ground alone, and though he did not, he seems to have had a pretty good idea of it. It would indeed lead to most extraordinary results if every action *ad factum præstandum* could be thus brought up to this Court, and delay and expense caused, when all the time the defender has it in his power to do what is wanted.

Now, however, that the case has come before us in this way, I do not object to the course proposed by your Lordship, and am ready to allow farther proof.

LORDS ARDMILLAN and KINLOCH concurred.

An interlocutor was pronounced by the Court allowing farther proof to be led at an early date.

Agent for Appellant—George Andrew, S.S.C.

Agent for Respondent — Alexander Morison, S.S.C.

Tuesday, October 25.

TENNANT & CO. *v.* THOMSON.

Process—Suspension and Interdict. Circumstances in which the note was passed, but interim interdict refused, the Court remarking that their uniform practice was to regulate interim possession in such a way that the least damage might be done in the meantime to either party; and yet that provision might be made for the due estimation of such damage, and for restitution to that party which should be eventually successful.

This was a reclaiming note against an interlocutor of the Lord Ordinary on the Bills (MACKENZIE) pronounced in a suspension and interdict brought by Messrs Tennant & Co. against Mr Thomson.

It appeared that Mr Thomson, who is a practical engineer, had made several inventions and improvements connected with road engines; and particularly had invented "an improved wheel for steam carriages to be used upon common roads." This invention he patented in 1867. In December 1869 he entered into an agreement with the complainers Messrs T. and M. Tennant and Co., engineers, Leith, of which the following is the substance:—

"(1) The said Robert William Thomson, in consideration of the royalty and other conditions after stipulated, hereby grants to the said second parties the sole and exclusive license, power, and authority to make, use, exercise, sell, and dispose of his said invention and patent right, and the road steamers, and apparatus connected therewith, which the said first party has by the said patent rights the exclusive right to construct, as well as the whole other powers, privileges, and authorities granted by the said letters patent . . . for and during the space of three years from the date of these presents, and that for their, the said second parties', own behoof and benefit. . . . (3) The said parties of the second part hereby oblige themselves to use their best endeavours to sell the said road steamers, and to obtain orders therefor, and will duly advertise the same, in terms to be approved by the first party. They shall do and perform all things necessary for the execution of all orders they may receive for the said invention, and with all possible despatch. They shall keep a regular and distinct account of all orders received and executed by them, which shall at all times be open to the inspection of the first party, and mark, number, and name to his approval all road steamers manufactured by them. (4) In consideration of the foresaid sole and exclusive license, power, and authority, the said second parties hereby bind and oblige themselves to pay to the said first party, and his heirs and assignees," a certain specified royalty. "(5) In the event of the said second parties being at any time subsequent to 1st July 1870 unable to make the supply of said road steamers keep pace with the demand therefor, which shall be proved by their inability to furnish one such road steamer of usual power within six weeks from receipt of the order, or to furnish twelve such road steamers within four months, then the exclusive right hereby conferred may be put an end to by the said first party. . . . (7) The said first party of the first part shall at once discontinue the manufacture of the said road steamers by himself or others on his behalf, and shall transfer to the said second parties orders for nine of said road steamers (per note annexed) which he presently holds, and the work which has been done in fulfilment of said orders, and the whole working drawings, specifications, and contracts for the said work, they paying him cost price for all said work, he reserving to himself only the royalty or premium thereon before stipulated, which orders the said second parties shall be bound to execute with all despatch under the conditions of this agreement. . . . (11) In all things relating to the subject-matter of this agreement, whether during its subsistence or at the termination thereof, and in all matters relating to the meaning of these presents, or the carrying out of the same, or any article thereof, where any question or dispute or difference of opinion shall arise between the said parties, every such question, dispute, or difference shall be, and is hereby, referred to James Leslie, C.E., whom failing to Thomas Stevenson, C.E., as arbiters in succession mutually chosen; and the parties bind and oblige themselves to implement and fulfil to each other whatever the said James Leslie, whom failing the said Thomas Stevenson, as arbiters in succession foresaid, shall determine in the premises by written awards or decrees arbitral, interim or final, under the penalty after written; and both parties bind and oblige themselves to fulfil this agreement to each other under the penalty of £500 sterling, to be paid by the party failing to the party performing or willing to perform, over and above performance. (12) The said second parties shall make no traction engines with any manner of soft or elastic tyres without Mr Thomson's approval in writing; and it is hereby agreed that if at any time the said first party should be dissatisfied with the manner in which the second parties carry out this agreement, he shall be at liberty to manufacture in his own works any engines he chooses; but the same shall not terminate the second parties' right to manufacture under this agreement."

