the disposition of the house No. 6 Doune Terrace, executed by the deceased Robert Allan Harden on the 1st of November 1849, in favour of deceased Mrs Mary Cleghorn or Harden, and her heirs and assignees whomsoever, and the infeftment thereon in her favour, has not been effectually revoked by his trust-disposition and settlement of 5th December 1873, and that the said house has not been effectually conveyed by the said trust-disposition and settlement to the parties of the first part to this case: (2) That the parties of the second part are entitled to the said house or to the price thereof, as heirs of the said deceased Mrs Mary Cleghorn or Harden: (3) That the parties of the second part are not entitled to payment of any sum corresponding to the amount of the annual rent or value of said house for the years that have elapsed since the death of the said Mrs Harden, and during Mr Harden's possession: (4) That the said second parties are not liable to repay to the said first parties the sum of £2000 mentioned in article 4th of the Special Case: (5) That James Cleghorn Moore of Burton Hall, Carlow, is entitled to the legacy bequeathed to him by Mr Harden."

Counsel for First Parties—Kinnear—Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Second Parties—Fraser—Gloag. Agents—MacRitchie, Bayley, & Henderson, W.S.

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*Thursday, March* 16.

## FIRST DIVISION.

[Lord Curriehill.

### THE TRUSTEES OF THE FREE TRON CHURCH EDINBURGH *v.* MORRISON.

*Process—Reclaiming Note—Reponing—Default.*

A summons concluded for declarator that the defender was bound to implement a contract of sale of heritable subjects, and further, *inter alia*, for payment of the price, amounting to £5250. There was no real defence upon the merits, and when the case was in the Procedure Roll, upon 25th January 1876, counsel appeared and stated that both he and the agents had ceased to act. Intimation was then ordered to be made to the defender by registered letter, that a motion for decree would be made on 1st February, and on that day decree was pronounced in terms of the first declaratory conclusion of the summons, and *quoad ultra*, the Lord Ordinary being unwilling to pronounce an extractable decree, the case was continued for a fortnight. On 15th February another counsel, instructed by another agent, appeared and asked for delay, which was granted. When the case was called on the 18th no appearance was made for the defender, and decree was given in terms of the petitory conclusion of the summons. The defender prayed to be reponed, but in these circumstances, and on an expression of opinion that an omission to append the interlocutors to the reclaiming note was due to purposes of concealment, and that the object throughout seemed to be to get delay, the Court refused to repone him, and found him liable in additional expenses.

Counsel for Pursuers (Respondents)—Jameson. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defender (Reclaimer)—Burnet. Agent—R. A. Veitch, S.S.C.

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*Friday, March* 17.

## FIRST DIVISION.

[Lord Rutherfurd Clark.

### DUDGEON *v.* THOMSON & CO.

*Process—Suspension and Interdict—Breach of Interdict—Partnership.*

A obtained interdict against B in a process of suspension and interdict for infringement of patent. Thereafter B assumed a partner under the firm of B & Co., and A brought a second process of suspension and interdict against the firm for infringement of the same patent. *Held* that as A's averments upon which his case rested were that B had personally, and apart from any question which might arise in regard to his partner, committed a breach of the interdict previously granted, the proper course was to bring a petition and complaint for breach of interdict, and not to ask the Court for a repetition of the previous interdict; and process *sisted*, to allow the petition and complaint to be brought.

Richard Dudgeon, London, on 31st January 1873 obtained interdict against William Thomson, engineer, Glasgow, in a process of suspension and interdict for infringement of a patent held by him for improvements in apparatus used in "expanding boiler-tubes." In that process the validity of the patent was brought in question by the pleas of the respondent, but his objections were not given effect to. Dudgeon now brought another suspension and interdict for infringement of the same patent against the firm of William Thomson & Co., in which he alleged, *inter alia*, that "infringements of the complainer's said patent have been, and are being, carried on by the said William Thomson, or at least he has been and is actively participating in the said infringements." The firm of Thomson & Co. consisted of, as appeared from their contract of copartnery, Thomson the respondent in the first process, and another partner, who had been taken into the concern after the date when the interdict was granted. The respondents, besides denying that they were infringing the patent, pleaded its invalidity on four different grounds, none of which were alleged in the previous process. The complainer answered that these pleas were excluded *exceptione res judicata*, in respect that they were either proponed and repelled, or competent and omitted, in the first action. The Lord Ordinary repelled the plea of *res judicata*, and a reclaiming note was presented.

