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In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Wednesday, October 15.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

BEECHAM v. MACGILVRAY.

Trade Name—"Beecham's Pills"—Hired Evidence—Interdict.

The sole proprietors and manufacturers of a patent medicine called "Beecham's Pills" brought an action against a surgeon to have him interdicted from selling, in a shop kept by him, as Beecham's, pills not manufactured by them. At a proof, witnesses sent to the shop for the purpose of detecting any fraudulent dealing on the respondent's part, deponed to having asked for pennyworths of Beecham's Pills, and to having been supplied with pills which were not the complainers', whereas the respondent's assistant, who alone attended to the shop, denied ever having sold Beecham's Pills in such small quantities, or ever having sold as Beecham's, pills which were not truly so.

The Court (Lord Young *dub.*) held (*aff.* Lord Kyllachy) that the complainers had established their case, but before granting interdict allowed the respondent an opportunity of lodging a minute undertaking that he would not in future sell pills as Beecham's which were not manufactured by the complainers.

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Cases of *Bass & Company v. Laidlaw*, May 22, 1886, 13 R. 898; and *Thomson & Company v. Robertson*, July 12, 1888, 15 R. 880, referred to.

Observations per Lord Young upon the unsatisfactory character of hired evidence.

Thomas Beecham and Joseph Beecham, patent medicine manufacturers and proprietors, St Helens, Lancashire, trading under the name of Thomas Beecham, brought an action of suspension and interdict against Duncan Macgilvray, surgeon and physician, carrying on business in a shop in Norfolk Street, Glasgow, to have him interdicted from in any way offering for sale, or selling by himself, or by others acting under or for him as pills manufactured by the complainers pills not manufactured by the complainers, and from supplying in implement of orders or requests for Beecham's Pills or Beecham's Patent Pills or of similar orders or requests, pills not manufactured by the complainers.

The complainers stated that they were the sole proprietors and manufacturers of a medicinal preparation or medicine known as "Beecham's Pills," which they manufactured at St Helens aforesaid, and which manufacture had been carried on for over forty-three years. That the respondent had for a considerable time past been and still was in the habit of selling at his said shop certain pills not manufactured by the complainers as Beecham's Pills, which were not Beecham's Pills, and of describing pills sold by him at his said shop as Beecham's Pills which were not Beecham's Pills. That in particular the respondent, on each of the dates following, in his said shop, in answer to orders for Beecham's Pills, being the

NO. I.

complainers' pills, sold and delivered to the following purchasers pills not manufactured by the complainers and not Beecham's Pills, and which were known by the respondent to be not manufactured by the complainers, and not to be Beecham's Pills, as follows, viz., To Mrs Sarah Ann Harding on the 3rd December 1890, to James Thomson on the 10th December 1890, to George Lockhart on the 11th December 1890, to Thomas Stewart on the 15th December 1890, and to Joseph M'Dade on 15th December 1890. And that the pills thus sold by the respondent as Beecham's Pills were made up so as to induce the purchasers to believe that they were purchasing the complainers' pills. The said pills were and are sold by the respondent fraudulently as the complainers' pills, he being in the knowledge that they were not so, and this the respondent had done and did for the purpose of availing himself of the great reputation acquired by the complainers to pass off spurious pills as the complainers'. The respondent had for long acted fraudulently, and in breach of the complainers' rights, and was still continuing to act as aforesaid, to the complainers' loss and damage.

The respondent denied the statements of the complainers so far as regarded the alleged sale of Beecham's Pills.

