

Friday, December 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

JACKSON (LAMONT'S TRUSTEE) v.
LAMONT.

Process—Bankrupt—Expenses—Caution.

In a suspension and interdict brought by the trustee in a sequestration to have the bankrupt interdicted from infringing a patent which had passed to the trustee as part of the bankrupt estate, the bankrupt attacked the validity of the patent on the usual grounds. *Held* (rev. judgment of Lord Kyllachy) that the bankrupt must find caution for expenses as a condition of litigating the action.

The estates of Messrs Ferguson, Lamont, & Company, marine insurance brokers, Royal Exchange Buildings, Glasgow, and of Charles Lamont, the only surviving partner of that firm, as such partner and as an individual, were sequestrated on 14th February 1889, and on 7th March Thomas Jackson, C.A., Glasgow, was appointed trustee on the sequestrated estates. Part of the estate which passed under the provisions of the Bankruptcy Act to the trustee, consisted of a patent, No. 3107, dated 4th August 1876, for "a new or improved compound for the preservation of animal and other substances, the same being applicable to other purposes." This patent had been acquired by Charles Lamont by indenture, dated 17th March 1884, from the inventor, William Fisher Grier, for the sum of £5000, and he carried on the business of making and vending the said preservation—known as "Glacialine"—under the name or style of "The Antitropic Company."

On 25th June 1889 Thomas Jackson, the trustee in the sequestration, with consent of the creditors and commissioners, paid the sum of £800 to discharge a mortgage secured over the patent.

On 28th September 1889 Charles Lamont, who though still an undischarged bankrupt had started business in Glasgow as an insurance broker under the name of Ferguson, Lamont, & Company, issued a circular in these terms—"The Antiseptic Company Universal Food Preservative.—63 St Vincent Street, Glasgow, 28th September 1889.—Manufactory, Port-Dundas, Glasgow.—Dear Sir,—Owing to private losses the business of the Antitropic Company of which I was sole proprietor has passed into other hands. Having made favourable purchases of material I am now in a position to supply the trade at a reduced price with a preservative which will be found identical in sample to the first quality of the Glacialine I have hitherto sold. By further effecting certain economies in manufacture and expenses, I am enabled to sell direct to the consumer and my late customers at prices 20 per cent. to 30 per cent. below former quotations. My experience in the manufacture of antiseptics over the past ten

years is a guarantee of the purity and efficiency of our goods. Referring you to our quotations attached, and soliciting a continuance of your esteemed orders,—I am, Yours truly,—C. LAMONT, late proprietor Antitropic Company."

The present note of suspension and interdict was presented by Thomas Jackson, the trustee, early in October praying the Court, *inter alia*, to interdict the respondent from infringing the letters-patent already mentioned (purchased by the respondent from William Fisher Grier), or from making, using, or vending during the continuance of the letters-patent the invention described in the same, and in the specification filed in pursuance of the provisions thereof; and also from infringing the trade-mark advertised by the Antitropic Company, or from in any way infringing the complainer's right to the said trade-mark and the name "Glacialine."

The complainer averred—" (Statement II.) The name 'The Antiseptic Company' is a colourable and fraudulent imitation of the name 'The Antitropic Company,' and by the use of it, and the offer to supply at a reduced price 'a preservative which will be found identical in sample to the first quality of the Glacialine I have hitherto sold,' the respondent intended to prejudice, and is in fact largely prejudicing, the complainer's interests as trustee foresaid. The respondent, moreover, is now offering for sale and selling, and is purporting to sell, the compound or material called Glacialine, which is made according to the manner described in the said letters-patent, and which is made by the respondent, or on his instructions, and not only without the consent but contrary to the express desire of the complainer, and in infringement of the said letters-patent. He is also selling the same as Glacialine in infringement of the complainer's rights in said trade-mark and in the name Glacialine. He also pretends to sell his preparation as being in fact the same as that manufactured by the complainer."

The respondent answered—"Denied. Explained that the name 'Antiseptic' is a descriptive name which is peculiarly applicable to, and has for many years been used to designate, and is now commonly used to designate, the commodities which the respondent proposes to sell. These commodities are not described in or protected by the said letters-patent. Explained further, that the alleged invention described in the letters-patent was publicly disclosed, and was in common use prior to the date of the letters-patent. *Inter alia*, an invention substantially the same as that therein claimed is described in and is anticipated by Olsson, No. 1893, A.D. 1869. Further, substances containing the same ingredients, and applied to similar purposes as the substance described in Grier's patent, were manufactured and sold by W. Alway & Sons, White Lion Street, Pentonville, London; by F. Fredericks, Marlow Lodge, Oxford Road, Gunnersbury, London; and by Stevens & Company, 347 Kennington Road, London. Similar substances, used

