

would find that it was a quite correct summary so far as it went, and also that there was nothing in the headline and paragraph taken together which will bear the meaning the pursuers put upon the headline alone. I would have come to the same conclusion if the headline were to be taken alone. The question is whether the headline contains a statement which falsely represents that the pursuers' company had become bankrupt, and that the Court of Session had pronounced an order for the winding up of the pursuers' company. I do not think any reasonable reader could put that meaning upon the words. What they really mean is plain, that there was a petition in Court for the winding up of the Grand Theatre, and that to the newspaper there was something surprising in that. There is nothing injurious in saying that the paper was surprised that there should be a proposal to wind up the theatre. All that the heading itself contains is that there was a petition for winding up, and that is perfectly true. To put upon these words the innuendo that the pursuers' company had become bankrupt, and that not only was there a petition in Court, but that the order for winding up had been pronounced, is to my mind going altogether beyond what is justified by the words themselves. Mr Steedman in his very clear, and I must say also very moderate argument, said that there were some people who would only read headlines and not paragraphs who might have misunderstood this one. It is very possible, perhaps very likely; but then in order to support an action for slander it must be shown that the meaning ascribed to the words is that which would be ascribed to them by reasonably intelligent people. I think for these reasons that the Lord Ordinary is perfectly right.

LORD MACKENZIE concurred.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court adhered.

Counsel for Pursuers and Reclaimers—Wilson, K.C.—Steedman. Agents—Steedman, Ramage, & Company, W.S.

Counsel for Defenders and Respondents—Clyde, K.C.—Black. Agents—Webster, Will, & Company, S.S.C.

Thursday, July 8, 1909.

FIRST DIVISION.

[Sheriff Court at Glasgow.

WILLIAMSON v. MEIKLE.

Trade Name — Similarity — Deception — Company.

A, the managing director of a business known as the Kelvindale Chemical Company, after severing his connection with that company, started a similar

business in the same neighbourhood under the name of the Kelvinside Chemical Company. It was conceded that the name had not been adopted with any wrongful intention. In an action of interdict at the instance of the Kelvindale Chemical Company to prevent the defender using the name "Kelvinside," the evidence showed that the similarity of the names had led to some inconvenience, chiefly through the misdirection of correspondence, but it was not proved that there had been any actual confusion between the two companies.

Held that as the pursuer had failed to show that the name chosen by the defender was calculated to mislead his customers or to divert his business, he was not entitled to interdict, and action dismissed.

On 12th October 1908 Ernest Henry Williamson, chemical manufacturer, carrying on business as "The Kelvindale Chemical Company," Lochburn, Maryhill, Glasgow, brought an action against James Meikle, chemical manufacturer, Dawsholm, Maryhill, Glasgow, carrying on business there as "The Kelvinside Chemical Company," in which he craved the Court "to interdict the defender from using the name 'Kelvinside Chemical Company' or any other name or description of firm which is substantially the same or is a colourable imitation of the pursuer's."

The pursuer acquired the business (as well as the goodwill) of the Kelvindale Chemical Company in May 1908 from the liquidator of the Kelvindale Chemical Company (1904) Limited, the business having been originally started in 1889. In July 1908 the defender, who had been the manager of the original Kelvindale Chemical Company and also of the two limited companies which succeeded it, started a similar business under the name of the Kelvinside Chemical Company not far from the pursuer's works.

The pursuer pleaded—“(1) The pursuer having acquired the right to the business of the Kelvindale Chemical Company is entitled to interdict against the defender trading under the name of the Kelvinside Chemical Company or any other colourable imitation of pursuer's trade name. (2) There being a similarity between the name taken by defender with pursuer's name, and particularly in view of defender's previous connection with pursuer's company, the use by defender of said name being intended and likely to injure the pursuer and benefit the defender, interdict should be granted with expenses as craved.”

The defender pleaded—“(2) The action is irrelevant. (4) The name used by defender being geographically correct and not intended or calculated to mislead the public he is entitled to absolvitor, with expenses.”

On 21st April 1909 the Sheriff-Substitute (MACKENZIE) after a proof, the import of which appears from the opinion (*infra*) of Lord Kinneir, granted interdict as craved, and on appeal the Sheriff (MILLAR) adhered.

