

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, SEAND, 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.

2432 of 1872, and 4078 of 1878, by importing and selling horse-shoe nails made by machinery and apparatus constructed according to these two patents or an imitation thereof; that this had been done by travellers and otherwise at prices below the pursuers' price; that such selling and offering to sell had seriously injured the pursuers' business and profits and caused them serious loss; that their business had thus been curtailed in its growth, particularly in Scotland, and their trade connection, in addition, interfered with and spoiled, which would be a source of loss for a considerable time to come. They estimated the damage thus caused at the sum sued for.

Messrs Stewart & Company averred (and the note of the Lord Ordinary in the process of interdict showed) that the letters-patent, No. 2432 of 1872, concluded with two claims, and that the interdict was granted only in respect of an infringement of the second, and that the less important claim; that the letters-patent No. 4078 of 1878 concluded with six claims, and interdict was granted in respect of the infringement of one of the six, and that the least important claim. They averred further, that nails of the same character and quality as those sold by the defenders could be and had been manufactured without adopting the mechanism described in any of the parts of the letters-patent in respect of which interdict was granted, and that without making important modifications of the mechanism described in the letters-patent founded on nails of the character sold by them could not be made at all. Further, they stated that the nails sold by them, or some of them, had not been manufactured by the use of machinery described in the portions of the letters-patent against the infringement of which interdict has been granted. If there was therefore any infringement at all, it was only as regarded a subsidiary and unimportant part of the machinery, and the pursuers' claim was grossly exaggerated.

Messrs Stewart & Company pleaded, *inter alia*,—“(2) The pursuers not having acquired right to the patents alleged to have been infringed till 23d May 1884, and the assignment in their favour not having been registered in the Register of Patents till the 11th September thereafter, they are not entitled to claim damages for the period prior to the date of registration, or at all events prior to the date of the assignment. (3) The pursuers having suffered no damage in consequence of the defenders' actings, absolvitor should be pronounced with expenses.”

The parties put in a joint-minute, in which the defenders, with the view of limiting the proof in the action, but merely for the purposes of the action, admitted that all the horse-shoe nails imported by them from Sweden prior to 20th March 1885, consisting of 6515 boxes of 25 lbs. each, and all the horse-shoe nails sold by them prior to 20th March 1885, consisting of 5752 boxes of 25 lbs. each (of which 1390 boxes were made entirely without the use of the “interceptor” forming part of the subject of the letters-patent No. 2432 after mentioned) were made by machines not differing from the machines belonging to Messrs Kollen, which were referred to in the opinion of the Lord Ordinary of 20th March 1885 granting the interdict, and in contravention of claim 2 of the letters-patent No. 2432 of 1872, and claim 6 of No. 4078 of 1878, in respect of which interdict was granted, and that of said 5752 boxes, 2481

boxes were made and sold prior to the 23d May 1884, 200 of which were made without the use of the interceptor, the remaining boxes being made between that date and the 20th March 1885, of which 1459 boxes were made without the use of the said interceptor. The pursuers, on the other hand, only for the purposes of the action, did not maintain that said nails were made by mechanism constructed in contravention of claim 1 of No. 2432, nor of the claims of No. 4078 other than the 6th.

The import of the proof as affecting the question of damages appears from the note of the Lord Ordinary, and in the opinion of the Judges of the Inner House.

On the 11th March 1886 the Lord Ordinary (LORD KINNEAR) decreed against the defenders for the sum of £530.

“*Opinion.*—I think it is clear, from the evidence which has now been adduced, that from the date of the agreements with the United Horse-Nail Company the pursuers were in right of the patents which were subsequently formally assigned to them by the assignation founded upon. They were bound by the agreement to take over the pending contracts and liabilities of the former company as from its date, and the evidence shows that they did in fact take over the business on the 28th of June, or at all events in the beginning of July 1883, and I think it follows that any infringement of the patent right after the 28th of June or the beginning of July was an injury to the pursuers, for which they are entitled to compensation.

“Now, that leaves only one question—the question of the amount of damages—and I do not think it is in general necessary or desirable to give reasons in detail for fixing damages, because although the elements which ought to be taken into account may be capable of more or less exact definition, still in most cases the estimate of the particular sum which the pursuer may be entitled to as compensation must be made upon somewhat vague and conjectural considerations. It is really a jury question. But there are one or two points in this case as to which I think it is due to the parties that I should say how far I take them into consideration.

“In the first place, the defenders say—and I think rightly—that the pursuers can only recover compensation for the actual loss which they have sustained; and, on the other hand, it is said with equal justice, that every sale of a patented article is an injury to the patentee or to the assignees of the patent, and *prima facie*, therefore, it would appear to me that the true measure of damage should be the amount of profit which the assignees of the patent would have made if they had themselves carried through those sales, because the loss which they have sustained is simply the loss of profit upon sales, which it may be presumed they would have made were it not for the wrongful intervention of the defenders. But then it is said—and there is force in the consideration—that it is rather an assumption than a matter of certain inference to say that if the infringers had not interfered the sales made by them must necessarily have been made by the pursuers; because there are other considerations which go to the effecting of sales, such as connection in trade, and energy and skill in the conduct of business, and

