

leave his wife. Against that it may be said that he made no provision for her maintenance, and that her misconduct was subsequent to the desertion which she alleges. In a successful action of divorce at the husband's instance he would not acquire right to the heritable property belonging to the wife. The *ius mariti* would come to an end, and all he would be entitled to would be his courtesy supposing there had been a child of the marriage. If the decree of divorce was at the wife's instance, she would be entitled to her terce out of the husband's heritable property belonging to him. I am not disposed to exercise my discretion under the Act in such a manner as to affect the wife's property with consequences more penal than would follow from a divorce. On the whole I think the petitioner is entitled to the authority desired, because the case comes within the letter of the statute, and the desertion has been proved. With regard to the subsequent conduct of the petitioner, I think it should not operate as an absolute bar to her getting the decree sought, especially as the husband contributed nothing to the support of his wife after deserting her. The provision of the statute is of a discretionary nature; and if there had been any contribution by the husband to the support of his wife, the Judge might refuse in such a case to give the authority asked for."

Counsel for Petitioner — Campbell Smith.
Agent— John Macmillan, S.S.C.

Tuesday, May 22.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

DUNNACHIE AND OTHERS *v.* YOUNG & SONS.

Trade Name—Descriptive Name—Interdict.

On the lands of Glenboig a seam of clay of superior excellence for making bricks was worked by two companies engaged in brick making, both of whom stamped their bricks with the name "Glenboig." Brickmakers on the adjoining estate of Heathfield having struck this seam, which extended under their lands, began to advertise and sell the bricks made by them therefrom as "Glenboig" bricks, distinguishing them from the bricks of the brickmakers on the lands of Glenboig only by using the name of their firm. In an action of suspension and interdict against their use of the name Glenboig at the instance of the brickmakers on the lands of Glenboig, it was proved that the name was understood in the trade to apply to bricks made on the lands of Glenboig, and not to bricks made from the Glenboig seam of clay. The Court granted *interdict* against the respondents selling as Glenboig goods any bricks not made by the complainers on the lands of Glenboig.

Trade-Mark—Infringement.

The Glenboig Fire-Clay Company having acquired and registered as a trade-mark the word "Glenboig," held that the use by other traders of the trade-mark "Young's Glenboig" was an infringement of the right of the

company, and that they were not barred from taking proceedings to restrain such infringement by reason of the fact that another brickmaker on the lands of Glenboig was allowed by them without objection to use the words "Star Glenboig" as a trade-mark.

In this action of suspension and interdict, James Dunnachie, of the Star Fire-Brick Works, Coat-Bridge, and John Hurl and others individual partners of the Glenboig Fire-Clay Company, sought to interdict John Young & Sons, fire-brick manufacturers, Heathfield, "from selling, shipping, or exporting, and from causing to be sold, shipped, or exported, any fire-clay goods stamped with the word 'Glenboig,' other than fire-clay goods manufactured by the complainer James Dunnachie, or by the complainers the Glenboig Fire-Clay Company, and from stamping or otherwise marking with the word 'Glenboig' any fire-clay goods manufactured by them, at their works at Heathfield or Cardowan, both in the county of Lanark, and from designating, advertising, selling, shipping, or exporting, and from causing to be designated, advertised, sold, shipped, or exported, as Glenboig goods, any fire-clay goods other than fire-clay goods manufactured by the complainer James Dunnachie, or by the complainers the Glenboig Fire-Clay Company, and from using the name Glenboig either by itself or in combination with another word or other words as their trade-mark, or on their letter paper or invoices or other stationery used by them, or in their illustrated catalogues, or to designate any fire-clay goods manufactured by them, or any fire-clay goods sold, shipped, or exported by them, other than fire-clay goods manufactured and sold by the complainer James Dunnachie, or by the complainers the Glenboig Fire-Clay Company, and from in any way representing that fire-clay goods manufactured by them, the respondents, are Glenboig goods, or made at Glenboig, or of Glenboig clay, and from in any way infringing the sole and exclusive right of the complainers to use the name of Glenboig for the purpose of designating the fire-clay goods manufactured by them."

In the county of Lanark round Coatbridge there is a tract of land under which are numerous beds of fire-clay of varying quality. One particular seam of a fine fire-clay runs through the lands of Glenboig, Gartcosh, Garnkirk, Cumbernauld, and Heathfield.

