

rent is too low, and that the tenant would not give any more. That would be a perfectly good reason. Whether you could prove that was so or not would depend upon different circumstances, and the best proof would be an offer from somebody else at a largely increased rent. Nobody could say that that was not a good reason for parting with a tenant. And in the same way I think it would come under the words of the second clause, because it could not be said to be a reason inconsistent with good estate management. Good estate management means getting as much as your property is worth.

There may be many other reasons equally valid. Suppose, for instance, the tenant made his farm the headquarters of low and disgraceful company. I imagine that would be a good reason for getting rid of him. Or suppose he made it his custom to take every opportunity of insulting and being disagreeable to the landlord's family. If I were an arbiter I would hold that to be a good and sufficient reason. Of course, what any particular arbiter might hold I do not know. But, at any rate, I think it is quite clear that reasons of both sorts are within the purview of the Legislature, although I cannot express it better—because it is not a definition I am giving—I cannot express it better than this, that the real object of the clause is, not to give fixity of tenure, but is to provide for compensation if there has been capricious action on the part of the landlord in refusing to renew the lease.

The answers I think we should give to these questions categorically are—The *First* in the affirmative. The *Second* that it is original manorial value. I am construing original manorial value exactly as the arbiter has done. The *Third* in the affirmative. The *Fourth*, yes, subject to deduction of such a sum as may be found deductible under the provisions of the note appended to the schedule. The *Fifth* was withdrawn. The *Sixth* in the affirmative. The *Seventh* and the *Eighth* we refuse to answer.

LORD KINNEAR—I concur.

LORD JOHNSTON—I also concur.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

“Answer the first question of law in the case in the affirmative: In answer to the second question find that the term ‘value’ falls to be interpreted as the original manorial value, meaning thereby the value of the manorial constituents thereof, such as nitrogen, potash, &c., before the feeding stuff was consumed: Answer the third question in the affirmative: Answer the fourth question in the affirmative, but subject always to deduction of such sum as may be found deductible under the provisions of the note appended to the schedule to the lease: Find it unnecessary to answer the fifth question: Answer the sixth question in the

affirmative: Refuse to answer the seventh and eighth questions as stated: Recall the determination of the Sheriff-Substitute in so far as not in accordance with the above answers, and with said answers remit the case to the arbiter to proceed as accords: Find no expenses due to or by either party, and decern.”

Counsel for Brown (Appellant)—Chree—MacRobert. Agents—Connell & Campbell, S.S.C.

Counsel for Mitchell (Appellant)—Murray, K.C.—Hon. W. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, December 14.

### FIRST DIVISION.

[Lord Mackenzie, Ordinary.

CHARLES P. KINNELL & COMPANY,  
LIMITED v. A. BALLANTINE &  
SONS AND OTHERS.

*Trade Name—Descriptive Name—Description of Article Sold—Likelihood of Deception—Interdict—Terms of Interdict.*

A descriptive name, although *in initio* its exclusive use is due to patents, may become so exclusively associated with the goods of a particular manufacturer A as to acquire a secondary meaning denoting goods of his manufacture alone. A is then entitled to interdict B from using the name as descriptive of, or in connection with, similar goods, not of A's manufacture, sold or offered for sale by B, without clearly distinguishing such goods from the goods of A. A, however, is not entitled to a declarator that he has the exclusive right to use the name in connection with such goods, nor to an unqualified interdict.

Charles P. Kinnell & Company, Limited, hot-water engineers, Southwark Street, London, raised an action against A. Ballantine & Sons, engineers and iron-founders, Bo'ness, as a firm, and against David Ballantine and Archibald Ballantine, the individual partners of the firm, for declarator “that the pursuers have sole and exclusive right to the use of the name ‘Horse Shoe’ as applied to boilers, and that said name applies exclusively to boilers manufactured and supplied by the pursuers, and that the defenders are not entitled to sell, offer, or advertise for sale, or dispose of as ‘Horse Shoe’ boilers any boilers manufactured by them, or not manufactured and supplied by the pursuers,” and for interdict against the defenders “from issuing circulars, lists of prices, or other documents in which boilers not manufactured and supplied by the pursuers, and in particular boilers of the defenders' manufacture, are described as ‘Horse Shoe’ boilers, and from in any other way describing boilers manufactured

or supplied by them as 'Horse Shoe' boilers, and from selling, disposing of, or in any other way passing off such boilers as being 'Horse Shoe' boilers," and for £500 damages.

The facts of the case appear from the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 7th November 1908, after a proof, pronounced this interlocutor—"Finds and declares, interdicts, prohibits, and discharges, in terms of the conclusions of the summons thereanent, and decerns: Decerns against the defenders for payment to the pursuers of the sum of fifty pounds sterling (£50) in name of damages."

