ORIGINAL CIVIL.

Before Mr. Justice Farran.

1885.
July 3, 5, 6, 8, 10.

THE MA'NOCKJI PETIT MANUFACTURING COMPANY, LIMITED, (PLAINTIFFS), *v.* THE MAHA'LAXMI SPINNING AND WEAVING COMPANY, LIMITED, (DEFENDANTS.)*

Trade mark—Infringement of trade mark—Damage caused to plaintiffs by way of enhancement of loss, and not by loss of profit—Measure of damages.

Where the infringement of the plaintiffs' trade mark by the defendants caused a loss of profit to the plaintiffs, not by diminishing the amount of goods sold by the plaintiffs, by taking away their customers or ousting them from their usual market, but by causing the goods actually sold by the plaintiffs to be sold at a diminished price;

Held, that the defendants were liable for the loss sustained by the plaintiffs; and that the amount of the reduction in the price of the goods sold was the measure of damages.

The plaintiffs sued the defendants for the infringement of a trade mark used by the plaintiffs upon bundles of yarn sold by them, and known as "No. 20 red tie" yarn. They alleged that the defendants introduced into the Madras market a quantity of yarn bearing similar marks to those upon the plaintiffs' yarn, but of very inferior quality; and that, in consequence of this action of the defendants, the selling price of the plaintiffs' yarn was, during the months of April and May, 1885, depreciated beyond the amount of depreciation attributable to the natural fall of market prices in those months; and they contended that such extra depreciation was the natural and reasonable result of the defendants' wrongful act. The plaintiffs calculated the damages sustained by them at Rs. 6,000.

It appeared that, during the months in question, the plaintiffs' mills were not working at a profit, and would have made no profits, even if the plaintiffs had obtained for their yarn the ruling market price. The damage, therefore, (if any) caused to the plaintiffs by the action of the defendants, was not in the form of profits, but in the form of enhancement of loss.

Held, upon the evidence, that the extra fall in the price of the plaintiffs' yarn beyond the general market depression was due, not simply to the introduction of the defendants' yarn into the Madras market, but to its introduction with the trade mark similar to that of the plaintiffs. The Court found that the said wrongful act of the defendants prejudicially affected the sale of the plaintiffs' yarn to the extent of about two annas per bundle; that the damage thus sustained by the plaintiffs was the reasonable and probable result of the defendants' action; and that the plaintiffs were entitled to recover such damage from the defendants.

SUIT for an injunction to restrain the defendants from using the plaintiffs' trade mark and for damages, &c. The plaintiffs alleged that for a number of years they had manufactured and sold a certain

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yarn, known as "No. 20 red tie" yarn, which for the purposes of sale was made up in bales and bundles in the manner and with the marks described in the plaint; that this "No. 20 red tie" yarn had, for some time, had a high reputation and extensive sale in the Madras Presidency; that the defendants had been imitating the marks affixed upon the plaintiffs' "No. 20 red tie" yarn, and had sold a large quantity of their own yarn as and for the plaintiffs' said yarn, and had thereby caused much damage to the plaintiffs.

The plaintiffs prayed (*a*) for an account of the gains and profits made by the defendants by sale of the yarn bearing marks in imitation of the plaintiffs' marks; (*b*) for an injunction against the defendants; (*c*) for the cancellation of the plates, &c., used for producing the marks complained of; (*d*) for damages.

The defendants in their written statement stated the number of bales which they had manufactured bearing the marks of which the plaintiffs complained, and the manner in which they had disposed of them; and pleaded that in manufacturing and selling such bales they had been ignorant that they were violating any rights of the plaintiffs; and that they had undertaken not to continue to use such marks and devices. They further stated that they had brought into Court Rs. 1,000, which, they contended, was sufficient to cover any loss sustained by the plaintiffs.

The plaintiffs refused to accept the said sum of Rs. 1,000, which, they contended, was quite inadequate. The case, accordingly, came on for hearing upon the question of damages only.

The plaintiffs estimated their loss at about Rs. 6,000, resulting from the defendants having introduced, into the Madras market, yarn bearing marks similar to the plaintiffs' marks, but of very inferior quality. They alleged that their "No. 20 red tie" yarn had, consequently, during March and April, 1885, been depreciated beyond the amount of depreciation due to the natural fall of the markets in those months; and they contended that such extra depreciation was the natural and reasonable result of the defendants' act. They also claimed a sum of Rs. 9,000 as further damage incapable of being estimated by calculation.

The defendants contended that the extra fall in the price of the plaintiffs' yarn, beyond the fall due to the general depreciation of the market., was not attributable to the acts of the defendants, but to other causes which they specified.

