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M'bra v. Holdsworth

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Piracy of Registered Designs.

M'CREA V. HOLDSWORTH.

IMPORTANT TRIAL

IN THE

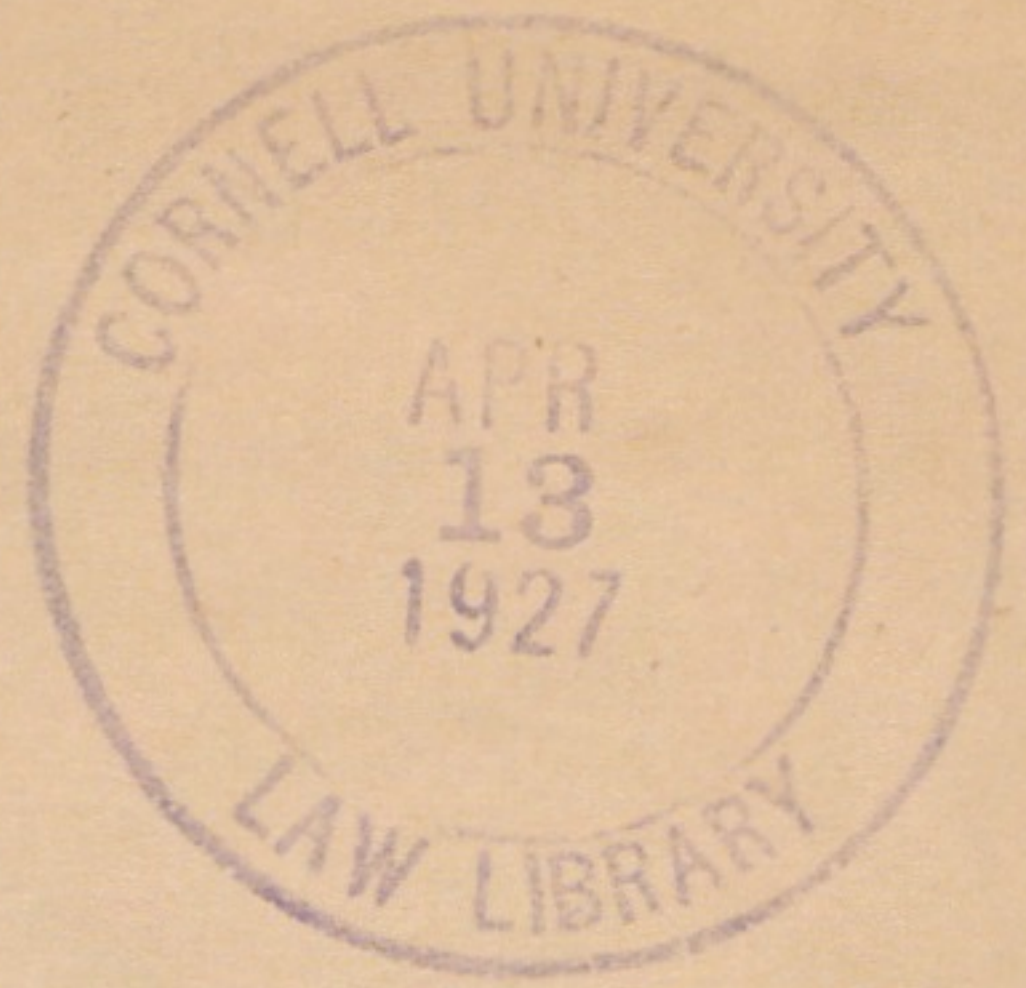
COURT OF QUEEN'S BENCH,

(BEING THE SECOND TRIAL,)

BEFORE

LORD CHIEF JUSTICE COCKBURN,

ON 18TH FEBRUARY, 1864.



HALIFAX, March, 1864.

GENTLEMEN,

We have had so many enquiries respecting the late trial, that we thought it better to have it copied from the papers, &c., in its present form, for the convenience of those interested in the subject. The summing up of the Lord Chief Justice may be worthy of your attention.

We regret to say that during these trials there have been various reports circulated against us, which were calculated to do us much injury. We have endeavoured to find out the authors of them, but without success. We beg, however, to assure you that such reports were quite unfounded and utterly devoid of truth.

