

in averment and in evidence they confuse the "passing on of information received" (in other words a representation that certain information has been received from a certain source) with a representation that the information so received was in fact correct. The evidence seems to me unsatisfactory as regards this part of the pursuers' case, but as it satisfied the Lord Ordinary who saw and heard the witnesses I do not think it safe to dissent from his conclusion that the pursuers "made the defenders' representations to them their own representations in a question between them and the British Hispano Line, Limited."

The defenders have two other preliminary pleas (pleas 3 and 4). In so far as there are averments which support these pleas they have not, in my opinion, been established by the evidence. On the merits I think that the pursuers have proved their case, and I have nothing to add to what has been said by the Lord Ordinary on the subject.

LORD CULLEN—I agree with the Lord Ordinary in holding that the contract between the pursuers and defenders was induced by material misrepresentations made by the defenders.

As regards the question whether the contract between the pursuers and the Hispano Company was induced by a repetition to the latter company by the pursuers of the misrepresentations made to them by the defenders, the evidence is to my mind not wholly satisfactory; but on this question of fact I do not feel justified in differing from the conclusion reached by the Lord Ordinary, who saw and heard the witnesses, that it was so induced.

The defenders, however, in the first place, plead no title to sue. On this topic I concur in what has been said by Lord Skerrington. In the next place, the defenders plead that the pursuers are not able to make *restitutio in integrum*. The position under this head of the case is as follows:—When the action was raised the pursuers offered to make *restitutio in integrum* on the footing of their contract with the defenders being rescinded. The defenders, however, refused to have the contract rescinded, and maintained that there was no ground for rescinding it. Prior to the closing of the record the pursuers became able to make *restitutio in integrum* by the setting aside of their contract with the Hispano Company. Now that it has been decided that the defenders are wrong on the main issue as to misrepresentation by them so that their contract with the pursuers falls to be reduced, there is no difficulty about *restitutio in integrum*, and I am unable to see any equity in the view that the pursuers' remedy should fail merely because at the inception of the action when they offered a *restitutio* which the defenders refused to accept, they could not there and then have made it had the defenders chosen to take it. No legitimate interest of the defenders has thereby suffered so far as I am able to see. The defenders, indeed, by their unfounded defence on the main issue of misrepresentation have unduly prolonged

the period at which the condition of making *restitutio* as an incident of reduction has become practically operative as a condition on which they are now interested to insist.

In the next place, the defenders maintained that the action is barred by homologation through the proceedings connected with the alterations on the pantry of the ship. This is a perfectly distinct issue. There is, however, no record for it. The record is destitute of any reference to the matter, and I do not think it is entitled to be considered.

Lastly, the defenders found, in bar of the pursuers' remedy, on material change of circumstances through the sale of the ship, &c. On this matter I agree with the Lord Ordinary's view that such change of circumstances was entailed by the defenders' own course of action in wrongfully insisting in the validity of their contract with the pursuers instead of consenting to its rescission.

I agree with your Lordships in thinking that the reclaiming note should be refused.

The Court refused the reclaiming note.

Counsel for Pursuers and Respondents—D. P. Fleming, K.C.—Normand. Agents—Webster, Will, & Co., W.S.

Counsel for Defenders and Reclaimers—Brown, K.C.—Aitchison—Gillies. Agents—Smith & Watt, W.S.

Saturday, July 15.

FIRST DIVISION.

[Lord Blackburn, Ordinary.]

BRITISH THOMSON-HOUSTON COMPANY, LIMITED v. CHARLES-WORTH, PEEBLES, & COMPANY.

Patent—Infringement—Interdict—Interdict against Exportation of Infringing Articles Brought into this Country from Abroad.

The patentees of an electric lamp who had obtained interdict against foreign manufacturers infringing their patent in this country brought actions of interdict against certain merchants in which they craved interdict against the respondents "using, putting in practice, disposing, selling, or offering for sale, or importing into the United Kingdom, or exporting therefrom" the lamps in question. The respondents only resisted that part of the crave which related to exportation, on the ground that exportation did not *per se* constitute an infringement, and they declined to accept any limitation on the right they claimed, which would leave them free to return to their foreign consigners lamps sent into this country by mistake in infringement of the patentee's rights. *Held* (diss. Lord Skerrington) that in view of the fact that the complainers were merchants and not carriers, and that they asserted an unlimited right of exporta-

tion which might operate to the detriment of the patentees, that the latter were entitled to interdict as craved.