The peculiar excellence of this seam of clay consisted in its possessing to a greater extent than other fire-clays the power of resisting the action of heat at extremely high temperatures, so that goods made from it were almost entirely free from the risk of cracking after being subjected to extreme heat. The complainers Dunnachie and the Glenboig Fire-Clay Company occupied for the purposes of their brickworks separate portions of this bed of clay lying under the lands of Glenboig, each having a manufactory on those lands. The respondents occupied the bed of clay lying under the lands of Heathfield which were situated about two and a half miles from Glenboig. The seam of valuable clay above referred to had been worked for a considerable period by the complainers at their respective works. It was in consequence well known, and commanded a high price in the market at home

and abroad, the brand of the complainers the Glenboig Fire-Clay Company being known as "Glenboig" and that of the complainer Dunnachie as "Glenboig Star." The complainers the Glenboig Fire-Clay Company were registered proprietors of the trade-mark "Glenboig." The other complainer was registered proprietor of the trade-mark "Star Works Glenboig," with a star and the initials J. D.

In 1874 the respondents in the course of their workings struck the seam of clay worked by the complainers, and in a circular dated 23d March 1874 they intimated that they were "at present engaged in sinking a field of clay lately occupied by them to the fire-clay known as the Glenboig seam, and in a few months we will be able to supply bricks, &c., made from this clay in addition to our celebrated Cardowan." In 1882 they began to stamp their ware with the words "Young's Glenboig" in the execution of an order to supply Glenboig bricks for Russia. This order had been offered to the complainers by Messrs Castel & Latta, iron merchants, Glasgow. On its being declined in consequence of their engagements it was given to the respondents, who for the first time used the stamp "Young's Glenboig." On the complainers remonstrating, the respondents expressed their regret, and begged the former to request Castel & Latta to accept the goods without the words "Glenboig" stamped upon them. This, however, they declined to do. This communication by the respondents, however, they represented to be contained in a private letter by one of the parties who had long been an intimate friend of one of the leading partners of the Fire-Clay Company, and desired to make advances in a friendly spirit for the sake of peace.

The complainers averred that the recognised superior quality of the Glenboig clay was the result of many years' care and attention in the manufacture of bricks and other goods from it, and that the clay used by the respondents was of inferior quality, and deficient in the properties which make Glenboig clay valuable. By using the name Glenboig in the stamp impressed upon their goods and in their advertisements they were falsely and fraudulently leading the public and the trade to believe that their goods were of the complainers' manufacture.

They pleaded—"(1) The complainers are entitled to the sole and exclusive use of the name 'Glenboig' in connection with fire-clay goods, in respect—1st, of their registered trade-marks; 2d, that that name has become identified with their goods, and that by their exertions goods sold under that name have acquired a distinctive and valuable reputation in the trade; 3d, that they are the only parties in right of the Glenboig fire-clay field; and 4th, that they are the only manufacturers of goods made of Glenboig fire-clay. (2) The proceedings of the respondents complained of being an infringement of the exclusive rights of the complainers, or one or other of them, to use the name or description 'Glenboig,' as applied to fire-clay goods, suspension and interdict ought to be granted as craved. (3) The use of the name 'Glenboig' by the respondents being intended falsely and fraudulently to induce the public and the fire-clay trade to believe that in purchasing the respondents' goods they are purchasing goods manufactured by the complainers, or one or other of them, to the loss,

injury, and damage of the complainers; or *separatim*, said use being in any view calculated to induce the said belief, interdict ought to be granted as craved."

The respondents averred that the term "Glenboig" was not confined to goods made by the complainers, but was used as descriptive of the goods made from the seam of good quality above referred to, whether actually made by the complainers or respondents, and this term was so understood by the trade and the public. They also averred that the complainers had acquiesced in their use of the word Glenboig as applied to their bricks, and had even ordered goods from them having that word on them in order to supply customers of their own whom they could not themselves supply.

They pleaded—"(1) The complainers' averments are irrelevant. (2) The respondents not having infringed the complainers' rights the note should be refused. (3) The respondents being entitled, in respect of the custom of trade, the complainers' acquiescence, and the other facts averred, to describe their goods as they have done, the note should be refused. (4) The complainers having no exclusive right to describe their goods as Glenboig goods, the note should be refused. (5) The respondents' goods being made from Glenboig clay, they are entitled so to describe them."

The respondents led evidence to show that the word Glenboig was a name applied in the trade to designate bricks made of the "Glenboig" seam, and not only bricks made by one or other of the complainers on Glenboig farm.

It appeared, however, that till 1882 the practice in the trade was to name the bricks after the lands on which they were manufactured, and not after the particular seam of clay from which they were made.