therefore it does not necessarily follow that the pursuers would have made every sale which the defenders succeeded in making if the defenders had not interfered at all. There is another consideration which the defenders have urged, and perhaps a more formidable one, because they say that the patents have only been infringed in so far as they apply to two separate parts of the process of the manufacture of shoe nails, and that those two parts are in themselves of subordinate importance, and therefore they say that they have derived no material advantage from the infringement, because the real merit of the nails they have sold is not attributable to the patented mechanism or to any process or mechanism that is not open to the public. And therefore they say that since no considerable portion of the profit they have made upon the sales in question can be traced to their use of the patented machinery the pursuers are entitled only to nominal damages, if they are entitled to damages at all. Now, as to the matter of fact upon which that argument was founded, I think that if I were to proceed merely upon the evidence which has been adduced in this case, and which was not adduced in the former action, as to the value and utility of the particular part of the punching-machine which is covered by the claim which the defenders are said to have infringed, there might have been considerable force in the defenders' argument. But then the argument goes too far, because the purpose of the device in question is to save waste, and the evidence, according to their view of it, is that so far from saving waste it really involves greater waste than the former process of manufacture, or, in other words, that the supposed invention is perfectly worthless, and therefore that the patent is void from inutility. But it is an admission in the case that the patent No. 4078 has been infringed by the defenders in the particular respect set forth in their minute. Now, that means that there is a good patent, which necessarily means that there is a patent for a useful and meritorious invention, which the defenders have infringed, and that is the admission upon which I am asked to proceed in considering the question of damages, and therefore I cannot assume anything contrary to that, but must, on the contrary, assume that the particular piece of mechanism which is covered by this part of the patent is a useful and meritorious part of the invention—that the value of the patent is what the patentee alleges—that it saves waste, and therefore saves cost of manufacture. I should not, however, have thought the matter of very much importance, in so far as the argument rests upon this patent alone, if the pursuers had been in a position to say that all the sales of which they complain involved an infringement of the other patent, No. 2432; because, in order to the production of the manufactured article which forms the subject of this complaint, it is necessary to use not only the machine which is covered by the patent No. 4078—the punching-machine—but also the finishing-machine, which is covered by No. 2432, and according to the opinion of the late Professor Fleeming Jenkin, and according to the evidence in the former case, the finishing-machine is certainly an exceedingly ingenious and useful invention. It is covered by three separate patents—the pursuers at least maintained it was covered by three separate

patents—but of these there was only one that I was able in the former action to sustain as valid, but still the mechanism covered by that single patent, No. 2432, is undoubtedly very ingenious and useful, and therefore if every nail that has been sold by the defenders involved in its production an infringement of that patent I should not have thought it very material to consider, for the purposes of this question, whether it involved the infringement also of any part of patent No. 4078.

“But then the admission that the defenders by importing and selling the nails in question have infringed the patent for the finishing-machine is qualified by the counter admission that the infringement of that machine arises only with reference to the sale of a certain portion of the cases of nails imported and sold by the defenders. I think something like 1800 odds out of 5000 odds cases of nails have been produced, according to the admission, without infringing that patent. As to the question of law that was suggested as arising upon that admission all I think it necessary to say is, that it is a misapprehension to suppose that it was decided in the former case that there could be no infringement of the patent without taking the interceptor as well as the moveable gate, which is patented as in combination with the interceptor. That was not decided. It was a question that did not arise, and was not necessary to be considered, because there was no question in the former case that the defenders had imitated the interceptor, nor that they had imitated the combination, if I was right in the view I took of the evidence as to the similarity of their machine to the pursuers' machine. Therefore it is a misapprehension to suppose that there was any decision as to the possibility of infringing No. 2432 without taking both the moveable gate, which is a material part of that invention, and the interceptor, which is also a material part of it. Of course I say nothing for the purpose of deciding it now, because for the purposes of this action the parties are agreed as to what is to be taken as the condition of the infringement—the admitted fact as to the infringement is that the defenders are to be held as having infringed No. 2432 by the importation and sale of those cases of shoe nails, but of those cases alone which were produced by the use of the interceptor.

“Now, that being the state of facts upon which this argument for reducing the damages to nominal damages is founded, the question is, whether the defenders are well founded in maintaining that, by reason of the infringement being applicable only to those portions of the patented machine which I have described, the pursuers are precluded from saying that the loss which they have sustained by the infringement is the loss of the profit they would have made upon the sale of the nails if they had sold them themselves? And there certainly is a great deal of authority for saying that where only a part of a complex machine is protected by a patent the infringer cannot be made liable for the aggregate profit derived from the entire machine, as if that were the profit he had made by the use of the patent. But then the cases cited by the Solicitor-General, in which that consideration was thought to be material, were not actions of damages for infringement. They were suits in equity for ascertaining

the profits obtained by the infringers charging them as trustees for the patentee, and in such case it would be exceedingly material to show that a part of the profit for which they were asked to account was really attributable to processes which were not covered by the patent at all. For the only question in these cases is, what advantage the infringer has derived from the use of the patent over and above what he would have got from the use of the processes open to the public, and this is very clearly explained in the American case of *Mouray v. Whitney* [*infra*], quoted by the Solicitor-General. The question as to the patentee's loss does not enter into the consideration at all, because as the law was stated in the House of Lords in *Betts v. De Vitre* [*infra*], the basis of the claim for profits is that the patentee condones the infringement and does not complain of it, but seeks to recover the whole profit made by the infringer as if it had been made as trustee for him. But this is an action of damages for infringement, and the question is not what profit the infringer has made, but what loss the patentee has sustained; and what the pursuer complains of is, that he having a sale for articles of common use, which was of great value to him by the use of his patented machine, the defenders have infringed his patent right by interfering with his business and depriving him of the sales which he alone would have made if the defenders had not pirated his machine. Now, if the pursuers have lost the profit they would have made upon these sales by reason of the defenders' infringement, it does not appear to me to be of very much importance whether you can trace the profit which they would have made, or how much you can trace to the use of a particular portion of their machine. What they have lost is the sale. The great value of all machines of that kind consists not merely in their producing a superior article, but in their producing that article at a cost which enables the patentees to put it upon the market so as to command large sales, and that is what they lose by an infringement which enables others to compete with them.

