But for the reasons I have stated I do not think that makes any difference, and accordingly although *Allsopps* is not an authority on the legal part of the question, at the same time I think it is a good authority as to what is a just and equitable arrangement, and that it is a case which is a safe one to follow.

On the whole matter I am of opinion that this resolution ought to be confirmed.

[Counsel here referred to the question of voting power.]

I do not propose to touch that, because I think the proposal is equitable. I do not share the views of the reporter there. It merely leaves the shareholders as a whole exactly as they were in the old days with regard to voting power, though their capital interest in the company will now be different.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Younger, K.C.—Hunter, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

Counsel for the Respondents—Cooper, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 20.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

BILE BEAN MANUFACTURING COMPANY *v.* DAVIDSON.

Trade Name—Misrepresentation—Fraud—False Statements in Advertising—Fraud whereby Trade Established Disentitling to Protection of Trade Name.

A company established a large business for certain pills, called "Bile Beans," by extensive advertising through which ran the story that the pills were compounded, with other ingredients, of a vegetable substance of marvellous health-giving properties which had been long known and used by the natives of Australia but only recently, after great research, discovered by C. F., a scientist. The labels and wrappers of the pill-boxes did not contain distinct references to this discovery, but the pills were called C. F.'s. The company having raised an action of interdict for the protection of the "trade name" of the pills it was proved that the story was a fabrication, the pills being compounded of ingredients known to all chemists.

Held that the false and fraudulent misrepresentations of the complainers, by which they had built up their business and were deceiving the public, disentitled them to have that business protected by the Court.

Process—Equitable Remedy—Fraud—Protection of Trade Name—Fraud by Complainers Seeking an Equitable Remedy not Pleaded on Record but Disclosed at Proof.

In an action of interdict for the protection of a trade name, where in the proof it was disclosed, though not pleaded on record, that the business had been established by a fraud on the public, the Lord Ordinary (Ardwall), the point having been taken by counsel but without amendment, proceeded to dispose of the case on this ground, and his judgment was subsequently sustained by the Division.

Trade Name—"Passing Off"—Name Descriptive or Fancy?—Secondary Meaning of Words Used—"Bile Beans"—Right to Exclusive Use of Trade Name because of Association in Mind of Public—Sufficiently Distinguishing—Interdict.

In 1899 a company started to sell pills in the United Kingdom. The pills were sold in boxes on which were labels bearing, *inter alia*, the words "Charles Forde's Bile Beans for Biliousness." In 1904 one Davidson began to sell liver pills in boxes on which were labels bearing, *inter alia*, the words "Davidson's Bile Beans." His pill-boxes differed from the company's in size and price, and the colouring, printing, and general appearance of the respective labels were different. The company raised an action to interdict him from selling as bile beans pills not made or supplied by them.

The words "Bile Beans" had formed part of a trade-mark taken out in this country by J. F. Smith & Company, of St Louis, U.S.A., in 1887, who, however, did not appear to have sold any of their bile beans in this country, and the complainers had in 1902 obtained an assignment of this trade-mark. Since 1887, in America, the word "bean" had been applied to oviform pills, and appeared in drug catalogues, but pills of that shape were not in common use in England. In certain of their advertisements the complainers referred to bile beans as "a title given to express exactly what the preparation is, a Bean for the Bile."

Opinions (*per* the Lord Justice-Clerk, and Lords Kyllachy and Stormonth Darling affirming the Lord Ordinary, Ardwall) that complainers had failed to prove that "Bile Beans" was a "fancy name" of their invention.

Opinions (*per* Lord Justice-Clerk and Lord Kyllachy, affirming the Lord Ordinary, Ardwall) (1) that the complainers had failed to prove that the term "Bile Beans" was so associated in the public mind with their pills that they were entitled to the exclusive use of the term, and (2) if that were to be held otherwise, that they had failed to prove that the respondent's pills had not been sufficiently distinguished.

Opinion of Lord Low on these matters *reserved.*

In February 1905 the Bile Bean Manufacturing Company, Greek Street, Leeds, and Charles Edward Fulford and Ernest Albert Gilbert, manufacturing chemists, both of Greek Street, Leeds, the individual and only partners of the said company, brought a note of suspension and interdict against George Graham Davidson, wholesale and retail chemist, Polwarth Place, Edinburgh. The complainers in their note prayed the Court "to suspend the proceedings complained of and to interdict, prohibit, and discharge the respondent from in any way advertising, exposing, or offering for sale or selling, or in any way causing to be advertised or exposed or offered for sale or sold, as bile beans pills or other articles not made or supplied by the complainers, and from stamping or otherwise marking for sale, exposing, selling, or supplying as in implement of orders for bile beans pills or other articles made by the respondent, or pills or other articles not made by the complainers, and from representing in any way that pills manufactured by the respondent or pills or other articles not made by the complainers are bile beans of the complainers' manufacture."

The complainers pleaded—"(1) The words 'bile beans' having acquired a secondary signification, designating solely the article manufactured and sold by the complainers, the complainers are entitled to interdict the respondent from manufacturing, supplying, and selling any medicine or articles under the name of 'bile beans' not manufactured and supplied by the complainers. (2) The words 'bile beans' having acquired a secondary signification, designating solely the article manufactured and sold by the complainers, and the respondent having no right or title to manufacture and sell pills or other articles under the name of or to represent them as 'bile beans,' the respondent should be interdicted as concluded for. (3) The respondent having represented goods manufactured by him to be those of the complainers' manufacture, the complainers are entitled to interdict as craved."

The respondent pleaded—"(2) The pursuers not having the right to the exclusive use of the words 'bile beans,' the prayer of the note ought to be refused. (3) The complainers' statements, so far as material, being unfounded in fact, the respondent is entitled to absolvitor. (4) The respondent never having sold his own goods as in implement of orders for those of the complainers' manufacture, he is entitled to be assoilzied. (5) The prayer of the note ought to be refused, with expenses, in respect (*a*) that in describing his goods the respondent made use of words of the common stock of the English language, and (*b*) that the respondent clearly distinguishes goods of his own manufacture from those of the complainers."

The respondent had no plea, and made no averment, of fraud on the part of the complainers.

The labels on the pill-boxes of the complainers and the respondent were of different colours and designs, and the letterpress on them was as follows—

The facts established are given in the opinion of the Lord Ordinary (Ardwall), *infra*.

The note was passed on 15th March, the record closed on 12th May 1905, and the case put on the Procedure Roll, but on 18th May this last order was discharged and parties allowed a proof of their respective averments.

On 5th September 1905 the Lord Ordinary (ARDWALL), after hearing counsel and considering the proof, refused the note and found the respondent entitled to expenses.

Opinion.—"This is a note of suspension and interdict brought by the Bile Bean Manufacturing Company, Leeds, and Charles Edward Fulford and Ernest Albert Gilbert, the partners of that company, asking to have the respondent Mr Davidson, who is a wholesale and retail chemist in Edinburgh, prohibited from selling under the name of 'bile beans' any pills or other articles not made or supplied by the complainers. It is not a proceeding for the protection of a registered trade-mark, but for the protection of the complainers' trade and of a trade name at common law.

