

cognitions I do not think that the reporters have any other or larger discretion which should entitle them to decide the question of *probabilis causa* with the aid of precognitions without the opposite party having the opportunity of seeing the precognitions and being heard on their effect.

LORDS KYLLACHY, STORMONTH DARLING, and LOW concurred.

The Court pronounced the following interlocutor:—" . . . of new remit as craved. . . ."

Counsel for the Applicant—MacRobert. Agent—W. H. Hamilton, S.S.C.

Counsel for the Objectors—Paton. Agents—Davidson & Macnaughton, S.S.C.

Friday, July 20.

SECOND DIVISION.

[Lord Dundas, Ordinary.]

THE DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* THE DUNLOP MOTOR COMPANY, LIMITED.

Trade Name—Personal Name—Infringement—Fraud—Deception—Personal Name already Associated with One Trade or Branch of Trade Applied by Persons of Same Name to Other Trade or Branch of Trade.

Robert Dunlop and John Fisher Dunlop, partners in a cycle and, to a limited extent, a motor repairing business in Kilmarnock, under the name of "R. & J. F. Dunlop," separated the motor and cycle branches of their business and formed of the former a company with a capital of £500, called the "Dunlop Motor Company Limited," of which they and a few friends and relatives were the shareholders. Under the memorandum and articles of association, which were very wide in their scope, they had power to deal in and manufacture, *inter alia*, motors and motoring "accessories." The company had neither the capital nor plant to manufacture motors, but had reasonable prospects of doing good business in repairs and "accessories." The Dunlop Pneumatic Tyre Company, Limited, famous as makers of the "Dunlop" tyre for cycles and motors, the patent for which had recently expired, but who also were makers of cycling and motoring "accessories" of every description, and who also had power under their memorandum and articles of association to manufacture motors, sought to interdict the Dunlop Motor Company, Limited, from carrying on the proposed business under that name or any name comprising the word "Dunlop." There was no evidence to show that the complainers had acquired a special right to the

name "Dunlop" in connection with accessories as they had with tyres, or that the respondents had been actuated by any fraudulent motive in the selection of their name, or that any members of the public had really been misled by the name.

The Court refused to grant interdict. *Per Lord Kyllachy*—"The law . . . has never yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been in addition to the mere use of that name some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another."

The Dunlop Pneumatic Tyre Company, Limited, having their registered office at 14 Regent Street, Glasgow, brought an action against the Dunlop Motor Company, Limited, having their registered office at 30 John Finnie Street, Kilmarnock, in which they sought to interdict the respondents "(1) from carrying on business under the style or title of 'The Dunlop Motor Company, Limited,' or under any other or similar style or title comprising the word 'Dunlop,' or any style or title calculated to deceive or mislead the public into the belief that the respondents' company is the same company as the complainers' company, or is in connection therewith, or that the business of the respondents' company is the same or in any way connected with the business of the complainers' company, and (2) from passing off or attempting to pass off the respondents' company's goods as and for the goods of the complainers' company, and also from issuing or publishing any catalogues, labels, circulars, show-cards, advertisements, or billheads, or from using any trade name comprising the word 'Dunlop' in connection with any goods not being goods manufactured or sold by the complainers' company. . . ."

They averred, *inter alia*—" (Stat. 1) The complainers are a limited company, incorporated on 6th May 1896. The objects for which the said company was established are, *inter alia*, as follows:—(a) To acquire and take over as a going concern the undertaking of the Pneumatic Tyre Company, Limited (incorporated in 1894), and all or any of the assets and liabilities of that company, and also certain patents, and with a view thereto to enter into and carry into effect, with or without modification, the three several agreements in the terms of the drafts referred to in clause 3 of the articles of association of this company.' (b) To carry on the business of manufacturers and of dealers in and letters to hire of pneumatic and all other tyres and wheels of cycles, bicycles, velocipedes, and carriages and vehicles of all kinds, and all machinery, implements, utensils, appliances, apparatus, and things capable of being used therewith, or in the manufacture, maintenance, and working thereof respectively, or in the construction of any track or surface adapted for the use of any

such tyres and wheels.' '(c) To carry on the business of manufacturers of, dealers in, and letters to hire of cycles, bicycles, tri-cycles, velocipedes, perambulators, bath-chairs, horse-carriages, motor or horseless carriages, and carriages and vehicles of every description, and all component parts thereof respectively, and also all apparatus and implements and things for use in sports or games' (Stat. 2) The patents known as the Dunlop patents, which were owned and worked by the complainers and their predecessors, caused an unprecedented development in the cycle, motor, and carriage industry, in which the complainers and their predecessors have taken a leading part. The complainers do a large business in every part of the United Kingdom, particularly in the manufacture and sale of tyres, pumps, inflators, and other parts and accessories for motors and cycles. They are also manufacturers of motor tyres and wheels and other motor accessories, such as rugs and motor clothing generally. (Stat. 3) In 1888 the word 'Dunlop' was first used by the predecessors in title of the complainers' company to designate the goods manufactured by them. Since that time the word has been in continuous commercial use as designating generally the goods manufactured by them. The complainers do a large business not only in the manufacture and sale of tyres but also in the manufacture of all accessories used in relation to motor cars and bicycles, and in numerous other goods, rubber and otherwise, used in and about motoring and cycling. These include tyres of all kinds, wheels for motor cars, valves, pumps or inflators for motors, repairing outfits for motor car tyres, indiarubber matting, waterproof clothing, and indiarubber goods of all kinds. All these goods are associated with the name 'Dunlop.' The word 'Dunlop' is stamped on all or most of them. In the case of tyres there is also impressed a bust of the inventor J. B. Dunlop, which forms the trade-mark. The name is associated by the public and in the cycle and motor industry with the complainers' company and their goods. It is of great value to the complainers, many prizes have been awarded for 'Dunlop' motor tyres, and they have repeatedly restrained its use by other companies and firms in the cycle and motor trade. The Dunlop Rubber Company, Limited, referred to in the answer, is a subsidiary company of the complainers, and is owned and controlled by them. (Stat. 4) The respondents are a limited company, incorporated on 1st July 1904. Their purposes as defined by their memorandum of association are, *inter alia*, as follows—'(1) To acquire the motor branch of the business of R. & J. F. Dunlop, cycle and motor merchants and manufacturers, Kilmarnock, and with that object to execute and carry into effect a minute of agreement between R. & J. F. Dunlop, cycle and motor merchants and manufacturers, Kilmarnock, and Robert Dunlop and John Fisher Dunlop, the individual partners of the firm, of the first part, and this company of the second part, a draft whereof has been approved by