The Lord Ordinary (KINNEAR) after proof recalled the interim interdict which had been granted and dismissed the note.

"*Opinion.*—The complainers are tenants of separate portions of a bed of clay lying under the lands of Glenboig, in the neighbourhood of Coatbridge, and each has a manufactory on the same estate. Their complaint is based upon an averment that the clay on Glenboig Farm is possessed of exceptional qualities, being 'distinguished by possessing to a greater extent than other fire-clays the power of resisting the action of heat at extremely high temperatures,' so that the goods which are 'made of it are almost entirely free from the risk of cracking after being subjected to extreme heat.' This is of course a very valuable quality in fire-clay, and the complainers aver, besides, that they have devoted great care and attention to the manufacture of bricks, and other goods, from this clay; that their goods have acquired a wide and favourable reputation, and that their brands 'Glenboig' and 'Star Glenboig' command a high price in the market.

"I think these averments are substantially borne out by the evidence. There can be no doubt that the complainers' goods are in great demand, and have a high reputation in the markets, both of this country and the Continent, and that that reputation (which is proved to be well deserved) is of great commercial value. I think there can be as little doubt that this high reputation is attributable not to any peculiarity

or special excellence in the manufacture but to the distinctive qualities of the Glenboig clay. It is not disputed that the complainers are, both of them, good manufacturers; and it is clear enough that they would not have acquired the reputation which they enjoy for their manufactured goods if these had not been well made. But, at the same time, there is nothing exceptional in their process; and if the same material had been wrought by any other competent manufacturer, there seems no reason to doubt that the same results would have been obtained.

"I think it proved that the respondents, who are lessees of seams of fire-clay in the immediate neighbourhood of the complainers, began about eight years ago to work a seam which is not only identical in quality but is practically the same seam as that worked by the two complainers. It is, in my opinion, immaterial to consider whether the continuity of the strata is altogether unbroken between the mineral field worked by the complainers and that worked by the respondents. For all practical purposes they are working the same seam; and I think it proved that long before the respondents reached it in their working it was known to mining engineers and fire-clay manufacturers to extend beyond the limits of the area leased by the two complainers, and that both within and beyond that area it was known by the name of 'Glenboig clay,' and by no other name.

"In these circumstances the complainers claim to have 'the sole and exclusive right to use the name of "Glenboig,"' not merely as a trade-mark—that is, as a mark impressed upon or affixed to fire-clay goods—but also as a descriptive name to designate such goods in advertisements or in invoices or otherwise in the ordinary course of business, and they ask protection by interdict against infringement of their right in either of these two ways. The complaint, therefore, raises two questions, which, although they are not well distinguished in the conclusions for interdict, are in themselves distinct, and depend upon different considerations.

"1. The complainers seek to have the respondents interdicted from using the name 'Glenboig,' even otherwise than as a trade-mark, and irrespective of any means they may take to make it clear to the public—if they use it in advertisements—or to their customers—if they use it in the ordinary course of business—that the goods they so describe are of their own manufacture, and not of the manufacture of either of the complainers. It is not to my mind intelligible that the sole and exclusive right to the use of a descriptive name should be vested at the same time in two competing manufacturers. But, apart from the difficulty thus occasioned, the case upon this branch of the complaint appears to me to be untenable.

"The respondents are not entitled to represent their goods as goods of the complainers' manufacture. But as soon as they had reached the Glenboig clay, and began to work it, they were, in my opinion, quite entitled to take advantage, not of the complainers' reputation as manufacturers, but of the reputation of the valuable raw material which they had acquired. And, accordingly, the Solicitor-General, as I understood his argument, did not dispute that the respondents were justified in issuing a circular in 1874, in which they announced that they were

'at present engaged in sinking on a field of clay . . . to the fire-clay known as the Glenboig seam, and in a few months will be able to supply bricks, &c., made from this clay, in addition to our celebrated "Cardowan."' It is, at all events, the fact that from that time onwards they have constantly advertised in various forms that they were manufacturing bricks from the clay known as the Glenboig clay, and that they have done so without challenge from either of the complainers. No doubt they did so in such terms as to make it perfectly clear to the readers of their advertisements that they were selling goods of their own manufacture, and not of the complainers' manufacture. But the result is, that if the raw material, as distinguished from the complainers' manufactured goods, had not previously been known as Glenboig clay, it has now become known under that name in consequence of the advertisements and trade circulars of the respondents. It cannot therefore be maintained that the use of the word 'Glenboig' is in itself a representation that the goods described by that name are the goods of either of the complainers. If the respondents had used it, or proposed to use it, in a manner calculated to deceive, such use would be prohibited. But all their circulars and advertisements appear to express quite clearly that they are themselves the makers of the goods they offer.

