

Thursday, January 8.

FIRST DIVISION.

[Lord Adam, Ordinary.]

DETRICK AND WEBSTER *v.* LAING'S PATENT  
OVERHEAD HAND-STITCH SEWING  
MACHINE COMPANY (LIMITED).

*Process—Title to Sue—Joint-Right—Action by  
One Joint-Proprietor to Enforce Agreement  
entered into with Another Party by all.*

An agreement having been entered into in regard to a patent between the four joint-proprietors of the patent and a company—held that one of the joint-proprietors had no title to bring an action against the company to enforce the agreement.

Observed that it would have been otherwise had the pursuer been seeking interdict against infringement of the patent.

This was an action at the instance of Edington Detrick, manufacturer, San Francisco, California, and William Webster, engineer, formerly of San Francisco, now residing at Leeds, in England, against Laing's Patent Overhead Hand-Stitch Sewing Machine Company (Limited), having their registered office at Dundee, to have it found and declared that an agreement, dated 15th October 1878, entered into between the pursuers and Joseph Johnston Barrie, merchant, Dundee, John Watson & Co., merchants, Dundee, and Robert Abbot Glenday, merchant, Dundee, the then proprietors of certain letters-patent, and the defenders, was valid and effectual and binding upon the defenders in all respects; and to have the defenders decerned and ordained "to implement and fulfil the said agreement, and in particular, upon receiving payment, or offer of payment, from the pursuers of the royalties mentioned therein, to accord to the proprietors of the Webster patent, and all others acting under agreement with them, or with their consent, full and undisturbed right and liberty to make, use, exercise, and vend sewing machines made in conformity with the said agreement."

On 25th January 1884 the Lord Ordinary (LEE) ordered the pursuers Detrick and Webster to sist mandatorily.

The pursuers reclaimed, and on 23d February 1884 the First Division recalled the order on the pursuer Webster to sist a mandatory, and *quoad ultra* adhered. On 28th May 1884 the Lord Ordinary "in respect of the failure of the pursuer Detrick to sist a mandatory in terms of interlocutor of 23d February last, assolvizes the defenders from the conclusions of the summons, so far as directed against them at his instance, and decerns."

The action was thereafter insisted in only at the instance of the pursuer Webster. At the date of this decision he had seven twelfths of the patent (of which one had recently been assigned to him), Detrick four-twelfths, and the proprietor of the other twelfth took no part in the proceedings. The circumstances out of which the action arose were thus stated by the Lord Ordinary in the opinion appended to his interlocutor of 18th July 1884, quoted *infra*—"The pursuer appears to have sold certain sewing machines to certain firms . . . Kinnear & Company, sack merchants, Dun-

dee; J. F. White & Company, merchants, Dundee; The Cowgate Calendering Company, Dundee; and others. The machines so sold to these people contained, among other things, a 'thread barrel,' which is claimed by Laing's Patent Overhead Hand-Stitching Company as having been patented by them. Accordingly that company take proceedings against those gentlemen as infringing their patent. The pursuer says he sold those instruments or machines to the company, or effected an agreement with them of this nature—"The Laing's Patent Overhead Hand-Stitch Sewing Machine Company (Limited) agrees to pay to the proprietors of the Webster patent the sum of £5 sterling as royalty on each machine they make for working with notched needles, as patented by Mr Webster. The proprietors of the Webster patent agree to pay to the Laing's Patent Overhead Hand-Stitch Sewing Machine Company (Limited) the sum of £5 sterling as royalty on each machine they make, excepting those shipped to India, having a thread barrel; and it is acknowledged that what is described in the Laing patent as a 'thread barrel' is the same as in the Webster patent is described as a 'cylindrical thread-controller and take-up.'" The pursuer says that that company have no title to interfere with the sale of those machines. That dispute gave rise to the present action, which is an action to enforce that agreement."

The defenders pleaded—(1) No title to sue.