Trusting we shall receive a continuance of your esteemed favours,

We are, Gentlemen, yours respectfully,

H. C. M'CREA & CO.

M'CREA v. HOLDSWORTH.

COURT OF QUEEN'S BENCH.

[THE first trial took place at Guildhall, in February, 1861, before the late Mr. Justice Wightman and a Special Jury, resulting in a verdict for the plaintiff.]

The Second trial took place at Guildhall, before Lord Chief Justice Cockburn, on Thursday, the 18th of February last. Mr. Lush, Q.C., Mr. Gray, Q.C., and Mr. Philbrick, appeared for the plaintiff; and Mr. Manisty, Q.C., the Hon. Mr. Denman and Mr. Kemplay for the defendants.

Mr. Philbrick opened the pleadings. The action was for an infringement of a copyright of a design applied to the ornamentation of woven fabrics; to which the defendants pleaded—1st, not guilty; 2nd, that the plaintiff was not the proprietor of the design; 3rd, that he had not registered it; 4th, that the design was not new or original.

Mr. Lush stated the case. The plaintiff was a manufacturer at Halifax; the defendants were also manufacturers at Halifax and Bradford; and the action was for an invasion of the copyright of a design applicable to the ornamenting of a woollen fabric, which Mr. McCrea brought out at great expense in 1861. By the Copyright and Designs Act the proprietor of a new and original design is entitled, on registration, to protection for three years. The design consisted of a set of stars placed together on what is known as the Albert chain ground, the weft and warp being interwoven in a particular manner, so that turn which way one might the star appeared to be shaded. The design was not in the star itself, nor in the ground by itself, but in the whole thing taken together, in the particular arrangement of a set of stars on that particular ground. The design was registered by a piece of the cloth being taken to the registrar. The pattern took with the public, and shortly afterwards the design was copied by the defendants.

Mr. Henry Charles M'Crea, examined by Mr. Gray : I am a manufacturer at Halifax, in Yorkshire, and trade under the firm of H. C. M'Crea and Company. I manufacture damasks and other cloths of that description. I have carried on business about twenty-seven years. It is exceedingly desirable to bring out new patterns. The market requires them. I have been in the habit of bringing out new designs from time to time, and of registering them. Previous to February, 1861, I manufactured a cloth which was called Pekin Cloth. That is the cloth respecting which the present action is brought. The term "Pekin" applies to the ground independently of the design. I gave it the name of Pekin Cloth. I invented the design in the early part of February, 1861. I never saw that particular pattern and cloth before—that particular combination. There was a pattern known before as a Chain pattern; that is, the ornamented ground. It has a general resemblance to my pattern. Before manufacturing that particular cloth I made a great number of experiments and had the chain ground woven in different ways. At that time, I had no intention of putting a star or any other ornament upon it. I received a communication from a customer at Hamburg (Mr. Lieberman) stating that if a star or flower was put upon the ground it would be likely to sell. It was dated December 1, 1861. I had a designer in my employ named Schmillentzky. He gave me the design of a star on a piece of paper (produced). He did so at my suggestion, and when he brought it down I said the stars were not sufficiently novel, and I suggested a broad border round them like that which I now produce, and said if they are brought out well they will form a good design. I marked out a border round one of the stars, stating that the one given to me was not broad enough. I then gave directions that the cloth should be manufactured on that particular ground, and with that particular star upon it. Cards are prepared for weaving the pattern in the Jacquard loom. These cards are laid before the workmen. The cards are pierced according to the pattern to be produced in the weaving. The cards having been prepared I set my men to manufacture the cloth and produce the article which had been designed. The star on the cloth produced contains the broad border of which I have spoken. The pattern shades according to the light in which it is viewed, and that effect is produced by a particular combination of the warp and the weft. In some lights the whole of the border is not seen at the same time. Having manufactured the cloth I sent some of it up to London for registration. The registered number is 138,353.

The Registrar of Designs produced the piece which had been sent to the office for registration.