the subscribers hereto.' '(2) To carry on the business of motor manufacturers' agents and dealers, and all or any other trades or businesses of any kind which can be conveniently carried on by the company in connection with such business or any part thereof, or the carrying on of which may, in the opinion of the directors, be likely to be beneficial to the company.' '(3) To manufacture, buy, sell, repair, convert, let on hire, or otherwise deal in motors, cycles, cars, carriages, carts, waggons, vans, and vehicles, and their component parts and accessories, and fittings and conveniences of all kinds which can be conveniently dealt in by the company, and to carry on any other businesses, whether manufacturing or otherwise, which can be conveniently carried on in connection with any of the company's objects.' The respondents carry on business in terms of these purposes, and deal, *inter alia*, in tyres, pumps, inflators, wheels, rugs, and other parts and accessories of cycles and motors. They are registered and carry on business under the style and title of the 'Dunlop Motor Company, Limited.' (Stat. 5) The adoption by the respondents of the style or title 'Dunlop Motor Company' is calculated to deceive the public into purchasing the goods of the respondents in the belief that such goods are the goods of the complainers' manufacture, or that the respondents and their goods are associated with the complainers' company. (Stat. 6) The complainers believe and aver that the respondents have adopted said style and title for the purpose of passing off their goods as and for the goods of the complainers, and for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired, and for the purpose of associating their business with the business of the complainers, and that they are so passing off their goods as goods of the complainers' manufacture. . . ."

They pleaded, *inter alia*—“(1) The adoption by the respondents in their business of the style or title of 'The Dunlop Motor Company, Limited,' being an infringement of the complainers' rights, interdict should be granted as craved. (2) The adoption of said style or title being calculated to deceive the public into purchasing the respondents' goods in the belief that such goods are the goods of the complainers, interdict ought to be granted as craved. (3) The respondents having adopted said style or title for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired, and for the purpose of associating their business with the business of the complainers, interdict ought to be granted as craved.”

The respondents in a statement of facts averred, *inter alia*—“(Stat. 1) The respondents' company was incorporated on 1st July 1904. As the respondents' memorandum of association bears, the respondents' company was formed and incorporated for the purpose, *inter alia*, of acquiring the motor branch of the business of R. & J. F. Dunlop, cycle and motor merchants, Kil-

marnock. (Stat. 2) Of the seven shareholders who form the respondents' company four of them are Mr Robert Dunlop, Mr John Fisher Dunlop, Mr Alexander Dunlop, and Mr David Dunlop. These four gentlemen are all engaged in the business of the respondents' company, and they hold among them four-fifths of the shares of the respondents' company. (Stat. 3) The name 'Dunlop' has been used by the respondents' predecessors (Messrs R. & J. F. Dunlop) for eight years in connection with the cycle and motor business carried on by them. That firm commenced business in 1897 in premises situated in Bank Place, Kilmarnock, and removed to their present premises at 39 John Finnie Street in November 1898, where the firm still continues to carry on the business so far as not acquired by the respondents' company. The respondents' predecessors have been engaged in the motor business (that is, in the dealing in complete motors, cycles, tricycles, and cars, and the repairing of these things) for seven years, and have during that time peaceably enjoyed the free use of the name 'Dunlop' under the firm name of R. & J. F. Dunlop. The partners of that firm were and still are the said Robert Dunlop and John Fisher Dunlop. (Stat. 4) The said Mr Robert Dunlop and Mr John Fisher Dunlop are the directors of the respondents' company. (Stat. 5) The respondents and their predecessors have become identified with the manufacture, sale, and repair of motors and motor vehicles, and the name is of great value to them in this respect. The respondents, as matter of fact, have never used any trade name comprising the word 'Dunlop' in connection with any goods manufactured or sold by them where that name has been applied to any like goods advertised as manufactured or sold by the complainers. (Stat. 6) The complainers have never dealt in or manufactured motors or motor cars complete, or the engines or bodies of such cars, or even repaired such cars. . . . (Stat. 10) The adoption of the name 'Dunlop' in connection with the respondents' company was in order to retain the goodwill of the business in connection with the manufacture, repair, and sale of motors, which their predecessors had built up during the seven years they had been engaged in the business, and also in order to preserve the name in connection with a new system of transmission gear for motors, which is believed and reported upon to be a very valuable one. This system is the invention of the said Mr John Fisher Dunlop, who, as already stated, was a partner of the respondents' predecessors, and is one of the two directors of the respondents' company. The complainers do not manufacture or deal in the principal part of the respondents' business, viz., the manufacture and sale and repair of motors of all descriptions, whether moving or stationary. The sale of tyres and accessories such as are dealt in by the complainers' company is only incidental to the business of motor manufacturers, and the respondents are

not limited to the complainers' goods for such accessories. . . ."

They pleaded, *inter alia*—"The complainers' averments are neither relevant nor sufficient to support the prayer of the note."

A proof was taken by the Lord Ordinary (DUNDAS), the result of which is indicated at length in his opinion and those of the Judges of the Second Division *infra*.

The material facts proved were that the complainers were chiefly known to the public as manufacturers of the famous "Dunlop" tyres for bicycles and motors, the patent for which had recently expired; that under their memorandum and articles of association they had the widest powers of manufacturing everything connected with motors and motors themselves; that they had never manufactured motors, but did a considerable trade in motoring accessories such as wheels, pumps, valves, &c., for none of which, however, had they established an exclusive right to the name of "Dunlop." The respondents on the other hand had not sufficient plant or capital to manufacture motors, but had good prospects of establishing a business in repairing motors, selling motors on commission, and in particular selling all kinds of motoring accessories. There was no suggestion in the proof that they had ever represented that goods of their manufacture were goods manufactured by the complainers, and no proof that their motive in choosing the name of their company had been to obtain a fraudulent advantage from the reputation of the complainers. There was also practically no evidence that any member of the public had been misled by the name.

On August 1, 1905, the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Finds that the adoption by the respondents in their business of the style or title of 'The Dunlop Motor Company, Limited' is an infringement of the complainers' rights, and that such adoption is calculated to deceive the public into purchasing the respondents' goods in the belief that such goods are the goods of the complainers, and into confounding the respondents' business with that of the complainers: Therefore interdicts, prohibits, and discharges the respondents, their servants and agents, from carrying on business under the style or title of 'The Dunlop Motor Company, Limited,' or under any style or title calculated to deceive or mislead the public into the belief that the respondents' company is the same company as the complainers' company, or is in connection therewith, or that the business of the respondents' company is the same as, or in any way connected with, the business of the complainers' company, and from passing off or attempting to pass off the respondents' company's goods as and for the goods of the complainers' company: *Quoad ultra* refuses the prayer of the note . . . and decerns."

