

are competent under it to a patent. These are (1) that the subject-matter is not patentable; (2) that the patentee is not the first inventor; (3) that there has been prior use; (4) that the subject of the patent is not of general public utility. In the letters-patent, again, there are conditions introduced which raise all these four objections except the first, and there is an additional condition which requires the patentee to enrol a specification describing his invention and the manner of performing it; so that taking the Act of Parliament and the letters-patent together, they raise five different grounds of objection to a patent; and these are the only possible defences that can be pleaded against an action of infringement, except always, of course, the plea founded on a general denial of infringement. In the present case these objections are all well stated. Leaving out the eighth and ninth pleas, the former being a denial of infringement, the other pleas resolve themselves into the five objections to the patent. The first and the seventh are objections, stated in different words, to the subject-matter; the second is an objection to the public utility of the patent; the third raises the objection that the patentee is not the first inventor; and the fourth is that there has been prior knowledge of the patent. The fifth objection is that the specification does not conform with the conditions of the letters-patent; and the only remaining plea is the sixth, which alleges that the pursuer does not distinguish between what is old, and therefore not claimed, and what is new, and therefore claimed. That plea is a further extension of the objection that there has been prior use of the patent, or that the patentee is not the first inventor, and is a modification of these pleas, combined with a well known principle of patent law that if the old matter be so mixed up with the new as to be inseparable, then the whole patent is bad. That is a principle of law a little beyond the plea involved in the third and fourth pleas of the defenders. Now, the first ground of defence, that the subject-matter of the patent is such that a patent could not legally be granted, is a question of law and not of fact, and therefore there is no special issue required for it. It is not a question of law to be determined before the trial, because before the Court understand the specification the Court cannot determine what the subject-matter is. But still it is a matter of law and not of fact, with which the jury have no concern. The other four defences do require special issues; but then there are four only, and not five, and the objection to the issues is that five are wanted to try four questions. Under the third plea the defender has proposed two issues; but the Court are of opinion that neither of them is the proper issue to try the question raised by the third plea, and still less is it competent to try the question under two issues. It is difficult to reconcile the authorities on the point of what constitutes such difference as would entitle a patentee to take out a patent, some apparently holding that the man who first publishes a patent is the inventor, others that the invention of it is required. The proper issue here will be one which shall follow as strictly as possible the terms of the Act of Parliament and the conditions of the letters-patent, and will be whether the pursuer was not the true inventor; and under this issue it will be open to the defenders to maintain any objection to the claim of originality and true invention, except the objection of prior use, which is raised under another issue.

The following are the issues adjusted—the first two being those of the pursuer:—

“It being admitted that the pursuers obtained the letters-patent, No. 5 of process, dated 27th January, and sealed 3d July 1860, and filed the specification, of which No. 6 of process is a certified printed copy:

“It being also admitted that the pursuers obtained the letters-patent, No. 7 of process, dated 13th November 1862, and sealed 13th January 1863,

and filed the specification, of which No. 8 of process is a certified printed copy—

“1. Whether, from the 1st of October 1863 to the 18th of November 1864, or during part of said period, and during the currency of the said first-mentioned letters-patent, the defenders did, at their works at or near Bannockburn, wrongfully, and in contravention of the said letters-patent, use the invention described in the said first-mentioned letters-patent and specification?

“Whether, from the 1st of October 1863 to the 18th of November 1864, or during part of said period, and during the currency of the said second-mentioned letters-patent, the defenders did, at their said works at or near Bannockburn, wrongfully, and in contravention of the said letters-patent, use the invention described in the said second-mentioned letters-patent and specification?

“Damages laid at £500, with interest from 18th November 1864.

OR,

“1. Whether the pursuers are not the first and true inventors of the invention described in the said first-mentioned letters-patent and relative specification?

“2. Whether the invention described in the said first-mentioned letters-patent and specification was publicly used in the United Kingdom prior to the date of the said letters-patent?

“3. Whether the said invention described in the said first-mentioned letters-patent and relative specification is not practically useful for the purposes therein set forth?

“4. Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to practice the said invention so as to produce the effects set forth in the said first-mentioned letters-patent and specification?

“5. Whether the pursuers are not the first and true inventors of the invention described in the said second-mentioned letters-patent and relative specification?

“6. Whether the invention described in the said second-mentioned letters-patent and specification was publicly used in the United Kingdom prior to the date of the said letters-patent?

“7. Whether the said invention described in the said second-mentioned letters-patent and relative specification is not practically useful for the purposes therein set forth?

