

in at least as favourable a position as any other creditor, and it would seem to be rather hard upon the bankrupt to say that such circumstances as I have detailed make him responsible for a dividend of 5s. not having been paid under the sequestration, and that though a dividend of 7s. 6d. was paid under the private trust the provisions of section 6 of the Act of 1881 were not complied with because a dividend of 5s. was not paid under the sequestration. The Sheriff held that he had quite sufficient information before him without further inquiry to enable him to dispose of the objection to the bankrupt's discharge. He was quite entitled, I think, to hold that opinion, and it is not necessary to go much into the argument as to the time at which the Sheriff was bound to consider the matter referred to him by the Act of 1881. I entirely concur, however, with the view expressed by Lord Kinnear during the discussion, that at any time the Sheriff is entitled to say, "Here is something which is uncertain, and there must be inquiry to clear it up." And if the Sheriff is not satisfied as a result of that inquiry that the failure to pay 5s. has not been due to circumstances for which the bankrupt can justly be held responsible, I think he is entitled at any time before discharge is actually granted to inquire and satisfy his mind as to how matters stand.

I am therefore in favour of holding that this appeal is incompetent as regards the interlocutor of 1st October, and that as regards the interlocutor of 10th October it must be refused on the merits.

LORD ADAM—I agree that this appeal is competent so far as regards the interlocutor of 10th October, but that the effect of the appeal is not to submit to review by this Court the interlocutor of 1st October.

I think the interlocutor of 1st October is a substantive judgment, which in terms of section 170 of the Bankruptcy Act of 1856 requires to be appealed against within eight days. If that is not done—and it has not been done in this case—the interlocutor becomes final, and it is incompetent for us to inquire whether the judgment of the Sheriff is well-founded or ill-founded. Though that is the case, I think, nevertheless, that it is competent for us to inquire into the matters disposed of by the interlocutor of 10th October, which discharges the bankrupt.

All that is said against this last interlocutor on the merits is that the Sheriff in finding the bankrupt entitled to his discharge did not have in view the provision of section 6 of the Act of 1881, which requires that before he gets his discharge a bankrupt must pay a dividend of 5s., unless the Sheriff is satisfied that the bankrupt's failure to pay such dividend has arisen from circumstances for which he cannot justly be held responsible. The only ground for suggesting that the Sheriff has not taken that provision into consideration is that there is no finding to that effect in his interlocutor of 10th October, but I can see no proof that the Sheriff did not take

the provision of the statute into consideration or that he has not done as he ought. It was perfectly competent for the Sheriff, notwithstanding the interlocutor of 1st October, before actually discharging the bankrupt, to consider any matter bearing on the question of that discharge, whether such matter had occurred since the interlocutor of 1st October or not, and accordingly the Sheriff was, in my view, quite entitled, if he thought it necessary, before pronouncing the interlocutor of 10th October, to have called for evidence in addition to the declaration or oath of the bankrupt and the report by the trustee, that the bankrupt's failure to pay a dividend of 5s. under the sequestration was due to circumstances for which he could not justly be held responsible. There was no difficulty in the Sheriff requiring such additional evidence, and it is pretty evident that he did not do so, because he had dealt with that question raised by section 6 of the Act of 1881 before pronouncing the interlocutor of 1st October. It was quite within the Sheriff's discretion to require additional evidence or not, and we cannot interfere with his decision on that matter.

LORD M'LAREN and **LORD KINNEAR** concurred.

The Court refused the appeal as incompetent so far as it seeks to submit to review the interlocutor of 1st October; further, refused the appeal as an appeal against the interlocutor of 10th October.

Counsel for the Petitioner—Ure. Agent—David Turnbull, W.S.

Counsel for the Objectors—MacWatt. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Sheriff Court of Forfarshire.]

WHITE v. BRIGGS.

Copyright—Trade Circular—Advertisement—Drawing—Infringement.

The patentee of a building cement advertised it by a pamphlet, which was registered at Stationers' Hall, and in which he described the buildings for which it might be used, gave instructions for its use, and illustrated its application to brick walls by a simple sketch. Another manufacturer issued a leaflet advertisement claiming in similar terms that his cement was applicable to similar purposes and buildings, and illustrating its application to brick walls by a similar sketch. The patentee raised an action for interdict against him on the ground of piracy, but did not allege infringement of the patent. *Held* that as the complainer's pamphlet was merely an advertising medium, without any literary or artistic merit,

the respondent had not infringed the copyright thereof by using certain of its terms and one of its illustrations for describing and advertising his own goods.

