incidence of flooding with its dangers and possible loss until the inundations can be charterised as periodical or frequent, I think the security aimed at, both by the common law of the land and by the statutes affecting the City of Edinburgh, would be largely and improperly impaired. The responsibility of the authorities is for each and every failure of their duty in effectual drainage. Unless this be secured a dangerous latitude would be allowed in effective local administration, and I do not think that such a latitude is permissible by law.

For these reasons, I am of opinion that the judgment of the Lord Ordinary should be reverted to by this House, and that the judgment of the Second Division should be reversed, with costs.

Their Lordships reversed the interlocutor appealed against and restored that of the Lord Ordinary.

Counsel for the Pursuer and Appellant—Constable, K.C.—Ingram—J. B. Marshall. Agents—D. Tudhope, Edinburgh—Morice Strode & Son, London.

Counsel for the Defenders and Respondents—Dean of Faculty (Scott Dickson, K.C.)—W. J. Robertson. Agents—Sir Thomas Hunter, W.S., Town-Clerk, Edinburgh—Beveridge, Greig & Company, London.

COURT OF SESSION.

Friday, March 14.

SECOND DIVISION.

[Lord Dewar, Ordinary.

WATSON, LAIDLAW, & COMPANY, LIMITED *v.* POTT, CASSELS, & WILLIAMSON.

(Reported *ante*, 1909 S.C. 1445, 46 S.L.R. 348, and February 5, 1911, 48 S.L.R. 782.)

Patent—Infringement—Damages—Measure of Damages.

In an action of damages brought by a manufacturing firm who held a patent for improvements in centrifugal machines against another manufacturing firm for damages arising out of the sale by them of machines which infringed the pursuers' patent, *held* that while the measure of the pursuers' damages was *prima facie* the profit they would have made if they had effected the sales of the pirated articles themselves, that amount was subject to diminution in so far as the defenders had proved that the pursuers could not themselves have effected the sales of the pirated articles at their usual profit, or that the sales of the pirated articles were due to the special exertions of the defenders; and was subject to increase in so far as the pursuers had proved that they had been compelled to sell the patented article at a lower price than usual owing to the unfair competition of the defenders.

Observations (*per* Lords Dundas and Salvesen) on methods of assessing damages in cases of infringement of patents.

Watson, Laidlaw, & Company, Limited, *pursuers*, brought an action against Pott, Cassels, & Williamson, *defenders*, for interdict against infringement of a patent for improvements in centrifugal machines, and for £5000 damages.

After sundry procedure the House of Lords, on 26th June 1911, affirmed an interlocutor of the Second Division of the Court of Session, which granted interdict and remitted the cause to the Lord Ordinary (DEWAR) to dispose of the question of the amount of damages due by the defenders to the pursuers in respect of the infringement of the patent. (See report *ante*, 48 S.L.R. 782.)

Thereafter the defenders made a tender of £1500 in name of damages, which the pursuers did not accept, and on 30th March 1912 the Lord Ordinary, after a proof led, the import of which appears in the opinions of Lords Dundas and Salvesen *infra*, decerned against the defenders for payment of the sum of £1500 damages.

Opinion.—"In the year 1907 the pursuers (Watson, Laidlaw, & Company, Limited) raised this action against the defenders (Pott, Cassels, & Williamson) for interdict against the infringement by the defenders of the pursuers' patent, No. 10,034, of 1903 for improvements in centrifugal machines, and for damages laid at £5000. At an early stage parties agreed by joint-minute to reserve proof on the question of damages until a judgment on the question of infringement had been obtained. The pursuers obtained judgment, and thereafter the case was remitted to me to dispose of the question of the amount of damages due by the defenders to the pursuers in respect of the manufacture by them of the improvements on centrifugal machines in infringement of said letters-patent.