The British Thomson-Houston Company, Limited, London, *complainers*, presented a note of suspension and interdict against Charlesworth, Peebles, & Company, mechanical and electrical engineers and merchants, Glasgow, *respondents*, to have the defenders interdicted from infringing letters patent (No. 10,918 of 1913) granted in favour of the pursuers for improvements in incandescent electric lamps and from "using, putting in practice, disposing, selling or offering for sale, or importing into the United Kingdom of Great Britain and Ireland, or exporting therefrom during the currency of the said letters-patent and without the consent, licence, or agreement of the complainers . . . incandescent electric lamps which embody the improvements described in the complete specification filed relative to the said patent.

The complainers had already obtained interdict against the foreign makers infringing their patent in this country.

In the present action the issue between the parties came ultimately to be whether the decree of interdict to be granted should include interdict against exportation. The complainers made no special averments in support of such interdict, but the question was raised in the following plea-in-law for the respondents:—“(5) Exporting from the United Kingdom not in itself constituting infringement, interdict cannot competently be granted in the terms of the prayer.”

On 1st June 1922 the Lord Ordinary (BLACKBURN) granted interdict in terms of the prayer in the action upon the patent of 1913.

Opinion.—“There are two actions here against the defenders Charlesworth, Peebles & Company, one of suspension and interdict, which originated in the Bill Chamber, and the other an action of interdict, delivery, and payment. In the latter action the defenders have put in a minute withdrawing their defences, and in particular withdrawing their four pleas-in-law, which is equivalent to an admission that decree both of interdict and delivery must be pronounced in favour of the pursuers. In the action of suspension and interdict there is a conclusion in the note against the defenders exporting the lamps to which both actions apply from this country, and in the minute put in by the defenders in that action they have only withdrawn their first four pleas-in-law, leaving a fifth plea to the effect that exporting from the United Kingdom is not in itself an infringement of the patent. I am asked to refuse the interdict which the pursuers now seek against exporting the lamps on the ground that this plea leaves an important question [to be discussed on which I ought to hear a full debate. It seems to me that once the defenders have admitted, as I think their minute does admit, that the decree for delivery must go out against them under the action of interdict, delivery, and payment, it is idle for them to ask me to postpone granting interdict in the other action against

their exporting the lamps from this country. To do so would only leave them an opportunity of defeating the other decree, and accordingly I shall pronounce decree of interdict in terms of the note in the suspension and interdict as well as interdict and delivery in the other action. The question of damage is reserved, and I shall reserve the question of expenses until the damages are disposed of.”

The respondents reclaimed, and argued—Export of a patented article did not necessarily imply infringement. The complainers were already protected against export for commercial purposes by the interdict against “using, disposing, selling, or offering for sale.” Sending patented goods out of the United Kingdom was not *per se* an infringement, for it was taking the goods beyond the ambit of the patent. Transport of such goods was not of itself an infringement, though if done for sale or use it might become an infringement—*Badische Anilin and Soda Fabrik v. Johnson & Company*, 1897, 14 R.P.C. 919, [1898] A.C. 200; Frost, Patent Law (4th ed.), pp. 385, 387, 388. There was a distinction between cases where the person handling the patented goods obtained an advantage and cases where no such advantage emerged—*Neilson v. Betts*, 1870, L.R., 5 H.L.C. 1, at p. 10; *Nobel's Explosives Company v. Jones, Scott, & Company*, 1881, 17 Ch. D. 721, *per James, L.J.*, at pp. 741, 742; *Badische Anilin and Soda Fabrik v. Johnson & Company (cit. sup.)*, *per Lord Herschell*. It was not an infringement to be in innocent possession of a patented article—*Pessers, Moody, Wraith, & Gurr, Limited v. Newell & Company*, 1914, 31 R.P.C. 510; *British United Shoe Machinery Company, Limited v. Simon Collier Limited*, 1910, 27 R.P.C. 567. The property of articles made in violation of a patent was with the infringer if he would otherwise have the property in them, and the Court only interfered to prevent them being used in derogation of the patentee's rights—*Vavasour v. Krupp*, 1878, 9 Ch. D. 351, *per Cotton, L.J.*, at p. 360.

Argued for the complainers (respondents)—The complainers' right to interdict against importing generally was admitted, but exporting was correlative with importing. Mere export might constitute infringement—*British Motor Syndicate, Limited v. Taylor & Sons, Limited*, 1900, 17 R.P.C. 189, 723, [1900] 1 Ch. 577, [1901] 1 Ch. 122. Use for experiment and instruction might constitute infringement—*United Telephone Company v. Sharples*, 1885, 2 R.P.C. 28, 29 Ch. D. 164. Even the return of infringing goods to the source from which they came might be an infringement—*Upmann v. Elkan*, 1871, L.R., 7 Ch. 130, *per Lord Hatherley*; Kerly on Trade Marks (4th ed.), p. 499, was also referred to. [The LORD PRESIDENT referred to *Betts v. Willmott*, 1870, 18 W.R. 946.]