"Therefore it appears to me to be a fair enough ground for estimating their damages to take the whole profits which they would have made upon the sales actually made by the defenders if the defenders had not interfered so as to prevent the pursuers effecting those sales themselves. That would mean the difference between the cost of manufacture and the prices at which they were selling at the time to their own agent. No doubt there are the considerations to which I have adverted which ought to be taken into account. I cannot hold it as absolutely certain that they would have made the whole of these sales. That is a consideration, however, which I think is not capable of being estimated very exactly in money, and before determining as to the weight which is to be given to it, there is another point to be taken into view—a ground upon which the pursuers maintain that the profit upon their sales—I mean the profit upon the defenders' sales at the actual rate at which the pursuers are selling for the time—is by no means sufficient to compensate them for the loss which they have actually sustained, because they say that they have been compelled by the wrongful competition of the defenders to lower their prices to their own agent in Scotland, and therefore that to give them full

compensation the profits of which they have been deprived by the defenders are not to be estimated at the rates at which they were selling at the dates when the actual infringement took place, but at the higher rate at which they were enabled to sell before the defenders began to compete with them, or before the competition of the defenders had brought down their prices so considerably, as they say it in fact succeeded in doing, and for the same reason they say it follows that they must also have the difference between the prices which they actually earned on their own sales to their agent in Scotland and the rates they would have earned if there had been no competition. Now, I think this additional claim would not be unreasonable if the grounds in fact upon which it rests could be satisfactorily established, for if they have the sole right of manufacturing and selling horse-shoe nails produced by their machine they might well be entitled to damages for interference with their business over and above loss of profit on the actual sales of nails imported by the defenders. But then I think they have failed to prove damage on this account, at least to such an extent as would enable me to make any satisfactory estimate of the amount which they have lost in this way, because though it is true there has been a considerable fall in prices since the beginning of 1883, when the defenders first began to sell nails made by the machines which have been found to infringe the pursuers' patents, I do not think it is proved that the competition of the defenders was the sole cause of that fall. There is evidence that, however excellent the pursuers' nails may be, there were other nails in the market with which they had to compete; and independently of competition there are other causes for the fluctuation of prices which do not appear to me to be excluded by the evidence. Therefore I am not able to give any precise pecuniary value to this element of loss which the pursuers allege. The result is, that there are considerations tending on the one hand to increase, and on the other to diminish, the compensation to which the pursuers would be entitled if their loss of the profits which they might have earned upon the sale of the same number of cases of nails as the defenders have sold in violation of their patent were to be taken as the true measure of damage. But they are neither of them capable of any precise pecuniary estimation, and I think the fair result is that these considerations on either side, which cannot be estimated with precision, should be allowed to neutralise one another, and therefore that the measure of damage should be the difference between the cost of manufacture and the profit which they would have obtained upon the sale to their own agent in Scotland of as many cases of nails as are admitted to have been sold by the defenders in violation of the patents, taking the rates which they obtained at the time when the infringement actually took place.

"Now, the evidence as to that is, that if the whole 5752 boxes were in question, the amount of damages would be £611; but the pursuers were not in right of the patents until the end of June 1883, and I think about 700 of the 5752 boxes were imported by the defenders prior to the end of June 1883, and therefore I think the sum of £611 brought out in the pursuers' evidence must suffer

the deduction to the extent of 700 boxes. The result of that is, that I think a fair compensation to the pursuers will be £530. I do not know that that is the exact amount, but it is within a few pounds of the profit which I think they might have obtained if the defenders had not interfered. It is right to add, though I daresay I have said it already with reference to the argument which the defenders urged upon the extent of the infringement of the pursuers' patent, that in my opinion the defenders have infringed, and have admitted upon their admissions a very substantial infringement of a really valuable patent, and therefore the suggestion that this is a case for mere nominal damages is entirely without foundation."

The pursuers reclaimed, and argued—The infringement was admitted, and the only question was one of damages. The admitted infringement was without excuse, and therefore the damages should be estimated on the highest scale. The evidence showed that the pursuers' trade increased until 1882. It began to decrease in 1883, when the defenders put their nails upon the market, and revived the moment the interdict was pronounced. Till the defenders entered the market the pursuers enjoyed a practical monopoly, and consequently all the defenders sold would have been sold by the pursuers. Besides, it was proved that the defenders undersold the pursuers, and thus caused them serious loss, not only by interfering with their business connection, but by forcing them to lower their prices. Accordingly in estimating the pursuers' loss the calculation must proceed on an estimate of the profits which the pursuers would have made on the sales which the defenders actually made. And the value of these sales must be computed not at their actual value, but at the value which they would have realised had the prices not been lowered by competition. Moreover, the allegation of the defenders that they reaped no material advantage from the infringement could not be considered, as the question was not what profit the defenders had made, but what loss pursuers had sustained—*De Vitre v. Betts*, January 10, 1873, L.R. 6 (H. of L.) 319; *Watson v. Halliday*, June 7, 1882, L.R., 20 Ch. D. 780; *Yale Dock Manufacturing Company v. Sargent*, April 5, 1886, 117 U.S. Rep. 536; *Terrell on Patents*, 1884, 177; *Parsons on Contracts* (7th ed.), 1883, book iii. chapter 13, section 11. The Lord Ordinary had taken off 700 boxes on the ground that the pursuers were not in right of the patents until the end of June 1883, but the question was not regarding the importation, but the sale, of the nails.

Argued for the defenders—While in the previous case they had admitted that they had saved by the infringement, they had proved in the present case that they had derived no material benefit from it. The previous admissions had consequently been made in error, and they must be construed in their narrowest interpretation, *i.e.*, the advantage admitted must be taken as merely nominal—*Jones v. Morehead*, December 1863; *Wallace's Reports* (United States' Supreme Court), 155. In any case, only subsidiary portions of the patents had been infringed, and if any damage was due it was limited to the profit derived from these partial infringements—*Mowry v. Whitney*,

December 14, 1871, *ib.* 620. These and such considerations must receive effect in assessing damages—*The Suffolk Company v. Hayden*, December, 1865, 3 *ib.* 315; *Seymour v. M'Cormick*, 16 How. 480, quoted in *Curtis on Patents* (4th ed.), 1873, 459. The Lord Ordinary's note was based entirely on the assumption that the defenders' ability to compete depended on the use of the pursuers' mechanism, and that had it not been for the former competition the pursuers would have had complete control of the market. But there were, leaving both pursuers and defenders out of consideration, twenty other nails in the market. Besides, the defenders would have been strong competitors without any infringement at all, as apart from any use of the pursuers' patent they could put a cheaper nail upon the market. They did not undersell the pursuers; their success was in great measure due to the greater activity of their agents. All these circumstances must go to the question of the amount of damages. Accordingly the question for the Court to decide was, whether the process, adoption of which constituted the infringement, effected a saving, and whether the loss of the pursuers was occasioned by infringement in excess of what was implied in the admissions. It was only for this excess that the defenders were liable, and there was no such excess.

