

of his wife and the rest of his family were secured by the former possessing the policy of assurance which at first had been issued to him by the Insurance Office.

I do not go further into the evidence, as I adopt entirely the Lord Ordinary's remarks upon it and upon the surrounding circumstances. The matter could not I think be better put than by the Lord Ordinary when he says that "Robb took the expedient to keep himself fair with Brownlee and his wife on whom he was sometimes dependent without as he thought putting his one asset beyond his control or defeating his wife's legitimate claims, by pretending to the Insurance Association that he had lost his policy, and so getting a duplicate which he made the basis of a somewhat ostentatious gift to Mrs Brownlee, while knowing all the time that the policy was not really lost but was in his wife's keeping, and never intending to divest himself of the control of it." Accordingly, on the assumption that parole evidence is competent in this case to explain the intentions of the deceased, I arrive at the same conclusion as I do on the deed itself, that Mr Brownlee's claim must be rejected.

With regard to the will, it is unnecessary to go into that matter, as counsel for Mrs Robb has intimated that he is satisfied with the Lord Ordinary's interlocutor and content to accept the policy as forming intestate succession of the deceased Joseph Robb, and that his client should administer it as his executrix-dative.

I accordingly am of opinion that the Lord Ordinary's decision was well founded.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary dated 30th July 1906: Find that the deed No. 7 of process is a valid assignment of the deceased Joseph Robb's *jus crediti* in the policy of assurance (which he held from the Scottish Provident Institution) in favour of the claimant's wife Mrs Elizabeth Scott Robb or Brownlee, and that the same is now vested in the claimant George Brownlee: Therefore sustain the claim of George Brownlee and repel the claim of Mrs Robb."

Counsel for the Reclaimer—Cooper, K.C.—A. A. Fraser. Agents—Allan, Lawson, & Hood, S.S.C.

Counsel for the Respondent—Morison, K.C.—Dunbar. Agent—R. S. Rutherford, Solicitor.

Saturday, July 13.

EXTRA DIVISION.

[Sheriff Court at Kilmarnock.

WILLIAM MORTON & COMPANY v.
MUIR BROTHERS & COMPANY.

Contract—Implied Condition—Condition Arising from Nature of Contract—Custom of Trade—Legality of Custom—Proof of Custom.

A & Company, a firm of lace manufacturers, placed a number of orders for lace curtains with B & Company, another firm of lace manufacturers in the same district. The designs for the curtains were supplied by and remained the property of A & Company. In order to make the curtains B & Company had to prepare a set of perforated pattern cards into which the designs were translated. The cards so made were the property of B & Company. The designs were not registered. When the curtains were put on the market the designs were so far published that any person in the trade who bought the curtains could derive the designs therefrom, but would incur considerable expense in doing so. The contracts between A & Company and B & Company contained no express stipulations as to the use which B & Company might make of the designs or the cards. The practice of the trade in the district was that the owners of such cards did not, without the express or implied consent of the owners of the designs, use the cards for any other purpose than to fulfil the orders of the owners of the designs. *Held* (1) that the restriction on the use of the cards, entailed by the local practice, was not contrary to law; and (2) that the restriction was a condition arising from the nature of the contract, established by the evidence as a custom of trade, and implied in the contract between A & Company and B & Company.

Proof establishing a custom of trade in the particular district.

Bankruptcy—Vesting of Estate in Trustee—Tantum et Tale—Moveable Estate—Moveable Estate Held subject to Restrictive Condition.

B & Company were sequestrated. They owned pattern cards for certain manufacture made from the designs of A & Company, and subject by custom of trade to a restriction on use in favour of that company. *Held* that the cards vested in the trustee subject to the restriction on use.

Contract—Sale—Corporeal Moveable—Moveables Held by Seller under Contract Imposing Restriction as to Use—Notice to Purchaser of Restriction—Adoption by Purchaser of Contract Imposing Restriction.

B & Company's premises with their contents, which included pattern cards

for curtain manufacture held by custom of trade subject to a restriction as to use in favour of the owners of the designs A & Company, and also pattern cards subject by express agreement to a restriction as to use in favour of a firm the owners of the designs, were exposed to public roup and purchased by C & Company. The articles of roup provided that if the cards were taken over the purchaser should be entitled to use them only subject to his implementing the obligations contained in the agreement or "any other similar agreement in connection with said cards or any of them." C & Company elected to take over the cards. After obtaining possession they delivered to A & Company certain goods which were in course of manufacture at the date of the sale. They also accepted a cancellation of part of A & Company's orders. They asked A & Company whether they should destroy the cards applicable to A & Company's designs and were instructed not to do so. *Held* that the restriction as to use attaching by custom of trade to the pattern cards from A & Company's designs was binding on C & Company—*per* Lord M'Laren, on the ground that the articles of roup gave notice to C & Company of the restrictive condition affecting the cards; and *per* Lords Pearson and Ardwall on the ground that C & Company had adopted the contract between A & Company and B & Company, and were bound by its conditions, express or implied.

William Morton & Company, lace manufacturers, Newmilns, in "the Irvine Valley," an important centre of the lace trade, brought an action in the Sheriff Court at Kilmarnock against Muir Brothers & Company, lace manufacturers, also at Newmilns, in which they prayed the Court "to interdict and restrain the defenders from using for their own behoof in the manufacture of lace curtains and curtain nets the cards in their possession applicable to the design or patterns, the property of pursuers, for lace curtains and curtain nets bearing the following numbers, viz.— . . . and to interdict and restrain the defenders from selling curtains and curtain nets made from said cards."

The pursuers had been for some years in the habit of employing the firm of Robert Muir, lace manufacturer, the defenders' predecessor in a factory at Newmilns, to manufacture curtains and curtain nets to their order. They were the owners of the designs mentioned in the prayer of the petition, and these designs had been handed to the firm of Robert Muir to enable that firm to execute the pursuers' orders. From these designs Robert Muir had had sets of perforated cards prepared as a necessary preliminary step in the manufacture of curtains. The contract between the pursuers and Robert Muir was contained in a number of written orders for curtains and curtain nets addressed by the pursuers to Robert Muir. These orders contained no

express stipulation restricting the use of the cards.

On 25th November 1904 the estates of Robert Muir had been sequestrated, and Alexander Mitchell, C.A., Glasgow, appointed trustee. On 15th March 1905 the factory, &c., belonging to the firm of Robert Muir had been exposed to public roup and purchased by the defenders. Article 10 of the articles of roup provided—"Declaring in regard to the said stock of cards, including, *inter alia*, such as may fall to be dealt with under an agreement between Messieurs Heyman & Alexander, manufacturers, Stoney Street, Nottingham, and Samuel Ross, manufacturer, Newmilns, then sole trustee of the said Robert Muir, dated 4th and 5th June 1896, or under any other similar agreement with them or any other person, the purchaser of said lot 1 shall have the option, to be declared in writing to the said Alexander Mitchell within fourteen days after the date of sale of said lot 1, to purchase and take over the same at mutual valuation. . . . If the purchaser shall elect to take over and purchase said cards he shall only be entitled to use the same subject to his implementing the obligations undertaken by or incumbent on the second party to said agreement or his successors in relation to said cards, or under any other similar agreement in connection with said cards or any of them."

The agreement between Heyman & Alexander and Samuel Ross was a formal minute of agreement in the English form. It provided, *inter alia*—"First, in regard to the designs belonging to the first party and supplied or which may be supplied by the first party to the second party for the purpose of manufacturing therefrom and to the first party's orders lace curtain blinds, vitrage toilets, and other similar goods, according to said designs belonging to the first party, the second party hereby undertakes not to manufacture any goods according to such designs except to the order of the first party, and the second party hereby further bind and oblige themselves not to communicate such designs to any other person or persons. *Second.* The second party being put to considerable expense in manufacturing said goods from said designs belonging to the first party, the first party shall not be entitled to get such goods manufactured from said designs by another manufacturer than the second party."