"*Opinion.*—In this case interdict is sought by the Dunlop Pneumatic Tyre Company, Limited, against the Dunlop

Motor Company, Limited. The complainer company was incorporated in 1896. Its memorandum and articles of association are No. 43 of process, and the objects of its formation are, sufficiently for the purposes of the case, summarised in Statement I. The complainers aver (Statement III) that 'in 1888 the word "Dunlop" was first used by the predecessors in title of the complainers' company to designate the goods manufactured by them. Since that time the word has been in continuous commercial use as designating generally the goods manufactured by them. The complainers do a large business not only in the manufacture and sale of tyres but also in the manufacture of all accessories used in relation to motor cars and bicycles, and in numerous other goods, rubber and otherwise, used in and about motoring and cycling.' They enumerate certain classes of goods which they say are associated with the name 'Dunlop,' and add that 'the name is associated by the public and in the cycle and motor industry with the complainers' company and their goods.' The respondent company was incorporated on 1st July 1904. Its memorandum and articles of association form No. 28 of process, and the objects of its formation are, sufficiently for present purposes, recited in Statement IV. The company's registered title is 'The Dunlop Motor Company, Limited.' In Statement VI the complainers 'believe and aver that the respondents have adopted said style and title for the purpose of passing off their goods as and for the goods of the complainers, and for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired, and for the purpose of associating their business with the business of the complainers, and that they are so passing off their goods as goods of the complainers' manufacture,' and interdict is craved accordingly.

"Before proceeding to consider the contents of the proof it will I think tend to clearness if I endeavour in the first place to summarise what I believe to be the legal principles and rules applicable to such cases as the present, and then, when that has been done, to apply the law to the facts which have been proved. The fundamental principle underlying the whole matter is 'that nobody has any right to represent his goods as the goods of somebody else'—(*per* Lord Halsbury, L.C., in *Reddaway*, 1896, A.C. 199-204, followed by Lord Alverstone, M.R., in *Valentine Meat Juice Company*, 1900, 17 R.P.C. 673-679. See also *per* Lord Langdale, M.R., in *Croft*, 1843, 7 Beav. 84). It has been deduced as a corollary from this that if a complainer can show that a name—whether his own or a fancy name or other name—has become identified by the public user with his goods in the market, and that it is being used by another under such circumstances or in such manner as to suggest that the goods which that other is selling are in fact the goods of the complainer, the latter will be entitled to interdict, the Court protecting him against

any attempt to trade on or take benefit from the reputation which he has built up for himself—*Valentine Meat Juice Company* (*sup. cit.*); *Reddaway* (*sup. cit.*). But in order to obtain relief it is not, as I understand, necessary for the complainer to prove that the respondent is trading in specific articles in which he also deals; it may be enough if the result of the respondent's use of the name, which has acquired a secondary signification in the trade in connection with the complainer's business and his goods, is such as would in the ordinary course of human affairs be likely to result in the confounding of the respondent's business with that of the complainer, or the belief that the one is connected with the other. And it has been decided that this rule will apply to cases where the general character of the business carried on by the respondent is not identical with but materially different from that of the complainer. Thus in *Eastman Photographic Materials Company, Limited*, 1898, 15 R.P.C. 105, the plaintiffs obtained an injunction restraining a cycle company from using in its cycle business the name 'Kodak,' which had become identified in the market with the complainers' photographic business. In *Dunlop Pneumatic Tyre Company, Limited v. Dunlop Lubricant Company*, 1898, 16 R.P.C. 12, the present complainers successfully restrained the defendant company from using the name 'Dunlop,' in spite of the fact that they (the plaintiff company) did not in fact sell oil or lubricants, though they had power under their constitution to do so. I may refer also on this matter to *Valentine Meat Juice Company, sup. cit.*, especially p. 682; *Eno v. Dunn*, 15 A.C. 252 (a trade-mark case); *Dunlop Pneumatic Tyre Company, Limited v. Dunlop-Truffault Cycle and Tube Manufacturing Company, Limited*, 1896, 12 T.L.R. 434. It has further, I think, been settled that it is no conclusive answer upon the part of a respondent to say, and say truly, that the name he is using is his own name; and that case does not differ in principle from those where another—perhaps a fancy—name is in dispute. Thus, in *Valentine Meat Juice Company* the then Master of the Rolls, in dealing with the rights of parties where the name of an individual is being used, observes (17 R.P.C., at p. 680), that 'although it is of course more abundantly necessary in that case that it should be clearly established that the name has come to designate in the market the plaintiff's goods, when that is established I do not think there is any difference between the rule of the law that ought to be applied or the remedy that ought to be granted where such a right has been infringed.' In *Reddaway* Lord Herschell (1896, A.C., at p. 211) quotes with approval the language of James, L.J., in *Massam v. Thorley's Cattle Food Company*, 14 Ch. Div. 748, where his Lordship said—'*Burgess v. Burgess* (3 D. M. and G. 896) has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article,

whatever may be the consequences of it, or whatever may be the motive for doing it, or whatever may be the result of it.'—(See also the recent case of *Abel Morral, Limited*, 1903, 20 R. P. C. 429, affirming 19 R. P. C. 557). Lastly, it has been laid down that in order to a complainer obtaining interdict it is not necessary to prove a fraudulent intention on the part of the respondent—*Cellular Clothing Company*, 1899, A.C. 326, Lord Chancellor, 334, 335. Fact rather than intention must be regarded, and it is sufficient for the complainer if he can show that the result of the respondent's actings or projected actings does, or may be reasonably expected to, result in a confusion between his goods and those of the complainer, or in a supposed connection between the respondent's business and that of the complainer, owing to the manner in which the respondent is using a name to which the complainer has succeeded in attaching a secondary signification in the trade, as indicating his goods or his business. The modes, honest or dishonest, by which such results may be achieved or sought to be achieved are of course manifold—as witnessed by the number and variety of reported cases, especially in England—but the general principles or rules of law applicable to cases like the present are, I conceive, those which I have endeavoured to sketch in outline.

"Coming now to the facts, I am of opinion, in the first place, that the complainer company has fully established that it has succeeded in impressing upon the word 'Dunlop,' as known and used in the cycle and motor industry, a secondary and well-recognised meaning, as being identified with that company and its goods. No doubt the chief item of the company's business is tyres, but it also makes and sells under the name 'Dunlop' many other things accessory to the motor as well as to the cycle trade, as described by the manager Mr Baisley, and in this it has had the assistance of the Dunlop Rubber Company, and other companies subsidiary to and entirely constituted by the parent Company. The complainers have expended enormous sums in advertising in the name of 'Dunlop,' and I do not doubt that that name is an asset of the highest value to them—all the more so because the Dunlop patents are all now expired. Upon this first point therefore I am in favour of the complainers.

"In order to a proper understanding of the remaining matters it is necessary to give a succinct account of the circumstances which preceded and attended the formation of the respondent company. In 1898 two brothers, Robert and John Fisher Dunlop, entered into partnership under the firm of R. & J. F. Dunlop. Their office was, and is, at 39 John Finnie Street, Kilmarnock. Their business was that of cycle agents and cycle repairers, and to some extent cycle manufacturers, and they also sold tyres, tubes, and other accessories of the cycle trade. They had also a motor tricycle, and did something in the way of repairing motor cycles, and occasionally motor cars, but they did not make or sell motor cars.

