

acted, that would not be a case which would fall under the *Fourth* case, which appears to me to be the case applying to investments. If such a banking company or insurance company made investments of their realised funds in stocks in the colonies which were paying them interest periodically, that would, so far as these investments were concerned, be a very different matter. But just as it appears to me that you could not under the *Fourth* case include a banking company carrying on the ordinary business of bankers, so as little do I think you could include under the *Fourth* case this wool broking company, which makes advances as part of its wool broking business and ancillary to it, and gets interest on current accounts as part of its profits in the same way as commission received. It appears to me plainly to fall under the *First* case, and that under that case alone can this charge be made.

LORD ADAM—In my opinion the money here, which is said to yield interest so as to bring it under case *Four* of Schedule D, is simply neither more nor less than money used by the company in the ordinary carrying on of its business and trade. That being so, I think the return from such money is neither more nor less than trade profit, and being so, that it falls under the *First* case in Schedule D and not under the *Fourth* case. I am therefore of opinion that the decision of the Commissioners ought to be affirmed.

The Court answered the first alternative of query 1 in the affirmative, and the second alternative in the negative, and found it unnecessary to answer the other questions.

Counsel for the Surveyor of Taxes—Darling—Young. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for the Company—D.-F. Mackintosh—Lorimer. Agents—Menzies, Coventry, & Black, W.S.

Thursday, July 12.

SECOND DIVISION.

[Lord McLaren, Ordinary.

HENRY THOMSON & COMPANY v. ROBERTSON.

Trade Name—Sale—Interdict.

In an action of declarator and interdict at the instance of a firm of whisky blenders against a spirit merchant, in which the pursuers alleged that the defender had sold whisky as blended or manufactured by them, which in point of fact had not been so blended or manufactured, evidence was led to show that on several occasions persons who had asked for the pursuers' whisky had been supplied with a different blend. *Held*, on the evidence, that it was not proved that the defender had fraudulently or wrongfully represented that he was a seller of the pursuers' whisky, and was therefore entitled to be assoilzied.

This was an action at the instance of Henry Thomson & Company, wholesale Old Irish

Whisky merchants, Newry, Ireland, and the individual partners of the firm, against James Robertson, spirit merchant, 157 Seagate, Dundee. The conclusions of the summons were for declarator that the defender was not entitled to sell, by himself or others acting for him, as whisky manufactured or blended by the pursuers whisky not really so manufactured or blended, and for interdict.

The pursuers averred that they had carried on the business of blenders of whisky at Newry for more than twenty-five years, and that their whisky had acquired a great reputation in Great Britain. They further averred—"The pursuers have recently become aware that the defender James Robertson has been in the habit of wilfully and fraudulently in his said shop selling as the pursuers' whisky, in reply to orders or requests for that whisky, whisky or other liquor not manufactured or blended by them, and known by the defender not to be manufactured or blended by or for the pursuers, on the false pretence, made by the defender or by his shopmen and servants, that such whisky or other liquor was whisky manufactured or blended by the pursuers. . . . In particular, the defender has habitually offered for sale and sold whisky under the said false pretence during 1886 and 1887, and particularly during the months of July, August, September, and October 1887. Among other such sales so made by the defender and his shopmen at his said shop were the following—On several occasions in or about the months of July and August 1887, to Annie M'Connon Fee and Janet Jaffrey Ross, both residing at 22 Queen Street, Dundee;" and upon thirteen occasions between the 31st August and the 15th October 1887 to a man M'Gregor, who went into the shop with different companions, on the part of the pursuers.

The defender denied these averments and explained "that the defender has never to his knowledge had in his premises or sold any of the pursuers' whisky, and that he has never made any representation to this effect. He exhibits in his premises placards containing the names of several manufacturers of whisky and other liquors, but has never used or exhibited any placard or label of Thomson's whisky. He has specially instructed his assistants that if any special manufacture of whisky other than those sold in his premises is asked for, at once to intimate that they do not sell whisky of the manufacture asked. This practice has been adhered to regularly, both by the defender and his said assistants. . . . The defender is willing and ready to put up an intimation or placard in his premises publicly announcing that Henry Thomson & Company's Old Irish Whisky is not sold in his premises."