Macpherson and *Inverarity* for the plaintiffs.

Latham (Advocate General) and *B. Tyabji* for the defendants.

July 20. FARRAN, J.:—(After referring to the pleading and the correspondence which took place between the parties, continued:) The result is, that the plaintiffs are admittedly entitled to a decree in terms of paras. (*b*) and (*c*) of the prayer of their plaint, and to Rs. 1,000 as damages, and the costs of the suit down to the 3rd June, 1885, together with their costs of obtaining a decree to the above effect.

The only questions left for determination are, whether the plaintiffs have established their claim to recover more than Rs. 1,000 as damages from the defendants; and how the costs subsequent to the 3rd June, 1885, are to be borne.

The issues raised at the hearing were "—1. Whether the defendants have manufactured or sold any "No. 20 red tie" yarn with the devices or marks complained of, other than as in paras. 2 and 3 of the written statement admitted? 2. Whether any, and what, number of the bales of the defendants' "No. 20 red tie" yarn have been sold in Madras as and for the plaintiffs' "No. 20 red tie" yarn? 3. Whether the plaintiffs are entitled to any, and what, damages in excess of the sum of Rs. 1,000 paid into Court? 4. Whether the plaintiffs are entitled to any, and what, relief in this suit? The material issue is the third. The answer to it, under the peculiar circumstances of this case, is one which cannot be given without hesitation.

The actual facts of the case are not much in dispute. The difficulty is to draw the proper legal inferences, and to deduce the proper legal consequences from these facts as proved. The mode adopted by the plaintiffs in assessing their damages is, I believe, novel; but that, of itself, is no reason for rejecting it if it contravenes no legal principle. I state it before giving the

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results which the evidence, in my judgment, establishes. The plaintiffs complain that they have suffered appreciable damages, which they calculate, in round numbers, to amount to Rs. 6,000 from the defendants having manufactured, and introduced into the Madras market, a considerable quantity of "No. 20 red tie" yarn in bundles bearing devices and marks very similar to those used by the plaintiffs upon their bundles of "No. 20 red tie" yarn, but very inferior in quality to the plaintiffs' "No. 20 red tie" yarn. The plaintiffs allege that, in consequence of this wrongful action of the defendants, the selling price of their (the plaintiffs') "No. 20 red tie" yarn was, during the months of March and April, 1885, depreciated beyond the amount of depreciation attributable to the natural fall of market prices in those months, and that such extra depreciation was the natural and reasonable result of the defendants' wrongful action. The case is complicated by the fact that, during those months, the plaintiffs' mills were, in the manufacture of their "No. 20 red tie" yarn, and generally, working without profit, and would have been so working had the plaintiffs obtained for such yarn the fair market price at that time ruling. The damage, therefore, caused to them by the action of the defendants was not in the form of diminution of profits, but in that of enhancement of loss. The plaintiffs had to go on manufacturing this yarn to prevent their mills standing idle, and to avoid losing touch with their usual markets. The plaintiffs also complained that they had, by the like action of the defendants, suffered further damage incapable of being estimated by actual calculation. This further damage they put at the sum of Rs. 9,000.

All yarn manufactured in Bombay is made up into bundles of 10 lbs., the hanks in each bundle being tied with a string, by which it is known to dealers in the market. The yarn, with which the present suit is concerned, is "No. 20 red tie" yarn. For many years, previously to 1885, the plaintiffs' company have been in the habit of manufacturing "No. 20 red tie" yarn for the market of Madras and its dependencies, and making it up in the usual 10 lb. bundles, and packing such bundles in bales of 30 bundles. I may here note that yarn, intended for Madras and all other places, except China and Calcutta, is packed in bales