*Opinion.*—"The pursuers, who are hot-water engineers in London, ask for declarator that they have the sole and exclusive right to the use of the name 'Horse Shoe' as applied to boilers, and for interdict against the defenders, a firm of engineers and iron-founders at Bo'ness, from issuing circulars, &c., in which boilers not manufactured and supplied by the pursuers, and in particular boilers of the defenders' manufacture, are described as 'Horse Shoe' boilers, and from selling or passing off such boilers as being 'Horse Shoe' boilers. There is then a conclusion for damages.

"There is here no question of a patent right. Nor is there any question of trademark.

"The defence is that the pursuers have no exclusive right to use the name 'Horse Shoe' in connection with boilers, and that the term is descriptive merely of a particular type or shape. The pursuers maintain that in the market 'Horse Shoe' boilers mean their boilers, and those of nobody else; and that the defenders have put on the market boilers designated 'Horse Shoe' boilers in such a manner as to be likely to mislead the merchants who purchase from them, or the ultimate purchaser from these merchants. The legal principle applicable to such a case as the present is not in dispute between the parties, and it is this, that no one has a right to represent his goods as being the goods of somebody else. The authorities on this branch of the law are for the most part just illustrations of the application of this principle.

"The first question is whether in the trade the term 'Horse Shoe' has acquired a secondary or special meaning when applied to boilers. What may to the ordinary public seem merely a description of the article sold, may to the trade involve a representation that the article is the make of a particular manufacture. *Reddaway v. Banham* [1896], A.C. 199, the 'Camel Hair Belting,' was a case where the respondents were restrained from describing their belting as 'Camel Hair Belting,' though it was made of camel hair, because that would deceive purchasers into the belief that they were getting something they were not getting, viz., belting made by the appellants. In the case of *Cellular Clothing Company v. Maxton & Murray*, [1899], A.C. 326, 1 F. (H.L.) 29, the pursuers failed because it was held (1) that the word 'Cellular' was an ordinary

English word which appropriately and conveniently described the cloth of which the goods sold by the respondents were manufactured; and (2) that the term had not been proved to have acquired a secondary or special meaning so as to denote only the goods of the appellants.

"Upon the question whether 'Horse Shoe' boilers mean boilers of Kinnell's make, or whether they mean boilers of a particular kind without reference to any particular maker, the evidence is to my mind strong that the name 'Horse Shoe' has come in the trade to be associated with boilers of Kinnell's make alone.

"The name was first applied in 1883 to a boiler with which Kinnell gained the silver medal at the Royal Horticultural Society's Show in 1883. The boiler itself is produced. It is circular, and not of the shape of a horse shoe. This corroborates Kinnell's evidence that the name was adopted by him as a fancy title, 'Horse Shoe' being associated with good luck. Subsequent to that the pursuer pushed the sale of his boilers under the name of 'Horse Shoe.' The boilers sold were of the shape of which the section [in some instances] resembles the letter U, the section [in others] resembles a horse shoe. During the last twelve years the pursuer spent upwards of £2000 solely in advertising the 'Horse Shoe' boiler. A large number of testimonials have been received by him from persons who have bought and used the boiler. In 1884 two patents were taken out for an invention which were applied to the boiler. These were allowed to lapse in 1887 and 1888.

"The evidence upon this point is, I think, correctly summed up in two passages in the cross-examination of Edwardes, a witness for the defenders, who says (1) that he does not know of any boiler not manufactured by Kinnell having been sold to or bought by the public under the name 'Horse Shoe'; and (2) that all boilers similar in shape to Kinnell's not manufactured by them are called by names other than 'Horse Shoe.' A number of instances of this are given in the proof, e.g., the 'Heel' boiler of the Thames Bank Iron Company and the 'Oulton' boiler of the General Iron Foundry Company.

"The criticism was made upon the pursuers' witnesses that they are all buyers from Messrs Kinnell, and that in some cases they believed it was only Messrs Kinnell who were entitled to manufacture these particular boilers. The admissions made by Edwardes and also by Reid, together with the fact that these witnesses, as well as those examined for the pursuers, have had a large experience in the trade, are in my opinion a sufficient answer to these points.

"I therefore hold it proved that 'Horse Shoe' boilers mean boilers made by Messrs Kinnell, and not boilers of a particular kind without reference to any particular maker. If this is so, and if the defenders have been selling their boilers under such a designation as to deceive the public into the belief that they are obtaining the boilers

of Messrs Kinnell, then as is pointed out by Lord Herschell in *Montgomery v. Thompson*, [1891] A.C. 217 (Stone Ale), they 'ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the person seeking the injunction had a right of property in the name.'

"The position of the defenders in regard to these boilers is this: They had for a number of years made for the pursuers the component parts of these boilers, and had despatched them to the pursuers, who then fitted them together. On each boiler was cast the name of the maker Kinnell and the title 'Horse Shoe.' In 1903 the pursuers, who had started a foundry of their own, ceased to employ the defenders. The defenders, who had retained the patterns, continued to make boilers of a similar type, some of which were supplied to the General Iron Foundry Company as 'Oulton' boilers, and some to the Thames Bank Iron Company as 'Heel' boilers. The name 'Heel' was cast on the boilers, the name 'Oulton' was not. The name 'Horse Shoe' was not cast on any of them.