The defenders elected to take over the cards, for which they paid at the rate of £1 a ton, their value as waste paper, and they subsequently supplied the pursuers with goods which were at the date of sale being manufactured therewith. On 22nd March 1905 they wrote the following letter to the pursuers:—"We accept with pleasure your cancel of goods on order, excepting those made and on machine. We have a number of your patterns here, and assuming they are worthless we purpose destroying them.—Yours truly, MUIR BROS. & CO." On receipt of this letter the pursuers verbally instructed the defenders not to destroy the cards. Subsequently the pursuers dis-

covered that the defenders were using their designs to supply the general market. The pursuers then raised the present action of interdict.

The pursuers averred—“(Cond. 3) The arrangement and understanding between pursuers and said firm of Robert Muir was that the patterns or designs were to remain the pursuers’ property, and that the said firm of Robert Muir was not to be at liberty to manufacture and sell for its own behoof curtains or nets made from said designs. This is also a custom well recognised in the trade.”

The evidence on custom of trade is given in the Sheriff-Substitute’s note (*infra*).

On 1st November 1905 the Sheriff-Substitute (MACKENZIE) repelled a plea to the pursuers’ title to sue, referring in his note to the case of *M’Cosh v. Crow & Company*, March 17, 1903, 5 F. 670, 40 S.L.R. 514, and on appeal the Sheriff (BRAND) sustained his interlocutor inasmuch as it repelled this plea, but varied it in the allowance of proof.

On 30th May 1906 the Sheriff-Substitute (MACKENZIE), after a proof, pronounced the following interlocutor:—“Finds (1) that the pursuers and defenders are lace manufacturers at Newmilns; (2) that for some years the pursuers were in the habit of employing the firm of Robert Muir, lace manufacturer, to manufacture curtains and curtain nets to their order, and that designs for that purpose were supplied to the said firm of Robert Muir; (3) that from these designs so supplied by the pursuers the said firm of Robert Muir had cards punched as a necessary process in the manufacture of said curtains and curtain nets; (4) that the designs for curtains and curtain nets enumerated in the prayer of the petition were so supplied by the pursuers and were their property; that orders were given at various dates for curtains and curtain-nets to be made from these designs, and that the cards therein mentioned were made from these designs; (5) that the contract between the pursuers and the said Robert Muir was constituted by letters giving orders for certain quantities of curtains and curtain-nets, under reference to the custom of trade hereinafter explained, and also by verbal communications by the managing partner of the pursuers’ firm to the manager of the said firm of Robert Muir; . . . (7) that in giving said orders the pursuers’ managing partner drew the attention of the manager of the firm of Robert Muir to the fact that they were only to be used for their (the pursuers’) orders, and that the said managing partner replied that he quite understood that; (8) that the district in which the pursuers’ manufactory is situated, and which is referred to in the evidence as ‘The Irvine Valley,’ is an important centre of the lace curtain manufacturing industry; (9) that it is proved that in that district there prevails a custom of trade to the effect that when designs are handed as above by one manufacturer to another for the purpose of having curtains made from them, there is an implied under-

standing that curtains from these designs are not to be made or sold by the second manufacturers except to the orders of the first or with his express consent; (10) that in Nottingham, which is also an important centre of this industry, the custom of trade to this effect is not so well defined, but that it is not wholly inconsistent with the above understanding; (11) that said custom of trade or understanding was known to both the pursuers and the firm of Robert Muir, and that it formed an implied condition of the contracts between them entered into as above; (12) that the estates of the said Robert Muir were sequestrated on 14th November 1904, and Alexander Mitchell, chartered accountant, Glasgow, was appointed trustee thereon; (13) that the said Alexander Mitchell had carried on the business of the said firm for the period from 3rd September 1903 to 26th July 1904; (14) that on 15th March 1905 the factory belonging to the estates of the said Robert Muir known as the Annabank Factory was exposed to public roup in terms of the articles and conditions of roup and sale, and that the said factory was purchased by the defenders, with entry as at 31st March 1905; (15) that by the tenth clause of said articles and conditions of roup and sale it is provided that the purchaser of said factory should have the option within fourteen days after the date of sale to purchase and take over at mutual valuation the stock of cards in or about the said factory, whether in actual use at the date of entry or not, including, *inter alia*, such as might fall to be dealt with under an agreement between Messrs Heyman & Alexander, manufacturers, Stoney Street, Nottingham, and Samuel Ross, manufacturer, Newmilns, then sole trustee of the said Robert Muir, dated 4th and 5th June 1896, or under any other similar agreement with them or any other person, and that if the purchaser should elect to take over and purchase said cards, he should only be entitled to use the same subject to his implementing the obligations undertaken by or incumbent on the second party to said agreement or his successors in relation to said cards, or under any other similar agreement in connection with said cards or any of them; (16) that the said agreement with Messrs Heyman & Alexander is No. 42 of process, and that the second party thereto agreed not to manufacture any goods according to designs supplied to them by the said Heyman & Alexander (the first party thereto) except to the order of the first party, and not to show or communicate or deliver such designs or anything used in the manufacture of such goods to any other person; and, on the other hand, the first party agreed not to have goods manufactured from any designs supplied to the second party by any manufacturer other than the second party; (17) that the agreement between the pursuers’ firm and the said Robert Muir with regard to the designs and cards mentioned in the prayer of the petition, including the condition referred to by the pursuers’ managing director in conversation with the manager

of the said firm of Robert Muir above referred to, which condition was implied by the custom of trade in the circumstances, constituted a 'similar agreement' within the meaning of the said tenth clause of the articles of roup and sale; (18) that said condition implied by the custom of trade was known both to the said Alexander Mitchell and the defenders; (19) that the defenders purchased the whole stock of cards from the said Alexander Mitchell and paid for the same; (20) Finds that since purchasing the said stock of cards the defenders, on receiving a cancelling order from the pursuers for certain goods then on order, on 22nd March 1905 wrote to them the letter in which they say—'We have a number of your patterns here, and assuming they are worthless we propose destroying them'; (21) that the pursuers replied through Mr Coubrough, their salesman, that defenders were not to destroy the cards, to which they agreed; (22) that in the month of April following some negotiations took place for a repeat order, but the parties did not agree as to terms; (23) that in the following month it came to the pursuer's knowledge that the defenders were manufacturing and putting on the market curtains made from some of the cards mentioned in the prayer of the petition, otherwise than to their order, and that the goods so manufactured were being offered at lower prices than those charged by them; (24) that the defenders assert a right to so manufacture goods from said cards, and have intimated their intention of continuing to do so: Finds in law that the rights acquired by the defenders in the said cards by the said sale from the trustee were subject to the implied condition constituted by the said custom of trade, and that the pursuers have a right and title to interdict the defenders as craved: Therefore repels the defences and grant interdict in terms of the prayer of the petition: Finds the defenders liable to the pursuers in the expenses of process: Allows an account thereof to be given in, and remits," &c.

Note.—"This case has been argued on both sides with great ability, and with a sense of its importance to the parties concerned, and also to all those interested in the industry with which it is concerned. The findings in fact at which I have arrived are fully set out in the preceding interlocutor, and it is perhaps unnecessary to repeat the narrative of the circumstances which have given rise to the present dispute. I shall confine myself to the points at which it is proper that I should explain the views which I have formed of the principles of law which fall to be applied. It may be pointed out that there are two contracts to be considered. First, the contract or agreement between the pursuers and Messrs Robert Muir, and, secondly, the contract of sale between the Messrs R. Muir's trustee and the defenders. With that part of the defence which consists in the argument that the defenders have nothing to do with the first contract and that the pursuers have nothing to do with the second, I shall deal afterwards. It will be useful first to

consider what the contracts were in themselves.

