dition fit to be put on shipboard, and we have the evidence of Sutcliffe and his principal clerk that this bale of goods was not in a fit condition to be put on shipboard. The consignee is absolutely entitled to reject goods sent to him with a view to have them forwarded if they are not fit to be forwarded, and Sutcliffe says that that is his custom except in cases which he says are exceptional, and Mr Reed, the harbourmaster, says the same thing. Well, in these circumstances, to say that Mr Sutcliffe was to blame in the matter is to maintain what there is no ground for at all. I should say that if the goods were damaged, and if it was for him to exercise his judgment as to whether the goods should be sent back or not, and if he exercised an honest judgment, he would not be responsible in the matter. Although that would be quite a satisfactory ground of judgment for me, I do not think that this case raises it, as I am of opinion that Sutcliffe exercised a perfectly right judgment in this case. If the railway companies had differed as to this they might have remonstrated, but there is no evidence that they did do so. I cannot think that the damage is too remote to be recovered. As to the measure of the damages, it is just the difference between the contract price of the goods and the price they brought when sold in the market.

Lord Craighill—I concur in the judgment which is to be pronounced, but as regards one part of the case I have had some hesitation. If Sutcliffe & Son had rejected the bale of goods at once there would have been no difficulty about his liability. He refused the goods no doubt, but he still held on to them, and gave orders to have them sent back to Galashiels. But my doubts are not so strong as to make me differ from the opinions of your Lordships.

Lord Rutherfurd Clark—I concur.

The Court pronounced this interlocutor:—

"Find in fact—(1) That on 16th January 1884 the pursuers delivered to the defenders at Galashiels a bale of goods, to be carried to Grimsby, and delivered there to Messrs John Sutcliffe & Sons, shipping and forwarding agents, and transmitted by them to Messrs Oppenheimer & Grabowsky, Berlin, the consignees of the goods, to whom they were invoiced at the price of £62; (2) that the said bale was in good condition when delivered to the defenders, but when tendered to Messrs Sutcliffe & Son was damaged, and was in consequence immediately returned to the pursuers, who received it on 25th January, and after repacking, despatched it on the same day to Messrs Sutcliffe & Son; (3) that on receiving the bale Messrs Sutcliffe & Son forwarded it to Messrs Oppenheimer & Grabowsky, but on 4th February, and before the bale reached them, they intimated to the pursuers that they declined to receive the goods as their market had been lost by the delay in sending them to Berlin; (4) that the bale was returned accordingly to the pursuers, who, by arrangement with the defenders, sold its contents at the price of £29, 19s. 9d.; (5) that, including charges for insurance and carriage and interest, the loss sustained by the pursuers on the invoiced price of the said goods amounted at the date of this action to £36, 1s. 2d. sterling: Find in law that Messrs Sutcliffe & Son were entitled to refuse to forward the bale in its damaged condition, and were entitled to return it; that Messrs Oppenheimer & Grabowsky were justified in rejecting the goods because of the delay in forwarding them; and that the defenders are responsible for the loss thereby sustained by the pursuers: Therefore sustains the appeal: Recal the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-Substitute: Of new ordain the defenders to make payment to the pursuers of the sum of £36, 1s. 2d. sterling, with the legal interest thereon from the date of citation to this action till paid: Find the pursuers entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Appellants — D.-F. Mackintosh, Q.C.—M'Lennan. Agents—Liddle & Lawson, S.S.C.

Counsel for Respondents — Balfour, Q.C.—Dickson. Agents — Millar, Robson, & Innes, S.S.C.

Wednesday, December 15.

FIRST DIVISION.

[Lord Fraser, Lord Ordinary in Exchequer Causes.

DODSWORTH *v.* RIJNBERGEN AND OTHERS.

Revenue—Customs—Prosecution of Crew of Vessel Found in British Port or Waters having on board Spirits, &c., in Packages of a Character of which Import Forbidden—Customs Consolidation Act 1876 (39 *and* 40 *Vict. c.* 36), *secs.* 179, 221, *and* 259.