containing 30 bundles. Bales for China and Calcutta contain 40 bundles. In 1884, the plaintiffs had by long user established their right to, and were using, as a trade mark upon their "No. 20 red tie" yarn the device of an elephant standing upon a pedestal, which was printed upon the straw boards placed on two sides of each bundle, and also upon two sides of the casing paper in which each bundle was wrapped. Upon the pedestal were printed, in English and Gujaráti characters, the initial letters of the name of the plaintiffs' company. On a third line, beneath these initial letters, the word "Dinshá" was printed in Gujaráti character. Each bundle, also, had affixed to it, both under and upon the covering, or casing paper, a blue ticket, called a facing paper. A specimen bundle of the plaintiffs' "No. 20 red tie" yarn in straw boards was put in, and another with its casing paper on. The plaintiffs' company in 1884, as they previously had done, sold all their "No. 20 red tie" yarn, made up as I have described, to the firm of Dungersey Gángji in Bombay, or rather manufactured for that firm such quantities as the firm ordered from the plaintiffs. The firm of Dungersey Gángji, in turn, either sent such yarn to Madras to a firm, called Khusháldás Kahándás, to be sold there, or sold it to dealers in Bombay for export to Madras and its presidency. The whole or almost the whole of the plaintiffs "No. 20 red tie" yarn thus found its way to the Madras markets. Besides the "No. 20 red tie" yarn of the plaintiffs' mills, the "No. 20 red tie" yarn of other mills found its way to Madras, notably that manufactured by the Bombay United Spinning and Weaving Company, more commonly called the "Mangaldás," and by the Prince of Wales and Parel Companies. Other mills also sent similar yarn to Madras in small quantities, such as the Victoria Mills, the Dhurumsey Mills, and the Khatáo Mills; but the quantity of the plaintiffs' "No. 20 red tie" yarn sent to Madras exceeded that of all the other mills taken together. Before October, 1884, the defendants did not export any yarn to Madras, nor was their yarn sent there. One or two Madras mills sell "No. 20 red tie" yarn in Madras, but the evidence relating to such sales is meagre. In quality, the plaintiffs' "No. 20 red tie" yarn has always been superior to the yarn of similar description sent from

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Bombay to Madras. It is equal in quality with that of the Empress, Anglo-Indian, and Morárji Mills, but their yarn is not sent to Madras.

At the close of the defendants' case it was attempted to be shown that "No. 20 red tie" yarn of the Morárji Mill was sent to Madras, but unsuccessfully. Maganlál Mánchand, called upon this point, broke down. If the Morárji Mill "No. 20 red tie" yarn were sent to Madras he must have known it. It is not very material, but Jádowji Jairám gives evidence opposed to that of Maganlál; and I do not think it has ever been sent there.

In consequence of its superiority in quality, the plaintiffs' "No. 20 red tie" yarn in Bombay commands a higher price than that of their competitors for the Madras market, the difference in favour of the plaintiffs' yarn being seven or eight pies per pound. There is no substantial difference in the quality or price of the other Bombay mills exporting "No. 20 red tie" yarn to Madras. I do not now refer to the defendants. The "No. 20 red tie" yarn of the Madras United Mill is superior even to that of the plaintiffs' mill, and commands a considerably higher price in Madras. In Madras the plaintiffs' "No. 20 red tie" yarn is sold as "Dinshá" or "Dinsháji" yarn. It is also, from its device, known as "Ratayanay" or "double elephant" yarn. It there enjoys the highest reputation, and, prior to the end of 1884, sold at about seven annas a bundle, or about eight pies per pound higher than the similer yarn of its Bombay competitors. The difference of one anna per bundle is slightly greater than the difference of one pie per pound, being in the proportion of twelve to ten. The off-take of the plaintiffs' yarn (No. 20 red tie) from Madras and its mofussil would seem to average about 420 bales a month. The off-take of the same kind of yarn of all the other mills for those markets apparently did not average as many bales.

The above is a fairly approximate summary of the state of the Madras branch of the "No. 20 red tie" yarn market as it existed in the month of October, 1884.

In September, 1884, the defendants began to manufacture "No. 20 red tie" yarn for the Madras market. For that purpose

they adopted a trade mark very similar to that of the plaintiffs, which I have described, except that the elephant bore upon its back a figure intended to represent, I believe, Her Majesty the Queen holding a sceptre, but which one witness described as a sepoy with a dagger; and the English and Gujaráti lettering on the pedestal were different. The defendants manufactured 93 bales with this device prior to the 19th November, 1884, of which they sent 20 bales, in lots of 10 each, to the firm of Khusháldás Kahándás for sale on the defendants' account in Madras. The residue they sold to dealers in Bombay, but for the Madras market presumably. As to the circumstances under which the latter bales were sold, there is no evidence; but the correspondence between the defendants and the firm of Khusháldás Kahándás has been put in evidence; and Govardhandás Jámnádás, the *munim* of that firm, has been examined, on commission, for the plaintiffs. The following conclusions may be deduced from this correspondence :—1. That the defendants were pitting their yarn against the plaintiffs' yarn, and desired that it should be classed upon the same level. 2. That they knew it was sold by merchants, other than Khusháldás, under the style of "New Dinshá," and did not object to its obtaining that designation. 3. That the defendants' yarn was favourably received in the Madras market. 4. That Khusháldás classed it far below "Dinshá" yarn, which he styles as "No. 20½ red tie" yarn. 5. That, at the end of 1884, the Madras yarn market was dull, and tending to be overstocked.