At advising—

LORD ADAM—This is an action brought by the pursuers for damages in respect of the infringement of two patents belonging to them. These are, first, claim 6 of letters-patent No. 4078, and claim 2 of letters-patent No. 2432, both being used in the manufacture of horse-shoe nails, the first in connection with the punching-machine and the second in connection with the finishing-machine.

The Lord Ordinary has found the pursuers entitled to a sum of £530 as the damage sustained by them in respect of the infringement by the defenders of these two patents.

He has arrived at that result in this way—The number of cases of nails sold by the defenders between the end of June 1883, when the pursuers acquired right to the patents, and the 20th March 1885, when the sale of the nails by the defenders was stopped by interdict, was 5052, and the sum of £530 is the amount of profit (that is, the difference between the cost of manufacture and the prices at which the nails were selling at the time) which the pursuers would have realised on the footing that they would have sold all these nails themselves. There are, however, two other elements which the Lord Ordinary has taken into consideration; the one is that he thinks it is not certain that the pursuers would themselves have made the whole of those sales, a consideration which goes to diminish the amount of the damages, and the other is that the competition of the defenders may to some extent have lowered the selling price of the nails in the market, and so have diminished the pursuers' profits.

"The result is," he adds, "that there are considerations tending on the one hand to increase, and on the other to diminish the compensation to which the pursuers would be entitled if their loss of the profit which they might have earned upon the sale of the same number of cases of nails as the defenders have sold in violation of

their patent were to be taken as the true measure of damage. But they are neither of them capable of any precise pecuniary compensation, and I think the fair result is, that these considerations on either side, which cannot be estimated with precision, should be allowed to neutralise one another;" and so he arrives at the result of giving as damages to the pursuers the profits which would have been realised by them had they themselves sold the whole of the nails sold by the defenders.

I am not satisfied that the basis on which the Lord Ordinary has thus rested his award of damages is sound.

I see nothing in the proof to show, or to make it probable, that the pursuers would have made all these sales. There is nothing in the proof to show that purchasers generally would have this particular nail and none other. There is keen competition in the nail trade, and no doubt these sales were in large part due to the exertions of the defenders' agents. I do not think therefore that it is either proved, or that it would be at all in accordance with the fact to presume, that the pursuers but for the intervention of the defenders would have effected the whole or any large part of these sales. If the pursuers had had a monopoly of horse-shoe nails, and if none could have been manufactured or sold except by the use of their patents, probably the assumption made by the Lord Ordinary would be correct enough, but I do not think it is so where, as in this case, there are many competing nails in the market, all apparently equally sought after. Neither am I satisfied that even in that case the whole profits of the manufacture would furnish the true measure of the damages to be awarded. I cannot help thinking that the Lord Ordinary has been misled by the supposed analogy of the case in which a patentee, as he is entitled to do, claims, not damages in the proper sense, but the profits made by the infringer by the use of the patent infringed—in which case the profits made by the infringer on the sales is the measure of the patentee's claim.

The pursuers, however, maintain that by the use of the parts of the punching and finishing machines which the defenders have infringed the defenders have been enabled to compete with them so as not only to force down the selling price of the nails in the market, and thus diminish their profits, but also to reduce the amount of sales of the nails which they would otherwise have effected.

It appears to me that these are perfectly relevant grounds of damage, and if established in fact would entitle the pursuers to corresponding damages. But the defenders reply that it was not because of their use of the infringed patents that they were enabled to manufacture and sell the nails in question, which they say could and would have been manufactured and sold by them as freely and cheaply if they had not used these patents, and they further say that it was not the competition of their nails which brought down the price in the market, upon which they say their nails had no appreciable effect, but the competition of other nails, and if such be the state of the fact it would appear that the pursuers' claim for damages must fail.

As I have said, the infringed patents are claim No. 6 of patent No. 4078, and claim No. 2 of patent No. 2432.

With reference to patent No. 4078, the defenders maintained that they had, by inadvertence, failed in a previous case between them and the pursuers to contest the validity of this patent, and they have led evidence in this case to show that the patent was of no utility, and therefore invalid. But I agree with the Lord Ordinary that for the purposes of this case the defenders are bound by the admission contained in their minute [quoted *supra*], which necessarily means that the particular piece of mechanism which is covered by this part of the patent is a useful and meritorious invention in respect that it saves waste, and therefore cost of manufacture.

But that does not preclude inquiry into the degree of usefulness of the patent, and the amount of waste saved by its use, facts which, having regard to the pleas of parties, it is necessary to ascertain in this case.

Claim No. 6 of No. 4078 is described in the letters-patent as "an improvement in the art or method of making animal shoe nails, which consists in punching from a rolled ribbed plate blanks of different widths, those cut from one edge of the plate being wider at or near their heads than those cut from the other edge of the plate, the object being to economise waste heretofore common and necessary when cutting blanks of equal width."

The punching-machine is, I understand, a complicated and ingenious piece of machinery which the defenders were quite entitled to use. The invention patented consisted of the use in the punching-machine of a matrix and die, constructed so as to punch out blanks of different widths, but the patent in no way affected or interfered with the defenders' right to use the punching machinery with matrices and dies adapted to punch out blanks of the same size. The process patented was in no way required for the manufacture of the nail—the only question is, whether by its use the nail can be manufactured more economically, and if so, to what extent.

The pursuers have examined one mechanical engineer, Mr Beck, who is of opinion that the saving of waste by the use of the patent would amount to from 10 to 15 per cent.; while the defenders have examined two engineers, Messrs Cruickshank and Morton, who are equally positive that the use of the patent would result in an increase of waste.

The difference between them may, I think, be accounted for to a considerable extent by the fact that the defenders' witnesses assume, and perhaps rightly, that the patent is used exactly as described in the letters-patent, in which case I think they are right in saying that its use would result in increased waste, while the pursuers' witnesses, in order to prove that there is less waste, have to assume that not only a wider but also a longer blank is punched out. It may be that if this be done a saving may result, but it is to be remarked that there is nothing said in the letters-patent about the one blank being longer than the other.

Seeing that these machines have been in use by both pursuers and defenders for a considerable time, one would have expected that the question might have been brought to the test of actual experiment.

