would fall upon the debtor who had the least share in causing the injury.

I have not hitherto noticed the English case of *Merryweather* v. *Nixan*, 8 T.R. 186. Assuming it to be an authority establishing the general rule for which the appellant contends—a proposition which seems to admit of doubt—I can only regard it as a positive rule of the common law of England, which is inconsistent with and ought not to override the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptation.

For these reasons I am of opinion that the interlocutor appealed from is right, and ought to be affirmed with costs.

LORD HALSBURY—I concur with the proposition that the case of *Merryweather* v. *Nixan*, 8 T.R. 186, has been so long and so universally acknowledged as part of the English law that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated; but I am not prepared to differ from the views entertained by the Lord Chancellor and my noble and learned friend Lord Watson when dealing with the jurisprudence of Scotland.

The difficulty which has arisen is, I think, one of words. The word "tort" in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But "tort" in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or quasi-delicts and delicts proper is reasonable and just, though I doubt whether in dealing with an English case one would be at liberty to adopt such a distinction. It becomes unnecessary to consider the form of the suit, but I think that in England the transmutation of the cause of action into a judgment would not prevent the application of the principle of *Merryweather* v. *Nixan*, 8 T.R. 186.

LORD SHAND—I also am of opinion that the appeal in this case should be dismissed, and having had an opportunity of reading and considering the opinions which have just been delivered by the Lord Chancellor and my noble and learned friend opposite, Lord Watson, I have nothing to add to the reasons which have been given by him.

The House affirmed the decision of the First Division, and dismissed the appeal with costs.

Counsel for the Appellant—Sir R. Webster, Q.C.—T. Shaw. Agents—Parker & Ponsford, for Macpherson & Mackay, W.S.

Counsel for Respondents—Sol.-Gen. for Scotland (Asher, Q.C.)—Salvesen—T. F. Dawson Miller. Agents—Thomas Cooper & Company, for Boyd, Jameson, & Kelly, W.S.

Tuesday, June 5.

(Before the Lord Chancellor (Herschell) and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

STEVENSON *v.* STEVENSON.

(*Ante*, vol. xxxi. p. 350.)

Parent and Child—Custody of Children—Husband and Wife—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *sec.* 5.

This case is reported *ante*, vol. xxxi. p. 350.

Mr Stevenson appealed.

The House, on the undertaking of the appellant to abandon the proceedings in England and to commence without delay an action for judicial separation in Scotland, and to proceed therein with due diligence, recalled the interlocutor appealed against, and remitted the cause to the Court of Session to sist the proceedings appealed against *in hoc statu* pending the decision of the wife's action; the wife to have the interim custody of the children; the husband to have reasonable access.

Counsel for the Appellant—The Lord Advocate (J. B. Balfour, Q.C.)—Levett, Q.C. Agents—Bower, Cotton, & Bower, for J. Murray Lawson, S.S.C.

Counsel for the Respondent—Graham Murray, Q.C.—H. Tindal Atkinson. Agents—Murray, Hutchins, & Company, for Maconochie & Hare, W.S.

Monday, June 11.

(Before the Lord Chancellor (Herschell) and Lords Watson, Morris, and Russell.)

INSTITUTE OF PATENT AGENTS *v.* LOCKWOOD.

(*Ante*, vol. xxx. p. 375, and 20 R. 315.)

Patents, Designs, and Trade-Marks Acts of 1883 (46 *and* 47 *Vict. cap.* 57), *sec.* 101, *and of* 1888 (51 *and* 52 *Vict. cap.* 50), *sec.* 1—*Board of Trade—Power to Make Rules—Rules Laid before Parliament and not Objected to, Held ultra vires.*

By section 1 of the Patents, Designs, and Trade-Marks Act 1888, amending the Patents, Designs, and Trade-Marks Act 1883, it was enacted (1) that after 1st July 1889 no person should describe himself as a patent agent unless registered as such in pursuance of the Act; (2) that the Board of Trade should from time to time "make such general rules as are in the opinion of the Board required for giving effect to this section," and the provisions of section 101 of the principal Act should apply to all rules so made; (3) "provided that every person who proves, to the satisfaction of the Board of Trade, that prior to the passing of this Act he had been *bona*

fide practising as a patent agent, shall be entitled to be registered as a patent agent in pursuance of this Act; (4) if any person knowingly describes himself as a patent agent in contravention of this section he shall be liable on summary conviction to a fine not exceeding £20."

