Friday, December 21.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* CHARLESWORTH, PEEBLES, & COMPANY.

Process — Printing Productions for Inner House— Documents not Proved or Put in Evidence—Excerpts from House of Lords Case and Appendix in Contemporaneous English Action.

An electrical engineering company brought an action of interdict and damages in Scotland for infringement of a patent. The company had already brought another action against a different defender in England, and at the time when proof was led in the Scottish action an appeal to the House of Lords was pending in the English action. At the proof in the Scottish action the defenders lodged in process a bound volume containing the House of Lords case and appendix in the appeal in the English action, but the Lord Ordinary disallowed questions being put to witnesses regarding its contents. The Lord Ordinary having granted decree, the defenders reclaimed and intimated to the pursuers that they proposed to print as an appendix to the reclaiming note, and as part of the evidence to be laid before the Inner House, excerpts from the bound volume. The excerpts consisted of certain portions of the pleadings of parties in the appeal, and certain portions of the shorthand notes of the evidence led at the trial.

On the respondents objecting to the reclaimers printing and boxing the proposed appendix in respect that the excerpts were not evidence in the present action, the Court *sustained* the objection.

Observed that the reclaimers, while not permitted to print a truncated edition of the volume in question, might if they chose print and box the volume as a whole, though it did not follow that the permission to print was to be construed as a licence to use it.

The British Thomson-Houston Company, Limited, London, *pursuers*, brought an action against Charlesworth, Peebles, & Company, *defenders*, for interdict, delivery, and damages in respect of an alleged infringement of a patent.

On 19th July 1923, after proof led, the Lord Ordinary (BLACKBURN) pronounced an interlocutor in which, *inter alia*, he granted interdict.

On 31st July 1923 the defenders reclaimed, and on 16th October 1923 the case was sent to the roll.

Subsequently thereto the respondents presented a note to the Lord Justice-Clerk, which stated, *inter alia*—"The defenders and reclaimers have intimated to the pursuers and respondents that they propose to print in an appendix to the said reclaiming note, and as part of the evidence to be laid before their Lordships of the Second Division, excerpts from the bound volume of the House of Lords case and appendix in an appeal to the House of Lords in an action in the High Court of Justice in England — *British Thomson-Houston Company, Limited* v. *Duram Limited.* The said appeal (which is reported in 35 R.P.C. 161) is concerned with another patent belonging to the pursuers and respondents, which the defenders and reclaimers allege to be an anticipation of the letters-patent 23499 of 1909. The excerpts which the defenders and reclaimers propose to print consist of certain portions of the pleadings of parties in the said appeal and of certain portions of the shorthand notes of the evidence led at the trial. None of the said excerpts were spoken to by any of the witnesses in the present action, and they were in no way made part of the evidence therein. The pursuers and respondents have informed the defenders and reclaimers that they object to the print of the said excerpts being boxed to the Court or received by the Clerk of Court in respect that they are not evidence in the present action. The defenders and reclaimers have, however, informed the pursuers and respondents that the printing of the said excerpts is to be proceeded with, with a view to the print being boxed. In the event of the said excerpts being printed and being held to be competent evidence it would be necessary for the pursuers and respondents to print large additional excerpts, or alternatively to print the whole of the said volume. The pursuers and respondents therefore respectfully bring the matter to your Lordship's notice. They humbly submit that the said excerpts are not evidence, and that no print thereof should be boxed to the Court or received by the Clerk of Court."

At the hearing in the Single Bills on 15th December 1923 the respondents argued—The Court should direct the Clerk of Court not to receive the appendix. The Lord Ordinary had held that the evidence contained in the excerpts was not competent evidence, and unless and until the Court at the hearing of the reclaiming note decided that the evidence was competent the appendix should not be put before the Court. The Court should decide the question of competency before looking at the evidence. If at the hearing the Court were to hold that the evidence was competent, and if the evidence was thereafter duly proved or admitted, the respondents would print the whole of the bound volume, because the appendix contained excerpts merely, and therefore gave a partial representation of the evidence. In any event, apart from their partiality, the excerpts were not competent evidence because they had not as yet been proved, the Lord Ordinary having disallowed questions relating to them. It was not competent to put in evidence what had not been proved—*Grierson* v. *Mitchell*, 1912 S.C. 173, 49 S.L.R. 94; *Galbraith (Neill's Trustee)* v. *British Linen Company*, (1897) 5 S.L.T. 164; *Shedden* v. *Patrick and Others*, (1849) 11 D. 1057; *Lockyer* v. *Sinclair*, (1845)

8 D. 1; *Williamson* v. *Taylor*, (1845) 7 D. 842. The bound volume did not have the unity of a document or deed. Even if part of its contents had been proved by being put to witnesses, the remainder of its contents was not thereby proved also.