Mr Gibbs, the pursuers' manager, tells us from experiment that the waste has been reduced since

the improvements in 1878 from 33 per cent. to 16 per cent., but this experiment is of no value in the present question, because these improvements included others calculated to save waste besides the one in question.

Mr Cruickshank says that he ascertained by experiment that the total waste when punching nails of equal size was 7 per cent. If this be true, it shows that it was only on this small margin of 7 per cent. that saving could be effected by the use of the patent. Mr Kollen, however, did make the experiment, and he tells us that—“I made an experiment to ascertain the amount of waste in punching blanks from the plate last summer. I took two blanks of equal width at the head, and of the same length, and the percentage of waste I got was 3·458. I made another experiment with another size of nail, and I got a little less waste, viz., 2·951 per cent. Then I made another experiment with the same size, the nails being of equal width at the head, but of different length, and I found that with the size which had before given 3·458 per cent. of waste, I now got 5·647, and with the size which had before given 2·951 of waste, I now get 6·596 per cent. Then I made a third experiment with blanks of different width at the head and of different lengths, and I got 6·392 per cent. of waste. I find from experience that there is more waste in punching blanks with broad heads at one side of the plate, and with narrower heads at the other. I find there is least waste when blanks are punched of equal width and equal length from opposite sides of the plate.”

If this evidence can be relied on it would appear that there was no saving, but a loss, by the use of the patent, and Mr Kollen is not cross-examined at all as to this. Mr Kollen, however, continued to use the patent until he was interdicted, from which it may be inferred that he derived some advantage from it.

On the whole matter, I have come to the conclusion that if the patent is used exactly as described in the letters-patent, no saving is effected but the reverse, and that in any view the saving is so immaterial that I have no doubt the defenders without its use would still have manufactured their nails, and competed with the pursuers just as they are doing now.

With reference to the infringement of claim No. 2 of Patent No. 2432, this patent is for a piece of machinery called an interceptor, and is a part of the finishing machine. It will be observed that the interceptor has nothing to do with the fabrication of the nail. Mr Gibbs, the pursuers' manager in Sweden, says—“When the machine is working properly the interceptor has nothing whatever to do; it is an apparatus which comes into use only in case of obstruction or choking in the tunnel, so as to intercept the supply of blanks coming down. We have never used,” he says, “the interceptor described in the second claim in Sweden;” and a little further on he says, “we have entirely done away with the gate described in the specification as arranged to be opened by forward pressure. We have never used that in Europe at all. We found in America that it was not successful, and we have never used it in Sweden. It would not be an advantage in making nails, and we, consequently, did not adopt it.”

Mr Morton says there are innumerable means

of counteracting a block without the use of an interceptor. One method, and one that is in use, is to drive the finishing-machine by means of a friction pulley, which will only stand a certain strain, and in the event of that strain being exceeded the pulley slips, and the whole machine comes to a stand. By adopting that method nails can be as cheaply made as by the use of the interceptor, and Mr Kollen says, “Since March 1885 I have not used the interceptor in my nail-making machines. For sizes 11 and 12 we have not used it since the autumn of 1883. The interceptor on the machine we were working for these sizes at that time was broken, and we never repaired it. Instead of the interceptor to stop the supply of nails when a choke takes place, we use a friction pulley to drive the machine, and whenever a choke occurs, the resistance being greater than the pulley is able to overcome, the machine stops. I gave up its use,” he says, “altogether in January or February 1885. I did not find it an advantage when I used it.” And it is matter of admission that 1459 of the 5000 odd boxes of nails in question in this case were made without the use of the interceptor.

It appears to me, in the face of this evidence, it is impossible to say that this patent was of much, if any, use in the process of manufacture.

With reference to the question whether the competition of the defenders' nails brought down the selling price of the pursuers' nails in the market, I am of opinion that they did not do so to any appreciable extent.

I think it is clearly proved that many nails of different kinds and descriptions keenly compete in the horse-shoe trade, and that it was the competition of these nails that brought and kept down the price, and that the price was not affected by any competition of the pursuers' and defenders' nails *inter se*.

I do not propose to analyse the evidence in detail, but I would refer to the evidence of Mr Seeley, the pursuers' manager. He says—“There was a change in the price of our nails before 1883. The discount we gave was at first 30 per cent. and then 35 per cent., and in the end of 1881 or beginning of 1882 I increased the price-list and changed the discount. I did so because before that we had been selling at a price that we could not live at. Prices for ordinary iron have fallen very much recently, but there has been no fluctuation in the price of the material and plate we use for years. I attribute the high rate of discount which we still maintain to competition alone. That applies to the period from March to September 1885 as well as before.”

Now, this is a very significant statement, because Mr Seeley says that the pursuers brought down their prices in 1881, but the defenders did not begin to sell till 1883, and he further says that he attributes the present high rate of discount, which is, in other words, the low rate of price, to competition alone, but the defenders ceased to use the infringing patents in March 1885, and the price not having risen since, the inference would seem to be that the market price was not affected by the defenders' use of the patents.

I would also refer to the evidence of Mr Goodall, Mr Lamb, and Mr Andrew Goodall, where an account will be found of a dozen [nails] or



so in number which were competing in the market, and their evidence is confirmed by that of some purchasers and sellers of nails. On the whole matter, I have no difficulty in coming to the conclusion that the competition of the defenders' nails had no appreciable effect on the market price at which nails were selling.

If this be so, and if I am right in thinking that the defenders could and would have equally competed with the pursuers if they had not used the patents, then the conclusion at which I am compelled to arrive is, that the pursuers have failed to 'prove that they have suffered any loss from the defenders' use of their patents, and therefore are not entitled to recover any substantial damages. But nevertheless the defenders have committed an illegal act in infringing the pursuers' patent, and in that view they would be liable in a nominal sum of damages.

There is, however, another view of the case which was not pressed before us, but which leads to a somewhat different result.

A patentee whose patent has been infringed may elect either to claim damages or the profits made by the infringer by the use of his patent. Now, although I do not think that the patentees in this case have proved that they have suffered loss by the acts of the infringers so as to entitle them to damages, still it does not follow that the infringers may not have made some profit by the use of the patents which the patentees are entitled to claim.

