

claim had been carried back to 1813 or to 1842, or had applied to the period between 1813 and 1860, it must have been met by two most formidable pleas. First, the effect of the Income-Tax Statutes, and secondly, *mora*. In my opinion the claim which the collector of the Widows Fund has against the treasurer of the College is just the difference between what he retains from the widows' annuities as income-tax and what is kept back by his debtors in making their payments to him. Upon the whole matter I agree with the judgment proposed by your Lordship.

LORD ADAM—The first question, which arises in Mrs Cockburn's case is, whether the provision in section 8 of the Act of 1813 as to the widows being paid their annuities free of income tax is or is not repealed?

It is repealed unless it be specially saved or re-enacted. Is then this privilege re-enacted? It certainly is not, nor is it in any way saved from the repealing words.

But it has been suggested that we are to re-enact it by implication. It certainly would require a very much stronger argument than anything I have heard to satisfy me that it was the intention of the Legislature to preserve this privilege, and therefore without any hesitation I come to the conclusion that it was intended by the Act of 1860 to repeal the privilege conferred by the Act of 1813.

The next question arises in the other action, and is this, What is the amount of income tax which the College is bound to repay to the collector of the Widows' Fund? Now, the words of the 8th section of the Act of 1813 are, "to repay to the collector of the said fund the whole amount of the tax upon property or income that may have been paid by him on the said fund for the year preceding."

It has been urged that the meaning of this is that the collector is to be repaid all that has been deducted from him, and that in estimating this amount he is not bound to take into account the sums he is entitled to deduct from the annuitants. I cannot adopt such a reading of the statute. It is only the difference between these two amounts which the collector can claim against the College. With regard to the sum of £53, 19s. 5d. claimed by the collector in the first petitory conclusion of his summons, I do not see that he is entitled to recover this sum from the College, because he will be entitled to recover it from the annuitants, and so he will not in any way be out of pocket. Upon the whole matter I concur with your Lordships.

LORD MURE was absent from illness.

In the action at the instance of Mrs Cockburn against the collector of the Widows Fund the Court adhered.

In the action at the instance of the collector against the Royal College of Surgeons the Court pronounced this interlocutor:—

"Recal the interlocutor of 4th February 1887, in so far as it decerns and declares in terms of the declaratory conclusions of the summons, and in so far as it decerns in terms of the first petitory conclusion of the summons: *Quoad ultra* adhere to the said interlocutor: Dismiss the action so far as

regards the said declaratory conclusions, assolvie from the first petitory conclusion, and decern: Find that the defenders are bound to pay annually to the pursuer a sum sufficient to reimburse him and the fund under his charge of the difference between the amount of income-tax paid by the pursuer, directly or indirectly, and the amount of income-tax deducted by the pursuer in paying the widows' annuities; and as regards the said interlocutor of 5th March 1887, refuse the reclaiming-note and adhere to the said interlocutor."

Counsel for the Pursuer Mrs Cockburn—Darling—W. E. Fraser. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defender the Collector of Widows' Fund—H. Johnston—A. Pearson. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Defenders the Royal College of Surgeons—Gloag—Strachan. Agent—James Robertson, Solicitor.

Friday, May 25.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

WALKER, HUNTER, & COMPANY v. THE
HECLA FOUNDRY COMPANY.

Copyright—Design—Infringement—Patents, Designs, and Trade-Marks Act, 1883 (46 and 47 Vict. cap. 57)—Interdict.

The holders of a certificate under the Patents, Designs, and Trade-Marks Act, 1883, for the copyright of a registered design for kitchen-range fire-doors, the design being for "a range fire-door with moulding on top, the moulding forming part of range, shape to be registered," applied for interdict against an alleged infringement. *Held*, after a proof, that as the respondents' fire-door differed merely in the outline of the moulding from that of the complainers', it was an infringement, and interdict *granted*.

Ante, July 20, 1887, 24 S.L.R. 750; 14 R. 1072.

This note of suspension and interdict was presented by Walker, Hunter, & Company, of the Port-Downie Ironworks, Falkirk, against the Hecla Foundry Company, ironfounders and range manufacturers, Dobbie's Loan, Glasgow, and the individual partners, to have the respondents interdicted from "infringing the copyright of a registered design for kitchen-range fire-doors, No. 16,596, the property of the complainers, conform to certificate of registration, dated 10th November 1884, granted in pursuance of the Patents, Designs, and Trade-Marks Act (46 and 47 Vict. c. 57), and in particular, from making, vending, or using any fire-doors for kitchen-ranges having a moulding, cast or fixed, thereon, in manner shown in the design."

In defence the respondents maintained various pleas, which, as stated in the opinion of the Lord Ordinary *infra*, were held to have been previously decided, as reported *ante* 24 S.L.R. 750, and 14 R. 1072. The respondents also main-

tained that the design of the door which they made was not an infringement of the complainers' design.