"In February 1906 the defenders began to issue price lists which had printed on the front page 'Horse Shoe' boilers, and their name and address. They sent none of these to the pursuers. The account shows that 1000 copies were ordered, 500 with the name Ballantine and 500 without. The defenders' clerk depones that at that time they had occasional inquiries from customers for 'Horse Shoe' boilers. His evidence is that they sent out about 100 of these circulars. In September 1906 the defenders began to supply Young & Marten, customers of Messrs Kinnell, London, with 'Horse Shoe' boilers. The pursuers heard of this, and on 17th January 1907 wrote to Young & Marten complaining of a catalogue of theirs in which they illustrate and offer for sale 'Horse Shoe' boilers and call them so, and also under a particular title the 'Crescent,' and stating that the use of the title 'Horse Shoe' boilers is calculated to mislead buyers. The reply was that Young & Marten regarded the words as descriptive merely, but that they regarded Messrs Kinnell had gained a well-earned reputation for their horse-shoe form of boiler, and that they would omit the words from the catalogue. Correspondence passed on the subject between Young & Marten and the defenders, the result of which was that the latter said the use of 'Horse Shoe' boilers had better be dropped.

"In November 1907 the price list issued by the defenders came to the knowledge of the pursuers, and they on 7th November 1907 wrote challenging the defenders. The defenders replied that they had learned from one of their customers (this was Young & Marten) that the pursuers were objecting to the use of the name, and that immediately on receipt of this information they had stopped using it and had not since issued any lists bearing it. Further correspondence passed, in which it was pointed out that although in the list com-

plained of the word 'Horse Shoe' had been deleted in ink it was quite legible, and claiming damages, payment of which was refused, hence the present litigation. Between the time when Young & Marten wrote to Ballantine and the time Kinnell wrote to him about thirty of the lists were issued. In these lists the word 'Horse Shoe' was struck out and 'Greenhouse' substituted. In December 1907 lists were printed in which the boilers were called 'Compact.' About 800 or 900 of the 'Horse Shoe' price lists were destroyed.

"It was argued for the defenders that there was and could be here no misleading of the purchasers, who were merchants and knew that what they were getting were boilers, not of the manufacture of Messrs Kinnell, but of Ballantine & Sons; that there was no sufficient evidence of boilers being supplied under the name 'Horse Shoe' to any of the general public; and that this case differed from any of those cited in which it had been held there was passing off, because here the boilers sold by Ballantine & Sons had not 'Horse Shoe' stamped upon them.

"In *Wotherspoon v. Currie*, L.R., 5 E. & I. Ap. 508 (Glenfield Starch), it was pointed out by the Lord Chancellor (Lord Hatherly) that it is not upon a *mala mens* towards the first purchaser that the decision of these cases rests. In that case the goods were labelled 'Glenfield Starch,' and it was a necessary consequence that the first purchaser was enabled to deceive others by this means. The principle, however, appears to me to be applicable here, though the circumstance of the label is wanting. The boiler made by Messrs Kinnell had a well-established reputation. It is known as the 'Horse Shoe.' A member of the public wants the 'Horse Shoe' boiler, not because it is a particular shape, nor because it is made by a particular maker, but because his neighbour, who has a 'Horse Shoe' boiler in his greenhouse, has told him it has given satisfaction. If the merchants who buy from the defenders receive from them price lists of 'Horse Shoe' boilers, if when they send an order the invoices bear that 'Horse Shoe' or 'H.S.' boilers are being supplied, then the means are placed in their hands of delivering to customers who ask for 'Horse Shoe' boilers, not the 'Horse Shoe' boiler of Messrs Kinnell, but a 'Horse Shoe' boiler made by Ballantine & Son. In such a case the customer would not get what he really wanted. In some cases the boilers so supplied were stamped with a particular name, but in other cases there was no name upon them. There was no name cast on the boilers supplied to Young & Marten by the defenders.

