

depreciated, as to terminate without any necessity a trade which was extensively and lawfully carried on before. You cannot terminate it by prosecuting the corporation; it is entitled to do the thing; but you can terminate it by prosecuting each of the seven or seventy or seven hundred members composing the corporation, and so attain the same result. I have no hesitation whatever in dismissing the one complaint, and that entirely upon the same grounds upon which the other was dismissed. I repeat—and your Lordship has noticed it, Lord Selborne dwells upon it, and so does Lord Blackburn—that the real purpose and object of the statute is the safety of the public. The trades-union interest is not one which I would look upon very favourably. The public interest is entirely protected by the provision that if this business is carried on in any shop, the drugs shall be compounded and dispensed, and everything in which the safety of the public or the interest of the public is concerned shall be done, by duly qualified persons. There may be a difficulty in the case of an assistant dispensing or compounding drugs who is not duly qualified, but the language of the noble and learned Lords in the case cited points to the prosecution of such an assistant under the statute. In that way the public interest and safety are entirely attended to and preserved. As I have already stated, I am very glad that we have an opportunity of expressing this view of the law, which I think is one beneficial to the public, and quite consistent with the public safety. I am for quashing this conviction.

LORD CRAIGHILL—I concur. I think the decision in this case is governed by the decision of the House of Lords, and that the Act of Parliament does not apply to corporations. I have nothing further to add.

The Court sustained the appeal and quashed the conviction.

Counsel for the Appellants—D.-F. Mackintosh—Orr. Agents—Wishart & Macnaughton, W.S.

Counsel for the Respondent—Graham Murray—Shaw. Agent—P. Morison, S.S.C.

COURT OF SESSION.

Wednesday, July 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WALKER, DOWNIE, & COMPANY v. THE
FALKIRK IRON COMPANY.

Copyright — Design — Infringement — Patents, Designs, and Trade-Marks Act 1883 (46 and 47 Vict. cap. 57), Part III., sec. 47, sub-secs. 1 and 3, secs. 52, 57, 58, and 60.

The Patents, Designs, and Trade-Marks Act 1883, Part III., section 47, sub-section 1, provides that a certificate of registration may be obtained by the proprietor of any "new or original design not previously published in the United Kingdom." Section

50 provides that, on registration, the proprietor shall have copyright in the design for five years. Section 60 provides that "'design' means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial or partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes."

In an action of interdict for infringement of the copyright of a design, registered in terms of the statute, for fire-doors for kitchen-ranges, the respondents maintained (1) that as the design served certain useful objects it was not a proper subject for registration under Part III. of the Act, and that an application for letters-patent should have been made under Part II.; (2) that the design could not be made the subject of registration because it related to, or depicted, not an article complete in itself, but one which was to be used in combination; (3) that the registration of the design was ineffectual, because it did not announce that it was registered for shape only, and that therefore third parties were entitled to assume that it was registered only for ornament; and (4) that the design was not novel. *Held* (1) that even if letters-patent could have been obtained, that did not prevent registration of the design; (2) that sections 57, 58, and 60 recognised the existence of a protected design to be applied to an article of manufacture; (3) that the Act intended that the purpose for which a design is registered may be proved by evidence when any question arises; and (4) that, upon the evidence, the design was novel. Interdict granted.

Walker, Hunter, & Company, Port Downie Ironworks, Falkirk, applied to the Comptroller of the Patent Office, London, for the registration of a design for fire-doors for kitchen-ranges of which they claimed to be the proprietors. The design was duly registered on 10th November 1884, and a certificate granted in terms of the Patents, Designs, and Trade-Marks Act 1883.

This was an application for interdict at the instance of Walker, Hunter, & Company against the Falkirk Iron Company, ironfounders, Falkirk, and the individual partners thereof, in which the complainers averred that the respondents had infringed, and were in the course of infringing, their copyright of the said design by making and selling fire-doors on kitchen-ranges of the same design and construction as those registered by them, without their consent.