“8. Whether the description contained in the said last-mentioned specification is not such as to enable workmen of ordinary skill to practice the said invention so as to produce the effects set forth in the said second-mentioned letters-patent and specification.”

FLEEMING v. HOWDEN AND DUNLOP.

Entail—Clause—Irritancy—Declarator. A deed of entail having provided that in the event of any of the heirs of tailzie succeeding to the peerage, the estate should then devolve on the next heir—held by the whole Court (1) That on the occurrence of the event, the estate devolved *ipso facto* on the next heir, without the necessity of any declarator; and (2) That the next heir was entitled to the rents from the date of the succession to the peerage in competition with the trustee on the last heir's sequestrated estate, and a person holding a disposition and assignation to the rents from the last heir.

Counsel for the Pursuer—The Solicitor-General and Mr Pattison. Agent—Mr Thomas Ranken, S.S.C.

Counsel for the Defenders—Mr Patton and Mr Millar. Agents—Messrs Scott Moncrieff & Dalgetty W.S., and Mr George Wilson, S.S.C.

In an action of declarator, adjudication, and payment originally raised at the instance of the late

Right Hon. Clementina Elphinstone Fleeming, of Biggar and Cumbernauld, wife of the Right Hon. Cornwallis, Viscount Hawarden, with consent and concurrence of her husband, and the said Viscount Hawarden, for his interest, against the Right Hon. John Fleeming, Lord Elphinstone, formerly John Fleeming, Esq., of Biggar and Cumbernauld, now dead, and George Dunlop, writer in Edinburgh, and now insisted in by the Hon. Cornwallis Fleeming (sometime Maude), only son of the said Viscountess Hawarden, and the said Viscount Hawarden, his father, as his administrator-in-law, against James Howden, C.A., in Edinburgh, trustee on the sequestrated estate of the said deceased Lord Elphinstone and the said George Dunlop, the Lord Ordinary (Kinloch), on the 12th of November 1864, found that in a question between the pursuer Lady Hawarden and the original defender Lord Elphinstone, the succession of the latter to the peage on or about 19th July 1860 had the effect of determining and bringing to an end, *ipso facto*, the right of the said Lord Elphinstone to the entailed estate libelled, and of transferring to the pursuer the right to the said estate from and after the said date.

The entail in question contains a provision to the effect "that in case it shall happen any of the heirs of tailzie mentioned, other than the heirs-male of my body, or of the body of the said Mr Charles Fleeming, to succeed to the title and dignity of peage, then, and in that case, and how soon the person so succeeding, or having right to succeed, to my said estate, shall also succeed, or have right to succeed, to the said title and dignity of peage, they shall be bound and obliged to denude themselves of all right, title, or interest which may be competent to them of my said estate; and the same shall from thenceforth, *ipso facto*, accrue and devolve upon my next heir of tailzie for the time being, sicklike as if the person so succeeding and bound to denude were naturally dead." John Fleeming, the heir then in possession, succeeded to the peage as Lord Elphinstone on 19th July 1860. On the 18th July last, in reviewing the interlocutor of the Lord Ordinary, the Court pronounced the following judgment:—

"Edinburgh, 18th July 1865. — The Lords of the Second Division having resumed consideration of the reclaiming note for the defenders against Lord Kinloch's interlocutor of 19th November 1864, with the revised cases for the parties, recall the interlocutor reclaimed against: Find that the late John Fleeming, the original defender, was served heir of tailzie and provision, and duly infeft in the estates claimed by the original pursuer, Lady Hawarden, on the 1st May 1841: Find that by the death of John, 13th Baron Elphinstone, on 19th July 1860, the succession to the title and honours of the barony of Elphinstone, in the peage of Scotland, opened to the said John Fleeming as the heir next entitled to succeed to the said peage: Find that on the 31st October 1860 the original pursuer, Lady Hawarden, being the heir of entail next entitled to succeed to the said estates after the said John Fleeming, raised the present action against the said John Fleeming, and the defender Dunlop for his interest, for the purpose of compelling the said John Fleeming to denude of the said estates in her favour, and also for the purpose of adjudging the said estates to belong to her in virtue of the said provision in the said deed of entail, and of the opening of the succession to the said title and honours of the barony of Elphinstone to the said John Fleeming: Find that the defender Dunlop was, during the lifetime of the said John Fleeming, and at the time when the present action was raised, in possession of the said estates, and had been in such possession prior to the succession of the said peage opening to the said John Fleeming on the 19th July 1860, as disponee under the disposition, No. of process, executed in his favour by the said John Fleeming on 14th, and registered in the General Register of Sasines on the 25th November 1859: Find that the said disposition,