"It appears to be a common practice among lace curtain manufacturers to hand designs belonging to them to other manufacturers to carry out, either because they themselves have too much work on hand, or for some other reason. The design, which is either made by the manufacturers' own designer, or purchased by him, is handed over for this purpose, and the first operation which the second manufacturer performs is to 'read' and transfer the design or draft on to cards, which are punched in such a way as to carry out that particular design when attached to the loom.

"The contract between the pursuers and Messrs R. Muir to this effect in the present case appears to have taken the form of simple written orders, giving the number of the pattern, the size of the curtain, and the number of pairs required. Specimens of these orders are the letters in process, and there are produced orders of this kind relating to all the numbers detailed in the prayer of the petition at various dates. It is contended for the pursuers that in all such orders there was an implied condition, founded on the custom of trade, that the manufacturer who received the order was not to make any goods from that design except to the order of the firm from whom it was received. The great bulk of the evidence in the case has been directed to this point, and, in my opinion, the pursuers have been successful in establishing a custom of trade to that effect.

"The evidence of the witnesses from Ayrshire, where, in the district described as the Irvine Valley, there exists a very important centre of the lace curtain industry, is almost all one way. Witness after witness, representing firm after firm, speak to this understanding without any hesitation or dubiety. They are men who are daily engaged in the industry in question and have intimate experience of its working. Apart from the pursuers there is . . . all of whom speak to this custom of trade in clear and unmistakable language. On the other hand, the defenders argue that the lace industry is not confined to the Irvine Valley—that a wider field must be taken before a custom of trade can be established—and that in particular the custom of trade in Nottingham, the original seat of the industry, must be taken into account, and is contradictory of the Scotch evidence. I did not form the opinion that the evidence ought necessarily to be confined to Scotland, and I have therefore had the advantage of a considerable body of testimony on this matter from witnesses from Nottingham who are well qualified to speak on the subject in question. Their evidence, however, has not shaken the impression derived from the pursuers' witnesses, and that mainly for two reasons. In the first place, it did not appear to me to be unreasonable to regard the Scotch industry as of itself sufficient in bulk and individuality to have formed a practice of its own, especially as several of the English witnesses specially men-

tioned that they did not profess to speak of any custom mutually observed between these two branches of the industry. Thus Mr Shipley, when asked if there is much intercourse between the Scotch trade and the Nottingham trade, replies—'There is with the merchants but not with the manufacturers.' Mr Wooton also says that there may be a custom of trade in Scotland of which he is not aware. Mr West says—'I have no experience whatever of the customs of trade in the lace trade in Scotland,' and Mr Cooper's evidence is much to the same effect. It would appear, therefore, that there is not much intercourse between the two branches of a kind which would tend to form a custom of trade common to both on this particular point. The limitation of custom to a district is of common occurrence in other matters than that of trade. An example of this may be found in a case in which I was myself the judge of first instance (*Bruce v. Smith*, 17 R. 1000), where the question related to a peculiar alleged custom with regard to the capture of whales in Shetland. Very valuable opinions on the subject of the force and scope of custom were pronounced in that case by Lord Young and Lord Rutherford Clark. It was a subject of remark by the latter that it was remarkable that the custom in question did not obtain in Orkney 'which came to the Crown of Scotland under the same title and at the same time.' It may well be, therefore, to my mind that where an industry is carried on in two branches separated by some geographical distance, that a custom obtaining in one of these branches may be proved by evidence from within itself, apart from differences which may exist in the other. But is there any such difference? The second ground upon which I think the defenders' English evidence fails to support them is that it does not impress me as containing any clear negative to the custom averred by the pursuers. It is true that Mr Shipley says at one part of his evidence that 'the custom of trade in Nottingham is absolutely the reverse of what the pursuers here contend, namely, that the manufacturer in the "brown" cannot use the cards which he has punched for another firm, and I should say that the Scotch trade is exactly the same as the Nottingham trade.' But as his evidence develops it does not appear to me to come up to a reversal of the custom averred by the pursuers. He seems to make it a condition of the use that business connections between the two manufacturers should have ceased. I do not know that the pursuers put their case so high as to contend that the second manufacturer can never under any circumstances use the cards. Both parties, it would appear, are free to make what subsequent arrangements they like. In cross-examination Mr Shipley seems to indicate that it is only when the original manufacturer has finished with the pattern and given it up that it is, at least as a matter of business propriety, right for the second manufacturer to use the cards. The trade being a

'season' one, the absence of orders for twelve months would give rise to the assumption that the pattern had been given up. Mr Wooton seems also to indicate that the cards ought not to be used unless there has been some rupture or breach between the parties to the contract. In the absence of such a rupture, although there might be no legal method of preventing their use, it would be a violation of business courtesy and propriety to do so. He goes so far as to say that to use the cards without notice would be 'a distinct violation of the ordinary custom of the trade.' Both Mr West and Mr Cooper seem to consider that notice ought to be given, and the former puts the period of waiting without orders from nine to twelve months. Mr Hurcomb's evidence is much to the same effect. With regard to Mr James Cleland, who is produced as a manufacturer in the Irvine Valley, and who says—'I was the second manufacturer in Scotland to take up the manufacture of lace curtains,' it is open to remark that he has been for eleven years in America, and since coming home three years ago he has been in another trade. Nor does the transaction to which he mainly speaks seem to be a direct negative to the pursuers' contention. Apart from the evidence of others it is to be noted that the parties to the first contract themselves, Mr Morton and Mr R. Muir, from their evidence as to conversations between them, make it quite clear that this custom was understood. On the whole matter I am satisfied that the custom of trade has been proved, and that it was an implied condition of the first contract.

"The second contract, that, namely, between the defenders and the trustee on the sequestrated estate of Messrs R. Muir, raises questions of another kind. It is said for the defenders that in purchasing the cards in question they acquired an absolute right to them. I do not think this contention can be sustained. The contract in this case is conditioned by writings the terms of which cannot be disputed. This element in the case to my mind entirely disposes of the arguments of the defenders founded on the 23rd section of the Sale of Goods Act 1893. I think it is proved not only that conditions existed limiting the title to these cards, but that these conditions were fully in the knowledge of the defenders at the time of the sale. The cards were plainly sold under reference to the agreement with Messrs Heymann & Alexander, and 'any other similar agreement in connection with said cards or any of them.' If I am right in thinking that the custom of trade as alleged by the pursuers formed part of the first contract, it is plain that that contract was a similar agreement to that with Messrs Heyman & Alexander, for the latter document practically expresses in set terms the same principle. But it is said that there is here no *jus quaesitum tertio*, and that the pursuers being no party to the contract have no rights under it. The rules as to the constitution of a *jus quaesitum tertio* have been explained in many cases, and perhaps

most recently in the case of *Welsh & Forbes v. Johnston*, 1906, 43 S.L.R. 353. It is, I think, settled that in order to have a right of action the third party must be either named or described in such a way as to be clearly indicated—*Finnie*, 1857, 3 Macph. 75. Now, it appears to me that if Messrs Heymann & Alexander have such a right, and I think that cannot be doubted, the pursuers are placed in the same position by being designed as a class of persons holding similar agreements. If these agreements are really similar, it does not appear to me to be of vital importance that their names are not specifically mentioned. I am, therefore, of opinion that the pursuers have rights under the second contract which must be respected by the defenders. If these rights are constituted by a custom of trade such as I have found proved, it is needless to add that the defenders must be bound by it also, and must be taken as having accepted it as part of their contract.