During the period from the date of the said agreement down to 1st July 1870, the complainers received several orders for road steamers and traction engines, and executed some of them in terms of the agreement. Towards the beginning of July, however, the respondent, Mr Thomson, began to suspect that the complainers were not pushing the patent as much as he was entitled to expect under their agreement with him, but that, on the contrary, either from want of inclination or from want of machinery, &c., they were delaying the execution of some orders and losing others, in a manner very detrimental to his interest. Acting upon this

idea, he determined to bring the working of the patent back into his own hands, in terms of the 5th section of the minute of agreement already quoted. With this object, as the complainers allege, he wrote eight similar letters, of date July 2d, of which the following is a sample:—

"Gentlemen,—I beg to hand you an order for one of my road steamers, of six horse power A size, with vertical cylinders behind. This road steamer to be provided with boiler and tubes of the same height as those in the 'Old Don.' No governor or fly-wheel. The drawing of this steamer to be submitted to me for approval. This steamer is for Stockholm, and is to be packed for shipment. It is a condition that this steamer shall be completed and packed for delivery not later than six weeks from your receipt of this order, failing which I shall not be bound to take or pay for it.

I have, in addition, to intimate that if this road steamer is not completed and packed ready for delivery in six weeks from your receipt of this order, it is my intention, in exercise of the power under the fifth head of my agreement with you, to put an end to your exclusive right to make and sell my road steamers.

"Be so good as acknowledge receipt of this order.—Your obedient servant,—R. W. THOMSON."

In reply to which Messrs Tennant & Co. wrote Mr Thomson, upon 6th July,—

"Dear Sir,—I am now instructed by the directors of Messrs T. M. Tennant & Co., Limited, to write you with regard to the eight letters from you, bearing date 2d inst., purporting to hand us orders for eight road steamers.

"By the fifth head of the agreement, to which you refer, you are entitled to put an end to the agreement if, at any time subsequent to 1st July 1870, we are unable to 'furnish one road steamer of usual power within six weeks from date of the order, or to furnish twelve road steamers within four months.' We cannot help remarking it as singular, that all at once, and immediately after the 1st of July, such an extensive business as is indicated by your orders should be proposed to us, after a period of six months has elapsed during which only six steamers have been ordered. Taken along with the singular terms of the orders, and the reference in them to the fifth head of your agreement with us, and the fact that the steamers ordered all seem to differ from each other, and from anything we have made before, we cannot help regarding these orders as having been gathered up for the purpose of being launched at us after 1st July, and as being intended rather that they may not be fulfilled than for working out fairly the subsisting agreement.

"We cannot receive the letters you send us as orders which may form the basis of a contract, for the following reasons: 1st, They do not sufficiently define the steamers ordered; 2d, They do not name the prices; 3d, They do not provide for our payment; and 4th, They impose conditions which are completely at variance both with the letter and spirit of our agreement. . . .

"We think you must, from your knowledge of the extent of our works, be satisfied of our ability to comply with the provisions of article 5th, provided we begin upon a complete design which has been proved to be perfect in all its parts, and no mere experiment. Hitherto the time and money of the company has been very much wasted in experimental work upon your designs, which was frequently only put together in order to be taken asunder again. We have not complained much of this. It was almost inevitable in the case of a novel machine, all the parts of which had not been perfected at the outset; but we think that the forbearance we have shown, and the readiness which we have exhibited to enter upon expensive experiments, and develop the patent as much as possible, are meeting with a very poor return. In proof of our anxiety rather to anticipate the demand than to fall short of meeting it, we may mention that we have in progress no fewer than 17 steamers—viz., 11 of the B engine, which is the usual engine in demand, and 2 engines of the C size, and 4 of the Dunmore class—for none of which we have received any orders at all. This is in addition to a steamer of a novel kind, constructed to your order. We may say also that, notwithstanding your conduct towards us, we are despatching two engines for exhibition at the Oxford show, for which we have not been paid.