Mr. M'Crea's examination continued: That is the article which I registered as a design. The design altogether is ornamental. The date of registration is the 15th February, 1861. I sent up a duplicate to the registrar and afterwards had it returned. I then proceeded to manufacture the article and send it out. It was exceedingly successful, and was one of the best patterns I had produced. Towards the close of August, or in the early part of September, I received information that the design had been copied. I met Mr. George Holdsworth on 'change at Bradford between the 20th and 30th December. I said to him, "I understand that you have been copying one of our patterns, and I wish to know whether that is so." He said, "Oh, the thing is quite old, and we have plenty of patterns of the same thing." I said, "if that is so, and you can prove it, I have nothing more to say. Can I see them?" He replied, "They are at the warehouse." I said, "then I will go and look at them." He seemed to hesitate, and said he would prefer that I would leave it until his brother came home. I said, "I am sorry for that; I have experienced an injury." He promised to let me see them as soon as possible. Not hearing from him for several days, I wrote a letter to him. It is dated the 30th September, 1861, and the letter was read:—

Halifax, 30th September, 1861.

Messrs. J. Holdsworth and Co.

Dear Sirs,—This morning's post brings us more unpleasant letters from our friends, who complain that the value of their Pekin Cloth stock is lessened by your offering to sell similar goods at 4d. to 6d. per yard less than they paid us. They also seek, in consequence of your proceedings, some compensation from us. We feel that these acts of yours must create a very unfavourable feeling against us, and tend to injure our trade and connections. We must, therefore, take immediate steps to protect our interests. We have every reason to believe that our claim to the Pekin Cloth, as original proprietors, is just and reasonable, and being advised that our legal rights are also secured, we must earnestly request you either to cease making, offering, or selling any more of this cloth *at once*, or, to be good enough to convince us either to-day or to-morrow that you are justified in the course you are taking. We are assured by Messrs. Akroyd and Messrs. Wards, that they have not sold a piece of this cloth, and they express themselves as unwilling to interfere with our claim to it; the only parties we can learn that have copied our cloth are yourselves, Mr. W. Brown, and a small maker. Permit us to observe that apart from all legal protection there ought to exist in old established houses, claiming to be considered wealthy and respectable, a high and honourable feeling in harmony with their position, avoiding any course obviously opposed to all that is reputable or creditable. Assuring you of our anxious desire to have this matter pleasantly arranged with you without being forced into a painful situation,

Believe us, dear sirs, yours faithfully,

H. C. M'CREA and Co.

A letter in reply was also read making an appointment for the Thursday morning following, at Messrs. Holdsworth's warehouse, in Bradford. I went to the warehouse on the Thursday, and saw both Mr. George Holdsworth and Mr. William Holdsworth. They showed me several cloths. There was one precisely resembling

a silk cloth, manufactured by Keith and Co. Keith and Co. were pleased with my Pekin Cloth, and I arranged that they should supply the whole of London. They made a silk border to attach to the cloth. I knew of their having done so. I made no complaint to them. I did not see it until long after my design had been registered. Messrs. Holdsworth did not show me anything resembling my design except the border, and I told them that it had been manufactured to suit my cloth. The cloth is used for curtains, and the border is suitable to the purpose. On seeing the articles produced by Messrs. Holdsworth, I expressed myself very much dissatisfied. They said they would continue the manufacture, and that I ought to be ashamed of myself for imposing on the public. The cloth now produced, which was manufactured by the defendants, is a piracy of my design.

Cross-examined by Mr. Manisty : I have one agent abroad who sends me designs. I have received designs from a person at Paris. M. Lieberman, at Hamburg, is a customer. I had made the chain pattern before 1861. I believe that it had not been an article of commerce in England before that time. I had made a small quantity of the pattern before by way of experiment, but had not sold any of it. After I had registered it, I discovered that there was the same cloth abroad—that I had no right to register it—and then I ceased registering it. Up to the last trial I thought that the ground was mine. I ceased to apply the registration stamp soon after the last trial. I had registered the ground as distinct from the star. I received the ground without the star from Mr. Lieberman, dated the 1st December, 1860, and registered it as my own in February, 1861 ; but I had made it before. I had made alterations, but the idea was the same. At the suggestion of Mr. Lieberman, I put a star upon the cloth. I never received from him the entire plan. Mr. Lieberman sent me a foreign pattern which I placed upon a different ground and registered as my own. I am not aware that I had seen similar stars to that produced by Schmilentzky until he produced it. When I registered the ground I considered it new, and I considered the combination of the ground and the star new. There is a difference between the star at the head of the *Star* newspaper and the star which I use. My star has a border. The other star has an outline. In my opinion the star which I use is quite new.