"I have now taken the proof and read the whole evidence and documents, and considered the authorities to which counsel referred me, and I am of opinion that the loss which the pursuers have sustained through the defenders' infringement of their patent may be fairly fixed at the sum of one thousand five hundred pounds (£1500). As the question is entirely a jury one, and as there did not appear to be any real dispute between parties regarding the elements to be taken into consideration in estimating the pursuers' loss, I do not think that it is either desirable or necessary to give reasons for fixing the amount of damages at the sum I have named. But as the case may perhaps go further it is right that I should add that the witnesses on both sides gave their evidence frankly and fairly."

The pursuers reclaimed, and argued—The award of damages given by the Lord Ordinary was wholly insufficient. In a case like the present, where the patentees had not

granted any licences to use the patent, the measure of the damages was the profit made by the infringer on the pirated articles, subject, it might be, to some slight deduction in respect that the patentees might not themselves have secured all the orders—*United Horse Shoe and Nail Company, Limited* v. *Stewart & Company*, December 17, 1886, 14 R. 266, 24 S.L.R. 180, *rev.* March 12, 1888, 15 R. (H.L.) 45, 25 S.L.R. 447; *Boyd* v. *The Tootal Broadhurst Lee Company, Limited*, 1894, 11 R.P.C. 175; *Meters, Limited*, v. *Metropolitan Gas Meters, Limited*, 1911, 28 R.P.C. 157. The patent was not a mere accessory of the machine but was an integral part of it, and therefore the profit should be estimated on the whole machine and not on a part of it, and the evidence showed that the profit made by the infringers was more than £5000. On the question of expenses, *Jack* v. *Black*, 1911 S.C. 691, 48 S.L.R. 586, was referred to.

Argued for the respondents—The award of damages given by the Lord Ordinary was reasonable in amount and sufficient. It was equivalent to a finding that the reclaimers were entitled to one out of every three or four orders obtained by the respondents. Where a patent had been infringed the patentees were entitled either to call on infringers of the patent to account for the profits they had made and to make that the estimate of the damages, or else to table a claim of damages, but they must elect between one or other of these alternatives—*United Horse Shoe and Nail Company, Limited* v. *Stewart & Company, cit. sup.* If, as here, the patentees chose the latter alternative, the profit made by the infringers was immaterial, and there was an onus on the patentees to prove the actual loss which their business had suffered—*United Horse Shoe and Nail Company, Limited* v. *Stewart & Company, cit. sup. per* Lord Watson in 15 R. (H.L.) at p. 48, 25 S.L.R., p. 449; *Meters, Limited* v. *Metropolitan Gas Meters, Limited*, 1910, 27 R.P.C. 721, *per* Eve J. at p. 731; Frost, Law of Patents, 4th ed., vol. i, p. 520. Moreover, in assessing the damages in a claim of this sort there were no precise data on which to proceed, and the question was really a jury question, and therefore the Court could not disturb the finding of the Lord Ordinary—*United Horse Shoe and Nail Company, Limited* v. *Stewart & Company, cit. sup.*, *per* Lord Chancellor (Halsbury) in 15 R. (H.L.) at p. 45, 25 S.L.R., p. 448; *Pneumatic Tyre Company, Limited* v. *Puncture Proof Pneumatic Tyre Company, Limited*, 1899, 16 R.P.C. 209, *per* Lord Russell, C.J., at p. 214; *Meters, Limited* v. *Metropolitan Gas Meters, Limited, cit. sup. per* Cozens-Hardy, M.R., in 28 R.P.C. at p. 161. In any event, the respondents had acted in *bona fides*, and the Court should not find them liable in penalising damages. The case was one for nominal damages merely, because there were only three ways in which the reclaimers could show a loss, viz.—by showing (1) that they had been compelled to reduce the price of their goods, (2) that the volume of their business had been reduced, or (3) that the expansion of their business had been checked; and the reclaimers had failed to prove any of these things.