"At the debate following on the proof the counsel for the respondent, in addition to the contentions put forward by him on the record, submitted that on the facts brought out in the evidence it appeared that the complainers' business was not a *bona fide* trade; that no trade name had been acquired by them by legitimate and *bona fide* trading; that their whole business was founded on and is still being carried on by means of a gross fraud; and that accordingly they did not come into the Court with clean hands, and therefore are not entitled to the equitable remedy which the Court will give to a *bona fide* trader in order to protect a trade name used in a legitimate and honest trade. It is true that no notice of this contention is stated on record, but the respondent maintained, and I think with reason, that the fraud perpetrated by the complainers was divulged to him for the first time in the evidence of Mr Gilbert, one of the complainers, himself, and therefore he had not been in a position to place any pleas regarding it on record. In the next place he maintained that it was *pars judicis* to take notice of any fraud appearing at a proof on the part of an applicant for the protection of the Court to a trade name and to refuse the protection asked where such fraud was proved. I therefore take up this question first because (first) if the respondent's contention is sound there is an end of the case apart from the other questions raised, and (second

because the consideration of it conveniently introduces the history of the trade and trade name which form the subject of the present proceedings.

"In 1896 the complainer Mr Gilbert (who must then have been only twenty-one years of age), who had been born in England, was in business in New South Wales in connection with a stationery or printing business. He had no knowledge whatever of chemistry or medicine, but he happened to get introduced to the other complainer Charles Edward Fulford, who was a Canadian by birth, who is not a qualified chemist, but who had served five years as a shopman in a chemist's shop in Canada, and who further had been connected with the business of the Dr Williams Medicine Company, a firm who deal in what are known generally as proprietary medicines. One of their medicines is called 'Pink Pills for Pale People,' and Fulford, as will afterwards be seen, sought like them 'Apt Alliteration's Artful Aid,' by calling his medicine 'Bile Beans for Biliousness.' It occurred to Fulford that it might be a good thing to carry on business as medicine and pill manufacturers or agents, and he and Gilbert agreed to go into partnership for that purpose. They first started the preparation of Gould's Tiny Tonic Pills, but they did not have such success in that business as they expected. In the early part of November 1897 Fulford one morning told his partner that at four o'clock in the morning he had hit upon a title for a new pill that was to be put upon the market, namely—'Bile Beans for Biliousness.' It was agreed that this would be a very good name to apply to a pill, and accordingly Mr Fulford prescribed a formula for the pill they were going to put upon the market. It does not appear whether this formula was drawn up by Fulford from the smattering of knowledge of *materia medica* which he had picked up in the chemist's shop in Canada, or whether it was a formula which he had copied out while in service in that shop, or which he had got a medical man in Australia to draw up for him. Mr Fulford was absent at the time of the trial at Carlsbad in Germany—it was said in ill health (although no medical certificate was produced). At all events he did not appear as a witness for himself and his firm. I must therefore be content with the evidence of his partner. The pill took in Australia, and in 1899 Fulford proceeded to this country to open a market in England. Neither the company nor the partners manufactured pills—even their name is misleading—they merely sent the formula to Messrs Park, Davies, & Company, or other manufacturing chemists to manufacture the pills in millions according to the formula sent them. The firm appointed a firm of wholesole chemists in England as their agents, and they themselves opened premises in Leeds and commenced to advertise on a most extensive scale. Since 1899 their business has spread over the whole of the country, and Mr Gilbert has gone a tour of the world with the view of studying the conditions and finding out the possibilities of the trade in various places, and he has established agencies in Cape Colony and all the British Colonies in Africa, in the Philippine Islands, Hong Kong, Shanghai, Japan, India, and other places, and also in Egypt, Malta, Gibraltar, France, the Gold Coast, and the West Indies, and the only places in the English speaking world where they have not set up business are Canada and the United States of America. They have spent £300,000 Mr Gilbert states in the building up of this business in the United Kingdom, and in the period during which they have done business there they have issued 83,000,000 of small pamphlet books, mostly illustrated, which have been distributed from house to house by a large gang of men and inspectors. They have also published a number of musical advertisements, such as the 'Bile Bean March,' the 'Coronation March,' and the 'Bile Bean Budget,' and, in short, have flooded the English-speaking world with their advertisements. But if one may judge from the way in which it is perpetually put forth in the forefront of their advertisements, the foundation stone of their success has been the false and fraudulent statement that their bile beans are for the most part composed of a natural vegetable substance which Fulford discovered in Australia, which for ages had brought health and vigour to the natives of that island continent, and which was being now introduced for the benefit of civilised nations. This story is repeated in almost every one of the pamphlets which have been published, and is referred to in nearly the same language in the shorter advertisements. One of their latest publications is entitled 'Strange Japanese Customs,' to which is prefixed the following passage:—'The secret of the natives. More important than the whereabouts of hidden gold was the secret of the ancient natives of Australia. For untold ages they had handed down to them the great secret of how certain native herbs cured the diseases to which they were subject, and thus preserved them in excellent health. When Captain Cook made his great Australian discoveries the amazing health of the natives was one of the chief things which impressed him. Writing on this very subject he afterwards said—"I did not observe (amongst the natives) any appearance of disease or bodily complaint, or eruption of the skin, or marks of any, and the most severe wounds healed most rapidly. Very old men without hair and teeth showed no signs of decrepitude, and were full of cheerfulness and vivacity." Not only from the writings and observations of Captain Cook, but from their own experiments also, scientists have long been impressed with the superiority of vegetable medicines. Some years back Charles Forde, an eminent scientist, thoroughly investigated the healing extracts and essences of Australian roots and herbs, and after long research he found himself the discoverer of a natural vegetable substance which had the power of acting in the human system

in the same way as nature's own animal substance bile, and which was beyond all doubt the finest remedy yet discovered for all liver and digestive disorders. This substance was specially compounded with other ingredients, and so concentrated and refined that a suitable dose could be contained in the space offered by a small bean. Put up into this convenient form these beans for the liver or bile became widely known and used as "Charles Forde's Bile Beans"—a name now known throughout the civilised world.'

"This statement is both false and fraudulent. There was no such person as Charles Forde, his true name being Fulford; he was not an 'eminent scientist,' having had no scientific training and no standing whatever as a chemist or anything else; he never investigated the healing extracts and essences of Australian roots and herbs; he never made any research; he never was the discoverer of a natural vegetable substance which had the power of acting in the same way as animal bile; in fact, no such substance exists, and no such substance forms the basis along with other ingredients of bile beans, these beans being compounded by wholesale chemists in America out of the drugs which they have in stock, and no one of which has anything specially to do with Australia.