The crew of a foreign vessel were convicted in a Justice of Peace Court on a complaint under the Summary Jurisdiction Acts, charging them under section 179 of the Customs Consolidation Act 1876 with having, within one league of the coast of the United Kingdom, packages of spirits, &c., of a size and character which are prohibited to be imported. *Held*, in an appeal against the conviction, (1) that the accused were not competent witnesses in defence; (2) that assuming that the Justice of Peace was bound, if asked, to record the evidence, there was no ground of complaint against the conviction in his not having done so, since no motion was made to that effect; (3) that the proceedings being by complaint under the Summary Jurisdiction Acts, and not upon an "information" under the Customs Acts, it was not necessary that the procedure should be upon the sworn statement of the informer.

At a Justice of Peace Court held at Lerwick in August 1886 Jan Jan Rijnbergen and others, the master and certain seamen of the "Merchant," of Schiedam, were charged (under the Summary Jurisdiction Acts) on the complaint of Jeremiah Dodsworth, superintendent of Customs at Lerwick, with an offence against the Customs Consolidation Act 1876. Their agent objected to the complaint as defective in specification, and it was amended, the respondent's agent con-

senting, and the amendment being authenticated in the ordinary way by the Clerk of Court.

The amended libel, it is sufficient to say, charged the accused with having in their possession within the three-mile limit, or within the port of Lerwick, packages of tobacco and spirits of a size and character such as are prohibited to be imported.

At the adjourned diet (the adjournment having been made at the respondents' request) the respondents' counsel objected to the complaint in respect the original complaint was bad, and the amendment virtually amounted to a new complaint. This objection was repelled, as also certain objections to relevancy, and the accused were convicted on evidence and fined.

They appealed. The grounds of appeal are fully stated in the opinion of the Lord Ordinary. His Lordship dismissed the appeal.

"*Opinion.* — The five appellants were convicted by Mr Sheriff Cheyne, acting as a Justice of the Peace for the county of Zetland, of an offence under the 179th section of the Customs Consolidation Act 1876, in so far as they being foreigners, had on board a foreign ship, within one league of the coast of the United Kingdom, within the limits of the port of Lerwick, packages of spirits, tobacco, and cigars of a size and character prohibited to be imported into the United Kingdom, and they were sentenced to pay penalties or be imprisoned. The present appeal has been taken against the conviction and sentence under and by virtue of the 17th section of the Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56). Various grounds have been stated in support of the appeal, and these raise questions of importance in regard to procedure in the Court of Exchequer.

"1. It is maintained that the complaint, as originally presented, was not relevant, in respect that it was defective in specification of particulars. This objection was stated to the Justice of the Peace, and the minutes of Court bear that 'the Justice having intimated that he was of opinion that the objection was well-founded, Mr Anderson (the solicitor for the prosecutor), with a view to obviate the objection, craved leave to amend the complaint' by deleting certain portions of it and inserting new matter. 'Mr Galloway, on behalf of the respondents, consented to the proposed amendments being made, and the Justice accordingly sanctioned their being made, and appointed them to be authenticated by the Clerk of Court in common form.' The objection has been renewed before the Lord Ordinary, while at the same time it is admitted that the amended complaint cannot be challenged for want of specification. It is argued, however, that the amendments were incompetent as changing altogether the character of the complaint. The Lord Ordinary is of opinion that it was competent so as to amend it, but further, that it is not allowable now, after the amendments were consented to, to renew the objection.

"2. The next ground of appeal is that the captain of the vessel, Jan Jan Rijnbergen, tendered himself as a witness, and the Justice refused to allow his evidence to be taken. This being a proceeding for a penalty, it was incompetent (unless there be some statutory enactment allowing it) to allow the accused in such a proceeding to be adduced as a witness—*Bruce* v. *Linton*, December 13, 1861, 24 D. 184; *Alison* v. *Watson*, December 2, 1862, 1 Macph. 87; *Blair* v. *Mitchell*, July 9, 1864, 4 Irvine, 546. But it is said that by the Customs Consolidation Act 1876, section 259, persons accused like the appellants are made competent, and are compellable to be witnesses. That section does not apply to the present case. It is only in any prosecution where a dispute shall arise as to whether the duties of customs have been paid, or whether the goods have been lawfully imported or lawfully unshipped, or concerning the place from whence they have been brought, that the accused's evidence may be taken. There is no dispute here about any of these matters. The present case only concerns the having on board at a prohibited place certain goods of a character forbidden to be imported into the United Kingdom.

