

Thursday, May 13.

FIRST DIVISION.

[Lord Johnston, Ordinary.]

THE MICA INSULATOR COMPANY,
LIMITED v. BRUCE PEEBLES &
COMPANY, LIMITED.

(Reported *ante*, 6th July 1905, vol. xlii,
p. 700, and 7 F. 944.)

Expenses—Abandonment—Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10—“Full Expenses.”

The Judicature Act 1825, sec. 10, empowers a pursuer to abandon his action on condition of paying “full expenses” to the defender. *Held* that “full expenses” means expenses taxed as between party and party, but not subject to modification by the Court.

Expenses—Abandonment—Patent Cases—Precognitions—Preliminary Investigations—Expenses where no Interlocutor Allowing Proof actually Pronounced but Necessarily the next Step—A.S., 15th July 1876, General Regulation 3.

In an action for infringement of patents, in which the defenders pleaded that the pursuers' averments were irrelevant for want of specification, and the patents invalid on the grounds of anticipation and prior use, the Lord Ordinary allowed a proof, but the Court, on a reclaiming note, on the ground that the pursuers' averments were wanting in specification, recalled the Lord Ordinary's interlocutor, and subsequently, having allowed the record to be amended, remitted the case to the Lord Ordinary to proceed. Before an interlocutor formally allowing proof was pronounced, the pursuers lodged a minute of abandonment in ordinary form.

Held that defenders' expenses fell to be taxed in the same way as if a formal order for proof had been pronounced at the date of the interlocutor remitting to the Lord Ordinary, and that they were consequently entitled to the expense of taking precognitions, but that they were not entitled to the expense of making the preliminary investigations necessary to enable them to set forth on record the defences of prior use and anticipation.

Patent Cases—Expenses—Patents Act 1883 (46 and 47 Vict. cap. 57), secs. 29 (6) and 107—A.S., 15th July 1876, General Regulation No. 3.

Section 29, sub-section 6, of the Patents, Designs, and Trades Marks Act 1883 applies to Scotland, but it does not affect Scottish procedure, which is protected by section 107, and consequently it does not supersede General Regulation No. 3 appended to the Act of Sederunt of 15th July 1876.

The Judicature Act 1825 (6 Geo. IV, c. 120), sec. 10, after providing for the final adjustment of the record which is to foreclose

parties in point of fact, enacts—“... the pursuer having it in his power notwithstanding to abandon the cause on paying full expenses or costs to the defender. . . .”

The Act of Sederunt of 15th July 1876, for regulating the fees and charges of enrolled law agents practising before the Supreme Courts, in General Regulation No. 3 provides—“The expenses to be charged against an opposite party shall be limited to proper ‘expenses of process,’ without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof.”

The Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57), section 29, enacts:—“(1) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or the judge, at any subsequent time, particulars of the breaches complained of. (2) The defendant must deliver with his statement of defence, or, by order of the Court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof. . . . (6) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case.” Section 107—“In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the Court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the courts in Scotland in such an action, or in any action or proceeding respecting a patent hitherto competent to those courts.”

The Mica Insulator Company, Limited, London, brought an action against Bruce Peebles & Company, Limited, Edinburgh, concluding for, *inter alia*, interdict and damages, in respect of infringement by the defenders of two patents belonging to the pursuers. The defenders pleaded, *inter alia* (1) that the pursuers' averments were irrelevant and lacking in specification; and (4 and 5) that the patents were invalid by reason of (a) want of patentable subject-matter, (b) lack of invention on the part of the grantees, (c) anticipation, and (d) prior use.

On 27th March 1905 the Lord Ordinary (STORMONTH DARLING) allowed a proof. The defenders reclaimed, and on 6th July the Court, holding that the pursuers' averments were irrelevant for want of specifica-

tion, recalled the interlocutor of the Lord Ordinary and allowed the pursuers to lodge a minute of amendment of the record. On 3rd November 1905 the Court pronounced the following interlocutor:—“Having considered the note for the defenders, together with minute of amendment for pursuers and minute of amendment for defenders . . . Allow the record to be further amended in terms of the said minute of amendment for defenders, and the amendments having been made, of new close the record and remit the cause to the Lord Ordinary to proceed therein as accords. . . .”