Section 101 of the Act of 1883, *inter alia*, provides that any rules made in pursuance of it shall be laid before both Houses of Parliament, and that if either House of Parliament should, within 40 days after the rules had been laid before them, resolve that the rules ought to be annulled, the same should be of no effect after the date of such resolution.

The Board of Trade, in virtue of the powers thus conferred, issued certain rules providing, *inter alia*, that an annual fee of £3, 3s. should be paid by every registered patent agent, and that the name of any patent agent not paying such fee should be removed from the register. These rules were laid before Parliament and not objected to.

Thereafter a person who had proved, to the satisfaction of the Board of Trade that he had practised *bona fide* as a patent agent prior to the passing of the Act of 1888, and who had been registered as a patent agent, refused to pay the annual registration fee.

The keepers of the register thereupon removed his name from the register, and as he continued to describe himself as a patent agent they brought an action of interdict to stop him from doing so.

Held (*recalling* the interlocutor of the First Division in as far as it assoilzied the respondent, but otherwise *affirming* it, although on different grounds) that the rules having been laid before both Houses of Parliament for 40 days without being annulled, were "of the same effect as if they were contained in the" statute, and as long as they remained in force it was not competent to question their authority; and secondly, that the right mode of procedure against an unregistered patent agent was by way of summary proceeding for the penalty.

Lord Morris, while agreeing that these rules were *intra vires*, dissented from the view that it was not competent for the Courts to question the validity of the rules.

This case is reported *ante*, vol. xxx. p. 375, and 20 R. 315.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — In this case the summons of the present appellants claims a declaration that the defender was not registered as a patent agent in pursuance of the Patents, Designs, and Trade-Marks Act 1888, and was not entitled to describe himself as a patent agent; and in the second place, that the defender ought and should be interdicted, prohibited, and discharged from describing himself as a patent agent. The pursuers in the action were the Institute of Patent Agents and three registered patent agents practising in Glasgow. An interdict in the terms concluded for by the summons was granted by Lord Low, the Lord Ordinary, who came to the conclusion that the defender had held himself out as a patent agent when not registered, and that he was therefore liable to be interdicted in the manner prayed.

When the case came before the Second Division of the Inner House they recalled the interdict. They came to the conclusion that although the defender was not registered as a patent agent, and had been holding himself out as such without being registered, his name had been improperly removed from the register by the Institute of Patent Agents or the registrar appointed; and, consequently, that although not registered, he could not be treated as having committed an offence by so holding himself out. The majority of the learned Judges came to the conclusion that the rule under which the registrar had purported to erase his name was invalid, being *ultra vires* although duly made by the Board of Trade with the formalities and in the manner prescribed by the Act. They came to this conclusion on somewhat different grounds, to which I shall have to call attention in a moment. I will first state to your Lordships what are the statutory provisions, and what are the rules made under them.

Provisions relating to the registration of patent agents were first made in the year 1888 by 1st section of the Patents, Designs, and Trade-Marks Act of that year, which provided that after the 1st of July 1889 a person should not be entitled to describe himself as a patent agent unless registered as such in pursuance of the Act; and, next, that the Board of Trade should as soon as might be after the passing of the Act, and might from time to time, make such rules as were in the opinion of the Board of Trade required for giving effect to the section. It contains a further provision, which I shall have occasion to call attention to hereafter. It also provides that "If any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding twenty pounds."

It will be observed that the enactment does not provide for the manner in which the register is to be formed, who is to be the registrar, the formalities requisite for registration, or any particulars in relation to it, but leaves it to the Board of Trade to make such general rules as in their opinion are required for giving effect to the section, the effect of course intended by the Legisture being the establishing a complete system of registration for patent agents. The Board of Trade accordingly made a number of rules, and amongst them a rule requiring a certain fee to be paid on first registration, and an annual fee of three guineas so long as the person continued on the register, and providing further that

non-payment of the prescribed fees should be a ground for erasing the name from the register.

My Lords, the Lord Ordinary considered that those rules were *intra vires*. The majority of the Inner House appear to have thought that no rules with reference to fees could be *intra vires*, inasmuch as the power to impose fees was not expressly conferred. Lord Rutherfurd Clark, I gather, dissented from that view, and concurred with the Lord Ordinary in thinking that some fees might be properly imposed by rules. He said—"It is quite possible that fees may be exacted for the maintenance of the register, but the fees which are fixed by the rules are plainly in excess of what is required for that purpose, and it is equally plain that they were not imposed in order to carry that purpose into effect." I am unable to see upon the record any foundation for that conclusion. It seems to be suggested that there was an admission that they were larger than would be required for such a purpose, but no such admission has been made at the bar, nor does it appear on the record, and I cannot but think that there was some misapprehension as to there being an admission going to that extent.