You are plainly placing yourself in a position of antagonism to us in this matter. It is a pity; for we mean to faithfully work out and insist on the provisions of the agreement, and to give the patent a fair trial; and the want of harmonious co-operabetwixt you and us must tell very much against the success of the business; and we are, dear Sir, yours truly,—T. M. TENNANT & Co., Limited."

Farther correspondence followed, and finally Mr Thomson wrote, upon July 9, stating that he must get the orders executed elsewhere, and formally withdrawing the exclusive right which Messrs Tennant held under the minute of agreement. In reply to this, Messrs Tennant wrote:—"As you are unreasonable enough to say that you will on this pretext break through the arrangements and go to other manufacturers, we are applying for an interdict. You are aware that by the agreement you and we are bound to go before the arbiters therein named with any disputes, and we are quite ready to submit the whole matter to Mr Leslie. We hold you liable in all loss, damage and expense which may be occasioned by your failure to adhere to the provisions of the agreement."

Accordingly, Messrs Tennant brought the present interdict, seeking to prohibit the respondent, and all others acting under his authority, from exercising or using in any manner of way any of the rights or privileges conferred by the letters patent upon the respondent, and by him transferred to the complainers.

The complainers pleaded—"(1) The respondent having, by the said indenture or memorandum of agreement conferred upon the complainers the sole and exclusive right to use, exercise, sell, and dispose the foresaid invention and patent right, and the road steamers and apparatus connected therewith, and that agreement being still subsisting and binding upon the parties, the respondent is not entitled to depart from the said agreement, and confer said right upon any other person or persons; (2) The respondent is not entitled at his own hand to depart from the terms of said agreement, or to declare same to be at an end, there being provision therein for the settlement of all questions or differences relating to the subject-matter thereof, or to the carrying out of the same by arbitration; (3) The respondent, by his said letter, having intimated his intention (contrary to the terms of said agreement) of having the foresaid eight road steamers constructed elsewhere than at the complainers' works, and by persons other than the complainers, the complainers are

entitled to interdict as craved, until the differences which have arisen between the parties have been settled and determined by the said arbiters."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 20th July* 1870.—The Lord Ordinary having heard the counsel for the parties, and considered the note of suspension and interdict, answers thereto, note for the respondent, No. 26 of process, and productions, passes the note; and in respect of the undertaking of the respondent, set forth in the said note, to keep an account of all road steamers manufactured under his authority by makers other than himself and the complainers, and to find full caution to make good all loss and damage occasioned by such manufacture; and, in respect of the further undertaking of the respondent in said note, to refer to the arbiter named in the agreement between the parties, No. 4 of process, the questions stated in the said note, on the respondent finding caution as offered, refuses interim interdict.

"*Note.*—It is provided by the Patent Law Amendment Act, 15 and 16 Vict. c. 83, sec. 35, that a book, entitled 'The Register of Proprietors,' shall be kept at the office appointed for filing specifications in Chancery, wherein shall be entered any assignment of or license under any letters patent, and the district to which such license relates, with the names of the persons having any share or interest in such letters patent or license, and any other matter or thing relating to or affecting the proprietorship in such letters patent or license; and it is thereby provided 'that, until such entry shall have been made, the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent, and of all the licences and privileges thereby given and granted.'