On 20th July 1906, before an interlocutor formally allowing proof had been pronounced, the pursuers lodged a minute of abandonment, and the Lord Ordinary (JOHNSTON) appointed the defenders to lodge in process an account of their expenses, and remitted the same when lodged to the Auditor to tax and to report.

In taxing the defenders' account the Auditor disallowed certain items including charges for preliminary investigations made for the purpose of setting forth on record the defences of prior use and anticipation, and fees to English patent-agents consulted as to the defences. He issued the following note:—“The Auditor has not felt himself at liberty to tax this account otherwise than in accordance with the regulations laid down by the Court. He has allowed the maximum instruction fee £3, 3s., but has disallowed all the charges in reference to precognitions and other preparations for a proof, no proof having been allowed. He was referred by the defenders' agent to the case of *Armitage v. Caird*, 1859, 21 D. 1176, in which the Court in a similar case allowed certain charges of this description, and an English case was also referred to, viz., *Piggott & Company, Limited v. Corporation of Hanley*, Reports of Patent Cases, vol. 23, p. 639 (1906), in which Justice Swinfen Eady also allowed such charges.

“How far the case of *Armitage* may be held as affected by the change since that date in the practice as to charging for taking instructions, for which a fee of three guineas is now allowed instead of 13s. 4d., the fee then allowed, the Auditor cannot say, but if the matter were open he would consider it reasonable that in the circumstances some special allowance should be made to cover inquiries necessary for stating the defence, as was done in that case. Probably the allowing of a modified fee to one of the patent agents employed and a fee to the agent for instructing him and perusing his report might be the most suitable method of dealing with the matter.

“The Auditor is not sure how far the English case could be followed as the procedure there dealt with is so special. He does not remember any similar charge being allowed in his own experience, and has been unable to discover any record thereof except as above referred to.”

On 22nd May 1907 the Lord Ordinary reported the cause to the Court.

Note.—“This case, which was raised before Lord Stormonth Darling in the end

of 1904, and in which, after hearing parties in the Procedure Roll, his Lordship on 27th March 1905 sustained the relevancy and allowed a proof, was further discussed in the Inner House in July 1905, when (7 Fr. 944, 42 S. L. R. 700) your Lordships of the First Division found the pursuers' case materially wanting in specification, and consequently on 6th July 1905 recalled the Lord Ordinary's interlocutor of 27th March 1905, with a view to the pursuers considering whether they would propose to amend their record. The record was thereafter amended to the satisfaction of your Lordships, and on 3rd November 1905 it was reclosed in the Division and the case remitted to me, as in room of Lord Stormonth Darling, to proceed as accords.

“No movement was made in the case before me until July 1906, when, after some fencing between the parties, the defenders moving for a diet of proof to be fixed in order to bring matters to a point—though correctly I should have had first to pronounce a renewed order for proof—and the pursuers seeking further delay, the pursuers on 20th July 1906 lodged a minute of abandonment in terms of the statute, in respect whereof I, on that date, in ordinary form appointed the defenders to lodge an account of the expenses incurred by them. This account, amounting to £286, 16s. 9d., has been taxed by the Auditor at £69, 3s., the sum taxed off being as much as £220, 13s. 9d. On objections for the defenders to the Auditor's report a difficult question of process in relation to expenses arises.