though *ex facie* absolute, was truly a security for debt due by the said John Fleeming to the defender Dunlop: Find that the said John Fleeming and the defender Dunlop lodged joint defences to this action, and that thereafter the said John Fleeming died on 13th January 1861: Find that the estates of the said John Fleeming were sequestrated under the Bankrupt Act after his death on 7th July 1862, and the defender Howden is trustee in the sequestration which is still in dependence: Find that in July 1861 the said Lady Hawarden, original pursuer, was served in special as heir of tailzie and provision of the said estates to the said John Fleeming, as the heir who died last vest and seised in the said estate: Find that the entail of the said estates under which the said John Fleeming held the same was a valid and effectual entail under the statute 1845; and with these findings, appoints the revised cases for the parties, with the record and productions, to be laid before the Judges of the First Division and the permanent Lords Ordinary, for the purpose of their Lordships giving their opinions in writing on the following questions:—

"(1.) Whether the devolution of the estates provided by the said clause of the deed of entail took effect *ipso facto* on the succession to the said peage opening to the said John Fleeming so as to entitle the said Lady Hawarden to immediate possession of the said estates, and to the rents and profits thenceforth accruing without any decree of declarator giving effect to the devolution?

"(2.) Whether assuming that the debt which the disposition to the defender Dunlop was intended to secure, is a subsisting debt, the said Lady Hawarden was, in competition with the said defender, as disponee and assignee of the said John Fleeming, entitled to the rents and profits of the said estates for the period between the succession to the said peage opening to the said John Fleeming on the 19th July 1860 and the raising of the present action, or for the period between the raising of the present action and the death of the said John Fleeming?

"(3.) Whether the said Lady Hawarden was, in competition with the trustee on the sequestrated estate of the said John Fleeming, entitled to the said rents or profits, or any part of the same?"

The following is the opinion returned by the Lord President, Lord Curriehill, Lord Ardmillan, Lord Jarviswoode, Lord Ormidale, and Lord Mure, in which the judges of the Second Division to-day concurred:—

"We are (1) of opinion that upon the succession to the peage opening to John Fleeming, the devolution of the estates provided by the clause of the deed of entail took effect so as to entitle Lady Hawarden to immediate possession of the estates, and to the rents and profits thenceforth accruing, without any decree of declarator. The event referred to—namely, the succession to the peage—was not a contravention of any of the provisions or conditions of the deed of entail. It was not an act prohibited to be done, or an omission of anything that the heir in possession was enjoined to do. It was an occurrence of a character altogether different from those matters in reference to which the statute 1685 contemplates an action of declarator. It was not a penal irritancy; it was not, in the sense of the entail, or in any proper sense, an irritancy. It was a provision or condition for regulating the course of succession. John Fleeming took the estates, not only subject to the condition that if he succeeded to the peage (or it might have been if he succeeded to a certain other estate of greater value), the estates now in question should from thenceforth devolve on and accrue to the next heir, but also subject to an express obligation on him, as soon as the succession to the peage opened to him, to *denude*, which is tantamount to an obligation on him forthwith to *convey* the estates in question to the next heir. If John Fleeming refused to cede possession, an action at the instance of the next heir might be necessary, not to give her the right,

but to enforce it, and compel implement of the obligation; nor could John Fleeming, by resisting such action, prolong the period of his lawful enjoyment of the rents, or postpone until decree in that action the period when the rights of the next heir would commence. It has been suggested that at least the instituting of an action at the instance of the next heir was necessary to put an end to the right of John Fleeming. We do not think so; but we would observe, that whether the date of succeeding to the peerage, or the date of instituting the action, be taken as the date at which John Fleeming's right ceased and that of the next heir commenced, the practical consequences in this case appear to us to be the same, because both of these events occurred during the currency of the half year between Whitsunday and Martinmas, and there being no unusual condition in the leases, no right to any part of the rents of that half-year ever belonged to John Fleeming. (2.) As regards the competition referred to between Lady Hawarden and the defender Mr Dunlop, we are of opinion that Lady Hawarden was entitled to the rents and profits of the estates for the period between the date when the succession to the peerage opened to John Fleeming and the date of his death. When John Fleeming's right ceased, that of Mr Dunlop, derived from him, also ceased. This, we think, follows on principle, and from the terms of Mr Dunlop's title. (3.) We are of opinion that Lady Hawarden was, in competition with the trustee on the sequestrated estate of John Fleeming, entitled to the rents or profits in question."

Lord Deas, Lord Kinloch, and Lord Barcaple returned separate opinions, in which they arrived substantially at the same result.

