Saturday, July 9.

SECOND DIVISION.

ST ANDREWS DISTRICT COMMITTEE OF COUNTY COUNCIL OF FIFE *v.* THOMS.

Process—Proof—Diligence for Recovery of Writs—Letters Written by Living Persons with Reference to Subject of Litigation—Right-of-Way.

Held that the pursuers in an action for declarator of right-of-way were not entitled to recover from the defender letters written within six months of the raising of the action, by persons still living, in answer to inquiries put by him to them with reference to the matter in dispute, in respect that such letters could not be evidence in the case.

Observations (*per* Lord Young) upon the impropriety of granting such a diligence, even with a view to recovering old letters by persons long dead, apart from special averments that such letters were in existence.

This was an action at the instance of the St Andrews District Committee of the County Council of the County of Fife against David Wedderburn Thoms, of Feddinch and Winthank, in which the pursuers sought declarator of a public right-of-way across the lands of Feddinch and Winthank.

An issue for the trial of the cause was adjusted and approved by interlocutor dated 24th May 1898.

Thereafter, by interlocutor dated 21st May 1898, the Lord Ordinary (STORMONTH DARLING) granted a diligence for recovery of the documents enumerated in a specification thereof. One of the articles of this specification was in the following terms—"(3) All letters, telegrams, memoranda, or other writings passing between the defender or any of his predecessors in the lands of Feddinch and Winthank, or either of them, or any person on behalf of him or them on the one hand, and any member of the public on the other hand, having reference to any of the matters mentioned on record prior to the date of raising the present action."

Thereafter notice was given for the sittings.

At the diet before the Commissioner (Mr F. M. Anderson, advocate), the defender being called on to produce under article 3 of the specification above quoted, deponed—"I produce three documents as per inventory, which I have signed as relative hereto. There are certain other documents I have falling within this call, which I decline on the advice of my agent to produce, but am quite willing to hand them over to the Commissioner sealed up, which I now do. I do so on the ground of confidentiality, they being of the nature of precognition after the question was raised between the parties."

The Commissioner reserved consideration of the point, and subsequently made the following interim report to the Court, of date 7th July 1898—"The Commissioner having opened the sealed packet containing letters handed to him by the defender at his examination as a haver for the pursuers on 27th June last, and which is referred to on page 6 of the foregoing report, is of opinion that the letters therein fall to be produced under article 3 of the specification No. 14 of process, but, as requested by defender's agents in their letter to him of 28th June, a copy of which was sent by them to the agents for the pursuers of like date, he has again sealed them up to await the decision of the Court on an interim report of the Commission."

Argued for the defender—These letters were all written within six months of the date when the action was raised by persons still living and in answer to inquiries made by the defender when making investigations with a view to the present action, which was then threatened. Such letters were of the nature of precognition and confidential, and the defender ought not to be compelled to produce them.

Argued for the pursuers—The letters in question fell within the specification of documents for which the Lord Ordinary had granted a diligence. [LORD JUSTICE-CLERK—I can understand how letters might be evidence with regard to a right-of-way if they were written some time ago, and by persons now dead, but how can letters written so recently by persons still alive be used as evidence? You must call the writers and examine them.] The interlocutor of the Lord Ordinary had been allowed to become final, and the Court were not now entitled to review that interlocutor and to inquire whether the diligence ought to have been granted. They admitted that the statements made on the other side of the bar as to the nature and dates of the letters were correct.

The LORD JUSTICE-CLERK intimated that the Court were of opinion that the letters were not evidence and that they must be returned to the haver.

LORD YOUNG—I should like to take this opportunity of saying that I do not think that even in the case of old letters a diligence of this kind should be granted unless upon a distinct statement that such letters exist and what they are about. A "fishing" diligence for the purpose of discovering whether there are any such letters should not be granted.

LORD TRAYNER was absent.

The Court recalled the deliverance of the Commissioner, and appointed the sealed packet to be opened up and the documents therein to be returned to the haver.

Counsel for the Pursuers — Aitken. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defender—Macfarlane. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, July 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE CELLULAR CLOTHING COMPANY, LIMITED *v.* MAXTON & MURRAY.