"In another pamphlet—'Australia in London'—the complainers say—'Many eminent scientists set about the discovery of the secret, and one of them, Charles Forde, devoted himself to an exhaustive investigation of the native Australian herbs and fruits. Armed with the implements of modern scientific research he was able to make progress where others, not similarly equipped and fitted for the investigation, had failed. After years of research, he found himself the happy discoverer of a vegetable substance which acted on the liver and digestive organs differently and in superior manner to any medicine known. The best laboratories, the most modern plant, all that science dictated as being best for the purpose, was requisitioned in the compounding of this substance into convenient medicinal form; and the result of it all was the production a few years back of Charles Forde's Bile Beans—the most perfect medicine of modern times.' And so the changes are rung upon this wonderful discovery in every pamphlet and advertisement of the complainers. There is therefore no doubt in my mind that their business is one founded entirely upon fraud, impudence, and advertisement, although it may be that the pill is as effective as any ordinary pill so compounded as to act as a cholagogue or as an ordinary laxative medicine, but it seems certain that these beans would never have taken the hold of the public they have done except for the foundation fiction of their being the product of a great discovery of an ancient Australian medicine by an eminent scientist using the most advanced scientific methods and apparatus.

"The next question, however, is—do these frauds constitute a relevant ground for refusing to the complainers the remedy they seek in the present action? I am of opinion that they do, and I may refer to some decided cases as authorities for that opinion.

"In the case of *The Leather Cloth Company* v. *The American Leather Cloth Company*, 11 H.L. (Clark's 523), it was held that where the advertisement or trade-mark states what is not true, it cannot be made the subject of protection in the Court of Chancery. In that case the label which it was sought to protect was so framed as to lead the public to believe that certain goods were tanned, whereas they were not tanned, and were made in the United States of America, whereas they were made in England. It was held *in re Fuente's Trade Marks*, [1891] 2 Ch. 166, that the former fraudulent use of marks representing that certain cigars were made in Havana, whereas they were made in Mexico, disentitled the applicant to have them registered as new marks, even though the dishonest portions of the old marks were omitted, for that would in effect have been to enable the applicant to benefit by his former fraudulent conduct. A similar decision was given in the case of *Newman* v. *Pinto*, 4 Patent Reports, 508. The plaintiff was refused protection against an alleged infringement of his rights in a trade-mark and label used in connection with cigars, because the cigar boxes and labels conveyed a representation that the cigars were manufactured in Havana, which was untrue. In these cases the misrepresentation seems to have been actually contained in the trade-mark, but in the case of *Ford* v. *Foster*, 1872, L.R., 7 Ch. App. 611, several cases were quoted by Lord Justice Mellish on page 631 in support of the proposition that 'the same reasoning would apply if the trade was a fraudulent trade,' and he refers to *Perry* v. *Truefitt*, 6 Beav. 66, where the use of the trade name was to sell under the name of Mexican Balm some composition which never came from Mexico, but which was said to be composed from some wonderful herbs to be got only in Mexico, and in the case of *Pidding* v. *How*, 8 Sim. 477, there was evidence that the object was to persuade the public that the tea, which was called 'Howqua's Mixture,' was an extraordinary mixture made up by some great man in China, when in point of fact it was made in England. These two cases bear a striking resemblance to the present, for the objects of the complainers' trade are to represent that Charles Forde's Bile Beans are composed principally of a wonderful vegetable product got only in Australia, and which had for ages brought health and vigour to the natives of that island, which is now admitted to be untrue; and another object of the complainers was to persuade the public that these bile beans were the product of the long and laborious research of a eminent scientist, with the aid of the most advanced chemical apparatus, whereas in point of fact they are made of common drugs by a firm of manufacturing chemists in America. The case

of *Ford* v. *Foster* is founded on by the complainers as showing that a collateral misrepresentation regarding a trade-mark or trade name will not disentitle the owner of the name to relief at law or in equity, provided it do not appear as part of the trade name, and they maintained that here the frauds which I have already alluded to are collateral to the trade name of bile beans, and therefore cannot be held to have the effect of disentitling them to the remedy they now ask. I cannot assent to this view of the case. The name 'bile beans' was used as a trade-mark so far back as 1887, and the trade-mark and trade name 'J. F. Smith's Bile Beans' was registered as a trade-mark in June 1888, as appears from the *Trade-Marks Journal* of 13th June 1888. The complainers' real trade name, as appears from the passages above quoted, and under which their medicine has become known, is 'Charles Forde's Bile Beans,' regarding which they say in one of their latest publications that it is a name now known throughout the civilised world. Passing by the fact that Forde is what may be called a fictitious name itself, yet it is pertinent to inquire what is represented by the name 'Charles Forde's Bile Beans.' Now what was intended to be conveyed by that name was all the false and fraudulent representations attached to Forde's name in the complainers' published statements to the effect that Forde was an eminent scientist, and the discoverer in Australia of a 'natural vegetable substance,' possessed of all the extraordinary characteristics and effects already alluded to, and the benefit of which he was giving to the world in his bile beans. It seems to me, accordingly, that the name of Charles Forde and all the fraudulent statements regarding that person and his discovery are indissolubly connected with the term 'bile beans,' so far as used by the complainers, and that in considering whether the complainers are entitled to the remedy they now ask, this Court is bound to take notice of the fact that the complainers' trade, in connection with which the name 'Charles Forde's Bile Beans,' and as part of that name the two words 'bile beans,' have been used, is a fraudulent trade, and that according to the dicta of Lord Justice Mellish in *Ford* v. *Foster* no action ought to be entertained by a Court of Equity to protect it or the name which has been used in connection with it. On these grounds I think that the complainers' application ought to be refused.

"2. It is right, however, that I should exhaust the case by dealing with the questions which were raised on the merits, and as if the complainers' trade was untainted by fraud. The complainers here maintained that they are entitled to the exclusive use of the words 'bile beans,' because these words have acquired a secondary signification designating solely the article offered to the public by them, and that they are entitled to have the respondent interdicted from using the name in any of the ways set forth in the prayer of the note.