At advising—

Lord Dundas—On 9th June 1910 this Court decided the question of infringement in favour of the pursuers, and ordered inquiry as to damages. The defenders appealed to the House of Lords; and on 26th June 1911 the appeal was dismissed, the noble and learned Lords being equally divided in opinion. The case is reported in 27 R.P.C. 541 and 28 R.P.C. 565. Proof as to damages has now been led before the Lord Ordinary, who has assessed them at £1500, an amount which concides with that of a tender by the defenders; the coincidence, I gather, was not accidental. His Lordship observes that "the question is entirely a jury one." The case is certainly not one which according to our modern practice would be considered suitable for or would be remitted to trial by jury; but one can agree in his Lordship's observation in the sense, which I suppose he meant, that the assessment of damages in a case of this sort can rarely, if ever, be arrived at by a process of exact arithmetical calculation. The Lord Ordinary, however, adds that "as there did not appear to be any real dispute between parties regarding the elements to be taken into consideration in estimating the pursuers' loss, I do not think that it is either desirable or necessary to give reasons for fixing the amount of damages at the sum I have named." The debate at our bar seemed to me to demonstrate that there was a large measure of dispute between the parties as to the principles on which damages ought to be assessed and the elements to be considered in doing so. The pursuers maintained that the figure of £5000 claimed in the summons was fairly supported by the evidence; the defenders, while not reclaiming against the Lord Ordinary's interlocutor, argued that damages have not truly been established beyond a nominal amount. I am unable upon the proof to discover a basis for arriving at a sum in the region of £1500. I therefore greatly regret that the Lord Ordinary has given us no indication of his own views in regard to the rules upon which damages ought here to be assessed or the method by which he reached the figure of £1500. We are left to assess the damage *de novo* upon the evidence and the arguments before us. If upon these materials I could arrive at a figure not widely differing from £1500, I should consider it improper to disturb the Lord Ordinary's award; but in the absence of any indication as to how that result was reached by his Lordship, or of any figures given in evidence which would to my mind justify it, I am bound to say that, for reasons to be stated, I think the pursuers are entitled to a much more substantial amount of damages than the Lord Ordinary has awarded.

We have to ascertain, it may be by rough and ready methods, the amount of loss the pursuers have sustained as the

natural consequence in fact of the defenders' sales of machines containing the pursuers' patented invention, which the Court has decided to be a useful and meritorious one. The invention consisted of a conical elastic buffer or buffer-bearing for the spindles of centrifugal machines, combining both support and control. The defenders have admittedly sold a large number of machines containing this invention. Each such sale was a legal wrong, and *prima facie* a ground of damages; and the measure of damage is *prima facie* the amount of profit which the pursuers could have made if they had effected these sales themselves. This view is, I think, a sensible one, and supported by the authorities to which we were referred. But the *prima facie* aspect in any given case may be more or less readily and more or less materially altered by other considerations arising on a purview of the whole circumstances. For example, the nature of the trade in question, the area of its exercise, and the volume of competition, must be considered. If the area of trade competition is very wide and the number of rival competitors in the field very numerous, the less reason will there be for assuming that a pursuer would, if the defenders had not sold a given number of his patented article, have himself been in a position to effect as large a number of sales and at his usual profit. Again, the *prima facie* presumption may be greatly weakened if it appears that the number of infringing sales was due largely to the superior business energy, skill, and activity of the defenders in pushing trade upon the market. Whether or not a pursuer may fairly claim, as an item of damages, that he has been compelled, owing to the defenders' illegal actings, to sell some of his machines at a lower price than usual, is, I think, a question to be decided on the circumstances of each case. In the *United Horse Shoe and Nail Company Limited* (1886, 14 R. 266; rev. 1888, 15 R. (H.L.) 45; 13 A.C. 401)—an instructive case upon the whole of this subject—Lord Macnaghten considered the claim inadmissible in the circumstances, as he thought the lowering of the price was not the natural or direct result of the infringement but arose rather from a timorous and half-hearted policy on the pursuers' part; but the Lord Ordinary (Kinnear), whose interlocutor was restored by the House of Lords, thought the reduction of price a relevant consideration; and in *Meters Limited* (1910, 27 R.P.C. 721; affd. 1911, 28 R.P.C. 157) a substantial sum of damages was allowed on that head. The Court must in each case consider the whole circumstances, and assess the damages as best it can which the pursuer has suffered as the fair and natural consequence of the defenders' illegal conduct. I think it unnecessary to refer in detail to the cases cited to us; but I believe that what I have said is in harmony with the decisions.