At advising—

LORD PRESIDENT—The reclaimers are merchants and deal in, among other things, electric lamps. They were importers of a particular class of lamp, manufactured in Holland, which infringes the Thomson-Houston Company's patent. The latter

company had already obtained interdict against the Dutch makers infringing their patent in this country, and in the present note of suspension and interdict they seek interdict against the reclaimers doing so likewise. The merits of the question thus arising between the Thomson-Houston Company and the reclaimers were disposed of adversely to the reclaimers in an ordinary action concluding, *inter alia*, for damages and delivery of the infringing lamps in their possession at the date when the action was raised. In the note of suspension and interdict the reclaimers withdrew all their pleas—including that to relevancy—except the fifth, and it is on this plea that the question arises.

The prayer craves interdict against both importation into this country and exportation from it, as well as the usual interdict against making, using, exercising, and selling. The reclaimers have no objection to any part of the interdict except that which relates to exportation, and the ground of their objection is that stated in their fifth plea, namely, that "exporting from the United Kingdom does not in itself constitute infringement."

The point arises in very peculiar circumstances.

In the first place, the Thomas-Houston Company do not make on record any special averments to support an express interdict against exportation. Not only, however, have the reclaimers withdrawn their plea to relevancy, but when invited to recur to this ground of objection for the present purpose their counsel declined to adopt that course.

In the second place, it might have been thought superfluous to add to an interdict which already covers manufacture, use, exercise, sale, and importation, any express mention of exportation. But the reclaimers frankly explained that while they had no intention of importing for use or sale in this country, their desire was to be free in the matter of exportation from it. They referred to the principle discussed in such cases as *Neilson v. Betts* ((1871) L.R. 5 (H.L.) 1) and *Badische Anilin Fabric v. Basle Chemical Works* ([1898] A.C. 200, see especially *per* Lord Herschell at p. 208), by which warehousemen or transport agents do not necessarily commit infringement by handling a patented article. But they did not dispute that any projected handling of these infringing lamps on their part would be neither as warehousemen nor as transport agents, but in their capacity as merchants. If there is the smallest chance that the reclaimers would regard themselves free, under an interdict which did not expressly include exportation, to import these lamps and, instead of selling them in this country, to export them to purchasers abroad, I am very clear that exportation should be expressly covered by the interdict. The reclaimers also explained that they anticipate receipt in the future from the Dutch maker or other persons of infringing lamps among or in lieu of supplies of non-infringing lamps ordered by them. This might, no doubt, occur by mistake, and they

desired to be free in such an event to return the goods without risk of incurring penalties for breach of interdict. Cases such as *Uppmann v. Elkan* ((1871) L.R., 7 Ch. Ap. 130) and *Betts v. Willmott* (1870, 18 W.R. 946) show that it is not difficult in circumstances of this kind for a merchant who finds himself innocently in possession of infringing articles to adopt a line of action which will protect him. It was accordingly suggested to the reclaimers that a refusal on their part of infringing goods which they had not ordered and the return thereof to the sender, if that was all that was intended, might easily be reserved to them (if necessary) by adjecting a few qualifying words to the interdict. But they declined to avail themselves of an opportunity which was afforded to them of proposing such words. I think in these somewhat unusual circumstances it would not be fair to the patentees to refuse interdict, in the case of merchants of this class of goods, against exportation.

It appears that the Lord Ordinary had mainly in view the risk of defeating the order for delivery of infringing articles pronounced in the ordinary action. But the reclaimers have made it perfectly clear that the question is of wider ambit and involves possible future commercial dealings.

LORD MACKENZIE—Interdict ought in my opinion to go out in terms of the Lord Ordinary's interlocutor. There are sufficient grounds for this in the way the respondents put their case in plea 5—"In any event, exporting from the United Kingdom not in itself constituting infringement, interdict cannot competently be granted in terms of the prayer." If there had been reason to doubt what the position of the respondents is, it was removed by the argument submitted on their behalf. This made it plain that they did not limit their right to send out of the country goods which they rejected and returned to the consignors. They are merchants, not carriers, and when they urge a wider right than this they emphasise the necessity for giving the patentees protection to the fullest extent.