"In support of this proposition it was maintained in the first place by the complainers that the words 'bile beans' was a fancy name of their invention. I hold that this has not been proved in point of fact. The word 'bean' apparently has been applied, at all events since 1887, in America to an oval or oviform form of pill which, it seems, has become a favourite in that country owing, as is suggested in the evidence, to its being an easier pill to swallow than the globular form. While these pills are not exactly the shape of any bean I have ever seen, yet perhaps the word 'bean' is intrinsically a more appropriate word for the form of medicine which it is used to describe than a pill, which means a little ball or round object, whereas a vegetable bean is to some extent of an oval shape. It is proved that in the Chas. N. Crittenton Company's Catalogue—a well-known American catalogue of drugs and medicines—no less than five different kinds of beans for various ailments are in the list of medicines, including 'Bright's Kidney Beans,' 'Candy Regulating Beans,' 'Lyon Drug Company's Female Beans,' 'Nerve Beans,' and 'Smith's Bile Beans,' and accordingly at present 'bean' is apparently the only word in the English language which has been specificially appropriated to an oval pill, although it is true that it has not hitherto been largely applied in this country to medicines of that kind except by the complainers, for the obvious reason that such oval pills have not been used here except by the complainers and J. F. Smith & Company till quite recently. But as already pointed out, on 7th November 1887, J. F. Smith & Company, manufacturers at St Louis, United States of America, applied for and obtained in England a registration of a trade-mark on which, *inter alia*, was inscribed these words,—'J. F. Smith's Bile Beans,' and below that 'cure biliousness, sick headache, malaria, and all diseases arising from a disordered liver. Dose, one Bean.' I have very little doubt that we have here the origin of the name which Mr Fulford would have us believe was revealed to him in a vision of the night. Two boxes of Smith's Bile Beans have been produced in the present process, and the complainers evidently thought the matter of some importance, for they acquired a right to this trade-mark by assignment. But the best evidence regarding the question whether bile beans is a descriptive word or a fancy name is to be found in the complainers' own advertisements in the *Daily News* of Tuesday, 3rd September 1901, and the *Daily Chronicle* of 27th December 1901. In the first of these the following sentence occurs:—'The result of this experimenting was the addition of some eight other ingredients, the whole being called Bile Beans, a title given to express exactly what the preparation is—a bean for the bile. The expense and care in perfecting and compressing this preparation to the size of a small bean was very great, but the result is a small oval bean that the youngest child can take with ease, and a medicine the consumption of which last

year reached some thirty million doses in Australia alone, the rich and poor alike being the friends of this marvellous specific;' and this statement is repeated again and again in the complainers' advertisements. They can therefore hardly maintain that the words 'bile beans' are not a descriptive name. And the two words of which it is composed are certainly ordinary English words, although, as I have said, the application of the word 'bean' to a medicine is of recent introduction. It is proved, however, that it has been applied to confectionery, whether manufactured so as exactly to resemble an ordinary vegetable bean or possessing only a general oval form.

"I am therefore of opinion, on the authority of the *Cellular Clothing Company*, A.C. 1899, 326; *Parsons* v. *Gillespie*, A.C. 1898, 239; *Fels* v. *Hedley & Company*, 20 Patent Reports, 437, and 21 Patent Reports, 85, that this is a name which the complainers are not entitled to the exclusive use of as a fancy name which they have made their own. It was not invented by them, nor had they the exclusive use of it at any time.

"III. A third question, however, arises upon the views expressed in *Reddaway* v. *Bannerman*, A.C. 1896, 199. In that case it was held that a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods. The goods in that case were machinery belting, the making and selling of which is a trade which a large number of manufacturers are engaged in, and for about seventeen years before the case was tried the plaintiff had called the belting which he manufactured 'Camel Hair Belting' in order to distinguish it from the belting of other manufacturers, and many other manufacturers had different names for their belting taken from other animals. Originally it was not known that the belting in question was made from camels' hair, but afterwards it was discovered that it really consisted of the hair of the camel. It was proved in that case that the name 'Camel Hair Belting' had come to mean in the trade the plaintiff's belting and nothing else, and accordingly when the defendant began to sell belting made of yarn of camel hair and stamped it 'Camel Hair Belting,' the plaintiff was held entitled to an injunction against him using these words descriptive of or in connection with belting made by him without clearly distinguishing such belting from the plaintiff's belting. That case differs from the present in this important particular that all along there had been in the market belting of the same material as the plaintiff's belting, and which never had got the name of camel hair belting, and there were therefore good grounds for holding that the plaintiff was entitled to exclude others from using the name, at all events without distinguishing it clearly from his goods. In the present case, however, as in the *Fels Naptha* case, little weight can be attached to the use by the complainers as against the general public of the term 'bile beans', because up to the time of the respondent selling other pills as a cure for biliousness no one had occasion to use the words bile beans except the Smiths to a very limited extent, and therefore all the evidence of persons who say that the name is associated by them with the complainers' goods is of little importance, for the reason that the complainers were the only sellers of such goods, and nobody could get goods of that name from anybody but them. I would refer on this subject to the observation of Lord Shand in the *Cellular Clothing Company* case, A.C. 1899, page 339, at the foot of the page, and to Lord Davey's opinion in the same case, page 343. The present resembles very much the *Fels Naptha* cases, 20 Patent Reports, 437, and 21 Patent Reports, 85, where the complainer had had for a considerable time the monopoly of selling soap into the composition of which naptha entered, and which had become known as 'Naptha Soap,' or simply 'Naptha,' yet he was refused an injunction against other persons who had commenced to sell naptha soap under that name, it being held that they were within their rights in doing so. I accordingly do not think that the evidence led by the complainers is sufficient to show that as in a question with all other vendors of medicines they have established such a right to the words 'bile beans' as representing their manufacture alone, as to exclude the use of these words by other traders selling oval pills as a cure for biliousness.

"But even assuming that the name 'bile beans' has come to be understood by the public to mean the complainers' manufacture and no others, that will not preclude other traders from using the name provided they distinguish their bile beans from those of the complainers. This, I think, has been sufficiently done by the respondent. The respondent's boxes are different in size, price, label, and general appearance from the complainers', as is shown by those produced in process. In all cases of alleged infringement of the complainers' rights, which are proved, there are none in which the parties asked for the complainers' bile beans. They simply asked for bile beans, and were offered boxes at different prices, including the complainers' boxes, and generally selected the respondent's bile beans, it being for the purpose of getting these boxes that they were sent to ask for bile beans at all. I am accordingly of opinion that, even if the words 'bile beans' have come to have the secondary meaning attached to them which the complainers claim, the respondent has shown that he sufficiently distinguishes his own bile beans (which, it may be noticed, are a bean manufactured by Park, Davies, & Company, who formerly manufactured for the complainers) from the complainers' bile beans. But the complainers ask in their note that the respondent be interdicted from the use of the name 'bile beans' altogether, and this, I think, they are not entitled to for the the reasons above stated.

"The difficulty I have in this case arises from the conduct of the respondent, who from the outset apparently endeavoured to appropriate to his own goods the notoriety which the complainers by their extensive advertisements have procured for the medicine known as bile beans or Charles Forde's Bile Beans. It is clear from the somewhat humiliating confessions which he had to make when under cross-examination, that the respondent, having determined to secure the benefits of the catching alliterative name 'bile beans,' set about considering how he might keep within the letter of the law. He first thought of calling his bile beans 'Dr Scott's Bile Beans,' a name as fictitious as Charles Forde, and he then studiously sat down to eliminate from the various drafts of his advertisements anything he thought might implicate him in legal difficulties. That he intended to take advantage of the reputation of Charles Forde's Bile Beans is plain from the commencement of his circular, where he says—'These pills are held in the highest repute throughout the United Kingdom as a tried and established remedy for bile, indigestion, &c.,' and he admits that what he wanted to do was to sell something which would be good for biliousness, and which he would call bile beans. He at one time, apparently, thought of selling under that name beans made after the formula 1120 of the *Pharmaceutical Journal*, and he finally resolved to sell an oval pill known as Park, Davies, & Company's Cathartic Compound No. 160, being induced to do so apparently by the belief which he divulges in his evidence that these beans were the beans which all along the complainers had been selling, which was not the case, as was clearly proved by the evidence of Dr J. Lewkowitch.

