

Tuesday, July 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

THE CELLULAR CLOTHING COMPANY, LIMITED v. MAXTON & MURRAY.

Trade Name—Unregistered Descriptive Name—“Cellular Cloth”—Secondary Meaning—Whether Use by Other Trader Calculated to Mislead Purchasers—Form of Interdict.

An action of interdict was raised by the proprietor of a certain fabric which he had advertised and sold for some years under the name of “cellular cloth,” for the purpose of preventing a rival trader from using the name to designate goods not of the pursuer’s manufacture, in such manner as to induce purchasers to believe that they were the pursuers’ goods. It was maintained by the pursuers that the word had acquired in the trade a secondary meaning indicating only goods made by them, while the defenders maintained that it was a word naturally and appropriately descriptive of the fabric, and had acquired no such exclusive signification. The Court, after a proof, *refused* to grant interdict, *holding* (1) that while the word “cellular” had acquired the secondary sense claimed by the pursuers, the primary sense of the word as an ordinary description of the fabric still subsisted and was used, (2) that the defenders had not used the name so as to induce the belief that they were selling or offering for sale the pursuers’ goods.

Opinion (per Lord M'Laren) that had the pursuers succeeded in establishing this second proposition, they would have been entitled to an interdict against the use of the name “cellular” “without a distinctive addition” or “without clearly distinguishing the goods from those of the pursuers.”

An action was raised by the Cellular Clothing Company, Limited, against Messrs Maxton & Murray, wholesale shirt manufacturers, Edinburgh, craving the Court that the defenders and their agents should be interdicted, prohibited, and discharged “from using the name, word, or term ‘cellular’ by itself or in combination or in conjunction with any word or words describing or distinguishing or in connection with cloth or clothing so as to denote or indicate cloth or clothing not being cloth or clothing made or supplied by the complainers, and from selling or offering for sale, or causing to be sold or offered for sale, cloth or clothing not of the pursuers’ manufacture, made or supplied by the pursuers, under the name, word, or term ‘cellular,’ and from using trade labels, window tickets, wrappers, invoices, circulars, notices, or advertisements of any

kind with the said name, word, or term ‘cellular’ by itself or in conjunction with any other word or words thereon in connection with the manufacture or sale of cloth or clothing, bandages, sheets, curtains, shirts, or underwear not made or supplied by the pursuers, or upon or attached to any such goods or class of goods not made or supplied by the pursuers, and from publishing or issuing, or causing to be published or issued, circulars, notices, or advertisements of any kind containing or using the word ‘cellular’ in such way as to denote goods of the pursuers’ manufacture, and from using said word in any way calculated to lead the public to infer or believe that the defenders are entitled to sell goods under the name ‘cellular’ which are not made or supplied by the pursuers, or that the goods which they so sell are made or supplied by the pursuers, and also from otherwise in any way infringing the pursuers’ right to the name, word, or term ‘cellular,’ by using it in any way so as to designate any goods not made or supplied by the pursuers.” There was also a conclusion for damages.

The pursuers averred that in November 1836 their managing director had designed a cloth of great hygienic value, suitable for shirtings and underwear, which had been put on the market, and the rights in which he had in 1888 assigned to them; that they had given to this fabric the name of cellular cloth, and had advertised and sold it under that name for the last ten years.

They averred—“(Cond. 3) Pursuers on all their goods sold or offered for sale have used the word or name ‘cellular’ to mark and designate their goods, and to indicate that the goods so marked or designated are of their make or supplied by them, and it has come to be, and is now known and recognised by the trade and by the public as distinctive and designative solely of goods made or supplied by the pursuers. The said word or name ‘cellular’ never was used to designate or mark cloth or clothing or other such material or fabric in the market or to the public until the pursuers did so, and when the trade or the public ask for or order cloth or clothing under the name ‘cellular,’ they expect and intend to be supplied with the pursuers’ goods and no others.”

The pursuers averred further that they had discovered several instances of traders passing off other material or fabric not of their manufacture under the term “cellular,” but that in all such cases, on being remonstrated with, they had undertaken to desist, or had consented to interdict restraining them from continuing such practice.”

They averred further—“(Cond. 5) In or about February or March 1897 the pursuers discovered that the defenders were selling, and offering for sale, and had sold, shirts and underclothing and cloth under the name ‘cellular,’ which were not made or supplied by the pursuers, and that in their pattern and quotations books, which they issued to the trade, they

were systematically using the word 'cellular' to designate and classify goods which were not of the pursuers' manufacture, and that in such manner as to make purchasers believe that said goods were pursuers' goods. They sold such goods under said name, and issued said books. This the respondents did, and it is believed are doing, in the knowledge, as is averred, that the trade and the public understand by 'cellular' goods, goods manufactured or supplied by the pursuers, and with the intention, or at all events with the result of diverting the pursuers' trade, or of causing goods to be passed off under the name 'cellular,' or as the pursuers' goods, which were not supplied or made by the pursuers, but by the defenders themselves."

The pursuers averred in particular that these pattern books had been sent to Mr Stephen Brown, hosier, Kelso, and that on their complaining, the defenders had refused to discontinue their proceedings, in consequence of which the trade and the public would be induced to believe they were buying the pursuers' goods, and they would accordingly be damaged thereby.