The exact origin of the name of "New Dinshá" has not been traced; but it seems to have originated, not in Madras, but in Bombay; for Kunia & Co. wrote from Bombay to the witness Chengleraya Chitti to sell the defendants' yarn under that name. This was in October, 1884.

It will be convenient here to consider the relative qualities of the plaintiffs' "No. 20 red tie" yarn and of the defendants' "No. 20 red tie" yarn. Upon a review of all the evidence bearing upon the point, I have arrived at the conclusion, that the defendants' yarn was from 1½ to 2 annas per bundle superior to the Mangaldás, Prince of Wales, and other similar yarns, and about 5 annas per

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bundle inferior to the plaintiffs' yarn. Upon the former point, I rely chiefly upon the correspondence just referred to; and upon the latter, upon the evidence of the defendants' witness, Maganlál Mánchand. I adopt the market price as a good test of quality.

On the 19th November, 1884, the defendants adopted the device, of which the plaintiffs complain. Specimens of defendants' bundles, with casing paper and in straw board s respectively, have been put in as exhibits. The devices are almost identical with those of the plaintiffs, of which they are, apparently, an imitation, save that the Gujaráti and English letters on the pedestal, on which the elephant stands, are somewhat different—a difference not likely to be observed in the Madras mofussil where English and Gujaráti characters are not in use or known. The representation of the Queen is there removed from the back of the elephant. The defendants have given no evidence to show under what circumstances they adopted a trade mark so similar to that long in use by the plaintiffs.

Under the circumstances I have detailed, it certainly behoved them to avoid a trade mark at all resembling that of the traders they were seeking to supplant. 528 bales were manufactured by the defendants with the elephant device, of which 393 were sold and delivered before the 19th February, 1885; 45 were delivered on the 19th February; 40 on the 25th February; 40 on the 4th March; and 9 were repacked in bundles bearing the old device of the Queen and elephant. On the 19th February, the plaintiffs had discovered that the defendants were using their elephant device, and had written to the defendants to complain of their conduct. After the receipt of that letter, the defendants delivered 80, if not 125 bales, bearing the device now complained of. These 519 bales (528 *minus* 9) must have begun to arrive in Madras at the end of 1884, the way for their reception having been prepared by the earlier bales sent there, bearing the Queen and elephant marks. The plaintiffs allege that the result of the introduction of these bales into the Madras market was to depress the price of their yarn below the proper market rate, which otherwise would have been obtained for it, and that such a result would not have been caused, had not the defendants' yarn bundles borne the plaintiffs' devices.

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I now proceed to consider this somewhat difficult question. About the rates for yarn in Madras during the last three months of 1884 there can be no doubt. They are given in the series of letters I have referred to, written by the defendants' agents in Madras to the defendants in Bombay. The plaintiffs' yarn from Rs. 4-5-0 per bundle on 1st October 1884, fell to Rs. 4-4-0 towards the end of December. Similarly, the yarn of the Mangaldás, Prince of Wales, and other mills manufacturing "No. 20 red tie" of the same class, fell from Rs. 3-14-0 to Rs. 3-13-0, the market thus showing an uniform fall of one anna per bundle. The defendants' yarn in the same period may be said to have risen a half anna, from Rs. 3-14-0 to Rs. 3-14-6. The defendants contend that this slight rise in a falling market was due to its having been, in the first instance, sold below its proper rate for the purpose of getting a foothold in the Madras market. The plaintiffs, on the other hand, contend that it was due to the defendants having even then assimilated their marks very closely to those of the plaintiffs, and introduced their yarn as "New" or "*Kotá*" or "*Nakli*" Dinshá. However that may be, I think that, at the end of the year, its normal rate, upon the defendants' contention, must have been reached. The rates then were—For the plaintiffs' yarn, Rs. 4-4-0 per bundle; for the defendants', Rs. 3-14-6; for the Mangaldás, &c., yarn, Rs. 3-13-0. This agrees with the view, I have previously expressed, of the comparative qualities of the yarns. It is much to be regretted that the materials for judging of the subsequent movements of the Madras market for the first four months of 1885 are not equally satisfactory. They can only be gathered from the letters of Khusháldás Kahándás to Jaithá Dungersey, and of the same writer to the defendants, of 7th March, 1885. The last-mentioned letter, which may be looked at for this purpose, however, shows that in March the plaintiffs' yarn had fallen to Rs. 4-1-0; the Mangaldás, Prince of Wales, and other similar yarn had fallen from Rs. 3-12-6 to Rs. 3-12-0, while a Madras witness gives the rate for the defendants' yarn at this time as Rs. 4. Thus, while the fluctuations of the market only affected the Mangaldás, &c., mills to the extent of ½ anna per bundle, the plaintiffs' yarn fell from Rs. 4-4-0 to Rs. 4-1-0, while the defendants' yarn rose to Rs. 4; or, if I am at liberty to