"I cannot therefore approve of the respondent's proceedings, but whatever his intentions I think he has acted within his legal rights, and that it has not been proved that he ever to any member of the public attempted to represent that his beans were the complainers' beans, although he has certainly attempted to secure for his own beans the advantages of the publicity which the complainers have acquired for a medicine named bile beans, and I may observe that in the record the respondent offers to advertise that he no longer sells the complainers' bile beans, and that he has ceased to have any business relations with them.

"On the whole matter, and for the various reasons I have above set forth, I am of opinion that the complainers' application for interdict should be refused."

The complainers reclaimed, and argued—(1) The words "bile beans" had acquired a secondary signification denoting pills of their manufacture or supplying. They had introduced into this country the use of the word bean as a synonym for pill. Though a trade-mark had been registered by one Smith in 1887, which included the words "bile beans," neither he nor his successors J. F. Smith & Company had sold pills in this country as bile beans, and in any case the complainers had acquired from J. F. Smith & Company any rights to the name they might have had. In the trade their pills were known and listed as "Bile Beans." The name was a fancy, not a descriptive name. What were sold were not beans but pills, and pills not bean shaped but oviform; "beans" described neither their genus nor their shape. This distinguished it from *The Cellular Clothing Company* (*cit. infra*). That words were ordinary English words, *e.g.*, the words "Silverpan Jam" in *Faulder* (*cit. infra*), did not prevent them, if used in a strained sense, acquiring a secondary signification denoting a particular manufacture. Even if the words were descriptive, the application of them to their goods only had been sufficiently universal and long continued to give them a secondary meaning denoting their pills and no one else's—*Reddaway* (*cit. infra*). (2) There was evidence of fraud on the part of the respondent and of his "passing off" his pills as theirs. The evidence of "passing off" was sufficient, especially in view of the fact that his intention of so doing was manifested in the successive drafts of one of his advertisements, and, *inter alia*, in the fact that this advertisement in draft and as issued referred to "these pills" as a "tried and established remedy" although their composition had not, as the draft disclosed, been determined on when the advertisements were in draft. The fraud was the more marked in that the respondent had acted as their agent. The use of the respondent's name on the labels, on the boxes, and certain differences in printing did not disprove the respondents "passing off" or the intention of so doing; he was well aware the public looked chiefly to the words "bile beans." It was not necessary to show an exact resemblance between the pills or the labels. On (1) and (2) the following cases were cited—*Cellular Clothing Company* v. *Maxton & Murray*, July 12, 1898, 25 R. 1098, 35 S.L.R. 869, April 27, 1899, 1 F. (H.L.) 29, [1899] A.C. 326, 36 S.L.R. 605; *Reddaway* v. *Banham*, [1896] A.C. 199; *Montgomery* v. *Thompson*, [1891] A.C. 217; *Wotherspoon* v. *Currie*, 1872, L.R., H.L., 5 E. & I. Ap. 508; *Powell* v. *Birmingham Vinegar Brewery Company*, [1896] 2 Ch. 54, [1897] A.C. 710; *Massam* v. *Thorley's Cattle Food Company*, 1880, L.R., 14 Ch. D. 748; *Faulder & Company, Limited* v. *O. & G. Rushton, Limited*, 1903, 20 R.P.C. 477; *Valentine Meat Juice Company* v. *Valentine Extract Company, Limited*, 1900, 17 R.P.C. 673; *Singer Manufacturing Company* v. *British Empire Manufacturing Company, Limited*, 1903, 20 R.P.C. 313; *Eastman Photographic Materials Company* v. *Comptroller-General*, 1898, 15 R.P.C. 476, [1898] A.C. 571; *Hommel* v. *Gebruder Bauer & Company* (*in the matter of the trade-mark Hæmatogen*), 1904, 21 R.P.C. 576. (3) The verdict of the Lord Ordinary on the facts that "the name of Charles Forde and all the fraudulent statements regarding that person and his discovery are indissolubly connected with the term 'bile beans,' so far as used by the complainers" was a finding

on fact on an issue that was not before him, for there was no case on record against them of fraud. (4) That finding was not justified by the evidence, which did not establish that their whole business was fraudulent or that the misrepresentations were not collateral. The name Charles Forde did not occur on by any means all, even of their earlier, and in few of their later, advertisements. The advertisement about Captain Cook and the great discovery was never used by them in Australia, and occurred in only about one-twelfth of the advertisements in this country. They were really only puffing advertisements with picturesque stories to draw the public's attention to them—*Holloway* (*cit. infra*). They did not make the whole business unlawful or taint it with fraud so as to make the complainers "outlaws" and disentitle them, for instance, to sue for the price of goods supplied and not paid for, or to the remedy now sought; they could not be "outlaws" in the one case and not in the other. Even if the erroneous statements could be called misrepresentations, they were collateral, for they occurred neither in the name of the article, nor on the label, nor in any wrapper round the box; collateral misrepresentations did not disentitle them to the protection of the Court. On (4) the following cases were cited:—*Forde* v. *Foster*, 1872, L.R., 7 Ch. Ap. 611; *Perry* v. *Truefitt*, 1842, 6 Beav. 66, 63 Rev. Rep. 11; *Pidding* v. *How*, 1837, 8 Sim. 477, 6 L.J. (N.S.) Ch. 345, 42 Rev. Rep. 231; *Sykes* v. *Sykes*, 1824, 3 B. & C. 541, 27 Rev. Rep. 420; *Marshall* v. *Ross*, 1869, L.R., 8 Eq. 651; *Holloway* v. *Holloway*, 1850, 13 Beav. 209.

