver that in May 1894 the engineers forwarded to them the final measurements of the work done by the contractor, bringing out a sum of £1968, 16s. due to the defender, and a further sum of £143, 12s. 4d. for extra work rendered necessary by alterations in the plans. Of this sum £1800 had been paid to the defender on account, leaving a balance outstanding of £312, 8s. 4d.

The pursuers not being satisfied with the measurements, refused to pay this balance, and decided to employ a neutral engineer to go over the measurements, and compare the same with the account as scheduled—“They accordingly appointed Mr James Barr, civil engineer, Glasgow, for this purpose, and generally to test whether the work had been carried out in conformity with the plans and specification. As the result of examinations made by Mr Barr and of other investigations, the pursuers believe and aver that the drains have not been properly laid and connected; that they have not been laid at the depths stipulated for; that the pipes have not been cemented and jointed as specified; that the covering of ashes on the top of the under drainage is not to the stipulated depth; that the stones or other obstructions found in line of cutting drains have not been removed, and that the earth forming the ornamental plots is not of the character specified or of the depth stipulated for. The defender, taking advantage of the absence of supervision on the part of the engineers entrusted with the duty of superintending the work, deliberately set himself to scamp the work as after mentioned, made a mere pretence of executing it in accordance with the provisions of the specification, and by means of fraudulent devices succeeded in palming off the work as being executed in a workmanlike manner and according to contract.”

The pursuers continued—“The defender was well aware all along that he had not executed the works in terms of his contract in the several respects before mentioned. He concealed, however, all of his said failures from the pursuers or their authors or predecessors, and claimed and accepted payment of the instalments of the contract