"2. The question remains, whether by stamping the words 'Young's Glenboig' on their fire-clay bricks they have imitated the trade-marks of one or both of the complainers.

"The Glenboig Company's trade-mark consists of the word 'Glenboig.' This is not a trade-mark which could have been registered under the Act of 1875 had it not been in use before the passing of that Act—(*Ex parte Stephens*, L. R., 3 C. D. 659). But having been so used, it is not disputed that it is entitled to protection.

"The other complainer Mr Dunnachie's trade-mark consists of the words 'Star Works, Glenboig,' with a star and the initials J and D—the star and initials being in the centre of the device, below the words 'Star Works,' and above the word 'Glenboig.' The word 'Glenboig' is thus a material part of each of the trade-marks; and it is in evidence that the complainers' brands are well known in the market as 'Glenboig' and 'Star Glenboig' respectively.

"Neither of the complainers, therefore, is in a position to maintain that the use of the word 'Glenboig,' although in combination with another word or words, is in itself an infringement of his trade-mark, because each of them has, as against the other, a right to use that word. They are competing traders, and each concedes to the other the right which he denies the respondents. It is said that Mr Dunnachie was entitled to put the name of 'Glenboig' on his goods, notwithstanding the prior adoption of that name by the other complainers as a trade-mark, because his works are situated on the Glenboig Farm. But that would not justify him in using a brand which would mislead the public to suppose that they were purchasing the Glenboig Company's bricks—(*Seizo v. Provezende*, L. R., 1 Ch. 192). If this device is defensible therefore (and it is admitted to be unimpeachable), it is because it is sufficiently distinguished from the Glenboig Company's so as not to interfere with it. But it

follows that the word 'Glenboig,' which is common to both, cannot be the exclusive property of either. In each of their trade-marks it represents something which they enjoy in common. And it appears to me that what it is understood to represent is the valuable raw material which is employed in their manufacture by both of the complainers, but of which neither has a monopoly. But if that be the meaning of the word, the respondents also who are working the same raw material are equally entitled to use it, provided they take care, by using another word or words along with it, to distinguish their goods sufficiently from those of the complainers.

"The only question therefore is, whether the variation adopted by the respondents is sufficiently distinctive; and it appears to me that the respondents' brand 'Youngs' Glenboig' is just as distinguishable both from Mr Hurl's 'Glenboig' and from Mr Dunnachie's 'Star Glenboig' as either of these is from the other. There is a great deal of evidence, and it is in accordance with the conclusion at which without evidence I should have arrived, that the brand 'Young's Glenboig' would deceive nobody to whom the manufacturers are known. The trade witnesses say that if bricks so branded were offered to them they should have no difficulty in seeing that they were not the manufacture of Mr Hurl or of Mr Dunnachie, and that they were the manufacture of Mr Young. It is said that in Russia and Germany people may be deceived. But the trade-marks being words and names in the English language will be equally distinguishable by all persons capable of reading and understanding.

"It appears to me, therefore, that the respondents have done nothing either by way of advertisement, or by the brand they propose to use, to induce the belief that their goods are the goods of the complainers, or either of them; and consequently that there is no ground for interdict."

The complainers reclaimed, and argued—The proof showed that in trading circles it was unknown to call fire-brick by the name of the seam of clay from which it was made. In the present case, then, according to this custom, the bricks had been named after and identified with the manufactories at Glenboig. It might be true that the respondents in course of their sinking had struck the Glenboig seam of clay, but their subsequent actings constituted merely an attempt to mislead the public into believing that the bricks offered by them to the market were the same as those manufactured at Glenboig, and known widely as the "Glenboig" bricks. The complainers were entitled to protection from this attempt.—*Lochgelly Iron and Coal Company v. Lumphinnans Iron Company*, January 15, 1879, 6 R. 482; *Wotherspoon and Another v. Currie*, April 16, 1872, L.R., 5 Eng. & Ir. App. 508; *The Singer Manufacturing Company v. Kimball & Morton*, January 14, 1873, 11 Macph. 267; *The Singer Machine Manufacturers v. Wilson*, December 13, 1877, 3 App. Cas. (H. of L.) 376; *Johnston & Co. v. Orr Ewing*, March 6, 1882, 7 L.R., App. Cas. (Privy Council), 219; *Ford v. Foster*, June 11, 1872, 7 L.R., Ch. App. 611; *Braham v. Beacham*, February 12, 1878, 7 L.R., Ch. Div. 848. 2. The trade-mark used by the respondents was so identical with that of which the complainers were registered proprietors as to be cal-

culated to deceive the public—*Seizo v. Provezende*, January 22, 1866, 1 L.R., Ch. App. 192; *Dixon v. Jackson*, January 29, 1867, 5 Macph. 526.