“An argument has been used by the defenders which seems to me to have considerable force, and may be thus expressed—‘As none of these designs were registered, is this not an attempt to create a kind of artificial copyright which the law does not and ought not to recognise?’ I think, however, the law of copyright, from the mere fact of there being no registration, does not apply, and that the custom of trade is not founded on any mistaken view of this department of the law, but has been formed by mutual consent among those engaged in this industry as a convenient regulation in a kind of contract peculiar to that industry. This seems to me to be a suitable field for the operation of trade custom. Moreover, it is obvious that any right of the defenders in ordinary circumstances to copy a design which is not copyright is not interfered with by an interdict which will only apply to a set of cards, the construction of which has been specially facilitated under a mutual arrangement between the parties.

“As I have said, I do not think any question of patent or copyright arises in this case. I think there is sufficient ground for its decision in the conclusions I have come to on the facts as to custom of trade. There is, therefore, less necessity for again referring to the case of *M. Cosh v. Crow & Company*, 1903, 5 F. 670, with which I have dealt in my former interlocutor of 1st November 1905. If there had been no proof of a particular custom of trade, that case would still have presented a very strong analogy to the present. As, however, it may in one view be held to involve a question under the Fine Arts Copyright Act 1862—although this does not appear to have formed the ground of the decision—I think it is unnecessary to hold that the analogy is complete. The law applicable to the present case, now that the whole facts are ascertained, does not seem to require this, although that judgment certainly tends strongly in the pursuers’ favour.

“On the whole case I am satisfied that the pursuers are entitled to interdict, and I

therefore give decree as craved with expenses.”

The defenders appealed, and argued—The alleged custom of trade had not been proved. Proof of what generally happened would not establish such a custom as would add new stipulations to a contract—*Brown v. M. Connell*, June 7, 1876, 3 R. 788 (per Lord Gifford). In order that a custom should have this result certain conditions must be present. (1) If the pursuers founded on a general custom of trade, the custom must be uniform throughout the industry—*Armstrong & Company v. M. Gregor & Company*, January 19, 1875, 2 R. 359, 12 S.L.R. 243. (2) On the other hand, if a local custom were averred, the custom must be notorious throughout the district and must be known to both parties—*Bell*, Prin., sec. 101; *Morrison v. Allardyce*, July 27, 1823, 2 S. 434, N.E. 387; *Holman v. Peruvian Nitrate Company*, February 8, 1878, 5 R. 657, 15 S.L.R. 349. (3) The custom must also have been uninterrupted for a long period of time—*Clacevitch v. Hutcheson & Company*, October 28, 1887, 15 R. 11, 25 S.L.R. 11. On the evidence none of these requisites was present here. Further, custom in order to be binding must be consistent with the law—*Bell*, Prin., section 83; *Anderson v. M. Call*, June 1, 1866, 4 Macph. 765, per L. J. C. Inglis at p. 769, 2 S.L.R. 47. The custom here alleged was contrary to law. The pursuers were attempting to set up an artificial system of copyright without conforming to the statutory requirements of registration—*Patents, Designs, and Trade Marks Act 1883* (46 and 47 Vict. c. 57), secs. 49, 50, and 61. The designs were published when the curtains were put on the market—*Daniell on Patents*, pp. 71 and 73. Anybody in the trade who bought curtains could derive the designs. The pursuers not being the owners of a registered design were not entitled to interdict the defenders from using the designs—*Woolley v. Broad*, [1892] 1 Q.B. 806. The photograph negative case (*M. Cosh v. Crow & Company*, March 17, 1903, 5 F. 670, 40 S.L.R. 514) was distinguishable (1) because the copyright of a photograph remained with the sitter—*Copyright (Works of Art) Act 1862* (25 and 26 Vict. cap. 68), sec. 1; and (2) because it was plain *ex facie* of the negative that the person whose features were depicted had an interest in the negative. Even if the custom were proved the pursuers were not entitled to prevail as against the defenders. No doubt the cards vested in the trustee *tantum et tale*—*Heritable Reversionary Company v. Millar*, August 9, 1892, 19 R. (H.L.) 43, 30 S.L.R. 13. But the trustee could convey a higher right than his own to a *bona fide* purchaser for value. There was no *vitium reale*, and the doctrine *assignatus utitur jure auctoris* did not apply to sales of corporeal moveables—*Bell*, Com., pp. 302, 304, 306; *Scottish Widows' Fund v. Buist*, July 14, 1876, 3 R. 1078, 13 S.L.R. 659. The defenders had therefore acquired the cards free of any restrictive condition to which the firm of Robert Muir might have subjected them—

selves. The articles of roup did not restrict the defenders' right in the cards, because the pursuers' contract was not "similar" to Heyman & Alexander's. Even if the two contracts were similar, the pursuers would not have been entitled to found on the articles. The trustee and the defenders might have altered the terms of the articles without reference to the pursuers. The pursuers were neither named nor designed in the articles. The pursuers therefore had no *ius questitum* in the stipulations contained in the articles, and were not entitled to found on them—*Peddie v. Brown & Company*, June 9, 1857, 3 Macq. 65, at p. 73; *Finnie v. Glasgow and South-Western Railway Company*, August 13, 1857, 3 Macq. 75; *Henderson v. Stubbs, Limited*, November 13, 1894, 22 R. 51, 32 S.L.R. 49; *Welsh & Forbes v. Johnston and Others*, February 3, 1906, 43 S.L.R. 353.

Argued for the pursuers—The custom of trade had been proved, and it was an implied term of the pursuer's contract with Robert Muir that the designs should be used only for the purpose of making curtains to the pursuers' orders, at least until the pursuers abandoned the designs—*Pollock on Contracts*, 7th edition, p. 253. The custom of trade was in no way contrary to law. The pursuers might have made an express contract to the same effect. The pursuers were not claiming protection against the public on the ground of their ownership of the designs. But they did claim protection against unfair competition on the ground of their contract with the defenders. No doubt the defenders could buy curtains in the market and derive the designs from the curtains. But the cards were property which had come into existence solely for the purpose of supplying pursuers' orders, and the defenders were not entitled to use them for any other purpose—*M'Cosh v. Crow & Company, cit. sup.* The case was truly a case of confidential employment. The custom was reasonable and such as the Court would uphold—*Bruce v. Smith*, June 4, 1890, 17 R. 1000, *per* Lord Rutherford Clark at p. 1011, 27 S.L.R. 785. The cards had thus become the property of Robert Muir *sub modo*—subject to a restriction. They vested in the trustee in bankruptcy *tantum et tale*—*Heritable Reversionary Company v. Miller, cit. sup.* The defenders had no higher right. They were in the trade and must be taken to have known of the custom. They had notice in the articles of roup that the cards were held subject to restriction. Further, the defenders had become privy to the contract between the pursuers and Robert Muir. With respect to designs of which curtains were in course of manufacture at the date of the sale, the defenders had adopted the contract by delivering the curtains. With respect to designs for which curtains were not in course of manufacture, the defenders had acquiesced in the pursuers' claim that they had a right of control over the cards.

At advising—

LORD M'LAREN—The question in this case relates to the legal construction of a form of contract which appears to be in general use in a branch of the weaving industry, *videlicet*, the manufacture of lace curtains as carried on in Irvine and the neighbourhood. According to the evidence it is a case of very frequent occurrence that a manufacturer who is unable to overtake all the work that he has in hand commissions another manufacturer to weave a stated number of curtains according to a design which he supplies. The lace design is wrought out by means of the well-known apparatus of the Jacquard loom, and I need hardly add, in speaking of such a very familiar process, that to the production of any given design it is necessary to prepare a system of perforated cards by means of which the threads of the warp are shifted in the process of weaving so as to produce the required design.