I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a court of law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed. Such a department as the Board of Trade is very much more competent to determine a question of that description than judges can possibly be, and it would be, I think, not an improvement upon any scheme of legislation which gave power to fix fees if those fees were made subject to the control of the judges according to their views of what fees were reasonable or unreasonable.

The question whether there is power to impose a fee at all is no doubt a much more serious question. The contention on the part of the respondent is, that there being no express power given to impose fees, it can never be supposed that it was intended to commit to a public body without express sanction and authority the power to impose taxation, which this in effect is. I cannot myself regard this as properly called taxation. The Statute of 1883, of which this Act in many particulars is an amendment, creates a register, or, at all events, continues a register, and it provides that the Board of Trade, with the sanction of the Treasury, may regulate the fees to be required for registering and doing other acts in connection therewith; and of course the fixing of fees for a great variety of matters being left to a rule-making body is a description of legislation thoroughly well understood. It is every-day practice of those to whom rule-making is committed to have committed to them also the fixing of the fees which are to be paid in relation to matters to be done under the rules. There is therefore nothing novel in legislation of this description. But it is said that no such right is expressly conferred. My Lords, it is impossible to my mind to conceive wider language than that which is used in the second sub-section of the 1st section of the Act of 1888. The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade. The section itself contains no provision with reference to the register or the registrar or proceedings on registration, or any of those matters, but it gives very wide power to the Board of Trade to make such rules as are in their opinion required for giving effect to the section. It seems to me that thereupon it was their duty to make all the rules necessary for making the legislation contemplated by the section effective. The Legislature must be taken to have contemplated that a register could not be made without some one filling the office of registrar, or some corresponding office; that any person performing those duties would require a payment for performing them; that the funds not having been expressly found by Parliament, must be somehow or other provided; and seeing that the system and scheme of the legislation under the previous Act had been that fees on registration should at all events go towards the expenses of paying for registration, I cannot but think that it was well within the scope of this enactment that the Legislature should entrust the Board of Trade, who were to make these rules, with the power of fixing such fees as they thought reasonable and necessary for carrying into effect the purposes of the section. Unless they had done so, it seems to me very difficult to say that it would have been possible to carry them into effect at all. With all deference to the learned Judges who have taken a different view, it appears to me that the conclusion at which they have arrived has been induced by not sufficiently regarding the method of legislation which has been followed in the section now under consideration, and not observing that it was the intention of the Legislature, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade.

My Lords, what I am about to say bears also upon the further question which has been argued. It is said that this would be a very large power for the Legislature to commit to any other body, but it must be remembered that it is committed to a public department, and a public department largely under the control of Parliament itself; and not only so, but inasmuch as the section provides that these rules are to be dealt with in the same manner, and subject to the provisions contained in the 101st section of the previous Act, the result is to leave the matter completely in the control of Parliament, because any of the rules made by the Board of Trade may be

annulled by either House of Parliament within forty days after they are laid on the table, and the laying of them on the table is made compulsory. Therefore, my Lords, I can see nothing extraordinary in leaving to such a body as the Board of Trade the powers which are in question in this case, at all events when the exercise of their functions by a great public department of State, itself under the control of Parliament, is placed directly under the control of Parliament also, and made subject to its direct action.

That really would be sufficient to determine that these rules were such as the Board of Trade were entitled to make. I will say one word, however, before leaving this part of the subject, upon the point suggested that they involved something harsh or unfair as regards the respondent, inasmuch as it was said that before this he could exercise his profession or calling of a patent agent without any registration, without the payment of any fee, and now he can only do so and represent himself as a patent agent by paying an annual fee to keep on the register. That is, in a sense, perfectly true; but, on the other hand, it must be remembered that the position of a patent agent on the register, when nobody not on the register can call himself a patent agent, is a position very different, and in many respects much more advantageous, than that which he occupied before, and I am not prepared to say that there is any hardship in imposing a small and reasonable fee upon a man who obtains that advantage in order that the register, in the interests of the public, may be carefully and properly maintained.