Mr. Manisty then put out particulars, which had been delivered in accordance with the judge's order, which were described by the plaintiff as "a particular collocation" of the shading and border of the stars upon the ornamented chain surface, as shown on the registered pattern, thus showing together the ornamentation of the woven fabric.

Re-examined: I did not register the star alone independently of the ground. The novelty of the star consists in the shaded bordering.

A Juryman: You say that the suggestion of putting a star on the cloth was thrown out by a correspondent. After you invented the pattern did you send him a sample of the article and get his approval, and did he order a supply of the article?

Witness: Yes; he was very much pleased with it.

Mr. Jean Frederick Schmillentzky, examined by Mr. Philbrick: At the end of 1860 and beginning of 1861 I was in the employ of Mr. McCrea as a designer. In conformity with his instructions I designed the pattern which has been produced, from which the cloth was woven.

Cross-examined by Mr. Manisty: The star on the *Star* newspaper is not a design—it is only part of a design. The design in this case is the collocation of five stars. I don't think that is the ordinary form of placing stars. I never saw them in the *quincunx* form before February, 1861, either with or without a border.

Mr. Daniel Keith examined by Mr. Gray: I am a silk manufacturer carrying on business in Wood Street, and have been for many years engaged in supplying and providing houses with damask curtains. One of my first objects is to obtain new and beautiful patterns. I know the star pattern manufactured by Mr. McCrea. I first saw it in April, three years ago. It was shown to me by Mr. McCrea's agent, and I secured the whole of it for the London market. It was quite new to me. I am in communication with many foreign houses, but never saw the pattern before that time. I made borders suitable to the pattern on the cloth. The patterns for the borders were taken from the patterns on the cloth. Some time afterwards the defendants sold me some of their cloth of the same pattern.

Cross-examined by Mr. Manisty: I never saw any stars so well placed before. I may have seen them in the same form, but not to produce any impression.

Forster Graham, examined by Mr. Philbrick, partner of Messrs. Jackson and Graham, Oxford Street, extensively engaged in furnishing, regarded the plaintiff's pattern as extremely well conceived, elegant, and novel. He never saw its like before.

Mr. Thomas Russell, of the firm of Watson, Carter, and Russell, Cheapside, saw the cloth in 1861, and in his opinion it was a novelty. He never saw it before.

Mr. H. J. Flanders, buyer to Messrs. Sewell and Co., Compton Street, was shown cloth in August, 1861, by Mr. H. Holdsworth, the London agent of the defendants' firm, and pressed to buy it as a novelty. He had previously seen Mr. McCrea's cloth.

John Senior Woodhouse, a partner in 1861 in the firm of Messrs. Reynolds and Co., of Cheapside, and now in business in Great St. Helen's, London, was formerly in the damask trade, and regarded the plaintiff's design as entirely novel.

Mr. Samuel Smith, dyer, of Bradford, dyed goods for the plaintiff in March, 1861, among them being goods of the registered pattern. The pattern was novel, and excited his attention.

Mr. Philbrick : On what grounds ?

Witness : The goods were much heavier than usual ; and I said to my man, " We must have more money for these " (laughter).

Mr. W. Coe, foreman of Messrs. Wainhouse and Coe., dyers, at Halifax, stated that in February, 1861, the firm dyed the pattern in question. In all his experience he had never seen plaintiff's pattern before 1861.

Mr. Wyatt Coffey examined by Mr. Gray : I am buyer for Messrs. Tarn and Co., of Newington. The pattern of Mr. McCrea was submitted to me in April, 1861, by the agent of Mr. McCrea. I thought I had never seen so much effect produced in any damask, and bought largely when our season begun. I believe the pattern to be quite new.

This closed the case on the part of the plaintiff.