We are, as I have said, bound by the admission of the defenders in this case to assume that both patents were useful and meritorious inventions, and seeing that the defenders continued to use them I think we may fairly presume that they found some profit in doing so.

I do not think, however, that the pursuers are entitled to claim the whole profits made by the defenders in the manufacture of the nails, but only such portion thereof as is fairly attributable to the use of those parts of the machinery covered by the patents.

We were not referred to any case in this country where the question occurred, but we were referred to a case decided in the Supreme Court of the United States—that of *Mowry v. Whitney*, in December 1871, in 14 Wallace's Reports. This was an action brought for the infringement of a patent for an improvement in the process of manufacturing cast-iron railroad wheels. The improvement consisted in a process of slow-cooling the wheels in connection with the employment of artificial heat to retard the progress of cooling. The Court below found that the defendant had infringed the patent, and found him liable in damages, these being assessed at the entire profits made by him by the manufacture and sale of all wheels sold by him in the manufacture of which the patented process had been used. The Superior Court reversed this latter finding, and decided that an infringer is not liable to the extent of his entire profits in the manufacture, and that in such a case the question to be determined was, what advantage did the infringer derive from using the invention over what he had in using other processes then open to the public, and which would have enabled him to obtain an equally beneficial result. The fruits of that advantage it was held were his profits, and that advantage is the measure of profits to be ac-

counted for. I agree with that case. The whole profit is not made by the use of the patents infringed, but by the use of the whole machinery employed. It is the saving only in the cost of manufacture which is effected by the use of the infringed patents which is the profit made by their use, and it is this saving, it appears to me, which ought on such an assumption to be given to the patentee.

The case we have to deal with is one in which the article produced is the result of a variety of successive processes, and of the use of a variety of complicated and ingenious machinery, all parts of which the defenders were free to use except only the two in question, which I think have been proved to be subsidiary and unimportant parts. The saving effected by their use must have been small. What proportion it bears to the whole profit realised we have no means of judging with precision, but I think that if we award £50—which is about one-tenth of the whole profits—to the pursuers on that account we shall be doing justice.

LORD MURE—I concur in the result at which Lord Adam has arrived. The only question before us in this reclaiming-note is the question of damages. There has been a decision on the question of infringement, and the proof proceeded in terms of a written admission by the parties. The ground upon which damages were claimed was somewhat different, I think, from what we usually find in these cases. In general when damages are claimed, the claim is measured by the profits the infringer has made by the use of the patent; but in this case, in article 5 of the concordance, which is the only one that makes specific mention of the grounds upon which the damages are assessed, the patentees complain of the interference with their business by the influx of nails made abroad and thrown into the market by the defenders while they were infringing the patent; and the Lord Ordinary has adopted that view, and has allowed (as he explains in his note) the pursuers the profits which they would have made upon the sales actually made by the defenders if the defenders had not interfered so as to prevent the pursuers effecting their sales themselves. That is the ground upon which he estimates the damage, which is a somewhat different mode from that usually adopted, and, having applied his mind to the consideration of the case in that view, he brings out the sum mentioned in his interlocutor as the sum which he thinks is due. I have looked at the evidence, and I concur with Lord Adam that it is not sufficient to instruct that any such loss has been sustained through the operations of the infringers. And while I think Lord Adam has taken a sound view of that matter, I further agree with him that there must necessarily, when there is infringement of this sort, be a certain amount of damage sustained by the patentee, although a sum far short of the sum claimed, and I think with Lord Adam that £50 may fairly represent any inconvenience and loss they may have sustained. I concur in the decision Lord Adam has come to.

LORD SHAND—This case undoubtedly presents points of novelty and of considerable importance for the decision of the Court. The question



which is raised, and which has been discussed before us, is one of fact only, and that is as to the amount of damage the pursuers are entitled to claim in respect of the infringement of their patents, which was established by the decision of the Lord Ordinary, and is admitted in the joint-minute of admissions. The claim as presented to us was, as Lord Adam has observed, not a claim for profit made by the defenders, but a claim for damage done to the pursuers by the actings of the defenders. It was presented under two heads. In the first place, it was said that the defenders, by bringing the nails into the market in large quantities in competition with the pursuers, and selling large quantities of nails, had really been selling nails which the pursuers would have sold, and the pursuers claim on that ground that they have been damaged by those sales, and that the measure of the damage is the profit the defenders made. The second head of damage was, that the defenders having put the nails, as they did, into the market, they thereby competed with the pursuers and brought down the pursuers' prices by a process of underselling from time to time, and that thereby a much larger sum than even the Lord Ordinary has allowed was sustained as damage.

Now, the Lord Ordinary in dealing with those claims has fixed the amount exactly on the same principle and brought out the same amount as if the defenders had infringed the pursuers' patents in all respects. It is clear upon a perusal of his Lordship's judgment that he would have arrived at exactly the same result as he has done in regard to the amount of damage, and no higher result, if it had been found by the Lord Ordinary that in every respect the pursuers' patents had been infringed; and his Lordship therefore has proceeded on this view, that the defenders could not have put nails the same in material and form on the market if they had been interdicted from the use of the patent in terms of the Lord Ordinary's previous judgment. But the great peculiarity of the case to which I think the Lord Ordinary has not sufficiently adverted is this, that the defenders were not found guilty of infringing these patents in all their heads, or infringing them generally. The Lord Ordinary's judgment in its terms no doubt was a general interdict against infringing these patents, but by reference to the opinion which his Lordship then gave it is quite clear that he held that the main parts of the subject of these patents were not infringed, and that only in two particulars—what I may call the fringes of the patents of the pursuers—there was any infringement at all. Certainly the infringement that was found under that former action had reference, as the Lord Ordinary says, I think, in this case, to merely subordinate points in the patents. That I think is made very clear by a short reference to the patents themselves. In the first place, the patent No. 4078 contains no less than six heads, and it is impossible to read those different heads of the patent without seeing that the substance of the patent is contained in the first five, none of which the Lord Ordinary found had been infringed. The first is for a machine generally "to punch blanks from a rolled, flanged, or ribbed plate, combined with feeding mechanism which intermittingly grasps and feeds forward the said flanged plate, and then releases the plate and