A proof was allowed, at which Mrs Sarah Ann Harding deponed—"I live at Lyle Cottage, Lower Park Road, Bristol. I am the wife of Henry Marwood Harding. I was asked by Mr Dowse, the agent for the complainers, Messrs Beecham, to go to the respondent's shop in Glasgow. The first time I went was on 27th November 1890. . . . On 3rd December 1890 I went back again to respondent's shop. I asked for some teething powders and a pennyworth of Beecham's Pills. I was served by the same gentleman as on the previous occasion. (Shown respondent)—It was not that gentleman. The shopman who was behind the counter put some pills into a box, as before, and gave them to me. No. 9 of process is the box which I got; I put a mark on the bottom at the time for the purpose of identification. When it was handed to me it was wrapped in the paper No. 10 of process—a portion of one of Messrs Beecham's bills. I marked the paper at the time. I gave both the box and the paper to Mr Dowse. On 11th December 1890 I went back to the respondent's shop again. I found the same gentleman in the shop as on the two previous occasions. I asked for some teething powder, and while I was being served a lad named George Lockhart came into the shop. I had arranged with him beforehand that he should do so. He asked for a pennyworth of Beecham's Pills; the person behind the counter repeated 'A pennyworth of Beecham's Pills,' or 'Beecham's Pills,' and supplied them. On each of these occasions the pills were taken from a china jar. I got the box from Lockhart when he left the shop, and marked it on the bottom with respondent's name, and Lockhart marked it with his initials. No. 11 of process is the box. The pills it contains are

those that were supplied to Lockhart as Beecham's Pills. I afterwards gave the box to Mr Dowse. On 15th December 1890 I went back again to respondent's shop. The same young man was in the shop as on the previous occasions. I asked for some corn plaster, and while I was being served a lad named Joseph M'Dade came into the shop. I had arranged beforehand that he should come in. He asked for a pennyworth of Beecham's Pills. He was supplied with pills, but they were not Beecham's. They were supplied from the same china jar as on the previous occasions. No. 12 of process is the box that was sold to M'Dade; I marked it on the bottom 'Macgillivray,' and M'Dade initialed it. The pills it contains are those that were sold to M'Dade as Beecham's. I gave the box to Mr Dowse as on the former occasions. I know the appearance of the real Beecham's Pills; they are yellowish in colour, and smaller than those sold by respondent."

Lockhart (15) and M'Dade (28) gave corroborative evidence.

Edward Dowse, the complainers' travelling agent, deponed to employing Thomson (16) and Stewart (44) in a similar manner with the like result, and his evidence was corroborated by them, the former stating that upon the first of these occasions when he visited the shop he was served by the respondent himself.

The respondent deponed—"I use the surgery mainly as a consulting-room, and the front part for dispensing my own prescriptions mainly. I also keep medicines of various kinds in the surgery. . . . I take nothing to do with the making up of prescriptions or the selling of drugs. My shopman William Craig attends to that department. . . . It is a matter of indifference to me whether I keep Beecham's Pills or not; I have the shop mainly for convenience as a dispensary. I never prescribe Beecham's Pills. I never saw one; I never saw a box broken. The statement made by the witness Thomson that I sold him Beecham's Pills is not true; I never was asked for them in my life. I never sold any pills as Beecham's. I cannot tell what sort of pills are in the boxes which have been produced to-day. I am not aware that any pills were ever sold in my surgery as Beecham's that were not made by him, or that pills were ever described as theirs which were not theirs. I never knew of any box of Beecham's Pills being broken up and sold in small quantities. My shopman had no authority from me to do any of these things; I consider he would have been acting wrongly if he did. I am not aware that there is any show card of Beecham's in my shop. . . . It is usual for chemists to get circulars and handbills from vendors of patent medicines. They are supplied with the intention of being circulated as advertisements, and I believe the shopman is in the habit of using them as wrapping-paper. . . . I am not in the way of serving in the shop myself. I am not aware of having served in the shop during November or December 1890, or at any time. It is not true that for a considerable time

past I have been in the habit in my shop of selling pills not manufactured by the complainers as Beecham's Pills or as Beecham's Patent Pills, or of describing pills sold at my shop as Beecham's Pills, or Beecham's Patent Pills which were really not Beecham's; if such a thing was done, it was without my authority or knowledge. I would not have allowed it if I had known. I never got pills made up so as to induce people to believe they were purchasing Beecham's Pills when they were not doing so."