The pursuers' case has been fully and carefully presented in evidence. We have definite figures proved which afford a basis, not indeed for exact calculation, but for reaching some figure which may represent a fair award, viewing the matter broadly as I suppose a jury might do. The defenders do not present any counter array of figures. I think it is fairly established that the loss of profits which the pursuers might have realised if they had effected all the infringing sales of machines (252 in number), and of spare parts, amounted to very nearly £5000. One must consider what percentage or amount ought fairly to be deducted. A considerable deduction must, no doubt, be made. In the first place, I observe that the market for centrifugal machines of the description in question is a comparitively limited one—mainly the sugar trade, particularly in Java and Barbadoes; and that the active competitors in this market were the pursuers and defenders—other competing persons being few and practically negligible. These facts are important in the question of damages, and show a position stronger for the pursuer than was present *e.g.*, in the *Horse Shoe and Nail* case (*cit*). But the defenders argued strenuously that the peculiar feature of the pursuers' special buffer was of little or no moment in regard to the sales in question, and that centrifugal machines containing the defenders' buffer were equally saleable on the limited market, and further that the large number of actual sales of the infringed article was due entirely or mainly to the superior energy, skill, and activity of their selling agent, Mr Akkerman. It seems to me that the first of these arguments hardly lies in the defenders' mouths to state, looking to their own rather peculiar course of conduct. It is plain on the proof that the defenders thought the pursuers' invention so far valuable that they altered their own machines so as to include it, and copied and circulated abroad the pursuers' circulars (with illustrations) of their invention, and even introduced a cable code word to express the pursuers' conical buffer. The cross-examination of Mr Williamson on these points contains passages which strike me as scarcely candid evidence. As regards the excellent business qualities of Mr Akkerman there seems to be only one opinion. He possesses a high certificate in the fact that he has been taken into the employment of the De Bromo Company who purchase and re-sell the pursuers' machines in Java. It is not perhaps surprising that a gentleman of such aptitude in business should take a somewhat sanguine view of his own ability to secure custom for any article he chose to put on the market for sale. I think we must make a substantial discount on Mr Akkerman's evidence in this respect, when we look at the real evidence contained in the correspondence produced. The correspondence discloses again and again that Mr Akkerman (then acting for Mr Hellendoorn, the selling agent in Java of the defenders' machines) attached peculiar importance in his orders in obtaining the pursuers' "new style." I do not think it much matters that their special buffer is not always or often specifically referred to, it is clear that

Mr Akkerman found that machines containing that buffer were most desired, and ordered them accordingly. I think this goes to diminish very considerably what I may call the personal equation of Mr Akkerman, but that factor does remain a material element in the case, and ought to be so regarded in the assessment of damages. The defenders' made it a point that the volume of the pursuers' sales of their machines did not (as appears from No. 595 of process) diminish during the years 1906 and 1907, when the infringing sales were made, but on the contrary increased, falling again in 1908 and rising in 1909, and they further pointed to the fact that the pursuers' sales during 1906 and 1907 showed a marked decrease in water-driven machines in regard to which no infringment is said to have taken place. I am not much impressed by these arguments. It has never I think been held that a pursuer in order to recover damages for infringement must disclose his books to the adversary, the Court, and the public, with the view of proving that his business as a whole was depressed and suffered during the period of infringment. Though the pursuers maintained or increased the number of their machines sold in 1906-7 it does not follow that the defenders' have done them no business injury. The problem is complex, and the presumption is against the infringer. But for their illegal conduct the pursuers might—probably would—have sold more machines than they actually did. It remains to consider some minor but not unimportant points of the argument. The defenders contended that from the figure to be arrived at as representing loss of profits which the pursuer would have realised if they had themselves effected the sales made by the infringers, a deduction must be made of £647, because twenty-seven of the machines specified in the list appear to have been bought and sold without particular reference to the pursuers' special buffer. It is to be kept in view however that these machines were in fact supplied by the defenders with that buffer. I do not think the whole sum should be deducted, though probably a material part of it should be. On the other hand, the pursuers claim to add a sum of £808, being loss of profit through reduction of prices in consequence of the defenders' illegal competition. The sum is vouched and spoken to by Mr William Murray. I am not sure that the claim is open to the criticism bestowed by Lord Macnaghten upon an analogous demand in the *Horse Shoe and Nail* case, and I consider that to some extent it may fairly be given effect to; though it would be unsafe to allow full weight to it. I have already pointed out that the matter seems on the authorities to be one for decision having regard to the circumstances of each case. Speaking in a rough and general sense these two items of £647 and £808 may probably be set off one against another.