"It was maintained, however, that the evidence does not instruct such a case. It is not necessary that a case of actual deception should be proved. It is sufficient if what is done is calculated to deceive. There is evidence that the general public in inquiring for these boilers inquire for them under the name only of 'Horse Shoe' boilers. This is spoken to by the witness

Swain, who for the last ten years has purchased from 50 to 100 of Kinnell's 'Horse Shoe' boilers a-year. The witness Hayward, who has sold 2000 of these boilers, says that in his experience customers come in and say they want a boiler similar to what has been supplied to a friend, calling it a 'Horse Shoe' boiler. The defenders also had inquiries from customers for 'Horse Shoe' boilers in February 1906, according to the evidence of their clerk. Though the defender in his examination-in-chief made it appear that their business is wholesale, in cross he admits that they have supplied people locally who have asked for 'Horse Shoe' boilers and supplied them under the name 'Horse Shoe.' This in my opinion is evidence that in certain cases the defenders took a benefit from the reputation of the 'Horse Shoe' boiler, which had been established by the Messrs Kinnell. From the list in process and the evidence of the pursuer it appears that seven of the customers who used to buy 'Horse Shoe' boilers from the pursuers have ceased and are buying from the defenders. The fact that the boilers did not bear the stamp 'Horse Shoe,' if they were sold under that title, is not sufficient to make a difference. In my opinion the pursuers are entitled to interdict. This does not mean that the defenders may not describe boilers made by them as horse shoe in shape, provided they do so fairly.

"Upon the question of damage it is proved that the pursuers' sales decreased last year by over 100 boilers, but that is open to the observation that bad trade may account in some measure for the diminution. During the time the price list complained of was in circulation the defenders admit selling 104 boilers at an average profit of 10s. 6d. It was not until October that the defenders commenced to call their boilers first 'Greenhouse' and then 'Compact.' The pursuers put their profit at 35s. The discount allowed by the defenders probably accounts for the difference in the figure. The pursuers are entitled to some damages. In the circumstances I am of opinion a sum of £50 should be allowed. The pursuers will be found entitled to expenses."

The defenders reclaimed, and argued—(1) The word "Horse Shoe" was descriptive. Whatever the idea of Kinnell in first using the word might have been, "Horse Shoe" was in fact appropriate to describe the boiler. It was appropriate not merely to those of Horse Shoe or U shape, but even to those of cylindrical shape. But in fact it was only used now to describe the Horse Shoe and U-shaped boilers. Even assuming it was in origin a fancy name, even an invented or fancy name, e.g., linoleum, granolithic, might become descriptive, and it then might be used by others than the inventors provided there was no attempt by the latter to pass off their goods as those of the first users—*Linoleum Manufacturing Company v. Nairn*, 1878, 7 Ch. D. 834; *Stuart & Company v. Scottish Val de Travers Paving Company, Limited*, October 16, 1885, 13 R. 1, 23 S.L.R. 11; *Singer*

*Manufacturing Company v. Loog*, 1882, 8 Ap. Cas. 15. (2) A proprietary right could not be acquired to a descriptive name, and to show that the primary meaning of the word had been completely displaced, and that it had acquired a secondary meaning, denoting exclusively the goods of a particular manufacturer, if not impossible, required the strongest evidence—*Cellular Clothing Company v. Maxton & Murray*, July 12, 1898, 25 R. 1098, 35 S.L.R. 869, *aff.* April 27, 1899, 1 F. (H.L.) 29 [1899], A.C. 326 (especially opinion of Lord Shand, p. 339-40), 36 S.L.R. 605; *Reddaway v. Banham* [1896], A.C. 199; *Parsons v. Gillespie* [1898], A.C. 239; *H. E. Randall, Limited v. E. Bradley & Son*, 1907, 24 R.P.C. 657, at 663 (*aff.* 773). To establish exclusive use, evidence regarding the period when the patents were still running was of little avail—*Cellular Clothing Company (cit. sup.)*, Lord Davey at 343-4. The only case in which a secondary meaning had been so acquired and injunction or interdict granted was *Reddaway v. Banham (cit. sup.)*, and the fourth question there (p. 201) must be answered affirmatively before interdict could be granted; the mere use of the name by the defenders was not sufficient; an endeavour to pass off must be shown—Lord Halsbury at p. 210. The ground of injunction there was passing off. Here neither actual deception nor intention to deceive had been shown. Indeed the defenders' names on the price lists complained of made it impossible, or at any rate very unlikely, anyone would be deceived. Moreover, the action here was not laid on passing off, but on right to the exclusive use of the name. In any case, there being no proprietary right in the name, interdict could not be granted in the terms sought, but as in *Reddaway (cit. sup.)* must be qualified by such words as "without distinguishing their goods from those of the pursuers."

Argued for the pursuers (respondents)—(1) The word "Horse Shoe" as applied to boilers was not descriptive. It was not the natural word to use in describing the boiler, nor an accurate and appropriate description of it. This distinguished the case from *Cellular Clothing Company (cit. sup.)*. It was applied indifferently to cylindrical Horse Shoe, and U-shaped boilers. It had been first applied to a cylindrical boiler, and most of the boilers now made by them were not horse-shoe in shape. The fact that other competitors in the trade had adopted different names for similar boilers was in favour of its being regarded as a fancy name. (2) Even if descriptive it had come to denote boilers of the pursuers' manufacture only. That was the meaning in the market as proved by the evidence. When a name denoting goods of A's manufacture was used by B, it was not necessary for A in order to entitle him to interdict to show there had been actual deception, but only that the use by B was likely to deceive—*Scottish Union and National Insurance Company v. Scottish National Insurance Company, Limited*, 1909 S.C. 318 (Lord Kinnear's opinion), 46 S.L.R. 267; *Singer Manufacturing Company v. Kimball &*

Morton, January 14, 1873, 11 Macph. 267, 10 S.L.R. 173; *Singer Machine Manufacturers v. Wilson*, 1877, 3 A.C. 376. (3) As to damages, £50 was less than the profit defenders had made out of Horse Shoe boilers.