William Craig, his assistant, deponed—
"We keep patent medicines in the surgery, and, amongst others, Beecham's Pills. They are kept in a glass case at the end of the counter. Beecham's Pills are not often asked for; perhaps once or twice a month, if that. The sales will not amount to more than two dozen boxes a year. When I entered respondent's service I was told there was the usual run of patent medicines in stock and to sell them as such only. I understand they should be sold in stamped boxes or stamped wrappers. It has never been my practice to break the stamps and sell the medicines in small quantities. I would not consider that lawful. I have been occasionally asked for small quantities of Beecham's Pills, and my answer always has been that we sell nothing less than a 9½d. box. . . . I have no recollection of wrapping any of the boxes produced in the portion of a bill, but I may have done so. These bills lie on the counter behind the glass case. They are used generally as wrapping paper, and they serve as advertisements. They were got from the complainers. There were other similar bills in the shop at the same time, amongst others bills of Warner's Safe Cure. I have no recollection of people calling at the surgery in December last and asking for Beecham's Pills and getting the boxes produced with white glazed pills in them. I have no recollection of ever seeing Mrs Harding before to-day. I do not remember serving Mr Dowse with a seidlitz powder and a boy coming in and asking for a pennyworth of Beecham's Pills, but I may have done so. If any person came in and asked for a pennyworth of Beecham's Pills I would tell them I had nothing less than 9½d. boxes. (Q) Invariably?—(A) Invariably."

The Lord Ordinary (KYLACHY) on 4th July 1891 pronounced the following interlocutor:—"Finds it proved that the respondent, or those for whom he is responsible, have sold in his surgery pills under the name of Beecham's Pills which were not of the complainers' manufacture: Before further answer, allows the respondent to state in a minute, if so advised, that he shall not hereafter sell pills under the name of Beecham's Pills which are not manufactured or supplied by the complainers or their agents: Finds the complainers entitled to expenses hitherto incurred, and remits the account thereof when lodged to the Auditor to tax and report: *Quoad ultra* continues the cause; and grants leave to reclaim.

"*Opinion.*—In this case of *Beecham v. Macgilvray* I think that pursuers have made out their case, and, although subject to the condition which I shall mention afterwards, I am disposed to think that it will not be necessary to pronounce an interdict.

"I see no reason to disbelieve the evidence of Mrs Harding and the other witnesses for the pursuers. I thought at the time, and I still think, that they were all speaking the truth. Nor do I see any reason to doubt their accuracy except that as regards the witness Thomson. I am disposed to believe that he was mistaken in stating that on the occasion to which he spoke he had been served by the respondent himself.

"It follows that I am not able to accept the general denial by which the respondent's assistant Mr Craig meets the whole story. I should be sorry to attribute to him wilful falsehood, but his failure to recollect any one of the occasions spoken to by the pursuers' witnesses, or to recognise any one of those witnesses as persons to whom he sold pills of any kind, can only, in my opinion, be explained on the assumption that the transactions of the kind complained of were so much a matter of course that they made no impression on his mind.

"This being so, I consider it proved that, not by mistake or accident, but in the ordinary course of business as conducted in the respondent's surgery, pills were sold as Beecham's Pills which were not Beecham's Pills at all. In other words, the complainers have, I think, proved their averment that prior to the raising of the action the respondent, or those for whom he is responsible, were in the habit of using the complainers' trade name to denote articles which were not made or supplied by the complainers.

"I cannot doubt that this is a legal wrong, and one for which in ordinary circumstances interdict ought to follow. The case is, I think, quite distinguishable from each of the two cases cited by the respondent—*Bass & Company v. Laidlaw*, May 22, 1886, 13 R. 898, and *Thomson & Company v. Robertson*, July 12, 1888, 15 R. 880. It appears to me that each of these cases was decided on its own facts, and can form no precedent for any other. In the first the sales complained of were (it must be assumed rightly) held to be accidents or mistakes. In the second the pursuers' witnesses were held to be unreliable. The present case, I think, much more closely resembles a recent case tried in the Court of Chancery before Mr Justice Vaughan Williams, and of which I was furnished with a report. In that case the complainers were the plaintiffs, and the question was as to a similar invasion of their trade mark, and after evidence of the same description as the evidence here, they obtained an injunction which the learned Judge granted without difficulty. I desire to say that I agree with every word of Mr Justice Vaughan Williams' judgment in that case.