When an order is given, the manufacturer who accepts the order has to prepare a system of cards corresponding to the design supplied to him. The preparation of the cards is a very material element in the cost of production. The weight of the evidence is to the effect that the maker in estimating for the number of curtains ordered includes the whole cost of preparing the cards, although some witnesses say that such estimates do not always cover the entire cost of preparing the cards, and that to a certain extent the manufacturer trusts to the chance of getting what is termed a "repeat order" to indemnify him completely for his outlay. It would thus appear that in general it is for the interest of both parties that such repeat orders should be given. The manufacturer who gives the original order (and who in this transaction may be regarded as a merchant employing the other manufacturer) will naturally wish to sell as many copies as possible of his design, and the maker of the curtains will wish to supply as many as possible, because then his original outlay in making the cards is spread over a larger quantity of goods.

The practice seems to be (I am not now considering its legal effect) that at least for the season in which the order is given the cards are held at the disposal of the person who gives the order, and are only used for orders given by him. But as the cards are the maker's property, it is considered that when the person giving the order has no further use for them, *e.g.*, if he intimates that he is not going to give a repeat order, the maker of the cards may use them for the purposes of his own business, or, it may be, for the execution of orders received from other parties. This practice is said to flow from, or at least to establish, an implied condition of the contract for the supply of the goods.

In this connection one other feature of the trade may be noticed. I have hitherto spoken of the case where a manufacturer being unable to overtake all the work he desires to execute employs another maker in his own branch of the trade to weave for him. But it is explained that in Notting-

ham, which is or was the chief seat of the lace industry, there are makers who do not manufacture lace goods on their own account, but make their living by doing work for other manufacturers. This is called by the witnesses the "brown trade," because the goods are in the brown or unbleached condition while they are in the hands of these auxiliary makers. I only mention this circumstance because it entered into the arguments. But, as I understand, there has only been one maker of the "brown trade" in Irvine, and in my opinion the distinction is of no consequence for the purposes of the present action.

The respondents William Morton & Company employed Robert Muir, now insolvent, to make lace curtains for them according to designs which they supplied. The work was executed on the usual terms—that is to say, the price charged to Messrs Morton was understood to cover the preparation of the cards, and the cards were the property of Robert Muir, and passed to the trustee on his sequestrated estate.

The trustee sold the machinery and plant by auction, and in the articles of roup a special condition was inserted regarding the cards which were disposed of, which I shall afterwards consider, because it is a disputed point whether that condition applies to the cards made by Robert Muir to the order of Morton & Company. To complete the narrative of the facts of the case, I have only further to say that Messrs Morton, respondents in the appeal, who wished to make further use of the cards which had been made by Robert Muir in pursuance of their orders, found that the appellants were using these cards for their own purposes, in contravention of the preferential right which they assert, and they instituted this process of interdict in the Sheriff Court to have the appellants interdicted from using the cards made from their designs for the manufacture of lace curtains, and from selling the lace curtains which they had made from the said cards.

In these circumstances the following are the questions which, as I think, arise for decision :—1. Is the condition alleged by the respondents within the region of usage of trade or customary implied condition, and is this customary condition proved?

2. Assuming that a trustee in bankruptcy takes no higher right than that of a gratuitous alienee (which I take to be the meaning of the expression *tantum et tale*), was the trustee in this case affected by the condition that the cards made to Messrs Morton's order were not to be used without their consent?

3. Are the appellants, who are purchasers from the trustee, affected by the condition?

On the first question, I may begin by stating what I take to be the fair result of the evidence, *videlicet*, that according to the general understanding of the trade in Scotland a maker who works to a design supplied to him has not an unqualified right to the use of the cards which he makes from that design, but is held to have received

the design for the purposes of the order given to him and any further orders from the same manufacturer or merchant. The witnesses naturally vary to some extent in their way of expressing the condition which limits the use that may be made of the cards, but the substance of their evidence is that the maker of cards to a design which is not his own is subject to a two-fold condition—first, that the cards are to be kept unused for a reasonable time to admit of the merchant or purchasers of the goods giving repeat orders if he so desires; second, that the cards are not to be used by the maker for his own purposes unless and until the merchant or purchaser has no further use for them. I do not propose further to analyse the evidence on this subject, because I hold that its import is reasonably clear, and because, as I understand, this appeal has been taken mainly in the view of getting a decision on the legal questions arising out of the case. I proceed, therefore, to consider what are the limitations on the right of ownership in the cards which may reasonably be implied from the nature of such contracts and the usage which has prevailed in carrying them into execution.

The conception of an implied condition is one with which we are familiar in relation to contracts of every description, and if we seek to trace such implied conditions to their source it will be found that in almost every instance they are founded either on universal custom or in the nature of the contract itself. If the condition is such that every reasonable man, on the one part, would desire for his own protection to stipulate for the condition, and that no reasonable man, on the other part, would refuse to accede to it, then it is not unnatural that the condition should be taken for granted in all contracts of the class without the necessity of giving it formal expression. A very good illustration of such an implied condition is the case of photographic portraiture referred to in the argument, and which was the subject of decision in the case of *M'Cosh v. Crow & Company*, 5 Fr., 670. It was there held that while the property of the negative portrait is in the photographer, he is not entitled to make copies from it for sale or exhibition without the consent of the person giving the order. This is a decision of our own Court, and from the authorities there cited, and particularly the opinion of Mr Justice North which is quoted by Lord Moncreiff, I have no doubt that the law of England is to the same effect as our own. Indeed the laws could not well be different. The decision is an adaptation to the comparatively new process of photography of the established principle that an artist who paints a portrait to order is not entitled to multiply copies of it without the purchaser's consent. But the interest of the decision as bearing on the present case depends on the peculiarity that photographic prints are obtained by means of an intermediate production, the negative plate, through the instrumentality of which the positive plates are produced,

just as in the process of weaving the lace curtain is produced by the action of the perforated cards on the warp in the loom. The cases have also this element in common, that they relate to the multiplication of an artistic design by mechanical methods.

I should desire, however, to guard myself against too readily accepting the suggested analogy and applying it to a special industry like the weaving trade; and without proposing to rest the decision on what is technically known as usage of trade, I think that evidence of the general understanding of the trade may very usefully be considered in determining whether there is or is not an implied condition in such contracts, whereby the merchant who furnishes the design reserves to himself a certain control as to the use to be made of the cards which are prepared from his design.

If I had to consider the question without the aid which this evidence affords I should think it a very unreasonable result of the bargain that the manufacturer, as soon as he had furnished the number of lace curtains that were ordered, should be at liberty to make use of the design and the cards prepared from the design to make an equal number of pieces for himself and so to compete in the market with his employer. I should not consider that the non-registration of the design made any difference; because the employer might be prepared to take the risk of members of the public copying his design and making sets of cards for themselves, and might yet consider himself protected by the nature of his contract against such a breach of confidence as is implied in the act of competing with him by the sale of goods made directly from his design and from the cards for which he had paid. If the employer had intimated that he had no further use for the cards, and especially if a sufficient time had elapsed to enable him to dispose of the goods supplied to his order, I should not be prepared to hold that the owner of the cards was put under any further implication not to make use of them. But now, when I learn from the evidence that what I should suppose to be a reasonable implication from the nature of the contract is in exact accordance with the understanding of the trade, uniformly accepted and acted on although not hitherto brought to the test of a legal decision, I think the implication is very much strengthened. The two grounds of judgment are not distinct; they support each other. First, the condition must be one which the law will regard as reasonably arising from the nature of the contract when fully understood. But as the Court is not conversant with the details of commercial business we receive evidence on this subject, and the result of the evidence on my mind is that I am satisfied that such a condition is implied; in other words, that no merchant would furnish a design and give an order except on the understanding that the maker of the goods was not to make use of his design to compete with him in the market.