“Under the Judicature Act 1825 the power to abandon is given to the pursuer only subject to the condition of ‘paying full expenses or costs to the defender.’ What are ‘full costs’ in the sense of the statute in the present case? The Auditor has taken the view that the General Regulations appended to the Act of Sederunt, 15th July 1876, are peremptory and admit of no exception, and that applying them he can only allow the amount at which in an ordinary case, where no order for proof had been pronounced, the account would have been taxed, and cannot allow anything for prior investigations and precognitions. While I think from his note that the Auditor felt the hardship to the defenders of his ruling in the present case, he had in my opinion no alternative except to do what he did or to report the case for instructions, and he probably took the more convenient method of dealing with the case, inasmuch as the result of applying the strict rule is made more apparent from his detailed taxation.

“I have given full consideration to the question, and shall submit the conclusion at which I have arrived, though, for reasons to be afterwards stated, I think it proper to report the case to your Lordships.

“I must refer first in greater detail to the course of procedure in the case. The action, *inter alia*, was for breach of patent, and sought interdict and damages. The patents founded on were two in number, dated in 1892 and 1895 respectively, but they had both been amended in August 1904,

very shortly before the raising of the action. They were for 'improvements in the manufacture of flexible sheets for electrical insulation,' and the material manufactured by the pursuers under their patents they describe as 'micanite' or 'flexible micanite cloth.' To the action the defenders pleaded (1) want of specification. But they also, besides (2) denying infringement, attacked the patent on the grounds of (3) want of patentable matter, (4) anticipation, and (5) prior use. Before lodging their defences, or at least before closing the record, the defenders took the course, first of all, of taking certain precognitions, and obtaining certain information as to the pursuers' alleged patents, and particularly as to a previous action in England at their instance founded on one of their patents, which action they had abandoned, and secondly of consulting two patent experts in England on the subject of their defences. The formal precognitions taken, apparently of employees in the defenders' works, were matter of little moment. The really important thing was the gathering of information in England by the defenders' agents, the consultation of patent experts, and their reports, which latter I regard both as advising as to the defence, and as the equivalent of the precognition of scientific witnesses. According to the defenders' account, all this was done prior to 27th March 1905, when Lord Stormonth Darling allowed a proof. Had that interlocutor stood unrecalled, the Auditor would have been technically able under the Act of Sederunt, 15th July 1876, to make allowance for 'precognitions' at any rate, whatever that term may cover. But that interlocutor was reclaimed against and was recalled, by reason of the original insufficiency and irrelevancy of the pursuers' statements, and therefore in the sense of the Act of Sederunt no interlocutor has been pronounced allowing a proof, which is the condition of the general regulations, appended to the Act of Sederunt, precedent to the Auditor being authorised to allow for precognitions, when the case does not ultimately go to trial.

"While the fact that an order for proof was pronounced by the Lord Ordinary and was recalled, and particularly was recalled by reason of the pursuers' failure to make a specific statement in support of the summons, cannot be left out of sight, I should not be inclined to found upon it either way, but to take the matter on broader grounds.

"During the discussion in the Inner House the pursuers saw fit to lodge a minute of amendment, which was considered by your Lordships and found not to obviate the defective specification. On judgment being pronounced, the pursuers apparently craved leave to lodge a supplementary minute, and this being granted them, there followed the withdrawal of the minute and the lodging of a new minute of amendment of record for the pursuers, which called forth a minute of amendment for the defenders, and thereafter a practically new record was made up on these

minutes and closed by your Lordships on 3rd November 1905, before the case was remitted to me. I have carefully examined the papers, and so far as I am in a position to judge, I am satisfied that the amended defences, called for by the pursuers' amended condescendence, could not have been stated without investigation such as the defenders made between the raising of the summons and 27th March 1905. The same might possibly be said of the original defences, but it is unnecessary to consider them.

"Do, then, the regulations of the Act of Sederunt of 1876 preclude the Court, in a case such as the present, from giving the defenders an allowance for the costs of such preparation for these defences, because technically there has been no interlocutor allowing proof? I think not, and I do so irrespective of the fact that the Lord Ordinary did actually allow proof, and that the recal of his interlocutor was by reason of the insufficient statements of the pursuers, who are now in the position of having to abandon their case after having occasioned the defenders considerable trouble and expense. I should have been of the same opinion had the Lord Ordinary, as your Lordships have found he should have done, held the case irrelevant and refused a proof.