Saturday, Feb. 3.

FIRST DIVISION.

KENNEDY *v.* KENNEDY.

Husband and Wife—Desertion of Husband—Order of Protection—Conjugal Rights Act—Proof. Application by a wife for protection of her property (aff. Lord Barcaple) *refused*, there being no proof of desertion.

Question.—Is a wife entitled to an order of protection if, though deserted at the date of the application, the desertion has ceased before the order is granted?

Counsel for Mrs Kennedy—The Solicitor-General and Mr W. M. Thomson. Agents—Messrs J. & W. C. Murray, W.S.

Counsel for Husband—Mr Mackenzie and Mr Gifford. Agent—Mr L. M. Macara, W.S.

This is a petition by a wife for protection of her property, presented under section 1 of the "Conjugal Rights (Scotland) Amendment Act, 1861," on the ground that she had been deserted by her husband. The parties were married in 1849. They had both been previously married, and by his first marriage the husband had had three children, while the wife had had two by hers. Two children were born of the second marriage, one of whom still survives. The wife's first husband was a grocer and spirit dealer in Lochee, and after his death in 1848 she continued to carry on the business. At the time of the marriage the respondent Robert Kennedy was a shore porter in Dundee. On 1st April 1852 the respondent left Lochee and went to California. The business of a shore porter was not paying, and it was agreed by both husband and wife that he should try his fortune at the gold diggings. She went with him to Glasgow, from which port he sailed. The three families of children were all left with Mrs Kennedy at Lochee. She was left in possession of the stock and business of the spirit shop, and he only took with him such money as was necessary to carry him abroad. They corresponded for two and a half years, but the correspondence then ceased for eight

years. It was, however, resumed in 1862, and continued until 1864. On 22d August 1864 the husband wrote to his wife that he intended to sail for Scotland on the following day, and in this letter he enclosed a bank bill for £180, a large part of his whole means, in order to secure the safety of the money in case anything should happen to himself on the voyage. Before receiving this letter, the wife had employed a law agent to present this petition, and it was presented on 21st July 1864. During her husband's absence she had saved about £400. The husband arrived in Scotland two days after his letter of 22d August, and as soon as he arrived he went to his wife's house in Lochee. Since then the parties have lived together as man and wife—he working at a trade and giving his earnings to her. The wife alleged that she consented to resume cohabitation with her husband, and to abandon this petition on his promising to sign a post-nuptial contract on certain terms. The husband, on the other hand, stated that he had never agreed to the terms which were embodied in a contract which was prepared, and that he refused to sign the contract, because it gave his wife power at any moment to turn him out of doors. The proceedings in these circumstances went on, and a proof was led, in which the circumstances which have been detailed were brought out. The parties, however, are still living together notwithstanding this litigation.

The Lord Ordinary (Barcaple) refused the petition, finding that when it was presented the petitioner was not deserted by her husband. And he further thought that, even were it otherwise, no protection should be granted in this case, because the wife was not now deserted by her husband. Section 3 of the statute provides that where the husband makes appearance the order "shall continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion, and cohabits with his wife," in which case he is to recall the order. His Lordship did not think that the order should now be made in circumstances which in his opinion would require its recall if it had been already pronounced.

Mrs Kennedy reclaimed. She founded on the case of Turnbull, 14th Jan. 1864 (2 Macp. 402), and argued that, if there was desertion when the petition was presented, she was entitled to an order of protection. The Court adhered.

The LORD PRESIDENT said—This is a peculiar case both as regards the branch of the law to which it belongs, and the history of the parties. On a consideration of the whole evidence, parole and written, I have arrived at the conclusion that the wife has not proved desertion on the part of the husband. When he went abroad, it was not in the way of desertion. He went after consultation with his wife, and for the purpose of benefiting her and the family. He kept up correspondence with her when away, which ceased, no doubt, for a time, but was afterwards resumed. It is difficult to say that, at any period of his absence, the manner of his leaving was converted into desertion. It appears that he was not so successful as he expected, but it does not appear that he ever realised the purpose for which he left this country. He accounts for the cessation of the correspondence by saying that he wrote a number of letters which were not answered; and it does appear that some of the letters miscarried. He also made enquiries after his wife and family, and he does not appear to have ever lost the proper feeling which as a husband and father he ought to have for his family. If he had come home in June instead of September, it is quite clear this application could not have been entertained. But his purpose to come home existed in June, and it never left him. The statute, I think, contemplates a wilful desertion for the purpose of avoiding cohabitation, and I think this is shown by section 3. It appears that the parties are now living on a good