At advising—

LORD PRESIDENT—The whole law applicable to a case such as this may be found in the two cases decided in the House of Lords—the cases of *Reddaway v. Banham* [1896], A.C. 199, and the *Cellular Clothing Company v. Maxton* [1899], A.C. 326. These two cases are also examples of the remedy granted and refused. The question therefore comes to be a question of fact—Have the defenders acted in such a manner as to make it likely that persons can be deceived into the belief that the goods advertised by the defenders are the goods of pursuers, when in fact they were not? Now, as pointed out by Lord Macnaghten in *Reddaway's* case, quoting Lord Justice James in *Singer Manufacturing Company v. Loog* (L.R., 18 C. D. at 412), there being no question of statutory trade-mark there can be no right of property in a name, but a name may be so used as to convey a false representation. How does this come about? The first step must be that that name has become in the market so associated with the goods manufactured or sold by a certain person as to be identified with those goods. This, as has been often pointed out, if the name is a fancy one or a meaningless one, is easy to prove. If the name is borrowed from common language and is descriptive, then it is difficult to prove; still it may be proved, as was done in *Reddaway v. Banham*. After that is proved, then the next step is easier, for it will then be enough to show that the name has been so used as to make it likely to deceive the unwary.

Now, I have put to myself, with great care, the first question as applied to the facts in this case. The name here is not a fancy one, but is a word of ordinary language. I have not found the case easy, but on the best consideration I have been able to give to it I have come to the conclusion, with the Lord Ordinary, that the name "Horse Shoe" as applied to boilers here has, in the trade and to the public generally, become so associated with the boilers of the pursuers' make as to designate boilers made by them. I am led to this result not only by the statements of the witnesses to that effect—I do not go through the evidence, which would involve much useless repetition—but by the following considerations:—First, the name originated when the pursuers had a patent for the boiler in question, and although the patent had nothing to do with the shape of a horse shoe, yet the use of the word, from the fact of the patent, was *in initio* exclusively in connection with the pursuers' boilers. Secondly, although the word "Horse Shoe" is descriptive *per se*, and is also so far appropriately descriptive of the thing in question in respect that the section of the boiler usually sold under the

designation is of horse shoe shape, yet the Horse Shoe boilers as made by the pursuers were not always of the horse shoe shape—the first shape used was cylindrical. And further, although many boilers of horse shoe section by other makers are in the market, it is not the practice of these makers to call their boilers "Horse Shoe," but to designate them by other names, such as "Heel," "Oulton," &c. Take, for instance, what is said by one of the defenders' witnesses, Cameron—"Dozens of firms make them, including Hartley & Sugden, Limited, Halifax; Graham & Fleming, Halifax; and Marriot & Graham, who make the same type of boiler, but not cast iron. (Q) What do you describe them as when giving orders to these firms?—(A) They have all their own names for them. Messrs Marriot & Graham call theirs the 'Paisley,' Messrs Hartley & Sugden call theirs the 'Halifax,' and Messrs Graham & Fleming call theirs the 'London.'" Now this seems to me tantamount to saying that the word is not *de facto* used in its descriptive sense in regard to boilers—a similarity to the use of the words "camel hair" in *Reddaway's* case, and in direct contrast to the use of the word "cellular" in *Maxton's* case, where it was held proved that "cellular" was the only term which could generically describe the fabric, and that it had been so used and applied for years to goods not of the Cellular Company's manufacture. If I am right so far, I think there is no doubt that the defenders' price lists were such as to be likely to deceive the unwary and unskilled—not the trade, but it is enough if the retail customers only be deceived. See the well-known remarks of the Lords in *Orr Ewing's* case (L.R. 7 App. C. 219) on the mark of the *Bhe Hath*.

The result, to my mind, is, then, that the pursuers are entitled to interdict, but not to what they ask; and that they are also not entitled to declarator. Their conclusions for both declarator and interdict seem to me to be based on the erroneous idea of exclusive property in a name without statutory trade-mark. I think the interdict they are entitled to must be conceived in the terms settled by the House of Lords in *Reddaway's* case. As regards damages, I think they fail in the proof. There is no proof of actual deception, and it seems to me to be too violent a conclusion to say that because their sales fell after the issue of the defenders' price lists, therefore that fall was due to a set of undetected deceptions. I think that the pursuers, on this branch, have not made out their case.