Then it is said that a right expressly given him by the statute is interfered with, inasmuch as the statute provides that "Every person who proves to the satisfaction of the Board of Trade that prior to the passing of the Act he had been *bona fide* practising as a patent agent shall be entitled to be registered as a patent agent in pursuance of this Act." Well, my Lords, a complaint is not now made that he was not so registered. It is sought to read this statute as if it ran thus—"Shall be entitled to be registered, and ever thereafter maintained on the register," which does not appear to me to fall within the language of the Act. But further than that, the argument loses sight of this, that he is only entitled to be registered in pursuance of this Act. Now, where is there anything in this Act about his title to be registered at all, or how he is to get on the register, or who is to put him there, or what register it is to be, and kept by whom? Nothing of the sort is to be found in the section. The words "in pursuance of this Act" only become intelligible if you read into the section, as the statute provides you shall, the rules which are made under sub-section 2. But if you read into the section, as showing how he is to be registered in pursuance of the Act, the rules made under sub-section 2, then of course every rule which is *intra vires*, at all events (putting aside for the moment the other question), is to be read into the section, and have just the same effect as if it had been contained in the Act itself, and if so, it is impossible to say that he can claim to be registered otherwise than in the manner which the statute as filled up, if I may say so, by the rule provides.

So far I have dealt with the question whether the rules are *intra vires*, but there is no doubt another very important question which has been argued before your Lordships, namely, whether this question can be canvassed in the courts, when once the rules have been made by the Board of Trade and laid as provided on the tables of both Houses of Parliament. It is said that it is only rules properly made under sub-section 2 which can become part of the Act and be treated as such.

My Lords, the words of sub-sec. 2 are—"The Board of Trade shall, as soon as may be after the passing of this Act, and may from time to time make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of section 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Therefore any rule which in the opinion of the Board of Trade is required to be made in order to give effect to the section is a rule made pursuant to the provisions of sub-sec. 2, and any rule made pursuant to the provisions of sub-sec. 2 is to be dealt with as if made in pursuance of section 101 of the principal Act. Now, let us see what is to be the effect as regards rules made in pursuance of section 101 of the Act of 1883. First of all, "the Board of Trade may from time to time make such general rules and do such things as they think expedient," and their "general rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." The "subject as hereinafter mentioned" is this, that they are to be laid before Parliament and remain before Parliament for consideration for forty days, and during those forty days they may be annulled by a resolution of either House. If not so annulled, or until so annulled, what is the effect? They are to be "of the same effect as if they were contained in this Act." My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same, that every person must conform himself to its provisions, and if in each case a penalty be imposed, any person who does not comply with the provisions, whether of the enact-

ment or the rule, becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference if it is open to consideration whether it be so or not.

I own I feel very great difficulty in giving to this provision, that they "shall be of the same effect as if they were contained in this Act," any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it. Those are points which I need not dwell upon on the present occasion.

Although it is not necessary for the determination of this case to express an opinion upon it, yet as the matter has been so much discussed, I think it only right to express the opinion which I entertain, that the words to which I have referred are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words I believe to be found in legislation only in comparatively recent years, and it is difficult to understand why they have been inserted unless with the object I have indicated.

I have dealt at length with the question whether this rule is *ultra vires* or not, and whether it can be so treated, because it is the ground upon which the decision proceeded in the Court below, and inasmuch as an adverse view was expressed to the validity of the rule, it appears to me well that, differing as I do from that view, I should express my differing opinion.

But that does not really conclude this case. The further question remains which was dealt with in some subsequent observations of one of the learned Judges—Lord Young—whether, even assuming that the rule is bad, assuming that the name of the defender was properly erased, assuming that he had no right to practise as a patent agent, assuming that by doing so he rendered himself liable to the penalty prescribed, it is open to the Institute of Patent Agents and three practising patent agents to come to the Court of Session and ask for the conclusions to be found in the summons of the pursuer. My Lords, upon that I confess, with all deference to the Lord Ordinary, I cannot but entertain a very strong opinion. You have here, for the first time, a new offence created—the offence of practising as a patent agent without being on the register. But for the enactment creating that offence the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature having created that new offence, has prescribed the punishment for it, namely, a penalty of £20. Can it possibly under these circumstances be open to bring the individual, not before the summary court at small expense to determine the question of his liability to a £20 penalty, but to bring him before the Court of Session with its attendant expense, and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure, and the £20 penalty, but would be liable to imprisonment for breach of the interdict.

My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison.