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check that figure by reference to the correspondence, to at least Rs. 3-15-0. While, therefore, the dullness of the market may possibly account for a fall, from the beginning of the year to April, of one anna per bundle in the plaintiffs' yarn, the remaining fall of two annas in it, and the rise of ½ anna in the defendants' yarn, cannot be so accounted for. The yarn of the Madras United Spinning and Weaving Company, which in October was selling at Rs. 4-8-0 per bundle, fell, by the period of which I am now speaking, to Rs. 4-6-3 per bundle, being a fall proportionate to the fall in the Mangaldás yarn. Of this yarn, too, it appears, from the same evidence, there was a glut, which does not appear to have been the case with the plaintiffs' yarn.

Independently of the oral testimony, I have, therefore, come to the conclusion, that the sale of the defendants' "No. 20 red tie" yarn, in Madras, in the early months of 1885, made up in bundles bearing the plaintiffs' trade marks, prejudicially affected the sale of the plaintiffs' yarn in Madras to the extent of about two annas per bundle. This view is fully borne out by the uncontradicted evidence of the witnesses examined under commission at Madras.

Assuming, however, the fall to have taken place, and to be attributable to the introduction of the defendants' yarn into Madras, the further difficulty arises, whether that fall is due to the simple introduction of the defendants' yarn, or to the introduction of that yarn under false colours? Whether it is due to honest competition, or to unfair competition? If the evidence of the witnesses examined under commission can be safely relied on, the answer must be that the fall was due to competition of the latter kind, as they attribute the fall in price in the plaintiffs' yarn to the fact of the defendants having used the double elephant on their bundles. The evidence is too voluminous to refer to in detail. To show the nature of it, I extract answers from that of the witness Goverdhandás Jamnádás:—"The bales marked with elephant and Queen had not so much reputation, nor did they command so extensive a sale as the bundles marked with the elephant. As the device of the defendants' bundle is almost identical with that of the plaintiffs' bundle, and as the defendants' bundle sells at Rs. 3-14-0 each, while the plaintiffs' bundle sells at Rs. 4-3-0 each,

people in the mofussil purchase the former in preference to the latter. The demand for the latter has fallen since the former came to market. In consequence of this, the price of the plaintiffs' yarn has been reduced by one or two annas a bundle in the market. If the sale of the defendants' goods marked with the elephant is stopped, the plaintiffs' goods will sell at the market rate." Further on, he says in cross-examination: "Merchants and brokers came to me, and said the packing marks of one bundle are almost identical with those of the other bundle; that the New Dinshá was sold very cheap; and that, therefore, the price of Dinshá must be reduced." And again: "But the merchants that purchased *Kotá* Dinshá from me might have deceived people in the mofussil by mixing *Kotá* Dinshá with Dinshá, and selling them at a higher rate. I asked the purchasers why they did not buy Dinshá? They said: 'By purchasing *Kotá* Dinshá at a cheaper rate, we can mix it with Dinshá, and sell the whole for a higher price.' I cannot give the names of the merchants who told me so. Salem merchants said that people in the mofussil cannot distinguish the difference between the plaintiffs' and the defendants' yarns, and that, therefore, they made a good profit. I cannot say who were present when the Salem merchants told me so. At the time the Salem merchants said so, I had not *Kotá* Dinshá with me. Whatever I had received, I had sold by that time." In re-examination, he says: "By mixing I mean that the merchants mix the bundles of New Dinshá with Dinshá, and sell the whole as Dinshá." Chengleraya Chitti, a witness not particularly favourable to the plaintiffs, says: "I received upwards of 80 bales up to date, all called New Dinshá. These 80 bales bore the marks of C. to C. 3 (the elephant mark) from A. Kunnia & Co. at Bombay. There was not much demand in Madras for the yarn marked with what I called the sepoy mark. There was a demand in sale for the yarn I received from Bombay, marked C. to C. 3." The witness Muralidás Rámdás states that he actually bought the defendants' goods, believing them to be the plaintiffs', but he did not see the devices on the bundles; and it was the name New Dinshá being applied to the defendants' goods which led him

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into error. Arunagherry Chitti speaks to the depreciation, in price, of the plaintiffs' yarn by the introduction of the defendants' yarn, but does not attribute such depreciation to the devices borne by the defendants' yarn. His evidence, on the whole, supports the defendants' contention, that it was the quality of the defendants' goods, rather than the marks they bore, which caused the plaintiffs' loss. I do not regard him as a satisfactory witness. He puts the sale of the double elephant yarn too early, and strives rather too much to minimise the effect of the defendants' yarn on the market. He was, however, a witness for the plaintiffs. The defendants called no evidence upon the commission.

