machine; it must, to use a logical phrase, 'assign the differentia' of the new combination." The entire machine in that case was a sewing machine. The new combination was an arrangement of three cones on one shaft, and Lord Westbury held that although "it was true that the cones and the shaft were described indiscriminately with the rest of the machine in the specification, there was nothing to indicate that it was this addition which constituted the improved arrangement or new combination." By "assigning the differentia" there, I understand Lord Westbury to have meant that where the patentee's invention only extended to a portion of an entire machine, he must point out the limits of that portion, distinguishing it from the rest of the machine of which it forms a part.

But what has the duty thus cast upon the patentees in cases of that description to do with the present case, in which the patentees on the face of their specification claim that "what is novel and original" is not any portion of an entire combination, but the entire combination itself? On the face of their specification *non constat* that their invention does consist in anything short of that entire combination, or that it would be adequately described by any words which did not include the whole of it.

Some confusion appears to me to have been imported into the argument of the case by opening the question of what will amount to an infringement of a patent which, like the present, claims as novel an entire combination of several parts, many of which may be old. This question, I think, is quite separate and distinct from the sufficiency of the specification on the face of it, which is all that we have to do with here.

But the case of *Lister* v. *Leather* has been cited and commented upon as an authority for the proposition that a patent for a combination covers and protects all subordinate combinations or parts, or at least such of them as are "new and material." It is plain however that that case did not go this length. It decided nothing more than this—that though the patent is for a combination it does not follow that there can be no infringement of it unless every part of that combination without exception is pirated. What the Court said was, that the taking of a subordinate part or parts *might* be, not that it necessarily *would* be, an infringement of the patent, and that whether it would be so or not depended, "upon what the parts taken were, how they contributed to the object of the invention, and what relation they bore to each other."

This only amounts to saying that on a question of infringement the essential nature of the invention will be regarded, and that there may be cases in which, though the patent is for an entire combination of numerous parts, a collusive imitation of that invention may be effected though some detail of the combination is omitted or changed—which is a doctrine familiar enough in patent law.

Upon the whole, then, I am of opinion that the direction of the learned Judge cannot be sustained. The case must, I think, go to a jury, and if on the evidence there is room for the jury to find that the novelty and usefulness of the pursuers' arrangements—in other words the pursuers' invention—consists in anything short of the entire combination mentioned in the first claim, the jury should be directed that in the event of their arriving at that conclusion they should find for the defenders on the pursuers' issue of infringement, on the ground that the patent is void in law.

Interlocutor of 18th January 1876 reversed, and case remitted, with a declaration that the exception ought to have been allowed and a new trial had.

COURT OF SESSION.

Wednesday, October 18.

FIRST DIVISION.

[Lord Young, Ordinary.

MORRISON *v.* SMITH AND CALDER.

Process—Reclaiming Note—Reponing—Default.

An action was dismissed by the Lord Ordinary "in respect of no appearance being made on the part of the pursuer." A reclaiming note was presented, and the Court, in respect that the agent and not the client had been to blame, remitted to the Lord Ordinary to repone the pursuer upon payment of the expenses occasioned by his default.

This was an action of reduction at the instance of Andrew Morrison, a cashier in Glasgow, as executor of a deceased brother, against Adam Smith, writer in Falkirk, and John Calder, a client of the latter, of an assignation in favour of Smith of certain policies of insurance, on the ground of fraud and circumvention.

On the 12th May 1876 the record was closed on the summons and preliminary defences, but on the case being called in the Procedure Roll upon 10th June, the Lord Ordinary "in respect of no appearance on the part of the pursuer by either counsel or agent," continued it till next day, and appointed Mr Arthur, S.S.C., "whose name appears on the record as agent for the pursuer, then to attend." An explanation was given by counsel next day that it was owing to inadvertence that no appearance had been made, as the case had not been seen in the roll. This explanation was accepted. On 21st June a proof was appointed to take place on 5th July, but upon that day the Lord Ordinary, "in respect of no appearance being made on the part of the pursuer," dismissed the action. The defenders' account of expenses was thereafter audited, and on 20th July the Lord Ordinary decerned for £90, the taxed amount.

The pursuer upon the first box-day in vacation (24th August) lodged a reclaiming note, dated 17th July, to be reponed against the decree of 5th July, but did not reclaim against the interlocutor decerning for expenses.

On the case being called in the Single Bills it was stated for the pursuer that, being resident in Glasgow, he had been obliged to leave his case in the hands of his agent, who had neglected it,

although he had supplied him with ample funds. He had now employed another agent.