moves back along over it, again grasping the strip and again feeding it forward to the punches after each operation of the punches;" second, a machine "for the manufacture of blanks for animal shoe-nails, a series of punches and dies to shape the blanks, an intermittingly operated feed of the class herein described, and mechanism to straighten the long, rolled, flanged strip supported in coil form in advance of the feeding mechanism;" third, "the combination with intermittingly reciprocating and grasping feeding mechanism of an adjustable stop to control the backward reciprocation of the feeding devices, and a stop to determine the forward reciprocation of the said feeding devices;" fourth, "the combination with the carriage which supports the feeding devices of an operating arm provided with friction rollers, one of which is moveably supported upon the said arm, the two rollers rotating in contact to operate substantially as described;" and fifth, "the combination with a nail-plate grasping lever or jaw held up by a spring, of a striker connected with the punch-slide to open and release the grasp of the said jaw upon the nail-plate preparatory to the backward movement of the said feeding devices." Now there, I think, one finds quite clearly the main features of what I may call the substance of the invention. The sixth head relates simply to a matter in which it is claimed that some saving can be effected in the use of the general subject of the invention. It says—"That improvement in the art or method of making animal shoe-nails which consists in punching from a rolled ribbed plate blanks of different widths, those cut from one edge of the plate being wider at or near their heads than those cut from the other edge of the plate, the object being to economise waste heretofore common and necessary when cutting blanks of equal widths." In short, the point of head six is, taking the patent generally as for the machine as it is now described, that it will make some saving in the operations to be carried out in the use of the machine. Now, it was that sixth head only that the Lord Ordinary found was infringed. And again, in regard to the other patent, the only infringement there found to have taken place was on head 2 of the claim, which was in these terms:—"In combination with the gate the book or interceptor *r* operating substantially as shown and described." Then, again, in the minute of admissions we have it made quite clear that that must be the view on which this question of damages arises, because while on the one hand the defenders admit that while the nails which they put on the market were manufactured subject to the infringement of head six of the first patent and the second head of the second patent, the pursuers on the other hand have admitted—only for the purposes of this action, but still admitted—for the purposes of this claim of damage, and they say they do not maintain, that the said nails were made by mechanism in contravention of claim one of No. 2432, nor any of the claims of the patent No. 4078 except the sixth. Now, upon that state of the rights of the parties as settled by the Lord Ordinary's judgment, followed by the interdict, the pursuers present the case in this shape—They say the defenders never could have manufactured their nails at all, standing an interdict of that kind, and if the rights of the parties had been so

declared; that if they had proceeded to manufacture without taking the benefit of these two minor parts of those patents they would have lost all their profit, and the nails would never have been in the market. If that be established in this case, then the pursuers' view of their claim of damages is right. The defenders on the other hand, however, have said—"Suppose we had been interdicted then, as we are interdicted now, from using these two subordinate minor parts of these patents, we could have put our nails on the market all the same; and if so, the view which you present in your claim of damages must be unsound, because the view on which your claim is presented is, that we could not have put our nails on the market." Now, looking at the position of the two parties, we have defenders before us who have been guilty of infringement, and I am free to confess that *prima facie* one would be disposed to hold infringers liable in damages, and if they mean to say that they could and would have manufactured nails all the same, and would have been quite as much in competition in the market as they were, notwithstanding that they have been found guilty of the infringement of those two patents, there is a heavy *onus* upon them to instruct that that was the case. But having given the best consideration I could to the argument (which was very full) and to the evidence, I am of opinion with my brother Lord Adam that the defenders have made out their point—that the result of the evidence is that they have shown that a mere interdict against contravening what I have called the fringes of these patents would not have prevented their being in the market with the nails just as they were, and if that be so, the case presented for the pursuers in that view undoubtedly fails. In the first place, we have the fact that the defenders have gone on to manufacture their nails; they stopped for a short time after the interdict, I suppose to take counsel and make arrangements, but since that they have gone on manufacturing their nails, and they are as fully and freely in the market as ever, and it is not said that the nails so manufactured do contravene those minor parts of the patents. Then, in the second place, although undoubtedly it has been found that these patents in the two years to which I have been referring were useful, and such as would base a claim for a patent, the question is, What amount of use was there? what amount of utility was there in the patents? and although I find on the one hand that there is a good deal of loose evidence on the part of the pursuers as to the percentage of saving that they could make by the use of the particular method patented under the sixth head of the main patent, on the other hand I think, when their men of skill and their own manager came to be subjected to cross-examination, their evidence produced the effect on my mind that really the amount of saving was very little. And when I look to that, and the large body of counter-evidence, the result is to impress me with the conviction that the saving is trifling, if there be a saving at all. Then, again, in regard to the use of the interceptor, it appears to me that the evidence of the pursuers really demonstrates that the interceptor, as put in the claim in the second patent, although found by the Lord Ordinary and Professor Fleeming Jenkin to be an ingenious contrivance, so that we must take it to

be of some benefit because of the decision in the former case, must be taken as a very trifling benefit, because Mr Gibbs, the pursuers' own manager, says in regard to that matter—"As I have said, the middle tunnel was discarded, because when the door opened, the supply of blanks not being checked, they continued to come down, and instead of passing between the bottom rolls, came out and fell into the nipper-frame and disarranged it, and caused serious trouble and delay. We found it was not advisable to have that door open, because it allowed the blanks to fall out and do damage to the machine. We made a new form of tunnel slightly different, and we also made a slightly different form of interceptor." And then he goes on to say that they have entirely done away with the gate; that it would not be an advantage to use that mechanism, and consequently they did not adopt it. Now, if that be so—if this interceptor as patented in combination with the gate—for the patent so bears: "In combination with the gate, the hook or interceptor  $\tau$  operating substantially as shown and described"—it appears to me that again there is a failure to show that the adoption and use of this part of the patent could be of any material advantage to the defenders. Now, if that be so, what is the result? The question I put to myself upon this jury question of damages was this, Does it appear that if this interdict had been granted as at the date when this process was brought into Court, or at a much earlier date, would that have precluded the defenders from making nails and putting them upon the market? My opinion upon that question is that it would not. I think the defenders would have been their competitors, and so I think it would be most unjust to the defenders that we should hold that the pursuers must reap the profit of all the nails which the defenders sold as if the defenders had not been in the market at all, and that the pursuers are therefore to have the benefit of the sales.

