

in solving the question—always a difficult one in the case of a great public establishment—what rent it might be expected to bring if let from year to year? The appellants' contention was that the only proper test was the dormitory accommodation, and there being 510 beds, they suggested a rate of £4 per bed, bringing out a valuation of £2040. It is quite true that in some cases valuations have been approved of in this Court which were based upon that figure. But each case has to be dealt with on its own merits, and there is no rule that the valuation of an asylum is to be at a fixed rate per bed, or that the number of beds is the only thing to be considered. Even if dormitory accommodation were the only guide, instead of being merely one of several, it would be manifestly absurd to apply the same rate to all asylums, whether large or small, antiquated or modern.

In short, the question is eminently one for the local tribunal, and unless it appears that they have proceeded on some wrong principle, or have erred egregiously in applying a right principle, it is not for this Court to disturb their finding. Neither of these things can be asserted of this valuation, although it may seem to be a high one as compared with the valuation of other asylums throughout the country. I would only add that I think the Committee were right, while valuing all the buildings as a *unum quid*, to value the farm and plantations separately.

LORD KYLLACHY—I concur.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellants—Dundas, Q.C. Agents—Gill & Pringle, W.S.

Counsel for the Respondent—J. Wilson. Agents—Party.

HOUSE OF LORDS.

Thursday, April 27.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Shand, and Davey.)

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

(*Ante*, July 12, 1898, 35 S.L.R. 869, and 25 R. 1098.)

Trade Name — Unregistered Descriptive Name — "Cellular Cloth" — Secondary Meaning—Use by Rival Trader.

An action of interdict was raised by the makers of a certain fabric which they had advertised and sold for some years under the name of "cellular cloth," for the purpose of preventing a rival trader from using the term "cellular" to designate goods not made and sold by the pursuers.

The House of Lords (*aff.* the judgment

of the First Division) refused to grant interdict, in respect that the pursuers had failed to prove (1) that the defenders had, otherwise than by the use of the term "cellular," done anything to induce the belief that the goods offered by them were goods of the pursuers' manufacture, or (2) that the term "cellular" had acquired in the trade any technical or secondary meaning different from its ordinary meaning as a term descriptive of the goods, so as to entitle the pursuers to claim its exclusive use.

The case is reported *ante, ut sup.*

The pursuers appealed from the judgment of the First Division to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case it appears to me that the initial proposition which has been put forward by the learned counsel is perfectly accurate, namely, that this is a question of fact; and if it is a question of fact, it is to my mind, at all events, one that admits of very easy solution.

I agree with almost every word of the judgment of the Lord Ordinary, and with the exception of the initial proposition I agree with almost every word of the judgment of the Inner House. I confess I am a little puzzled to know how the initial proposition of the Inner House is reconcilable with what follows. The learned Judges there say they felt a difficulty—and I think they are quite right in saying so—as to "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." Then the learned Judges go on, with great accuracy I think, to say, "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." Every word of that I concur with. Then the learned Judge goes on to say, speaking of the evidence—"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 part proved." Further on he says—"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 term descriptive 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."

I must say for myself I concur in every word of those passages which I have referred to in the judgment of the Inner House, and the only thing that, as I have said, puzzles me is how, on that reasoning, and under those circumstances, the Inner House can have pledged itself to the proposition that but for certain circumstances not very clearly defined they would have been in favour of the pursuers on the initial question. That is the whole question, the proposition being, as is rightly pointed out, that no man has a right to sell his goods as though they were the goods of another man. That is the proposition, and the passages I have read seem to me very clearly to dispose of the proposition that in the particular case here dealt with one man is selling his goods as the goods of another. But on the other hand it has been pointed out with great force and precision that all the circumstances proved are compatible with the view that the word has retained its natural and proper signification. I do not think it is a matter that demands very copious exposition, because, as I have said, it is a question of fact. And I should like to point out here that as we are dealing with a question of fact and not of principle (that is a proposition which, so far as I have heard, has not been disputed at the bar), it being a question of fact, no previous case can be an authority for another case; each case must depend upon the facts applicable to that case alone. A principle may be deduced from a previous decision, but there is no dispute about principle in this case, and therefore I am unable to understand what virtue there is in referring to other cases in which this principle has been affirmed.