"I was referred to the case of *Armitage v. Caird*, 1859, 21 D. 1176, also a patent case, in which absolvitor by default was pronounced before the record was finally closed. The Act of Sederunt regulating audit at that time was that of 19th December 1835, and though there were appended General Regulations, these contained nothing analogous to No. 3 of the General Regulations of 1876. The Court in that case allowed the defenders the expense of investigations prior to closing the record, and I cannot help being impressed by the views of the Lord President and Lord Deas, to the effect that a defender in such a case must put on record all his defences at the outset; he cannot make random statements; it is his duty to make only what he is prepared to support by evidence; the necessary inquiry to enable him to do so is one which the pursuer has 'forced upon the defender, who was pursuing in good faith an occupation which we have no reason for thinking he, at least, supposed to be unlawful.' Where the necessary inquiry is of the highly technical kind involved in a case where the question raised is of infringement of patent, it appears to me that it would work grave injustice if the defender by reason of a technicality, founded on the terms of a general regulation in an Act of Sederunt, were to be denied all allowance for the expense into which he has been forced by a pursuer, who in the end runs away from his action, admitting, as in this case, not only that it was originally in defective form, but that amend it as he will he cannot face a proof.

"I should myself have been prepared to hold that general regulations admitted of exception in the application, and that,

without making such exception here, I should not be following the direction of the Judicature Act, which is to see that the defender gets 'full' expenses. But I cannot ignore the strict view of the Act of Sederunt apparently taken by the Court in *Church*, 1883, 11 R. 398, and in *Shirer v. Dixon*, 1885, 12 R. 1013. In the first of these cases the circumstances did not meet the letter of the regulations, and the letter prevailed. In the latter of these cases I think I must read the judgment as indicating that in the view of the Court the particular proceeding was one to which the regulations did not apply, and not that in an exceptional case the regulations might be relaxed. The Court indicated no inclination to relax the general rule. The judgment therefore forms no support to me in the present case.

"But though I accept the view expressed by Lord Shand, that in order to prevent abuse in the conduct of process, the rule that parties should be required to make preliminary inquiries into facts, relevant though not within their own knowledge, at their own expense, unless a proof is allowed, is a salutary though a somewhat empirical one, I think that where a salutary general rule, if enforced to the letter in a particular case, does not prevent abuse, but occasions it, such general rule should admit of exception. And I am supported in this view by the declared object of the Court in regulation 4 being, to allow such expenses as are necessary for conducting litigation, and I conclude the particular litigation, in a proper manner. Expenses of the class here claimed for were, in my opinion, necessary for the proper conduct of the litigation. Were the question not one depending on the technicalities of Scottish procedure, I should consider the case of *Piggott & Company, Limited v. Corporation of Hanley*, 1906, 23 Patent Cases 639, as an analogous authority.

"While therefore I should personally be prepared to direct the Auditor to allow such expenses as were properly incurred in preliminary inquiries to enable the defence to be properly stated, and for that purpose to examine and tax the items charged (for I am far from saying that the charges are to be allowed as stated), I think it proper to make avizandum with the case to your Lordships for these reasons:—1st. I am not the judge before whom any of the procedure in the case has been conducted. On the contrary, the materially important part of the procedure, even to the making up of the present record, has been conducted before your Lordships. 2nd. I am prepared to allow charges which may not be held strictly to come within the term 'precognitions' used in the regulations, and 3rd. The regulations are those of the Court.

"There has been no case in which, in their present aspect, these regulations have been considered by the Court, or by either of the Divisions, and I do not think that it is within the province of a judge in the Outer House, at his own hand, and particularly in a case which only comes incidentally before him, to be the first to

introduce an exception to such General Regulations."