I have now indicated in a general way the elements which I consider ought to be taken into account in assessing damages in a case like this, and my views as to the particular circumstances here present. One must in familiar parlance use a broad axe. I am clearly of opinion that the pursuers are entitled to very substantial, and not to mere nominal, damages. I can find no basis in the evidence to support a figure in the region of the Lord Ordinary's award of £1500. The problem is no doubt difficult, but upon the best consideration I can give to the case I think that £1500 is a quite inadequate sum, and that we should not be treating the defenders with any severity—but it may be with some leniency—if we assess the damages payable to the pursuers (as I propose that we should do) at a sum of £3000.

LORD SALVESEN—The claim in this case is for damages in respect of the infringement of a patent for improvements in centrifugal machines. The patent has been held valid by a final judgment of the House of Lords, and although two of the noble and learned Lords were of opinion that it was not a valid patent, that circumstance can have no bearing on the assessment of damages, except in so far as it supports the view that the defenders in infringing the patent acted in good faith. The method of assessing damages in such cases has been fixed by a series of decisions. A patentee is entitled *prima facie* to recover from the infringer the profit which he would have made had the infringing machine been supplied by himself. In the present case this is not difficult of ascertainment. Parties are agreed that the defenders made and sold 252 machines which infringed the pursuers' patent, and the profits which the pursuers made upon similar machines have been accurately ascertained from their books. Taking the bare machines without the mixer and frame, which the defenders could have lawfully supplied, the profits on these machines amount to £4557, 9s.

The pursuers have furnished us with two alternative methods of arriving at their loss. Their statement No. 593 of process discloses the loss of profit upon those parts of the machine which included or required to be adapted to the buffer bearings to which alone the patented improvements applied. On the assumption that the defenders could have supplied their orders by buying these portions from the pursuers and otherwise completing the machines themselves, the loss of profit on the 252 machines would be reduced to £3339, 12s., but as I read the decision in the case of *Meters, Limited* (28 R.P.C. 157) the defenders are not entitled to have the damages assessed on this moderate footing. The subject of the patent in that case was only a small part of the mechanism employed in a prepayment gas meter. It was nevertheless held that the profit on the whole meter was the proper factor to take in calculating the amount of the patentee's damages. The circumstances of the present case are such as to make this rule peculiarly applicable. The pursuers and the defenders were rival manu-

facturers, and between them enjoyed a practical monopoly of the supply of centrifugal machines for sugar factories in Java and the West Indies, which were their chief markets. Accordingly it is very unlikely that the pursuers would have supplied separately the portions of the machines which embraced the "buffer bearings," and as they granted no licences to manufacture their improvements they could practically make sure of getting an order for the whole machine from any customer who desired the patented improvements. Sufficient allowance has, I think, been made in the earlier statement (already referred to) by excluding the mixer and frame from the calculation. The parties here being in keen competition it may be assumed that the pursuers would not have granted the defenders, if they had endeavoured to place their orders with them directly, the right to manufacture the patented improvements so as to oust them from the market which they hoped to capture by means of their invention.