"3. It is next objected to the conviction that the evidence was not recorded by the Justice of Peace. The prosecution is one under the Summary Procedure Act 1864, the 16th section of which enacts that 'it shall not be necessary, in any proceeding under the authority of this Act, to record or to preserve a note of the evidence adduced.' But the answer to this section made by the appellants is, that where a special statute directs that a note of the evidence shall be preserved, the section of the Summary Procedure Act does not take away the right thereby conferred upon the parties, even although the prosecution is expressly brought under the Summary Procedure Act, and reference is made to the case of *Halliday* v. *Bathgate*, June 1, 1867, 5 Irvine, 382. Unfortunately for the appellants, there is no provision in the Customs Consolidation Act directing a note of evidence to be taken. It is said, however, that the 243d section of that Act shows that a writ of certiorari can issue to bring up the proceedings to the Supreme Court upon complying with the conditions set forth in that section. This provision was in the previous statute, which was in operation when the Court of Exchequer Act passed, viz., 16 and 17 Vict. c. 107, sec. 290. The writ of certiorari can no longer be issued from a Scottish Court, for by the 17th section of the Exchequer (Scotland) Act 1856 it is enacted that 'in all cases where, at the date of the passing of this Act, a writ of habeas or a writ of certiorari might have competently issued from the Court of Exchequer to the effect of removing any proceedings before, or warrant granted or issued by, any Inferior Court or magistrate or public officer to the said Court of Exchequer in order to examination, it shall be competent to the party against whom such warrant is directed, or to either of the parties to such proceedings, to bring up such warrant or proceedings to the Court of Session sitting as the Court of Exchequer, to the like effect as by such writ of habeas or writ of certiorari before the passing of this Act, and that by lodging in the office of the Clerk of Court, attached to the Lord Ordinary in Exchequer causes, a note of appeal.' The Lord Ordinary has no means of ascertaining under what circumstances a writ of certiorari could be issued by the old Scottish Court of Exchequer prior to the Exchequer Act of 1856. There are no books from which such information can be obtained. This, however, is of little consequence,

because the Statute 6 Anne c. 26, sec. 6, enacts 'that the said Court of Exchequer in Scotland shall and may act, do, and proceed therein and thereupon in every respect whatsoever, as by law, or as the Court of Exchequer in England, by the constitution, course, or practice of or in the said Court hath been, or is enabled, or hath used or practised to do in the like cases in England, and upon, and in all such informations, actions, suits, or demands, or touching or concerning any of the premises, or any the proceedings thereupon, shall and may make all such orders and rules, and direct, award, and issue all such writs, precepts, process, and methods of proceedings as hath or have been, is, are, or may be done or practised in the same or like cases in the Court of Exchequer in England.' Now, then, what is competent under a writ of certiorari according to the practice and law of England? It is thus stated by Mr Archibald in his Treatise on the Justice of the Peace, vol. i. p. 195—'Summary convictions by magistrates may be removed by certiorari into the Court of Queen's Bench for the purpose of moving that Court to quash them for errors appearing upon the face of them—*R.* v. *Liston*, 5 T.R. 338. In this respect the certiorari is in the nature of a writ of error, except that a special application must be made to the Court or a Judge for it, and they will not grant the writ until they are first satisfied that the alleged defect appears upon the face of the conviction—*R.* v. *Cashiobury*, J.J., 3 D. and R. 35. It is no ground for a certiorari that the Justices came to a wrong conclusion on evidence'—*R.* v. *Bollon*, 1 Q.B. 66; Anon. 1 B. and Ad. 382).' Consequently the result of this is, that if the Supreme Court cannot review the decision of the Justices of the Peace on the merits, there was no object whatever in recording the evidence, nor any obligation on the Justice to do so, nor right on the part of the accused to demand that it should be done, and so the present case does not come within the decision in *Halliday* v. *Bathgate*.