The facts of the case are contained in the opinion of the Lord Ordinary *infra*.

The Lord Ordinary (M'LAREN) on 16th November 1887, after proof, found it proved that the respondents had infringed the suspenders' exclusive privilege by making for sale fire-doors of the pattern produced, and granted interdict.

"*Opinion*.—This is the second action at the instance of Walker, Hunter, & Company for contravention of the exclusive privilege which they claim under the Registration of Designs Act.

"The design was for a door for a convertible range, and it has been shortly described as a rectangular door with a moulding on the top of it. It appears that in these convertible kitchen-ranges the fire is opened by lifting or sliding back the fire-cover, and opening the fire-door in front of the bars, and then there is, I think, a bar that folds over, but when the fire-place is closed, then, according to the usual construction of these ranges, a moulding was cast on the fire-cover or fall-bar which might or might not be continuous with the moulding on the other part of the grate, but generally was of the same pattern or design. The practice has been to put the moulding upon the fire-cover or fall-bar, but, for reasons which I need not discuss, this was found inconvenient, and it occurred to the complainers as an improvement that the moulding might be cast upon the door, with the result that when the door was closed the appearance of the range was exactly the same.

"In a former action the validity of the exclusive privilege claimed was contested. It was contested upon three different grounds. First, it was said, having regard to the evidence in support of the exclusive privilege, that it was rather the subject of a patent than of a certificate under the Designs Acts if it was of any value at all. Then, I think, it was also said to be of no value, or that the improvement was so inconsiderable and so obvious as not to be entitled to protection. And then, further, the validity of the claim was disputed on the usual ground of anticipation, and there were, I think, two cases of anticipation brought forward, neither of which, however, was established. In the opinion of the Court, on a reclaiming-note from my judgment, all those objections to the exclusive privilege were rejected, and interdict was granted against the attempted infringement. If this had been a patent case the questions to which I have referred could not have been tried again, because I should unquestionably have granted a certificate in terms of the Act that the validity of the patent had been in question in the former case. But as the special provisions to which I am referring have not been made part of the copyright law the respondents in this case were entitled to raise these questions over again. It had been intended, I understand, to try the question of anticipation, but for the reasons which I stated in the course of the discussion I held that no such question could be tried under this record.

"With regard to the other objections—to wit, that this design is unworthy of legal protection at all, or that, if entitled to protection, it should be given by means of letters-patent—I need do no more than refer to the judgment of the Inner

House in the former action—a judgment which unreservedly disposes of these objections, and which I conceive to be authoritative on this question, superseding the necessity of any further consideration of these points by myself.

"There remains therefore only the question of infringement, whether the design of the door, which is undoubtedly made by the Hecla Company, is an infringement of the complainers' exclusive privilege? Now, the respondents' door is a rectangular door surmounted by a moulding, and except that the moulding has a different section from the moulding of the complainers, if those two doors were looked at in face as represented in the drawing (or in the manner of an elevation), then I say that, except in the particular which I have just noticed, I think there is really nothing to distinguish the two designs. But when you come to look at the respondents' door in section a difference becomes apparent, because the door is so attached to its hinges that instead of fitting into the space between the adjoining plates of the range, it lies over them, and the moulding, instead of fitting into the space left between the mouldings at the two sides, overlaps them, having its corners rounded off so as to make a transition more agreeable to the eye than if they had been cut off square. The difference that I refer to does not come out by comparing the respondents' drawing with the design for which the certificate was granted. It only comes out when the door is seen in section, and when the manner of its superposition upon the grate is considered.

"Now, upon the question of whether there is here an infringement nothing was said to the contrary of the complainers' proposition that mere differences in the outline of the moulding would not take the respondents' design out of the protected copyright. That seems to me perfectly clear, because there is nothing original in the moulding, and in the claim of registration it is made evident that the registration was claimed not for the particular moulding but for the material form given by placing a moulding—any suitable moulding—upon a fire-door in the described position. Well, then, I have to consider if there was no exclusive privilege claimed for the particular pattern of moulding, whether the exclusive privilege is limited to the case of a moulding which exactly fits into the adjoining mouldings, so as to present a continuous flowing surface, or whether it is not a privilege granted for putting such a moulding upon a fire-door in such a manner as to exclude air and to accomplish the object which had previously been accomplished by putting the moulding upon the fire-cover or fall-bar. It occurred to me, as one way of testing the question, to consider whether it would be possible for the respondents to obtain any right by registration of their design consistently with the right already given to the complainers? There is evidence to the effect that the respondents' pattern had been independently devised, and that they had not wilfully copied the complainers' design. But of course that will not avail them if the copyright obtained by the complainers is good. I think the true way of looking at the question is to assume, or suppose for the sake of the argument, that the respondents had been aware of the registered design, and with that knowledge had set about to make a

design of their own which should not copy or colourably imitate the complainers'. Now, if they had set about making a design in that view, and had produced the complainers' design, with this difference, that the moulding of the door overlapped the adjacent mouldings at the side instead of fitting between them, the question is, whether that design involves the exercise of any inventive skill at all, and whether it is capable of being distinguished from the complainers' design as a design?