The third alternative method of assessing damages is based on the opinion of Fletcher Moulton, L.J. in *Meters, Limited*, at p. 164. After dealing with the method of assessing damages in cases where the patentee has granted licences, and stating that in such cases the measure of damages is the amount of royalty exacted, he says—"I am inclined to think that the Court might, in some cases where there did not exist a quoted figure for the licence, estimate the damages in a way closely analogous to this. . . . I am inclined to think that it would be right for the Court to consider what would have been the price which—although no price was actually quoted—could have been reasonably charged for that permission, and estimate the damage in that way. Indeed I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure." Now the pursuers here have given evidence as to what would have been a reasonable royalty to exact, and they say that 10s. per inch of the diameter of the basket was the sum which they might fairly have charged by way of royalty. Mr Laidlaw justifies this by mentioning that the defenders in a somewhat similar case made a claim of 20s. per inch of the diameter of the basket. There is no counter evidence, and taking this method of assessment, which has much to commend it, we were informed that their claim would work out at £4384, which is not far short of the figure arrived at by the first alternative method. The pursuers further claim the profits on a number of parts supplied by the defenders to various people, as detailed in the supplementary list No. 249 of process. These items were incurred in connection with alterations and repairs of machinery. The profit which the pursuers lost by not supplying these spare parts, most of which were actually for the patented "buffer," and the rest for alterations necessary to receive it, amounts to £238, 17s. 4d., and is made up in the same way as the claim in respect of loss of profits on the sale of infringing machines. I think this amount falls to be added to the loss of profits on the sales of complete machines.

The pursuers' *prima facie* loss having thus been satisfactorily ascertained at a figure approaching to £5000, I confess that I have some difficulty in understanding why the Lord Ordinary should have reduced their claim to £1500. Where actual pecuniary loss is claimed, although it may be difficult of precise ascertainment, it is not a satisfactory method to assess the loss as a jury would when fixing compensation for injury to person or character. In such cases there is no principle by means of which the injury done can be transmuted into a money equivalent. It is otherwise where the Court have to deal with the invasion of a right of property, where, although the damages in many cases have to be estimated, the basis of estimation must be disclosed to judge of its fairness. I find that in all similar reported cases the judges have given reasoned opinions justifying the results at which they arrived, and they have laid down certain broad principles on which the assessment ought to proceed. I distrust an estimate which is arrived at without indicating the mode by which it has been reached, all the more when as here it precisely corresponds with the amount of the defenders' tender. The Lord Ordinary says — "There did not appear to be any real dispute between parties regarding the elements to be taken into consideration in estimating the pursuers' loss." I do not appreciate that observation, seeing that the pursuers maintained their demand for £5000, and the defenders, although not reclaiming against the Lord Ordinary's award, strenuously maintained that only nominal damages were due. On these grounds, I do not attach so much importance as I would otherwise have done to the award of the judge of first instance, more especially as it has not been influenced by any view that one set of witnesses were more reliable than the other.

The number of infringing machines sold by the defenders being definitely ascertained, and the profits which the pursuers would have made had these machines been supplied by them being also sufficiently proved, the only matter that is left in uncertainty is whether, if the defenders had acted within their rights, the pursuers would in fact have sold this additional number of machines. On this point the presumption is in favour of the pursuers, although it is not so strong as if there had been no substitutes already in the market. Where the subject of the patent is an entirely new article—the "Thermos flask," if it had been the subject of a valid patent, occurs to me as an illustration—it could scarcely be denied that every sale of an infringing flask constituted a source of loss to the patentee. Even in such a case, however, allowance might have to be made by way of a commission to the infringer for pushing the sale and so saving expense

