1774. *March* 9. MESSRS STIRLING and COMPANY,—*Chargers*; *against* ROEBUCK, GARBET, and COMPANY,—*Suspenders*.

PRIVILEGE.

Found a good objection to a Scotch patent, that previous to its being granted the art was known and practised in England.

[*Fac. Coll., XIII,* 218; *Note, App. No. I.*; *Privil. No. II.*]

THE suspenders, Messrs Roebuck and Company, obtained, by letters patent under the great seal of Scotland, the exclusive privilege of exercising the art of manufacturing oil of vitriol *in vessels of lead*, within Scotland, for 14 years. The chargers, Messrs Stirling and Company, having erected a vitriol work for carrying on the same process, Messrs Roebuck and Company presented a bill of suspension for the purpose of having them stopped. When the cause came to be argued, the chargers stated the following objections, *inter alia*, to the suspender's patent:—

1*mo*, They stated that the mere substitution of vessels of lead instead of vessels of glass, in the manufacture of the commodity in question, was not entitled to be considered a new invention. That it was acknowledged by the suspenders, that the art of making oil of vitirol had been long known, and publicly exercised, and they did not pretend to have made any discovery in the manufacture of the commodity itself. The mere using of cheaper and more commodious vessels, was no new invention entitled to the protection of a patent.

2*do*, Even the use of leaden vessels was no new thing on the part of the suspenders at the time when they applied for the patent, although they stated the case to be otherwise in their petition to the crown: the fact was, they had carried on this manufacture in vessels of lead for 20 years past.

3*tio*, The use of leaden vessels was not an invention of the suspenders at all. Long before the patent was obtained, the use of lead vessels was known and practised by various persons *in England*.

The suspenders ANSWERED,—1*mo*, Although they had not discovered the art of making oil of vitriol, they had discovered a new mode of making it, which was enough to entitle them to a patent. The art of extracting oil of vitriol from sulphur alone, was known more than 100 years ago, and yet Dr Ward got a patent for extracting it from a mixture of sulphur and saltpetre, which was merely a new mode of doing the same thing which had been done before.

2*do*, The suspenders had not used leaden vessels so long as the chargers alleged. But, moreover, they contended, in point of law, that it was not necessary to apply for a patent the moment a discovery was made. An invention is new, *quoad* the public, if not previously known and publicly practised.

3*tio*, The statement that the use of leaden vessels had been publicly practised in England before the granting of this patent, is not relevant, supposing it were true. A patent may be obtained by a person who first introduces an

art or manufacture into this country, although it has been previously known and carried on in foreign parts; Hawkin's *Pleas of Crown, tit. Monopolies, lib.* 1, c. 79, § 6; Bacon's *Abridgement, voce Monopoly*; case of *Edgeberry*, Salk., 2—447; 5th Geo. II., c. 8; and England is a foreign country with regard to Scotland.

A proof was taken, by which it was established, that the mode of manufacturing oil of vitriol in leaden vessels, had been known and practised in England previous to the patent.

The following opinions were delivered:—

Hailes. A very momentous question occurs here: Messrs Roebuck and Company contend, "that although they were not the inventors of making oil of vitriol in lead vessels, still their patent must be good to exclude others, because they were the first that practised that art in Scotland." Your Lordships will not establish this proposition without maturely weighing its consequences, which seem exceedingly strange. I will explain what I mean, by a few familiar examples: The first stocking-loom in Scotland was established at Glasgow between 30 and 40 years ago. According to Messrs Roebuck and Company, the man who first established that stocking loom, might have sought and obtained a patent, prohibiting all others in Scotland from establishing a stocking-loom in Scotland for 14 years: the same would be the case as to the still later establishment of looms for silk, gauze, and ribands, so necessary in the present ruined state of our linen manufactures. At this day, the working of velvet or of any other manufactures used in England, but not in Scotland, may be circumscribed by patent for 14 years, that is, all new manufactures may be limited, in Scotland, to one man for the space of 14 years. The only person in Scotland who has used Dr Franklin's conductor for lightning, is Dr Lind; were that gentleman less benevolent than he is, he might monopolize Dr Franklin's invention in Scotland for 14 years. According to the suspenders' argument, he, as the first user, though not the inventor, may have a patent. Although lightning were as frequent and as fatal in Scotland as in Virginia and Pensylvania, no man could use the conductor without Dr Lind's permission, no not even Dr Franklin himself. Take the latest invention of all, Dr Irvine's method of making salt water fresh: the process is simple; I may set it agoing in Scotland, procure a patent, and prohibit all the inhabitants in Scotland from making salt water fresh. Again, there is in Edinburgh one Dallaway, who understands the method of enamelling on white iron, as practised at Birmingham. This art is not known in Scotland; it is a manufacture which would maintain thousands of hands: there can be no doubt of the *publicus usus et exercitium* of Dallaway, for I have seen of his work; he may therefore obtain a valid patent to-morrow, and prevent the further introduction of the manufacture into Scotland for 14 years. Many more examples might be given; but these may suffice to call your Lordships' attention to this question, Whether that proposition can be true in law, whereof the consequences are obviously ruinous to the whole system of improvements in Scotland.