The defenders averred that their business was exclusively confined to Scotland, and that the pursuers had only in the last few years endeavoured to establish any connection there. They denied that they had ever represented themselves as selling the pursuers' cloth, and pleaded, *inter alia*—“(3) The pursuers not having the exclusive use of the word 'cellular,' the defenders ought to be assolizied. (4) The defenders having in describing their said patterns only made use of English words in common use, they are entitled to absolver. (5) The defenders not having injured the pursuers' business by unlawful means, they are not entitled to damages.”

The Lord Ordinary (KYLACHY) allowed a proof of consent of parties, the result of which is sufficiently indicated in the opinions of the Court, *infra*. The Lord Ordinary on 12th March 1898 pronounced an interlocutor by which he assolizied the defenders from the conclusions of the action.

Opinion.—“The pursuers in this case are an English company registered under the name of 'The Cellular Clothing Company,' who claim to have invented, or at least to have put on the market, a certain fabric suitable for shirtings and underwear, and woven in a particular manner, which they describe in their published advertisements. They have given to this fabric the name of 'cellular cloth,' and they have undoubtedly for the last ten years advertised, sold, marked, and invoiced it under that name largely in England, and also to some extent in Scotland. To be quite accurate, the inventor or first maker of the fabric was their managing director Mr Haslam, who began the manufacture in 1886, and who first put it upon the market as 'Kershaw's Cellular Cloth.' But the pursuers' company was formed in 1888, and I think it may be taken that the fabric began thereafter to be known in the market under the name of 'cellular cloth.’

“There is no question of patent. Mr Haslam states that he applied for and obtained a patent, but if so, it is not now in force. Neither is there any question of trade-mark. The pursuers have a registered trade-mark which they partially use, of which the word 'Aertex' is the essential part. The word 'cellular' has not been registered by itself or as part of the trade-mark. Nor was it, I think, suggested that it could be so, the Act of 1888 (section 10) permitting only the registration of such words when they are 'invented' words, or words 'having no reference to the character or quality of the goods.’

“The defenders are a firm in Edinburgh who are wholesale dealers in cotton and woollen goods, and appear to have a fairly extensive business in Edinburgh and over Scotland. The allegation against them is that 'in or about February or March 1897 they, in the course of their trade, systematically used the word "cellular" to designate and classify goods which were not of the pursuers' manufacture, and that in such manner as to make purchasers believe that said goods were the pursuers' goods.' And it is added they 'did and are doing so in the knowledge, as is averred, that the trade and the public understand by cellular goods, goods manufactured or supplied by the pursuers.' In short, the charge is that the defenders have been guilty of wilful misrepresentation to the pursuers' prejudice, the misrepresentation consisting in passing off their own goods as the goods of the pursuers.

“I may say at once, what I think must have been obvious to everybody who heard the evidence, that so far as the pursuers' case involves a charge of fraud—that is to say, of wilful and conscious misrepresentation, it has entirely failed. The defender Mr Maxton states—and I see no reason to disbelieve him—(1) that until challenged by the pursuers' solicitors he had never heard of the pursuers' company; (2) that, on the other hand, he had for some years been acquainted with 'cellular cloth' as a description of cloth in the market, which had been repeatedly offered him under that name by a Scotch manufacturer; (3) that he only took up the fabric in 1897, and his whole transactions in it have been of the value of less than £5. He states also, and has I think proved, that all the persons to whom he sold were retail shopkeepers, who perfectly understood that the goods were his own make—that is to say, were made by or for him, and that altogether he had so little desire or interest to push the article, or to use it in connection with any particular name, that when challenged by the pursuers he at first offered, to save trouble, to give an undertaking to stop the use of the word 'cellular' in any form. It was only, he explains, when the pursuers' solicitors having claimed a sum for expenses he was led to consult his agent, that he learned for the first time the true nature of the pursuers' claim, and made up his mind to resist what he, I have no doubt honestly thought, an unjust pretension.

“I need hardly, however, say that in

cases of this description it is by no means always necessary to prove fraud either actual or constructive. If the words 'cellular cloth' as used in the market, mean or have come to mean simply the cloth of the Cellular Company, the sale of other cloth under that name is a misrepresentation, which if it misleads, or is likely to mislead purchasers, is a legal wrong. And it can make no difference if that is so, although the seller neither knows nor has reason to know that the words have the sense supposed, or although knowing that that sense is current, he takes means which he sincerely but mistakenly believes to be sufficient to prevent misconception. The innocence of the act may of course affect the question of remedy, and the fact of the trader's ignorance (if he is a person conversant with the trade) may be an important element in the proof. But that is, of course, a different matter, and therefore I do not propose at present to say more on the question of fraud.

"The issue which I have to try is, I apprehend, simply an issue of fact, and it is this, Have the pursuers proved to my satisfaction (1) that in the market in which the defenders trade, 'cellular' cloth means the pursuers' cloth; and (2) that the defenders have marked or designated as 'cellular,' cloth sold by them, or offered by them for sale in such manner as to be likely to mislead purchasers—either purchasers from themselves or from shopkeepers with whom they deal?