Mr. Tyabji contended that it would be unfair to attribute the extra fall in the plaintiffs' yarn, beyond the general market depression, to the use by the defendants of the devices complained of, and argued that such extra fall is really attributable to other causes. He said (1) that a falling market must have affected the highly priced yarn in a greater degree than the cheaper article; (2) that the Dinshá yarn, being sold in larger quantities in the Madras market than other yarns, would naturally feel in a greater degree the influence of an adverse turn of prices; (3) that at the end of 1884, and in the early part of 1885, the plaintiffs sold an abnormally large amount of their Dinshá yarn,—that is, 700 bales in December, 150 bales in February, 725 bales in March, and 1,100 bales in April; and (4) that the legitimate competition of the defendants' yarn, which was both cheap and good, supplied a want in the Madras yarn market, and naturally reduced the price of the plaintiffs' yarn.

The answers given to these arguments were:—(1) That the first is an assumption. That the yarn of the Madras United Mills, a more highly priced yarn than the Dinshá yarn, was not proportionately with this latter reduced in price, and that the slight extra depression in the ruling rates of the former mills' yarn is accounted for by the admitted glut of it in the market. (2 and 3) That the amount of Dinshá yarn sent to Madras at the time in question was normal, as shown by the sales of it effected in Bombay during the opening months of 1885 by Dungersey Gángji; and that such normal amount would not be affected in

price by the overstock of inferior goods which never came into competition with it. (4) That, having regard to the admitted and proved superiority of the plaintiffs' yarn over that of the defendants', legitimate competition between them was out of the question; and that, moreover, the comparatively small quantity of the defendants' yarn sent to Madras could not, apart from the trade mark, have possibly influenced the market to the disadvantage of the plaintiffs, in the way in which it was, in fact, influenced.

These answers neutralize the effect of the argument of the defendants' counsel; and I am thrown back on the plaintiffs' suggestion as the only probable explanation of the abnormal fall in the selling price of their yarn in Madras; and I, therefore, adopt it, and principally for the following reasons:—(*a*) The results of the evidence taken on commission proves that the use of the elephant device, coupled with the name under which the defendants' goods were sold in Madras, was the real cause of the abnormal fall in the rates of the plaintiffs' yarn, so far as evidence can prove such a fact. (*b*) That it lies on the defendants' using, without explanation, a device so similar to that used by the plaintiffs, to show that the actual fall of price in the plaintiffs' yarn, which followed upon the introduction, into Madras, of the defendants' yarn bearing the former device, was not the result of the use of that device rather than on the plaintiffs to prove the contrary. (*c*) Because when the defendants ceased to use the device complained of, and began to sell their yarn as "Mahálaxmi yarn" or "Mahálaxmi Dinshá yarn" under the device of the Queen and elephant, the plaintiffs' yarn, not at once, but gradually recovered its original position in the market, and now sells at 5 pies per pound higher than the defendants' yarn of the same class, though the defendants' yarn has fairly maintained its price. The defendants' gain was certainly not proportionate to the plaintiffs' loss.

I now proceed to consider whether the damages, which I have found to have been caused to the plaintiffs by the defendants' wrongful action, are such as can be recovered in a Court of law, and whether that damage is the reasonable and probable result

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of such action of the defendants, or whether it is too remote The measure of damages which can be recovered in the case of a pirated trade mark is not yet settled by authority: Sebastian on Trade Marks, p. 213. It is, however, clear that a plaintiff can recover for the loss of profit which he can prove to have arisen directly from the defendants' wrongful conduct in pirating his trade mark. It will not be assumed, in the absence of proof, that the plaintiff would have sold all the goods which the defendants have sold with the pirated trade mark; but if the plaintiff can prove some distinct damage from the use of his trade mark by showing loss of custom, or something of the kind, he can recover such damages from the defendants—*Leather Cloth Company* v. *Hirschfield*(1). In cases of the unlawful use of a trade mark, loss of profits forms the substantial ground of the claim for compensation —Mayne on Damages, p. 47, *in notis*, (4th ed.) Loss of profits can be caused evidently in two ways:—(1) By diminishing the amount of the goods sold by the plaintiff, by taking away his customers, or ousting him from his usual market, or in some similar way. (2) By causing the goods actually sold by the plaintiff to be sold at a diminished price. If loss of profits can be directly traced to the action of the defendant, I see no reason why he should not be liable for loss caused in the latter way as well as in the former. There would seem to be no difference in principle. In the latter case, the reduction in the price of the goods sold would be the measure of the loss of the plaintiff. If the plaintiff were working at an extremely small profit, such reduction in price would cause him not loss of profit, but actual loss out of pocket. Here, again, there is no distinction, in principle, between the two classes of loss. For each I consider the defendant would be liable if such loss were shown to be the reasonable and probable result of his action.