The only observation that I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like sixty years ago by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things—I say things, because it is to be observed that not only words but things, such as the nature of the wrapper, the mode in which the goods are made, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the intervention of the Court. Lord Cottenham says in that case (*Millington v. Fox*, 3 Mylne & Craig p. 352)—“I see no reason to believe that there has in this case been a fraudulent use of the plaintiff's marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for although there is no evidence to show that the terms ‘Crowley’

and ‘Crowley Millington’ were merely technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of these names; and therefore I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual.” That I believe to be the law. It was the law then, and it has not been qualified or altered by the fact that the Trade Marks Act has since been passed which gives a feasible and perfectly facile mode of remedy in cases in which trade-marks apply.

I only wish to say, with reference to the case of *Reddaway v. Banham* (the camel-hair belting case) that some words of mine appear to have been made use of in a way they were never intended to be applied. It is true in that particular case there was the intention to deceive, and there was a fraudulent design which, as Lord Cottenham pointed out, was not at all necessary for the purpose of establishing a right to relief. What I did point out in that case was this—that a man in the trade, whose acquaintance with the trade terms as against him must be assumed, appeared to show by what he had written that the mere use of the particular words selected, namely, “camel's hair belting,” would be understood in the trade to mean the plaintiff's manufacture. Of course that letter proved two things; it proved the fraudulent design which perhaps would have been enough by itself, but it also proved (and it was that point I emphasised in the judgment I gave in that case) conclusively, as against him, that in the trade those words had been so accepted and known as indicating the plaintiff's manufacture that the mere use of them would enable him to take away the plaintiff's orders. I certainly thought I had guarded myself sufficiently by speaking of it as a matter, not of law, but of fact, and saying that that was evidence which if I had been a jurymen would have convinced me of the effect of the use of the words in question to the nomenclature of the trade.

There has not been any question, nor can there be any question, as to what the state of the law is. It is laid down in *Burgess's* case—the anchovy sauce case—with great precision; the simple proposition is this, that one man is not entitled to sell his goods under such circumstances, by the name, or the packet, or the mode of making up the article, or in such a way as to induce the public to believe that they are the manufacture of some-one else. The proposition that has to be made out is that something amounting to this has been done by the defendant, and if that proposition is made out, the right to relief exists.

In this particular case what strikes me is this, as the Inner House have distinctly and correctly pointed out in the passages

from their judgment that have been read, where you are dealing with a name which is properly descriptive of the article, the burden is very great to show that by reason of your using that name descriptive of the article you are selling, you are affecting to sell the goods of somebody else. Certainly the camel-hair belting case may be an example of what under ordinary circumstances it would be very difficult to establish, but it was established there. But here the word "cellular" as a description is applicable; some of the documents and all the advertisements point out how appropriate and accurate that mode of description is to the article sold. It cannot be denied, therefore, under these circumstances that it was for the appellants to establish, if they could, that an ordinary word in the English language properly applicable to the subject-matter of the sale was one which had so acquired a technical and secondary meaning, differing from its natural meaning, that it could be excluded from the use of everyone else. That is the proposition the pursuers had to make out.

I do not propose to go through the evidence. I am satisfied with what has been said about it by the two Courts before whom this question has come. It seems to me that the plaintiffs have failed in establishing this initial fact, and if they have failed in that, they have failed altogether, because that cuts out the root of a claim to a remedy. Therefore it appears to me that the ultimate judgment of both Courts was right, and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON—This case has been treated in argument with all the care and anxiety that seem to be required where counsel have to deal with a question touching trade-marks, but at the same time I must say that from the beginning to the end of the comments which have been made before your Lordships upon the evidence in this case, I have had no difficulty in following and in entirely concurring with the view of the facts that has been suggested in the judgment of the Lord Ordinary.

It is not necessary for me to dwell upon the case after what has been said by the Lord Chancellor, but I must first say that the word "cellular," in the use of which the alleged infringement of the pursuer's right consisted, is an ordinary English term. It is not only an English term, but it is a word which has no necessary connection with, and does not in itself necessarily suggest the existence of a Cellular Cloth Company, and it is a term which conveniently enough and appropriately enough describes that cloth of which the articles of dress sold by the respondents are manufactured. I have sought in vain in the evidence for any indication, in the first place, that there was any deceit or fraud committed by the use of that term "cellular cloth" which has led anybody, even a retail trader, or a retail trader's customer, to suppose for one moment that he was getting the Cellular Company's

cloth and not cloth manufactured in Scotland by another manufacturer. In the second place, I see no reason to suppose that there was in the term itself, or in the way in which it was presented to the public by the respondents, any chance given or opportunity given such as the law would disapprove of for a retail trader to commit a fraud upon the customers to whom he sells. Under these circumstances I think it is perfectly clear that this appeal has entirely failed, and proved to be unfounded, and that your Lordships ought to affirm the judgment of the Court below.