The pursuers pleaded—" (1) The defender having wilfully and fraudulently offered for sale and sold as whisky manufactured or blended by the pursuers whisky which was not so manufactured or blended, the pursuers are entitled to decree of declarator and to interdict as craved."

The defender pleaded—" (2) The defender not having sold whisky on the representations averred by the pursuers, and not having done or proposed to do anything in infringement of the pursuers' legal rights, the action is unnecessary, and should be dismissed."

The evidence for the pursuers was to the following effect:—Annie Fee (13) deponed—“I am a daughter of the late Mr Fee, who died on 21st February 1888. . . . For some time before his death he was in the habit of using Henry Thomson's whisky. . . . When my father sent me for whisky he told me to ask for Henry Thomson's, and that was always what I asked for. I went to defender's for whisky last year. I don't remember what time of day it was when I went first. . . . (Q) When you went into defender's what did you ask for?—(A) Henry Thomson. I wanted the whisky my father had sent me for. I know defender. It was generally the waiter I saw when I went to the shop. When I asked for Henry Thomson the waiter gave me it in a bottle. I think he took the whisky out of the second cask from the door. When he handed it to me I said ‘Is that the right thing?’ and he said ‘Yes.’ I only told my father sometimes where I had got the whisky. He said sometimes it was not the right thing I had got. My father was particular about getting Henry Thomson's whisky. He found it did him more good than other whisky; if he took any other whisky it made him ill. He was sometimes ill after he had taken what I brought him from defender's, and complained that it was not Henry Thomson's because it had made him ill.”

Janet Ross (12) deponed—“I live in Queen Street, Dundee, and am a daughter of Mrs Fee and a stepdaughter of the late Mr Fee. I used to go to buy whisky for Mr Fee; he was ailing, and needed it for his health. He always wanted to get a particular kind of whisky—Henry Thomson's Old Irish Whisky. He wanted that because the doctor ordered him to take it. I was told always to ask for that. I remember being sent out for whisky once or twice last year by Mr Fee. I sometimes went to defender's shop for it when I learned that he kept Henry Thomson's whisky. I went to defender's one night when the shop I usually went to was shut. I asked for old Irish whisky—Henry Thomson's Old Irish Whisky. I asked for a gill. I was served by the barman. I said to him, ‘Is that the right stuff?’ and he said ‘Yes.’ When I asked that I meant, was it Henry Thomson's.”

Robert M'Gregor, who was employed by Mr Brown, the pursuers' agent in Dundee, to see if allegations that the defender sold other whiskies as being that of Henry Thomson & Company were true, deponed that he was thirteen times in the defender's shop between 31st August and the beginning of October, and that on different occasions he was accompanied by men named M'Naughton, Cowans, and Grant. “I am sure that on each occasion we asked for Henry Thomson & Company's whisky. The salesman never made any remark on any of the occasions. I am sure he heard us distinctly when we asked for the whisky.”

M'Naughton, Cowan, and Grant gave corroborative evidence.

The defender deponed—“I never bought nor sold in my shop nor elsewhere any of pursuers' whisky. I have never pretended to do so, nor represented that I was to do so. I have never had show-cards, labels, bottles, nor any indication in my shop that I was doing so. I got my Irish whisky from Messrs Dalgairns & Com-

pany, Dundee. The whisky I get is Messrs Kirker, Green, & Company's, Belfast. I don't sell any other Irish whisky. The Belfast firm I have mentioned are distillers. . . . It has happened several times that I have been asked for a brand of whisky that I don't keep. That applies to both Scotch and Irish whiskies. If I am in the shop at the time I say that we have not got that brand, but that we have a good Scotch or Irish whisky, whichever it is, and I generally get the people pleased. I have only known one or two cases in which people who have asked for a brand of Irish which we did not have went away without taking what we offered them. When I get a new shopman, one of the first things I do, after initiating him into the way of working my business, is to give him instructions upon this matter. I gave instructions to Thomson when he came. He was not a novice, he had been at the trade before. I believe he has acted faithfully on my instructions. I have heard him act upon them. There is a reason for giving particular instructions on this matter to the shopmen; it is quite customary for people to come in and ask for a brand of whisky we do not have, and I should be sorry indeed to deceive any person.”