For these reasons I think that this action was not competent. It is not necessary to decide whether there are any cases in which a declaration might be asked. The only declaration asked here is a declaration of the law contained in the 4th sub-section of section 1, and a declaration that the defender has broken the law. That is the only declaration asked for. Obviously the sole object of the action is an interdict.

Although not on the grounds on which the Court below have proceeded, I concur in the result that the action cannot be maintained, and move your Lordships that the appeal be dismissed. Although I differ, and I believe all your Lordships differ, from the Court below in the grounds upon which you are dismissing the action, yet I

do not think it ought to make any difference with regard to the costs, because for the reasons I have given I think that the proceedings ought never to have been taken, that the defender might well defend himself on any ground he could, and that therefore the appeal should be dismissed with costs.

LORD WATSON—I am of the same mind with the Lord Chancellor on both the points which he has discussed. I agree with the noble and learned Lord that it is impossible to sustain the judgment of the Second Division upon the grounds which have been assigned for it, but that the judgment is right upon a ground which was pointed out by Lord Young at the close of the advising.

It appears to me that were the House to sustain the present action as a competent one it might lead to very unfortunate results. In reality this is a case in which the interference of the civil tribunal was invoked for the purpose of repressing that which the Legislature intended should be dealt with as a crime. I do not think it was intended by the Act of 1888 to create in the patent agents whose names are on the register a right which they could defend against those who use the term "patent agent" without having their names on the register by means of a resort to the Court of Session. On the contrary, I think it was the plain meaning of the Legislature that when a man whose name was not on the register chose to hold himself forth as a patent agent, the full measure of punishment to be inflicted upon him should be a fine within the sum limited, viz., twenty pounds, to be fixed by a summary court of criminal jurisdiction. There is a mass of statutes regulating sanitary and other improvements for the benefit of the general public, which every neighbouring member of the public has a certain interest in seeing enforced, as to which it would never do to permit the civil courts to adjudicate. It is clear, upon the face of such legislation, that breaches of those laws were intended to be dealt with simply as a matter of police regulation, to be punished by a fine. Here, in the Act of 1888, the main intention of the Legislature appears to have been to protect poor inventors from being robbed by unskilled patent agents who failed to make a specification and claim in such a form as would secure to them the fruits of their invention.

Upon the other point, looking to the view which your Lordships take of the incompetency of this suit, it is certainly not necessary for its decision to observe upon the grounds which found favour with the learned Judges of the Second Division, but I concur with your Lordships in thinking that although the question does not arise in this case for judicial determination, still seeing that the point has been decided in the Court below, and that we have heard full argument upon it, it is right that your Lordships should express an opinion. I must say that for my own part I have felt very little difficulty in rejecting the view which commended itself to the learned Judges of the Court below.

The first section of the Act of 1888, by sub-sec. 1, imposes a prohibition upon persons whose names are not on the register against using the description of "patent agent;" and the next sub-section lays upon the Board of Trade the duty of making bye-laws or regulations for establishing and maintaining a register of patent agents, those who had been patent agents before the date of the Act having their names inserted as a matter of course if they complied with the regulations; those who were not in that position, and who were subsequently admitted, having their qualifications tested by examination or in some other mode.

Now, it appears to me that the whole scheme was left to the discretion of the Board of Trade, and it is impossible for me to say that looking to those regulations, the Board of Trade have in any measure exceeded that discretion. It was by their opinion, not by any judicial opinion, that the matter was to be determined. The Legislature retained so far a check that it required that the regulations which they framed should be laid upon the table of both Houses, and of course these regulations could have been annulled by an unfavourable resolution upon a motion made in either House. But what is to be the effect if no such motion be made or carried, or if a motion hostile to the scheme be made in both Houses and rejected by both? The statute makes no difference between these cases. The views expressed by the learned Judges in the Court below, so far as I understand them, would in the latter case make it competent for the Court to inquire at its own hand whether or not the Board had kept within the statute although the Legislature had declined to interfere.

But I think that all doubt upon that subject is entirely removed by the terms of sec. 101 of the Act of 1883, which for all practical purposes is incorporated with sec. 1 of the later Act. "Any rules made in pursuance of this section" in applying the earlier statute to the later must be read as, "Any rules made in pursuance of sec. 1, sub-sec. 2, of the Act of 1888;" and assuming that the regulations before us were made by the Board of Trade in pursuance of section 1, sub-sec. 2, of the Act of 1888, then in that case these words apply—"Shall be of the same effect as if they were contained in this Act, and shall be judicially noticed." My Lords, in regard to those words which I have just read, I do not think I can express my opinion more clearly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself.