"4. It is said that the proceedings are inept, in respect that the alleged initial writ, called an 'information,' is not signed as it ought to have been by the Justice. The answer to this is that the prosecution had not begun by 'information' as prescribed by the Customs Consolidation Act, sec. 218, and subsequent sections. The prosecutor had power to adopt the form of 'information,' but also had power to avail himself of the more easy and familiar form of 'complaint' under the Summary Procedure Act. The 11th section of the Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. c. 33) especially enacts that 'The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all summary proceedings under or by virtue of any of the said statutes.' Therefore the prosecutor had full power to do as he in the present case did, viz., bring his complaint under the Summary Procedure Acts 1864 and 1881, which complaint he presented on the 21st of August, and it was upon that complaint that the whole subsequent proceedings took place. The paper called 'information,' dated 24th August, which has got into process was never presented or acted upon, and forms no part of the proceedings.

"The result is that all of the objections to the conviction and sentence being groundless, the appeal must be dismissed with expenses."

The appellants reclaimed, and argued—The complaint originally was incompetent, not having been signed by the presiding Justice, and it could not be amended, even of consent. By 46 and 47 Vict. c. 25, sec. 3, it was lawful for a crew to have on board large quantities of otherwise contraband goods for exportation. Therefore the complaint here should have been more specific than it was—*Simson* v. *Crawford*, Shaw's Jus. Reps. 523. If the evidence of the captain had been received, it would have been proved either that the ship was not within the three mile limit, or that it was there from stress of weather. Further, the evidence ought to have been recorded by the Justice of Peace, and this was not done—*Halliday* v. *Bathgate*, 5 Irv. 382; *Penman* v. *Watt*, 2 Broun, 586.

Counsel for the Crown were not called on.

At advising—

Lord President—It is not necessary to call upon the Crown, the Lord Ordinary having sufficiently disposed of the objections.

As regards the first objection, the accused are barred from raising any objection to the amendments made on the complaint because they consented to them. The objection made was that the complaint was bad, and amendments were accordingly made to save time and trouble by consent. The accused cannot now raise the objections which they have already waived.

The second objection, founded upon the 259th section of the Customs Consolidation Act 1876, appears to me to be perfectly well disposed of by the Lord Ordinary, who says—"It is said that by the Customs Consolidation Act 1876, sec. 259, persons accused like the appellants are made competent, and are compellable to be witnesses. That section does not apply to the present case. It is only in any prosecution where a dispute shall arise as to whether the duties of customs have been paid, or whether the goods have been lawfully imported or lawfully unshipped, or concerning the place from whence they have been brought, that the accused's evidence may be taken. There is no dispute here about any of these matters." It is plain that there is none. It is said that the goods in question were lawfully on board the vessel, and that there has been no contravention of the statute. But the matter of fact is quite clear. The question was, whether this vessel was within the three mile limit having on board goods which were unlawful, and whether the accused were the persons on board. The goods were neither imported nor unshipped except after the forfeiture, so that the objection fails.

The third objection is, that the evidence in the case was not recorded by the Justice of Peace. But the Justice was not bound to record it unless he was specially requested. Whether he would have been bound to do so even if asked it is not necessary here to decide. It is enough that he was not bound to do so either under the Summary Procedure Acts or under the Customs Act of 1876 unless specially asked to do so.

Fourthly, the 221st section of the Customs Act

of 1876 provides that where the prosecution is upon an information, the oath of the informer is necessary to the warrant to bring the offender before the Justice of Peace. But here it is not so. It is a prosecution proceeding upon a complaint, the ordinary form in Scotland. A complaint need not be upon oath, but the complainer must prove his averments. An information, on the other hand, requires to be immediately acted upon. It has been said there was an information in this case. There certainly is a document calling itself an information, but it is not the writ upon which the prosecution began. The information bears the date of the 24th August, the complaint that of the 21st August.

It has been explained that the information was presented to remedy the defects of the original complaint, but it forms no part of the present proceedings, and accordingly the objection is quite untenable. On the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORDS MURE, SHAND, and ADAM concurred.

The Court adhered.