The respondents admitted that they were making and selling fire doors for kitchen-ranges of a construction similar to those registered by the complainers, and averred that they had a right to do so, and that what the complainers claimed as a design was not a proper subject of registration and certificate within the meaning of the statute.

They stated—" (Stat. 1) The article in question is the door of a convertible kitchen-range, *i.e.*, of a kitchen-range which may be used either as a close range or an open fire. When such a range is shut it is closed in on the top by means of a hot-plate, and in front by means of a door. The fall-bar, which

in the open fire projects outwards, can be turned up so as to be flush with the front of the range, and allow the door to shut. To complete the shutting in of the fire when the range is closed, it is necessary to close the open space between the hot-plate and the door, and it was the practice to do this by putting an iron plate or fire-cover upon the top of the fall-bar, which filled up the space between the hot-plate and the door.

“(Stat. 2) Some time ago it occurred to the respondents that it would be better so to mould the upper portion of the door that when the fall-bar is up, and the door closed, the moulding upon the upper portion of the door should fit into the edge of the hot-plate, filling the space occupied in the other system by the moulding on the plate or fire-cover. The respondents accordingly constructed ranges on this principle.”

The respondents pleaded—“(3) The complainers’ alleged design not being a design or a proper subject of registration and certificate within the meaning of the Patents, Designs, and Trade-Marks Act 1883, the note ought to be refused. (4) The complainers’ alleged design not being new and original, the note should be refused. (7) The respondents not having infringed any rights of the complainers, the note should be refused. (8) The complainers having no copyright in said alleged design, the note should be refused, and the respondents found entitled to expenses.”

By interlocutor of 5th February 1887 the Lord Ordinary (M’LAREN), after a proof, the import of which appears from the opinions *infra*, repelled the pleas-in-law for the respondents, and granted interdict.

“*Opinion.*—In this case the complainers are applying for interdict against the infringement of their registered design, No. 16,596, by the respondents. For reasons of convenience in the Acts of Parliament under which exclusive privileges are granted to the originators of ornamental designs no description of the design is permitted to enter the register, but the certificate of registration is accompanied by a perspective or diagrammatic drawing of the design, as the case may require, and the certificate is granted for the application of the design shown in the drawing to goods of a certain class. In the present case the certificate bears that ‘a copyright of five years’ is granted in respect of the application of the design to articles in class one. The drawing attached to the certificate is a perspective representation of an iron door with a moulding cast on the top edge. The moulding is shown cut off at each extremity in such a manner that it would fall in line with any continuation of the moulding which might be cast on the object to which the iron door is to be fitted. It appears from the evidence that the door shown in the drawing is the fire-door of a kitchen-range. I should infer from the drawing itself that the moulding was intended to be continuous with the moulding of the object to which the door was to be fitted, because if the moulding were intended to apply only to the door I should have expected that it would be shown ‘returned,’ or finished off in some way at the angles; and according to the evidence the drawing would be so interpreted by persons accustomed to deal in such things. The drawing does not bear to be a door of a kitchen-range, but it is recognisable as such by persons

who sell or use such articles, just as a drawing of the fire-bars of a sitting-room grate would be recognised by everyone who uses an open fire-place of the construction familiar in this country. As I have already said, the statute does not authorise the insertion of descriptive matter in the certificate, and the drawing must be self-interpreting.

“The novelty claimed by the designer consists in this—that his design is the first application of the idea of a continuous moulding along the front of a kitchen-range, inclusive of the fireplace door. The respondents deny the merit and originality of the design, and also maintain that it is not a subject of copyright of design. The objections may be conveniently treated together. It appears to me that the design has such merit and originality as entitle it to copyright protection, provided it can be shown to fall within the scope of the Designs Act.