The respondents replied—1. They were entitled to use the name "Glenboig" in respect they had reached in 1874 the Glenboig seam in the course of their workings. 2. The words "Young's Glenboig" were clearly distinguished from the complainers' trade-mark—*Young v. Macrae*, March 20, 1862, *The Jurist* (New Series), vol. ix. 322; *James v. James*, February 23, 1872, 13 L.R., Equity Cas. 421; *The Singer Manufacturing Company v. Wilson*, March 25, 1876, 2 L.R., Ch. Div. 434; *The Singer Manufacturing Company v. Loog*, December 14, 1880, 18 L.R., Ch. Div. 395—*aff.* Dec. 13, 1882, 8 Ap. Ca. 15; *Wotherspoon & Co. v. Gray & Co.*, November 1863, 2 Macph. 38; *Charleson v. Campbell*, November 17, 1876, 4 R. 149.

At advising—

LORD JUSTICE-CLERK—Two questions are raised in this case—first, whether the respondents have assumed and applied to articles manufactured by themselves the trade name in use to be applied by the pursuers to articles manufactured by them, and that for the purpose of inducing purchasers to believe that such articles were manufactured by the pursuers? and secondly, and separately, whether the respondents have used and applied to their own ware the registered trade-mark of the pursuers? If these questions, or either of them, are answered in favour of the pursuers, there remains the further question as to the remedy to which the pursuers may be entitled.

The relative position of the parties to this dispute may be very shortly described. Both are manufacturers of goods from fire-clay in the county of Lanark. Their works are situate about two miles from each other, and they use in their manufacture the clay found in the lands on which these works are placed. The name of the lands on which the pursuers' works stand is Glenboig. That of those occupied by the respondents is Heathfield. The same seams and quality of clay are found in each. It has been the invariable practice in this trade, as is clearly proved and indeed not disputed, to name the ware manufactured at the different works by that of the lands which they occupy; and thus the manufacture of the pursuers has been universally known in the trade as Glenboig, and that of the defenders as Heathfield; they pass under those denominations in the market, and the ware has been stamped with these respective names.

It appears, however, that the Glenboig fire-brick has attained a reputation in the market which Heathfield has never reached, and hence this controversy. The superiority of Glenboig is attributed by Heathfield to the fact that the former used in the manufacture a seam of clay of fine quality which, although existing on the Heathfield lands also, the respondents had not been fortunate enough or skilful enough to arrive at. At last in 1874 their workings struck this seam, and not content with allowing the excellence of their ware to make it known to the trade, they have pursued a system of advertisement to publish the fact that they were working the same seam of clay as that found in Glenboig, until at last, in 1882, they began to stamp the

Heathfield ware with the words "Young's Glenboig."

The object of these proceedings is not disguised. The Heathfield ware has no connection whatever with the neighbouring works a couple of miles off, any more than it has with the other fire-clay fields in the vicinity in which precisely the same seams of clay occur, and it would have been quite as reasonable to have called these fire-bricks by the name of Garnkirk, Gartcosh, or Cumbernauld as to stamp them with the name of Glenboig. The object of the proceeding was to attract to Heathfield goods part of the popularity of Glenboig.

But it is said that in stamping their ware with the word "Glenboig" the respondents did not mean the trade or the public to understand that these goods were made at Glenboig, but only that they were made out of a seam of clay which they allege to be known as the Glenboig seam.

If it were material to the question before us, I think the evidence brought to establish that the word "Glenboig" was known as a generic name, applicable to a particular seam of clay wherever found, is both untrustworthy and inconclusive. The perusal of it has satisfied me that until the respondents commenced their advertisements in 1874 there was nothing like a general or even a partial use of the name in this sense even among scientific men. But it is quite sufficient for the present purpose that the witnesses are all agreed that until 1882 the invariable practice in the trade was to name the fire-bricks after the name of the lands on which they were manufactured, and that none were ever known to be named after a particular seam of fire-clay. It follows from this universal custom that the name of Glenboig meant in the trade, when applied to fire-brick, those manufactured at the Glenboig works, and was not understood or intended to mean anything else. It is proved by the evidence of the respondent Mr Young and by Mr Moore that this very seam of clay is found in the lands of Garnkirk, Gartcosh, Heathfield, and Cumbernauld as well as in Glenboig. These are all brickfields, but never, excepting in the present instance, was the term Glenboig applied to the produce of these manufactories.