On 1st July 1904 'The Dunlop Motor Company, Limited,' was incorporated. Its memorandum and articles of association are No. 28 of process. The capital of the company was 500 shares of £1 each. The principal shareholders are the two Messrs Dunlop, already referred to, and the others are their brother Alexander, a builder, their brother David, a mechanic, their aunt Mrs Fisher, the Rev. W. S. Reid, and their solicitor, Mr Barnett. The directors of the company are Mr Robert Dunlop and Mr John Fisher Dunlop. Its office is 39 John Finnie Street, Kilmarnock. The primary objects of the company were to acquire the motor branch of the business of R. & J. F. Dunlop, in terms of an agreement, and, shortly put, to carry on the business of motor manufacturers, agents, and dealers. By the said agreement, which is a somewhat strange document, the partners of the firm agreed to sell to the company the motor branch of the said business, including goodwill and whole property belonging to it, its motor machinery and plant, fittings, utensils, and stock-in-trade, as per inventory annexed, and also the sum of £150 in cash. The 'price' was to be £500, payable by the allotment 'to the first parties and their under-mentioned nominees' of 500 shares in the company, 'which shares shall be deemed for all purposes to be fully paid up' in the proportions stated in the agreement. An advertisement, conceived in terms of preposterous exaggeration, which was drawn up by the Messrs Dunlop without the advice or knowledge of their solicitor, was published immediately after the formation of the limited company. I refrain from further comment upon this document. Now the professed objects for the attainment of which this technical severance of the motor branch of the business of Messrs R. & J. F. Dunlop was effected by the creation of The Dunlop Motor Company, Limited, were three in number, viz., (a) to obtain fresh capital; (b) to obtain adequate premises for the motor business; and (c) to exploit an invention by Mr J. F. Dunlop in relation to transmission gear for motors. But the strange thing is that no one of these objects has to any material extent been achieved. (a) The amount of 'fresh capital' obtained was no more than £150. It appears by the way that the Rev. Mr Reid failed to pay his £50, and Messrs R. & J. F. Dunlop had to find that money for the company. (b) The only working premises of this company are certain subjects in Kilmarnock, which are held upon a verbal sub-let of a lease which had but four years to run, and upon such premises it would be manifestly absurd to lay down extensive plant and appliances. (c) The invention was not in fact assigned to the company, and it appears now to be of doubtful value. The brothers Dunlop explain that they desired to start the limited company upon a modest scale, but that they had it in view if all went well to increase their capital as they had taken power to do under the constitution of the company by the aid of friends. The whole history of the company is of a

nebulous and unsubstantial quality. It is not at present in a position to manufacture one motor car, and has not attempted to do so. The business it carries on is scarcely if at all different from the old sort of business done by the firm before the creation of the company. I am bound to say that the impression left upon my mind is that there must or at least may have been objects in view other than those which have been stated as inducing the inception of the company, and there are traces in the evidence that there was at all events an idea that it was destined to fall into the hands and under the control of outside 'friends' of one sort or another. The impression to which I have alluded is not lessened by the fact that a company named the Dunlop Maritime Motor Company, Limited, has still more recently been floated by the Messrs Dunlop and certain nominees nearly but not precisely identical with those who make up the registered members of the Dunlop Motor Company, Limited—that the Dunlop Maritime Motor Company, Limited, has a capital of £1000, not paid up, and that no very substantial reason so far as I gather has been stated for its existence. But I do not desire to pursue this topic further, because, as I have already pointed out, the case can be decided, if the grounds upon which I proceed are well founded, apart from any considerations as to *bona fides*, or the reverse, upon the part of the Dunlops.

"The respondents deny that the complainers have succeeded in establishing that the name 'Dunlop' has acquired any special or exclusive significance in connection with their goods or business; and upon this point, as I have already stated, I am against them; but they further maintain that even if such a signification had been proved to exist as regards the complainers' tyres, no interdict should pass against the respondents, because, as they allege, their business is a motor business proper and not a business principally dealing with tyres, and the classes of customers to which the parties respectively appeal are quite separate and distinct. A rough comparison of Nos. 43 and 28 of process shows that, as regards the powers taken by the two companies there is no very striking or substantial difference, but that, in the case of the complainers' company tyres are put in the forefront and motor business proper rather in the background, while in the respondents' constitution the position is practically reversed. The more important comparison, however, is between the things actually done by the companies respectively. The complainers, as already pointed out, have many branches of business besides the matter of tyres. The respondents on the other hand, despite their title, cannot truly be described as a motor manufacturing company—they have neither money, plant, nor premises to enable them to make a single car—and they do at present deal in certain classes of goods and carry on certain lines of business in common with the complainers.

In my opinion the titles of the two companies bear such a similarity to one another that the one would 'in the ordinary course of human affairs' be 'likely to be confounded with the other'—(see *per James, L.J.*, in *Hendriks*, 17 Ch. Div. 638, 645). I think that the general character of the businesses is not less similar but much more similar than was the case in several of the decisions to which I have already referred upon this point. But the respondents further argued that they were entitled to use the word 'Dunlop' in the name or title of their limited company because it is in fact their own name. I have already dealt generally with the law upon this matter. I think that if they had chosen to call their new company 'The R. & J. F. Dunlop Motor Company, Limited,' they would probably have been entitled to do so, because the company's name would then have been practically the same as that of the firm under which they had for years previously been in use to trade—(see *Tus-saud*, 44 Ch. Div. 678, *per Stirling, J.*, 687-8; *Burgess*, 3 D. M. & G. 896; *Turton*, 42 Ch. Div. 128). It is not easy to see why, if the respondents really desire to avoid all possible confusion with the complainers' goods, they should not be willing to use the other name. But they have declined to do so, and I think that 'The Dunlop Motor Company, Limited,' is a name to which the complainers are entitled to object.

"For these reasons I shall grant interdict substantially in the terms craved in the prayer of the note, and find the complainers entitled to expenses."