Gardenston. Here is such an improvement as may be held an invention. There is nothing in the objection, that Roebuck and Company had privately

carried on the trade for a number of years. The great difficulty is here, that the work in lead vessels had been carried on in England before the date of the patent. I should even doubt whether a patent might be granted to the person who first introduced any foreign invention into Britain. In matters of prerogative, there is no distinction between England and Scotland. This distinction was taken away by the happy *Union.*

KAIMES. This is a matter of considerable moment, because it concerns the good of the public and manufactures. The suspenders take the benefit both of the Act of James the *First*, and of the general prerogative of all princes, touching patents to new inventions. The radical point is, whether Messrs Roebuck and Company have invented any thing material?—They certainly have. The use of lead vessels instead of glass, is a matter of great moment. It has been said, that, if the use of lead vessels was known in England before the date of the patent, Messrs Roebuck and Company cannot support their patent; and to illustrate this, the use of the stocking-loom, &c. has been mentioned. I am not sure that the king could not have granted a patent to the person who introduced the stocking-loom into Scotland. The cases, however, are different, for the stocking loom was a public manufactory in England, to which every one had access; whereas they who made oil of vitriol in lead vessels at Bridgenorth or Bewdly, wrought privately, and work privately still.

MONBODDO. The invention of Messrs Roebuck and Company has proved useful: It has been found by this Court that it is sufficiently published. I do not see the case of *The Glasgow Merchants* in so favourable a light: they had no certain knowledge of Roebuck's method: they sent one of their servants to corrupt the servants of Roebuck, and to discover the secret. Yet we must determine upon grounds of *law*, not of *favour*. The *first* objection is, That there is no new discovery. *Ans.* Call it a discovery, or call it an improvement, it is so material as to entitle Messrs Roebuck and Company to a reward. The *second* objection is, That the patentees had used this method for 14 years before the date of the patent. *Ans.* 1*st*, In point of fact, it is long since they began to try it; but they did not till of late bring their trials to perfection: 2*d*, There was no occasion for applying to obtain a patent till there was a danger of discovery. The *third* objection is, That the discovery was not made by Roebuck and Company. I do not see any evidence of the art having been practised in Scotland. The charger's pretensions for discovery are ridiculous. It is acknowledged that there is no proof as to Steel. With respect to England, that the art was practised in England before the date of the patent, I am satisfied. It is probable that the discovery came from Roebuck himself, by the treachery of one Fauconbridge, a discarded servant. [This is a probable conjecture. The company gave Fauconbridge 10s. a-week, and, on his proving idle and drunkensome, dismissed him. It is likely that he told all he knew to the English artists, and that though he might not be able to explain the whole process, yet could tell enough to set chemists on the right scent: it was a poor saving in the company to suffer so dangerous a man as Fauconbridge to go at large, because he was not worth his wages.] However, I lay not stress on the circumstance of the discovery having come from Roebuck and Company. The question then comes to this, Will not Roebuck's patent be good, as he first brought the art into Scotland? Even in that view, as the introductor of

this art, he is a great benefactor to the nation. The art was not publicly practised in England: its being secretly practised there, will not affect Roebuck's patent. But I will suppose that the art was publicly practised in England: still I think it the same thing as if Roebuck had introduced it into Scotland from beyond seas. In the sense of law, England, with respect to us, is beyond seas. [There is a decision of the Court, finding the contrary in express terms.] The article of Union touches not this case. This is not a matter of trade, though it may be useful in *trade*. There is no communication of the law of patents between the two nations.

