

Saturday, May 22.

SECOND DIVISION.

[Sheriff of Stirlingshire.

BASS, RATCLIFF, & GRETTON (LIMITED) v.
LAIDLAW.

Trade-Name—Interdict—“Bass Beer”—Refreshment Rooms at Railway Station—Travellers.

The brewers of Bass & Co.'s beer raised an action of interdict and damages against the keeper of the refreshment rooms at a railway station, on allegations of an habitual fraudulent practice by him and his barmaids of selling as “Bass's beer” a beer of a different and inferior kind. The Court refused the interdict, on the ground that it was proved that while travellers asking for “Bass” might have occasionally been supplied with different beer, being that kept by the defender, yet when they asked specially for beer of Bass's brewing they were informed by the defender's servants, acting on his instructions, that such was not kept in stock.

Messrs Bass, Ratcliff, & Gretton (Limited), brewers at Burton-on-Trent, in this petition sought to interdict Thomas Laidlaw, the lessee of the refreshment rooms at Stirling Railway Station, and all others acting under or for him, from “selling as ale manufactured by the pursuers, ale not manufactured by or for the pursuers;” and also £500 as damages in respect of his having sold as ale manufactured by the pursuers, ale not manufactured by or for them. The grounds on which the interdict was craved were stated as follows:—The beer which the pursuers manufactured had acquired an extensive reputation, and was well known at home and abroad under the names of “Bass & Co.'s East India Pale Ale,” or “Bass & Co.'s Pale Ale,” or Bass & Co.'s Beer,” or “Bass' Beer.” It yielded them large profits, and in 1854 they had adopted and duly registered in 1875 a special label as a trade-mark, which they sent out with their beer, whether supplied to retail dealers in casks or in bottles. The pursuers had recently discovered that during March, April, May, and July 1885 the defender had habitually sold ales at his refreshment rooms under the false pretence that it was ale manufactured by the pursuers, whereas he supplied ale not manufactured by them, and of an inferior quality to their ale, to the detriment of the pursuers' reputation.

The defender denied that he kept ale manufactured by the pursuer or sold ale in bottles bearing their label. He explained that it was possible that when the assistants were busy and numerous customers were calling for beer—a “glass” meaning a glass of whisky, “Bass” meaning “beer”—or other refreshments, the assistants might have supplied the beer in stock without remark; but that when Bass's beer was asked for specially, they had been ordered by him to inform the customers that it was not kept in stock, and that they had done so.

Interim interdict was granted.

After a proof, the import of which fully appears in the notes of the Sheriffs and in the opinion of Lord Young, the Sheriff-Substitute

(BUNTING) recalled the interim interdict formerly granted, and assolized the defender.

“Note.— . . . The principal allegations upon which the action is founded are contained in the 8th article of the condescendence. They are to the effect that during the months of March, April, May, and July 1885 the defender habitually sold ales at a refreshment-room at Stirling Station under the false pretence that it was ale manufactured by the pursuers. There is absolutely no evidence to be found in the proof to justify this allegation of habitual false and fraudulent representations. On the other hand, it is clearly proved that the defender gave distinct instructions to his servants that any customer asking for Bass' beer should be informed that it was not sold, and the servants all swear that these instructions were carefully carried out. There is evidence on this point of two gentlemen who having desired Bass' ale were informed that it was not kept. In addition, there was no notice on the walls that Bass' ale was kept in stock, and the beer was not sold in draught, but in bottles without labels. It appears to the Sheriff-Substitute, in these circumstances, that the publican in this case has done everything which he can be reasonably expected to do to prevent the possibility of any member of the public who may desire the manufacture of a particular brewer from being led to suppose that it has been supplied to him when it has not, and to prevent the possible injury to the brewer's reputation which might result if the beer so supplied was not of good quality.

“If the public want a particular article they must be careful to ask specially for it, and take some pains that there has been no mistake.

“The pursuers, however, further allege several special cases in which certain individuals who have been examined as witnesses have been given ale not the manufacture of the pursuers, after having asked for Bass' beer.

“Now, it is not quite clear that this amounts to an averment of fraudulent false representations. There is a great deal to be said in favour of the view that before there can be fraudulent false representations there must be the absence of all mistakes. The result of the evidence has convinced the Sheriff-Substitute that in the cases where the witnesses asked for Bass' beer, it is not proved that the barmaids understood anything more than that the customer wanted beer, and that in every case in the proof where the barmaid was made to understand that Bass' beer was specially wanted the customer was told that it was not kept in stock.

“This is conclusive of the case so far as the claim of damages is concerned. It also deprives the pursuers of the right to ask for interdict. A court of law will not grant interdict except against a wrong or threatened wrong. There has been no wrong proved in this case, and none is certainly threatened, for, on the other hand, the defender offers to take any means of informing the travelling public that he does not sell Bass' beer, by advertisement in his refreshment-room, or in any other form which may be desired. In these circumstances the pursuers have no right to ask for interdict.”