LORD MORRIS—I am quite of the same opinion as the noble and learned Lords who have preceded me, viz., the noble and learned Lord upon the woolsack, and my noble and learned friend opposite, on the two main propositions — first, that the action was incompetent, as being brought by persons who had no right to an inter-

dict; and secondly, that the general rules made by the Board of Trade in this case are *intra vires* and come within the powers conferred upon them by sec. 1, sub-sec. 2, of the Act of 1888, combined with sec. 101 of the Act of 1883.

I could add nothing usefully, and therefore would not waste your Lordships' time by saying more, except that I cannot go to the further proposition which, as I understand, the noble and learned Lord on the woolsack has laid down, that it is not competent for the courts of justice to consider whether these general rules are *intra vires* or *ultra vires*. I am of opinion that it is not alone competent for the courts of justice to consider, but that it is their duty to consider whether the rules are *ultra vires;* that there is no power delegated by the Legislature to the Board of Trade to make any general rules which when made are to be considered *intra vires* provided they are laid before both Houses of Parliament, and provided that nobody has taken the trouble either to read them or to make any motion upon the subject.

Sub-sec. 2 of sec. 1 of the Act of 1888, which has been repeatedly referred to, enacts—"The Board of Trade shall as soon as may be after the passing of this Act and may from time to time make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of sec. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Sec. 101, sub-sec. 3, which is to be read with that, is —"General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." Now, I admit that the words are very strong; the general rules are to have the same effect as if they were embodied in the Act: I accede to that. But what general rules? General rules which are made for "giving effect" to that section; not all general rules—there is no such power in my opinion given to the Board of Trade. What are the general rules which are to have the same effect as if they were contained in the Act? The general rules made under the section — general rules such as the Legislature has, under sec. 101, delegated to the Board of Trade the authority of making. But if a court of justice (before whom all these questions must ultimately come) considers that certain rules are rules which do not come within this section, in my opinion they would be *ultra vires*, and it would be the duty of the Court not to regard them as operative. As regards the question of their receiving any further sanction from the fact of their being laid before both Houses of Parliament, that is a matter of precaution; they do not receive any imprimatur from having been laid before both Houses of Parliament; it is only that an opportunity is given to somebody or other, if he chooses to take advantage of it, of moving that they be annulled. It is a precaution which in ninety-nine cases out of a hundred would be practically a sufficient precaution; but with reference to the abstract proposition which was queried in the judgment of the Master of the Rolls which has been cited, I have arrived at the conclusion that if the rules were not such rules as it was contemplated the Board of Trade should have the authority of making under the sections giving them the authority of making rules, it was the duty of the Court to determine that they were *ultra vires.*

LORD RUSSELL—I agree in the conclusion at which your Lordships have arrived.

In the facts of this case I think the second plea of the respondent is a good answer to the action, on the ground that the remedy is not injunction but summary prosecution under sec. 1, sub-sec. 4, of the Act of 1888. As to the broader questions, I think the rules are *intra vires*, and are therefore valid and binding, even apart from the provisions in sec. 101 of the Act of 1883, which is incorporated in and made part of sec. 1, sub-sec. 2, of the Act of 1888, namely, that the rules made are to have effect as if contained in the Act itself. But further, I think that if the rules are to be read as part of the Act (as I think they ought to be) it is not in this case competent to judicial tribunals to reject them. Such effect must be given to them by judicial construction as can properly be given to them taking them in conjunction with the general provisions of the Act or Acts of Parliament in connection with which they have been formulated.

GRAHAM MURRAY, Q.C.—The judgment as it stands is one of absolvitor. The judgment of the House would lead to a judgment of dismissal.

LORD WATSON—It ought not to be an absolvitor. The proper form is, "Recal the decree of absolvitor and remit to the Court below to dismiss the action."

The House ordered that the interlocutor of the 26th of January 1893 be varied by deleting the words "Assoilzie the defender from the conclusions of the action," and inserting in lieu thereof the words, "Dismiss the action." Further ordered, that the said interlocutor of the 26th of January 1893, subject to such variation, and also the said interlocutor of the 22nd of February 1893, be affirmed: And it is ordered, that the cause be remitted back to the Court of Session to do therein as shall be just and consistent with this variation and judgment: Further ordered, that the appellants pay to the respondent the costs incurred in respect of this appeal.

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