“The standard of originality to which an inventor must attain in order to have legal protection is in no case a high one. I do not enter here upon the illustrations which the law of patents affords. But confining my view to the subject of design copyright I take it to be clear that it is not necessary that the design should have any artistic merit. In the present case no originality is claimed for the pattern of the moulding; the novelty consists in it being cut off at the extremities so as to be continuous with the moulding on the range. This is an example of what may be called constructive design, and without professing to have any special knowledge of such matters I may safely affirm that in the taste or fashion at the present time constructive design is very much in favour with the makers of furniture and articles of domestic use. Instead of overlaying their goods with ornament which has no particular relation to the structure, or part of the structure to which it is to be applied, our designers aim rather at neatness or elegance in the lines that enter into the form of the object, or are appropriate to it. In a kitchen-range a plain moulding carried out broadly may be better taste than more elaborate ornament. In any view, it is an application of an idea or mode of treatment (a very elementary one it may be) to an object and in a way which is new as regards the particular application. There is evidence that the complainers’ design was immediately recognised as an improvement by the trade, and the fact that the respondents are selling the same thing (which I hold to be proved) is good evidence against them on the question of the worth of the design. In such circumstances I am not much impressed with the argument that this is not a design entitled to copyright protection. It is said that such a thing does not fall within any of the ordinary categories of invention; that ‘it was in the air,’ and that if the suspenders had not brought it out other makers would. The fact that several makers were thinking about something which one of them was the first to register is, to my mind, evidence that the thing registered is a design. It is apparently not a subject for which a patent could be obtained, and on the other hand it is not a mere unmeaning combination of known devices. Between these limits I think the designer may get protection for any variety of intelligent form or pattern capable of being applied to the kind of goods for which

he seeks a certificate. In the present case we have such an intelligent combination adapted to objects falling under class one. The merit of the invention, such as it is, consists in pleasing the purchaser's eye, and has nothing to do with the uses of the grate or the processes of cooking. I am therefore of opinion that this is not a subject for protection by patent, and that it is entitled to the copyright protection which the certificate purports to grant.

"I have not referred particularly to the authorities cited, but I have considered them, and I conceive that the judgment to be pronounced is supported by the decisions."

The respondents (the Falkirk Iron Company) reclaimed. The arguments appear sufficiently from the opinion of Lord Shand, *infra*.

Authorities cited by the reclaimers—*Harrison v. Taylor*, 4 H. & N. 815; *Windover v. Smith*, 32 Beav. 200; *Holdsworth v. M'Crear*, 6 L.R., Ch. App. 418, and 2 L.R. (H. of L.), 380; *Lazarus v. Charles*, 1873, 16 L.R., Eq. 117; *Adams v. Clementson*, 1879, 12 L.R., Ch. Div. 714; *Lemay v. Welsh*, 1884, 28 L.R., Ch. Div. 24; *Maloney*, 10 L.T. (N.S.) 190; Brice on *Ultra Vires*, p. 103.

At advising—

The opinion of the Court (LORD PRESIDENT, LORD MURE, LORD SHAND, and LORD ADAM) was delivered by

LORD SHAND—The pursuers Messrs Walker, Hunter, & Company of the Port Downie Iron Works, Falkirk, have raised this action to vindicate their alleged right of copyright in a registered design for kitchen-range fire-doors, and the Lord Ordinary by the judgment complained of has affirmed the existence of the right they claim. The defenders the Falkirk Iron Company have maintained under the reclaiming-note presented by them that no such right exists, and the main contention presented on their behalf is that the alleged design is not a proper subject of registration and certificate—that the provisions of Part III. of the Patents, Designs, and Trade-Marks Act of 1883 (46 and 47 Vict. cap. 57), which relate to the registration of designs, do not confer an exclusive privilege or copyright in such a matter as that forming the subject of the pursuers' claim, and that the exclusive privilege claimed, if novelty and utility can be established, can only be obtained by means of letters-patent taken out in terms of the second part of the statute.