Argued for the reclaimers — The reclaimers were entitled to print and box the appendix. It would be highly inconvenient at this stage of the case to decide the question, which might be an important one, of the competency of the evidence in question. In *Galbraith (Neill's Trustee)* v. *British Linen Company (cit.)* the question of competency arose at the hearing on the evidence after a proof, and when the Lord Ordinary gave his decision he was seized with the whole evidence. In any event the evidence was competent. The evidence had been proved, because the appendix possessed the unity of a single document. Moreover, the respondents themselves had cross-examined the reclaimers' witnesses on the contents of the appendix. The reclaimers were not attempting to make the evidence in one case evidence in another. Further, the reclaimers did not propose to charge the respondents with the evidence contained in the appendix. The reclaimers proposed to use the evidence only for the purpose of showing what the case was which the respondents had previously put forward and estopping them from putting forward a different case now—Phipson's Law of Evidence (6th ed.), p. 251; *Mollison's Trustees* v. *Crawfurd*, (1851) 13 D. 1075, *per* Lord President (Boyle) at 1087. Dickson on Evidence (3rd ed.), section 293, was also referred to.

At advising—

Lord Justice-Clerk (Alness)—This is an unusual application. It invites the Court, in the Single Bills, and without any knowledge of the action to which it relates other than that contributed by counsel for the parties during the discussion which took place upon the application, to ban a proposal made by the defenders and reclaimers to print and box a document to the Court.

Of the action to which the application refers I will only say that it is one of interdict against the alleged infringement of a patent, that one of the defences to it is anticipation of the patent, that the Lord Ordinary decided the case in favour of the pursuers, and that the defenders have reclaimed against his judgment.

I must now consider the document which the respondents seek *ab ante* to restrain the reclaimers from printing and boxing to the Court. It is thus referred to in the note containing the respondents' application, and the description is unchallenged by the reclaimers—"The defenders and reclaimers have intimated to the pursuers and respondents that they propose to print in an appendix to the said reclaiming note, and as part of the evidence to be laid before their Lordships of the Second Division, *excerpts from* the bound volume of the House of Lords case and appendix in an appeal to the House of Lords in an action in the High Court of Justice in England — the *British Thomson-Houston Company, Limited* v. *Duram, Limited*. . . . The excerpts which the defenders and reclaimers propose to print *consist of certain portions of the pleadings of parties* in the said appeal and of *certain portions of the shorthand notes of the evidence led at the trial.*" I should add (1) that the House of Lords case refers to an earlier patent of the respondents which is alleged to have anticipated the later one, and (2) that the House of Lords case was put by the reclaimers in their inventory of productions put in evidence by them.

Now I think that the proposal by the reclaimers to print an appendix containing excerpts selected according to their discretion from the House of Lords case is highly objectionable. Nor do I think that it is a good answer on their part to say that the respondents can print additional excerpts from the case should they regard those printed by the reclaimers as insufficient or misleading. The reclaimers have no right to impose that burden upon the respondents. In my opinion the reclaimers must print and box the whole document or leave it alone.

That the reclaimers are entitled to print the whole document if they are so minded I have no doubt at all. The document, as I have said, is included in the inventory of productions put in evidence by them, and I am disposed to think that it was rightly included there. For I observe that the volume was put without objection to Dr Oberlander in cross-examination. In these circumstances, while the reclaimers may not print a truncated edition of the House of Lords case, I see no warrant for forbidding them, if they are so disposed, to print and box it as a whole.