On 18th July 1884 the Lord Ordinary (ADAM) sustained that plea-in-law and dismissed the action.

"*Opinion.*— . . . The action is met by the defenders with the plea that the pursuer has no title to insist in the action; and that plea was argued to me. . . Now, it is obvious enough from the terms of the agreement that there had been a question as to the validity of the patents and the respective rights of those parties; and the agreement provides that, upon the lines of the Overhead Hand-Stitch Company paying to the proprietors of the Webster's patent a sum of £5 for each machine, they were to be entitled to make machines working with notched needles, which was evidently the subject of Webster's patent. On the other hand, the proprietors of Webster's patent agreed to pay to the defenders the same sum of £5 sterling as a royalty on each machine they made, excepting those shipped to India, having a thread barrel, and 'for these considerations each party accords to the other liberty to make use of the respective parts above named.' That being the agreement—which I have thought it necessary to enter into in some detail—the question is, whether Webster is entitled to insist in this action. It is an action, so far as I read it, in the conclusions and in the statements entirely directed to the enforcing of that agreement. It is not an action in any sense or in any way meant to put a stop to any infringement—apart from the agreement—of Webster's patent or any other patent. The question arises, what that agreement was? I am quite clear upon the construction of it that it was an agreement between the whole partners or proprietors of Webster's patent on the one hand, and the Overhead Hand-Stitch Company on the other part, and that it was not an agreement from which any one of the partners of the Overhead Hand-Stitch Company—which might, for anything I know, number twenty, thirty, or forty individuals

—should be exempt; it was not the meaning of the agreement that any one of those should be entitled to manufacture machines using Webster's patent with the notched needles. The meaning of it was that the Overhead Hand-Stitch Sewing Machine Company was entitled to manufacture such machines on payment of a certain royalty. And on the other part, I am equally clear that no one of the proprietors of Webster's patent could manufacture and sell machines containing the defenders' patented thread barrel. That is the nature of the agreement, and it humbly appears to me that the one proprietor, as Webster now is, is not entitled to enforce his agreement as against the Overhead Hand-Stitch Sewing-Machine Company. It is clear to me that where there is a joint and not a several agreement of this sort, one of the several proprietors of that patent cannot insist for implement of that agreement. The action would have been perfectly good founded on the merits if the whole of the proprietors were parties to the action, which they are not, but in the circumstances of the case I think the defenders' first plea-in-law is well founded, and I am prepared to dismiss the action and find the defenders entitled to expenses."

The pursuer reclaimed, and argued—The instance in this case comprehended eleven-twelfths of the patent. The proprietor of the other one-twelfth had advertised he would have nothing to do with the matter. The object of the agreement was merely to give vitality to the patent; the pursuers were really in the position of seeking to maintain a monopoly, and therefore the action was of the nature of an interdict—*Johnstone v. Craufurd*, July 3, 1855, 17 D. 1023; *Laird v. Reid*, 9 Macph. 699; *Lawson v. Leith and Newcastle Steam Packet Company*, Nov. 26, 1850, 13 D. 175; *Sheehan v. Great Eastern Railway Company*, 1830, 16 Ch. Div. 59.

The defenders replied—The foundation of the action was breach of contract. One of several joint proprietors could not alone sue implement of an agreement which the whole joint proprietors had made—*Miller v. Cathcart*, March 16, 1861, 23 D. 743, Lord Meadowbank; *Scotland v. Walkinshaw*, Nov. 18, 1830, referred to by Lord Medwyn in 13 D. 179.