"Now, we have had a good deal of evidence, some of it perhaps a little wide of the mark, but in order to estimate its effect there is one point on which at the outset I have found it necessary to make up my mind. Is this word 'cellular,' as applied to cloth, what is known as a fancy name, or is it a properly descriptive name, or if it is neither in strictness, to which does it most closely approximate? It is obvious that according to the answer the burden of proof on the pursuers may be very light or more or less heavy. If a man having goods to put in the market hits upon a name, not necessarily an invented word, but a name which has no relation to the character or quality of the goods, and by advertisements or otherwise applies the same to his goods, that name (apart from all questions of trade-mark) becomes *prima facie* the market name of his goods, and no evidence or very little evidence is required to prove that it is so recognised in the market. For the same reason its use by another trader is *prima facie* deceptive, and, speaking generally, it will be held to be so even if combined with or ostensibly qualified by other words. It is, in short, although not used or registered as a trade-mark, subject practically to the same rules.

"On the other hand, where goods are put into the market described simply according to their character or quality by appropriate English words, the position is just reversed. 'It may be,' to use Lord Herschell's words in the case of *Reddaway* [1896], App. Cas. 199, 'capable of proof,' that the use of such words by themselves, and without explana-

tion or qualification, has the effect, in particular circumstances, of deceiving purchasers into the belief that they are getting the goods of A, while they are really getting the goods of B.' That is the point—and I rather think the only point—decided in the case of *Reddaway*. But while such proof is possible, the difficulty of the proof is necessarily great. For *prima facie* it is scarcely credible that (putting aside the special conditions of foreign markets) men of business will be found to suppose that a manufacture that has taken the market and is unprotected by patent, can long continue to be produced by a single firm, or will fail to know that a manufacture described merely by character and quality is as likely to be the product of one firm as of another. Witnesses may no doubt be found to say the contrary—to say that they would or might have so believed. But the question is, would they really have done so, or been likely to do so, if brought to the test? And one is apt to be sceptical about general statements of that kind. Accordingly, I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in circumstances which truly involved fraud on the part of the user. And in saying so I do not, I think, fail to give due weight to the verdict and judgment in the case of *Reddaway*, for in that case there was, in the first place, the element that the name 'camel-hair belting' there in question had been for a long time, and indeed until the litigation began, understood and believed to be a fancy name; and in the next place, the verdict would not, as I read the report, have received the approval, at all events of the Lord Chancellor, had it not been for a particular circumstance to which his Lordship refers—a circumstance which was, as against the defendant, conclusive evidence, not only of misrepresentation in fact, but of intention to pass off his goods as the goods of the plaintiff.

"To which then of these two categories—fancy name or descriptive name—does the name 'Cellular,' as applied to cloth, most properly belong? Now, it is certainly not a 'fancy' name in the sense of the statute of 1883, or according to what I take to be the equivalent language of the statute of 1888. In other words, it is not a name 'which has no reference to the character or quality of the particular goods.' But I had at first, I confess, the impression that, although having such reference, and being therefore in a sense descriptive, it yet described the goods in an ingenious and fanciful manner, which made the description at least equivocal—equivocal I mean as between denoting a particular class of goods, and denoting the goods of a particular trader. And of course, if that were so, the latter and more restricted sense might easily enough be shown to be the received sense in the market. I had also the impression that in this view the evidence here adduced might be held sufficient as regards at least the London and English markets. In the end, however, I have come with

some hesitation to a different conclusion.

"I shall try to state shortly why I have done so. There can be no doubt that the word 'cellular' is an ordinary English word. It is to be found in all dictionaries, and is part of the common stock of language. It is quite commonly applied to describe a certain structure of natural substances, and, *prima facie*, it is equally open to describe a certain texture of woven goods. It is said, however, that as applied to cloth it was in fact a term new and peculiar, and in a sense that is no doubt true. But the question, I apprehend, is whether it was not, all the same, a quite accurate and appropriate term—indeed the most natural and appropriate term—wherewith to describe this particular kind of cloth. Now, as to that, it is, I think, fair to refer to the pursuers' own description of the character and qualities of their fabric. I take first their original advertisement, viz., that in the *Lancet* of June 1888. They there say—'The principle involved in this material, both for over and under-clothing, is that it is cellular in structure, so that advantage is taken of the non-conducting power of the air to make it a covering for the body equally fitted for the cold of winter and the warmth of summer.' I take next their advertised price list for the present year 1898, and I find this description—'On the other hand, cellular cloth is so woven that it consists of an infinite number of small cells, each cell having at its back fine threads to prevent too quick radiation, but not interfering with the escape of moisture and other substances.' And again, on the same page—'It has now been abundantly proved that cotton cloth made on the cellular principle is almost perfection, and is distinctly preferable,' &c., &c., 'to any other form of underwear for general use.'