On appeal the Sheriff (MUIRHEAD) found that on certain occasions between May and July 1885 (being occasions on which persons making in-

quiries on pursuers' behalf had bought beer at the Stirling station) "the defender's servants in the refreshment rooms at Stirling Railway Station sold as Bass' ale or Bass' beer various bottles of beer which they knew not to be of Bass & Co.'s brewing;" therefore recalled the Sheriff-Substitute's interlocutor and granted interdict as craved.

..Note.—There are allegations in the condensation of habitual fraudulent practice by the defender and his servants of selling as Bass' ale or beer what had not been manufactured by Bass & Co. I do not think there is proof either of habitual practice or fraudulent intent. But neither is necessary to justify an interdict. If there be occasional sales as Bass of what is known not to be Bass, and is in fact inferior to it, then the pursuers are wronged, and their reputation as brewers imperilled, although the vendor may have proceeded on the innocent belief that the purchaser asking for Bass was indifferent whether the beer supplied to him was that maker's or not. Eight different sales in the months of March, April, May, and July are spoken to by the pursuer's witnesses. If these sales rested solely on the testimony of Downie, Beaton, and Smith, I should have some hesitation, for there is force in the observation of the defender's counsel that all of them had been refreshing somewhat freely on the days they respectively made their purchases, and that their report of what passed between them and the barmaids at the time could not be accepted with perfect confidence. But there is in addition the testimony of Mr Burton and Mr Thompson, both of whom are above suspicion. They both declare that they severally asked, specifically and distinctly, for Bass' pale ale, and were at once supplied with what on analysis turned out to be not Bass but an inferior article. I do not doubt the *bona fides* of the defender—that it was contrary to his wish that any of his servants should sell under the name of Bass what they knew not to be Bass' beer. But the case of *Tonge v. Ward* (21 Law Times, N.S. 480) is authority for holding that he is liable to interdict on account of their actings. I do not think he was sufficiently careful to warn them, at least until after a communication made to him by Allsopp's traveller in the month of April. But the special warning given by him to them is of itself suggestive that something had been reported to him that led him to suspect a looseness in the previous practice of his barmaids. The defender offers to give an undertaking that he will placard in all his refreshment rooms that Bass' beer is not sold there. I do not think the pursuers can be expected to accept this alternative instead of the remedy the law affords them. It is no doubt a serious thing to impose an interdict upon a man in such a case as this, where he must be always to a great extent in the hands of his servants, but if he take every possible precaution to prevent the recurrence of the wrong complained of, and leave no room for suspicion that he has, directly or indirectly, actively or passively, been a party to its repetition, he need not fear the consequences, so far at least as the interdict is concerned. Pursuers' counsel stated they (very properly) do not press for damages, so I have said nothing about them."

The defender appealed, and argued—There was no case presented here for interdict. He

was innocent of any intention to defraud, and as soon as he knew that the pursuers considered they had ground of complaint, he had offered to make it known to the world that the beer sold at the station was not Bass' beer. The proof showed that when a hurried passenger came and asked for "Bass" occasionally the beer he kept in stock was given him, but when Bass' beer was emphatically and specially asked for, then the passenger was informed that it was not kept in stock. In such a state of the facts there was no ground for an interdict—*Singer Manufacturing Co. v. Loog*, 1879, 11 L.R., Ch. Div. 656.

He also referred to *Winans v. Macrae*, June 3, 1885, 12 R. 1051, as to the insufficiency of the grounds for asking an interdict.

The pursuers replied—It was not necessary for them to bring their case up to one of fraud to entitle them to interdict. It was enough if the defender was proved to have, even innocently, sold as their beer, beer which was of an inferior quality—*Blair v. Stock*, March 24, 1884, 52 L.T. 123; *Upmann v. Forester*, June 22, 1883, 24 L.R., Ch. Div. 231. If instructions were given to the barmaids to say that Bass' beer was not kept, they were not acted upon—*Tonge v. Ward*, Nov. 8, 1869, 21 L.T. (N.S.) 480.

At advising—

LORD YOUNG delivered the opinion of the Court, as follows:—I have read the evidence in this case, and the facts lie within a narrow compass. The defender leases the refreshment rooms at the railway station at Stirling, and supplies travellers with beer amongst other things. He says—and I entirely believe him, and so does the Sheriff-Substitute who heard him give his evidence, and the Sheriff-Principal who has reviewed the Sheriff-Substitute's judgment—that he does not sell the beer of Allsopp or Bass. He does not announce to the public that he sells either, and he tells us that as the beers of these two firms are familiar names with the public, he instructs his barmaids if any travellers ask for the beer of these two firms, to say that he does not keep it. The barmaids were themselves also examined, and they all give testimony in conformity with that of their master, but with the qualification, without which I should have doubted their perfect integrity, that it may quite well happen that in response to a demand for a pint of Bass they have supplied the only beer they had, but when they were emphatically asked for Bass they, in conformity with their instructions, told the travellers that it was not kept. I cannot conceive for a moment that travellers passing the railway station at Stirling will drink less beer because Bass is not kept, or that it is necessary, in order to promote the sale of beer there to thirsty passengers who go in for drink in passing, and to keep up the sale of beer, that it should be pretended that it is Bass' beer. There is no motive that I can see for the suggestion. But that notion is at the bottom of this ridiculous action. I call it a ridiculous action deliberately, to say that the appellant was cheating Bass by carrying on the sale of beer by pretending that he was dealing in Bass when he was not, because if the public knew he was not selling Bass they would pass on without purchasing beer. That is really all the interest the brewers have in the matter.