This was an action in the Sheriff Court of Forfarshire by William White, of Abergavenny, Monmouthshire, cement manufacturer, to have William Briggs, asphalt manufacturer, Arbroath, interdicted from infringing the pursuer's copyright in a series of pamphlets relating to "Hygeian Rock Composition," entered at Stationers' Hall under the provisions of 5 and 6 Vict. cap. 45, on 3rd September 1889, by publishing the same or any portions of them, or colourable imitations of them, in the form of advertisements.

The pursuer's pamphlet advertisement, the copyright of which was said to be infringed, was a paper-covered book of 40 pages, described as "White's Hygeian Rock Building Composition, rendering walls damp-proof," while the defender's advertisements were two leaflets, entitled "Healthy Houses, Damp-proof Building Rock Composition, trade-mark 'Tenax ;'" and "Damp-proof Building Rock Composition, trade-mark 'Tenax ;' instructions for use." There was no doubt that the pursuer's pamphlet was published previous to the publication of the defender's advertisement.

The pursuer averred—"These leaflets are copied from the pursuer's pamphlet with merely colourable alterations, and are substantially identical therewith, and the first of them contains a drawing to show the way in which the invention is to be used, which is an exact *fac-simile* of a drawing shown in the pursuer's pamphlets. The method of building described in the said circulars, and of using and applying the building composition described in the said circulars, is the same as that specified in the pursuer's patent and described in his pamphlets, and the defender's building composition, which is the same or similar to that patented by the pursuer, could not be used for the purposes described in the defender's circulars without infringing the pursuer's patent. . . . The printing and circulating of the said circulars is an invasion of the pursuer's copyright in the said series of pamphlets."

The parts of the pamphlet which the pursuer alleged were pirated by the defender were the words—"By its use great economy can be effected, inasmuch as the patentee will guarantee a 9 inch wall built on his system to be stronger than an 18 inch wall built in the ordinary way with mortar, in addition to possessing the immense advantage of being absolutely waterproof." "For the walls of large reservoirs, swimming baths, gasholder tanks, sea walls, basement and cellar walls, damp courses, this composition is unrivalled." The defender's advertisement stated—"It renders brick walls, &c., perfectly damp-proof, and greatly increases their strength. So much is this the case, that a wall built of two half-bricks on the flat with 'Tenax' run in is much stronger

than an 18 inch wall built in the usual way, making its use very economical." "It is specially suitable for cellar and basement walls, damp courses, reservoirs, tanks, swimming baths," &c. The pursuer's pamphlet showed, *inter alia*, two sketches, each displaying a brick wall built of two rows of bricks, with a space between the rows into which the rock composition could be run. The lower sketch showed how, by the use of a chair of sheet-iron, the composition could be run in. The defender's first leaflet reproduced these drawings, the only difference being that the sheet-iron chair was shown in the upper sketch.

The pursuer pleaded—" (1) The pursuer having a copyright in the said series of pamphlets is entitled to have the same protected from piracy, and he is entitled to interdict as craved. (2) The pursuer having obtained letters-patent to protect his invention is entitled to have the defender restrained either from infringing the same himself or publishing statements calculated to induce others to do so. (3) *Separatim*—The circulars issued by the defender being calculated to induce the public to infringe the pursuer's patent, the pursuer is entitled to interdict as craved, with expenses."

The defender pleaded—" (2) The pursuer having no valid copyright in the series of pamphlets founded on, the action falls to be dismissed. (3) Assuming the pursuer to have a copyright in the pamphlets referred to, the defender not having infringed same, is entitled to be assoilized."

The Sheriff-Substitute allowed a proof, from which these facts appeared.

Upon 22nd July 1890 the Sheriff-Substitute (ROBERTSON) issued this interlocutor:—"Finds in fact that the pursuer has patented an invention which claims to be original, and by which brick walls are consolidated and rendered damp-proof: Finds that with a view to introduce and advertise his invention the pursuer has printed and circulated the pamphlet piracy of which is complained of: Finds in fact that this pamphlet is of no literary value or merit apart from the invention which it advertises: Finds that the defender also claims to have invented a similar process, and has circulated the notices complained of with a view to introduce and advertise his process: Finds in fact and in law that in so doing the defender has not infringed any copyright in the pursuer's pamphlet: Therefore refuses the prayer of the petition, under reservation of the pursuer's right to proceed against the defender for an infringement of patent by injunction, interdict, or otherwise as he may be advised: Finds the pursuer liable in expenses, &c."