The respondents reclaimed, and argued—The respondents' business was different from the complainers, the former being a motor and motoring "accessories" and the latter a tyre business. It was true the complainers manufactured "accessories," but the name of "Dunlop" had not become associated with these. The name used by the respondents was their own name and not some special trade name acquired by the complainers. Accordingly on both of these grounds it was well settled law that the complainers could only be successful in obtaining interdict if they proved, which they had failed to do, that the respondents' object in adopting the name they had adopted was to obtain a fraudulent advantage from the complainers' name by passing off goods manufactured by them as goods of the complainers—*Burgess v. Burgess*, 1853, 3 D. M. & G. 896; *Eastman Photographic Materials Company, Limited, and Another v. John Griffiths Cycle Corporation, Limited, and Another*, 1898, 15 R.P.C. 105; *Eno v. Dunn*, 1890, 15 A.C. 252; *Dunlop Pneumatic Tyre Company, Limited, v. Dunlop-Treffault Cycle and Tube Manufacturing Company, Limited*, 1896, 12 T.L.R. 434; *Lucas, Limited, v. Fabry Automobile Company, Limited*, 1906, 23 R.P.C. 33; *Massam v. Thorley's Cattle Food Company*, 14 Ch. Div. 748; *Jamieson & Company v. Jamieson*, 1898, 15 R.P.C. 109, at 181; *Cellular Clothing Company, Limited v. Maxton & Murray*, April 27, 1899, 1 F. (H.L.) 29, 36

S.L.R. 605 (1899), A.C. 326. Further, in trade-name cases the onus of proving fraud lay upon the complainers, and this onus they had entirely failed to discharge. It was also noticeable that no evidence of any material importance had been adduced to prove that the public had been deceived, and the Court would not readily grant interdict *ab ante*.

Argued for the complainers—Their business was not confined to tyres, but extended to all classes of cycling and motoring accessories, the very things which would be dealt in by the respondents. With regard to these accessories, the word “Dunlop” had already attained a special meaning, viz., manufactured by the complainers, and they had therefore already acquired an exclusive right in connection with such accessories to that name, extending not only to such accessories as they were already manufacturing, but to those of a similar class which they might in the future manufacture under the powers contained in their memorandum and articles of association. The only question accordingly was—Was it likely that the public would be deceived?—*Brinsmead & Sons v. Brinsmead & Sons*, 1896, 13 T.L.R. 3; *Abel Morrall, Limited v. T. Hessin & Company*, 1903, 20 R.P.C. 429. It was unnecessary to prove that they actually had been deceived—*Bayer v. Baird*, July 12, 1898, 25 R. 1142, 35 S.L.R. 913; *Eno, cit. sup.*; *Singer Manufacturing Company v. Kimball & Morton*, January 14, 1873, 11 Macph. 267, 10 S.L.R. 173. It was not necessary to prove fraud—*Singer Machine Manufacturing Company v. Wilson*, 3 A.C. 376; *Cellular Clothing Company, Limited v. Maxton & Murray, cit. supra*; but fraud was sufficiently proved by the fact that the respondents really had no business, and had only floated the company on the chance of selling it at a profit at some future period on the strength of its famous name. Interdict would be granted even against a person using his own name if the public would be deceived thereby—*Valentine Meat Juice Company v. Valentine Extract Company, Limited, and Others*, 1900, 17 R.P.C. 673.

LORD KYLLACHY—The complainers' leading proposition and the leading proposition also of the Lord Ordinary's judgment appears to be this—that the adoption by the respondents as their trade designation of the name of the “Dunlop Motor Company” was, as against the complainers, a legal wrong, being so as calculated to deceive the public into the belief that the goods sold by the respondents were the goods of the complainers' company. That is, I apprehend, the theory of the interdict which the Lord Ordinary has granted—an interdict which, it will be observed, strikes generally against the respondents “carrying on business” under the name in question, and which assumes—if it does not indeed express—that the complainers have in some way acquired the exclusive right to the use of the name “Dunlop,” not only with respect to goods in which they themselves deal, but with respect (if not to all goods) at all events to all goods which are within the scope of the respon-

dents' business, including of course particularly the class of goods denoted by their (the respondents') trade name, viz., motor vehicles. It is not, I apprehend, doubtful that the interdict under review would strike at the manufacture, sale, hire, or repair by the respondents' company of such vehicles; and perhaps therefore it may be convenient to take as the first question in the case whether, assuming (for the sake of clearness) that the respondents were to confine their business strictly within the department of motor vehicles, they would by using their company name in connection with it commit a legal wrong as against the complainers.

Now the broad fact which confronts the complainers is of course this—that they, the complainers, do not deal or profess to deal in motor cars or other vehicles; and have therefore, *prima facie* at least, no interest in the name or names by which that business is carried on by others. How, it falls to be asked, do the complainers propose to get over that difficulty?

To begin with, they do not now contend—although at first they seemed by implication to do so—that they have an exclusive right to the use of the name Dunlop in connection with all departments of commerce. In other words, they do not now suggest that because they have made, as they say, the name Dunlop famous in connection, for instance, with pneumatic tyres, they have thereby acquired the exclusive use of the name in connection with (to put extreme cases) the manufacture or sale, say, of steam engines or railway waggons, or golf clubs or golf balls, or other articles in which they have never dealt.

Neither, again, was it, ultimately at least, contended that they have acquired such a right with respect to all articles in which by their memorandum of association they are empowered to deal. As is not uncommon, the complainers' memorandum of association (aiming of course at giving the company as far as possible all the powers of an individual trader) covers a great variety of possible businesses and departments of industry. It is printed in the appendix; and apart from pneumatic tyres it covers, *inter alia*, the manufacture of “cycles, bicycles, tricycles, velocipedes, perambulators, bath chairs, horse carriages, motor or horseless carriages, and carriages and vehicles of every description, and all component parts thereof respectively, and also all apparatus and implements and things for use in sports or games.” But it is of course obvious that the possession by an incorporated company of even unlimited powers of extending its business cannot at best put it in a better position than that of an individual trader, who has such powers always and as a matter of course. And if, as is not disputed, an individual trader can only acquire an exclusive right to the use of a trade name in connection with classes of goods in which he actually deals, it seems too plain for argument that the appellants' company cannot in this matter be in a different position.

Accordingly the complainers did not, as I have said, ultimately contend that if they have not a case founded on the nature and scope of their actual business, they have or can have a case founded on the terms of their memorandum of association. But what (dealing still with the question as one relating only to motor vehicles) they did contend was this, that although they never did and do not now deal in motor vehicles, or in fact in vehicles of any kind, they yet deal in certain things which are or may be parts or accessories of such vehicles, viz., pneumatic tyres, pumps, waterproof aprons, and other furnishings. These things they say are so "akin" to motor vehicles that the selling of motor vehicles by a company bearing the name of "Dunlop" would be apt to produce what they call "confusion"—people (of whom they produce specimens) being as they say apt to conclude that a company calling itself the "Dunlop Motor Company" is some new branch of the complainers' business—some branch belonging to them or with which they are in some way connected.