On the second question which I have put I shall say very little, because I think it is perfectly clear that the trustee in bankruptcy is bound by any personal condition which limits the right of the bankrupt. The argument that was rejected by the House of Lords in the case of *The Heritable Reversionary Company v. Millar* was that the trustee was only bound by conditions which entered into the real right. The bankrupt was the manager of a loan company, for whose convenience the titles to their securities were taken in the manager's name. The trustee on the bankrupt's estates proposed to sell these securities for the benefit of creditors, but the decision was that as the bankrupt held the properties in trust, although the trust was not reduced to writing, the creditors took nothing but the legal estate. In the present case, if we are right in holding that Robert Muir could not conscientiously use these cards for his own purposes standing Messrs Morton's right in them, it follows that the trustee was under a similar disability.

There remains for consideration the third question, Whether the appellants, who are purchasers from the trustee in bankruptcy, are affected by the implied condition? Now, I think it is quite possible that a trustee on a sequestrated estate, like any other owner of restricted property, might be able to give an unrestricted title to a *bona fide* onerous purchaser without notice of that restriction. This, however, could hardly ever occur in the ordinary course of business; because, first, unless we suppose fraud or incredible ignorance on the part of the trustee, he would certainly give the purchaser notice of the restriction affecting the subject of sale, and secondly, even if there was no express notification, in the case of a sale of moveables the purchaser would most probably discover the restriction for himself.

In the present case the articles of roup contained a special stipulation as to the cards. I should here state that one of the firms (Messrs Heyman) that had given orders to Robert Muir, had put him under an obligation in writing not to use the cards made from their designs to their prejudice. Now, with reference to the sale of the stock of cards pertaining to the sequestrated estate the articles of roup contains this clause—"The purchaser shall only be entitled to use the same subject to his implementing the obligations undertaken by or incumbent on the second party to said agreement (Heyman's agreement) or under any other similar agreement in connection with said cards or any of them."

I think that the effect of this clause was that the trustee did not profess to give an unqualified right to the use of any of the cards sold, and that the purchasers are put on their inquiry as to the existence of any similar agreement affecting cards other than those which belonged to Messrs Heyman. That the purchasers so understood the clause I do not doubt, because the price paid was only £1 per ton, which according to the evidence is the value of the cards as wastepaper. The appellants in a sense were

bona fide onerous purchasers, but then the price which they paid is not consistent with the supposition that they bought the cards with a right to use them for the manufacture of curtains for themselves. I do not, however, attach much weight to this consideration, because we know that bankrupt stock is often purchased for a sum much below its intrinsic value, and this was a sale by auction. But on the question whether the purchasers had notice of the condition affecting the use of the cards, I think that the expression "or under any other similar agreement" was sufficient notice that other persons in a similar position to Messrs Heyman had claims of a like nature on the cards made to their design; and as the appellants purchased the stock and plant, including the cards, with the intention of continuing the business carried on by Robert Muir, or engaging in a new business of the like nature, they must be held to have had knowledge of the customary conditions under which the designer has a preferential right to the use of the cards. For these reasons I am unable to affirm that the appellants acquired the cards free from the conditions affecting their use.

According to the uncontradicted evidence of Mr Morton, he in April 1905 asked the appellants for a quotation for the making of certain nets applicable to certain of his designs. The price quoted was 20 per cent. higher than he had previously paid, and he did not see his way to giving a repeat order. He afterwards learned that the appellants had offered the same goods to another trader at a lower price. I think that this action of the appellants was inconsistent with the respondents' rights as designers of the pattern, and that interdict must follow. In granting interdict in this case we do not in any way disaffirm the claim of the makers of such cards to make use of them in the case where the designer or owner of the design has intimated that he has no further use for them, or in the case where a reasonable time has elapsed (which the witnesses put as a year) without a repetition of the original order having been given.

I have only further to say that I do not think that the case of the respondents requires that they should have a *jus quaesitum* under the articles of roup. If these articles had proposed to give a new right, or to create a new restriction as to the use of the cards, the question would arise whether the respondents, who are not named in the articles, could claim the benefit of the right. But the object of the articles is the conservation of existing rights, and the motive of the trustee who put forward the articles was to protect himself against claims which might have arisen against himself if he had proposed to give a higher right than he himself possessed. In such a case the party who founds on the implied condition does not found on any right arising out of the articles of roup. He only refers to the articles for the purpose of showing that the purchaser had notice of a claim inconsistent with the full right of property which he asserts. For this pur-

pose the respondents may refer to the articles of roup without founding on the instrument as a source of title or right. In all the circumstances I am of opinion that the decree of the Sheriff should be affirmed.

LORD PEARSON—This is an action of interdict of a somewhat peculiar nature. The question raised is as to the extent to which the defenders, who are lace manufacturers, are entitled to make use of certain loom pattern cards now belonging to them, in the manufacture of lace curtains for their own behoof. These cards originated from patterns designed for and belonging to the pursuers, none of which, however, were registered under the statutes as to the registration of designs. Each design requires to be translated from the design sheet into a set of pattern cards, so as to reproduce the pattern in the web. When occasion requires, as, for instance, when a manufacturer has more work in hand than his looms can overtake, he agrees with some other manufacturer to undertake part of the work for him, forwarding at the same time the design which he desires to be reproduced. The other manufacturer prepares a set of cards from the design, and he then sends back the design, and keeps the pattern cards to be used in the fulfilment of the order.

The question now arises as to the right of the second manufacturer to use the cards thus obtained in making curtains of the same pattern for himself or for a third manufacturer, so as to compete with the firm from whom he got the design for the special purpose I have described. It is obvious that by using the patterns for his own behoof, or for behoof of a third party, he might easily compete with and undersell the manufacturer who entrusted the design to him.

Although the pursuers aver on record that the cards are their property, that is not the form of their claim, nor is it any part of their case. On the contrary, the conclusions of the summons are framed on the footing that the cards themselves are the property of the defenders. Accordingly the pursuers do not ask for delivery of the cards. The decree which they seek is an interdict against the defenders using the cards in question for their own behoof in the manufacture of lace curtains and curtain nets, and also against their selling curtains and curtain nets made from the said cards.

Accordingly it is incumbent on the pursuers to establish that the defenders' admitted right of property in the material of the cards themselves does not carry with it an absolute right of user, but is subject to some qualification or restriction in the pursuers' favour.

The case is further complicated by the fact that the defenders Muir Brothers & Company were not originally parties to the contract. That was entered into between the pursuers on the one hand and a firm designed as Robert Muir, lace manufacturer, on the other. The estates of that firm were sequestrated in the year 1904, and the

trustee in the sequestration (Mr Alexander Mitchell, C.A., Glasgow) proceeded to sell the business and the factory, and also the stock of cards which were in the hands of the sequestrated firm, including the cards now in question.

There are therefore two distinct questions raised. The first is, Did the firm of Robert Muir, with whom the pursuers entered into the original contract, hold the cards under any qualification or restriction enforceable by the pursuers as to the use they could make of them; and, in particular, were they at liberty to use them for the production of curtains which might be put on the market so as to compete with the pursuers? The second question is, Whether in the circumstances under which the defenders Muir Brothers & Company acquired the business and the cards they are affected by any such restrictions or qualifications as to the use of the cards which might have been enforceable as between the original parties?