I cannot believe that the beer-trade, which is literally from hand to mouth, is the least dependent upon the brewery with which the station refreshment contractor deals. The case is perfectly extravagant, and in every aspect of it, because when the appellant himself denies that he sold "Bass," a great part of the evidence we find consists of that of an analytical chemist to prove that what he did sell was not made by the pursuers. I think we have all indicated our opinion sufficiently during the argument, and I propose that, negating the pursuers' first plea-in-law, we find in fact that "The defender has not fraudulently sold as ale manufactured by the pursuers, ale which was not so manufactured," and in law that the pursuer is not entitled to the interdict claimed. We shall then sustain the appeal, recal the judgment of the Sheriff-Principal, and revert to that of the Sheriff-Substitute.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find in fact that the defender did not fraudulently sell as ale manufactured by the pursuers, ale that was not so manufactured: Find in law that the pursuers are not entitled to interdict; recal the judgment of the Sheriff appealed against; affirm the judgment of the Sheriff-Substitute; of new assolzie the defender from the conclusions of the petition."

Counsel for Pursuers (Respondents)—Comrie Thomson—Dickson. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defender (Appellant)—M'Kechnie—Shaw. Agents—Cunror, Cowper, & Cunror, S.S.C.

Thursday, May 20.

SECOND DIVISION.

[Sheriff of Lanarkshire at Glasgow.]

BRADLEY & COMPANY v. G. & W. DOLLAR.

Sale—Sale of Machinery for Particular Purpose—Seller's Right to Return.

Machinery for carrying out a particular operation was supplied to a purchaser, partly in April 1884, and partly in June 1885. During its working, after delivery, several trifling breakages occurred, all of which the seller remedied on the buyer complaining of them, but the buyer refused to pay for it on the ground that it was not according to the contract. Thereafter in a letter to the purchaser regarding a fresh complaint that the machinery was not according to contract, the seller offered to send a man to work it for several days, on the understanding that if it worked satisfactorily there would be no further dispute, and the purchaser, without expressly agreeing to this proposal, allowed the man to come and work it. In an action for the price, held by the Lord Justice-Clerk

and Lord Craighill that the offer of the seller was a fair one, that it had been carried out by the parties, and therefore that the machine having worked satisfactorily when their man left it, the purchaser must pay the price—by Lords Young, Craighill, and Rutherford Clark, that the machinery supplied was according to contract, and had been retained and used, and that therefore the purchaser was liable for the price.

Observed by Lord Rutherford Clark that where machinery is supplied to an order the purchaser is not entitled to return it in consequence of small breakages such as are to be expected when it is put into use, though he may be entitled to require the seller to repair them.

In November 1883 G. & W. Dollar, tinsmiths in Glasgow, ordered from Richard Bradley & Co., engineers at Wakefield, a press to turn out tin can covers. Another article known as a stamp was afterwards ordered, and an account for those articles, packing, &c., was incurred, which in all amounted to £209.

At the time this action was raised G. & W. Dollar had paid £106, 4s. of this account. The action was raised for £102, 17s. 3d. as the balance due. The "press" was delivered in April 1884. The "stamp" was delivered on 8th August 1884. It was subsequently in the same month agreed to exchange it for one of another kind, and the new one was sent in June 1885.

Both press and stamp were set up in Dollar's works by Bradley's men. Certain small breakages occurred in the working of the machinery after it was delivered. In August 1885 Bradley came himself to Glasgow to inquire into complaint of the machinery having failed to work well, and put to rights a small disarrangement which had occurred. Thereafter a small rod of trifling value broke, and on 19th August Dollar wrote complaining of this, and a new rod was sent them, and on 4th September another complaint was made as to it. After some correspondence the solicitors for Bradley, who had on 7th September made formal demand for payment of the account, wrote on 26th September insisting that they had fulfilled the contract, but offering to send a man "to work the tools for three or four days on the understanding that if the tools work correctly during that time no further question is to be raised." Dollar answered that Bradley might send a man to satisfy him as to the justice of the complaint, and maintaining that they were entitled to "a good job and fulfilment of contract as to working," but saying nothing of the nature of agreeing to the proposal or dissent from it. The solicitors replied requesting a definite answer, to which Dollar answered that Bradley must put "the machine in good working order before we take it off your hands." Thereafter Bradley's man was sent on 13th October, and he remedied the breakage complained of, which was a very small one, the repair of which occupied a very short time. He then remained and worked the machine for two days, after which he left, and immediately thereafter Bradley's solicitors again applied for payment and threatened an action, to which Dollar answered that previously the machine had always broken down when it had been used for a day or two, and they would work it for a week,