Now, although I listened to it I hope with all attention, I find it difficult to treat quite seriously an argument of this kind. I do not at all doubt that there are people capable of drawing such extreme and fanciful inferences, and that there are other people capable of persuading themselves that they would or might draw them, and of going into the witness-box and so deponing. I have more than once had occasion to express my opinion upon the value of that class of evidence, and also upon the abundance of it which seems always available. But the question really is, whether the average citizen of Kilmarnock, or perhaps rather such average citizen proposing to purchase or hire a motor car, would be likely to be deceived or even confused in the way supposed. As to that, all I can say is, that given the supposed conditions I do not hold it proved, and do not believe, that anything of the kind could happen. It would, it seems to me, be just as feasible for the respondents to contend as against the complainers that the latter were not entitled to set up under their (the complainers') company name an establishment say in Ayr for the sale of pneumatic tyres, because the respondents had for some years carried on in Kilmarnock under their company name an establishment for the sale of motor cars. So far as I can see, there would just be as much risk of the so-called "confusion" in the one case as in the other.

On the question, therefore, which is the main question in the case, and probably also the only question of much importance to either party—I mean the question as to the respondents' right to continue under their company name the business which that name denotes—I am of opinion that the complainers' case fails, and that they are not therefore entitled to retain the interdict which they hold. I have said that the motor business is for both parties the really important matter. And I say so for this reason. I gathered at the discus-

sion, and indeed it was, I think, avowed, that the complainers' real apprehension is that the respondents, if their motor business extends and prospers, and they obtain the command of capital, may bye-and-bye be in a position to acquire or claim an exclusive right to the use of the name "Dunlop" in connection with motor vehicles, and may thus be in a position to forestall the complainers when at some future time they may desire to take up that business. I do not say whether or not that is possible. But if it did happen the result would, on the principles for which the complainers in this case contend, be, in my opinion, entirely just.

It remains, however, to consider whether the complainers have any right to protection against the respondents' use of the name "Dunlop" in connection with the sale of articles—pneumatic tyres, &c., and the like—in which the complainers actually deal. And it is no doubt true that to some extent both parties appear to deal in tyres and other accessories of motor vehicles, the complainers doing so as they did during the subsistence of the Dunlop patents, and the respondents doing so as they did from 1898 to 1904, when they dealt both in cycles and motors under the name of R. & J. F. Dunlop. As to this, however, it has in the first place to be kept in mind (at least as regards tyres, the articles mainly in question) that tyres, whether pneumatic or solid, are always or almost always what are called proprietary goods—goods, that is to say, sold under the name of the makers or patentees, and as a rule stamped with a trade-mark, or at least with some name or device. There are, for example, as most of us know, "Dunlop Tyres," "Continental Tyres," "Clincher Tyres," and several others. And in selling such goods or their accessories the name of the actual seller is in general quite unimportant. In other words, the conditions of the tyre trade sufficiently exclude the idea of misrepresentation or personation, or passing off the goods of one trader as the goods of another.

Further, and in the next place, even if that were otherwise, it would be quite impossible to grant the complainers an interdict against the respondents selling, for example, "Dunlop tyres," or even Dunlop tyres made or put on the market by the respondents themselves. For up to 1902, when the complainers' patent expired, the name "Dunlop tyres" was the proper and usual name of certain patented articles—articles which, so soon as the patents expired, might be made by anybody and sold under their proper and usual name. In point of fact the reclaimers do not—so far as appears—make such articles, but supposing they did so, the complainers at least would have no title to complain of their doing so, or even, I apprehend, to inquire whether in doing so they strictly followed the patent specifications or departed from them to a greater or less extent.

Finally, and this is an observation which applies to all the minor accessories in which

both parties (the respondents mainly in connection with their repairing business) to a certain extent deal. The complainers have not proved that they any more than the respondents have acquired an exclusive right in connection with the sale of those articles to the use of the name Dunlop. Nor have they proved that the name in question has any special reputation or special value in connection with such articles. In point of fact the articles in question are, as appears from the list of the respondents' sales, articles of a quite common description which are sold by everybody in the trade and as to which the name of the seller is so far as appears unimportant. Certainly no materials exist in the evidence for any limited interdict directed exclusively to this not very important matter.

So far it will be observed I have considered the case apart from the special consideration that the respondents here are using as the name of their company the name of its founders and leading shareholders, that is to say, a name which would have been proper and natural for them to give to their company although the complainers' company was not in existence. It is, however, manifest that this is an element which makes the complainers' case *a fortiori* difficult—difficult, that is to say, even if contrary to the fact it were assumed that their (the complainers') business included the making or selling of motor carriages, or that the complainers' business was thus or otherwise in competition with the respondents' business. For with respect to the element referred to two observations occur and are I think justified.

The one is that, far as the law may have gone in its justifiable anxiety to prevent imposition upon the unwary purchaser, and content as it has sometimes been to pursue that object at the expense of encouraging the acquisition of virtual monopolies by traders and companies prepared to spend largely in systematic advertising and litigation, it has never as yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been, in addition to the use of that name, some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another. The authorities—beginning with the case of *Burgess* and other cases not yet overruled—appear to me to make that proposition fairly clear. I myself so held after full consideration in the case of *Dewar*, 7 S.L.T. 462—a case which was not carried further, and if the case of *Valentine*, 17 P.C. App. 673, or the opinions there expressed should be held—which I greatly doubt—to affirm or imply any broader proposition, all I can say is that, with the greatest respect, I am unable to agree with that judgment.

That is an observation as to the law. The other observation is as to the fact, and it is this, that with great respect I am not myself able to accept the Lord Ordinary's

strictures upon what he terms the inception of the respondents' company. It appears to me that in starting their company—in assigning to it the motor part of their former business, and in giving to it the name they did—the respondents did nothing which would not have been quite natural, and entirely in common course, although they had never heard of the complainers' company, or although that company had never existed. Their capital may have been small—their ambitions may have been disproportionate to their existing resources—they may have had exaggerated views of their position, and issued, I am afraid like other people, some exaggerated advertisements; but I see no sufficient grounds for imputing to them fraudulent conduct, or for holding that they have done anything injurious to the complainers or in excess of their legal rights. They may, as the Lord Ordinary plainly suspects, have had in view that once started they might, following the complainers' example, extend their business, obtain the command of capital, and associate their name with the motor industry, as the complainers have associated theirs with the manufacture of pneumatic tyres. But how the complainers, who do not deal in motors should have right to complain of that I fail to see. Nor can I imagine what right the complainers had to pry into their (the respondents') whole financial position and to subject them on that subject to a prolonged and, if I am right, quite irrelevant cross-examination.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled and that the interdict should be refused.