LORD SHAND — Notwithstanding the anxious and able argument presented on the part of the appellants, I am clearly of opinion that the Court of Session has come to a sound result, and that this appeal ought to be dismissed. For my part I entirely adopt the clear and valuable judgment of the Lord Ordinary, Lord Kyllachy, and I rely on the grounds of judgment which his Lordship has so well stated.

I must however add that I do not participate in even the slight hesitation which his Lordship has expressed as to whether the word "cellular" may not to a certain limited extent partake of the character of a fancy name. I am of opinion that the word is purely descriptive, and was so used by the appellants. The cloth advertised and sold by them has been and is called "cellular" because it is cloth the texture of which is made up of cells. The term cellular is used in its ordinary signification, and it was and is used because it aptly and properly describes the goods or material sold. It is unnecessary to elaborate the point, for I think it was scarcely disputed by the learned counsel for the appellants. But I find the clearest evidence of its being simply a descriptive term in the advertisements and price-lists which the appellants themselves circulated. In the price-lists they expressly say, "Cellular cloth is so woven that it consists of an infinite number of small cells." And in the advertisements, as the Lord Chancellor observed, the appellants have made it quite clear that they were nearly adopting this word as properly describing their goods. They have adopted a word which is in ordinary use, and they have used it in accordance with its ordinary signification in the English language.

There is a vital distinction in cases of this class between invented or fancy words or names, or the names of individuals such as "Crowley" or "Crowley Millington" attached by a manufacturer to his goods and stamped on the articles manufactured, and words or names which are simply descriptive of the article manufactured or sold. The idea of an invented or fancy word used as a name is that it has no relation, and at least no direct relation, to the character or quality of the goods which are to be sold under that name. There is no room whatever for what may be called a secondary meaning in regard to such words as the Lord Advocate pointed out in the course of his argument. The word used and

attached to the manufacture being an invented or fancy name, and not descriptive, it follows that if any other person proceeds to use that name in the sale of his goods, it is almost if not altogether impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer. A person invents or applies the term "Eureka" as the name of a shirt in his sales. If you buy a "Eureka" shirt, that seems at once to mean that you are buying a shirt made by the particular maker who is selling shirts under that fancy name. The public come to adopt the word "Eureka" as applicable to the manufacture of the particular person who began to use it, and as denoting the article he is selling; and if another person employs the word in the sale of the same or a similar article, it seems to follow that he is acting in direct violation of the law that no one in selling his goods shall make such representation as will enable him to pass them off as the goods of another, so as to get the benefit of that other's reputation.

A totally different principle must apply in the case of goods which are sold under a merely descriptive name. If a person employing a word or term of well-known signification and in ordinary use, though he is not able to obtain a patent for his manufacture, and although he has not got the protection of a registered trade-mark for the goods he is proposing to sell, is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods and to shut others out from the use of this descriptive term, he would really acquire a right much more valuable than either a patent or a trade-mark. For he and his successors in business would gain the exclusive right, not for a limited time as in the case of a patent, but for all time coming, to use the word as applicable to goods which others may be desirous of manufacturing and are entitled to manufacture and sell as much as he is. That being so, it appears to me that the utmost difficulty should be put in the way of anyone who seeks to adopt and use exclusively as his own a merely descriptive term.

The case on which the appellants have chiefly relied is that of the camel-hair belting—the case of *Reddaway*. Of that case I shall only say, that it no doubt shows it is possible where a descriptive name has been used to prove that so general—I should rather say so universal—has been the use of it as to give it a secondary meaning, and so to confer on the person who has so used it a right to its exclusive use, or at all events to such a use that others employing it must qualify that use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language, and which is descriptive only, and indeed were it not for the decision in *Reddaway's* case I should say this should be made altogether impossible.

It is true the question in issue in cases of

this class may generally be broadly stated as: Did the defendants by their representations seek to induce purchasers to acquire their goods under the false belief that these goods were of the plaintiff's manufacture? If it can be shown that representations to the effect that the goods were manufactured by the plaintiffs be made directly or by implication, by the language used, the plaintiffs would of course be entitled to a remedy. But where the plaintiffs' proof shows that the only representation by the defendants consists in the use of a term or terms which aptly and correctly describe the goods offered for sale, as in the present case, it must be a condition of the plaintiffs' success that they shall prove that these terms no longer mean what they say, or no longer mean not only what they say, but have acquired the secondary and further meaning that the particular goods are goods made by the plaintiffs, and, as I have already indicated, it is in my view difficult to conceive cases in which the facts will come up to this. Unless that be proved, there is no room for a charge of violation of any right, or indeed of a charge of fraud, for the defendants are only exercising the right which they possess as much as the plaintiffs do, and which everyone has, to employ words in ordinary use which are an apt and proper description of the goods for sale.