At the same time I cannot make it too clear that the learned Dean of Faculty will not be precluded by anything which we decide to-day from arguing at a later stage of the case as to the extent to which the Court can competently consider the contents of the House of Lords case. In other words, permission to print and box that document is in no way to be construed as a licence to use it. With regard to that question the respondents' rights remain intact. Probably they reserve themselves. But in a matter of this importance I desire to make express what is probably implied.

I propose, therefore, to your Lordships that the application should be disposed of in the sense which I have suggested.

Lord Ormidale—I agree with your Lordship that the crave of the note should be granted. The note proceeds on the recital that the defenders and reclaimers propose to print in an apppendix to the reclaiming note, and as part of the evidence to be laid before the Division, excerpts from the bound volume of the House of Lords case and appendix in an appeal in an action in the High Court of Justice in England, the excerpts consisting of certain portions of the pleadings of parties in the appeal and certain portions of the shorthand notes of the evidence led at the trial. The respon-

dents object that they are not evidence in the present action. Without either affirming or rejecting that proposition stated in so absolute a form, the procedure proposed by the reclaimers is, in my opinion, incompetent in respect, *first*, that the excerpts are not entered in the inventory of productions put in evidence by the reclaimers at the trial; *second*, that they have not even been lodged in process; and *third*, that they have not been considered by the Lord Ordinary, questions relating to their contents having been disallowed by him as incompetent. The bound volume from which they have been excerpted is entered in the inventory of productions put in evidence by the reclaimers without objection being taken by the respondents. The latter contended before us that the bound volume had not been proved. I express no opinion as to that. It is a question not relevant, in my judgment, to the issue presented to us at this stage, and is in no way affected by the judgment which your Lordship now advises the Court to pronounce. But the mere fact that the selected passages — I do not use the term in any invidious sense — are to be found in the volume supplies no warrant, in the circumstances I have referred to, for printing them as a separate entity in the appendix which the reclaimers propose to box. In effect as well as in form they constitute a new production. The question we are now deciding has not arisen very frequently in practice but the cases cited by the Dean, without definitely instructing any general rule, afford illustration at least of the Court's declinature to receive any writing or other production which has not already been considered by the Lord Ordinary and presented to him in the identical form in which it is tendered in the Inner House.

LORD ANDERSON—The reclaiming note in this action was sent to the roll on 16th October, and the case will come on for hearing next session. In view of the hearing the reclaimers propose to print and box to the Court a certain appendix. The respondents object to this being done, and the prayer of their note is that the Court should not allow the said appendix to be boxed to the Court or received by the Clerk of Court.

The reclaimers have not moved to be allowed to answer the averments contained in the note. These must therefore be taken *pro veritate*, and the note must be disposed of on the footing that its averments accurately describe what is proposed to be done. In the note the respondents aver that the reclaimers have intimated to them their intention of printing in an appendix to the reclaiming note and "as part of the evidence" to be laid before this Division excerpts from the bound volume of a House of Lords case and appendix thereto in a pending cause between the respondents and a company named *Duram Limited*. The subject-matter of the litigation is a patent belonging to the respondents, which is a different patent from that which forms the subject-matter of this action. The respondents go on to aver in their note that the excerpts which the reclaimers propose to print consist of certain portions of the pleadings of parties in the foresaid House of Lords appeal, and of certain parts of the shorthand notes of the evidence led at the trial of that action—"None of the said excerpts were spoken to by any of the witnesses in the present action, and they were in no way made part of the evidence therein." The legal basis of the prayer of the respondents' note is that these excerpts "are not evidence in the present action."

The bound volume containing the said House of Lords case is No. 304 of process. In the course of the proof the reclaimers' counsel attempted to use that case in this way — In cross-examination of one of the respondents' witnesses named Dr Oberlander a question was asked as to certain evidence given in the *Duram* case by a witness named Swinburne who had been a witness for the respondents. The question was objected to and the objection sustained. The next question put was—"(Q) I show you No. 304 of process, being the record of the evidence in the English Court, and direct your attention to certain passages." This line of evidence was disallowed by the Lord Ordinary. The object of the reclaimers in printing the proposed appendix seems to be to utilise at the hearing the evidence in the English case although they were debarred from doing so in the proof.