The defender appealed, and argued—It was not enough that the similarity of names led to inconvenience or to confusion; there must be proof of deception or the likelihood of it. The name complained of must be one calculated to deceive the public, and to induce them to purchase the defender's goods in the belief that they were the pursuer's. Nothing of that kind had been proved here; the mere fact that letters intended for the pursuer had been delivered at the defender's premises was not sufficient to warrant interdict, especially as their wrong delivery was due in most instances to the fault of the Post-Office officials. The following authorities were referred to:—*Buckley on Companies*, 9th ed., p. 14, sec. 8; *Levy v. Walker*, L.R., 10 C.D. 436, per James, L.J., at p. 447; *Grand Hotel Company of Caledonia Springs v. Wilson*, [1904] A.C. 103, per Lord Davy at p. 109; *British Vacuum Cleaner Company, Limited, v. New Vacuum Cleaner Company, Limited*, [1907] 2 Ch. 312, at pp. 323-4; *The Scottish Union and National Insurance Company v. The Scottish National Insurance Company, Limited*, 1909 S.C. 318, 46 S.L.R. 267.

Argued for respondent (pursuer)—It was not necessary to wait till injury had occurred before craving interdict; it was sufficient if, as here, injury was imminent. The fact that the similarity of names had led to confusion was admitted, and if, as here, the similarity were so great as to be calculated to deceive the public, the pursuer was entitled to interdict—*Hendriks v. Montagu*, L.R., 17 C.D. 638, at p. 648; *Singer Manufacturing Company v. Kimball & Morton*, January 14, 1873, 11 Macph. 267, at p. 273, 10 S.L.R. 173, at p. 176. *Esto* that no fraud either in fact or in intent had been proved, yet if the name assumed were so similar as to be calculated to lead to deception, its assumption would not be allowed. The question was one of inference from fact, and if a reasonable probability of deception existed interdict would be granted—*Manchester Brewery Company, Limited v. North Cheshire and Manchester Brewery Company, Limited*, [1898] 1 Ch. 539, *affd.* [1899] A.C. 83. A "possible" consequence of injury was enough, and here there was more than that for there was a strong probability. The confusion in regard to letters showed the reasonableness of that probability. It would result in the diverting of trade, and the pursuer was not bound to run the risk of the defender's not taking advantage of such mistake to his (the pursuer's) injury.

LORD KINNEAR—I am exceedingly reluctant to differ from the two learned Sheriffs upon a question of fact, because I think this is nothing but a question of fact. But I am unable to say that there is sufficient evidence before the Court to support the judgment.

As to the law of the question, I think the parties are agreed that there is no difficulty or doubt whatever. The question is simply whether the pursuer, the respondent here, has shown that the appellant has adopted

for a business of the same kind as his, and carried on in the same district of Glasgow, a name so like the name of the respondent's firm as to enable him to appropriate part of the respondent's business by misleading people to suppose that they are dealing with the respondent when in fact they are dealing with the appellant. That is the question, and it lies upon the respondent to prove the affirmative. I am of opinion, and I must say without much hesitation, that after reading all the evidence and hearing all that could be said upon it by the learned counsel, it is not sufficient to justify an affirmative answer to that question.

There are three points said by the learned counsel to be material. In the first place, there is the similarity of the two names adopted by the parties respectively. I think we are in a position, in the absence of any expert evidence founded upon the methods of conducting this particular business, to form an opinion for ourselves as to whether they resemble one another so much as to be calculated to mislead. In considering that question I think we must have regard to the announcement made by the appellant himself when he first intimated to the probable customers of his new firm that he was going to carry on business under a name that he specified. I think that is material, because the main ground of a complaint of this kind is that the old customers of the old firm are likely to be misled into going to the new firm instead of to the firm with which they are familiar. Accordingly, when the appellant started a new business, and started it in the particular circumstances stated—he having been employed in the old business, and knowing its customers—one naturally looks to the circular he issued to such persons as these to find whether he is really doing anything that is likely to mislead them or not.

Now his circular, I think, makes it perfectly clear in the first place that he has severed his connection with the Kelvindale Chemical Company, because that is the first explicit statement in the circular itself. Next, that he is going to continue manufacturing the same kind of goods of the best quality, and that they were to be sold under the registered brand of "Santarr." Then he concludes with the usual request to be favoured with the business of the people whom he is addressing, and signs the circular—"Kelvinside Chemical Company, James Meikle." That appears to me to be a perfectly clear intimation that he does not belong to the Kelvindale Company, that he is going to carry on the same kind of business, branding his goods in a particular way, and that his firm is going to be called "Kelvinside," and not "Kelvindale." It appears to me that nobody reading that circular intelligently could be confused as between the two names, unless it is to be held, as the respondent in his evidence appeared to maintain, that he has the exclusive right to the use of "Kelvin" in any combination. That, however, was a contention which was

abandoned by his counsel. I can see no real objection to the use of the appellant's name as being likely to be mistaken for the respondent's, and therefore likely to divert the respondent's business to the appellant.