Mr. Manisty, previously to addressing the jury on the part of the defendants, said he would state to His Lordship some facts which require consideration hereafter. The plaintiff complained that the defendants had taken his design—that he was the proprietor of a new and elegant design applicable to the ornamentation of woollen fabrics, comprised in class 12. This the defendants denied. One of the principal questions for consideration was whether registering the article by depositing it with the registrar, leaving the public to find out what the design was, was a good registration. He submitted that leaving a fabric consisting of one material was not a specification in a class consisting of several materials.

The Lord Chief Justice : If the design put on paper was sufficient, would it not be sufficient to show its practical application ? If either part—the star or the ground—was new, the combination was new. Supposing both parts to be old, the question would be, was there a novelty in the combination ?

His Lordship, after some further discussion, said he would give the defendants leave to move the court on the ground that the plaintiff had not conformed to the Act of Parliament by reason of the ambiguity of the article registered, leaving for the jury only the question of the novelty of combination.

Mr. Manisty then addressed the jury. If admitted by the plaintiff that the chain ground was old, it was clear that the star was suggested by an agent from abroad; would the jury then give a monopoly to a man who, at the suggestion of another, took an old star and applied it to confessedly an old ground, and in a manner and form which he should prove was also old? Not an atom of originality was there. He submitted also that by going to the registrars it was impossible to ascertain what was the design which the plaintiff claimed.

Mr. John Whiteley Ward, sworn, examined by Mr. Denman: Have you been in the damask trade at Halifax for the last fourteen years? For sixteen years now.

Do you know what is called the Pekin cloth, or whatever name it is known by, which was registered by the plaintiff? The plain chain, or Albert chain.

By what name do you know it?—The Albert chain.

Had you known it applied before the 15th of February, 1861? Yes, I had known it.

Actually manufactured?—I had made it myself.

The Lord Chief Justice: You had made it before February, 1861?—Yes.

Mr. Denman: Have you seen the fabric with the star and ground as registered by the plaintiff?—Yes.

As to the star, had you seen any star upon articles of this class in No. 12, before the 15th of February, 1861?—I have seen the same star.

Was that star an uncommon design; I do not mean as applied, but was that kind of star an uncommon star?—The star itself was very common.

The Lord Chief Justice: You mean that particular star. That particular star.

Mr. Denman: You have seen it applied to one or more than one of the class No. 12? I mean different kinds of fabrics.—I have seen it applied to damasks and stuffs that came within class No. 12—the same star.

In the course of manufacturing goods of this kind have you been in the habit of placing ornaments and stars, or other kinds of ornaments, upon grounds of various kinds, in almost every possible way?—I have.

I will ask you whether that collocation in the shape of a 5 was known in the trade?

The Lord Chief Justice: We have called it the quincunx form. That is with the one in the centre.

Mr. Denman: Was that collocation new in February, 1861?—Certainly not.

The Lord Chief Justice : Have you applied that to the star as well as to the other things ?—I applied that to stars as well as to other set objects.

Mr. Denman : In the course of your business have you had occasion to look at designs of registered fabrics ?—Yes.

Supposing you were going to the register office, and saw a fabric such as that registered by the plaintiff, would that enable you as a manufacturer to tell what was the new design registered ?

Mr. Lush : You must not put that question ; because the legislature has said it shall be sufficient to register the piece.

Mr. Denman : No ; they have not said so ; they have said it shall be as valid and effectual.

The Lord Chief Justice : It surely is not for the witness to tell us whether he would be able to do it or not.

Mr. Denman : He is here as a practical man.

The Lord Chief Justice : Then you had better recall all the other witnesses. The question is what has the plaintiff done.

Mr. Lush : It is not like the specification of a patent.

Mr. Denman : I will not press it.

The Lord Chief Justice : There the inventor is bound to communicate to the public how the patent is to be carried out. All that he is bound here to do is to register his design, then it is for the court or judge to say whether that is sufficient.

Cross-examined by Mr. Lush : Are you in any one's employment now ?—No.

What are you doing ?—I am a manufacturer at Halifax.

Of this particular kind of thing ?—Yes.

Have you any piece of your manufacture in which you have seen this star ?—I have not.

No pattern at all ?—I have no pattern.

Have you ever sold any piece with this star upon it ?—No.