The question raised is one of importance, and is not free from difficulty. By sec. 47 of the statute the design to be protected must be a "new or original design not previously published in the United Kingdom." The alleged novelty of the pursuers' kitchen-range fire-door, which is not admitted, consists in its shape—in having a moulding on the top of the door corresponding to and fitting into the moulding in front of the hob of the range when the door is closed; and, assuming that such a design applicable to a kitchen-range is a good subject of copyright, it seems to me that sufficient novelty has been made out to sustain the right. It is true that doors having mouldings along the top corresponding with and fitting into the article of which they form part have been in use in wooden articles of furniture, such as sideboards, cupboards, and the like, but the evidence appears to show that until it occurred to the pursuers, with

a view to secure special advantages, to have fire-range doors so made, this had not been done by any others in the trade. The moulding on fire-ranges was in use to be fixed to the top or fire-cover of the grate or to the fall bar, and the door which closed immediately below had no moulding, but was closed against the end of the grate immediately below the moulding on the cover or fall bar.

I do not think it necessary to go into the evidence on the point of novelty. It seems to be quite clear that the defenders' workmen first got the idea of adopting the shape which the pursuers introduced from having seen one of the pursuers' designs, and though there is some evidence by two witnesses of the name of Crosthwaite that they used a somewhat similar design, I think the shape of the door described by them, which opened downwards, was essentially different; while, as regards the stoves spoken to by some other witnesses, the moulding extended round the whole door, and did not correspond or fit into the rest of the article as the fire-door of the pursuers does into the fire-cover or hob of the grate, so as to make one continuous moulding. It may be quite true that it did not require a great degree of originality to suggest or mature the design which the pursuers claim as new, because doors of a similar shape or moulding had been used in articles of wooden manufacture. But unquestionably, on the evidence, the pursuers were the first to think of and apply the design in the making of a fire-door for a kitchen-range, and I think there is sufficient novelty to sustain the design as a subject of copyright.

Now, undoubtedly the adoption of this shape, which I call new on the grounds just explained, has been found to be attended with some important advantages. When the door had no such moulding (1) an open space or slit was left for the length of the fire-grate, through which cold air was admitted to the upper side of the fire, and (2) the fire-cover having the moulding on it was heavy and inconvenience was found in lifting it off, while if the moulding was put on the fall-bar and became part of it, as was frequently the case in the later manufacture, it intercepted the heat and prevented the benefit of the full radiation being got in front of the fire. The use of the new shape results in the removal of these disadvantages, and yet preserves a symmetrical if not ornamental form.

Assuming the novelty of the design to be made out, the points of the defender's argument, as stated, appear to be (1) that as the design serves the useful objects now explained, it should properly speaking be made the subject of a patent; and farther (2) that under the branch of the statute relating to designs you cannot have a registered design of an article not complete and independent in itself, but which is to be used in combination with an article to which it is to be attached. I shall deal with these points separately.

And in regard to the first of these it is to be observed that the statute does not profess to give any definition of a design which may be the subject of copyright. Section 60 declares that design "means any design," without defining the meaning of the term, and then goes on, "applicable to any article of manufacture," &c.,

“whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes.” Now, it is quite true that the subject of registration must not be an article of manufacture itself, but a design to be applied to an article of manufacture or substance for the pattern, shape, or ornament; and also that the statute in that branch of it which relates to the registration of designs, does not afford or profess to afford protection to any mechanical principle or contrivance directly. The Act in this branch gives protection only to the shape or configuration, or to the design for the shape or configuration, in such a case as the present. The result of such protection may be, however, to secure important advantages such as attend a mechanical contrivance, if these advantages should be the result directly or indirectly of the shape or configuration adopted. Thus in the present case the new shape of fire-range door, with the moulding as part of it, has the particular advantages over the old shape of door which I have already noticed. These are not directly the subject of protection, but inasmuch as they are dependent on and inseparable from the shape or configuration they are indirectly secured by the registration of the design. It may be quite true that in place of registering the design for its shape, and so gaining protection for a period of five years, the pursuers might rather have applied for letters-patent, with protection for the longer period of fourteen years for improvements in the manufacture of doors for convertible fire-ranges, and have made, not the mere shape, but the mechanical action and contrivance, the subject of protection by letters-patent. But assuming that such letters-patent might have been obtained, and that there was novelty not only sufficient to validate the registration of a design but to create an effectual patent, this would not in my opinion lead to the result that the design was not a proper subject for registration. I observe that in Mr Coppinger's excellent work on the Law of Copyright (p. 447), when treating of the provisions of the Statute 6 and 7 Vict. c. 65, sec. 3, he observes—“It appears to be the received opinion that under this clause may be registered designs, the subjects of which could in many cases have obtained a patent.” And in the case of *Rogers* (1850), 16 Q.B. 108, an opinion to that effect was given by the learned Judges, and specially by Justices Coleridge and Yule. The words of the statute then under consideration were these—“Any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration.” These are very much the words in the present Act, having this difference only, that it is not necessary now to show that the shape of the registered design will serve a useful purpose. So I am of opinion that the registration of the design in this case for its shape or configuration is effectual, securing as it does advantages directly resulting from the shape, and that even though the pursuers could have obtained letters-patent for improvements in the manufacture of fire-range doors which would have secured these advantages as an exclusive privilege.