I come therefore to the conclusion, and with no hesitation, that in stamping their goods with the words "Young's Glenboig" the respondents intended their customers to believe that they were manufactured at Glenboig, and that because of the high reputation which that manufacture had attained in the trade. They could not mean their customers to believe that the word "Glenboig" merely denoted the seam, because they knew that this was never done in the trade.

On this part of the case I should have desired no further evidence than that afforded by the immediate facts out of which this dispute has arisen. The respondents had reached this seam of clay in 1874, and manufactured their fire-brick from it, and it appears had endeavoured to attract attention to the fact by sundry advertisements, in which they announced that they had done so. But they never ventured to stamp their ware with the name "Glenboig." In 1882 they received an order from a Glasgow firm for a large quantity of fire-brick. This had been offered to the pursuers, and as they were too busy to undertake it, they recommended the respondents to their cus-

tomers. In the execution of this order they for the first time used the stamp "Young's Glenboig." The pursuers instantly remonstrated, and Mr Young at once expressed his deep regret—said it had been done without his knowledge—that it was very wrong, and should not happen again, and entreated the pursuers to intercede with the Glasgow firm to accept the goods without the word "Glenboig" stamped on them. But the Glasgow firm were obstinate. They wanted the stamp of "Glenboig," because their customers would accept no other, proving clearly that the trade attached no consequence whatever to the seam of clay from which they were manufactured, and cared only for the stamp of the Glenboig manufactory.

If this is so, the addition of the word "Young's" was merely colourable. It would not, in the opinion of Castel & Latta, prevent their customers from accepting the goods as of Glenboig manufacture; and that was the only matter as to which they were solicitous.

I am therefore entirely with the pursuers on the first point, and the second becomes immaterial. I am however also of opinion that the respondents have infringed or adopted the registered trade-mark of the company.

It is not disputed that the word "Glenboig" was duly registered by the company as a trade-mark in 1876, under the Trade-Marks Act; and that by the expiration of five years from that time it became absolute. But it is contended that the respondents have not adopted the trade-mark, because "Young's Glenboig" is not the trade-mark. This contention, however, seems to me quite inadmissible. The respondents were not entitled to use the trade-mark, and had no reasonable excuse for doing so, and the addition of their own name will not justify them in adopting the trade-mark of their neighbour. It is said, however, that Mr Dunnachie, who is also a manufacturer on the lands of Glenboig, has used without objection from the company the trade name of "Star Glenboig;" and that therefore anyone who chooses may adopt the trade-mark of the company, if he put any other word before it.

I cannot say that I see any force in this view, or any analogy between the cases. The "Star Glenboig" ware is rightly and honestly so called. Unlike that of the respondents, it is Glenboig ware. The name expresses nothing but the truth. Whether the assumption of that designation would or would not have been an infringement of the company's trade-mark we need not consider, because it is not challenged. It does not follow that the trade-mark would have been acquired at all but for the acquiescence of the company in the modification introduced by the other. The arrangement on both sides was entirely reasonable, and cannot limit the pursuers' right in the trade-mark when it is infringed by persons who have no pretence whatever to call their manufacture by that name. I am therefore prepared to grant the interdict prayed for in the first part of the prayer. In regard to the advertisements, although they are ambiguous, and perhaps disingenuous, I am not prepared to say that they all constitute a violation of the pursuers' rights. The respondents are entitled to say that their seam of clay is the same as that found in Glenboig, for that appears to be true. They are probably entitled to think and to say that this

seam is known among engineers and geologists as the Glenboig seam, although I think it doubtful if it is so. But they were bound to make their meaning quite distinct, and to use no words which could lead to the inference that the goods referred to were made at Glenboig. The advertisement quoted from "Iron" in 1881 goes considerably beyond that line. But at present I am not prepared to carry the interdict further. The prayer is much too wide, and I think the pursuers will be well advised if they confine their demands to interdict against the stamping of the goods, and depart from the rest of the prayer. In making that proposal I am influenced partly by the fact that these things are past, and were not challenged at the time, and partly by the hope that if your Lordships take the same view good sense and right feeling will prevent further controversy.