Was, then, the diminished price obtained for the plaintiffs' Dinshá, or double elephant "No. 20 red tie" yarn, in Madras, in the early months of 1885, the *reasonable and probable* result of the defendants' action in this case? I have already held that it was the result. To answer that question, it is necessary again

(1) L. R. 1 Eq., p. 299.

to revert to the evidence to see what the defendants actually did, and what the course of business in Madras was. The defendants made up their goods in bundles bearing, as it is admitted, a close similarity to those manufactured by the plaintiffs, and sold them to dealers in Bombay,—the greater part of them to one dealer, an old buyer of the plaintiffs' goods from the firm of Dungersy Gángji, by name Gulpuri Nensi. The correspondence I have referred to, though it related to the goods marked with the Queen and elephant, shows, I think, that the defendants intended their goods to be sold as rivalling the goods of the plaintiffs and under the name of New, or of *Kotá*, or of *Nakli* Dinshá, but at a somewhat lower price. They did not, however, send their goods to Madras as those of the plaintiffs. They were packed in bales bearing their own marks, or such marks as indicated to the wholesale dealers in Madras that they had not been manufactured in the plaintiffs' manufactory. The wholesale dealers in Madras knew that goods which they received were not of the plaintiffs' manufacture. The defendants' goods were sold in Madras in bales rarely, if ever, opened in Madras, and for export to the Madras mofussil. Merchants in the Madras mofussil, notably from Salem, either came to Madras to purchase, or through their correspondents in Madras purchased, unbroken bales of yarn with the intention of opening them in their own places of business, and selling them in bundles to purchasers. Such merchants had been in the habit, in this way, of purchasing Dinshá yarn for many years under that name. They did not see the trade mark of an elephant when they purchased in Madras; but they, no doubt, expected, when the bales were opened, that the bundles would bear the accustomed device. The purchasers from them, unable to read and probably paying no attention to the letters upon the pedestal under the elephant, looked to the device alone ensuring their getting the goods they were accustomed to use. These merchants learned in 1884—how they received the information does not clearly appear—that yarn was being sold in Madras under the name of New Dinshá, and, after a short time, that it was packed so as closely to resemble in appearance the Dinshá yarn. This they were able at the end of 1884 to obtain at the rate of Rs. 3-14-6 to Rs. 3-14-0 per bundle,

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while for Dinshá yarn they had to pay Rs. 4-4-0 per bundle. Under these circumstances they went to Khusháldás Kahándás, the principal dealer in Madras in Dinshá yarn, whose sales give the rate to the market, and in effect said: "We can buy New Dinshá yarn at Rs. 3-14-6. The quality of it, though inferior to, is like Dinshá. The marks are, to all intents and purposes, the same. We can sell it as Dinshá, or mix the bundles with Dinshá bundles, and sell the aggregate as Dinshá. If you don't reduce the price of Dinshá, we won't buy Dinshá. We will buy New Dinshá." Khusháldás Kahándás, acting under this compulsion, was obliged to reduce, and did reduce, the selling price of Dinshá yarn, gradually, by 1½ to 2 annas per bundle. Was that the *reasonable and probable* result of the defendants' action? I have come to the conclusion that I ought to hold that it was. If Khusháldás Kahándás had refused to reduce, it seems clear that, for a time at least, he could have sold but little of the plaintiffs' Dinshá yarn, and that to that extent the plaintiffs would have been damnified by having their stock left unsold in their hands. He yielded to the pressure. The plaintiffs lose by that, but in a different manner.

It may be said that the course proposed to be pursued by the merchants, if the price had not been reduced, would have been fraudulent; and that the defendants, not themselves guilty of any actual fraud, cannot be deemed to have reasonably contemplated that others would be guilty of it. But the answer seems to be this. Deception is the basis upon which all suits in respect of pirated trade marks are founded. The actual manufacturer, who pirates the trade mark, rarely, if ever, deceives any one. The persons who, in the first instance, purchase from him know that they are purchasing an article with a questionable trade mark. It may pass through many hands before the ultimate unwary purchaser is made a victim; but yet an account of profits, or its alternative, an inquiry as to damages is in such cases directed.