David Thomson, the defender's shopman, deponed—“I have seen the girl Fee, who has been examined to-day, in the shop. I remember her asking for a gill of Henry Thomson's, and I refused it. I said we did not keep it; and she went away back, and then she said, ‘Give us Irish,’ and I gave her Irish whisky. . . . I remember three men coming into the shop sometime ago and asking for Henry Thomson's whisky. The witness Robert M'Gregor was one of them. The first day they came they asked for a half of Henry Thomson and a glass of beer. I told them we did not keep Henry Thomson, and they said, ‘Give us what you have, Irish,’ and I did so. . . . (Q) Is it the case that between the end of August and the middle of October M'Gregor, M'Naughton, Grant, or Cowans, asked you for Henry Thomson's whisky, and that you supplied them without remark?—(A) No, I told them we did not keep it. I told them so on every occasion I heard them ask for it.” Thomson was corroborated as to the girl Fee's visit by a customer who was in the shop at the time.

Upon 13th March 1888 the Lord Ordinary (M'LAREN) pronounced this interlocutor:—“Finds it not proved that the defender has fraudulently or wrongfully represented that he is a seller of Henry Thomson & Company's Old Irish Whisky: Therefore assoilizes the defender from the conclusion of the action, and decerns: Finds the defender entitled to expenses, &c.

“*Opinion.*—I am of opinion that the pursuers have failed to establish their case, and I shall state in a few words what I think is necessary to be proved in a case of this description.

“Every manufacturer, and I think every wholesale dealer, or dealer of any kind, is entitled to be protected against the use of his firm name without his authority, even if the right is rested on no other or higher ground than the annoyance which may result from being supposed to be responsible for transactions with which you have nothing to do. That is a legitimate interest; and besides, it is very obvious

that if one trader passes off goods under the name of another trader, it is because he wishes to take the benefit of the reputation which that other trader has acquired. Such reputation does not necessarily follow from his being the manufacturer of the goods which he sells. It may be due to his commercial skill, as being a good judge of goods, and the care which he uses in selecting them. Against any fraudulent use of their name I do not doubt that Messrs Henry Thomson & Company are entitled to be protected. If there were evidence that the defender had either advertised that he sold the pursuers' whisky, or had exhibited their show-cards in his shop, or put the pursuers' name upon handbills, or had voluntarily stated to any customer that he sold Henry Thomson & Company's whisky, that would have been a case for interdict without proof either of deception or resulting damage. It would be a clear case of the illegal use of another person's trade name. But the case is more delicate when it depends mainly upon the circumstance that goods of a particular firm have been asked for, and goods not coming from that firm supplied. In such a case everything, I think, ought to be presumed in favour of the dealer, especially if he gives instructions to his assistants that when goods which he does not keep are asked for they are to explain to the customer that they are not kept, but that goods of an equivalent quality are kept and will be supplied. I should not be prepared to grant interdict in a case of this kind upon proof that in one or two instances some customer had asked for Henry Thomson & Company's whisky and had got the nearest whisky to that which was in the shop. I think it would be ridiculous to hold that a few instances of that kind amounted to an invasion of right. The thing is casual; there is no evidence of design or intention to injure, and probably it is in such a case the result of inadvertence. Now, in the present case there is not even evidence to this extent, if we except the supply of whisky on three or four occasions to an old infirm man of the name of Fee, who occasionally sent members of his family to purchase a glass of whisky for him. He had a fancy for Henry Thomson & Company's whisky, and his daughters knew of this preference, and asked for the pursuers' whisky when they were sent for it. They say that they were not told that the whisky given to them was of a different mark. The defender's shopman, on the other hand, says that he did tell them, and he is confirmed in regard to one of the occasions by the evidence of a customer who happened to be in the shop at the time. It must therefore be regarded as at least a very doubtful question whether the whisky was in fact supplied in answer to a demand for Henry Thomson & Company's. I have great doubts whether the whisky was supplied without the necessary explanation being made. Even if the facts were as the pursuers allege, in the circumstances I should not hold this to be sufficient evidence to support an application for interdict.