Argued for the respondent—(1) The complainers had made many material misrepresentations regarding their business and the goods they sold. They had deceived the public as to the maker of the pills (which were manufactured for them in America), the country from which they came, and the nature, substance, and quality of the pills (which could be made from the ordinary stock of a wholesale chemist, and contained no herb or root peculiar to Australia, or which complainers obtained from there). The misrepresentations occurred in a larger proportion of the advertisements than stated by the complainers; it was not merely the advertisements that referred to the pills as made from specific roots in Australia that must be taken into account, but in many others there was some allusion or other to the wonderful discovery, and the numbers of these lying advertisements circulated were enormous. In fact, complainers boasted they had spent £300,000 on their advertisements, pamphlets, &c., and had distributed 83,000,000 pamphlets. The complainers' whole business depended on its advertisements, and the lying stories in them were indissolubly connected with the name of Charles Forde which appeared on the pill boxes. The "verdict" of the Lord Ordinary on the facts was fully justified by the evidence. In the circumstances the misrepresentations were not collateral, and in any case the distinction between collateral and non-collateral misrepresentation was not recognised in Scotland. The scheme by which the complainers had tried to appropriate the use of the words "bile beans" was fraudulent. They had put "trade-mark" on the labels of their pill boxes, whereas they had no trade-mark at any rate in this country (they probably could not have got one—Patents, Designs, and Trade-marks Act 1888 (51 and 52 Vict. cap. 50) section 10), and gradually had tried to eliminate the name Charles Forde from their advertisements. Their obtaining from J. F. Smith & Company an assignment of their trade-mark containing the words "bile beans" was, in view of the fact that Smith had no business and no goodwill, a fraud on the Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57), sec. 70. Those who sought the protection of the Court must do so with "clean hands"—*ex turpi causa non oritur actio.* On (1) the following cases were cited—*Pidding* v. *How* (*cit. sup.*); *Perry* v. *Truefitt* (*cit. sup.*); *The Leather Cloth Company, Limited* v. *The American Leather Cloth Company, Limited*, 1863, 4 De G. J. & S. 137, esp. Lord Westbury, at p. 143, 11 H.L. (Clarks) 523, at p. 546; *In re Wood's Trade Mark* (*Wood* v. *Lambert & Butler*), 1886, L.R. 32 Ch. D. 247, at p. 264; *Newman* v. *Pinto*, 1887, 4 R.P.C. 508; *Worden* v. *Californian Fig Syrup Company*, 1902 (decided 1903), 187 U.S. Rep. 516, at 528; *Cheavin* v. *Walker*, 1877, L.R. 5 Ch. D. 850. (2) Where there was a *turpis causa* it was *pars judicis* to refuse the protection of the Court—*Morgan* v. *M'Adam*, 1867, 36 L.J. Ch. 228, at p. 229; *Lee* v. *Haley*, 1869, L.R. 5 Ch. Ap. 155; *The Leather Cloth Company, Limited* v. *The American Leather Cloth Company, Limited*, 1863, 11 H.L. (Clark's), 523, Lord Cranworth, at p. 532-533. The fraud was not disclosed till the proof, and the plea to relevancy was sufficient to cover it. (3) The words "bile beans" had not acquired a secondary meaning denoting solely the complainers' pills. They were descriptive words. Beans described sufficiently accurately the pills. The complainers' own advertisements referred to the words as a good description. Words developed their meaning by derivative use, *e.g.*, a coffee bean was not strictly a bean but a berry, and in Latin *phaselus*, a bean or bean-cod, came to mean a boat or pinnace. For the various meanings of bean they referred to Murray's dictionary. "Bile beans" was not a fancy term. The words were not meaningless as applied to the article in question, nor inappropriate. For a definition of a fancy term they referred to that of Lopez (J.) *in re Van Duzer's Trade-Mark*, 1887, 56 L.J. Ch. D. 370, 34 Ch. D. 623. "Beans," moreover, could not be separated from its context. The name that the complainers gave to their pills (apart from the fact that they were called Charles Forde's) was not beans or even bile beans, but Bile Beans for Biliousness, and on the labels one big B sufficed for the three words. Common English words as these were incapable of acquiring a secon-

dary meaning, in the sense that the mere use of them involved a representation that the goods were those of a certain manufacturer. *Faulder & Company, Limited* (*cit. supra*) (Silverpan Jam) proceeded on the fraud of the infringer. The evidence of the complainers was insufficient in law to establish a secondary meaning for descriptive words. On (3) the following cases were cited—*Montgomerie* v. *Donald & Company*, February 1, 1884, 11 R. 506, 21 S.L.R. 338; *Stuart & Company* v. *Scottish Val de Travers Paving Company, Limited*, October 16 1885, 13 R.1, 23 S.L.R. 11; *J. H. Dewar* v. *John Dewar & Sons, Limited*, March 29, 1900, 7 S.L.T. 462; *Cellular Clothing Company* (*cit. supra*), Lord Davey's opinion; *Parsons* v. *Gillespie* [1898], A.C. 239; *Ripley* v. *Griffiths*, 1902, 19 R.P.C. 590; *Fels* v. *Hedley & Company, Limited*, 1903, 20 R.P.C. 437; *Fels* v. *Christopher Thomas & Brothers, Limited*, 1904, 21 R.P.C. 85; *Hommel* (*Hæmatogen*) (*cit. supra*); *King & Company, Limited* v. *Gillard & Company, Limited*, 1904, 21 R.P.C. 589, *aff.* 1905, 22 R.P.C. 327; *Weingarten Brothers* v. *Charles Bayer & Company*, 1905, 22 R.P.C. 341; *Faulder & Company, Limited* (*cit. sup.*); *Wotherspoon & Company* v. *Gray & Company*, November 10, 1863, 2 Macph. 38.

At advising—

LORD JUSTICE-CLERK—The evidence in this case discloses the history of a gigantic and too successful fraud. The two complainers who ask an interdict against others do so to protect a business which they have brought to enormous proportions by a course of lying which has been persisted in for years. The scheme they formed was to delude the public into the belief that a valuable discovery had been made of a medical remedy hitherto known only to certain savage tribes in a distant part of the world but known to them for ages, and that the medicine had been prepared by the aid of "the implements of modern scientific research," and that "the best laboratories and most modern plant" had been requisitioned for compounding this wonderful Australian vegetable substance. The place of the discovery, the mode of the discovery, the discovery itself, the instruments of research, the laboratories, were all deliberate inventions, without any foundation in fact. The story was that a certain Charles Forde, who was declared to be a skilled scientist, had, while in Australia, noted the fact that the aborigines were markedly free from certain bodily ailments, and that by patient research and exhaustive investigation he had ascertained that this immunity was obtained by the use of a natural vegetable substance whose properties for cure of such ailments were extraordinary, and that as the result of his research this wonderful remedy was now given to the world. All this was in every particular undiluted falsehood. There was no such person as Charles Forde, no eminent scientist had been engaged in researches, no one had gone to Australia and learned of a time-proved native cure. The truth was that the complainers had formed a scheme to palm off upon the public a medicine obtained from drug manufacturers in America as being the embodiment of the imaginary Australian discovery by the eminent scientist Charles Forde. Accordingly, having got their supplies from the American drug dealer they proceeded to create a public demand by flooding this country and other countries with advertisements in the press, and by placards, leaflets, and pamphlets, in which the lying tale was repeated, often embellished with pictorial representations of the healthy savage and with pictures of the imaginary scientist duly bearded and begoggled, having the precious root pointed out to him by the Australian native.

It was of importance in exploiting a fraud of this kind to get a catching name, and the only trace of discovery in the whole proceedings was that the complainer Fulford thought out the alliterative name of Bile Beans for Biliousness. Even this was not in a true sense original, the word beans having been in several cases applied to boluses in an oval form, and the words "bile beans" having formed part of a trade-mark taken out so early as 1887 by one Smith. This descriptive name has proved so valuable a possession that it is desired now to establish a monopoly of these words in combination, and to interdict anyone else from using them, upon the footing that these words are not merely a descriptive name but have come to designate the goods sold by the Bile Bean Company formed by the complainers, and that any use of the name by others is a fraud upon that company. The claim is not for right in a trade-mark. The claim is made at common law for protection of a trade by preventing a name appropriated to it being used by others.