Argued for defenders—In patent cases the rules for making up records and taxing accounts of expenses were the same in Scotland as in England, procedure only being saved by section 107 of the Patents Act 1883. Regulation No. 3 appended to the Act of Sederunt, 15th July 1876, did not therefore apply to patent cases having been superseded by section 29 (6) of the Patents Act. In England the defenders would be entitled to recover the expenses of stating particulars if these were certified by the judge to have been reasonable and proper—Patents Act 1883, section 29 (6). Accordingly, the defenders were entitled to the expenses of any particulars for which they could have got a certificate in England. In England the Court would not order a trial merely for the purpose of ascertaining whether a certificate should be granted or not—*Wilcox & Gibb v. Janes*, [1897] 2 Ch. 71—but they would grant a certificate if they knew enough about the case to be able to certify that the particulars were reasonable and proper—*Chamberlain & Hookham, Limited v. Mayor of Huddersfield*, 1901, 18 R.P.C. 454; *Ashworth v. Horsfall & Bickham*, 1904, 21 R.P.C. 47; *Pigott & Company, Limited, v. Corporation of Hanley*, 1906, 23 R.P.C. 639. It was not necessary that the case should have gone to trial; the Court might obtain the necessary information from interlocutory proceedings—*Kerr & Hoegger, Limited, v. Crompton & Horrocks*, 1901, 19 R.P.C. 9. In the present case the Court could see that the particulars set out on record were reasonable, and the defenders were entitled to recover the expense of putting them on record. The present case should at least be dealt with on the footing that an interlocutor allowing proof had been pronounced. After the record had been amended, a proof was necessarily the next step of procedure, and it made no difference that the interlocutor did not contain the words "allow a proof." In any view, Regulation No. 3 appended to the Act of Sederunt of 15th July 1876 was not preemptory—*Shirer v. Dixon*, May 28, 1885, 12 R. 1013, 22 S.L.R. 669. The Court should exercise their discretion by seeing that the defenders got "full expenses," which in the present case meant expenses taxed as between agent and client, or at least included the expenses of the particulars which the defenders were under a statutory duty to put on the record—Patents Act 1883, section 29 (6); *Armitage v. Caird*, July 8, 1859, 21 D. 1176.

Argued for pursuers—The defenders were asking for extrajudicial expenses, and they were not entitled to such expenses in patent cases any more than in other cases. The pursuers were entitled to abandon on paying "full expenses"—Judicature Act, section 10—and full expenses meant expenses taxed in the usual way—*Ross v. Mackenzie*, June 26, 1889, 16 R. 871, 26 S.L.R. 600. *Armitage v. Caird* (*cit. supra*) was distinguishable. Even on the analogy of the English cases the defenders were not entitled to prevail. In England they would

not be entitled to the expenses of any particulars unless they had obtained a certificate that the particulars were reasonable—Patents Act 1883, section 29 (6)—and the Court would not certify unless they had before them such evidence as would enable them to say that the particulars were reasonable—*Mandleberg v. Morley*, 1895, 12 R.P.C. 35; *Bethell v. Gage*, 1897, 14 R.P.C. 699; *Pigott & Company, Limited v. Corporation of Hanley* (*cit. supra*). In the present case no evidence had been led, and the Court was not in a position to certify. No interlocutor allowing proof had been pronounced. The Lord Ordinary's interlocutor of 27th March 1905 had been recalled. It had never become final and was not an interlocutor allowing proof in the sense of regulation No. 3—*Clippens Oil Company, Limited v. Edinburgh Water Trustees*, March 20, 1906, 8 F. 731, 43 S.L.R. 540. The regulations were peremptory and applied to the present case. *Shirer v. Dixon* (*cit. supra*) was special. The defenders therefore were not entitled even to the expense of precognition—*Church v. Caledonian Railway Company*, December 22, 1883, 11 R. 398, 21 S.L.R. 268; *Malcolm v. Moore*, December 18, 1901, 4 F. 369, 39 S.L.R. 259. If the case were to be dealt with on the footing that proof had been allowed, the defenders were entitled only to the expense of precognitions and not the expense of preliminary investigations.