LORD SKERRINGTON—I am of opinion that the interdict as granted by the Lord Ordinary was unduly wide, in respect that it restrained the respondents from infringing the complainers' patent by "exporting" from the United Kingdom incandescent electric lamps of the kind described in the prayer of the note of suspension and interdict. In the first place, the complainers' statement of facts contains no averments which would justify an interdict against exportation. On the contrary, it is absolutely silent upon that subject. In the second place, the only ground stated by the Lord Ordinary in his opinion for subjecting the respondents to an interdict against exporting lamps is unsatisfactory and indeed untenable, and the complainers' counsel did not venture to maintain it. In the third place, the interdict as granted offends against the fundamental and salutary rule that an interdict ought not to be expressed in language which is of doubtful meaning. A respondent is entitled to know exactly

what it is that he must abstain from doing. The lengthy debate to which we listened showed that opinions may reasonably differ as to the meaning of the word "exporting" as used in the interdict. If the complainers desired to obtain from the Lord Ordinary or to maintain in the Inner House an interdict against the exportation of lamps by the respondents, their counsel ought, in my judgment, to have asked leave to amend their pleadings by adding the averments which were necessary both from the point of view of relevancy, and also for the purpose of defining the acts from which the respondents must abstain under pain of committing a breach of interdict. In expressing this opinion I have not lost sight of the fact that the respondents' fifth plea-in-law may be construed as an assertion of a right to "export" lamps whatever may be implied by that expression. This circumstance does not in my view exonerate the complainers from the duty of presenting their case to the Court in proper and usual form. I think that the interdict ought to be limited by omitting the words "or exporting therefrom."

LORD CULLEN—I concur with the majority of your Lordships.

The Court adhered.

Counsel for the Respondents (Reclaimers)—Moncrieff, K.C.—Wark, K.C.—Burn Murdoch. Agents—Davidson & Syme, W.S.

Counsel for the Complainers (Respondents)—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—Webster, Will, & Company, W.S.

Wednesday, July 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.

M'KINLAY v. DARGAVIL COAL COMPANY.

Reparation—Negligence—Trap—Injuries to Children—Gate in Place Frequented by Children—Relevancy.

A father brought an action against a colliery company for damages for the death of his child, aged nine, who while playing about a gate at the entrance to a colliery was killed owing to the gate, upon which other children were swinging, closing and crushing him between the hinge-end of the gate and the gatepost. The gate was so constructed that the space between the hinge-end of the gate and the gatepost was about one inch when the gate was closed and increased by the opening of the gate until it was sufficient for a child to pass through. The pursuer averred that the gate when open was, in the knowledge of the defenders, dangerous owing to its size, construction, and weight, that it was in a state of disrepair which prevented it from being secured, when open, by a device which the defenders

had provided for that purpose, that children habitually played on and about the gate with the tacit permission of the defenders, that it formed an allurement to them which, owing to the danger not being obvious, was of the nature of a trap, and that the defenders had taken no precautions to prevent children from being injured. *Held (rev. judgment of Lord Hunter, Ordinary, the Lord President dissenting)* that the pursuer had stated a relevant case for inquiry, and issue *allowed*.

George M'Kinlay, miner, Larkhall, *pursuer*, brought an action against the Dargavil Coal Company, Limited, *defenders*, in which he claimed £500 as damages for the death of his son, aged nine, who had been killed while playing about a gate at an entrance to the Cornsilloch Colliery, Larkhall, of which the defenders were owners.

The pursuer's averments were as follows, the words in italics being added by amendment:—(Cond. 2) In the vicinity of the colliery there are two large blocks or tenements of houses known as Cornsilloch, which are occupied by the miners and other employees working at the defenders' colliery. The said tenements are situated at the entrance to the colliery. At one time said tenements were separated from the colliery ground by means of a wooden fence, but latterly the said fence fell into disrepair, and for a considerable time prior to the accident after mentioned it had ceased to be any barrier to free access from the tenements to the colliery ground. The distance from the back of the tenements to what is known as the colliery entrance is only some 30 to 40 yards. At said colliery entrance there are two gates, one a large wooden gate for vehicles and the other a small gate. The large gate closes a path which is used as a cart entrance to the colliery, and at one time when not in use was invariably kept shut and fastened. For a long time past this has not been done. . . . (Cond 3) The larger gate, known as the traffic gate, is of large dimensions. It is some 12 feet long and is 9 feet in height. It is doubly built and heavily constructed. It is fixed to the gatepost by means of large iron hinges some 12 inches each in length, and in the gate there is a hook which is intended to fit into an iron eye which is affixed to an upright post, with an arrangement for padlocking said hook, so as to secure the gate when open and prevent it being, as it would be owing to its weight, a source of danger. The gate has sagged owing to its weight, and for some considerable time prior to and at the time of the accident after mentioned, the hook could not be brought into line with the eye so as to secure it. The defenders were aware that the gate was defective in this respect, as it was their custom to secure the gate when it required to be open for traffic, by placing in front of it bricks and stones so as to hold it in position. . . . (Cond. 4) The ground at the back of the tenements above referred to and in the vicinity of said gate, both within and without the grounds of the colliery, is and was at the time of the accident in question used