"It seems to me that if these passages accurately describe the character, and qualities of the pursuers' cloth, it is not possible to hold that the term 'cellular' is, as applied to that cloth, a term at all arbitrary or fanciful. On the contrary, it appears to me to be a term strictly and accurately descriptive of the particular fabric. Assuming that the fabric consists of a number of small cells, and that its merit and advantage is that it is woven in that way, I think that to call it cellular is to call it by its natural and appropriate name. If its feature had been simply porosity, and it had been called 'porous' cloth, I do not see that the question would have been different. Indeed, I should rather infer that this must have been Mr Haslam's original view, for, as I have said, the cloth was first put on the market as 'Kershaw's Cellular Cloth,' Kershaw being the name of the spinner in whose mill it was first made.

"Now this being so—the name being simply descriptive—it is, as I have already said, extremely difficult to appropriate such a name by attaching to it a secondary and restricted sense which shall make it not a descriptive name but a name for the goods of some particular maker. Still this

is, as has been held, possible; and I must therefore consider the evidence by which the pursuers propose to establish the transformation that they allege.

"That evidence may be said to be of two kinds. In the first place, there are adduced a number of witnesses engaged in the soft goods trade who state generally what they understand, and what they understand the trade to understand, by the words 'cellular cloth.' I have nothing to say against that evidence. It is largely made up of the testimony of persons who are the pursuers' agents, or are in some way connected with them. But it is not met by counter evidence; and it is probably as reliable as such evidence usually is. All I need say about it is that it did not make much impression on my mind. The pursuers have also, however, proved certain facts, and in particular these:—(1) that although prior to 1888 goods were in the market to which the adjective cellular might without violence have been applied, the word was not in fact so applied, but was first applied by the pursuers in or about that year; (2) that the pursuers have since 1888 used every effort to appropriate the word, or to associate it with their goods—advertising it liberally, if not profusely, and claiming the word as theirs by every means in their power; (3) that in particular they have, by threats of legal proceedings, compelled or induced a number of persons, mostly retail shopkeepers, throughout the country, but in at least two cases companies with a board of directors, to grant undertakings to desist from the use of the name; and (4) that as the consequence of these proceedings, or for other reasons, various firms—one at least a firm of position in London—have, in selling cloth closely resembling the pursuers, adopted names of their own, more distinctive, and in fact fanciful, e.g., the word 'cellinette' adopted by Messrs Morley. That, I think, is a fair statement of the pursuers' proof.

"Now, I do not say that there is not here a case which requires to be considered, but for the purposes of the present action it appears to me to fall short of what is required, and to do so especially for two reasons.

"In the first place it has to be noted that the case which the pursuers make, and must make, against the present defenders, is a case of indirect misrepresentation, i.e., misrepresentation to the general public through the retail shopkeeper. The defenders are wholesale merchants, and it is not suggested that they themselves sell, or are likely to sell, except to persons in the trade who know quite well that they are selling their own goods and not, e.g., the goods of the Cellular Company. At all events, it is clearly proved that they have never, in fact, sold except to such persons. The case against them, if there is a case, depends entirely on their issue of a certain book of patterns, of which a good deal was heard in the proof—a book of patterns which, it is said, may be exhibited by retail drapers to their customers, and contains on one of its pages a designation of certain patterns

as patterns of cellular cloth. The alleged deception is therefore, as I have said, deception of the general public—the customers of the retail shops; and that being so, the difficulty as it seems to me is that, so far as I can discover, there is no evidence which goes to show that among the general public the word ‘cellular’ has in fact acquired any secondary or special meaning. I may be wrong, but I can find no evidence that the average customer who asks for or is shown cellular shirts or cellular cloth knows, or for that matter cares, by whom the material has been made or put in the market. It is true that by the pursuers’ advertisements their cellular cloth is extensively advertised, and advertised as only obtainable wholesale from the pursuers’ company; and, no doubt, there are persons who read such advertisements, and who accept their statements, and who therefore associate all cellular cloth with the pursuers. There are, probably, also persons (perhaps more numerous) who assume that an article so advertised is a patented article, and can only be produced by the patentees. And again there are, I daresay, others who, knowing or recollecting nothing of the pursuers’ name, assume generally that an article advertised is produced by the advertisers. The question, however, is not as to isolated persons who draw undue inferences, or even as to the class of persons who read and are impressed by advertisements. The question is as to the general public. And as to them all I can say is, that sitting here as a jury, I am not able to hold it proved that either in England or Scotland the public recognise the word ‘cellular’ as denoting the pursuers’ goods.

“The second consideration is this. The defenders’ business is in Scotland. That is the market in which they deal, and by reference to which their action in this matter must be judged. Now, I am of opinion, not only that the pursuers have failed to prove that in the Scotch market the term cellular is recognised as denoting the pursuers’ goods, but that the weight of the evidence is entirely the other way. I do not propose to analyse the proof. I have done my best to consider it carefully. Nor shall I say more of the pursuers’ evidence than that if their case had been really substantial, I should have expected them to have been in a position to present evidence of a different class. But what I do say is this—that I have found it impossible to reconcile the assumption involved in the pursuers’ case (the assumption, viz., that the word cellular does in the Scotch market denote the pursuers’ goods) with testimony adduced by the defenders—testimony which speaks to facts, and as to the truthfulness of which I have no doubt. I must, I think, take it as proved that the defender Mr Maxton never heard of the pursuers’ firm until this case began, and yet that for about three years he had known cellular cloth as a commodity in the market and known it under that name. It must also, I think, be taken as proved that Mr Allan, the head