At advising—

LORD PRESIDENT—This is an application for suspension and interdict on behalf of Richard Dudgeon, who is the owner of a patent for the invention of "improvements in apparatus used in expanding boiler-tubes," against the firm of William Thomson & Co. It appears that there were previous proceedings of the same kind directed against William Thomson, one of the partners of this company, and in that process the validity of the patent was brought in question by the pleas of the respondent, but his objections were not given effect to, and interdict was granted in terms identical with those which are now applied for in the case before us. The judgment of the Lord Ordinary was adhered to in this Division.

The allegations of the complainer in the present case are that the patent has been, and is being, infringed by William Thomson, or at [illegible] been and is actively participating in [illegible]. From their own statement [illegible] the respondents, through [illegible] have sold expanders [illegible] patent, but [illegible] all assembling [illegible] machine, and they allege that they communicated drawings of their machines which the complainer says are infringements of his patent.

The respondents, beyond saying that they are not infringing the complainer's patent, plead its invalidity, and that upon four grounds, none of which were alleged in the previous process. The complainer says that these pleas are excluded as being *res judicata*, or, if not, as competent but omitted in the former process. The Lord Ordinary has repelled the plea of *res judicata*, and this reclaiming note has been presented.

But it appears to me that, before considering this question, there is a preliminary one, and that is, whether the complainer has chosen his proper remedy. The respondents are the firm of Thomson & Co., which the complainer alleges is only another name for William Thomson. But that allegation is not correct, for the contract of co-partnery has been produced, from which it appears that another partner has been taken into the concern. But if the complainer's allegations are true, and his case depends upon their truth, it is plain that a breach of interdict has been committed by the respondent Thomson. Whether the other partner has participated in that breach, in the knowledge that he was so doing, does not appear; but it is beyond dispute that Thomson is alleged to have violated it.

With these facts before us, we cannot permit the complainer to take the course he proposes unless he presents a complaint for breach of interdict. To grant a second interdict where a first has been broken would be a course to which the Court would not resort. Interdicts must be obeyed, and it is impossible for a party to come and ask for a repetition of a previous interdict in place of bringing a complaint for breach of it. The present suspension must be sisted to enable the complainer to bring a petition and complaint.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

The Court pronounced the following interlocutor:—

"Sist process to give the complainer an opportunity of presenting a petition and complaint for breach of the interdict granted by the interlocutor of Lord Mackenzie, dated 31st January 1873, adhered to by this Division of the Court on 4th July following: Reserving all questions of expenses."

Counsel for Complainer (Reclaimer)—Balfour—Hunter. Agent—D. Curror, S.S.C.

Counsel for Respondents—Asher—Jameson. Agents—Auld & Macdonald, W.S.

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*Friday, March* 17.

## FIRST DIVISION.

[Sheriff of Renfrew.

MACKINNON (CRAWFORD'S TRUSTEE) *v.* ANDERSON (WATSON & CAMPBELL'S TRUSTEE).

*Bankruptcy—Ranking—Guarantee—Double Ranking.*

C guaranteed W from all loss arising out of transactions between him and S. W drew bills on S and discounted them. These were partly for value and partly not. C, W and S, became bankrupt. The banks holding the bills ranked on the estates of S and W, and drew a dividend from each, but not [illegible] in all to full payment.

[illegible] a question between W's trustee and C's trustee—*Held* (1) that W's trustee could only rank on C's estate for the sum actually paid by him as dividend in respect of the bills, and not for the whole amount of the bills to the extent of drawing what was actually paid; and (2) that the trustee on C's estate was not entitled to require the trustee on W's estate to give any relief to the estate of S in respect of the dividend paid from that estate on bills accepted or drawn by S for the accommodation of W, or to state the amount thereof, or of any dividend paid thereon by the estate of S as an item to the debit of W in balancing accounts between the two estates.

C and W were also engaged in other transactions, and bills were drawn for accommodation of W, and the banks holding the bills ranked upon and drew dividends from the estates of C and W.

*Held* that C not entitled to retain the sum paid in respect of these other bills as a set-off against W's claim under the guarantee in the first transaction, because, as these other bills had already been ranked on W's estate by the banks, to admit C's retention in respect of them would be to sanction a double ranking on W's estate.

This was a question of ranking in bankruptcy, which arose from the following circumstances:—

Crawford gave Messrs Watson & Campbell a letter of guarantee by which he bound himself to "undertake liability for and guarantee payment to you of all sums due or to become due to you by Messrs Thomas Shaw & Company."

Thereafter several bills were drawn by Watson & Campbell, and accepted by Shaw & Co. These bills were discounted by various banks, and Watson & Campbell received the proceeds. They amounted in all to £11,000 odd, of which £8000