Did you ever make any piece with that star upon it ?—No.

You were in Mr. McCrea's employment, were you not ?—Eighteen years ago.

Do you mean to say you have seen a shaded star like this ?—I do not say I have seen the same star ; I mean the same star in outline.

You have been examined before. Did you, on your oath, ever see a star like that shaded and filled up in a border like that ?—Not bordered. I cannot conceive that the shading of an old outline is new.

The Lord Chief Justice : We do not want your conceptions. That will be for the counsel to speak about. You never saw a star with a shaded border like that ?—I have seen it on carpets and oil cloth, but not on fabrics like this.

You have never seen a star shaded and bordered like that. Have you seen it applied to damasks?—I have seen it applied to fabrics in class 12.

Have you seen it applied to carpets?—Yes.

And to oil cloths—Yes.

Mr. Lush: Do you mean to say you ever saw a carpet with a star shaded like this, with a broad band or border like this?—I have seen it with the same shading.

I mean a broad band like this?—No, with a shading. I have seen a star shaded.

What do you mean to convey—that you had seen the same star on carpets and on oil cloths? Do you not know that that was a star without a shaded border like this?—I mean to convey that I have seen the same star in outline.

The Lord Chief Justice: The question was very distinct, whether you had ever seen a star shaded and bordered like this applied to carpets, and you said you had.—I have seen it applied to oil cloth with the border. I have seen it applied to carpets with the shade; and I have seen it applied to oil cloth with border and shading.

Mr. Lush: Have you ever seen such a star applied to oil cloths filled up with a broad border like this?—The question is what you mean by a broad border.

I mean broad in proportion to the size of the star. Have you ever seen an oil cloth shaded like this?—The breadth of the border might not be so wide in proportion, but it had a border.

Re-examined by Mr. Manisty: The outline was the same when applied to carpets or oil cloth?—Yes, the outline was the same.

The shading was the same?—Yes.

But the border perhaps was not quite so broad?—Not quite so broad.

Mr. Thomas Parker, one of the salesmen in the employ of Messrs. Akroyd, damask manufacturers, Halifax, said before 1861 he had seen the chain ground work and they had made it themselves. Was not aware that stars had been used in ornamenting damasks before 1861. Saw no novelty in plaintiff's cloth. In 1861 there was no novelty in placing stars in the quincunx form. There is a band round the star on plaintiff's cloth, so there is round the star on the *Morning Star*.

Mr. William Francis Harris, importer of French and German upholstery, Wood Street, Cheapside, said he was well acquainted with damasks. He had sold the Albert chain previous to 1861. He had seen stars used in damasks and other fabrics somewhat resembling that in plaintiff's, but not shaded and bordered.

Mr. Drummond, a designer for many years at Halifax and Bradford,

who designed the star for the defendant in 1861, said he designed it from the *Morning Star*. The quincunx and a piece of Pekin cloth collocative is a necessity. Never saw the plaintiff's design till he saw it at the first trial. Was not told to make the border. That was left to taste, and the breadth came out of his own head. The designs of plaintiff's and defendant's cloths were alike, and corresponded in size, with slight exceptions which he pointed out.

Cross-examined by Mr. Lush: I acted according to instructions given me by Mr. John Holdsworth. He sent me a corner of the *Morning Star* in an envelope. I don't remember that the letters were belted round with ink. I have seen seven stars with borders in carpets, oil-cloths, and damasks. My instructions were to make the stars two or three inches broad, with 96 picks, and to be worked up like the *Morning Star*. I had also a piece of the Albert chain sent me. The two cloths are marvellously alike (laughter).

The Lord Chief Justice: I have heard of a boy who copied his verses out of Ovid; and he said it was not extraordinary that two persons should think alike (laughter).

Mr. Lush: There never was a luckier hit than this (more laughter).

Mr. Robert Christie, a designer at Kidderminster for more than 40 years, had seen similar stars to plaintiff's applied to carpets, and believed that he had designed them himself with five, six, and eight points, and with and without borders, before 1861. The quincunx arrangement arose necessarily from the lines crossing each other at right angles.

William Wood, another designer, said he had designed a star with a border in 1850 very like plaintiff's. The quincunx arrangement was not new. It was a "set figure."