One argument which was urged for the defenders I may notice at this stage. It was pointed out by the defenders that the patterns being unregistered designs had no protection, and became public property when once they were put on the market; and it was argued that the pursuers were here attempting to get the benefits of registration by means of private agreements. I must say that this does not strike me as an accurate or fair representation of the pursuers' position. I think they are entitled by private agreement to limit the area of publicity as much as they can, and so to arrange matters by contract that their own patterns shall not be used against them in the trade through any act of the firm to which they have entrusted them for a specific purpose. That position seems to be quite reasonable, and all the more so because the arrangement is really for the advantage of both parties. It was represented as an arrangement by which the defenders were said to have bound themselves not to take advantage of these patterns as public property which all the rest of the world were entitled to do. But it is to be remembered that the arrangement is for mutual advantage. It is entered into when one manufacturer has his mill running full and another has not. The former sends his own new and private patterns, prepared (as the proof shows) at considerable cost; and with them he sends an order for so many hundred or thousand pairs of curtains. The other is perfectly free to decline the business; but if he does not he makes an offer to manufacture the goods at so much per pair, allowing for the cost of preparing the pattern cards. It is obvious that if, in addition to the agreed quantity, he were to manufacture from the same cards for his own private business, or for a third party, he might do a great deal of harm to the firm which owned the patterns. He himself, having no outlay on patterns, could undersell the firm in that pattern of goods in the general market; or he might put other firms in a position to compete with them. So far, therefore, from there being anything undue or unfair

in the pursuers' contention, it seems to me to be quite fair and natural that it should be part of the contract, that so long as the manufacturer who so employs the other has it in contemplation to continue his orders, that other shall not be entitled to make any other use of those cards; but that he is free so to use them if the other party notifies that he is done with his orders, or has allowed a whole season to elapse without renewing them.

The pursuers put their case alternatively, maintaining that a contract of such a nature would of itself imply some such limitation, but that in any view there is a custom of trade to that effect. I am disposed to think that the first alternative would suffice for the pursuers' case, and that the contract between the parties really constitutes one of those confidential business relationships in which one party is entrusted with something which he is to use for a specific purpose and no other—as where private patterns are handed to an ironfounder, or confidential papers to a typewriter. But it is not necessary, in my view, to decide the case on this ground; for the pursuers have averred, and in my opinion quite satisfactorily proved, the existence of a custom of trade to the same effect. On this point I consider it sufficient to refer to the careful and accurate analysis of the evidence by the Sheriff-Substitute. I hold that the terms which the pursuers seek to import into this contract by usage of trade are (to use the words of Sir Frederick Pollock), "proved to be an accustomed part of such contracts made between such persons as the Court has before it."

The second question in the case, as to whether the defenders, who came in as purchasers from the trustee, are bound by the contract to this effect, is, I think, a question of some difficulty. I do not refer to the question whether the trustee in the sequestration is so bound, for I think it clear that he is. But the contract must be transmitted against the purchasers. Now, I think it is proved (1) that the purchasers took up and completed all the pursuers' orders which were actually in hand at the transfer; (2) that as regards current orders not actually in hand they accepted from the pursuers a cancellation of so much of them as applied to nets, but not of the others; and (3) that in response to their suggestion that they should destroy the pursuer's cards in stock, they were requested by the pursuers not to do so, which was tantamount to leaving those cards open for further orders. The defenders, however, instead of waiting till the end of the season, set about immediately to manufacture curtains from those cards and to put them on the market in competition with the pursuers. This I hold they were not entitled to do, inasmuch as upon the proved facts they had adopted the original contracts, with all their terms, express and implied.

LORD ARDWALL—The pursuers and defenders are both manufacturers of lace curtains and curtain nets at Newmilns in

Ayrshire. About three or four years ago the pursuers, finding that they had more work ordered in the way of making curtains and nets than they could overtake in their own factory, commenced to employ the now defunct firm of Robert Muir to manufacture curtains and nets for them from their designs. It may be explained that the firm of Robert Muir were engaged in what is referred to in the evidence as the "brown trade," which merely means that they carried on the manufacture of lace curtains and nets up to the stage when these articles had passed through the looms, but had not been bleached and finished, whereas what are known as manufacturers in the "white trade" not only do all that the "brown" manufacturers do but complete the finishing of the curtains and nets so as to make them fit for the market. The said designs had either been designed in their own factory by the pursuers' designer, or had been purchased from outside designers and paid for by the pursuers.

It is proved that it is a common practice amongst lace manufacturers when one firm cannot fulfil their orders quickly enough, that they should employ other firms of manufacturers, either in the "brown" or "white" trade, to manufacture curtains and nets for them up to a certain stage. The process of manufacturing curtains from designs is as follows.

After a design has been drawn it is transferred to what is known as a "draft," which is a large sheet of paper covered with lines crossing each other at very short distances, and showing the texture of the lace at different places by various colours and shades of colours. When the "draft"—or, as it is sometimes called the "pattern"—is handed to the manufacturer who is to make the curtains or nets, his first process is to put that pattern on to cards. With a view to this the design is first "read" on to strings, and after these strings have been placed in proper positions on a large card or piece of paste-board it goes to the punchers, and under the guidance of these strings the cards are punched with holes in such positions as to produce from the looms curtains according to the desired design. It requires a greater or less number of punched cards to carry out a design, and when these cards are placed in a loom the manufacture of the lace curtain or net commences and proceeds till the articles are completed so far as the loom is concerned. They are then ready for bleaching and finishing. The numbers set forth in the prayer of the note are the numbers of the designs handed by the pursuers to the said Robert Muir for the purpose of manufacturing curtains and nets according thereto, and the cards mentioned in the prayer of the note are cards punched from these designs and intended for the purpose of manufacturing curtains and curtain nets in conformity with such designs. It is matter of admission by both parties that the material of the cards belongs to the manufacturers who supplied and punched them. The question at issue is as to the use of the cards.

The estates of the firm of Robert Muir were sequestered on 14th November 1904, and Alexander Mitchell, C.A., Glasgow, was appointed trustee thereon. He had previously carried on the business of the said firm for the period from 3rd September 1903 to 26th July 1904, under a family arrangement. On 15th March 1905 the factory belonging to the estate of Robert Muir was exposed to public roup, along with the moveable contents thereof, and the defenders, Muir Brothers & Company, became proprietors of the factory and of the cards in question by purchase. I shall afterwards refer particularly to the circumstances and conditions under which these cards were taken over by the defenders.

Since the defenders got possession of the said factory and cards they have been manufacturing for their own behoof lace curtains and curtain nets from cards made in conformity with the pursuers' designs, and having been selling them or offering them for sale. In these circumstances the present action of interdict was raised.

It will be convenient to consider the pursuers' case under two distinct heads, and to inquire, first, whether the firm of Robert Muir got possession of these designs and held the cards made from them under a contract which prevented them from using them otherwise than for executing the pursuers' orders or repeat orders; and, second, assuming that this was so, whether the defenders as purchasers of these cards are barred by delegation, adoption, or otherwise from repudiating the conditions of the contract under which Robert Muir held these cards.

The contract under which the designs in question were handed over to Robert Muir was one of a simple description. The designs were sent along with an order for curtains or nets, which took the form of a letter setting forth the numbers of the designs sent, the number of pairs of curtains or lengths of net wanted, the quality, and the price at which they were to be manufactured. It is proved that in accepting orders, or estimating, for the manufacture of curtains, the manufacturer who is to weave them is accustomed to take into consideration the cost of making the cards necessary to carry out the designs. It is maintained for the pursuers that in all such contracts there is an implied term arising from the custom of the trade to the effect that the manufacturer to whom designs are sent by another manufacturer in order that the first manufacturer may weave curtains and curtain nets therefrom for behoof of the second manufacturer, is not entitled to utilise cards punched for the purpose of carrying out the designs of the manufacturer who gave him the order, except for the order or repeat orders of such manufacturer; or, to put it more shortly, that a manufacturer employed to carry out a design furnished to him by another manufacturer for the purpose of executing orders for him, is not entitled to utilise these designs or the cards made from them for his own purposes. This custom, of

course, may be expressed in a variety of ways applicable either to the use of the designs, or the cards, or the curtains and nets manufactured from them, but the above statement of it sufficiently sets forth the custom as averred by the pursuers.