"The complainers, under the agreement between the parties, No. 4 of process, claimed for three years, from 17th December 1869, the sole and exclusive license to make, use, sell, and dispose of the respondent's invention granted to him by his letters-patent, for 'an improved wheel for steam carriages to be used on common roads, and the road steamer and apparatus connected therewith, as well as the whole powers, privileges, and authorities granted to the respondent by the said letters patent, and that within the United Kingdom.' This agreement or license has never been recorded in 'The Register of Proprietors,' appointed by the foresaid Patent Law Amendment Act to be kept. It was maintained by the respondent that, under the foresaid section of the statute, he, as grantee of the letters patent, must be deemed and taken to be the sole and exclusive proprietor thereof; and he cited the case of *Chollett* v. *Hoffman*, 30th April 1857, 26 Law Journal, Q.B. 249, in support of this claim. In that case the plaintiff, founding on an indenture assigning to him certain letters patent, raised an action for infringement of the patent. It was objected to his title that the indenture was not registered in pursuance of the statute. On the trial this objection was sustained, and a verdict directed for the defendant. A rule for a new trial, on the ground of misdirection, was discharged. Lord Campbell, C.-J., delivered the judgment of the Court, and stated that 'till the entry is made, no legal interest passed by the indenture, and nothing beyond a right to have the title completed.' The Lord Ordinary is of opinion that, in respect of this objection to the complainer's title, he cannot grant interim interdict, and that the note should be passed to try the question. The Lord Ordinary is also of opinion that the same course should be followed on other grounds. The question whether interim interdict should or should not be granted in this case depends upon the injury which the granting or refusing it would inflict. The complainers refused the eight orders sent them by the respondent on 2d July 1870, and made no counter proposal with regard to them. The respondent undertakes to exact the same royalty which the complainers pay him from any manufacturer whom he may employ. He offers to keep an account of all road steamers constructed for him, and to find full caution for all loss and damage which the complainers may sustain by reason of such manufactures; and he also undertakes to refer to Mr Leslie, whom failing to Mr Stevenson, the questions raised by him under the agreement whether he is entitled to rescind the agreement, in consequence of the complainers' failure to execute orders between the date of the agreement and 2d July 1870, and of their refusal to accept the eight orders sent them on second July; and, in consequence of their refusal to make the supply of the road steamers keep pace with the demand, the complainers cannot, it is thought, suffer in such circumstances any loss, or be put to any inconvenience by the refusal of interim interdict. But if interim interdict were granted, the respondent might suffer serious loss and damage, not only from the loss of the royalties on the eleven road steamers for which he had received orders, and on other orders which may come in, but also by reason of the demand for his road steamers being diminished and injured in consequence of the failure to accept and fulfil orders. The injury to the respondent so occasioned might never be repaired during the remainder of the limited period specified in the letters patent."

While in the Bill Chamber the respondents had lodged the following minute in process:—"The respondent states that in case the Lord Ordinary should think proper to refuse the application for interim interdict, he will undertake to keep an account of all road steamers manufactured by other makers under his authority, and to find caution for damages in common form; and, *in the same event*, also to refer to Mr Leslie, whom failing Mr Stevenson, the arbiter named in the agreement, the questions—(1) Whether the respondent is entitled to rescind the agreement in consequence of the complainers' failure to execute orders between the date of the agreement and 2d July, together with their refusal to accept the eight orders sent on 2d July? (2) Whether, under article 5 of the agreement, the respondent is now entitled to terminate the complainers' exclusive privilege, on the ground that they have failed to make the supply of the road steamers keep pace with the demand?" But the complainers, not being satisfied with its terms, reclaimed.

SOLICITOR-GENERAL, WATSON, and TRAYNER, for the complainers and reclaimers.

The LORD ADVOCATE and J. M'LAREN for the respondents.

At advising—

LORD PRESIDENT—The grounds upon which the Lord Ordinary has proceeded are quite sound. In respect of the undertaking of the respondent set forth in his note No. 26 of process, the Lord Ordinary was quite right to withhold interim interdict. The object in cases such as this is to

regulate the interim possession in such a way as to do least damage in the mean time to either party, and at the same time to provide sufficiently for proper restitution being made for any damage suffered to the party who shall be found in the right when the case is over. This principle has frequently been applied by this Court—notably in the case of disputed rights of salmon-fishings; also in the case of possession of land under disputed titles—as far back as the case of *Roebuck and Stirling*. The Lord Ordinary has taken every necessary precaution. He has obtained an undertaking from the respondent "that he will keep an account of all road steamers manufactured by other makers under his authority." He has also required him to find full caution for all damages the complainer might suffer; and to bind himself to go before the arbiter in terms of the agreement, and lay before him two questions against which the complainer has now nothing to say. He admits that they contain the questions in dispute between the parties, and does not suggest any alterations. Now there is no other way in which we could so well secure the interests of both parties, and particularly those of the respondent. Every day and hour are of importance to him in the exercise of his patent—every day and hour but are so much of his fourteeen years gone. Moreover, it would be impossible afterwards to determine what his damages had been. Were we to take a different course from that taken by the Lord Ordinary, and leave the complainers in the sole exercise of the patent, they might neglect to take proper advantage of it, and the loss to the respondent never be ascertained. It is far better to let the respondent provide against his own prospective loss than leave that loss to be afterwards estimated upon insufficient data. On the other hand, it appears to me that the complainers are completely protected by the terms of the Lord Ordinary's interlocutor. Were we to reverse that interlocutor, I am quite sure we should be taking a course far less likely to do justice between the parties.