The respondent opposed the motion, as the delays on the part of the pursuer had been numerous, and in any event asked that the pursuer should be found liable in substantial expenses.

Authorities—*Trs. of the Free Tron Church* v. *Morrison*, 13 Scot. Law Rep. 384; *Anderson* v. *Garson*, Dec. 16, 1875, 3 R. 254; *Arthur* v. *Bell*, June 16, 1861, 4 Macph. 841.

At advising—

Lord President—There is no doubt there has been a good deal of improper delay on the part of the pursuer in this case, but how far the pursuer is personally answerable, and how far this is attributable to the misconduct of his agent, it is not easy to determine. My impression from what I have heard is that the blame lies with the agent. The interlocutor against which the pursuer seeks to be reponed was pronounced in consequence of his failure to appear at the diet of proof, and that was a default of a serious kind.

It is impossible to entertain the proposition that the pursuer should be reponed except on very serious conditions as to expenses, and while I am not prepared in the circumstances to say that the reclaiming note should be refused altogether, I think that the pursuer must pay in full the expenses to which the defender has been put by his default. We are not in a position to determine how much these expenses are, and I think we should leave that to the Lord Ordinary to determine.

An apparent difficulty has been presented to us by the fact that the defender has already proceeded to have his account of expenses taxed, and has obtained decree, and that that interlocutor has not been brought under review. I desire to make two observations upon this point. The first is that we cannot touch that decree; and, in the second place, that that being so, I think we ought to dispose of this matter as if no such decree existed. Of course if the defender gives a charge upon the decree of 20th July, the payment of the expenses now to be found due by the Lord Ordinary as the condition of reponing the pursuer, if made, will be a payment to account of the £90 for which decree has already been obtained. But at present I give no opinion as to whether that decree can be suspended or not.

What I propose to do is to repone the pursuer against this decree by default on payment to the defender of the expense occasioned to him thereby, and to remit to the Lord Ordinary to ascertain the sum of expenses.

Lord Deas—This a very delicate question, but considering the very special circumstances of the case I am disposed to concur with your Lordship. I agree in thinking that the delay has lain with the agent and not with the party. It would be hard to apply with a strong hand a universal rule where the agent has failed and the client has never had an opportunity of knowing the state of matters and getting his agent to take up the case. This is not a precedent for any other case. It is a very favourable case for a party desiring to be reponed, and it is quite right that the Lord Ordinary should fix the amount of expense which the pursuer must pay.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Andrew Morrison, pursuer, against Lord Young's interlocutor of 5th July 1876, remit to the Lord Ordinary to repone the pursuer against the decree contained in the said interlocutor reclaimed against, on payment of the expenses occasioned to the defenders by the pursuer's default."

Counsel for Pursuer — M'Kechnie. Agents —J. & A. Hastie, S.S.C.

Counsel for Defenders—Henderson. Agents —Waddell & M'Intosh, W.S.

Wednesday, October 18.

FIRST DIVISION.

[Lord Young, Ordinary.

BUCHANAN *v.* WEIR.

Process—Caution—Expenses.

In an action of partnership accounting decree was given by the Lord Ordinary against the defender, which if it became final would have the effect of rendering him insolvent. On his presenting a reclaiming note, *held* that the circumstances did not warrant the Court in ordaining him to find caution for expenses.

This was an action of accounting, in which Alexander Weir, manufacturer, Ayr, was pursuer, and Moses Buchanan, commission agent, Glasgow, was defender. The matters in dispute had arisen out of a number of cash transactions—bills and promissory notes, &c.—which had passed between the two, and after a remit to an accountant to examine the accounts and vouchers the Lord Ordinary pronounced decree against the defender for £1510. The defender reclaimed against this judgment, and when the reclaiming note was called in the Single Bills the pursuer moved that the defender be ordained to find caution, on the ground that he was insolvent (*cf. Maxwell* v. *Maxwell*, 3d March 1874, 9 D. 797).

The defender admitted that the effect of the decree of the Lord Ordinary if it became final would be to render him insolvent, but, on the other hand, if that interlocutor was recalled, and judgment given in terms of his pleas-in-law, he would not be insolvent.

At advising—

Lord President—I understand that if the defender had been successful in this action, and had obtained judgment in terms of his pleas-in-law, he would not be insolvent, and that is not contradicted. His position now is that he is provisionally insolvent. It is a peculiar case, and I am not aware that upon that ground we have ever ordained a defender to find caution. The circumstance that the question at issue is one of a partnership accounting is material. Such questions are generally difficult, and require a great deal of trouble to extricate, and judges frequently differ upon them. It must not be taken for granted in the discussion of this motion that