LORD KINNEAR—There is no question as to the law by which this case must be governed. It is admitted that no one can be allowed to sell his goods, or advertise them for sale, by a name which will induce the public to believe that they are manufactured by somebody else. The question therefore comes to be a mere question of fact, and upon that question I agree with your Lordship in the chair for the reasons you have given, and I have nothing to add.

LORD SKERRINGTON—The pursuers ask for and have obtained a declarator to the effect that they have the sole and exclusive right to the use of the name "Horse Shoe" as applied to boilers. I have always understood that at common law a person cannot acquire an exclusive right to the use of the name under which he has traded or which he has applied to his goods, and that the measure of his right is to demand that other persons shall not use the same name in such a way as is likely to deceive the public to his prejudice. No precedent for such a decree was cited by the pursuers' counsel, and I am of opinion that it ought to be recalled. Of course, there is no reason why a pursuer as a step towards getting an interdict should not ask the Court to declare that for a certain period he has had the exclusive use of a particular name. Indeed, some such finding in fact by the Court of Session would be necessary in the case of an action originating in the Sheriff Court where a proof had been led. But any such declarator or finding would be quite different from the declarator of right for which the present pursuers conclude.

The pursuers further ask for and have obtained an interdict restraining the defenders in absolute terms from describing boilers of their manufacture as "Horse Shoe" boilers. Interdict is asked not merely against the use of the name or description "Horse Shoe," in such a way as to induce the belief that the goods offered for sale are of the pursuers' manufacture, but against its use in any circumstances whatsoever as applied to boilers not manufactured by the pursuers, and also against the defenders in any way passing off their boilers as being "Horse Shoe" boilers. This conclusion is very similar to that which was considered and disapproved of by Lord McLaren in his opinion in the *Cellular Clothing Company, Limited v. Maxton & Murray* (25 R. 1098, pp. 1105-7). As his Lordship points out, it is very like a claim to the exclusive property in a name. It is true that an interdict in equally absolute terms has been granted in some cases; for example, by the House of Lords in the *Glenfield Starch case* (*Wotherspoon v. Currie*, 1872, L.R. 5 E. & I. App. 508, p. 523). According to modern practice, however, as stated by Lord Macnaghten in the case of *Reddaway v. Banham*, [1896] A.C. p. 221, in all cases where a defender is to be restrained from using unfairly words or marks which he is at liberty to use provided only they are used fairly, the interdict ought to be in the form which has received the repeated approval of the House of Lords. According to this form the defender is interdicted from using the name or description in question without clearly distinguishing his goods from those of the pursuer. There is high authority for holding that an interdict so qualified may prove to be as stringent as an interdict granted without any such qualification, seeing that the facts may be such as to make it idle and impossible for the defender to attempt to distinguish between his goods and those of the pursuer, so long as he continues to

use the name or description in question—see the "Stone Ale" case, *Montgomery v. Thompson*, [1891] A.C. 217, pp. 221-2. This form of order has the further advantage that it makes it clear that the remedy is granted, not in respect of any exclusive right or property in the name which is vested in the pursuer, but in respect of the general right which everyone possesses to prevent the publication of any statement which is both untrue and also prejudicial to his pecuniary interests. In order to constitute an infringement of an interdict granted in the form approved by the House of Lords, the pursuers would not require to prove that the persons who bought the defenders' goods under the disputed name or description knew the name of the pursuers as manufacturers. In many cases the customer does not know or care who is the manufacturer, but simply desires a particular manufacture which he had been in the habit of using, or which has been recommended to him by others who have used it. In some of the cases where an interdict was granted, the defender had actually put his own name upon the goods which he sold. On this point I refer to the opinion of Lord Justice Lindley in the "Yorkshire Relish" case—*Powell v. Birmingham Vinegar Brewery Company*, [1896] 2 Ch. 54, pp. 77-8—and to the opinion of the Lord Chancellor (Halsbury) in the same case in the House of Lords, [1897] A.C. 710, p. 713. I mention this point because it seems to have been overlooked in the cross-examination of the pursuers' witnesses.

For these reasons I am of opinion that if the pursuers are entitled to an interdict it should be qualified in the manner suggested. I do not overlook the fact that the pursuers maintain that they have proved that the word "Horse Shoe" is a mere fancy word as applied to boilers, and that it is meaningless except as distinguishing goods of their manufacture. Even if this had been the result of the proof so far as regards the present use of the term in the trade, I should hesitate to decide by implication that a boiler could never be designed and manufactured to which the word "Horse Shoe" could properly be applied as a description.