Now this name which the complainers desire to have protection for was the name chosen to designate the article about which all these lying statements were put forward in order to make a trade by inducing the public to buy the article as being what the complainers said it was, the article being one to which the description given and the historical statements made in regard to it were wholly inapplicable. And it is to be observed that these statements were not of the mere puffing order, not of the "never failing," the "incomparable," the "unique," or the "worth a guinea a box" order, but were statements of alleged facts carefully elaborated and intended to be accepted as facts from which the public might draw a sound inference that the article sold would effect to the buyers what it had done for ages to another race in another part of the world. The purpose was not to catch those who listen to mere assertion about a thing, but to convince them that they were buying a drug which incontestable facts had demonstrated to be a valuable remedy.

I agree with the Lord Ordinary in holding that the complainers being engaged in perpetrating a deliberate fraud upon the public in describing and selling an article

as being what it is not, cannot be listened to when they apply to a court of justice for protection. It is their own case as brought out in the evidence which stamps their whole business with falsity. In bringing forward their case they were compelled to disclose what otherwise might never have been known, and was not known to the respondent, that the business they sought to protect was tainted with fraudulent misrepresentation. I should have no hesitation in so holding on general principles. No man is entitled to obtain the aid of the law to protect him in carrying on a fraudulent trade. But the cases quoted at the debate and by the Lord Ordinary establish as I think very clearly that the courts have in the past given effect to the principle which allows nothing to the man who comes before the seat of justice with a *turpis causa*. I do not enlarge upon the precedents, as I have had an opportunity of seeing an opinion prepared by Lord Stormonth Darling in which they are more fully gone into, and the Lord Ordinary has in his opinion very fully quoted the cases. I therefore agree with the Lord Ordinary that the demand of the complainers must fail.

This view is sufficient for the disposal of the case. The complainers cannot succeed in obtaining assistance from the law for a business based on unblushing falsehood for the purpose of defrauding the public into a totally false belief as to the origin and material of the goods they sell.

It is not necessary in these circumstances to refer to the other matters alluded to in the Lord Ordinary's opinion, but I may say shortly that I entirely concur in the Lord Ordinary's view that the name used by the complainers "bile beans" was not a fancy name invented by them but was a descriptive name, the word "bean" as applied to drugs made up in oval form having been in frequent use for many years, and the words "bile beans" having formed part of a trademark obtained so far back as 1887, and the complainers went to the expense of buying out the company holding it. There is, I think, no ground for holding that it was a fancy name invented by the complainers and they had not the original and never had the sole use of it.

I am also of opinion upon the evidence that the respondent has not sold his bile beans under any such form of package or advertisement so that any person exercising ordinary observation could suppose he was getting the complainers' bile beans. I was much struck by the appearance of the labels. They are as unlike as can be. The only resemblance consists in the words bile beans. The colours are different. The arrangement of the colours is different. The one bears "trade-mark," which was untrue, the other does not. The one bears in small letters "Charles Forde's," which forms a marked part of the falsehood, the other is headed in strong letters "Davidson." The one has an alliterative "Bile Beans for Biliousness," there being only one large B for the whole three words. The other states 'Bile Beans" only with the name "Davidson" again below it in brackets in type as large as the "Charles Forde" in the complainers, and further the boxes in which the beans are sold are of different sizes and of different material and of different price. In short, there is no practical resemblance except in so far as the words "bile beans" are concerned. To these words the complainers have plainly no exclusive title.

Whatever strictures may be made upon the motives of the respondent, I am of opinion that he has not infringed any right of the complainers, and has not been proved to have passed off his goods as those of another.

I am on these grounds in favour of adhering to the interlocutor of the Lord Ordinary.

LORD KYLLACHY — I agree with your Lordship, and I also agree with the Lord Ordinary's judgment upon all its grounds. I do not think it necessary to say more.

LORD STORMONTH DARLING—I am perfectly satisfied with the first and leading ground of the Lord Ordinary's judgment in this case, and I would have contented myself with expressing my concurrence in the reasons he assigns so clearly for coming to that conclusion were it not that some points in the argument have probably been developed more fully before us than they were in the Outer House.

The pursuers are vendors of an antibilious pill, which is manufactured for them in America from a private and undisclosed formula prescribed by Mr C. E. Fulford, the senior partner of the pursuers' firm. The pills are sent over from America to the pursuers' premises in Leeds, from which, after being packed in boxes, they are distributed in enormous numbers to wholesale chemists all over the world. Each box contains a label bearing the words "Charles Forde's Bile Beans for Biliousness," and a list of ailments for which the pills are said to be a cure. "Charles Forde" is a fictitious name, or rather is an *alias* for C. E. Fulford. The business in the United Kingdom was started in 1899, and quickly attained very large proportions, having been fostered by an elaborate system of advertisement, not only in newspapers and magazines but by pamphlets distributed from house to house, and even by the publication of pieces of music such as the "Bile Bean March." In the summer of 1904 the complainers discovered that the respondent, a wholesale and retail chemist in Edinburgh, was beginning to sell an antibilious pill of his own under the name of "bile beans," and they immediately raised this action, in which they ask that he should be interdicted from selling as bile beans pills or other articles not made or supplied by themselves.

This therefore is a pure case of passing-off, not complicated by the existence of any patent, and the only connection that it has even with a trade-mark is that in 1902 the complainers obtained an assignment from J. F. Smith & Company, a New York firm, of a certain trade-mark bearing the words "J. F. Smith's Bile Beans," which their

predecessors had registered in this country so far back as 1887. But the complainers do not found upon J. F. Smith's trade-mark, While therefore the case must be taken on the footing that the complainers have no registered trade-mark applying to their pill, it is clear that even where there is no trade-mark the law will not allow one trader to pass-off his goods as the goods of another, unless that other be guilty of some fraud upon the public disentitling him to the protection of the law.