Counsel for Appellant—Lord Adv. Macdonald, Q.C.—Kennedy. Agent—Robert Pringle, Solicitor of Customs.

Counsel for Respondent—Galloway. Agent—James Skinner, S.S.C.

Friday, December 17.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE UNITED HORSE-SHOE AND NAIL COMPANY (LIMITED) *v.* JOHN STEWART & COMPANY.

Patent—Infringement—Reparation—Damages for Partial Infringement—Infringer's Profits.

Where a patent has been infringed it is relevant for the patentee to aver as grounds of damage that by the infringement the infringer forced down the selling price of the article in the market, and so diminished the patentee's profit; and also that he reduced the number of sales which the patentee would otherwise have effected.

Certain minor parts of patented machinery for the production of nails were infringed. The patentee raised an action of damages for the infringement. The Court *found* that on the facts proved he was only entitled to nominal damages, but allowed him a sum as the infringer's profits, giving him under that head not the whole profit made by the infringer by producing the nails, but only such portion as was attributable to the use of those minor parts of the machinery the patentee's right in which had been infringed.

The United Horse-Shoe and Nail Company (Limited) was incorporated, under the Companies Acts 1862 to 1880, in June 1883 for the purpose of acquiring the whole assets of the United Horse-Nail Company (Limited) and of the Horse-Shoe Manufacturing Company (Limited), and an agreement was made between the United Horse-Nail Company (Limited) and the new company, dated 27th June 1883, whereby it was agreed that the whole business, property, and liabilities of the old company should be transferred to and taken over by the new company. The United Horse-Nail Company (Limited) had been incorporated under the Companies Acts in April 1881 for the purpose of acquiring the whole assets of the European Globe Nail Company of Boston, including the patents and inventions belonging to that company. Among these patents thus acquired by the United Horse-Nail Company were —"Letters-patent, dated 15th August 1872, No. 2432 of 1872, granted unto the said William Morgan Brown for an invention entitled 'Improvements in machinery for the manufacture of horse-shoe nails,' a communication from abroad by Thomas House Fuller, of Boston, aforesaid; and letters-patent, dated 14th October 1878, No. 4078 of 1878, granted to Gerald Clarence Hopper, of 38 Southampton Buildings, Chancery Lane, London, for an invention entitled 'Improvements in mechanism for and in the method of manufacturing blanks for animal shoe nails,' a communication from abroad by Thomas House Fuller, of Boston, aforesaid." Along with these patents the United Horse-Shoe and Nail Company (Limited) acquired works at Gothenburg and the machinery therein, and from and after June 1883 carried on their works for the manufacture of horse-shoe nails by means of machinery made in accordance with the patents above mentioned. By an assignment dated 23d May 1884, executed in pursuance of the foresaid agreement, the United Horse-Nail Company (Limited) assigned to the new company all the foresaid patents, and all and singular the benefits, privileges, and advantages arising therefrom.

Towards the close of the year 1883 the United Horse-Shoe and Nail Company (Limited) came to believe that large quantities of horse-shoe nails, made by machines constructed in the mode and on the principles described in the specifications of the foresaid inventions, but without any licence from the company, or any right to use the said inventions, or any of them, had been imported by John Stewart & Company into this country from Sweden, and had been sold by them to merchants and others in various towns and places throughout the country. The nails so imported were made by Messrs Kollen at their works near Gothenburg, in Sweden, by means of machines which the company considered to be imitations of the machines described in the specifications of the foresaid inventions, and infringements of the patents acquired by the company.

On 19th January 1884 the company brought a suspension and interdict against Messrs Stewart & Company, and on March 20th 1885 the Lord Ordinary pronounced judgment interdicting Messrs Stewart & Company from making use of the letters-patent numbered 2432, and dated 15th August 1872, and the letters-patent numbered 4078, dated October 1878. Messrs Stewart & Company acquiesced in the judgment, and it became final.

Upon the 5th May 1885 The United Horse Shoe and Nail Company (Limited) raised an action against Messrs Stewart & Company, concluding for £10,000 damages. They stated that between 1st January 1882 and the date of the interdict the defenders had infringed the rights and privileges granted by the letters-patent, No.