LORD DEAS—One of the questions before the Lord Ordinary was whether this dispute between the parties came within the reference in their agreement. Even if it did not, I consider that the Lord Ordinary's interlocutor would have been reasonable. But now it is admitted that the dispute does come under the reference; and the respondent now says he is willing to go before the arbiter. Instead of acceeding to this, what do the complainers do? They insist upon going on with the litigation. They do not wish any alterations made upon the questions which the respondent proposes to lay before the arbiter, but they waste from the 20th of July till now in coming before us and trying to get the Lord Ordinary's judgment on the subject of the interim interdict reversed. The question is whether the complainers are to have interim interdict while the case goes before the arbiter. Such a proceeding would be beneficial to neither party; and I consider the Lord Ordinary to have rightly refused it.

LORD KINLOCH concurred.

LORD ARDMILLAN absent.

Lord Ordinary's interlocutor affirmed.

Agents for Appellant—Murdoch, Boyd & Co., S.S.C.

Agents for Respondent—Millar, Allardice, & Robson, W.S.

REGISTRATION COURT.

(Before Lords Benholme, Ardmillan, and Ormidale.)

Monday, October 24.

BLACKWOOD *v.* ALEXANDER.

Franchise—Feu-duty, Return of, to the Assessor—County Voters Act 1861, §§ 5 *and* 8—*Reform Act* 1868, § 16. *Held* that an elusory feu-duty was adequately expressed by the word "none" in the return made to the assessor under the County Voters Act 1861, § 5, and schedule (A) appended to that Act, and also in the list made up under § 8 of that Act and § 16 of the Reform Act of 1868; and that the assumption was that such was a correct description of the feu-duty, until proof was led to the contrary.

The Sheriff (G. NAPIER) stated the following Special Case:—

"At a Registration Court for the county of Peebles, held by me at Peebles on the 15th and 16th of September 1870, under 'The Representation of the People (Scotland) Act 1868,' and other Acts therein recited, William Blackwood, writer, residing at Minden, Peebles, a voter on the roll, objected to the name of James Alexander, weaver, West Linton, entered on the assessor's list of voters, being added to or continued on the roll of voters for the said county.

"The said James Alexander stood upon the assessor's list as proprietor of dwelling-house, shed, byre, and pertinents at West Linton. The subjects were entered in the valuation roll as of the annual value of £5, 1s. In the return made by James Alexander to the assessor under the Lands Valuation Act, in the column in which he was required to insert the amount of the feu-duty or ground-annual, &c., there was inserted the word 'none,' and that word was inserted in the like column in the valuation roll. The titles produced by the said James Alexander showed that the said subjects were held by him under an *a me vel de me* holding. The disposition in his favour also contained the following clause: 'And we bind ourselves to free and relieve the said James Alexander and his foresaids of all feu-duties, casualties, and public burdens.' No other written evidence as to liability for feu-duty, or its amount, was offered on either side.

"James Alexander was examined as a witness, under protest taken by the objector, that parole proof of the amount of the feu-duty or reddendo payable by him was incompetent, when the following facts were elicited. That Alexander had never paid any feu-duty, and had never been asked to pay any; that he had made no inquiry as to who was, and could not tell who was, the over-superior of said subjects, and that he believed there was no feu-duty, because he found in the disposition in his favour the clause above quoted. That it was in respect of that clause, and of the facts that he had never been asked to pay, and had never paid any feu-duty, that he stated in his return to the assessor that there was no feu-duty.

"The assessor had made no inquiry regarding the feu-duty, but had entered 'none' solely upon the return furnished to him by the said James Alex