LORD STORMONTH DARLING—If the decision of this case depended to any material extent on the motives of the brothers Dunlop in getting up the respondent company and calling it the Dunlop Motor Company, Limited, I should be slow to differ from the Lord Ordinary on what is after all an inference of fact, or more properly perhaps an impression, from the conduct of witnesses whom he saw and heard. But the Lord Ordinary really decides the case on a view of the law which is independent of all questions of good faith. His view comes to this, that where one trader has acquired for his goods a reputation under a certain name, he is entitled to prevent another trader in all time coming from using that or any similar name for selling goods of a similar class provided a certain number of members of the public say in the witness-box that there is a risk of confusion between the names, so as to lead to the goods of the trader complained against being probably mistaken for the goods of the trader complaining. I cannot assent to a doctrine so wide and sweeping, which seems to me to convert what is intended to be a protection of the public against "passing-off" into an illegitimate monopoly. When witnesses come forward and speak of the risk of confusion, I think they must make sure that the risk does not arise from their own carelessness

and inattention. Here there is no instance of any single article being actually sold by the respondent company under the belief that it was made by the complaining company, or of any person being actually misled. The one business is a large one, concerned mainly with tyres. The other business is a small one, connected, in so far as it is not merely embryonic, mainly with the making and repairing of motor-cars. And the one point where the risk of confusion is said to come in is the use of "Dunlop" in the name of both. The Lord Ordinary concedes that if the respondents had called their new company the R. & J. F. Dunlop Motor Company, Limited, they "would probably have been entitled to do so, because the company's name would have been practically the same as that of the firm under which they had for years previously been in" use to trade. And it is because they have declined to do so that his Lordship thinks the complainers entitled to object to their carrying on business at all on the ground that it may lead to possible confusion. But I take leave to doubt whether the unobservant people who jumped to the conclusion that because they saw the name "Dunlop Motor Company" over a door in Kilmarnock, the Dunlop Pneumatic Tyre Company had opened a branch in that town, would have been less apt to confound the two businesses by the mere insertion of the letters "R. & J. F." I am disposed to think that the confusion was subjective and not objective.

I therefore agree with Lord Kyllachy, and, I understand, the rest of your Lordships, that the respondents, in incorporating their own surname into the title of their new company, committed no legal wrong against the complainers, and that the note must be refused.

LORD LOW—The complainers are the Dunlop Pneumatic Tyre Company, Limited, and they seek to interdict the respondents, the Dunlop Motor Company, Limited, from carrying on business under that name, and from passing off their goods as and for the goods of the complainers' company.

The chief article sold by the complainers is the well-known pneumatic tyre, which was first invented and patented by a gentleman of the name of Dunlop. The complainers subsequently acquired other patents relating to pneumatic tyres, and no one disputes that the tyres which they made under these patents were generally known as "Dunlop" tyres.

The patents have now expired, although I understand only a few years ago, and I suppose that anyone could now make tyres of the Dunlop type. It is not necessary to consider whether a person doing so would be entitled to sell them as "Dunlop" tyres, because it is not suggested that there is the least risk, or indeed possibility, of the respondents manufacturing tyres, or passing off as "Dunlop" tyres, tyres of a different type.

The complainers, however, also do a large business in what they call accessories to the motor and cycle trade, namely, such

articles as tyre pumps, wheels, rims, valves, clothing, rugs, repairing outfits, and the like. They aver that "all these articles are associated with the name of Dunlop," and "that the name is associated by the public, and in the cycle and motor industry, with the complainers' company and their goods." They also aver that the adoption by the respondents of the name "Dunlop Motor Company" is calculated to deceive the public into purchasing the goods of the respondents in the belief that such goods are goods of the complainers' manufacture."

The Dunlop Motor Company was got up by two brothers, Robert Dunlop and John Fisher Dunlop, who for some years had carried on a cycle shop in Kilmarnock under the partnership name of R. & J. F. Dunlop. They also did a little in the way of repairing motors, and they appear to have got an agency for the sale of a motor tricycle, which, however, did not lead to much if any business. In 1904 they resolved to separate their motor business from their cycle business, and accordingly they formed the Dunlop Motor Company. It is a small company, the capital being only £500 in 500 shares of £1 each. The principal shareholders are the brothers Dunlop, the others being two brothers and an aunt, their law-agent, and a friend. There is not the least chance, I imagine, that the company will ever make a motor car, as they have neither the capital nor the machinery to enable them to do so, but I see no reason why they should not get together a fair local business in the way of repairing motors, and they may also make something by selling motors on commission. So far I do not think that the complainers can object, because they neither make nor sell nor repair motors, and it is of no moment, in my judgment, that they have power in their memorandum of association to engage in the motor business.

There remain the accessories to the motor trade. What the complainers seek, and what the Lord Ordinary has granted, is interdict against the respondents selling anything which can be regarded as an accessory to a motor vehicle, so long at all events as they carry on business as the "Dunlop Motor Company." The complainers' case is that such articles of their manufacture are known to the public as "Dunlop"—for example, a "Dunlop" tyre pump or a "Dunlop" repairing outfit—and they allege that persons seeing the name "Dunlop Motor Company" upon the respondents' premises would assume that that company was a branch of their (the complainers') business and would buy articles from the respondents—such as a tyre pump or a repairing outfit—under the belief that they were getting articles manufactured by the complainers.

Even assuming (what I think doubtful) that the complainers could acquire such a right as they claim in regard to articles of the kind which I have described, and which are in no way specialities of their business, but are made by a number of wholesale firms, I am of opinion that their

case fails upon the facts. As I have said, there is no dispute that the tyres made by the complainers under their patents were known as "Dunlop" tyres, but in my judgment there is no sufficient evidence that, as regards accessories, the name "Dunlop" has come to mean articles made by the complainers.

The bulk of the evidence amounts to no more than this, that a person who required some article connected with a motor or cycle, and who noticed that the word "Dunlop" formed part of the respondents' title, might jump to the conclusion that the respondents' company was a branch of or was in some way connected with the complainers' company, and under that erroneous impression might buy the article which he required at the respondents' shop in the belief that he was getting an article manufactured by the complainers.

I do not think that any of the evidence which goes beyond that is of importance, and I may quote a few sentences from the examination-in-chief of the witness Dempsey, whom the complainers put into the witness-box as their first skilled witness. Mr Dempsey deals in motors and cycles, and seems to have had large experience of that industry. He said—"I am familiar with the use of the name 'Dunlop' as designating certain goods. The most important of these are 'Dunlop tyres.' (Q) Were there other things such as bicycle pumps and motor pumps called 'Dunlop'? (A) To a limited extent. (Q) And valves? (A) Indirectly. They were known as 'Dunlop' valves and 'Dunlop' pumps. (Q) Do you think the name 'Dunlop' Motor Company is a name likely to mislead those in the trade and members of the public? (A) I would not like to use the word 'mislead,' but it might make people think that it was connected with those we know as 'Dunlop.'"

In face of such evidence I think that it is impossible for the complainers to maintain that the name "Dunlop" has, as regards practically every article which can be used as an accessory to a motor or cycle, acquired the secondary signification which they aver.

Further, the complainers stamp every article made and sold by them with the word "Dunlop," and it may be presumed that persons who are in the habit of buying articles made by the complainers are aware that that is the case. If it had appeared that the respondents were stamping articles sold by them and not manufactured by the complainers with the word "Dunlop," the case would have been very different; but there is no suggestion of anything of that kind.