for similar purposes, were likewise common in the market, and were sold under the names of 'Refrigerine,' 'Thionine,' 'Icealine,' and 'Iceoline.' Explained further (first) that the final specification appended to the said letters-patent is not in conformity with the provisional specification; (second) that the patentee has not in his said letters-patent sufficiently distinguished what is old and not claimed by him from what is new and claimed by him; and (third) that the final specification does not sufficiently disclose the method in which the said alleged invention is to be used and applied. The respondent and his creditors were well aware for some years past that the validity of Grier's patent could not be maintained. Reports from patent experts were obtained to that effect; and in consequence the respondent never at any time sought to prevent the infringement of the said patent by the numerous firms who were selling in the market substances similar to that described in Grier's specification."

The respondent, *inter alia*, pleaded—" (4) The letters-patent founded on are null and void, in respect (1st) that the alleged invention therein described was known and used prior to the date of the letters-patent; (2nd) that the patentee fails in his letters patent to distinguish what is old and not claimed from what is new and claimed; (3d) that the specification fails sufficiently to describe the method by which the alleged invention is to be used; and (4th) that the final specification is disconform to the provisional specification. (5) The alleged trade-mark is invalid, in respect that the name 'Glacialine' was well known and in common use long prior to the complainer's alleged registration."

On 24th October the Lord Ordinary (KYLACHY), having heard counsel, on caution passed a note and granted interim interdict against the respondent infringing the letters-patent in question, and against using the trade-mark referred to in the prayer of the note, and *quoad ultra* refused interim interdict.

On 4th December the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel in the Procedure Roll on the motion of the suspender that the respondent be ordained to find caution for the expenses, refuses said motion; and on the motion of the suspender grants leave to reclaim: Finds the respondent entitled to the expenses of this discussion; modifies the same to the sum of £5, 5s., for which decerns against the suspender.

"*Opinion.*—In this case of *Jackson v. Lamont* I have not found sufficient reason for ordering the defender to find caution for expenses. The case is no doubt special, and it may be that the defender's position is *prima facie* unfavourable, but it is, I think, the settled rule that a litigant shall not be required to find caution in respect of impecuniosity, or in respect of the *prima facie* aspect of his case, or indeed any other ground than that he has been divested of interest, or at least of all immediate interest,

in the subject of the suit. That is the ground on which a pursuer who has been sequestrated or has executed a trust-deed is in general required to find caution; and is also, I apprehend, the ground, and the only ground, on which a bankrupt defender is sometimes (as in the case of *Stevenson v. Lee*, 13 R. 913, quoted by the pursuer) subjected to the same condition.

"Now, here I am not able to say that the defender has not a sufficient and sufficiently immediate interest to try the present question. He is sought to be interdicted as he says from earning his livelihood, by using a certain invention which according to him is open to the public. In other words, he is sought to be interdicted from using, as a member of the public an alleged public right. In such circumstances it is I think certain that if his opponent were a third person and not his own trustee, he could not, although an undischarged bankrupt, be held divested of proper interest to defend. For although the earnings of an undischarged bankrupt may, I suppose, under some circumstances be claimable by his creditors, they certainly can only be so so far as not required for his own support, and the interest which the bankrupt thus retains must always, I think, be sufficient for the purposes of such a question as this. And if this be so where the bankrupt is being sued by a third party, I do not see that it makes any difference that the pursuer here is the defender's trustee, and that the patent which is said to be infringed belonged formerly to the defender himself. It is not the rule (rather the contrary) that a bankrupt is bound to find caution in actions between him and his creditors; and although it is true that the defender here is denying the validity of a patent which belonged to himself, and which his trustee acquired from him by virtue of his sequestration, still that only affects the merits, or rather the *prima facie* merits, of the defences; and even on that point it is perhaps right to observe that the defender at least avers that the patent had been given up as bad prior to his sequestration, and that the invention had, prior to the sequestration, been recognised as *publici juris*. On the whole, I refuse the pursuer's motion, with expenses; but as the point is new and perhaps narrow, I give leave to reclaim."

