Saturday, July 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BROWN *v.* JOHN HASTIE & COMPANY, LIMITED.

Process—Amendment of Record—Patent—Motion to Amend Record after Reclaiming-Note Presented — Res Noviter — Attempt to Adduce Evidence Available before Proof Closed—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 29.

In 1903 a pursuer raised an action to interdict a defender from infringing his patent and for damages. The defender averred that the invention patented had been anticipated in six different patents, which he specified.

The Lord Ordinary after proof, pronounced judgment in favour of the pursuer, and after reclaiming against this judgment the defender moved the Court to allow him to amend the record in terms of section 29 of the Court of Session Act 1868 by averring that the invention patented had been anticipated in a patent dated in 1876.

The Court *refused* the motion on the ground that the proposed amendment did not raise a new question essential to the real issue between the parties, but was an attempt to adduce additional evidence in regard to a fact which the defenders should have ascertained before the proof.

Section 29 of the Court of Session Act 1868 enacts—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues of any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper, and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." . . .

In August 1903 Andrew Betts Brown, of Rosebank Ironworks, Edinburgh, and Brown Brothers & Company, Limited, engineers at said works, raised an action against John Hastie & Company, Limited, Kilblain Engineworks, Greenock, in which the pursuers asked the Court "(1) to declare that improvements in or relating to controlling valves of steering-engines made in accordance with the provisional and complete specifications lodged 25th July and 10th October 1902 by Robert Richardson of 16 Jamieson Street, Govanhill, Glasgow, and accepted 2nd July 1903, relative to the letters-patent No. 16,525 of 1902 granted in favour of the said Robert Richardson, and improvements in or relating to controlling-valves of steering-engines made in accordance with the complete specification lodged on 13th May 1903 by Walter Graham, director of the said John Hastie & Company, Limited, and accepted 25th June 1903, relative to the letters-patent No. 10,894 of 1903, granted in favour of the said Walter Graham, are infringements of the letters-patent No. 29,773 of 1897 granted in favour of the pursuer Andrew Betts Brown for an invention relating to improvements applicable in connection with the valves of steering and like engines;" (2) to interdict the defenders infringing said patent; (3) to ordain the defenders to deliver up to the pursuers all mechanisms and parts thereof constructed in breach of pursuer's patent; and (4) to ordain the defenders to pay the pursuers £2000 damages."

The pursuers averred, *inter alia*—"(Cond. 2) The object and substance of the said invention is the prevention or leakage of steam in steering and the like engines by the introduction into the steam feed-pipe of a casing which contains a cut-off valve operated from and acting in unison with the controlling valve of the steering or like engine. The results obtained and the mode of obtaining them are novel and useful. By the use of the invention 60 per cent. of steam is saved, which prior to its date leaked through the controlling-valve. It has been widely adopted with complete success."

The defenders denied that they had infringed the pursuers' patent, and averred, *inter alia*—"(Ans. 2) Admitted that the object of the said invention is the prevention of leakage of steam in steering and the like engines. Explained that this object is a common one in steam engineering, and that a steam saving cut-off valve, fitted in the steam way or steam passage leading into the control-valve of a steering-engine is a well-known device long in use, and is exemplified in the specifications of letters-patents granted to Davis & Company, Limited and W. R. G. Hay, No. 7814 of 1895; to Robert Lewis Jones, No. 1108 of 1877; to John Tickle, No. 2155 of 1887; to Andrew Fisher and Robert Richardson, No. 17,512 of 1888; to Michael N. Cummiskey, No. 26,2649 of 1882, United States of America; and to said patentee No. 270,396 of 1883, United States of America. Admitted that the results obtained by means of such devices, including that which is the subject of the pursuers' patent, are useful. Admitted also that the pursuers' invention has been widely adopted, and with success. *Quoad ultra* denied."

Of the six patents above mentioned five were added to the defences at the adjustment of the record.

After proof the Lord Ordinary (KYLLACHY) on 25th March 1904 pronounced the following interlocutor:—"Finds and declares, and interdicts, prohibits, and discharges, in terms of the conclusions of the summons, and decerns: Further, decerns and ordains the defenders to deliver up to the pursuers all mechanisms or parts thereof in their possession constructed in accordance with the specifications Nos. 16,525 (1902) and 10,894 (1903) in breach of the pursuers' letters-patent, No. 29,773 (1897), and to pay to the pursuers the sum of £300 in name of damages," &c.