to the patentee. The present case is not so strong, for the older type of centrifugal machine had worked reasonably well before the pursuers' improvements were patented. At the same time the defenders are scarcely in a position to deny that the improvements were such as to commend themselves to purchasers, for they took the trouble of copying the circulars which the pursuers issued to the trade. Not merely so, but their leading selling agent, Mr Akkermann, throughout the correspondence expressly ordered all the centrifugal machines he required with the pursuers' latest improvements; and during the period covered by the pursuers' claim not a single machine of the older type was supplied. The same remark applies to Mr Brocklehurst, who represented the defenders in Barbadoes, and who was very insistent that what he called the deeper buffer should be supplied. On the other hand, there is no doubt very strong evidence given by Mr Akkermann, whose credibility can scarcely be impeached as he is now in the service of the pursuers' selling agent in Java, that his orders were secured largely by personal influence, and that he could have induced his personal friends and customers to take the defenders' machines even although not supplied with the latest improvements. There is also evidence from certain other customers who seem to have been merely middlemen and had no technical knowledge of the different types of machines, that they were not aware when they were supplied by the defenders with machines to their order that they were fitted with "conical buffers." It was also strongly maintained by the defenders' counsel that the really attractive part of the new design consisted in the ball bearings, admittedly not patented, and not in the buffer bearing. Further, it was said that the pursuers could not have supplied so many additional orders though they had obtained them, and it was pointed out, as controverting their claim that they supplied more centrifugal machines during the years 1906 and 1907, when the defenders were infringing the patent, than they did in 1908 when the defenders had ceased to infringe. This last argument does not appear to me to be of great weight, seeing that the total number of machines supplied in any given year necessarily depended on the state of the sugar trade and the number of extensions that were being made in sugar factories, and admittedly 1906 and 1907 were specially prosperous years. Any inference which might be drawn from the figures is also displaced by the circumstance that in 1909 the machines supplied by the pursuers rose to a much higher total than in any of the preceding years. Assuming that substantial allowance must be made on the above referred to various heads, I do not see that, taking them all together, it would be reasonable to reduce the pursuers' claim so as to bring it below a sum of £3000, or twice the sum which the Lord Ordinary has awarded.

The pursuers have a further claim of £808, 8s. 10d., which is based on loss of profit through their having to sell their machines at reduced prices in consequence of the unfair competition of the defenders. There is much to be said in support of this claim, but, on the other hand, it was (as I understood) admitted that £647 falls to be deducted in respect of twenty-seven orders in which the conical buffer played no part. These two items may perhaps be fairly set against each other. The result, therefore, in my opinion, is that the pursuers ought to be awarded damages to the extent of £3000, and that the Lord Ordinary's interlocutor should be altered accordingly.

LORD GUTHRIE — The question in this case, namely, the assessment of damages for the loss sustained by the pursuers through the defenders' infringement of their patent of 1903 for improvements in centrifugal machines, is stated by the Lord Ordinary to be entirely a jury question, and he has assessed the damages on this footing at £1500. The Lord Ordinary's view that the question is entirely a jury one is in accordance with opinions delivered by many eminent Judges. For instance, in the *United Horse Shoe and Nail Company, Limited* v. *Stewart & Company* (1888, 15 R. (H.L.) 45) the Lord Chancellor (Halsbury) said—"While I agree with the Lord Ordinary that the pursuers can only recover compensation for the actual loss which they have sustained, the estimate of the particular sum which is to be arrived at when assessing compensation for the jury is purely a matter for a jury, and can rarely be made the subject of exact arithmetical calculation." But although this is true, it does not follow that the Lord Ordinary should have left us without any means of judging whether the result arrived at by him was a reasonable one. It seems to me that in this case we were entitled to know from the Lord Ordinary in the first place on what basis his calculation was made. Has he taken as his starting-point the total number of infringing machines made and sold by the defenders, or, if not, what smaller number? Next, whatever number of machines he may have taken as the basis of his calculation, has he reckoned the whole profit which the pursuers might have made, or, if not, what proportion? Then, on the other side of the account, we were entitled to know what elements of deduction, if any, the Lord Ordinary took into account in arriving at the figure of £1500 brought out by him, although it would not have been necessary for him to state what sums he reached under each head of deduction. Had the Lord Ordinary stated the basis on which he proceeded in arriving at his result I should have felt greater difficulty in interfering with his judgment. Or again, had the result reached by him varied by a sum of, say, not more than two or three hundred pounds from that which seems to me just, I should not have felt warranted in altering the Lord Ordinary's interlocutor. But in the absence of any indication of how the Lord Ordinary reached his result, and being of opinion, as I am,

that the proper verdict is at least double that found by the Lord Ordinary, I have no hesitation in concurring with your Lordships. I think it has been sufficiently proved that of the profit of between £4000 and £5000 proved in the evidence at least £3000 could and would have been earned by the pursuers.