LORD PRESIDENT—Lord Johnston has reported to your Lordships a question that arises upon the taxation of an account. The case is the sequel of the *Mica Insulator Company v. Bruce Peebles & Company*, which is reported in the 7th volume of Fraser, p. 944. But it is as well to state, in order to make no confusion, that after the interlocutor which is appended to the report in that case the parties came back and on 3rd November 1905 your Lordships, having considered certain minutes of amendment, of new closed the record and remitted the case to the Lord Ordinary to proceed therein as accords. The parties then went back to the Outer House and for the moment nothing was done; but when the case was enrolled with the view of having a diet of proof fixed, a minute of abandonment was handed in for the pursuers, which, of course, was sustained on the ordinary terms—that is to say, on payment of full expenses, which is the condition imposed by the Judicature Act; and the question now for your Lordships, on the report of the Lord Ordinary, is upon the taxation of these expenses.

The Auditor, conceiving himself bound strictly by the terms of the third general regulation of the regulations appended to the Act of Sederunt of 1876, and finding that the original order for proof had been recalled by the Inner House and had not been technically replaced, considered that he was disentitled from allowing any expenses connected with anything that might be called preliminary investigation. The Auditor, in a note appended to his taxation

of the account, pointed out that he considered that somewhat of a hardship in the present case; and the Lord Ordinary, who in his written report has gone fully into the subject comes to this conclusion—that he should personally be prepared to direct the Auditor to allow such expenses as were properly incurred in preliminary inquiries to enable the defence to be properly stated.

Now, on the argument we have had addressed to us, really three different questions arise. The first question was whether the expenses—"full expenses"—which are imposed statutorily by the Judicature Act as a condition of sustaining a minute of abandonment meant anything different from expenses. In one sense I do not think they do, but in another sense the words are not pleonastic. I think the meaning of "full expenses" as used in the Judicature Act is this—that it took away by statute from the judge the power which the judge would otherwise have of modifying expenses. The minute of abandonment can only be sustained if full expenses are paid and not modified expenses. But then "full expenses" means, I think, expenses as between party and party, and does not admit of any other plan of taxation, such as, *exempli gratia*, between agent and client. And, accordingly, for practical purposes, "full expenses" in a minute of abandonment means precisely the same thing as "with expenses" when expenses without any qualification are awarded in an ordinary action. In other words, you are remitted to the ordinary rule of taxation. Now, that was the first question.

The second question was a question which arose upon the terms of the Patent Act, upon which Mr Sandeman submitted an ingenious argument. It raised an important point, which I think must be decided once for all. The 29th section of the Patent Act sets forth certain regulations as to what must be done in legal proceedings. In particular it deals with the delivery of what it calls particulars, and then comes the section on which Mr Sandeman founded—sub-section 6—which I shall quote in a moment. Now, your Lordships have already determined, *inter alia*, in this very case that that 29th section of the Patent Act must always be read along with the 107th section, which entirely saves Scottish procedure. Now I venture to say so far as the 29th section is concerned, although I quite feel that it is a direction to us which we are bound to attend to just as much as English judges are bound to attend to it, yet really the 29th section does nothing which the law of Scotland would not have done without it. First of all, take these branches of it which deal with the delivery of particulars and the provision that unless particulars are delivered proof shall not be allowed upon these matters. That really is no more than an expression of what our ordinary practice rules are with regard to statements on record. We should not, quite apart from that, have ever allowed in a patent case a person to go in, for instance, to a proof of prior user or prior disclosure unless he had given notice of it on record.