COALSTON. I am clear that there is no relevancy on the first and second objections. My sole difficulty lies on the third objection, That this art had been practised in England, and elsewhere, before the date of the patent. There is no proof either as to the Stirlings or as to Steel. It is not sufficient that others may have *known* it, if others did not *use* it. The patent will be good: so says the Act of King James I., which the parties admit to be the law of Britain; but the evidence of its having been practised in England, is sufficient to void the patent. I admit that its being practised in foreign parts would not be a good objection. It is proved to have been practised at Bridgenorth and Bewdly: this, I think, is a good objection, in the words of the Articles of Union. Upon this clause of the Articles of Union, the statute of James I. is admitted to be the law of Britain. At the time of the Union, there was scarcely one manufacture properly practised in Scotland. Most of the manufactures now known were then known in England. Was it agreeable to the statute of Monopolies, or to the Articles of Union, that any subject of Scotland could apply for a patent respecting any manufacture known in England but not in Scotland? This cause falls to be determined upon the Articles of Union. If there was any doubt as to this, the arguments *ab incommodo* are unanswerable. As to what is said, that this art is kept secret in England, the truth is, that manufactures, especially in the chemical way, are kept secret as much as possible even after a patent.

[He might have illustrated this by the case of Roebuck's own works, where, notwithstanding the patent and specification, the secret of the process is carefully preserved.]

JUSTICE-CLERK. I would repel the first and second objection; but the *third* is irresistible. As to what is said, that this business is kept a secret, it is notoriously known that many of the most valuable manufactures in England, whether with patent or without, are conducted with all imaginable secresy. The words *publicum exercitium*, though in the patent, are not in the statute. I should be sorry that we adopted this rule of decision, holding that a patent would be good against establishing manufactures in Scotland which are practised in England, though in a secret way. We have evidence co-extensive with the discovery made in Chancery, that the manufactory is carried on in lead vessels in England: this destroys the evidence from the king's patent, that Roebuck was the original inventor. The law of Monopolies is general, with the exception of the first inventor.

GARDENSTON. In the case of *Clark* against *Laycock*, decided in the King's Bench, Clark had a patent for both kingdoms: his patent was set aside upon

the evidence of Scots witnesses, that the art had been practised in Scotland before the date of Clark's patent.

MONBODDO. I regard not arguments *ab incommodo*: we must judge according to law, not conveniency. If there are such evil consequences from patents, why, let the King grant none such, or let the Legislature regulate them.

[He misunderstood me. I endeavoured to show, from the consequences, that that could not be law which necessarily produced such effects.]

On the 4th March 1774, "The Lords found it proved, that the method of making oil of vitriol in vessels of lead, was practised in England before the date of Messrs Roebuck and Company's patent; and therefore found the letters orderly proceeded."

Act. J. M'Laurin, A. Lockhart. *Alt.* A Crosbie, H. Dundas.

Reporter, Justice-Clerk.

Diss. Kaimes, Pitfour, Monboddo.

1774. *March* 10. GEORGE Ross of Cromarty, &c. *against* SIR RODERICK M'KENZIE, &c.

MEMBER OF PARLIAMENT.

It is competent to any Freeholder to challenge decree of valuation, though he has no other interest in challenging it than merely to support the objections to enrolment for Freeholders.

[*Faculty Collection, VI.* 294; *Dictionary*, 8663.]

HAILES. I will give my opinion in two words: I am clear as to the jurisdiction of this Court. I might hesitate as to the power of the freeholders, were it not for a series of decisions which cannot at present be departed from. I would therefore follow the course which we have held for so many years.

GARDENSTON. I am as *laconically* of the same opinion.

KENNET. I wish to see decisions uniform, especially in election matters. I have no doubt as to the jurisdiction of this Court, which indeed is not much disputed. As to the second point, it is established properly: at any rate, it is *established.* If the Court does not allow this power in one shape or other, either *ope exceptionis* or by reduction, the power of naming members of Parliament will be in the commissioners of supply.

PITFOUR. If the Act 1681 had not been the rule, I should have had no objection to the absolute power of the commissioners. I once heard it said, in French, of judges, *Ils oublient les personnes, ils attendent aux choses.* With the commissioners of supply, the rule is inverted, *Ils oublient les choses, il attendent aux personnes.* The distinction of *ex facie*, or not, is a good one; things that require proof cannot be taken up *ope exceptionis.*