"Note.—By 5 and 6 Vict. cap. 45, no one can protect himself against infringement of copyright unless he has duly registered in accordance with the Act. The pursuer duly registered his pamphlet last May, so he is now in a position to protect himself against infringement. It appears that the defender began to print and circulate the notices complained of in April 1889; he also printed a thousand copies in September

1889; so that the infringement complained of took place before registration. This, however, does not prevent the pursuer now raising action—See *Goubard v. Wallace*, W.N. 13, and *Coppinger on Copyright*, p. 146. So that I can sustain the relevancy of the action and consider the merits. I have no doubt a pamphlet may be the subject of copyright. The term 'book' used in the Act includes 'catalogues, tracts, abridgements, digests, expensive designs, and the like, so long as these claim to be original and to be the product of mental effort apart from mere advertisement.'

"In the case of *Hotten v. Arthur*, 1 H. & M. 603, a bookseller's catalogue was protected by the Court because short anecdotes or descriptions of the books were appended to the catalogues. As Vice-Chancellor Page Wood remarked, these were the product of mental exertion, and the publisher had a right of property in them apart from the books which they described. In the case of *M'Farlane*, 10 R. 801, a trade book of designs was made the subject of protection, and the Court allowed a proof of the piracy, the designs being very costly, and having been all made from original castings or patterns in the possession of the publisher. In the same way a cemetery stone mason, who published a book of monumental designs taken from tombstones, was held to be entitled to protection. But an ordinary advertisement, which has no value or use except to make known the kind of business of the advertiser, is not within the scope of the copyright law. *Coppinger*, p. 97, and perhaps the case of *Cobbett v. Hood*, L.R., 114 Eq. 407, best illustrate the principles of copyright law. Lord Romilly says—'Wherever letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar things.'

"In short, unless the pursuer's pamphlet has some value apart from its use as a mere advertising medium, I do not think it can fairly come within the scope of copyright protection. I have carefully read the pursuer's pamphlet. It may be described as a trade circular or intimation, partaking largely of the nature of an advertisement, and it explains a patent invention by which brick walls are consolidated and rendered damp-proof. This is done by pouring a cement between two brick walls built parallel to and within an inch of each other, and several drawings of walls illustrate the *modus operandi* of the invention. There is no literary merit or value in the pamphlet apart from the invention. And the drawings are only original in so far as they illustrate the patent, being merely figures of brick walls drawn in perspective. In the absence of all literary effort, whether poetic, dramatic, historical, or inventive, there is really nothing to steal or pirate except the idea of the patent itself. There are no smart pictures or *jeux d'esprit*—nothing which corresponds to the jocular and artistic originalities connected with Pears' Soap, for example, or to the playful

allusion to 'Darkest Africa' which promotes the sale of Nubian Blacking. These are clever designs combined with witty ideas, which have cost some thought and trouble apart from soap and blacking. The young gentleman who 'won't be happy till he gets it,' and the young lady who was 'washed ashore' by soap, are amusing trade designs which I can quite suppose no one can appropriate or make use of in selling another soap. But in the present case there is nothing of that sort, and I have great doubts whether the Copyright Act applies. But even if it does, and even if the pamphlet is entitled to protection, has the defender pirated it? Assuming that he has discovered a cement also—perhaps a cheaper and better one—how is he to describe it and the method of using it except by using English words and terms which are necessarily similar to those used by the pursuer? I quote, for example, the following line of the pursuer's pamphlet—'A cwt. will fill in about yards superficial, half-inch thick.' The pursuer complains that the defender says exactly the same of his cement. Now, unless the pursuer is to be the only person in the world who is to be allowed to deal with a hydraulic mixture of this particular consistency and specific gravity, I fail to see any harm in the defender saying that his cement will cover a certain superficial area also; and if the pursuer is to be the only person in the world entitled to use this cement, then he must proceed against the defender for infringing his patent, not for pirating his pamphlet. The pursuer also complains that the defender uses his cement on the same subjects as are detailed in the pamphlet, such as 'reservoirs,' 'baths,' 'tanks,' 'basement walls,' and 'damp courses.' Surely the pursuer has no copyright in printing these words. In the same way I regard the illustrations. These are merely figures of brick walls. The pursuer complains that the defender's figure of a brick wall has the same number of bricks in it, and is drawn at the same angle of perspective as his own. But these figures are nothing in themselves except as illustrating the invention. I fancy anyone may draw a figure of a brick wall, even at the same angle as the pursuer has done, and with the same number of bricks in it. But in doing so, if he illustrates as his own a patented idea of another man's, then an action for infringement of patent will lie against him. But not surely one for infringement of copyright in a brick wall at a certain angle, and with so many bricks in it. So that, in regard to the line above quoted and the figure of the brick wall, in my opinion the pursuer might just as well claim copyright in the multiplication table or in the figure of a square.