And accordingly we have held already that section 29 does not make it necessary in Scotland to deliver a paper headed with the name of Particulars, but that the object of it is perfectly well attained by giving notice on record in the ordinary way. Well, now I come to the sub-section which we have to deal particularly with here, and that says this—“ . . . [reads *Patents Act 1883, sec. 29, sub-sec. 6, supra*] . . . ” I venture to think that that again is an expression of what our ordinary practice would have done without it. In our views of audit we should never have allowed the costs of parts of the case that had been found to be entirely useless and did not contribute to the case at all or the eventual issue of the case at all. Of course, when you come to apply a rule of that sort to a case there are difficult questions of degree, but that is neither here nor there, the general rule is clear enough. Why that particular sub-section was put in I do not know, but I do not think it would be a difficult guess to suppose that it was put in to meet some sort of abuse which it was considered had arisen in the English practice. And, more than that, one can easily see that the phrase as it is had this effect in England, that it relegated the matter to the determination of the Judge. Now, although in one sense I have no right to know anything of these matters, because it is not my system of law, yet it is common knowledge, and I do know that there are in England many matters regulated by the Master which in Scotland are always under the determination of the judge. The effect of that section is, in England, to take these things out of the cognisance of the Master and bring them directly before the judge. And therefore again, if I hazard another guess, I think that that had very likely something to do with the genesis of the section. That sort of provision is, of course, of no use in Scotland, where all these matters are directly under the cognisance of the Judge. And therefore what it comes to is this—Are your Lordships to deal with this sub-section as putting on a statutory requirement that there should be a certificate under the hand of the judge in order to deal with what is an Auditor's question? I do not think that that sub-section was meant to operate that way at all; and I think, taken along with section 107, we are still entitled to go according to our own procedure, in which, allowed to run in its own natural channels, we shall entirely carry out the whole spirit of the enactment that is in sub-section 6 of section 29.

Well, now, that question being put out of the way, we come to the next and only other question—Whether the particular taxation here has been right. The case in this matter is somewhat peculiar. It is not a thing that can very easily recur. The course of the case was this. The pursuers came into Court alleging an infringement by the defenders, but the infringement not of a thing but of a process. Well, they had a discussion in the Outer House, and apparently there was some difficulty. The Lord Ordinary allowed a proof. The defenders

reclaimed, and said there was not sufficient specification in the pursuers' complaint to enable them to meet it, and in particular that the pursuers had not told them the way in which the defenders had infringed their process. It is evident that there is all the difference in the world between a process and a thing in this matter. If it had been that the defenders had made a certain machine or a certain thing which was like the pursuers', they would need no more specification; but if the defenders have infringed a process the pursuers must tell in what way the particular process has been infringed. That argument prevailed in the Inner House, and the Inner House thought that, as the action stood, it really was not relevant for want of specification; but, as in all cases where the action is not relevant for want of specification, they gave the pursuers an opportunity of amending. In order to let them amend, it was necessary to get out of the way the formal order for proof standing in the interlocutor of the Lord Ordinary. Accordingly, the first step was to recall the order for proof, and give the pursuers an opportunity of amending. Parties did amend, as I pointed out, and having amended and having made what, in the view of the Inner House, was a relevant record as being not wanting in specification, the record was of new closed and the case remitted to the Lord Ordinary. Now, of course, a formal order for proof was not renewed, but there was no other possible order which the Lord Ordinary could pronounce. Accordingly, my view is that, when the case went back from the Inner House, it was truly in the same situation as if an order for proof had been pronounced. The General Regulations attached to the Act of Sederunt are, of course, of the highest authority, but they are only regulations. They are merely a set of rules which the Court gives out for the guidance of the Auditor. They are not rules which any one Division sitting by itself can in any way set aside, because they have the authority of the whole Court by which one Division is bound. But, on the other hand, they are not a statute where one must necessarily stick upon the mere letter of what has been enjoined; they are merely rules for our guidance, of which we are fully entitled to interpret the spirit.