of a well-known firm in Edinburgh (now a limited company), and a witness above all suspicion, had substantially the same experience. It must further, I think, be taken—not to name others—that Messrs Wilson & Mathieson, of Glasgow (a firm whose position and the extent of whose trade is, I think, acknowledged), first heard of the pursuers’ company three years ago, and yet have known and dealt in cellular cloth, and done so under that name for about six years. These are, I think, facts; and as I have said, they appear to me to be very difficult to reconcile with the pursuers’ case. It is not to me credible that a term originally descriptive should have acquired a recognised and technical meaning in the Scotch soft goods trade without the fact being known, if not to the defenders, at all events to such firms as Messrs Wilson & Mathieson of Glasgow, and Messrs Allan and Messrs Maule of Edinburgh. Nor is it altogether without significance in this connection that the pursuers’ whole sales throughout Scotland during the last three years have amounted only to the sum of £4500. It may be that they have succeeded better in England, and perhaps also abroad. But I cannot hold that they have, as yet at least, established conditions in the Scotch market which make it misrepresentation to sell in Scotland as cellular cloth any cloth which is not theirs.

“I perhaps should add a word with regard to the undertakings obtained from various retail traders, and the injunctions obtained against some of them. It appears to me that this kind of evidence is to some extent double edged. There is no doubt that a certain number of traders, either because satisfied of the pursuers’ rights, or because they did not consider the matter worth contesting, have been found (1) to admit that they had in good faith used the name in controversy, and (2) to undertake that they would not in future do so. But on the other hand, it must be observed that these undertakings and the correspondence relative to them, seem also to show a somewhat widespread ignorance of the alleged secondary sense of the word ‘cellular.’ And I must also observe, with respect to the injunctions, that the evidence as to these would have had greater weight if it had not appeared that the injunctions were granted of consent, and that in two of them—if not also in the third—consent followed on payment by the pursuers of the defenders’ costs.

“Altogether, I have come to the conclusion that the pursuers have failed to prove their case, and that the defenders are entitled to absolvitor.”

The pursuer reclaimed, and argued—The true question at issue between the parties was—“Was what the defenders were doing calculated to enable them to pass off their goods as those of the pursuers?” The result of the evidence was to show that the word “cellular” had acquired in the trade a secondary sense—that is to say, it indicated to the trade a cloth made by the pursuers. According to the defenders it was merely the dictionary word descriptive

of the cloth, but to this contention there were three conclusive answers, viz., the description was not scientifically accurate; the word had never been used before the pursuers' employment of it except as descriptive of the tissue of bodies, or in a botanical sense; and finally, there had been in the trade for years cloths of a similar description which were never called cellular. Accordingly, this was not a case where the word in dispute was so exactly descriptive of the goods that the defenders were unable to get another word to describe them. If the pursuers had succeeded in establishing their contention that "cellular cloth" had acquired the secondary meaning which they maintained it had, then the sale of other cloth under that name was a misrepresentation, which, if it misled or was likely to mislead purchasers (as was proved to be case here), constituted a legal wrong. It was not necessary to prove that purchasers had actually been deceived if the use were held likely to deceive them, and the question of fraudulent intention had no bearing upon the point except in so far as it was evidence as to the deductions from the facts of the case—*Reddaway v. Banham* [1896], L.R. App. Ca. 199; *Singer Machine Manufacturers v. Wilson* [1877], L.R. 3 App. Ca. 376; *Birmingham Vinegar Brewing Company v. Powell* [1897], L.R. App. Ca. 719; *Millington v. Fox*, 1838, 3 Mylne & Craig, 338. The Lord Ordinary, therefore, in absolving the defenders from any fraudulent intention or design to infringe, was not contributing anything towards the decision of the real point at issue. The case of *Parsons v. Gillespie* [1897], L.R., App. Ca. 239, was not in point, being decided merely upon the determination of a question of fact, viz.—that the defenders' use of a term was not calculated to deceive. As regards the form of interdict craved, the pursuers would be satisfied with one in the form approved in the case of *Reddaway, supra*.

Argued for respondents—The word "cellular" was an appropriate descriptive name of the material—in fact the most natural and appropriate description of it that could be found—and the pursuers had entirely failed to prove that they had attached to it a secondary sense, transforming it into a name for their particular goods. As regards the deception or likelihood of deception caused by the defenders' use of the word, there was not the slightest evidence of any deception of the general public or of traders, nor that what the defenders had done was calculated to produce any such deception. Accordingly, the case was absolutely on all fours with that of *Parsons v. Gillespie*. They were really not at issue with the pursuers upon the principles of law to be deduced from the cases of *Reddaway*, *Singer Co.*, and *Birmingham Vinegar Co.* The case really turned upon the facts, and the Lord Ordinary's judgment, based upon the evidence, should not be readily upset—*Taylor v. Burger*, February 15, 1898, 35 S.L.R. 398, at 400. The conclusions for interdict craved in the summons were

far too comprehensive, and the form of interdict now asked for would not square with these, while the averments made by the pursuers in support of them had completely broken down.