"I think the pursuer has mistaken his remedy. He ought to proceed against the defender for infringement of the patent, as threatened by his solicitor in May 1889. Whether he will succeed or not I cannot say, but according to *Stubbs' Directory* for the United Kingdom I see there are upwards of fifty makers of cements in London, and sixty more in the provinces, so that the

pursuer may have some trouble.

"I cannot better sum up this case than in the words of Lord Selborne in *Singer Manufacturing Company v. Loog*, L.R., 8 App. Cas. 15. He says—'If the defender has a right to make and sell articles similar to the pursuer's, he has a right to say so, and to employ the terminology common in his trade, if he does this in a fair, distinct, and unequivocal way.'"

The pursuer appealed, and argued—It was plain, and even admitted, that the defender had pirated the illustration of the brick wall. That was infringement of copyright. The produce of one man's thought and labour was used by another in a book which was for exactly the same purpose as the originator's—*Kelly v. Morris*, March 8, 1866, L.R., 1 Eq. 697. The absence of letter-press did not matter, nor that the publication was not sold, but was simply used as an advertisement to push the sale of the advertiser's goods—*Maple & Company v. Junior Army and Navy Stores*, June 29, 1882, L.R., 31 C.D. 369. Besides the illustrations, there were various expressions taken from the pursuer's pamphlet, and although there could be no copyright in the words themselves, when the matter was looked at as a whole the piracy was apparent. It was not necessary that a great deal of the matter in the book should be taken if the idea was used for a competitive purpose—*Bradbury and Others v. Hotten*, November 14, 1872, L.R., 8 Ex. 1; *Macleuan v. Moody*, June 23, 1858, 20 D. 1154; *Morris v. Ashbee*, November 10, 1868, L.R., 7 Eq. 34.

The respondent argued—There was no infringement of copyright, because nothing was taken that was subject to copyright. The defender's composition was intended for much the same purpose as the pursuer's, and to be used in the same way, and in description thereof it was impossible to use any other words than the pursuer had used beforehand. The pursuer had no monopoly of the English language, and the defender was entitled to say what his composition could be used for. The same rule applied to the design. It was simply a representation of a brick wall, and nobody could draw it any other way. It was always important to look at the amount of matter said to have been taken from any publication in a question of piracy. Here the amount was very trifling. The pursuer did not allege that the defender had infringed his patent, hence he had no interest in procuring an interdict against these advertisements.

At advising—

LORD JUSTICE-CLERK—As the case has now been presented to us, there is no complaint that the respondent is in any way infringing the right of the complainer's patent.

The facts of the case are these—The complainer and respondent both have a mode of using cement in building walls. The process is simply by leaving a slot or opening between two rows of bricks and then pouring the composition between them, and they both say that by this means the

wall is made better than if built in the ordinary way. The nature of the composition is much the same, but the names are different.

The pursuer has issued a pamphlet setting forth the virtues of his manufacture, and the only question is, whether in the leaflet or advertisement issued by Briggs he has infringed the complainer's copyright in his pamphlet? Now, the case for the complainer, to begin with, is, that the respondent has made an improper appropriation of words and sentences which were in his pamphlet. I have looked with care at the said infringement of copyright, and I must say I have found nothing to find fault with on that ground. Both say that their compositions will effect certain purposes, and these purposes can only be described in similar language. If the respondent wishes to say that his cement is good for application to swimming baths or to damp-proof walls, it is impossible for him to use other than similar words to those which the complainer has used before in describing the same things. I think there is no infringement of copyright in the question of these words or sentences. There might be cases in which it would be held that copyright had been infringed in which a very special description had been taken, but where the description had been given in such general terms as here, I do not think there can be any infringement of copyright.