Lord Young concurred.

Lord CRAIGHILL.—There are here two complainers, the one Dunnachie, and the other the Glenboig Fireclay Company, both manufacturers of fireclay goods on Glenboig of clay raised from that farm. Each has a trade-mark—that of the latter being the word "Glenboig," and that of the former, which is delineated on the record, being shown as "Star Glenboig." The respondent, again, is a manufacturer of fireclay goods at Heathfield, a place over two miles from Glenboig. They also have a trade-mark, and it is "Young's Glenboig," and it was only recently adopted; and the purpose of the present action is to restrain the respondents from using this trade-mark, either by stamping it on bricks or other clay goods, or by using the word "Glenboig" by itself or in conjunction with another word or other words, in advertisements, invoices, or other communications issued to the public or to customers, as descriptive of goods manufactured by the respondents. The Lord Ordinary has refused the interdict prayed for, and hence the reclaiming-note on which the case is now before the Court.

Recapitulation of the facts is unnecessary, because these have been related by the Lord Ordinary, and his statement has not been impeached; on the contrary, it has been accepted by both parties, who differ only as to the result which in point of law ought to be deduced.

The complainers say they are aggrieved by the use of the word "Glenboig" on the respondents' trade-mark. These are the words they employ on the record—" (Stat. 5) Notwithstanding that their goods, and particularly their bricks, are not made of Glenboig, but of an inferior clay, the respondents John Young & Sons have recently been making and selling their goods under the name of 'Glenboig' goods. This has been done by them fraudulently, with the intention and effect of deceiving purchasers and the public, and inducing them to believe that these inferior goods are made by the complainers, and of Glenboig clay. The respondents claim to be proprietors of three registered trade-marks, consisting of the following words, viz. — (1) 'Cardowan,' (2) 'Young's Silica,' and (3) 'Young's Glenboig.' The complainers stamp all their goods with their respective trade-marks, and the respondents in the same way stamp their goods with one or other of their trade-marks. The complainers being aggrieved

at the use of the word 'Glenboig' in the respondents' third trade-mark, they called upon the respondents to desist from using the word." They thus complain upon two grounds. In the first place they say that the use of this word is an appropriation of their trade-mark; and secondly, that whether this be so or not, "Glenboig" as used by the respondents is calculated to mislead, and does mislead, the public, and the fireclay trade in particular, inasmuch as it induces them to "believe that in purchasing the respondents' goods they are purchasing goods manufactured by the complainers, or one or other of them, to the loss, injury, or damage of the complainers." If either of these grounds of complaint has been made out, the remedy prayed for must be granted; otherwise not. Nor is the law very jealous of such pretensions as those here put forward. Monopoly is not the thing for which the one party struggles, and which the other resists. On the contrary, fair trading is all for the protection of which the law is invoked, and the public as well as the manufacturer or merchant are concerned, that infringement of trade-marks and trade designations should be prevented. For there is a double wrong; the public are or may be deceived, and the trader whose trade-mark or trade designation is or may be injured. These principles are not contested; the question is as to the effect of their application on the present occasion.

The right of the complainers to their respective trade-marks is not disputed. The controversy relates to the point of infringement. "Glenboig," which is the trade-mark of the Glenboig Fire-Clay Company, is but a word. "Glenboig" is the place where their clay is raised, and where this clay is manufactured. Their goods have long been known in the market by this mark, and there is no doubt that this mark has come to be a valuable property. But such a mark has this inconvenience, that it is more liable than most other trade-marks to encroachment without the penalty of infringement being as a consequence incurred. The name of a person may be a trade-mark; there may be other manufacturers of goods of the same description; and the latter are not precluded from fencing their own names or their goods by reason of the fact that this name has already become the trade-mark of another manufacturer. The only condition they must fulfil is that the name as used by them shall be accompanied with something which shall be a distinction, if the bare name would lead to the deception of the public, and the injury of the trader on whose goods the name first appeared as a trade-mark. There are numerous cases on this subject, the more important of which are noted by Mr Sebastian in his treatise on the Law of Trade Marks, and the result has been thus summarised by him:—"The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced, that while as against persons bearing a different name a manufacturer's right in his name trade-mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up. This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and

satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered."

To this it may be added that in cases where fraudulent intention is required, the use by the alleged infringer of a name not his own is regarded as a pregnant circumstance, as to which the case of *Ainsworth v. Wamsley*, L.R., 1 Eq. 518, may be consulted.