At advising—

LORD PRESIDENT—I do not think it can be disputed that this is an action for the enforcement of an agreement. The first conclusion of the summons is that it should be found and declared that an agreement entered into between the pursuers, who are part proprietors of certain letters-patent, and the defenders is valid and effectual, and binding upon the defenders in all respects; and the second conclusion is to have the defenders ordained to implement and fulfil the agreement, "and in particular, upon receiving payment, or offer of payment, from the pursuers of the royalties mentioned therein, to accord to the proprietors of the Webster patent, and all others acting under agreement with them, or with their consent, full and undisturbed right and liberty to make, use, exercise, and vend sewing machines made in conformity with the said agreement." The other conclusions of the summons are directed to the same object, viz, the enforcement of the rights secured by that agreement to the proprietors of the patent. Now what is the agreement? It bears on its

face that "The Laing's Patent Overhead Hand-Stitch Sewing Machine Company (Limited) agrees to pay to the proprietors of the Webster patent the sum of five pounds sterling as royalty on each machine they make for working with notched needles, as patented by Mr Webster. The proprietors of the Webster patent agree to pay to the Laing's Patent Overhead Hand-Stitch Sewing Machine Company (Limited) the sum of five pounds sterling, as royalty on each machine they make." The parties therefore to that agreement are the proprietors of the Webster patent on the one hand, and what I may for shortness call Laing's Company on the other. The pursuer of this action—that is to say, the only remaining pursuer—is William Webster, who is one of the proprietors of the Webster patent to the extent of six-twelfths or one-half. The question is, whether as proprietor of one-half of Webster's patent he is entitled to sue for enforcement of an agreement the one party to which is not William Webster but the whole proprietors of the patent? In such a case I think that the pursuer has no title to sue, and I therefore agree with the Lord Ordinary. If the pursuer had been seeking to protect the patent from injury I could understand that he might have had a good title—if, for example, he had been asking for interdict—just in the same way as a *pro indiviso* proprietor of a landed estate might obtain interdict against a stranger doing injury to the estate.

Here, however, there is an agreement, and it is a doctrine which is well settled, and founded not on expediency but on principle, that where the action is to enforce an agreement, the parties on one side of the agreement must be pursuers, and one only cannot possibly be allowed to sue. I am therefore for adhering.

An attempt was made to extend Mr Webster's interest in the patent beyond one-half, which I think failed altogether. Mr Detrick, a part proprietor in the patent to the extent of four-twelfths, was at one time joined with Mr Webster as a pursuer in the action, but as he did not sist a mandatory he has disappeared, and the defenders have been assoilzied from the conclusions of the summons so far as directed against them at his instance, so that it is impossible to take that share into consideration. As regards the other two shares, it was explained that one-twelfth has been assigned to Webster, which I do not think betters his position, and as regards the other twelfth it was said that the proprietor will not enforce his right.

I think that, looking at the agreement only, there is a defect in the title to sue.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. The rights which the parties obtained under the agreement were joint rights acquired by the whole members of the joint adventure. It is quite settled that one or more of such members cannot sue upon an agreement of this kind for implement of its provisions without the concurrence of all, and this is so for the obvious reason that the right of the partners under the agreement, and as against the other contracting party, is joint and not several.

In regard to the specialties of the present case, the pursuer holds six-twelfths or one-half of the

whole interest in the patent under the agreement, and the other parties, who are not here, hold the other half. That is obviously a case where the title of the pursuer fails in an action in which he seeks to enforce the agreement.

The Court adhered.

Counsel for Pursuer (Reclaimer)—J. P. B. Robertson — MacWatt. Agent — Alexander Morison, S.S.C.

Counsel for Defenders (Respondents)—Macintosh—Dickson. Agents—Davidson & Syme, W.S.

Friday, January 9.

## SECOND DIVISION.

[Lord Fraser, Ordinary.

### COOPER v. COOPER AND OTHERS (COOPER'S TRUSTEES).

*Minor — Restitution of Minor — Minority and Lesion — Reduction ex capite minorennitatis et læsionis — Foreign — Lex loci contractus — Lex loci solutionis.*

*Held* (by Lord Fraser, Ordinary, and acquiesced in) that a question as to the right to reduce an antenuptial marriage-contract executed in Scottish form by an Irish lady, a minor, in Ireland, and with a view to the domicile of the marriage being Scotland, was to be decided by the law of Scotland.