Now, that disposes of the first branch of the pursuers' claim, for which the Lord Ordinary has allowed upwards of £500, and upon the view I have now stated, and concurring in the opinion Lord Adam has delivered, I am of opinion that his judgment cannot be sustained.

The second head is—"You were in the market as competitors, and you constantly kept bringing down prices, and the result is we have lost a great deal of money which we would have had by selling our nails at much higher prices." Now, if what I have said be sound—and it is the judgment I have formed upon the evidence—it results that the competition would have existed all the same, and if the competition would have existed all the same, then the defenders as competitors were entitled to reduce the market if they thought fit, and so there is no damage done upon that head. But there is, further, a fatal objection to that, which is this, that I do not think it has been proved in this case at all that the competition of the defenders was really the cause of bringing down the price of these nails. It appears that before the defenders came into the field at all the prices of these nails were tumbling down steadily and considerably—coming down time after time in the market—and that they came down after the defenders came into the market is not in my opinion to be placed to their doing

so. The pursuers themselves seem to have led in reducing the prices, and I think they did so, not because of the defenders' competition, but because there was a very large competition with a great many other nails, particulars of which are given by the witnesses, and so I am of opinion with the Lord Ordinary and Lord Adam that in this part of the case the pursuers also fail.

Lord Adam has proposed that we should nevertheless allow a sum of £50 to the pursuers as damages or compensation, and I quite concur with his Lordship that that may be done. The ground upon which I do that is this, that in any view there has been an infringement of these patents. I do not think that as the case was presented the pursuers have made out damage which they could recover in either of the views they put, but taking their case as one in which they might have said—although they have not so said,—“Well, at all events we must have the profit made by your using these two parts of our patent,” I think we must take it that although the profit that would be made must be of very trifling amount, there must be some profit made, because the former case sustained the patents upon the footing that there must be some profit made. But looking to the evidence as a whole, I cannot see (assuming that I must take it that these were beneficial parts of the patent which the defenders used) that it has been made out that a profit beyond the sum of £50 at the utmost could have been made by their infringement of these heads of the patent, and taking it at that, I concur with what has been proposed by Lord Adam, and have only to repeat that I concur entirely in his Lordship's views, and have only ventured to add what I have done because of the novelty and importance of the question which it raises.

LORD PRESIDENT—I entirely concur in the opinion of Lord Adam. The result will be to reduce the damages found by the Lord Ordinary from £530 to £50.

The Court recalled the interlocutor of the Lord Ordinary, and decerned for £50 instead of £530.

Counsel for Pursuers and Reclaimers—Guthrie Smith—Shaw. Agents—Gill & Pringle, W. S.

Counsel for Defenders and Respondents—Asher, Q. C.—Ure. Agents—Maconochie & Hare, W. S.

Friday, December 17.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.]

ROSS v. M'KITTRICK.

(See *ante*, Ross v. Johnston (P.-F. of Burgh of Edinburgh), vol. xxiii. p. 695, June 8, 1886).

*Reparation—Slander—Verdict—New Trial.*

A tradesman raised an action of damages for slander contained in a newspaper article charging him with dishonesty in his business. No justification was pleaded, an apology was made, and the defender admitted in evidence

that the article implied a charge of dishonesty. The verdict was for the defender. Held that the pursuer's character having been calumniated by a false charge, he was entitled to a verdict, and that the verdict must be set aside as against evidence.

Lord M'Laren *dissented*, holding that there was no substantial difference in such a case between a verdict for the defender and a verdict for the pursuer with nominal damages.

In May 1886 Alexander M'Kenzie Ross, refreshment-room keeper at the International Exhibition held that year in Edinburgh, was charged before the Burgh Court of Edinburgh with having been guilty of an offence against The Weights and Measures Act 1878, actor or act and part, “in so far as on 8th May, in his premises at the Exhibition, he used or had in his possession for use for trade 28 measures of capacity which had not the denomination thereof stamped on the outside thereof in legible figures or letters, were not of the denomination of some Board of Trade standard, and were false or unjust.”

The Magistrate (Baillie TURNBULL) convicted him of the offence charged, “except in so far as it is charged in the complaint that the measures in question were false or unjust,” and fined him £2.

The facts proved, as stated in the report of the Justiciary Case referred to *infra*, were, that he used, when a glass of whisky was ordered, vessels for measuring it off and giving it to the customer, which contained about a third of a gill. They were not of the denomination of a Board of Trade measure, and were not stamped. Each bar was, however, supplied with an imperial half-gill measure duly stamped, which was used when half-a-gill was asked for.

Ross took a Case, and the High Court of Justiciary (*diss.* Lord Justice-Clerk and Lord Craig-hill), as previously reported June 8, 1886, 23 S.L.R. 695, quashed the conviction on the ground that the sale of a “glass of whisky” is not a sale by measure in the sense of the Weights and Measures Act said to have been contravened.

Before this appeal, however, was heard, the defender of this action, William Lethan M'Kittrick, printer and publisher of the *National Guardian*, a journal connected with the licensed victualling trade, and published in Glasgow, had on 26th May 1886 published in that paper an article commenting upon the case in the Burgh Court. The article, which was written by a regular contributor to the paper, and was headed “Illegal Measures,” stated that false weights and measures were always in existence, and remarked that “small and deceiving measures” would not be appreciated unless when compared with something bigger and more just to the purchaser. “Anyway, the false measure has not been acknowledged to be in strict accordance with the provisions set down in the decalogue. Hard names have been applied to it by inspired writers, and its use has been universally condemned as unfair and dishonest. Seeing that the use of a false measure violates one of the Ten Commandments, it follows naturally enough that a portion of the moral law is thereby broken. Nothing is more certain than that an infraction of the plain injunction ‘Thou shalt not steal’ must then ensue. It is not possible to regard the position in any other light.”