"The other cases founded on rest on the evidence of four witnesses who were sent by the pursuers' firm to make purchases with the view of finding out whether the defender was in the habit of supplying whisky in answer to a demand for theirs. I must say I was not favourably impressed with the evidence of the

first and principal witness M'Gregor. He began by stating what it was he asked for—that he asked for Henry Thomson & Company's Old Newry Irish Whisky, and he insisted that on every one of the ten or twelve occasions that he went there he asked for the whisky in these precise terms. That seems to me a very unlikely thing. If he did so, I think it must have come to be looked upon as a joke between him and the shopman—not meaning anything. But that was his statement, and then he added that he was always supplied with whisky. But he was not very communicative as to any other facts that transpired on his visits, or as to conversations which may have taken place. And I think, without being hard upon this witness, that it may reasonably be supposed that he was at least once or twice told that Henry Thomson & Company's whisky was not kept on the premises, especially as he does not expressly negative this supposition. But the evidence of the defender and his shopman is quite clear, the one as to the instructions given, and the other that he perfectly remembered telling M'Gregor on more than one occasion that he did not keep Henry Thomson's whisky, but that he would supply him with something equally good. If that were done once for all, and M'Gregor made aware of the fact, I cannot for a moment entertain the idea that injury was done to Henry Thomson & Company by reason of this statement not being repeated every time that M'Gregor asked for their whisky. The shopman knew that M'Gregor was aware that this was not Henry Thomson's whisky. To take a parallel case, it is a matter of common experience that many people, or say a thirsty traveller entering a hotel, will call for a glass of 'Bass' beer,' without caring in the least whether the beer supplied to them is made by Lord Burton's firm or not. It is understood by both parties that what is wanted is simply a good quality of bitter beer. If the customer makes it plain that he really wants the beer of a particular maker, and something different is supplied to him coming from a different maker, that is a fraud for which the law will give redress. In the present case I am quite clear that, after the first or second time, both parties perfectly understood that Henry Thomson & Company's whisky was not kept and was not wanted, although the form may have been gone through of asking for a glass of 'Henry Thomson.' In that case no injury was done. Of course the use of this kind of evidence is to furnish reasonable grounds for the belief that other customers are treated in the same way, and that a system of deception is practised upon the public. Now, no evidence has been adduced by the pursuers to show that there is any considerable demand for Henry Thomson & Company's whisky which has been interfered with by the defender. And in the second place, not one single instance—or at least only the one instance that I have mentioned—can be found of any customer from the public asking for Henry Thomson & Company's whisky and being deceived. And therefore I think the absence of all confirmation by outside testimony entirely displaces the inference that might under other circumstances be drawn from what M'Gregor and his companions have repeated.

"I shall find that no fraudulent representation has been proved on the part of the defender, and

that he is entitled to absolvitor, with expenses.”

The pursuers reclaimed.

At advising—

LORD JUSTICE-CLERK—I think that this is a slender ground of action even at the best. The action is one against a whisky dealer in Dundee by a blender of whisky in Ireland for selling whisky over his counter on the plea falsely stated that it had been blended by the pursuer. It is at anyrate not a very large-hearted ground of action. Dealers in such articles often give names to articles which probably do not altogether deserve them, and their customers do not much rely on the existence of the qualities which the names might imply. There might be instances given of such names being applied, as the name of Bass' or Allsopp's beer being given to liquors which really did not merit these designations. But at the same time I think that it should be a very clear and flagrant case which would lead the Court to entertain such an action as this.