At advising—

LORD M'LAREN—The pursuers are makers of, or wholesale dealers in, a textile fabric which they call "cellular cloth," and they have brought this action to have the defenders interdicted "from using the name 'cellular' by itself or in combination or in conjunction with any word or words describing or distinguishing or in connection with cloth or clothing, so as to denote or indicate cloth or clothing not being cloth or clothing made or supplied by the complainers." This is followed by conclusions for interdict with reference to sales, advertisements, and publication in other ways, and there is a further conclusion to which I shall immediately refer.

If we consider the summons critically, I should be disposed to say that the pursuers entertain a somewhat exaggerated opinion of the nature of their rights. They have no registered trade-mark, and their rights, if any, would seem to be to prevent outside persons from using the word "cellular" in their sales and advertisements so as to denote that their goods are the goods of the pursuers. But the pursuers, on the contrary, ask for interdict against the use of the word "cellular" so as to denote goods not being goods made or supplied by the complainer. That this is not a mere lapse is made evident by the subsequent conclusion, which is for interdict against the "using said word (cellular) in any way calculated to lead the public to infer or believe that the defenders are entitled to sell goods under the name 'cellular' which are not made or supplied by the pursuers." What is here claimed is very like a right of exclusive property in the word "cellular" as applied to goods, and this independently of statutory privilege. The summons, however, goes on to say, "or that the goods which they so sell are made or supplied by the pursuers," and I do not doubt that to this extent the summons is relevant. In other words, I think it is a relevant and legitimate demand (if well founded on the merits) that the defenders should be interdicted from using the word "cellular" in such manner as would induce the belief that the goods offered for sale are the pursuers' goods, when in fact these goods are not made or supplied by the pursuers. This, I venture to think, is the measure of the pursuers' right to interdict, although I do not mean that we should be prepared to grant an interdict in terms so general as those which I have used.

The case on the facts naturally resolves into two questions or issues—(1) Has the name "cellular" come to be generally or extensively known as a trade name applicable to the pursuers' goods? (2) Have the defenders used this name so as to represent that the goods they offer for sale are the pursuers' goods?

On the first question I am with the pursuers, but having regard to the very cogent reasoning of the Lord Ordinary I cannot say that I entertain a confident opinion on the subject. What chiefly influences my mind is this—The distinction as to descriptive and non-descriptive trade-names is only critical in a question as to registration, but it is admitted that an unregistered descriptive name may come into use in a secondary sense as denoting the goods of a particular trader. It is then a question of fact in the particular case whether the secondary meaning is proved, and I am not prepared to give an unqualified assent to the proposition that the proof is more difficult in the case of descriptive as distinguished from non-descriptive or fanciful names. A descriptive name may be a very taking name, and if the collocation be unusual, as in the case of “nourishing stout,” or as in the present case “cellular cloth,” the name may very readily come to be associated in the minds of traders, and that class of consumers who spend their time in reading advertisements, with the goods of the trader who advertises the name.

Now, it is in evidence that the Cellular Clothing Company advertised very largely (Mr Haslam's evidence), and this evidence is uncontradicted. Also, without taking seriously all that this gentleman says about the “scientific” value of his discoveries, it may at least be allowed that he discovered the appropriateness of the term “cellular” to describe his cloth, and the circumstance that he and the company which he promoted were the first to apply the epithet “cellular” to clothing makes it all the more likely that commercial people interested in this branch of trade would come to associate “cellular” cloth with the Cellular Clothing Company, and to accept the word “cellular” as a trade name in use by the pursuers and descriptive of their goods. I must say, too, that the pursuers have got a considerable body of respectable witnesses to come forward and to say that the word “cellular” was generally known as a trade name of the pursuers, and this evidence is not entirely displaced by pointing out, as the Lord Ordinary has done, that other witnesses of good commercial position and perfect fairness knew only “cellular” cloth as a commodity, and knew nothing of the company which is seeking to appropriate the name as its trade-name.

But then, in considering the effect of this evidence, we are confronted by a difficulty which does not arise in the case of an invented name, nor always even in the case of a descriptive trade-name, but which does arise in this case—I mean the possible subsistence in trade use of the primary meaning of the word “cellular” as denoting a particular class of goods, alongside of the secondary meaning which the pursuers seek to affix to it as denoting goods manufactured or sold by themselves.

An invented name has either no meaning at all or no meaning in relation to the goods which it denotes; and it has been held that a trader who selects such a name for the

purpose of distinguishing his goods from those of other traders is entitled to be protected in the use of the sign which he has chosen. In such a case the mere fact of the use of the arbitrary sign by a rival trader raises a presumption of a design to pass off his goods under false colours which it is not easy to displace. Again, there are cases like that of *Reddaway*, where, for example, the name “camel-hair belting” is truly a descriptive name, but is only known in trade as a synonym for Reddaway's belting, because Reddaway is the only known maker of the article. Nobody knows whether the thing is real camel-hair or an imitation; for all practical purposes the name is conventional, and the maker may fairly claim protection as in right of a conventional name. Even in this case it is not certain that the House of Lords would have sustained Reddaway's claim to an injunction had there not been positive evidence of a design, to which the respondent was a party, to pass off his goods, and “to take away the order from Reddaway.”

