

The Legal News.

VOL. II. AUGUST 30, 1879. No. 35.

GOOD WILL.

The cases which have come before our Courts upon the subject of good will are not numerous. That of *Findlay v. McWilliam*, 23 L. C. Jurist, p. 148, was one of the simplest character. The parties were engaged in business as wholesale confectioners, and were partners under the style of Findlay & McWilliam. McWilliam retired from the business, and sold to Findlay not only his interest in the assets, but also the "good will," and he received for his share of the good will \$1,000. Nevertheless, immediately after the dissolution, he opened a confectioner's shop in the same street, only a few doors distant, sent circulars to the customers of the late firm, soliciting a continuance of their orders, and in various other ways sought to convey to the public that he was really the successor of the firm from which he had just retired. The Court of Appeal held these acts to be a violation of the obligations imposed on him by his sale of the good will, and he was condemned in damages.

The case of *Thompson v. Mackinnon*, 21 L. C. Jurist, p. 335, was of a different complexion, and presented some of the difficulties which have surrounded cases of this class. Mackinnon had carried on business as a biscuit maker, and the name had acquired celebrity in connection with his manufacture. In 1876, he sold to Thompson his entire stock in trade "with the good will and all advantages pertaining to the name and business of the said John Mackinnon." Now, Mackinnon had been using a label or trade-mark, not registered, consisting of the word "Mackinnons," under which was engraved a boar's head grasping a bone in his jaws. This label Thompson caused to be registered, and continued to use. Subsequently, Mackinnon resumed business as a biscuit manufacturer, and having also commenced to use his old trade-mark, Thompson sought to restrain such use. The question was whether the exclusive right to use the trade mark passed to the purchaser, without express

mention being made thereof in the contract of sale, and whether Thompson was entitled to the privilege of stamping the biscuit made by him with the name of Mackinnon. The Court of Review held that the right had so passed. Reference was made to a case in favor of the purchaser, decided by the Tribunal of Commerce, Paris, 1854. One Bajou sold his business as a glovemaker, including the good will and the use of the business mark, and he was subsequently restrained from using his old manufacturer's mark, which was the *fac simile* of his signature. The correctness of this decision has been doubted, and it is to some extent in conflict with the judgment of the Court of Appeal, Paris, 1857, in the case of Bautain. The plaintiffs in that case had bought the right to use the name of Bautain "comme ils le jugeraient convenable." But in appeal it was held "que les demandeurs pouvaient se servir de ce nom seulement en leur qualité de successeurs de Bautain, et en le faisant accompagner de leur nom personnel de Merklein; que c'est donc abusivement que sur leurs enseignes, cartes et factures, ils portent le nom de Bautain seul, comme s'ils étaient eux-mêmes la personne dudit Bautain." The Code de Commerce, it should be remarked, forbids the use by a trader of a name other than his own. Much might be said, indeed, of the immorality of allowing a name to be bought and used for the deception of the public. What would be thought of a painter of celebrity who, desiring to retire from the further exercise of his art, sold to another painter the right to affix his private mark to his works? And if a biscuit maker has succeeded in catering with great success for the public taste, why should his name be used to palm off the productions of another, made from a different receipt?

We are governed here by the French law, but that of England differs little, and in the dearth of precedent on the subject, the English cases will be looked at with interest. We append, therefore, an article from the *Solicitor's Journal*, in which the latest English decisions are reviewed.

"Two recent decisions of the Appeal Court are of importance with relation to the subject of good will, which, though of narrow dimensions, is still somewhat perplexed.

"The first case is *Stewart v. Gladstone*, 27 W.