Trade Name — Unregistered Descriptive Name — "Cellular Cloth" — Secondary Meaning—Whether Use by Other Trader Calculated to Mislead Purchasers—Form of Interdict.

An action of interdict was raised by the proprietor of a certain fabric which he had advertised and sold for some years under the name of "cellular cloth," for the purpose of preventing a rival trader from using the name to designate goods not of the pursuer's manufacture, in such manner as to induce purchasers to believe that they were the pursuers' goods. It was maintained by the pursuers that the word had acquired in the trade a secondary meaning indicating only goods made by them, while the defenders maintained that it was a word naturally and appropriately descriptive of the fabric, and had acquired no such exclusive signification. The Court, after a proof, *refused* to grant interdict, *holding* (1) that while the word "cellular" had acquired the secondary sense claimed by the pursuers, the primary sense of the word as an ordinary description of the fabric still subsisted and was used, (2) that the defenders had not used the name so as to induce the belief that they were selling or offering for sale the pursuers' goods.

Opinion (*per* Lord M'Laren) that had the pursuers succeeded in establishing this second proposition, they would have been entitled to an interdict against the use of the name "cellular" "without a distinctive addition" or "without clearly distinguishing the goods from those of the pursuers."

An action was raised by the Cellular Clothing Company, Limited, against Messrs Maxton & Murray, wholesale shirt manufacturers, Edinburgh, craving the Court that the defenders and their agents should be interdicted, prohibited, and discharged "from using the name, word, or term 'cellular' by itself or in combination or in conjunction with any word or words describing or distinguishing or in connection with cloth or clothing so as to denote or indicate cloth or clothing not being cloth or clothing made or supplied by the complainers, and from selling or offering for sale, or causing to be sold or offered for sale, cloth or clothing not of the pursuers' manufacture, made or supplied by the pursuers, under the name, word, or term 'cellular,' and from using trade labels, window tickets, wrappers, invoices, circulars, notices, or advertisements of any kind with the said name, word, or term 'cellular' by itself or in conjunction with any other word or words thereon in connection with the manufacture or sale of cloth or clothing, bandages, sheets, curtains, shirts, or underwear not made or supplied by the pursuers, or upon or attached to any such goods or class of goods not made or supplied by the pursuers, and from publishing or issuing, or causing to be published or issued, circulars, notices, or advertisements of any kind containing or using the word 'cellular' in such way as to denote goods of the pursuers' manufacture, and from using said word in any way calculated to lead the public to infer or believe that the defenders are entitled to sell goods under the name 'cellular' which are not made or supplied by the pursuers, or that the goods which they so sell are made or supplied by the pursuers, and also from otherwise in any way infringing the pursuers' right to the name, word, or term 'cellular,' by using it in any way so as to designate any goods not made or supplied by the pursuers." There was also a conclusion for damages.

The pursuers averred that in November 1886 their managing director had designed a cloth of great hygienic value, suitable for shirtings and underwear, which had been put on the market, and the rights in which he had in 1888 assigned to them; that they had given to this fabric the name of cellular cloth, and had advertised and sold it under that name for the last ten years.

They averred—"(Cond. 3) Pursuers on all their goods sold or offered for sale have used the word or name 'cellular' to mark and designate their goods, and to indicate that the goods so marked or designated are of their make or supplied by them, and it has come to be, and is now known and recognised by the trade and by the public as distinctive and designative solely of goods made or supplied by the pursuers. The said word or name 'cellular' never was used to designate or mark cloth or clothing or other such material or fabric in the market or to the public until the pursuers did so, and when the trade or the public ask for or order cloth or clothing under the name 'cellular,' they expect and intend to be supplied with the pursuers' goods and no others."

The pursuers averred further that they had discovered several instances of traders passing off other material or fabric not of their manufacture under the term "cellular," but that in all such cases, on being remonstrated with, they had undertaken to desist, or had consented to interdict restraining them from continuing such practice."

They averred further—"(Cond. 5) In or about February or March 1897 the pursuers discovered that the defenders were selling, and offering for sale, and had sold, shirts and underclothing and cloth under the name 'cellular,' which were not made or supplied by the pursuers, and that in their pattern and quotations books, which they issued to the trade, they