The distinguishing feature of the present case is that, even if we grant it proved that in the understanding of a large and respectable section of traders and purchasers of these goods “cellular” is accepted as a trade-name for the pursuers' goods, it is also proved by an equally respectable though perhaps numerically inferior section of the trade that “cellular” cloth in their estimation means only cloth woven in an arrangement of small meshes or cells like the pursuers' cloth. The witnesses who gave evidence to this effect include manufacturers of “cellular” cloth as well as wholesale and retail dealers in it. Some of these witnesses say that they had not even heard of the existence of the Cellular Clothing Company until it was made known to them in connection with this action. The pursuers may reply that this is to “argue themselves unknown,” but when it is considered that the pursuers have no monopoly of the manufacture of cellular cloth, it is quite consistent with the probabilities of the case that the makers of such goods should persist in selling them under a suitable descriptive name ignoring the claims of all competitors. And therefore when Mr Anderson and Mr Higgins say that they have made and sold “cellular” cloth under that name for years—ten years in one case—and when this evidence is confirmed by a considerable number of wholesale and retail dealers, I think it must be admitted that the word “cellular” has not lost its descriptive signification according to the use of the cloth trade; in other words, that the primary meaning has not been displaced by the secondary meaning which the pursuers allege and have in fact proved.

The present case is perhaps intermediate between that of *Reddaway* and the ordinary case of a non-exclusive use of a descriptive trade-name. In the balanced state of the evidence as to secondary meaning, I think it may be affirmed that there is no presumption against the defenders from the mere use of the adjective “cellular”

as a true description of goods which they offer for sale. That being so, we are referred back to the principle on which this innominate right depends, which is that a trader is not entitled to represent that the goods which he sells are the goods of a different trader, to his injury. When this test is applied I think that much of the difficulty to which I have alluded as characteristic of the present case disappears, and I proceed therefore to consider whether as a matter of fact the defenders here used the trade-name so as to induce the belief that they were selling or offering for sale the pursuers' goods. If the affirmative is proved, the pursuers would be entitled to an interdict against the use of the name "cellular" without a "distinctive addition" according to the form of the interlocutor in the first stage of the *Aberdeen Palace Hotel Company* case, 19 R. 1042, or "without clearly distinguishing" their goods from those of the pursuers according to the form of the judgment of the House of Lords in the case of *Reddaway* [1896], App. Cas. 199.

It is in my judgment very necessary at this point to keep in view the form of interdict which we should be able to grant if the case were proved, because I hold it to be an established principle in our law that interdict will not be granted except on proof of an invasion or attempted invasion of the pursuer's rights by the defender. Now, it appears to me that before we could put upon the defenders the obligation of distinguishing their goods from those of the pursuers, it must be proved that the defenders had sold goods without distinguishing them, and under circumstances rendering such a distinction necessary. But when we turn to the evidence it is perfectly conclusive to the effect, first, that there was no attempt to deceive, and secondly, that nobody was in fact deceived. As to the first point, the defender Mr Maxton states that he sells to shopkeepers cloth which he purchased from a manufacturing firm in Glasgow under the name of cellular cloth, that the term "cellular" was perfectly familiar to him, and that he used it "in ignorance of the existence of the firm which is pursuing this action." There is no cross-examination as to his good faith in the matter, and no contrary evidence, and I must take it that the defender sold the cloth under the name by which it was sold to him, and with no intention to represent the goods as being cloth manufactured by or for the pursuers. The second point is just as clear. The pursuers were granted an inspection of the defender's books, and the extract produced contains entries of six sales of cellular cloth. The purchasers are all examined. John Jolly, the first in order, says this—"In giving that order I did not expect to be supplied with the make of cloth of the Cellular Clothing Company. I did not intend to order that, nor did I expect to get it. If I had wished to get the Cellular Company's goods I would not have gone to Messrs Maxton & Murray for them, because I knew they were not the Cellular Clothing

Company's agents." With one exception the other purchasers are equally explicit that they did not in making their purchases expect to get the goods of the Cellular Clothing Company, or understand that they were getting these goods.

The evidence of the remaining purchaser, Brown, is very significant. Being shown a pattern-book, he says—"It was admittedly a book showing goods of their (the defenders') manufacture, and I noticed that they put the word 'cellular' at the top of one of the pages in the book. Up to that time I had never heard of any goods being recommended as cellular except the product of the Cellular Clothing Company. I accordingly communicated with the Cellular Clothing Company, and they asked me to send the pattern-book which I had got, and I did so." In cross-examination this witness explains that he is sole agent for the pursuers in Kelso, and he admits that after having done them this good turn he had asked for financial assistance from the pursuers but did not get it. But the noteworthy point in this gentleman's evidence is that the pattern-book bore to be a book showing goods of the defenders' manufacture. There was no deception or implied misrepresentation such as is usually considered necessary to support a proceeding of this kind, and the action of the witness in writing to the pursuers was inspired by the belief that the pursuers had an exclusive right to the use of the word 'cellular' for trading purposes. On such evidence I am unable to hold that the defenders have done anything which would render them liable to be put under restriction with reference to the sale of this description of goods.