LORD JUSTICE-CLERK—I concur, but I may add that, if I had been disposing of this case myself I do not think I would have held £3000 to be an adequate sum of damages.

The Court recalled the interlocutor of the Lord Ordinary, and ordained the defenders to make payment to the pursuers of the sum of £3000 damages.

Counsel for Pursuers and Reclaimers—Clyde, K.C.—Sandeman, K.C.—R. B. King. Agents—Webster, Will, & Company, W.S.

Counsel for Defenders and Respondents—Dean of Faculty (Scott Dickson, K.C.)—Macmillan, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff Court at Perth.

HIGHLAND DISTRICT COMMITTEE OF PERTHSHIRE COUNTY COUNCIL *v.* RATTRAY.

Road—Expense of Extraordinary Traffic—Recovery by Road Authority—Certificate of Surveyor—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 57.

The Roads and Bridges (Scotland) Act 1878 enacts—"Section 57. Where by the certificate of their surveyor or district surveyor it appears to the authority which is liable to repair any highway that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same or by extraordinary traffic thereon, such authority may recover in a summary manner before the Sheriff . . . . from any person by whose order the excessive weight has been passed, or the extraordinary traffic has been conducted, the amount of such extraordinary expenses as may be proved to the satisfaction of the Sheriff to have been incurred by such authority by reason of the damage arising from such excessive weight or traffic. . . ."

In proceedings under this section by a road authority, *held* that in granting a certificate under the section it is not necessary that the surveyor should have had regard to the average expense of repairing highways in the neighbourhood or should so state in his certificate, though it is necessary that the road authority before taking action should have such regard.

Road—Expense of Extraordinary Traffic—Recovery by Road Authority—Personal Bar—Road Less than Legal Width—Highway (Scotland) Act 1771 (11 *Geo.* III, *cap.* 53), *sec.* 1.

The Highway (Scotland) Act 1771 enacts—"Section 1. . . . The justices of peace and commissioners of supply for the respective shires and stewartries, and the commissioners and trustees of turnpike roads . . . shall have power, and they are hereby authorised and impowered, to make, repair, clear, widen, and extend, and to keep in good repair . . . the several highways and roads under their management and direction respectively, so as the same shall be in all places fully twenty feet width of clear passable road, exclusive of the bank and ditch on each side of such highway or road respectively."

Opinion (*per* Lord Salvesen) that a local authority was not barred from recovering the damage caused to a road by extraordinary traffic by reason that the road was of less than the statutory width.

Opinion (*per* Lord Dundas) *reserved.*

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 57, and the Highway) Scotland) Act 1771 (11 Geo. III, cap. 53), sec. 1, are quoted *supra in rubric.*

The Highland District Committee of the County Council of Perth, *pursuers*, brought an action in the Sheriff Court at Perth against William Rattray, wood merchant, Perth, *defender*, in which they claimed payment of £1010, 10s. in respect that defender, who had purchased a quantity of growing timber at Foss in the parish of Dull and County of Perth, did, during the period from April 1910 to 6th June 1911 by means of a traction engine and waggons, conduct excessive weight or extraordinary traffic over the highway between Foss Sawmill and Coshieville, whereby, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses were incurred by the pursuers in repairing the portions of the highway and bridges and culvert mentioned in the certificate by the pursuers' surveyor by reason of the damage caused by such excessive weight or extraordinary traffic, conform to the certificate by the pursuers' surveyor.

The surveyor's certificate was in the following terms—

"*Perthshire Highland District Roads.*

"Certificate by the Road Surveyor to the Highland District Committee as to damage by excessive weights on the road between Foss and Coshieville.

"I hereby certify that much damage has been done to the road and bridges from Coshieville to Foss Sawmill through excessive weights passing along the road in the haulage of timber to Aberfeldy by Mr William Rattray, and that extraordinary