The Lord Ordinary has made this observation in his judgment:—"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 involve fraud on the part of the user." The appellants' counsel were unable, though invited by me, to cite any case that runs counter to that observation—which I believe to be sound. In the case of *Reddaway* it was held there was fraud. The person who sold the goods (the camel-hair belting) had expressly said that he would be enabled by using that term to sell his goods as the goods of the plaintiffs, and if the term camel-hair belting had really come to mean the plaintiffs' belting in the trade and with the public, and the defendant knew this that was a case of fraud. In the case of *Reddaway* I understand it was held that the words had acquired the secondary meaning alleged, and that the defendant's knowledge of this was important evidence on that point.

The case of *Millington v. Fox* was not one of the use of a properly descriptive name, but rather a case of the same class as those in which an invented or fancy name is used. "Crowley" and "Crowley Millington" were the names used, and these names clearly marked the plaintiffs' goods as being of their manufacture. No secondary meaning was acquired or could exist, and Lord Cottenham's observations must be read as referring to such cases and not to a case in which a merely descriptive word is used.

On the facts of this case I entirely agree with the Lord Ordinary. I think his Lordship is sound in the view he takes that this is to be tried as a question affecting the trade in Scotland, and even if it had

been proved that in England the word "cellular" had acquired the secondary signification claimed, still if it were not proved that in Scotland the same signification was attached to it by the trade and the public, I should say the decision ought to be different from what it might perhaps be in England. Supposing a plaintiff were able to prove that in a number of the southern counties of England his goods had been sold under that name, and if it could therefore be held that in these counties, by its universal use, the word had acquired a secondary signification—that would surely never entitle the plaintiff to have an injunction in every part of England. I say the same as between England and Scotland.

As to the proof itself, I have only to say this—It must not be forgotten that it is on the pursuers that the onus lies in seeking to appropriate as their own a descriptive term such as the word "cellular." It is for the pursuers to show that in Scotland the term has acquired in the trade and with the public the signification they seek to attach to it. We have a large body of evidence for the defenders to the effect that nothing of the kind has occurred. We have the pregnant fact that the defender had never heard of the pursuers nor of their particular cellular cloth, and that the persons from whom he bought and those to whom he sold were in the same position; and there were a good many other witnesses to the same effect. Taking the evidence as a whole, and keeping in view that the onus is on the pursuers to establish by proof that a special secondary meaning has been attached to the word "cellular," I am clearly of opinion that they have failed to make out their case.

I have spoken at greater length than I intended, but I have felt that the case was one of importance, and I have thought it incumbent on me fully to express the views I hold.

On the grounds I have stated I am of opinion that this appeal fails.

LORD DAVEY—I am under the impression that if the older decisions in England of the Court of Chancery were examined it would be found that descriptive words, or common words, expressive only of the quality of goods, would not have been by that Court considered entitled to any protection. But the facts and the law are frequently mixed up in the judgments of the Court of Chancery, and it may be that in the class of judgments to which I refer all that was pointed at was the extreme difficulty of proving that common or descriptive words have acquired a secondary sense and become significant of the plaintiff's goods. And I certainly cannot find that any such abstract principle has ever been adopted in the Courts of Scotland. Therefore I take the logical foundation of this branch of the law to be that which was stated by Lord Justice Turner in his judgment in *Burgess v. Burgess*, which has frequently been re-

ferred to, and the terms of which are present to your Lordships' minds. Shortly summed up it is that a man shall not by misrepresentation appropriate to himself business which belongs to his neighbour.

But there are two observations upon that which must be made; one is that, as has been more than once said, particularly by Lord Justice Fry (then, I think, a judge of first instance) in the case of *Siegert v. Findlater*, a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden, and indeed, a burden which it is not impossible, but at the same time, extremely difficult to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a "fancy" word.

The other observation which occurs to me is this—that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has not been used in connection with the article, and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone, is of a very slender character, for this very simple reason, because the plaintiff was the only maker of the goods during the time his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to and no merchant or manufacturer to resort to except the plaintiff. Of course that is a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has of course a legal monopoly, but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly, because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world; he gives it a name descriptive of the article; all the world may make the article; and all the world may tell the public what article it is they make, and for that purpose they may *prima facie* use the name by which the article is known in the market.