I do not propose to review the decisions in this chapter of the law, because I do not think there is any controversy as to the nature of the protection which the common law gives to a trade name, and the facts of one case are not of much use in elucidating another case. But it is right to say that the pursuers rely upon the case of *Reddaway* in the House of Lords as an authority in their favour. I need hardly say that the case of *Reddaway* is a very valuable authority on this subject, and the case is so far favourable to the pursuers' claim that it shows conclusively that the law will give fair protection to a descriptive trade-name notwithstanding that the more complete protection accorded by the statute in certain cases is denied to such names. I have kept this point provisionally in view in my observations on the first part of the case. But then I find that in the majority, if not in all the opinions delivered by the noble and learned Lords, the determining element was that the defendants, in concert with a purchaser from them, had connived at the passing of their goods as the goods of the plaintiffs, because they were induced by the purchaser to mark their goods in a particular way on being told that by so doing the purchaser hoped to take away the order from Reddaway. Nothing of the kind is proved, or even suggested in the present case, and I cannot see that *Reddaway's*

case, when rightly applied, will support the extreme assertion of common law rights which is put forward in the present case. It seems to me that if we were to grant interdict, we should in effect be putting the pursuers in the same position and giving them the same rights as if Parliament had authorised the use of a descriptive name as a registrable trademark; because their argument really amounts to this, that by the mere use of such a trade-name on an extensive scale the person using it acquires an exclusive right to that name, and that no other person is able to use it even for the purpose of describing his own goods so as to distinguish them from other goods of a different pattern or fabric.

For these reasons I am of opinion that the Lord Ordinary has come to a right conclusion, and that the reclaiming-note should be refused.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Graham Murray, Q.C.)—J. C. Watt—King. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders—Shaw, Q.C.—T. B. Morison. Agent—P. Morison, S.S.C.

Tuesday, July 12.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

BROWN AND OTHERS (BROWN'S TRUSTEES) v. HAY.

Property—Property in Documents of Commercial Value—Unauthorised Publication of Contents of Private Documents—Duty of Giving Information to Inland Revenue.

A clerk employed to audit the books of a firm of law-agents communicated to the Inland Revenue the contents of a document which belonged to a client of the firm, and which had come into his possession solely in the capacity of auditor. The document was a statement of the client's annual profits considerably in excess of the returns actually made by him to the Inland Revenue.

In an action raised by the client against the clerk, held that by divulging the contents of the paper in question to a third party the defender had infringed the pursuer's right of property in the document, and therefore that the pursuer was entitled to interdict and damages.

Per Lord M'Laren—"I have never heard or read that the duty of assisting the Treasury in the collection of the

public revenue was of such a paramount nature that it must be carried out by private individuals at the cost of the betrayal of confidence and the invasion of the proprietary rights of other people."

On 9th February 1897 Mrs Alice Catherine Brown and others, testamentary trustees of the late William Brown, of the Linkwood Distillery, Elgin, raised an action against James Hay, accountant in Elgin, concluding, *inter alia*, for (1) decree that the defender should forthwith deliver to the pursuers all documents or copies of documents having reference to the business of distillers sometime carried on by the said William Brown, and now by the pursuers at Linkwood; (2) interdict against communicating any information in regard to the said distillery to third parties without the pursuers' consent or to their prejudice; and (3) damages to the amount of £500.

The material facts in the case as averred on record and disclosed by the proof are thus summarised in the Lord Ordinary's note:—"The defender occupied for many years the position of cashier to the now dissolved firm of Cameron & Allan, solicitors, Elgin, and was employed in 1895 to wind up the affairs of that firm. In the course of his employment as liquidator he came upon a bundle of documents showing, *inter alia*, the profits for the years from 1872 to 1891 of the Linkwood Distillery, for which the dissolved firm had acted as law-agents. He made a copy of these documents so far as they showed the profits of the distillery, and on 5th November 1896 he sent this paper to the Inland Revenue authorities, adding that he had reason to believe that the profits in the income-tax returns had been considerably understated. At first he only suggested that inquiries should be made, but in the correspondence which followed he pointed the charge by claiming credit for 'exposing the fraud of the late Mr Brown in giving the Commissioners false returns.' Thereupon the authorities put themselves in communication with Messrs Cameron & Jameson, who had succeeded the dissolved firm as law-agents for the distillery. The accuracy of the figures communicated by the defender was not disputed by these gentlemen, but they maintained that certain deductions were claimable in respect of depreciation in the value of plant and machinery, and that when these were made it would be found that the profits had not been understated. As a result of the negotiations which followed, a test year was selected, and the question of deductions was referred to the local Commissioners of Inland Revenue. An inquiry was held, and the Commissioners fixed the amount of the deductions claimable. When their decision was applied to the years from 1884 to 1891, which formed the subject of controversy, it appeared that there had been a slight under-statement of profit. But the agents of the distillery claimed that against this there should be set an over-statement of profit for some years subsequent to 1891, and the Revenue autho-