Turning now from the conclusions of the summons to the condescendence, one naturally asks what the defenders are alleged to have done which ought to subject them to an interdict at the instance of the pursuers. The answer is found in the 5th and 7th articles of the condescendence, where it is alleged that the defenders sent out to the public prospectuses, price lists, and other documents in which they applied the name "Horse Shoe" to boilers not of the pursuers' manufacture, and "thus sold and passed off as boilers supplied or manufactured by the pursuers many boilers which were not so supplied or manufactured, but which were manufactured by the defenders on their own account." The case alleged by the pursuers is, accordingly, one of actual deception. Of course in order to obtain an interdict it is not necessary, as

the Lord Ordinary observes, for the pursuer to prove actual deception, but it is sufficient if what the defender did was calculated, or as I prefer to phrase it, was likely, to deceive the public. I did not understand either of the learned counsel for the respondents (pursuers) to maintain that they had succeeded in proving that any person had been or must necessarily have been deceived by the price lists issued by the defenders, or by anything else done by the defenders. They contented themselves, as I understood, with arguing that such deception was a likely though not a necessary consequence of what the defenders were proved to have done. This case seems to me to be an entirely different one from that made by the pursuers in their pleadings, and from that which the Lord Ordinary has held to be established. If I rightly understand the Lord Ordinary's note, he holds that actual deception has been proved to a certain extent. He says—"In certain cases the defenders took a benefit from the reputation of the 'Horse Shoe' boiler, which had been established by the Messrs Kinnell." This must mean that in his opinion the defenders took an illegitimate benefit and so deceived the public and injured the pursuers. In harmony with this view of the facts the Lord Ordinary has awarded £50 of damages against the defenders. Seeing that the pursuers have no trade-mark or right of property in the word "Horse Shoe," an award of damages could not be justified if all that has been proved against the defenders is that they issued price lists which were likely to deceive the public. The likelihood or probability of deception and of consequent injury to the pursuers is an excellent ground for an interdict but is no ground for an award of damages.

Upon the evidence I am of opinion that according to its primary meaning the word "Horse Shoe" as applied to a boiler is a descriptive term signifying that its section is, roughly speaking, of the shape of a horse shoe. Mr Kinnell, who was apparently the first to give the name "Horse Shoe" to a boiler, states that he selected the name as a fancy title suggesting good luck, and that he applied it indifferently to circular boilers and to boilers which had a section either like a "U" or like a horse shoe. While I accept this evidence, Mr Kinnell's intention in selecting the name "Horse Shoe" is immaterial if in fact the name is descriptive. Further, if it had been proved that circular boilers were known to the trade as "Horse Shoe" boilers, this would have gone far to show that the term as applied to boilers was non-descriptive and merely distinctive of the pursuers' manufacture. It appears, however, that whatever may have been the shape of the boiler to which Mr Kinnell first applied the name of "Horse Shoe" in 1883, that name was subsequently confined to boilers with a section like a "U" or like a horse shoe, similar to those shown on p. 48 of the pursuers' catalogue in process. Both of these boilers may quite fairly be described as having a section like a horse

shoe, in other words, as "Horse Shoe boilers." I agree, however, with the Lord Ordinary in holding it to be proved that the words "Horse Shoe" as applied to boilers has from identification with the pursuers' manufacture acquired a secondary meaning, so that its use without further explanation would in certain circumstances be likely to mislead the public into supposing that the boiler so described was manufactured by the pursuers, or at least was of the same manufacture as the boilers which for many years had been the only boilers sold under that name.

Though the name accurately enough describes a quality of a boiler, viz., the shape of its section, it does not appear that there is any advantage in describing a boiler with reference to its possession of this quality. Other manufacturers make similar boilers, but they do not call them "Horse Shoe" boilers, nor do they find it necessary in their lists to refer to the fact that their boilers resemble a horse shoe. It is true that one firm of boiler manufacturers at Halifax issued in August 1908 a catalogue in which the phrase "Horse Shoe group" appears, but their representative Mr Fleming stated that this was due to an oversight, and ought not to have appeared. A certain amount of use of the name "Horse Shoe" boilers has also been proved on the part of the defenders and some of their customers, but this is explained by the fact that many persons supposed that the pursuers' "Horse Shoe" boiler was protected by a patent up to about the year 1900. Accordingly after that date the defenders, who had made parts of the boilers for the pursuers and had the patterns in their possession, were asked by some of their customers to supply, and in other cases offered to supply, "Horse Shoe boilers," by which was clearly meant, not any boiler of a horse-shoe section, but a boiler identical with that manufactured by the pursuers under their supposed patent. This use of the term "Horse Shoe" does not go to prove that the word as applied to boilers was ever used in the trade as a merely descriptive term. I do not think that there is any other evidence to the effect that the word has ever been used in the trade in a purely descriptive sense. On the other hand, it is proved that there exist boilers which might fairly be so described but which are known by special distinctive names of their own.