In considering whether the alleged custom of trade has been proved to exist, I think it is of importance to observe that, apart from such custom altogether, and assuming nothing to have been said or done beyond the handing over of the design and the giving of the order, it seems to be a condition necessarily implied in a contract of a confidential nature, such as that in question, that a manufacturer to whom a design is entrusted by another manufacturer for a particular purpose should not make use of that design for any other purpose than that for which it was given to him; and, in particular, should not, having been entrusted with the design for a particular purpose, endeavour to turn it to his own benefit contrary to the trust under which he received it. A number of analogous cases may be given, *e.g.*, when a person hands a manuscript, intended only to be printed for his own use or for private circulation, to a printer, such printer would not be entitled to print and then publish copies taken from that manuscript; and again, suppose an inventor of some new machinery or the like sends a rough model of his invention to some one more skilled than himself in the same trade, and employs him to make drawings from it with a view to taking out a patent, it would necessarily be implied that the person so trusted with such model should not employ it for the purpose of taking out a patent himself or selling the invention to some other person. All this, I think, holds good in regard to such confidential contracts even where no patent has been taken out, or no trade-mark or design has been registered, or no printed matter has been entered at the Stationers' Hall. It is, I think, entirely beside the point to say that the present interdict is an attempt to get the benefit provided by the Designs Act without applying for registration; and it is out of the question, in my opinion, to say that such a custom of trade as thus alleged, or such a condition of contract, is to any extent illegal or contrary to public policy.

Now if the limitation of the rights of a maker of cards for a design is so natural and reasonable as almost to amount to an implied condition of contracts such as those in question, it does not require a great deal of evidence to prove that such a limitation has become crystallised into a recognised custom of the trade.

The Sheriff-Substitute has set forth in his note an excellent analysis and criticism of the evidence, and I do not think it is necessary for me to go further into it than he has done. I agree generally with the view that he has taken with regard to the district in question, which it now seems is the centre of the lace curtain trade, to the effect that the custom is undoubtedly proved to exist there; while with regard

to Nottingham and other places it seems certain that whatever the witnesses may say as to the particular wording of the condition which custom is understood to imply in contracts of this kind, they all practically admit that when one manufacturer hands a design to another to carry out, that other manufacturer gets possession of the design and makes cards from it subject to certain conditions more or less stringent in favour of the person from whom he received the design; but I may observe that the greater part of the evidence from Nottingham is inapplicable to the present case, for the cases which are spoken to by the witnesses from that district are for the most part cases arising between manufacturers and merchants, where the circumstances are very different from the present case, inasmuch as a merchant who has either made or bought a design is only concerned to have a certain number of curtains made from it, generally only for a season; he keeps no stock of cards, and no warehouse to put them in, and when once he has got as many curtains to dispose of as he requires for the season, the cards are of no further value to him, and indeed would be probably an incumbrance, and therefore, as might be expected, the rules regarding merchants are not nearly so stringent as those regarding manufacturers.

Taking the evidence as a whole, I am of opinion, without any serious doubt or difficulty, that the pursuers have established that there is a custom of trade in virtue of which there is an implied condition such as they contend for in all contracts where designs are handed by one lace manufacturer to another for the purpose of executing his orders, that condition being that the manufacturer to whom the designs are entrusted is not entitled to use them or the cards made for the purpose of carrying them out except for the purpose of executing the orders of the manufacturer from whom the design was received. It follows that I hold that the firm of Robert Muir received the designs and held the cards made therefrom subject to the said implied condition.

It is almost unnecessary to observe that the evidence shows that if the manufacturers to whom the designs belong either expressly or impliedly notify the holder of the cards that they do not intend to manufacture from these designs any more, the holders of the cards are entitled to use them as they please. Such notification is frequently held to be implied from long abstention from giving orders for curtains of a particular design.

The second, and perhaps more difficult, question in the case is whether the defenders are affected with the condition under which the firm of Robert Muir held the cards. In answering this question some attention requires to be paid to the circumstances under which the defenders took over these cards. Robert Muir's trustee in bankruptcy, Mr Mitchell, had for some time before the sale to the defenders been carrying on the factory belonging

to the sequestered estate, and it is noticeable that he had, as a trustee has a right to do, adopted the current contracts which the pursuers had with Robert Muir, because up to the time of the factory being handed over to the defenders he was manufacturing goods from the pursuers' designs in fulfilment of orders given by them. This appears from the evidence of Mr Bryson, a partner of the defenders' firm, and it also appears from the same evidence that the defenders took over these contracts from the trustee. Mr Bryson says—“When we had fixed the price of the cards with Mr Mitchell, we made an arrangement with him with regard to the orders in the books. We agreed to execute them without making any claim against the trustee. . . . Among these orders were certain orders for the pursuers.” He then goes on to say that they received a general cancellation of all work for the pursuers, and then they wrote the letter of 22nd March 1905, which is in these terms— . . . (*quotes, supra*) . . . Following on which the pursuers instructed the defenders not to destroy them in the meantime. I think this must be taken to mean that they might require to give them further orders, and the result was that Mr Robert Muir junior, who was then in the employment of the defenders, answered verbally on their behalf that it was all right and that they would not be destroyed.

The importance of all this is that it appears that first the trustee and then the defenders adopted the current contracts between the pursuers and the firm of Robert Muir, and I think it is not unfair to the defenders to hold that they undertook to retain the cards in question under the same conditions as the firm of Robert Muir had held them. As throwing light upon this it is noticeable that the price at which the cards were sold was fixed at £1 per ton, which is the price at which waste cards and waste paper is usually sold. So far from their observing the conditions under which these cards were held by Robert Muir, the defenders proceeded to compete with the pursuers in the market. For about the beginning of April 1905 Mr Morton of the pursuers' firm asked them for a quotation for the making of curtain nets according to certain of the designs. The price quoted was 20 per cent. higher than the pursuers had previously paid, and they accordingly did not give a repeat order. In the following month a customer came asking for a quotation for one of the designs mentioned in the prayer of the note, and when Mr Morton quoted the price he was told that the customer could buy the same number from the defenders at 4d. per pair less. The pursuers at once found fault with what was being done, and after certain correspondence, and receiving no satisfaction from the defenders, or any undertaking from them that they would cease to compete with them in curtains made from their own designs, they gave instructions for the raising of the present action of interdict.

In the whole circumstances I am of opinion that first the trustee in bankruptcy

of Robert Muir, and then the defenders' firm, adopted the current contracts between the pursuers and the firm of Robert Muir, and must therefore be held to be bound by the same conditions as those under which the firm of Robert Muir had received the designs and held the cards. I consider there is considerable force in the view taken by the Sheriff-Substitute that under the articles of roup there was a *ius quaesitum* in favour of the pursuers, but I prefer to put my decision upon the ground that the defenders adopted the contract between the pursuers and Robert Muir, and after recognising that the pursuers had rights in the designs and cards made therefrom, proceeded in breach of the condition of the contract to compete with the pursuers by offering for sale curtains made from their designs at a lower price than they were quoting to the pursuers for the same curtains made from their own designs.

For these reasons I think the Sheriff-Substitute's decision ought to be affirmed.

The Court pronounced this interlocutor—

“Recal the ninth finding in fact of the Sheriff-Substitute's interlocutor of 30th May 1906, and in place thereof find that it is proved that in ‘the Irvine Valley’ there prevails a custom of trade to the effect that when designs are supplied by one manufacturer to another for the purpose of having curtains made from them, it is an implied condition of the contract that curtains are not to be made or sold by the second manufacturer from such designs otherwise than to the orders of the first, except with his consent, either express or implied from a refusal to give further orders or from the cessation of orders for a year; *quoad ultra* find in terms of the findings in fact and in law in the said interlocutor: Therefore dismiss the appeal and affirm the judgment of the Sheriff-Substitute in said interlocutor, and decern; of new repel the defences, and grant interdict in terms of the prayer of the petition, and decern . . .”

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