Here the Lord Ordinary has found that there *is* fraud upon the public which strikes at the whole trade of the complainers, and therefore disentitles them to the protection of the law. "Nobody doubts," said Lord Kingsdown in *The Leather Cloth Co.* case cited by the Lord Ordinary at p. 542 of 11 Clark's House of Lords cases, "that a trader may be guilty of such misrepresentations with respect to his goods as to amount to a fraud upon the public, and to disentitle him on that ground, as against a rival trader, to the relief in a court of equity which he might otherwise claim. What would constitute a misrepresentation of this description may in particular cases be a reasonable subject of doubt, and it was in the present case the ground of the difference between the two judgments under consideration. The general rule seems to be that the misstatement of any material fact calculated to deceive the public will be sufficient for the purpose. This was the foundation of the judgment in *Perry* v. *Truefitt*, and in the case of *Howqua's Mixture* and several other cases, as well as of the Lord Chancellor's judgment in the case before us." What Lord Kingsdown, with the assent of Lord Westbury, here states as the general rule is "the misstatement of any material fact calculated to deceive the public." It is true that he states it as disentitling the trader to relief in a court of equity. But I cannot imagine a principle of so general a nature, and intended to protect the public against fraud, as turning on any mere question of procedure as between courts of law and courts of equity, particularly when applied in a country like Scotland where no such distinction exists. And if the principle applies I agree with the Lord Ordinary that the facts of the present case are amply sufficient to raise it. Mere puffing will not do. Exaggeration, however gross, of the merits and virtues of a remedy will not do. In the case of *Holloway's Pills*, in 13 Beavan, 209, it was held that the description of the inventor as "Professor," and the statement in advertisements that the pills were adapted to cure all diseases, did not amount to misrepresentations disentitling him to have an injunction against a piratical brother. But here what the Lord Ordinary well calls the "foundation fiction" of the discovery by an eminent scientist of a vegetable substance growing in Australia which had long ago enabled the natives of that country to defy disease and had at last been reproduced in the most convenient medicinal form as "bile beans"—this flagrant piece of invention was no casual lapse into hyperbolical language, but was circulated systematically from the very inception of the trade, and plainly formed the basis on which the whole superstructure rested. It is said that to have the effect of disentitling the trade to the protection of the law, the misrepresentation must not be collateral, but must be contained in the trade-mark (where it exists) or the trade name itself. But there was nothing collateral in this misrepresentation. It affected the very essence of the article offered for sale, and was plainly implied in the name "Charles Forde," that being the name of the so-called "eminent scientist" who had made the "valuable discovery."

If so, it does not matter that the rival trader, viz., the respondent Davidson, may have been actuated by a motive to secure for his own bile beans a certain advantage from the reputation which the complainers had acquired for theirs by advertisements which were as extensive as they were mendacious. The Lord Ordinary intimates that he cannot approve of all the respondent's proceedings and neither do I. It is true that the respondent sold his pills in boxes of a different size, and marked by a label of a different colour, on which his own name and not the complainers appeared. To the customer, therefore, who was reasonably wary there was not much risk of the respondent's goods being successfully passed off as the complainers, and I am not sure that the law is bound to concern itself with the interests of the unwary customer. Certainly it appears that the actual purchasers of the respondent's pills got exactly what they wanted. But, on the other hand, it is plain that the respondent was prepared to sell his own pills to anybody who simply asked for "bile beans" without specifying that they must be "Charles Forde's." Now, the two articles were necessarily different, for the complainers' pills were made from a secret formula (albeit containing no ingredient which had been discovered in Australia), while the respondent's were made from a well-known and probably effective enough formula for a cathartic mixture to be found in the ordinary list of the manufacturing chemists who compounded it. If he had made this plain to purchasers, no possible exception could have been taken to his proceedings. But he left it dark for no better reason than that he knew the complainers' pills to have acquired a great vogue, and he did not know of what they were compounded. He therefore took his chance of their carefully propagated story of the "great Australian discovery" turning out to be a fabrication. Perhaps it may be fortunate for him that it did turn out to be so, but as it did—and that could only be found out in the course of the investigation to which the complainers' proceedings were exposed in this case—the fraud of the complainers makes it unnecessary, as I think, to consider the respondent's conduct at all.

A great deal of argument was directed to the question whether, assuming the complainers' trade to be untainted by

fraud, they had succeeded in proving that the phrase "bile beans" was a "fancy name" of their own invention. The Lord Ordinary holds that this has not been proved in point of fact, and I am rather inclined to agree with him. I do not lay much stress on the old registration of bile beans as a trade-mark by J. F. Smith & Company, for their trade seems to have been insignificant. But the complainers can hardly be heard to say that the name is not descriptive when they advertised extensively that the title was given "to express exactly what the preparation was—a bean for the bile." Anybody who read that knew precisely that the article offered for sale was an antibilious pill; and, in face of such an intimation from the complainers themselves, no amount of evidence that "bean" is a novel and fanciful name for a pill can go very far. But it is unnecessary, in my view, to pursue this topic for the reasons I have stated. I am therefore for adhering.

LORD LOW—I agree with the result at which your Lordships have arrived. I am of opinion that the false and fraudulent misrepresentation by which the complainers have built up their extensive business disentitles them to have that business protected by the Court. I therefore think the application should be refused.

On the question whether if there had been no fraud the complainers would have been entitled to interdict I desire to offer no opinion. The question is not necessary for the disposal of the case, and seems to me to be attended with great difficulty.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Complainers (Reclaimers)—Dean of Faculty (Campbell, K.C.)—Clyde, K.C. — Cooper, K.C. — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondent—T. B. Morison — Gillon. Agents—Kirk Mackie, & Elliot, S.S.C.

HOUSE OF LORDS.

Monday, July 16.

(Before the Lord Chancellor (Loreburn), Lord Davey, Lord Robertson, and Lord Atkinson.)

EARL OF KINTORE AND OTHERS *v.* ALEXANDER PIRIE & SONS, LIMITED.

(In the Court of Session June 6, 1905, 42 S.L.R. 607, and December 18, 1902, 40 S.L.R. 210, 5 F. 818.)

Fishings—Salmon-Fishing—River—Rights of Upper Salmon-Fishing Proprietor—Rights of Lower Riparian Millowner.

The proprietors of salmon-fishing in the upper reaches of a river are not entitled, as against a lower riparian millowner, to insist upon having the condition and flow of the river left in their natural state, save in so far as affected by rights acquired by prescription; their right is limited to seeing that there is no obstruction or abstraction of such a character as materially to impede the free passage of salmon.

Question whether, in cases where water is abstracted, it is necessary that at least an equal amount of water to that abstracted be sent down the stream of the river on the ground that salmon always follow the main stream.

Prescription—River—Abstraction of Water from River—Prescriptive Right to Abstract Water at One Place—Right to Abstract the Same Amount of Water at Another Place—Right to Abstract at One Place Amount of Water Formerly Abstracted at Two Places.

"The effect of forty years' use of water of a river is to give the person so using right to continue that use, *modo et forma*, at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction."

Interdict — Competency — Form — Salmon-Fishing—Proprietors of Salmon-Fishing in Upper Reaches of River—Obstruction to Passage of Salmon by Lower Riparian Millowner—Rigidity of Interdict.

Where the proprietors of salmon-fishings in the upper reaches of a river allege obstruction to the passage of salmon up the river on the part of a lower riparian millowner, interdict at their instance is the appropriate remedy.

Where an interdict had been granted by the Court of Session defining the respective rights of the salmon-fishing proprietors of the upper reaches of a river and a lower riparian millowner in a question as to obstruction by the latter, the House of Lords in affirming the order added a declaration "that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy."

Process — Remit — Remit Subsequent to Proof—Terms of Remit—Competency of Remit.

In an action of declarator and interdict at the instance of the salmon-fishing proprietors of the upper reaches of a river against a lower riparian millowner, with the object of terminating or reducing his abstraction of water, a proof was taken, by which it was established that there was illegal obstruction to the passage of salmon on the part of the millowner. Thereafter a remit to men of skill was made "to