After carefully considering the whole evidence I am of opinion that the price lists issued by the defenders were likely to deceive if they found their way into the hands of the general public. If these lists had been issued only to persons in the trade, there would probably have been no risk of deception, but it appears that they were sent by the defenders to their trade correspondents in order that the latter might circulate them among their own customers. I refer to the letters from the defenders and to the evidence of Mr Ballantine. These price lists were of two kinds—some with and some without the name "A. Ballantine & Sons, New Grange

Foundry, Bo'ness, N.B." Lists with the defenders' name and that of their foundry printed on their face would not suggest that the boilers offered for sale were manufactured by anyone except the defenders; but such lists might be deceptive as suggesting that the defenders were the manufacturers of the "Horse Shoe boiler" which had been upon the market for a number of years. The other lists which did not bear the defenders' name, but which were intended to bear the name of the tradesmen who bought from the defenders, were, in my opinion, well fitted to mislead the public.

I am therefore of opinion that by issuing the lists complained of the defenders subjected themselves to an interdict restraining them from describing their boilers as "Horse Shoe boilers" without clearly distinguishing them from the pursuers' boilers. But I do not agree with the Lord Ordinary in holding that actual deception has been proved in the case of any of the persons who bought the defenders' boilers either directly from the defenders or from their customers. It follows that the award of damages must be recalled.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court recalled the interlocutor reclaimed against; interdicted the defenders from using the words "Horse Shoe" as descriptive of or in connection with boilers (not being boilers of the pursuers' manufacture) sold or offered for sale by the defenders without clearly distinguishing such boilers from the boilers of the pursuers; *quoad ultra* assoilzied the defenders from the conclusions of the summons, and decerned: Found the pursuers entitled to expenses in the Outer House, modified to two-thirds of the fixed amount thereof; *quoad ultra* found no expenses due to or by either party.

Counsel for the Pursuers (Respondents)—Hunter, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders (Reclaimers)—Murray, K.C.—Sandeman. Agents—Bruce & Black, W.S.

Tuesday, December 21.

## FIRST DIVISION.

[Lord Guthrie, Ordinary.]

M'INTYRE v. THE NATIONAL BANK OF SCOTLAND, LIMITED.

*Proof—Onus probandi—Fraud—Bill of Exchange—Non-Probative Writ.*

"The person who proposes to put in force a written instrument which is not in itself probative, must prove it to be genuine if its genuineness is disputed."

Duncan M'Intyre, farmer, Kelsay, Islay, was on 20th June 1908 charged at the instance of the National Bank of Scotland,

Limited, in virtue of an extract registered protest and warrant of the Lords of Council and Session, dated 15th April 1908, to make payment to the said bank of the sum of £400 sterling, with interest thereon at 5 per cent., alleged to be due by a bill of exchange dated 16th April 1907 and payable six months after date. The alleged bill purported to be drawn by Duncan M'Intyre upon and accepted by Dugald Campbell, farmer, Grainel, Islay, and to be endorsed by M'Intyre to Campbell.

M'Intyre brought against the National Bank a note of suspension of the charge, and averred that the signature "Duncan Macintyre" appearing on the bill as drawn was not his signature but a forgery, and that so also was the alleged indorsement. The genuineness of the signature of the acceptor, Dugald Campbell, was not disputed.

Execution was sisted, the note passed, and a proof allowed.

On 25th March 1909 the Lord Ordinary (GUTHRIE) pronounced this interlocutor—"Sustends the charge complained of, and whole grounds and warrants thereof, and decerns."

*Opinion.*—"The bill in question is admittedly accepted by Dugald Campbell, farmer, Grainel, Islay; it purports to be dated 16th April 1907, and to be signed by the complainer as drawer and endorser, and it bears to be for £400 at six months' date. The complainer was charged to pay the amount in the bill, and he seeks suspension of the charge. He alleges that the signatures 'Duncan Macintyre' on the face, and on the back of the bill, were not adhibited by him or with his authority.

"The respondents led in the proof. The *onus* was upon them to prove affirmatively that the signatures on the bill, purporting to be those of the complainer, were adhibited by him—(*Anderson v. Gill*, 20 D. 1326, *aff.* 3 Macq. 180). The reverse is the rule in the case of a probative deed, where on the face of the document there appear two attestations to the genuineness of the signature as against a single denial—(*Ferrie*, 1 Macph. 291). In the former case the *onus* is on the proposer, in the latter case on the challenger. . . . [*After examining the evidence.*] . . . The respondents, in order to succeed, were bound to prove that the signatures were those of the complainer, and in my opinion they have failed to do so."

The respondents reclaimed, and argued—They did not dispute that the *onus* was on them to prove the genuineness of the signatures on the bill, following the law in *Anderson v. Gill*, July 20, 1858, 20 D. 1326, *aff.* April 16, 1858, 3 Macq. 180, yet they submitted that this *onus* was very slight—Lord Fullerton at p. 1330 in that case—and this was also shown by the fact that till *Anderson v. Gill* it had been thought the *onus* lay on the party disputing the authenticity of a signature—*Findlay v. Currie*, December 7, 1850, 13 D. 278; *Gellatly v. Jones*, March 11, 1851, 13 D. 961. In any case they had discharged the *onus*.