

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

KINMOND *v.* JACKSON AND ANOTHER.

Limitation Act IX of 1871, sched. ii, arts. 11, 118—Exclusive Privilege—
Account of Profits—Damages—Act XV of 1859, s. 22.

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 Aug. 27.

In a suit for an account of profits obtained by the infringement of an exclusive privilege, the period of limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action for damages on the same ground, *viz.*, the period prescribed by art. 11, sched. ii, Act IX of 1871.

The facts and arguments sufficiently appear in the judgment of the Court.

Mr. *J. D. Bell* and Mr. *Branson* for the plaintiff.

The *Advocate-General*, offg. (Mr. *Paul*), Mr. *Jackson*, and Mr. *Agnew* for the defendants.

GARTH, C.J. (MACPHERSON, J., concurring).—This was a suit for an injunction to restrain the defendants from infringing an invention of the plaintiff for the rolling of tea leaf, the specification of which was filed, under the provisions of Act XV of 1859, on the 6th November, 1865; and the plaintiff also prayed for an account of the profits made by the defendants, and for damages.

The question of infringement has virtually been decided by our judgment in the several rules obtained by the plaintiff on the one hand, and the defendant, W. Jackson, on the other, which was given on the 19th of August last. In the first of those rules we decided, that Jackson's invention, the specification of which was filed on the 25th of April, 1873, was substantially an imitation of Kinmond's; and it is admitted, that between that date and the commencement of this suit, the defendants have been making, using, and selling a number of machines in accordance with that specification. The parties have very properly consented, that all the affidavits and mate-

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rials which were used before the Court on the argument of the rules, should be taken as evidence in this suit. The infringement, therefore, being established, it is clear that the plaintiff is entitled to the injunction for which he prays.

As regards the rest of his claim, the defendant objected at the trial, that the plaintiff was not entitled both to damages and to an account; and that he must elect between the two remedies. This is quite true, and the plaintiff has, accordingly, elected to have an account of the profits; but then comes the only real question in the case, for how many years before suit the account is to be taken.

The defendant contends, that article 11 in the second schedule to the Limitation Act is the one applicable to this suit. That article enacts, that in a suit for damages for infringing a copyright or any other exclusive privilege, the period of limitation shall be one year from the date of the infringement.

On the other hand, the plaintiff contends, that as he has waived his claim for damages, and asks to have an account instead, the suit is one which would have been brought in a Court of equity in England for an injunction and an account; and, therefore, that article 118 of schedule ii applies to this case, as being a suit for which no period of limitation is provided elsewhere in the schedule.

I was of opinion at first, that the plaintiff's contention was right; but upon consideration, and more particularly having regard to the repealed section of the Indian Copyright Act XX of 1847, and to the Patent Act of 1859, I have come to a different conclusion.

By the 16th section of the Indian Copyright Act it was provided, that "all actions, suits, bills, indictments, informations, and other criminal proceedings for any offence committed against the Act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed." The Indian Limitation Act IX of 1871, s. 2, repeals s. 16 of Act XX of 1847 to the extent of the words "actions, suits, and bills." It thus repeals the limitation prescribed by that section in the case of civil proceedings, actions, suits, and bills for infringement of copyright; and then by article 11, schedule ii,

enacts, that, in suits for damages for infringing copy-right or any other exclusive privilege, the period of limitation is to be one year, beginning to run on the date of the infringement. There can be little doubt, that the intention of the framer of article 11 was to supply the provision repealed in s. 16 of Act XX of 1847, relating to civil suits; and I think we ought to read the words of Act IX as not confined to what is technically known at common law as an action for damages, but as meaning generally every civil suit seeking a remedy for infringement, &c.

We have then also to look at s. 22 of the Patent Act XV of 1859, which enacts that "an action may be maintained by an inventor against any person who, during the continuance of any exclusive privilege granted by this Act, shall, without the license of the said inventor, make, use, sell or put in practice the said invention, &c., provided that no such action shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases, &c." This is the section under which an inventor has his remedy by civil suit for any infringement of his exclusive privilege. The term used "an action" is quite general, and includes every form of suit, whether an action for damages (in the technical sense), or a suit for an account of profits.

In my opinion article 11 of schedule ii embraces any suit or action brought under s. 22 of Act XV of 1859, and there was no intention of drawing any distinction between a suit framed as an action for damages, and one framed as a suit for an account. The taking of an account of profits is only a mode of compensating an inventor for the infringement of his privilege other than by an assessment of damages, and it seems unreasonable, that if the period of limitation is one year in the one case, it should be six years in the other. We think, therefore, that the plaintiff is entitled to an account of the profits for one year only from the date of the filing of the plaint; and he will have his costs of suit on scale 2.

Attorneys for the plaintiff: Messrs. *Sanderson & Co.*

Attorneys for the defendant: Messrs. *Orr and Harriss.*

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