Charles Lebrun, an artist and designer, at Nottingham, for about 20 years, had seen stars similar to the plaintiff's used in fabrics before 1861. Had seen it in lace, and made it himself in carpets. Here was the design in question. It was copied from a New Zealand canoe. They would find it in "Jones's Grammar of Ornament."

Wm. Woodward, of Kidderminster, carpet manufacturer, said it had been usual to ornament carpets with stars as long as he could remember, and the quincunx arrangement was usual.

The evidence of Hilliare Vite, of Berlin, taken at the former trial, was read. The effect was to show want of novelty in plaintiff's design.

Mr. Manisty then summed up: What was there, he asked, new about the star? According to the plaintiff's own evidence, the novelty consisted in a greater or less width of border. The plaintiff claimed, in fact, as a novel invention, the putting an old design, a star, upon an old ground, the Albert chain, and asked the jury to give him the monopoly for three

years, to the prejudice of all the other manufacturers in the country. This could never have been the intention of the legislature, and so he hoped the jury would say by returning a verdict for the defendants.

Mr. Lush then replied upon the whole case: The merits of the invention were very apparent from the circumstance that the 8th month after the plaintiff's goods were in the market the defendants imitated them. He contended that the peculiar kind of star registered by the plaintiff, with its shaded belt or border, was a novelty. The plaintiff's claim was for the whole design, not for the star alone nor the ground alone.

The Lord Chief Justice: Gentlemen of the Jury.—The question to be determined in this case is, what is the design which the plaintiff has registered? He can only maintain his exclusive right to a design if he has registered it, and the question is what has he registered? He tells us in his particulars of claim, that what he has registered is the particular collocation of the shaded and bordered stars, and the ornamental chain surface, as shown in the registered pattern; and the first question is, whether you are of opinion that, in point of fact, that is what he has registered; in other words, is the design which he has registered the application of the star shaded and bordered, or of the chain pattern ground separately, either the one or the other; or, was it the application of the stars to that particular chain pattern ground? If it was the former, that is to say either the star or the ground, or both separately, one from the other, then were the stars new? was the ground new? Now, we may dismiss the question of novelty in the ground, because it is conceded on the part of the plaintiff that he cannot maintain that the ground was a new thing; it had been used before; he may have thought at the time he registered his design that it was a novelty, it having been communicated to him by this gentleman whom he corresponded with at Hamburg, and he may have gone and registered it as a new design. It turns out that he is mistaken in that respect, and he admits that he cannot maintain the novelty of the chain ground as a new design. Then, was this peculiar star new? It appears that it is shaded and bordered in a peculiar manner. Now, we have had a good deal of evidence about it. Some witnesses say that the design of a bordered star is manifested by the exhibition of that star with which we are all familiar, which appears on the first page of the *Morning Star* newspaper; and they go on to say that that sort of star with a border has been applied before to carpets, oil cloths, and things of that description; there it has been seen and manifestly made public to the world. You heard the questions put to the witnesses in cross-examination, and it is for you to say how far the fact has been

really established. One witness said that, taking the *Morning Star* in his hand, if his instructions had been to apply that to a carpet, he should not have put a border; he should have put a border if he had had to apply it to damask, in order to make the figure clear: the damask would require there should be this border to it. It really is a remarkable fact, when, considering the question of novelty of the stars taken separately, or in combination with the grounds, that this particular combination does not appear to have ever been seen before. The collocation of stars in the quincunx form is admitted to be old, and very common; it is the way in which they put the set figure in order to prevent the monotonous uniformity, which would be the case if all the lines came straight down or crossed vertically; by starting one line one point higher than you start the next, you get the more varied form which is got there. The question is whether that star be new—that is one question for your consideration. It certainly is a remarkable fact that this particular form of star with the border does not appear to have been applied to damask fabrics until the plaintiff brought it out in February, 1861—then we have one of the defendants sending the *Morning Star* as a figure from which the designer whom he employed was to make a pattern of stars in this particular collocation, placed on this particular groundwork. The man who was called, to whom this figure of the *Morning Star* was sent, cannot take on himself to say that round this star there was not drawn an additional border in ink. You are asked on the part of the defendants to believe that the drawing on the *Morning Star* is a sufficient indication of the design, without its being necessary in a fabric of this sort to superadd the border. The man says when that was sent to him there was not an additional border in ink. It is a very remarkable fact that the gentleman is not called who could have told you whether he did or did not send the border; that might have removed any doubt upon it. The defendants are here, this matter has been tried once before: they must have known pretty well what points would be made in the case; and if he did superadd that, that is pretty conclusive to your minds that *Morning Star* drawing would not of itself convey to the mind of the designer or manufacturer that which was sufficient; if it were necessary to superadd the border, and if the border be a distinctive characteristic of this particular star, I should submit that was a new thing in itself. Mr. Lush says, with truth, if the jury should be of opinion, and he trusts you will come to that conclusion, that what the plaintiff intended to register was not the star *per se*, nor the groundwork *per se*, but the combination, it matters not whether the star is new or the star is old. The combination of the two things, if each be