*Husband and Wife — Reduction of Marriage-Contract on the ground of Minority and Lesion.*

*Held* that in considering whether a wife could reduce her marriage-contract on the ground that she was a minor when it was executed, and the provisions of it were to her enorm lesion, her husband's estate at the date of the marriage must be looked to, and not his estate at the dissolution of the marriage by his death.

*Marriage-Contract — Time of Execution — Antenuptial or Postnuptial.*

*Opinion* (per Lord Fraser) that a marriage-contract, the terms of which are finally agreed on by the parties, and which is ready for execution before the marriage, but is executed immediately after the marriage ceremony, is to be regarded as antenuptial, not postnuptial.

*Minor — Minority and Lesion — Husband and Wife — Marriage-Contract — Reduction ex capite minorennitatis et læsionis.*

By antenuptial-contract a husband provided to his wife in case of her surviving him an unsecured annuity of £80, which she accepted in full of terce and *jus relictae*, and conveyed to him her whole means and estate then belonging or which might belong to her during the marriage. The husband predeceased, leaving a trust-disposition and settlement by which he increased the annuity to £200, but made no further provision for her. At the time of the marriage the wife was a minor without any legal guardian, and was possessed of no property. The husband, who was a cotton-spinner, was at that date

possessed of means, heritable and moveable, to the amount of £15,000. The marriage was dissolved by the death of the husband thirty-five years after its date, during which period his estate had greatly increased. His widow then sought to reduce the marriage-contract on the ground of minority and lesion, and claimed her legal rights. It was proved that she had professional advice at the time of the marriage. *Held* (diss. Lord Rutherford Clark) that the wife having married a trader, who was subject to the risks of his business, and being at the time herself without means or expectations, there was in the circumstances no enorm lesion, and decree of reduction *refused*.

*Trust — Husband and Wife — Trust in Husband for Wife's Benefit.*

A lady transferred to her son-in-law a sum of money invested in 3 per cent. Government stock, with a letter of trust instructing him that he was to pay to her a certain yearly sum during her life, and after her death to pay the annual proceeds to her daughter, his wife, during her life, and on her decease to divide the principal among their children. The husband received the money, and after the truster's death made the wife an annual allowance—at first £50, and latterly £25—for pin money. In an action of accounting by his widow against his testamentary trustees, in which there was nothing but a declaration to that effect in his trust-settlement to show that the income had been paid to the wife after her mother's death, they pleaded that the sums paid as pin money should be attributed *pro tanto* to payment of the dividends on the stock, and that the balance then remaining unpaid must be held to have been applied for her behoof during the marriage. *Held* (by Lord Fraser, Ordinary) that the duty of the husband, and, after his death, of his trustees, was to have paid over the dividends to the wife, and that they were bound to account to her for them.

The pursuer of this action was the widow of the late Henry Ritchie Cooper. The defenders were the trustees of her late husband, and certain children of the marriage. The pursuer was a native of Ireland, and was the daughter of a merchant in Dublin. She was married in 1846 at Dublin, her native place, being then eighteen years of age. Her husband was a domiciled Scotsman, proprietor of a property in Scotland, and in business in Glasgow. Scotland was to be the home of the parties after marriage. The contract of marriage, which was in the Scottish form, contained the following clauses—"In contemplation of which marriage the said Henry Ritchie Cooper binds and obliges himself, his heirs, executors, and successors whomsoever, to content and pay to the said Mary Butler, in the event of her surviving him, an annuity or yearly payment of £80 sterling, and that half-yearly . . . during all the days of the lifetime of the said Mary Butler, . . . which provisions conceived in her favour the said Mary Butler hereby accepts in full satisfaction of all terce of lands, half or third of moveables, and every other thing that she *jure relictae* or otherwise could ask, claim, or demand from the said Henry Ritchie Cooper or his afore-