The defenders reclaimed, and before the case came out for hearing in the Inner House they lodged a minute of amendment in the following terms:—"Hunter, for the defenders and reclaimers, stated that since the date when the Lord Ordinary pronounced judgment in the case the defenders had become aware of the specification of letters-patent to Thomas Haig Smellie, No. 624 of 1876, and that the invention therein disclosed has a material bearing upon the scope and validity of the pursuers' letters-patent. He therefore craved leave to amend the record by adding to answer 2, after the words "United States of America," and before the word "admitted," the following sentence:—"Further, reference is particularly made to the specification of letters-patent to Thomas Haig Smellie, No. 624 of 1876, and in particular to the second claim thereof, which claims 'the employment in steam steering and other engines having an intermittent motion of an automatic stop-valve on the steam pipe or chest actuated either by the handgear or by the engine, or by both.'"

Argued for the defenders and reclaimers—The amendment proposed was necessary for the purpose of determining the real question in controversy between the parties, and should therefore in terms of the 29th section of the Court of Session Act 1868 be allowed on such terms as to the Court seemed proper—*Guiness, Mahon, & Co.* v. *Coats Iron and Steeel Co.*, January 20, 1891, 18 R. 441, 28 S.L.R. 285. The Act had altered the old law, and an amendment was now competent even although no *res noviter* was thereby averred.

Argued for the pursuers and respondents—The proposed amendment should not be allowed. There was here no new defence proposed to be added as in *Guiness, Mahon, & Company, supra.* No amendment of the record had ever been allowed at this stage unless there was a relevant averment of *res noviter*, and a defence was not *res noviter* when it could have been discovered with ordinary care at the date of adjusting the record—*Campbell* v. *Campbell*, February 10, 1865, 3 Macph. 501; opinion of Lord President M'Neill, 504; *Stewart* v. *Gelot*, July 19, 1871, 9 Macph. 1057, 8 S.L.R. 688. This was merely an attempt to supplement the proof by leading evidence about a patent which existed long before the proof. Such a course of action might go on indefinitely.

LORD JUSTICE-CLERK—If I thought that the amendment here proposed fell under the 29th section of the Act of 1868 as an amendment necessary for the purpose of determining the real question in controversy between the parties I would move that it should be allowed. But I am of opinion that this amendment is not one which in the slightest degree alters the question before the Court. Its real purpose is to bring forward fresh proof in the question which was decided in the Outer House after proof had been led by both parties, and this fresh proof is not on any matter that has occurred since the proof before the Lord Ordinary was taken, but on a matter with regard to which defenders had then the same facilities of information as they have at present. In these circumstances I think their motion ought to be refused.

LORD TRAYNER—The amendment of the record which the defenders now ask leave to make is not in my opinion such an amendment as is within the contemplation or provision of the 29th section of the Act of 1865. The amendments there provided for are amendments necessary for determining the real question in controversy between the parties. Accordingly, had the proposed amendment been one raising any question not previously stated which was essential to the real issue it would necessarily have been allowed. But it is not of that character. The question here raised and determined by the Lord Ordinary is whether the pursuer's patent is valid or invalid by reason of anticipation. No other question or issue is now raised or proposed to be raised. The one purpose of the proposed amendment is to enable the defenders to supplement the proof they have already led and closed by adding some evidence as available to them before closing their proof as it is now. That is not an amendment which raises any new point necessary to the determination of the real question at issue. That question, as I have said, remains exactly where it was as put on the existing record. I am therefore of opinion that the proposed amendment should not be allowed.

LORD MONCREIFF—I concur. What the defenders want here is simply to adduce additional evidence. That being so, I do not think that the case falls within the power of amendment conferred by the 29th section of the Court of Session Act, and accordingly I think that we should refuse the defenders' motion.

LORD YOUNG was absent.

The Court refused the defenders' motion to amend the record.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Sandeman. Agents—Steedman & Ramage, W.S.

Counsel for the Defenders and Reclaimers—Ure, K.C.—Hunter. Agents—Miller & Murray, S.S.C.

Saturday, July 16.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

HOPE *v.* BENNEWITH.

Property—Foreshore—Rights of Public on Foreshore—Right to Shoot.

A proprietor of lands holding a disposition of the foreshore from the Crown brought an action against B,