Not only names of persons, but names of places—or, as they have been called, geographical names—are also used as trade-marks, and the legal rules by which the latter are protected are kindred to those which protect the former. Thus the Glenboig Fire Clay Company, who first opened the field, took "Glenboig" as their trade-mark; but they were tenants of only a part of the field, and their right is not that tenants who subsequently came upon other parts of the field shall not allow "Glenboig" to appear on their goods, but that this word, if used, shall be accompanied by other words, or by a sign which shall be a distinction. The working of this rule was shewn when the complainer Dunnachie acquired a part of the clayfield. The right of the Glenboig Fire-Clay Company in the trade-mark "Glenboig" was untouched, while that of Dunnachie to use that word as part of his trade-mark for the purpose of telling that his goods were of Glenboig clay, and were manufactured on Glenboig, was asserted and recognised. But what Dunnachie did a stranger might not do. "Glenboig" as used by the latter, without explanation of the sense in which the word was used, could not but be a deception. The Lord Ordinary appears to me to have been insensible to this consideration. He thinks that because Dunnachie made "Glenboig" a part of his trade-mark the word must be *publici juris*. But Dunnachie was on Glenboig; the clay he used was raised and manufactured there; and in putting the place into his trade-mark he was only following the course followed by the trade. But the respondents are not on Glenboig. In using that word they introduce no innovation; and if they are to find virtue in it, this will probably be because those who at first or second hand are the purchasers of them read the word as indicating that the goods are the product of another manufactory than Heathfield. The respondents try to justify their assumption of "Glenboig" (1) on the ground that their clay is of the same seam; and (2) on the ground that the word "Glenboig" as used by them is qualified by the word "Young's," and so misapprehension, not to say deception, is prevented. The fact as assumed in the former has I think been established, but it is insufficient as a justification. The least that can be said on the subject is that the word as used is ambiguous and that would be enough. Why should the respondent use a word that may mislead,—that may lead people to buy his goods as the goods of the complainers. If all the respondents desire to suggest is that their bricks are made of clay of the Glenboig seam raised in Heathfield, there could be a word or words found by which that could be communicated. But, in truth, the word "Glenboig" in the respondents' trade-mark can hardly be considered to be ambiguous, because when geographical names are used as trade-marks "they are in that application to be

understood, not as describing the goods to which they are affixed to any special section of the earth's surface, but as representing the works at which, or the manufacturer by whom, those goods have been produced."—*M'Andrew v. Bisset*, 33 L.J., Ch. 561. The second justification I also think insufficient, for the word "Young's" does not overcome the inference which those without local or personal knowledge would deduce from the word "Glenboig." There must therefore, I think, be an interdict against the use of "Young's Glenboig" on the respondents' goods.

The complainers, however, ask much more. They seek that the word "Glenboig," however qualified or explained, shall not appear on goods manufactured by the respondents, or on advertisements, invoices, sale-notes, or on any business papers issued by the respondents. To such an interdict they are not entitled. The Glenboig seam has long been known in the trade and to mining engineers; and if, as I think they are, the respondents' goods are manufactured of clay from this seam—and they presented no ground for complaint as to the way in which the thing is done—they may, without encroaching on the rights of the complainers, indicate the seam, as say by marks on their goods, or in advertisements, or in business papers. This, I think, is far within the rule that the name of an existing place cannot for all purposes be appropriated, and that anyone who manufactures at a place the name of which has become another's trade-mark, may still describe his goods as made on that spot, though this must of course be done in a way by which imitation of the other's trade-mark is avoided. And the fact is, that they have so done in an advertisement which began to be published as long ago as 1874, to which exception never was taken by the complainers till this case came into Court. The continued use of this advertisement, or the communication of similar information in another form, ought not to be interdicted.

LORD RUTHERFURD CLARK concurred.

The Lords pronounced the following judgment:—

"Recal the Lord Ordinary's interlocutor: Interdict, prohibit, and discharge the respondents from selling, shipping, or exporting, and from causing to be sold, shipped, or exported, any fire-clay goods stamped with the word 'Glenboig,' other than fire-clay goods manufactured by the complainer James Dunnachie, or by the complainers the Glenboig Fire-Clay Company, or his or their assignees, and from stamping or otherwise marking with the word 'Glenboig' any fire-clay goods manufactured by them, the respondents, at their works at Heathfield or Cardowan, both in the county of Lanark; and in respect the complainers do not insist in the other conclusions of the note of suspension and interdict, find it unnecessary to consider the same."

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