The only other question is, whether there is any infringement because one drawing which appears in the complainer's pamphlet has been copied into the respondent's leaflet? The purpose of the drawing is to represent two things. One is to show the way in which the slot is left between the rows of brick, and the other is to show the mode of putting in the composition. Both adopt practically the same mode of doing these two things, but it is not alleged that Briggs was not entitled to use that mode; and if he is entitled to instruct the buyers how to use his cement by a picture, I do not see how he is to do that in any other way than he has already done. The drawing is simple. It does not seem to give the respondent any advantage. I do not think that the question whether it was more convenient to take this drawing out of the complainer's pamphlet and insert it in his own advertisement, or whether he should make a drawing of the same subject for himself, can be considered by the Court as raising a question of infringement of the complainer's copyright. These questions of invasion of copyright are always questions of degree, and when we come to consider that the nearest case to this one the complainer can bring forward is the case of *Kelly*, in which the amount of invasion was that the respondents had taken all the names of the persons living in certain streets of London out of Kelly's Directory, and incorporated the information in a work of the same kind, it seems to me that the degree is vastly far away from any case such as we have here. I think that the Sheriff-Substitute's interlocutor is right.

LORD YOUNG—I am of the same opinion. There is no question of patent law raised by the complainer here, or any case of a colourable imitation of his commodity by the respondent, or complaint of anything done to attempt to palm off the respondent's own commodity on the public as the complainer's. I am therefore of opinion—taking my language from that of Lord Selborne in the case of *Singer*, where he observes—“If the defender has a right to make and sell articles similar to the pursuer's he has a right to say so, and to employ the terminology common in his trade if he does this in a fair, distinct, and unequivocal way.”

It is admitted, then, that the respondent has the right to make his cement in the manner which he has described in his evidence, but it is said that in a leaflet which he has issued pointing out to intending customers how his cement is to be used, he has employed some of the language which the complainer had used in a pamphlet he issued for a similar purpose. I do not think there is any difference of opinion among us that in doing so he had not infringed the complainer's copyright.

But it is further said that for the same purpose of informing intending purchasers in the use of his cement the respondent has copied, or substantially copied, a small picture of a little bit of brick wall which appeared in the complainer's pamphlet, and that he has published it for the same purpose as the complainer, for illustrating the use of his cement. I am equally clear that in this matter also there has been no invasion of copyright. Anybody who wishes to illustrate his meaning by a bit of brick wall can draw a little piece of brick wall. There is no copyright in such a drawing for the purpose of illustrating something for which a brick wall may be used, nor is there any more originality in the drawing of a brick wall for the purpose of showing how this cement is to be applied than there is in the drawing of a hat in order to show how a band may be attached to it, or than the drawing of a snuff-box, or umbrella, or a tobacco pipe, for the purpose of illustrating how they may be used.

I think that the whole question of copyright is foreign to this subject. This is quite a different case from the cases to which we were referred, where what was complained of was the stealing from registered publications matter which had been obtained at great trouble, and which had cost large sums of money to bring out. There is no such case here. I am therefore of opinion that with regard to the question of this drawing, as well as to the use of the language which is complained of, the copyright of the complainer has not been invaded. It follows therefore that the question of copyright is foreign to the question, not so far as regards the summons, because there the question of copyright is quite clearly raised, but it is foreign to the subject-matter of the action before us. I am therefore of opinion that the interlocutor of the Sheriff-Substitute is right, and ought to be adhered to.

LORD RUTHERFURD CLARK—I am content to put my judgment in this case solely on fact, and to hold that in fact there has been no invasion of the complainer's copyright.

LORD TRAYNER—I think that the respondent was entitled to describe in the most appropriate language he could find, or in the language he thought most proper for his purpose, the mode in which his cement ought to be used, and I think it would be ridiculous to say that because he had used language which was almost similar to that used by another manufacturer of cement in describing the mode in which he thought his cement ought to be used, that there was therefore invasion of copyright.

I have had more difficulty about the question of the sketch, but I cannot hold that even with regard to the alleged copying of this, there is either in quantity or quality such an invasion of the copyright of the complainer that we can interfere. In fact, if I may say so, the whole question appears to me *de minimis*, and I think that the complainer might have been satisfied with the judgment he obtained in the Sheriff Court.

The Court adhered to the Sheriff-Substitute's interlocutor.

Counsel for the Appellant—D. F. Balfour—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—Guthrie Smith—W. Campbell. Agents—Duncan Smith & MacLaren, S.S.C.

Thursday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

WILLISON AND OTHERS, PETITIONERS.

Minor and Pupil—Tutor—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27).

By the 2nd section of the Guardianship of Infants Act 1886 it is provided that on the death of the father of an infant, the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. By section 8 it is provided that in the application of the Act to Scotland the words guardian and infant shall respectively mean tutor and pupil.

Held that on the death of the father it is not competent to appoint the mother to be factor *loco tutoris* to her pupil children, as she is already their tutor by operation of the statute.

This petition was presented by Mrs Alice Mitchell Willison, with the concurrence of