"The Court is, however, always unwilling

ing to put a person in the position of the respondent under interdict unless it appears that no other remedy will suffice. And here, I think, there are grounds for taking a milder course. I see no reason to doubt the honesty of the respondent's disclaimer of any personal knowledge of the facts which I have held to be proved, and I think, moreover, that the pecuniary motives towards a repetition of the offence by those in his employment are so slight that the complainers have not much reason to apprehend that the practice of which they complain will be continued. I am therefore disposed to content myself in the meantime with a finding that the complainers have proved their case, and to allow the respondent to put in a minute, if so advised, that no pills shall hereafter be sold in his surgery under the name of Beecham's Pills which are not manufactured or provided by the complainers or their agents. If that minute is put in, I shall in respect of it find that further procedure is unnecessary, and dismiss the action, but the complainers must of course have their expenses."

The respondent reclaimed, and argued—
(1) The only evidence for the complainers was that of hired witnesses. That was not evidence which was favourably regarded in a court of justice. There was no evidence that any *bona fide* purchasers of Beecham's Pills had not got what they wanted. (2) Even if that evidence was believed, it did not show any systematic fraudulent dealing on the part of the reclamer entitling the complainers to interdict. The circumstances of this case were less favourable for the complainers than those in the cases of *Bass* and *Thomson*, referred to by the Lord Ordinary, in which interdict had been refused.

Counsel for the complainers were not called upon.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary, who took the proof, is very decidedly of opinion that the complainers have made out their case, and that the respondent by his assistant has been from time to time selling pills as Beecham's which were not Beecham's. It would require a very strong case to lead us to a different result. It was said by Mr M'Laren that the witnesses called for the complainers were witnesses hired to try and discover a fraud. That is perfectly true, but it is difficult to see how else such transactions as are here alleged could be detected. It is very difficult for manufacturers to find out if goods are being sold as theirs which are not, and when proprietors of a patent medicine, for example, hear a report that such is being done, I do not see how otherwise they can act than by getting persons whom they can trust to come before a Court and give the result of their own experience. I think we should adhere to the Lord Ordinary's judgment.

LORD YOUNG—The ground of complaint as set forth in the condescence is un-

doubtedly relevant. It is that the respondent "has been, and still is, in the habit of selling at his shop certain pills not manufactured by the complainers as Beecham's Pills," and then the particular occasions are referred to.

The Lord Ordinary is of opinion that it has been established in point of fact that the respondent did sell pills as Beecham's which were not, when asked for Beecham's, not by *bona fide* purchasers, but by persons sent for the purpose of catching him tripping. I understand your Lordships to be of opinion that the evidence reasonably supports that view, and I feel that it would require a very clear case to justify our reversing the judgment of the Lord Ordinary, before whom the evidence was taken. Accordingly I am not prepared to differ from the judgment proposed, but I own that if the Lord Ordinary had arrived at a different conclusion, I should have very much sympathised with him, for the evidence is evidence which is not favourably regarded even when it is resorted to for the purpose of catching a thief or a knave. It is evidence not favoured by juries, and I do not regard it with favour. I agree that there are cases of crime where it is quite legitimate to catch a thief by such evidence. The most familiar instance is perhaps that of a suspected thief in the post-office who is trapped by marked money being put into the letters with which he will have to deal. But I do not think there is anything here to suggest knavery or trickery in this case. I therefore sympathise with the remarks made at the bar by the counsel for the reclamer. There is no evidence of any *bona fide* purchaser of Beecham's Pills having been supplied with any other kind. It is a woman, who is sent about the country by quack vendors, to pick up children in the street to go into shops and ask for penny-worths of Beecham's Pills, whose evidence is relied upon. That is not evidence to be regarded with favour; on the contrary, it is to be regarded with very great disfavour. It is her evidence, combined with that of boys, upon whom the very name of Beecham would need to be impressed, with which the Lord Ordinary is satisfied. The case did not captivate me at all. I should have preferred that the Lord Ordinary had decided the case the other way, but, as I have said, I am not prepared to dissent from your Lordships.

LORD RUTHERFURD CLARK—I quite agree with the Lord Ordinary. I think that it is possible to arrive at only one opinion upon the evidence.

LORD TRAYNER—I agree with the Lord Ordinary, and with the grounds upon which he has based his judgment. I have great sympathy with Lord Young's strictures upon the character of the evidence adduced, but the Lord Ordinary, who saw the witnesses, was satisfied with them, and with the truthfulness of their evidence. I concur.

The Court adhered.