old, if that has never taken place before, is a new design ; one-half the matters which enter into artistic designs, whether for manufactured fabrics, or other things, have been produced before in some shape or form or other. In the plastic art, in painting, almost everything is old, whether it has been painted, drawn, figured, or designed. You combine those varied things together, old as they all may be, and produce an entirely new combination, which has the effect of an entirely new design. That is the merit which the plaintiff claims, and to the effect and operation of which he is entitled, if you should be of opinion that that is really what he has in point of fact registered. Then comes the question, do you think he did intend to register not merely the peculiar star, not merely the ground? I think there is good reason to think he did not intend to include the ground pattern in the register, because we find that he registers it by itself as a separate design to be separately and distinctly registered. Then he has been obliged to abandon it. He says,—What I intended to register was this combination. If that be so, you will have to say whether the combination is new. Of course, if any one of the elements combined in a new combination be new, it is conclusive proof that the combination is new. But although all the elements may be old, yet the combination may be one that has been made for the first time, and it is for you to say whether you entertain a reasonable doubt that the collocation of stars—though the collocation be old, the stars old, and the ground old, if you should be of opinion that the whole taken together is a new combination ; that it creates and produces a new design, and that that design is what the plaintiff has registered, the plaintiff is entitled to your verdict. If you should be of opinion there has been, by the defendant, a use of the pattern of the plaintiff to his own purposes, he has no right to take the plaintiff's design and use it in the manufacture and sale of his own products. I do not think there is much contest on the point. It was suggested there was some little difference as to the intervals and spaces between the different stars ; much was not made of it, and the learned counsel did not insist on it. There cannot be much doubt on the mind of any one that the defendant's pattern was a repetition to all intents and purposes of the plaintiff's. Of course that is a matter for you to decide. Then what is the plaintiff's design, was it the star as a peculiar star, or was it the ground? If it is the star, it is for you to say whether the star is new. If it is the ground, it is quite clear that the novelty of that cannot be maintained ; or was it the combination? If it is the combination of all these things taken together, it will be for you to say whether the combination is new. You have not forgotten a piece of evidence which

was not contradicted, which is entitled to weighty consideration, that when the agent from the house came up to London and endeavoured to get these goods of the defendant into the market, one of the strong points he insisted on was the novelty of the design. They believed the design to be novel on their own part. If it was novel with them, it must have been novel with the plaintiff, who had anticipated them in registering this design before they heard of it. Those are matters for you. I have put the questions upon paper, and you will be kind enough to say Yes or No to those questions.

In a couple of minutes the jury found for the plaintiff on all points—that he registered for the whole combination, that the star was new, the combination new, and that the copyright had been infringed.

Mr. Lush : The verdict here will be damages 40s. The damages will be assessed afterwards under the bill in Chancery. Your Lordship will give us the necessary certificates.

Mr. Manisty : Your Lordship will give us leave to move on the point reserved?—The Lord Chief Justice : Yes.

Mr. Lush : Does your Lordship mean to give them leave to move on the point reserved?—The Lord Chief Justice : Yes. I do not think there is much in it, but I will give them leave to move.

Mr. Lush : We may want the County Court certificate as well as the ordinary certificates.—The Lord Chief Justice : Very well.