I am further of opinion that the defenders' contention that a design cannot be made the

subject of registration if it relate to or depict not an article complete in itself, but one which is to be used in combination with and as part of another article of manufacture, as, *e.g.*, a design of a door as specially applicable to and in connection with a fire-range, is unsound. The language of sections 60 and 57 and 58 appear to me to make this clear, for in these sections the design is described as applicable to any article of manufacture, and the exhibiting of “a design, or of any article to which a design is applied” in certain circumstances is declared to be no bar to subsequent registration of the design, and the infringement of copyright is prohibited by exposing for sale any article of manufacture, or any substance to which a registered design, or any fraudulent imitation thereof, shall have been applied. All of these provisions recognise the existence of a protected design to be applied to an article of manufacture to which it may be attached, and of which it becomes a part.

It was further maintained for the defenders that the registration of the design in question was ineffectual, because it did not carry on its face in some way the announcement that it was registered for the shape only; that third parties were entitled to assume that the registration was for the ornament in connection with the hinge, and gave no protection to the shape. The pursuers themselves, in the door which they now make, have adopted a different ornament in connection with a change they have made in the form of the hinge. I am clearly of opinion that this objection is not well founded. When an infringement of copyright is complained of, all that the alleged infringer is entitled to see is the registered design, either as it may be found in the form of the article itself, as, *e.g.*, an actual door of the fire-range in this case, or it may be the design and relative certificate which is in the hands of the owner of the copyright. The statute does not authorise him to demand inspection of the register itself from the comptroller until the copyright has ceased, as is clear from section 52d of the statute. No specification by the author of the design is required (or indeed allowed) as in the case of patents for inventions, and there is no register to which the alleged infringer can go, as in the case of infringement of a patent, in order to ascertain whether the act complained of can properly be characterised as an infringement, with reference to the purpose or object for which the design has been registered, whether for the pattern, the shape, or the ornament. In this state of matters it seems to me of necessity to follow—and it must have been intended—that the purpose for which the design was registered may be proved by evidence when any question arises on the subject; primarily the evidence of the owner who made the registration, but tested by the evidence of others acquainted with the trade and manufacture or business in the articles to which the design related. It will be found that many, probably the large majority, of designs are self-interpreting without such evidence, but there must be others in which a question may be raised, which, however, in most instances will be easily settled as soon as evidence is adduced. Thus, *e.g.*, in the present case, evidence having been fully led, no one has seriously suggested on the proof, in which persons acquainted with the trade have been