The complainer reclaimed, and argued—The question of finding or not finding caution was in all cases a question for the discretion of the Court, and in this case caution should be required—*Stevenson v. Lee*, June 4, 1886, 13 R. 913. Where the undischarged bankrupt was pursuing an action he was generally required to find caution, even in actions for the vindication of character—*Scott v. Roy*, July 15, 1886, 13 R. 1173; *Clarke v. Miller*, January 16, 1884, 11 R. 418. The present was a case for requiring caution, because the bankrupt, though in form a defender, was attacking and trying to cut down an asset of the bankrupt estate. *Prima facie*, the position of the trustee was a favourable one, as had been shown by the Lord Ordinary granting interim interdict, while that of the bank-

rupt was a peculiarly unfavourable one. The case of *Ritchie v. M'Intosh* was not an authority on the present question. It was not a case arising in the sequestration but under a trust-deed, and it was averred on record that the creditors had all been paid.

Argued for the respondent—The motion of the complainer could not be sustained for a moment if there were no element of patent or trade-mark in the case. The bankrupt was merely seeking to vindicate a right of his own, not a part of the bankrupt estate. If successful he would reap the profit personally. In the case of *Stevenson v. Lee* the subject in dispute was a piece of property of which the bankrupt was divested, and to which the trustee had made up title, and which the bankrupt was still seeking to vindicate. The result of the authorities might be thus summed up. In all cases where the bankrupt was seeking to vindicate a personal right he was not obliged to find caution for expenses even though he were pursuer, much less if he were defender—*Ritchie v. M'Intosh*, June 2, 1881, 8 R. 747, per Lord Young; *Thom v. Andrew*, June 26, 1888, 15 R. 780.

At advising—

LORD PRESIDENT—This is certainly a very peculiar case, and I do not think that any authority has been cited to us which is directly applicable. The patent was acquired by the respondent when he was a solvent trader with a large business, and the sum given for it was £5000. It does not appear that anyone ever challenged the patent before, and it is not likely that the trustee, when it was assigned to him under the operation of the Bankruptcy Act, would have discharged the mortgage of £800 unless he had believed it to have been a good and marketable patent, and worth at all events a great deal more than would be sufficient to clear the mortgage. *Prima facie*, therefore, it is a marketable patent, and forms a valuable asset of the bankrupt's estate. Now, if the respondent had confined his allegations to merely stating that what he was using in his trade was different from what was contained in the patent, his position would have been different, because he would have been simply defending himself against the allegations of infringement, and the issue would have dealt with the infringement of the patent. That, however, is not the position of the bankrupt here. On the contrary, he converts himself into a pursuer as soon as he attacks the validity of the patent, and upon record he attacks it on all the well-known grounds on which patents are usually assailed. Now, to allow a bankrupt the opportunity of cutting down an asset of the bankrupt estate in order to secure benefit to himself is a very strong proposition, putting out of the question the matter with which we are immediately concerned, the demand for caution. But when the question of caution comes to be considered it seems to me that, if we are to exercise our discretion, we must take into consideration the nature of the action pursued by the bankrupt, and when the object he pursues is to destroy what is *prima facie* a very

valuable asset of the bankrupt estate he is in a most unfavourable position. I am therefore of opinion that he must find caution.

LORD ADAM—Questions of finding or not finding caution are always in the discretion of the Court. In the present case I should be most unwilling to interfere with the Lord Ordinary's discretion if it were not clear that the respondent is actually the pursuer in this action. If that view had been presented to the Lord Ordinary I think he would probably have exercised his discretion as it is proposed we should do now. In the next place, it does not appear to me that the cases cited, where the bankrupt sues third parties, are applicable to this case. Indeed I am not aware of any case like this having occurred before. The respondent is practically the pursuer of the cause. The complainer is in possession of an *ex facie* valuable patent, for which £5000 was originally paid, and only in September last the complainer discharged a mortgage of £800 affecting it. That it is therefore in his opinion a valuable asset of the bankrupt's estate there can be no question. What the bankrupt is doing is to challenge the validity of this patent on the usual and well-known grounds which are set forth in his answer to statement eleven. Now, there is no doubt that if the case goes to trial he will have to stand as the pursuer in the issues taken on all these heads. *De facto* accordingly he is the pursuer in the action, and I am of opinion that he cannot be allowed to attack a valuable asset of the bankrupt estate without finding caution for the expenses of the action.