The second point is upon evidence—that some confusion has actually occurred. The learned Sheriff says that he regards the evidence as to the probability of confusion as very scrimp, although he comes to the conclusion that there is such probability. I must say for my own part I think there is no such evidence at all. The evidence of actual confusion, as I think the learned counsel admitted, is given in such a way as not to be admissible as proof of fact. We do not have the actual fact spoken to by a witness who is in a position to testify about that at all; it is mere hearsay.

The remaining point is that there has been and is likely to be a great deal of confusion by the misdirection of correspondence. That in itself does not appear to me to be very material, because that is an inconvenience to which all people and all firms carrying on business under names which may be in any way similar to the names of other people are subject. The mere fact of liability to misdirection does not in itself show either an intention to divert business or any probability that business will be diverted. It rather appears to me that the greater part of the evidence of misdirection shows the kind of mistake that might occur, and probably did occur, from the inaccurate recollection of the particular name by persons addressing letters to the firm they intended to address. The mistake between Kelvinside and Kelvindale is a kind of mistake that is just as likely to occur in the cases of persons who are careless or uncertain about the use of names, although they may never have heard of the two companies. We are told that there are in fact two districts in Glasgow, Kelvinside and Kelvindale; and the mistakes alleged might easily occur from a confusion of places although there were no confusion between two firms known to the writers of the letters. Then again, the misreading of the direction of a letter by a Post Office messenger is an inconvenience, but it does not tend to prove that a customer who knew the respondent and meant to deal with him was likely to mistake the appellant's firm for his.

On the whole matter I am of opinion that there is no evidence to support the ground of complaint. I do not think it is proved that the similarity of the names of these two firms is calculated to enable the appellant to carry away the business of the respondent, and I must say I have the less hesitation in coming to that conclusion because it is fairly conceded by the respondent that the appellant is not to be charged with any wrongful intention to take away his business to his prejudice. Therefore I am of opinion that we must recall the judgment of the learned Sheriff, find in fact that the similarity of the names is not calculated to mislead customers or to divert

the business of the respondent, and dismiss the action.

LORD PEARSON—I concur in your Lordship's opinion.

LORD SKERRINGTON—I agree with your Lordship. I wish to add one observation, which at first sight may seem to be merely a verbal criticism of the prayer of the petition and of the interdict which was granted by the learned Sheriff, but which I think is of some general importance. It is trite law that apart from statute there can be no right of exclusive property in a name, either a name under which a trader carries on his business, or a name which he chooses to apply to his goods. The remedy which the law gives to a person who has used a particular name in trade is that he is entitled to prevent others from using the same name in such a way as is likely to mislead the public into thinking that the business or the goods so described is or are the business or the goods of the pursuer.

In the present case, as I read the pleadings and the evidence, the pursuer claims the exclusive right to use the name Kelvindale, and the right to prohibit the use of any name which is a colourable imitation of that name. The result of that legal error is that the pursuer has failed in his evidence to direct his attention to the real issue which has to be proved. It is true that it is not essential in actions such as the present to prove actual deception. That is a correct proposition in point of law, but in each particular case it is a question of fact whether in the whole circumstances actual deception does not require to be proved. Now here the pursuer has given a number of instances of what he describes as confusion between the two names, but he has failed to prove that in any single case anyone was deceived. The absence of any such evidence goes a long way, in my opinion, to negative the suggestion that the defender has done something which is likely to deceive the public.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, found in fact that the pursuer had not proved that the adoption and use by the defender of the name "Kelvinside Chemical Company" was calculated to mislead the public into confusing the defender's business with that of the pursuer and purchasing the defender's goods in the belief that they were the goods of the pursuer, and dismissed the action.

Counsel for Pursuer (Respondent)—Constable, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for Defender (Appellant)—Crabb Watt, K.C.—Sandeman. Agents—Dove, Lockhart, & Smart, S.S.C.