In regard to the evidence that the word "Dunlop" might lead people to conclude that the respondents' company was in some way connected with the complainers' company, I think that that might happen in the case of a person whose eye was caught by the word "Dunlop," and who did not pay much attention to the matter. Anyone, however, who took the trouble to think about the matter would see that

the respondents' company was a motor company and the complainers' a tyre company, and would not be likely to think himself safe in assuming without inquiry that the two companies were identical. Now, I do not think that the respondents are liable to have their business practically stopped (unless they change their name) simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers. It would at all events be necessary to prove that a person acting with reasonable care and observation would arrive at that conclusion, and the evidence seems to me to fall far short of establishing any such case.

The complainers further aver that the respondents adopted "the said style and title" (the Dunlop Motor Company) "for the purpose of passing off their goods as and for the goods of the complainers, and for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired."

That, I think, amounts to a charge of fraud, and apparently the Lord Ordinary would have been prepared to hold it proved if he had not thought that there were sufficient grounds for his judgment apart from the question of *mala fides*.

Now, having carefully considered the whole evidence and circumstances I have come to the conclusion that it is not proved that the Messrs Dunlop introduced the name "Dunlop" into the title of their company for the purpose of passing off their goods as the complainers' goods, or of trading upon the complainers' reputation.

It may be that the knowledge that the name "Dunlop" was well known in connection with the manufacture of tyres may have suggested to the Messrs Dunlop the introduction of their own patronymic in the title of the motor company which they were forming, but I see no sufficient reason to infer that it occurred to them that by so doing they would attract custom intended for the complainers, much less that it was their intention and purpose to do so.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled and interdict refused.

LORD JUSTICE-CLERK—I had an opportunity of reading Lord Kyllachy's opinion, in which I entirely concur. The only difficulty I felt in coming to the conclusion that the complainers were not entitled to succeed was caused by the very strong views expressed by the Lord Ordinary. I think he was misled by the very decided opinion he formed as to the question of the purposes and aims of the Messrs Dunlop in Kilmarnock in forming the limited company which they did. I do not share his views on that matter, but holding these views, I think he has been led to grant an interdict in this case on grounds which do not appear to me to justify his having done so. My views have been clearly expressed by Lord Kyllachy, and I do not think it necessary to add anything to what has been already so fully expressed.

The Court recalled the Lord Ordinary's interlocutor and refused interdict.

Counsel for the Reclaimers (Respondents)
—Craigie, K.C.—Hon. W. Watson. Agents
—Campbell & Smith, S.S.C.

Counsel for the Respondents (Complainers)
—Scott Dickson, K.C.—Orr Deas. Agents
—Deas & Co., W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Salvesen, Ordinary.]

SIM AND OTHERS v. FERGUSSON AND OTHERS (MUIR'S TRUSTEES).

Trust—Investment—“Personal Security”
—Power to Invest on Heritable or Good Personal Security—Mere Personal Obligation—Deposit-Receipt of Colonial Bank—*Ultra Vires*.

By an antenuptial contract of marriage trustees were authorised “to invest the trust funds on heritable or good personal security.” They invested in deposit-receipts of colonial banks. There was no suggestion that these were not in good credit or that the investments were not sufficiently good of their class.

Held, affirming the Lord Ordinary (Salvesen), that “personal security” covered security depending on personal obligation only, and that the trustees had acted within their powers.

Process—All Parties not Called—Trust—Liability of Trustees—One Trustee Called—Delict.

The representatives of one of several trustees having been sued for an accounting, they pleaded that the action should be dismissed, as all the trustees or their representatives had not been called.

Opinion, per Lord Ordinary (Salvesen), that the rule established by *Croskery v. Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490, that where a defender is liable *in solidum* in respect of a delict or *quasi delict* the pursuer is entitled to proceed against him alone, even although there may have been others who acted along with the defender and against whom the defender might have a right of relief, might well be reconsidered in a suitable case where a defender was being sued alone with the object of shielding others who were equally responsible.

On 7th October 1905 Alexander Sim, residing at Contlee, Nicola Valley, British Columbia, and others, the children of the marriage between John Sim, bank-teller at Arbroath, and Christina Jane Mackay or Sim (both of whom were dead), brought an action of count, reckoning, and payment against David Scott Fergusson and others, trustees of the deceased James Muir, merchant in Arbroath, one of the trustees under the

antenuptial marriage contract of their parents, dated 24th and 26th September 1864 and registered 11th September 1866. In it they sought an accounting of the intromissions of Muir, who died on 16th March 1903, and his trustees with the trust estate constituted by the said antenuptial marriage contract, to the fee of which they were entitled, and to recover £1000 or such sum as should be found to be the balance due on such accounting.

The defenders, *inter alia*, pleaded—“All parties interested not having been called, the action should be dismissed.”

Certain accounts were produced by the defenders and objections to these were stated by the pursuers. Of these objections the following alone came to be of importance:—“(Objection III) The account produced shows that the trustees under the said marriage contract lent certain of the trust funds on deposit-receipts with the following colonial banks, viz., The City of Melbourne Bank (now the Melbourne Assets Company), the Australian Joint Stock Bank, and the New Oriental Bank. The said loans were not such as the trustees were entitled or authorised to make either at common law or under the Trusts (Scotland) Amendment Act 1884, neither were they within the powers conferred by the investment clause in the said marriage contract. Persons who lent money to the said colonial banks received no security for repayment of their advances, and the said trustees, including in particular the late James Muir, in so lending out the funds of the trust estate committed a breach of trust. The sums so invested have been partially lost through the failure of the said banks to meet the said deposits as they fell due, and the pursuers claim that they are entitled to have the accounts re-stated so as to credit the trust estate as at the date of Mr Sim's death, viz., 10th January 1897, with the face value of the amount of the deposits. . . .”

The power of investment conferred by the marriage contract was in the following terms:—“And they authorise the before-named trustees, if they see cause, to invest the trust funds on heritable or good personal security for the purposes foresaid, declaring that in so investing and lending the trust funds the trustees shall not incur any personal responsibilities.”

On 29th March 1906 the Lord Ordinary (SALVESEN) pronounced the following interlocutor:—“Repels *in hoc statu* the first and . . . pleas-in-law stated for the defenders: Repels the third objection for the pursuers to the accounts of the late James Muir as trustee under the marriage contract between Mr and Mrs Sim, libelled in the summons: Appoints the case to be enrolled for further procedure: Grants leave to reclaim.”

Opinion.—“The pursuers of this action are the children of the marriage between John Sim and his wife Mrs Christina Sim, and are the fiars of certain estate settled under a contract of marriage entered into by their parents. The income of the property so settled was payable to Mrs Sim