Counsel for Complainers and Respondents — Dickson — Macfarlane. Agents — Millar, Robson, & Innes, S.S.C.

Counsel for Respondent and Reclaimer—Jameson—M'Laren. Agents — Mackenzie, Innes, & Logan, W.S.

Thursday, October 15.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

JACK v. FLEMING AND OTHERS.

Reparation — Slander — Concurring in Slanderous Statement—Form of Issue.

In an action of damages for slander against several defenders, the pursuer proposed to take an issue on the question whether one of the defenders had "concurring in and adopted" a slanderous statement made by another defender. *Held* that the proper form of issue was to charge both defenders with having uttered the slander complained of, it being in the power of the jury, under such an issue, to hold that one of the defenders, though he had not uttered the slander in words, had by his conduct become a party thereto.

This was an action of damages for slander by Thomas Jack, twister, Crosslee Mills, Houston, against William Fleming, John Gourlay Harvey, and others.

The pursuer, *inter alia*, averred that he had for years been a member of the Houston Parish Church, of which the defenders were also members; that the defenders had conceived malice and ill-will towards him in connection with certain proceedings adopted by the congregation in 1890 in connection with the election of a minister to said church, and that in 1891 they seized upon the occasion of the pursuer's election to the eldership as a convenient opportunity of injuring his character, and deliberately and maliciously resolved to use every means in their power to prevent his ordination as an elder; that with that view they prepared and published in the parish a petition against his ordination, and canvassed the members of the congregation to get signatures thereto, making use of false and libellous insinuations against the pursuer to induce members of the congregation to sign. "Cond. 6.—"In particular, the defenders, William Fleming and John Gourlay Harvey, in their malicious endeavours to obtain signatures to the said petition, called upon Alexander Scott, gardener, Houston, at his house in Milligan Street there, on or about the 8th day of January 1891, for the purpose of securing his signature and the signature of his wife to the said petition. While there the said defender John Gourlay Harvey, in presence and hearing of the said Alexander Scott and of Mrs Elizabeth Burt or Scott, his wife, falsely, calumniously, maliciously, and without probable cause, stated

of and concerning the pursuer that pursuer had behaved most shamefully and disgracefully to that girl Dunlop, or did use words of like import, meaning thereby that the pursuer had been guilty of improper or immoral conduct towards a girl named Dunlop. The said charge was absolutely and entirely groundless. Further, the said defender William Fleming was then and there present, heard what the said defender John Gourlay Harvey said, and concurred with the latter in said slanderous statement regarding the pursuer, uttered in pursuance of their said malicious design."

On 26th June 1891 the Lord Ordinary (STORMONTH DARLING) appointed the following issues, *inter alia*, to be the issues for the trial of the cause—"(1) Whether, on or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defender John Gourlay Harvey, in presence and hearing of the said Alexander Scott, of Mrs Elizabeth Burt or Scott, his wife, and of the defender William Fleming, or one or more of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards that girl Dunlop at Barrochan Cross had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards Eliza Dunlop, residing at Barrochan Cross, or did use words of like import of and concerning the pursuer, to his loss, injury, and damage. (2) Whether, at the time and place above libelled, the defender William Fleming falsely and calumniously concurred in and adopted the said statement falsely and calumniously made by the defender John Gourlay Harvey of and concerning the pursuer, in presence and hearing of the parties named in the first issue, or one or more of them, to the loss, injury, and damage of the pursuer?"

The defenders reclaimed, and argued—The second issue should be disallowed. It was of an unprecedented form, and did not necessarily imply that the defender Fleming had been a party to the slander upon the pursuer.

The pursuer argued—The form of the issue would be changed if in the opinion of the Court it did not raise the question whether the defender Fleming had been a party to the slanderous statement made by the other defender. What the pursuer desired was to have that question put before the jury. It was submitted that that was done by the issue in its present form.

At advising—

LORD ADAM—In this case objection is taken to the second issue allowed by the Lord Ordinary, and I think it is altogether out of the question to allow an issue in the terms proposed, namely, whether the defender Fleming was guilty of slandering the pursuer by merely concurring in and adopting a statement made by another party. I agree with what was said by your Lordships during the discussion, that the issue must charge the defender with uttering the slander complained of in some way,