"I think that in this case the difficulty, if there be any, is in finding out the question for consideration, because when that is once stated I think it carries its own answer. If it be the question whether, in the assumed knowledge of the complainers' pattern, and wishing not to imitate it, the respondents have successfully achieved their object in making the door which is the subject of complaint, I think no one can doubt that the attempt is a failure—that to present what is a mere copy of the complainers' door, but to place it so that the moulding overlaps instead of fitting in between the adjacent parts, is not an independent design, but a very plain and obvious imitation of the complainers' design. I do not call it a colourable imitation, because I rather think it is the identical thing. It is either directly and literally the complainers' design, or it is in my judgment a very obvious imitation of it, and that being my view of the facts I shall give decree in the terms sought, interdicting the respondents from making, vending, or using fire-doors of the description complained of, with expenses."

The respondents reclaimed, and argued—The question was one falling under section 58 of the Act of 1883 (46 and 47 Vict. cap. 57) and the words "such design or any fraudulent or obvious imitation thereof." It could not be said that the respondents' door was either the same as the complainers', or a fraudulent or obvious imitation thereof, as the differences were apparent to the eye, besides being clear to a mechanic. In looking at a design of this kind it was only fair to look at it as a whole in order to determine its resemblance or dissimilarity to another design. The respondents' design showed a material novelty, and in respect of the novelty the complainers were not entitled to interdict—*Houldsworth v. M'Crear*, 2 L.R., E. & I. App. 380; *Barran v. Lomas*, 1880, 28 Weekly Reporter, 973.

Counsel for the respondents (complainers) were not called on.

At advising—

LORD PRESIDENT—This question is one of infringement of patent, and entirely a question of fact. In the former case we held that the subject of the patent was a new and original design, and therefore a proper subject of registration under the Patents, Designs, and Trade-Marks Acts of 1883.

The only question remaining therefore is, whether the reclaimers' design is not obviously an imitation of that of the complainers. Upon that matter I am entirely of the opinion expressed by the Lord Ordinary. Either the respondents' door is an obvious imitation of the complainers' door, or it is identical with it. In these circumstances I am for adhering.

LORD SHAND—I am of the same opinion. There can be no doubt that these two designs are the same, and that there is nothing to distinguish the one from the other.

I do not think in a case of this kind that it is necessary for the complainers to make out that the imitation has been wilful and intentional; it is enough if they show that the design is the same in order to have the infringement put a stop to.

LORD ADAM concurred.

LORD MURE was absent from illness.

The Court adhered.

Counsel for the Complainers—D. F. Mackintosh—Ure. Agents—Auld & Macdonald, W.S.

Counsel for the Respondents—Jameson—Younger. Agents—J. & J. Ross, W.S.

Saturday, May 26.

FIRST DIVISION.

[Lord Trayner, Ordinary.

CLARKE v. M'NAB AND OTHERS.

Process—Suspension—Expenses—Modification—Audit.

In a note of suspension the Lord Ordinary on the motion of the suspender refused the note, and modified the expenses for which the suspender was found liable to £5, 5s. Held that the Lord Ordinary, in the exercise of his discretion, was entitled to modify the expenses.

Hare v. Stein, 9 R. 910, followed.

Ante, March 10, 1888, p. 389.

On 24th January 1888 David Wilkie Clarke, joiner and builder in Dundee, was charged at the instance of Mrs M'Nab and others, in virtue of an extract registered bond and disposition in security, and warrant following thereon, to make payment of the sums borrowed by him.

On 31st January 1888 Clarke presented a note of suspension, praying the Court *simpliciter* to suspend the said charge and whole grounds and warrants thereof. At the same time Clarke presented to the First Division a petition for recall of inhibitions which had been used against him by Mrs M'Nab and others. The grounds of suspension and for recall of the inhibitions were the same, and the suspension was allowed to lie over to await the decision of the First Division in the petition for recall of the inhibitions.

On 10th March 1888 the First Division refused the petition, and on 14th March 1888 the Lord Ordinary (TRAYNER) pronounced this interlocutor in the process of suspension:—"On the motion of the suspender refuses the note of suspension; finds the suspender liable in expenses; modifies the same to Five pounds five shillings sterling.

Mrs M'Nab and others reclaimed against the Lord Ordinary's interlocutor in so far as it modified the expenses to £5, 5s., and argued—The motion made to the Lord Ordinary was "to refuse the note with expenses." His Lordship ought to have remitted the respondents' account of expenses to be taxed by the