LORD M'LAREN—It is not a little remarkable that the Court should be called upon for the first time to consider as matter of principle the conditions under which a bankrupt should be allowed to litigate with his trustee. When it is considered how easy it is for bankrupts to carry on war with creditors by getting up litigation with his trustees, and how seldom it is done, we must either suppose bankrupts to be of a class of people of extraordinary magnanimity towards creditors, or we must attribute the scarcity of such actions to the knowledge of the control which the Court exercises in the matter of security for expenses over the conduct of the cause, and consider that that has been sufficient hitherto to prevent such actions being unreasonably brought. Now, while not exactly the same case as presents itself with reference to security for expenses of contentious litigation between a bankrupt and a person outside the general body of creditors, yet I think that the decisions which have been given in that class of cases throw a good deal of light upon the present question, and especially this rule may be deduced from them, that the Court will in general be reluctant to hamper a bankrupt in the fair defence of an action brought against him, and in which he shows probable cause of defence, while at the same time, as a general rule to which there are only a few ex-

ceptions, a bankrupt pursuer will only be allowed to litigate upon the condition of finding security. It seems to me that this distinction is one the principle of which is equally applicable to litigations between the bankrupt and the body of his creditors as represented by the trustee. Now, when the bankrupt is defender he is not as a general rule called upon to give security, but it is a matter of discretionary administration whether the Court will compel him to do so; and I think no better reason can be found for exercising that discretion, in the sense of calling upon the defender to find security, than the circumstance or reason that although by the form of the action he is defender he is in substance pursuer, because he is in the position of making a claim against the trustee. Your Lordship has pointed out that such is the position of parties in the first case, and just because the question of finding caution is matter of discretion in the case of a defender I am of opinion that wherever it can be shown that the defender is virtually a pursuer, that discretion ought to be regulated according to the rule applied to a person who is in form a pursuer. If that circumstance had been taken into view by the Lord Ordinary I should, agreeing with Lord Adam, be disinclined to interfere with the Lord Ordinary. But I think that element appears to have been overlooked, and we must reconsider the matter on its merits, and find that the defender ought to be ordained to find caution for expenses as a condition of defending the action.

The Court recalled the interlocutor of the Lord Ordinary, and on the motion of the complainer ordained the respondent to find caution for expenses, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Complainer—Graham Murray—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—Asher—Ure. Agents—Dove & Lockhart, S.S.C.

Saturday, December 21.

SECOND DIVISION.

DAKERS v. THARSIS SULPHUR AND COPPER COMPANY (LIMITED), AND CHARLES TENNANT & COMPANY (LIMITED).

Reparation—Joint Liability for Damages—Independent Contract—Infringement of Bye-Law—Responsibility for Moveables after Delivery—Bill of Exceptions—New Trial.

The Tharsis Sulphur and Copper Company (Limited), by Cunningham, acting under a wheeling and weighing contract, discharged a cargo of pyrites upon a quay between 10th and 15th November, delivery of which to Charles Tennant & Company under contract

with them took place on the latter date. A passage of only 4 feet, contrary to one of the harbour bye-laws, was left between the pyrites and the edge of the quay, and upon 19th November a sailor returning to his ship tripped upon some pieces which had fallen over the roadway, and fell and afterwards died from his injuries.

An action of reparation was brought by his widow and children against both companies jointly and severally.

At the trial counsel for the first company asked the presiding Judge to direct the jury (1) that the discharge having been made by an independent contractor they were not responsible for the dangerous position of the cargo, and (2) that they were not liable for contravention of the bye-law; and counsel for the second company asked the Judge to direct that if they had used all reasonable despatch in removing the cargo they were not liable. The presiding Judge refused to give the rulings asked, and the jury found both sets of defenders liable jointly.

Both defenders excepted to the Judge's ruling, and also moved for a new trial on the ground that the verdict was contrary to the evidence. The facts were not disputed, but the Tharsis Company argued that they could not be liable after delivery of the cargo for an accident due to its dangerous position, and the Charles Tennant Company argued that they were not liable for the dangerous position in which the cargo had been put.

The Court granted a rule to show cause, but after argument discharged the rule, and refused the bills of exceptions.

The s.s. "Iberia" arrived in Glasgow on 10th November 1888 and was berthed in the Kingston Dock. She contained a cargo of 1168 tons of pyrites from the mines in Spain belonging to the Tharsis Sulphur and Copper Company (Limited), Glasgow, discharge of which was begun at 6 p.m. on 12th November, and continued day and night until completed at 2 p.m. on 15th November. The cargo was piled up in the shed and upon the roadway, which was 10 feet wide between the shed and the cope of the quay, but a passage about 4 feet wide was left along the edge. The cargo was weighed and deposited under the supervision of James Cunningham, acting under a wheeling and weighing contract with the Tharsis Company. The said cargo was for delivery to Charles Tennant & Company of St Rollox (Limited), chemical manufacturers, Glasgow, in terms of a contract between them and the Tharsis Company, which provided, *inter alia*, that the last day of ship's discharge or weighing from ship or depot was to be considered the date of delivery. Upon the evening of 15th November Cunningham sent notice that the discharge was completed to Charles Tennant & Company, who thereupon instructed their carters to remove the cargo, but as it was impossible to do so within the 48