Counsel for Trustees and for George and Jessie Findlay—Pearson — Baxter. Agents — Stuart & Stuart, W.S.

Counsel for *Curator ad litem* to Jane Findlay—G. R. Gillespie. Agents—Mackenzie & Kermack, W.S.

Saturday, November 13.

FIRST DIVISION.

HARVIE *v.* WILLIAM ROSS AND THOMAS ROSS.

Process—Interdict—Breach of Interdict—Petition and Complaint.

The holder of a patent obtained interdict against the respondent, an alleged infringer, who thereafter assumed another person as his partner. A petition and complaint was then brought against him and his partner alleging that he had broken the interdict, and that his partner was knowingly aiding and abetting him in doing so. They lodged separate answers, the latter maintaining, *inter alia*, that the complainer's patent was bad. Both denied the alleged breach of interdict. The Court allowed the parties a proof as to the alleged breach of interdict, but *refused* (in that process) to allow to the assumed partner a proof of his averments that the patent was invalid.

By deed of assignment dated 26th December 1883, registered in the Patent Office, William Harvie, lampmaker, Broomielaw, Glasgow, sole partner of "The Ross Patent Paragon Valve Company," acquired exclusive right to certain letters-patent granted for an improved valve to prevent waste of water in water-closets, urinals, &c.

In April 1886 Harvie brought a suspension and interdict against William Ross, brassfounder, for an alleged infringement of the said letters-patent, and on May 25th interim interdict was granted by Lord Trayner. This interlocutor bore that the "Lord Ordinary having heard counsel for the complainer, and considered the proceedings, in respect that the respondent has failed to find caution as appointed by interlocutor of 1st May, grants interim interdict."

Upon 18th October the present petition and complaint was presented (with the concurrence of the Lord Advocate) for breach of interdict against William Ross, and Thomas Ross, his son.

The complainer averred that William Ross manufactured and sold valves and apparatus so constructed as to be in infringement of the foresaid patent rights, and further, that in order to evade the interdict he had assumed as a partner his son Thomas Ross, who was pushing the sale of the said valves both in Glasgow and elsewhere; that the said Thomas Ross was well aware of the interdict against his father, and of the fact that the articles sold were made and sold in infringement of complainer's patent, and knowingly and wilfully aided him in breaking it, to the great prejudice of the complainer.

William Ross and Thomas Ross lodged separate answers. William Ross denied that his firm manufactured or sold valves of the kind referred to in the interdict proceedings, and stated that the valves which they now manufactured were not those referred to in the interdict, but were made and sold under a patent of his own, and were dissimilar.

Thomas Ross, while admitting the existence of the interdict against his father and partner, stated that no interdict had been ever obtained against him, and denied that he or his firm sold any valve to which the interdict against his father applied. He also took various objections to the validity of the letters-patent, in respect that the complainer was not the full and true inventor, that the alleged invention was not publicly known before the letters-patent, and not of public utility, &c.

Argued for the complainer—Proof should be allowed against both respondents, and the statements in the answers for Thomas Ross relative to the alleged invalidity of the letters-patent should be disallowed as irrelevant. The respondent Thomas Ross had been assumed as a partner since the interdict was granted, and with a view to enable the respondents to try and break it with impunity. The son was well aware of the existing interdict against his father, and that being so, he was not entitled to raise any question as to the validity of the letters-patent.

Authority—*Dudgeon* v. *Thomson*, March 17, 1876, 3 R. 604 and 975, and 4 R. (H. of L.) 88.

Replied for respondents—There was no case against Thomas Ross. He was assumed a partner after the interdict was granted. He was a partner working for his own interest, and not merely as the hand of another. *Alternatively*, if there was any case against Thomas Ross, then he was entitled to a proof of all his averments, including his allegations against the validity of the letters-patent. In any view, the complainer had not made his statements sufficiently specific against either of the respondents.

At advising—

Lord President—I am of opinion that the complainer is entitled to a proof of his averments, and that the respondent William Ross is also entitled to a proof of his averments, while as regards Thomas Ross, he is entitled to a proof of what is contained in articles 1 and 2 of his answers, but not of anything else. As to the competency of trying the present question by means of petition and complaint for breach of interdict, I entertain no doubt.

The question is as to an alleged infringement of letters-patent, and what will have to be determined is, whether or not the respondents have committed a breach of interdict.

The complainer alleges that his patent has been infringed, and I can see nothing in the case of *Dudgeon*, to which we were referred, to indicate that the trying of such a question by means of a petition and complaint for breach of interdict is in any way incompetent.

