

# The Legal News.

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## THE LAW OF TRADE-MARKS.

The cases which have been decided upon the law of trade-marks, says the *Law Times* (London), are so numerous, and additions are growing so rapidly, that that branch of law is fast becoming one of large proportions. The decision of Mr. Justice Fry in the case of *Orr, Ewing & Co. v. Johnson & Co.* (40 L. T. Rep. N.S. 307) is one of the latest additions. The facts present no difficulty. The plaintiffs were manufacturers of Turkey red yarn. This they exported to Aden, Bombay, and other places. For many years they had affixed on the bundles in which this yarn was made up a ticket, which they said caused it to be known in the Bombay market as "Bhe Hathi," i. e., two elephants' yarn. The ticket was of a triangular shape, and of a green color. On it was embossed in gold a triangular banner, supported at two corners by an elephant, and between the two elephants was a crown. The name of the plaintiffs' firm was printed on the banner, in Goozerattee characters. The defendants, too, were manufacturers and exporters of Turkey red yarn. Recently they had commenced using a ticket which was similar in shape and color to that of the plaintiffs. It had also two elephants on it in the same place as in the plaintiffs', but turned in the opposite direction. Between them was a figure of a Hindoo idol. There was a banner, as on the plaintiffs' ticket, but on it was the name of the defendants' firm in English letters. An application made by the plaintiffs to have their tickets registered was refused by the Court of Appeal (38 L. T. Rep. N. S. 695). An appeal to the House of Lords is pending. They claimed in this action an injunction to restrain the defendants from using the above ticket, and from otherwise imitating the plaintiffs' tickets. The evidence went to show that the native weavers in the country, who were the ultimate purchasers of the yarn, would probably be deceived. Mr. Justice Fry having answered in the negative the question whether a purchaser

of ordinary caution and ordinary intelligence would be deceived so as to take one ticket for the other, even if the two tickets were not before him, went on to consider whether the defendants had taken a material and substantial part of the plaintiffs' ticket. To determine this his Lordship considered two things: first, whether a large part of the tickets which impressed the eye, or was a significant part of the tickets, had been taken; secondly, the mode in which the plaintiffs' goods have been accustomed to be sold, and what people have called those goods. He arrived at the conclusion that the defendants took that which was a material and substantial part of the plaintiffs' ticket, and that consequently the burden was thrown upon the defendants of showing that their ticket did not deceive purchasers. This is founded upon the statement of the law by Lord Justice James in *Ford v. Foster*: 27 L. T. Rep. N. S. 219. "The plaintiff makes the *prima facie* case that he has a plain trade-mark, a material and substantial part of which has been taken by the defendants. Then the onus is, under those circumstances, cast upon the defendants to relieve themselves from that *prima facie* liability." Mr. Justice Fry then proceeded to inquire whether the defendants had so appropriated the material part with due precautions to prevent error. For this enquiry, the authority of Lord O'Hagan in the *Singer Machine Manufacturing Company v. Wilson* (38 L. T. Rep. N. S. 303) may be quoted: "If one man will use a name, the use of which has been validly appropriated by another, he ought to use it under such circumstances, and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs. I do not say that the mere possibility of deception should suffice to make appropriation improper, but the chance of misleading should be jealously estimated with a view to this consideration, even though ordinary attention might have been enough to protect from mistake." This inquiry likewise was decided in favor of the plaintiffs, and an injunction was accordingly granted. Struggle was made on behalf of the defendants for the recognition of the principle that where there is no actual identity of trade-