In the present case I hold with the learned Judges in the Court below, and with your Lordships, that there are certain facts which are beyond controversy. I take it as regards the defender, the present

respondent, that it is established that he has done nothing whatever to represent his goods to be the goods of the pursuer, unless the use of the word "cellular" without the addition of any other term—the simple use of the word "cellular"—is sufficient for that purpose. Indeed, I take it to be established by the evidence that the defender had not even heard of the pursuers' company until he was threatened with the present action.

I will assume for the purpose of this case that the pursuers, as Mr Haslam says in his evidence, first introduced the article, the cloth which is manufactured in the particular cellular mode (I am obliged to use the word "cellular" because I know of no other word to express it), and they first attached the name "cellular" to the cloth manufactured in that particular mode, whether it is so is not quite clear from the evidence, but I assume that Mr Haslam's statement in that respect is correct. I think it is established by the evidence that the word "cellular" is beyond all question of a descriptive character. I need only refer to the advertisements issued by the pursuers themselves for that purpose. I shall refer to those advertisements again, but they do contain a most careful and, it appears to me, clear and accurate description of the cellular mode in which the cloth is made, and they show, in my opinion beyond all controversy, that the word "cellular" is not only descriptive but is the most appropriate term which can be used for the purpose of describing cloth manufactured in the mode in which the pursuers manufacture their goods.

Then that being so, what is the evidence upon which the pursuers rely for the purpose of showing that the word has acquired a secondary meaning, so that the mere simple use of the word is alone evidence of a misrepresentation by the defenders? First, we have the advertisements. Now, I am not going to delay you by reading the advertisements; they have been referred to in the course of the argument, and I do not think I should be justified in reading them again—they are present to your Lordships' minds, so that it is unnecessary that I should do so. But I make this observation upon them—and I think it is well founded—that the advertisements which were put in, although beyond all question they contain, as I have already said, a very clear statement of the reasons why the cloth is called "cellular," and a very clear statement of the kind of cloth which is meant by the use of the word "cellular," they do not, according to my conception, draw attention to the fact, or in any way lead the readers of those documents to suppose either that the cellular cloth was the sole manufacture of the pursuers, or that the word "cellular" denoted cloth manufactured by them alone, and not cloth of a similar description made by other manufacturers.

The second class of proof is that of witnesses who say in effect this (I will take one of the best and I think one of the earliest witnesses—Mr Henley)—"If I heard anybody in the trade speak of "cellular

goods," I should understand that he meant the product of the Cellular Clothing Company." Well, so long as the Cellular Clothing Company were the only company who were making cellular goods, that would not be astonishing, and so long as they retain the monopoly, no doubt that might be the case; but as I have already said in speaking of the proposition generally, it is in fact very slender evidence upon which to found the superstructure which the pursuers' counsel endeavoured to erect upon it, and indeed, unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods, there is nothing to compare it with, and they are merely stating a fact.

The third class of evidence consists of cases in which the pursuers have induced certain persons to submit to injunctions and pay costs. That does not appear to me to be very strong evidence in favour of the pursuers. Of course a shopkeeper or a person in that position would hesitate a long time before he incurred the expense, which in the case of a trade-mark or in a patent case is no slight expense, of defending an action of this character. Probably the value to him of the trade he would lose would not in any way compensate for the risk he would incur. Therefore as evidence of the fact I do not attach much importance to these cases. On the other hand, I am bound to say that the Lord Advocate's observation appears to me to have been well founded, that of course persons if they wish to protect rights to which they conceive themselves to be entitled are bound to be prompt and vigilant in defending those rights when they appear to be infringed.

I will not detain your Lordships any longer. I might perhaps have contented myself with saying that I agree with the judgment of the Lord Ordinary, and in substance with the judgment delivered by Lord M'Laren on behalf of the learned Judges of the Inner House, subject to the observation which has been made by the noble and learned Lord on the Woolsack, that the expression of opinion with regard to the evidence at the beginning of the judgment does not seem to be altogether consistent with the grounds upon which the learned Judge finally finds in favour of the defenders.

I agree in the judgment proposed.

Appeal *dismissed* with costs.

Counsel for the Appellants—The Lord Advocate (Graham Murray, Q.C.)—Guthrie, Q.C.—J. C. Watt. Agents—Ernest Salaman, Fort, & Company, for Clark & Macdonald, S.S.C.

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