It remains to be considered whether our procedure sanctions this proposal. By our practice in proofs it is necessary that productions which it is proposed to use in the proof should be lodged in process with an inventory or inventories of these productions. The Act of Sederunt of 31st May 1902 provides that such productions must be lodged on or before the fourth day prior to the day appointed for the proof. The provisions of this Act of Sederunt may be relaxed by the Court on cause shown. It does not follow that all productions which have been lodged in process are put in evidence as part of the proof. At the conclusion of the oral proof and before the hearing on evidence each party must put in evidence along with an inventory all productions which are to be founded on as part of the proof. No production may be put in evidence which is not probative, or which has not been proved by witnesses or admitted by consent of counsel. The House of Lords case was put in evidence by the reclaimers prior to the hearing on evidence. We are not concerned, however, with the House of Lords case but with a proposed new production.

In my opinion the prayer of the note falls to be granted for a variety of reasons,

In the first place the proposed appendix has never been in process at all. The proposed excerpts, it is true, are all contained in the House of Lords case, which is in process, but the contemplated appendix is really a new production, being certain parts of the House of Lords case divorced from the context and assembled as an *ex parte* compilation. If this view is sound, what is proposed to be done seems struck at by the cases of *Williamson*, 7 D. 842, and *Grierson*, 1912 S.C. 173.

In the next place, assuming that the proposed appendix has been in process *in gremio* of the House of Lords case, it has never been put in evidence. The Lord Ordinary did not have it before him when considering the proof. This is fatal to its production now—*Shedden*, 8 D. 1057. Again, the proposed excerpts, as the respondents aver in their note, have never been proved. Presumably the excerpts will consist of those parts of the appeal case which the Lord Ordinary interpelled the reclaimers from attempting to prove. In consequence these excerpts cannot now be used as evidence—*Galbraith*, 5 S.L.T. 164.

Finally, the reclaimers are responsible for the accurate and complete printing of the productions. The House of Lords case is a production which, rightly or wrongly, was allowed to be put in evidence at the close of the proof. This having been done, the reclaimers are probably entitled to print and box the House of Lords case. But they will not be allowed in the absence of consent to print parts of the bound volume only. They must print the whole volume, or so much thereof as satisfies the respondents. The reclaimers may therefore, if they desire to do so, print and box the whole document *quantum valeat*. It must, however, be clearly understood that if the reclaimers print and box this document it does not follow that they will be entitled to use it as evidence in this case, or indeed for any other purpose. On the other hand nothing we are deciding precludes the reclaimers from maintaining, if they see fit to do so, that the Lord Ordinary was wrong in excluding the evidence which the reclaimers desired to obtain from Dr Oberlander. This is a point which does not require the proposed appendix or the appeal case itself for its determination. All we decide is that we must interpel the reclaimers from boxing to the Court the proposed appendix and the Clerk of Court from receiving it if presented.

LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

> "Grant the crave of the note, disallow the defenders and reclaimers printing, boxing, and lodging as an appendix the excerpts referred to therein, and interpel the Clerk of Court and boxing clerks from receiving prints of an appendix consisting of, or partly consisting of, such excerpts: Find the expenses incurred in the present application to be expenses in the cause."

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

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

Saturday, January 12, 1924.

SECOND DIVISION.

ANDERSON & MUNRO, LIMITED, PETITIONERS.

Company — Shares — Payment Otherwise than in Cash—Contract not Reduced to Writing — Omission to File Prescribed Particulars Timeously — Relief — Extension of Time for Filing Contract with Registrar — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 88, *subsecs.* 1 (*b*), (2), *and* (3).

The Companies (Consolidation) Act 1908 enacts—Section 88 (1)—"Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the Registrar of Companies . . .—(*b*) In the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted." (2) Where such a contract as above mentioned is not reduced to writing "The company shall within one month after the allotment file with the Registrar of Companies the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act 1891, and the registrar may as a condition of filing the particulars require that the duty payable thereon be adjudicated under section 12 of that Act." (3) "If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues: Provided that in case of default in filing with the Registrar of Companies within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court if satisfied that the omission to file the document was accidental or due to inadvertence, or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the Court may think proper."

A company which had made an allotment of shares fully paid up otherwise