examined, that the pursuers' design was or could be registered for any of the purposes authorised by the statute except its shape or configuration, attended as that shape is with useful results. A person alleged to be an infringer is quite entitled to demand of the person complaining that he shall state for what purpose or purposes under the statute the design was registered, and if he be dissatisfied with the answer he may under legal proceedings have such an inquiry as has taken place on that question in this case with reference to the pursuers' design. He may in that inquiry be able to show that the complainer is seeking to use the certificate of registration of the design for a purpose and to an effect which is not warranted by the design either as self-interpreting or as interpreted by the evidence where there is a question, and in that case he may succeed in his defence. I do not think it is possible to read the enactment of the statute, which leaves matters, and obviously designedly leaves matters, without special provisions on this subject, in any other way. For the only other reading would result in this, that where any design had a special or peculiar shape with some ornament, however slight, and was consequently registered on account of the shape, an infringer would be enabled to defeat the copyright by merely alleging that the design registered for shape was protected only as regards the ornament, or that the object of registration was doubtful, and so the registration was ineffectual, and that evidence could not be admitted on the subject. Such an interpretation of the statute would lead to the result that in the great majority of designs for which the statute obviously is intended to give protection no such protection could be given. This view of the statute does not recommend itself, and is not in my opinion to be adopted. It seems to me that in order to give reasonable effect to the statute the claim or representation of the pursuer in such cases not only may be the subject of evidence such as we have in this case, but may further be solved by an easy and certain test. The statute (section 47, subsection 3) provides that the application for registration "must contain a statement of the nature of the design" as well as of the class or classes of goods in which the applicant desires that the design be registered. This infers that the applicant shall state the purpose or object for which the design is to be registered, pattern, shape, or ornament, and accordingly in the Board of Trade rules issued in virtue of the statute it is provided by rule 9 that the application "shall, in describing the nature of the design, state whether it is applicable for the pattern, or for the shape or configuration of the design." I see no reason to doubt that when a controversy on this subject arises in judicial proceedings for alleged infringements of the design, and it becomes necessary to determine whether protection was given to the design for its pattern, shape, or ornament, "or for any two or more of such purposes," either party may refer to the application for registration for a definition or description of the purpose of the registration, and the Court will, where necessary, order the evidence on this subject to be produced, and such evidence should go far to decide the controversy. In the present case it is proved that the application was for a design for a

"range fire-door with moulding on top, moulding forming front of range. Shape to be registered." This piece of evidence by itself, and even more strongly if regard be had to the other evidence in the case, makes it clear that the pursuers' design was registered not for any mere matter of ornament in connection with the form of hinges of the door or otherwise, but, without reference to ornament, solely for its shape in connection especially with the moulding on the top which has material advantages.

I am of opinion that the pursuers' design was novel, that the design was registered for its shape or configuration, that it was a proper subject for registration and certificate under the statute, and as the design was clearly copied by the defenders the alleged infringement has been made out. On these grounds, though differing in some respects from the views of the Lord Ordinary, I am of opinion that his Lordship's judgment should be affirmed.

The Court adhered.

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

Counsel for the Respondents—Balfour, Q.C.—Wilson. Agents—J. & J. Ross, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

STEEDMAN v. STEEDMAN.

Husband and Wife—Divorce—Adultery—Pater est quem nuptiæ demonstrant.

A husband and wife separated voluntarily in 1865, six weeks after the marriage, and thereafter lived in separate houses in the same town. The husband, however, subsequently visited and had connection with his wife, who bore one child in 1866, and another in 1869. In 1885 the wife bore another child, in consequence of which the husband raised an action of divorce on the ground that the child was the result of adulterous intercourse. *Held*, upon the evidence, that the presumption *pater est quem nuptiæ demonstrant* had been rebutted, and decree of divorce granted.

Observations upon Montgomery v. Montgomery, January 21, 1881, 8 R. 403.

William Steedman, quarryman, Lochgelly, was married to Magdalene Brown on 27th November 1865. For about six weeks after their marriage the spouses lived together in Park Street, Lochgelly, when they quarrelled and separated, Steedman returning to live in his father's house, which was next door to that which his wife continued to occupy. He continued to visit her up to June 1868, when he began to suspect her of improper conduct with other men. In October 1869 Mrs Steedman removed to a house in High Street, Lochgelly. There were then two children of the marriage—Magdalene, born 3d April 1866, and Margaret, born July 29th 1869. Mrs Steedman then brought an action for alimony against her husband, which was settled by a minute of agree-