Apparently the case is this—That the pursuer between the months of July and October last—for the complaint and the evidence were limited to that time—had sold over the counter in the course of his business whisky which was represented as whisky blended by Henry Thomson & Company, when it was really the whisky of someone else. Some witnesses have averred that he really did sell whisky over the counter as blended by Henry Thomson & Company when in fact he knew that it was not whisky so blended, and if we were to take that evidence as true, even then we should not, I think, be prepared to find for the pursuer in the action. But, on the other hand, I am not sure that we can hold that evidence to be credible in all its details. The Lord Ordinary did not believe it.

On the whole matter I am of opinion that the pursuer has not shown that there was a systematic course of fraud on the part of the defender, for that is really the main thing to be looked to; and that being so, I think that we should adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I am entirely of the same opinion. I agree with the Lord Ordinary, and with what I understand to be your Lordship's opinion, that the pursuer has not proved in point of fact that the defender held himself out as a dealer in Henry Thomson & Company's whisky, and that there is no fraudulent intention attributable to him. It may be the fact that someone entering the defender's whisky-shop, and asking for Henry Thomson & Company's whisky, may have casually been supplied with Kirker, Green, & Company's whisky without being informed that such was the fact, although I do not think that even that is proved. But I do not think that such a case as that, even if proved, would establish ground for such an action as this, such as would warrant us in granting interdict against the defender. I think that the Lord Ordinary's interlocutor deals with the case with great propriety.

A case of this kind cannot be safely founded upon a few petty instances of alleged wrongous dealing with the pursuers' commodity, but upon a continued course of fraudulent representation and dealing. The defender says in his own evidence that he only gets his whisky from Kirker, Green, & Company, and that he does not sell any other kind. Suppose, then, that upon the

evidence that has been brought out in this case, Messrs Kirker, Green, & Company were to bring an action of damages against the defender, and to say—“You get your whisky solely from me, and have no other in your shop, but you have sold some of our whisky over the counter as being Henry Thomson & Company's whisky. Ours is a much better whisky, and by selling our whisky in their name you have given their name such an increase of reputation that will greatly enhance their business, and cause a loss to ours.” Could such an action be successful? I am clearly of opinion that here there has been no case of fraudulent representation at all made out by the evidence, and that the Lord Ordinary's interlocutor ought to stand.

LORD RUTHERFURD CLARK—I do not think that the pursuer has proved his case at all.

LORD CRAIGHILL was absent from illness.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sir C. Pearson—Ure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defender and Respondent—Asher, Q.C.—Shaw. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, July 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.

GALBRAITH (ROBERTSON'S TRUSTEE)

v. NICHOLSON AND ANOTHER.

Foreign — Jurisdiction — Trust — Forum conveniens.

The trustee on a sequestrated estate brought an action of accounting against the two trustees under a voluntary trust-deed for behoof of creditors which had been granted by the bankrupt shortly before his sequestration. The trust was Scottish, but one of the trustees was a domiciled Englishman, and pleaded no jurisdiction. *Held* that he was liable to the jurisdiction of the Court of Session in an action of accounting for the trust funds.

The affairs of James Robertson, tailor and clothier, Glasgow, who traded under the name of James Robertson & Company, became embarrassed in the beginning of 1885, and in June 1886 he granted a trust-deed in favour of Benjamin Nicholson, accountant, London, who acted on behalf of certain of his English creditors; on 16th July following he granted a second trust-deed for behoof of all his creditors in favour of Nicholson and Robert Kedie, warehouseman, Glasgow. Nicholson, as a professional accountant, acted under these trust-deeds, and took the chief part in the realisation of Robertson's estate. In May 1887 Robertson's estates were sequestrated on the petition of a Glasgow creditor, and Walter Galbraith, accountant, Glasgow, was appointed trustee. Nicholson appeared by counsel and opposed the granting of sequestration.