The novelty of the mode of assessing damages, adopted in this case by the plaintiffs, caused me to feel doubt as to its admissibility, but it seems to me to be logically defensible. I have to

assess their amount. The prices obtained in Bombay by Dungersey Gángji for Dinshá yarn at the beginning of 1885 are a reflex of the Madras prices during that period. They fell from Re. 0-6-6 per pound in December, to Re. 0-6-4 in March, to Re. 0-6-2 in April, to Re. 0-6-1½ in May, after which they began to recover. Dungersey Gángji could, of course, only pay to the plaintiffs in proportion to the rate at which he could sell. The rates at which he purchased from the plaintiffs and the amounts are as follows:—

In December 1884	...	700 bales	at Rs.	0	6	3 per lb.
„ January 1885	...	None.				
„ February 1885	...	150 bales	at Rs.	0	6	¾ „
„ March 1885	...	725 „	at „	0	6	0 „
„ April 1885	...	1,100 „	at „	0	6	0 „

Total in the four months 1,975, or, on the average, 494 bales per month. The average sales effected by Dungersey Gángji, during the eleven months given in exhibit O, is 438 bales per month. The 1,100 bales sold in April were sold after the injunction in this suit. I think it will be more fair to take the average of the plaintiffs' bales really thrown upon the market as the basis of the damages to be awarded against the defendants. This will give 1,752 bales, instead of 1,975 bales, actually sold from January to April, 1885. Deduction due to fall in market is put by the plaintiffs at one pie per pound. That was the fall in Mangaldás and Prince of Wales' yarn during this period in Bombay. The fall attributable to the defendants is, therefore, 1¼ pie in February and two pies in March and April. It is impossible, in such a case, to be mathematically accurate. In a case like this, damages can only be approximately ascertained. On half of 1,752 bales I shall allow damages at the rate of one pie per pound, and on half at two pies per pound. This, when worked out, amounts, in round numbers, to the sum of Rs. 4,110. I do not consider that this sum will really compensate the plaintiffs for the loss they have sustained from the action of the defendants; but it is the utmost I feel at liberty, on the evidence, to award. Effects do not always immediately cease with the removal of their originating cause.

I find upon the issues:—

(1) That the defendants have not manufactured or sold any

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"No. 20 red tie" yarn with the devices or marks complained of, other than as in paras. 2 and 3 of the written statement admitted. (2) That there is no proof that any of the defendants' "No. 20 red tie" yarn has been sold in Madras as and for the plaintiffs' "No. 20 red tie" yarn. (3) That the plaintiffs are entitled to the sum of Rs. 3,110 in excess of the sum of Rs. 1,000 paid in Court. (4) That the plaintiffs are entitled to a decree as follows, *viz.* :—that an injunction do issue in terms of para. (*b*) of prayer of plaint, and that the defendants do pay to the plaintiffs the sum of Rs. 3,110 in addition to the sum of Rs. 1,000 paid into Court, which the plaintiffs will be at liberty to draw out, and the costs of this suit, including the costs (if any) reserved.

Attorneys for the plaintiffs :—Messrs. *Craigie, Lynch, and Owen.*
Attorneys for the defendants :—Messrs. *Tyabji and Dayábhái.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1886. *September* 3.

JAITHA' BHIMA' AND ANOTHER, (PLAINTIFFS), *v.* HA'JI ABDUL VYAD OOSMA'N, AN INSOLVENT, AND C. A. TURNER, OFFICIAL ASSIGNEE, (DEFENDANTS).*

Mortgage—Equitable mortgage by deposit of title-deeds—Legal mortgage unregistered—Claim by mortgagee, who has failed to register mortgage-deed, to have an equitable mortgage by virtue of deposit of title-deeds previously to execution of mortgage-deed.

The plaintiff having consented to lend Rs. 10,000 to the defendant, the latter deposited with him, on the 2nd April, 1883, the title-deeds of a certain property. On receiving them the plaintiff told the defendant that he would take them to his attorney, have a deed drawn up, and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by his attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff, (*i.e.*, the 2nd April, 1885), there was no existing debt due by the defendant to the plaintiff. On the 6th April, 1885, the mortgage-deed was executed, and on the same day the money was advanced by the plaintiff to the defendant. The plaintiff stated that he "had advanced the money on the security of the title-deeds on the same day." He did not say how long before the execution of the deed the money had been paid, but the deed itself recited that the Rs. 10,000 were paid immediately before the execution

*Suit No. 210 of 1885.