Therefore I am of opinion that we are entitled to say to the Auditor that in the peculiar circumstances of the case the spirit of the third rule is carried out by holding that here it is in the same position as if an order for proof had been pronounced. But then I am bound to say I do not think that leads to the result to which the Lord Ordinary seems to have come, because he says that he would allow such expenses as were properly incurred in preliminary inquiries to enable the defence to be properly stated. Now, unless there is a distinction between patent cases and other cases—and there is no distinction raised by the terms of the Act—I see no ground for subjecting the pursuers to the expenses of the defenders in making their case. They may have, according to the General Regula-

tions, the expense of precognition, even although in the long last the proof, with a view to which those precognitions were taken, never is held, because the case has got into such a position that they were in good faith in going on and making their preparations for that proof which was necessarily the future of the case if the case went on. It is a perfectly different thing to say that they are to have the expense of finding out what their defence is to be. It may be that there is a little hardship in it. There is always a certain amount of hardship in defending yourself against an unjust claim. But, at the same time, any opposite rule would lead to inexplicable confusion. You must hold that defenders, when they are called into Court by pursuers, know their own defence. In most cases they do. Patent cases are so far peculiar that, though they may know their own defence in the infringement proper, they may not know the whole possibilities of their defence in the way of attacking the pursuers' patent, and as prudent people they may think it is a better means of defending themselves rather to direct a counter-attack against the pursuers' patent than to rely exclusively upon the fact that they had not infringed the patent.

On the whole matter I am, upon the Lord Ordinary's report, in favour of issuing an order to the Auditor that this account should be taxed, in this case, in the same way as if, in this case, an order for proof had been pronounced in so many words at the time the interlocutor of 3rd November was pronounced; but that, beyond that, no distinction can be made between this case, in respect that it is a patent case, and any other.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

“Direct that the Auditor should tax the account of expenses referred to in the same way as if, in this case, an order for proof had been issued at the time the interlocutor of 3rd November 1905 was pronounced; but that, beyond that, no distinction can be made, in respect that it is a patent case, between the present cause and any other; and with this direction remit to the Lord Ordinary to proceed: Find no expenses due to or by either party in connection with this discussion.”

Counsel for Pursuers—Macphail—Burn Murdoch. Agents—Mackenzie & Ker-mack, W.S.

Counsel for Defenders—Sandeman—Christie. Agent—E. I. Findlay, S.S.C.

Wednesday, May 29.

FIRST DIVISION.

[Lord Dundas, Ordinary.]

DICK'S TRUSTEES v. DICK AND OTHERS.

Succession—Trust—Uncertainty—“Local or Scottish Charitable Institutions and Schemes already Constituted or which may hereafter be Constituted”—Discretion Given to Trustees Named, Assumed, the Heir of the Longest Liver, their Assignees, Trustees “Otherwise Appointed”—Time of Distribution in Absolute Discretion of Trustees.

A trustor disposed his whole estate to A, B, C, and D, “and to any other person or persons whom I may hereafter nominate and appoint, or who may be assumed into the trust hereby created, and to the acceptors and survivors, acceptor and survivor of them, the major number of those accepting and surviving and resident in Great Britain from time to time being a quorum, and to the heir of the longest liver of them, as trustees and trustee for the ends, uses, and purposes after mentioned, and to the assignees of the said trustee or their foresaids,” his whole estate; and in the last place he directed—“And believing that I will be carrying out not only my own wishes but also those which inspired my late brother in bestowing the residue of my estate in the form of donations and bequests of a benevolent and charitable nature, I do hereby leave and bequeath the following legacies, payable at such times as my trustees may find convenient, viz.,” certain sums to well-known institutions in Glasgow and one in Kilmarnock, *e.g.*, Glasgow Royal Infirmary, “and further, after satisfying the foresaid legacies, I direct my trustees to realise and convert into money the whole residue of my means and estate, but that always at such time or times or from time to time as they may think proper, and always having special regard to” an arrangement for the carrying on of his business by his employees and provisions as to the realisation of investments, “and . . . in the event of there being any residue after providing for such bequests as I may hereafter make I hereby give and grant to my trustees, whether original or assumed or otherwise appointed, full power, and I direct them at any time or times or from time to time as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue or any part or parts thereof to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include these herein-