In the case of *Dudgeon* the House of Lords thought we had gone wrong, because after interdict had been granted by the Lord Ordinary, the complainer lodged a disclaimer and memorandum of alteration of his specification, and thereafter judgment was pronounced by this Division of the Court upon a petition and complaint for breach of the interdict which had been granted before the specification was altered. Nothing of that

kind, however, appears in the present case, so all difficulty arising from the specialities in the case of *Dudgeon* is entirely removed.

The circumstance of Thomas Ross being assumed into partnership with his father after the date of the interdict exactly corresponds with that of the party Donaldson, who was assumed as a partner by Thomson in *Dudgeon's* case.

As to William Ross, he does not in his answers attempt to raise any question as to the validity of his patent, and he could not well do so, because at one time he appears to have been the owner of this patent, and to have parted with it to the party who assigned it to the complainer.

But Thomas Ross in articles 3 to 7 of his averments has tried to raise this question, and it does not appear to me that he can competently do this.

The complaint against Thomas Ross is that he committed a breach of interdict by aiding and abetting his father in the manufacture and sale of the valves, he being aware of the existing interdict. In these circumstances Thomas Ross cannot be permitted to challenge in the process the validity of the patent.

I am therefore for sending the case to a Lord Ordinary for proof, subject to the limitations I have mentioned.

Lord Mure concurred.

Lord Shand—The simple and only question is, whether the Court having interdicted the infringement of these letters-patent the respondents have continued manufacturing the patented articles in spite of the interdict? It is quite clear that Thomas Ross is not carrying on any independent business, but that he is simply a partner with his father, and it is alleged against the copartnery that it is so being worked as to create a direct breach of interdict. If the complainer succeeds in showing this, then he will also have succeeded in showing that Thomas Ross committed a breach of interdict. As Thomas Ross must have known of the existing interdict, I do not see how he can competently raise any question as to the validity of the letters-patent, and therefore I agree with your Lordship that he should not be allowed a proof of the averments in articles 3 to 7 of his answers.

Lord Adam—I am of the same opinion. As to the father, the only question is, Did he commit a breach of interdict? while as to the son the question rather is, Did he aid and abet his father in the manufacture of these articles in the knowledge of the existing interdict? and that, I think, is sufficient.

The Court remitted to Lord Kinnear, and allowed the complainer a proof of his averments, the respondent William Ross a proof of his averments, and the respondent Thomas Ross a proof of the averments contained in articles 1 and 2 of his answers, *i.e.*, excluding his averments directed against the validity of the patent.

Counsel for Complainer—Ure. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Respondents—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Tuesday, November 16.

SECOND DIVISION.

THE SCOTTISH RIGHTS-OF-WAY AND RECREATION SOCIETY (LIMITED) *v.* MACPHERSON.

(*Supra*, p. 13.)

Process—Appeal to House of Lords—Interlocutory Judgment—Discretion—Act 48 *Geo. III. cap.* 151, *sec.* 15.

The pursuer of an action of declarator of right-of-way (a society suing in the public interest) sought leave to appeal to the House of Lords against an interlocutor whereby the Inner House, reversing the decision of the Lord Ordinary, appointed "the issues in the cause to be tried before the Lord Ordinary without a jury." *Held* that the fixing of the mode of trial being within the discretion of the Court, leave to appeal should be *refused.*

On 8th June 1886 the Scottish Rights-of-Way and Recreation Society (Limited) and Thomas Duncan and James Farquharson raised an action of declarator and interdict against Duncan Macpherson of Glen Doll. The action was for declarator that there was a public right-of-way over a certain road passing through the defender's land of the nature and in the direction stated in the previous report (*supra*, p. 13). Defences were lodged. On 20th July 1886 the Lord Ordinary (Lord Kinnear) issued the following interlocutor:—"The Lord Ordinary on the motion of both parties, Appoints the issues in this case to be tried by a jury within the Court-room of the High Court of Justiciary upon Tuesday the 23d day of November next, at half-past ten o'clock forenoon," &c.

The defender reclaimed, and on 23d October 1886 the Court pronounced this judgment—"Recal the said interlocutor: Appoint the issues in the cause to be tried before the Lord Ordinary without a jury, and remit the cause to his Lordship with instructions to proceed therein accordingly."

Thereafter the pursuers presented a petition to the Court for leave to appeal to the House of Lords against this judgment. The Act 48 Geo. III. cap. 151, sec. 15, enacts—"That hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of the said Division."

The petitioners stated that the question was one of public right depending on inquiry into facts, that they were advised that by the inveterate practice of the Court it ought to be tried by jury, and that they being charged with the public interest in that and similar cases had a material interest in having it so tried, rather than by proof and subsequent reclaiming-note, which would be productive of great expense. They also stated that they were advised that the said interlocutor was incompetent, as by the Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 46, the trial of a cause on issues before a Judge without a jury could