Watsons, attached nothing. Nor does the circumstance that the landlord, after getting the money and paying himself, will hold the reversion for behoof of the Watsons, or any person in their right, constitute double distress. In no view, therefore, is there anything to warrant a multiplepoinding, and the judgment of the Sheriff-Substitute dismissing the action is right. No expenses have been given to the arrester, because his arrestment, although obliging the real raiser to call him as a party, is utterly inept; and, properly speaking, he has no *locus standi* in the case at all."

Cruickshank appealed.

Authorities—*Scott* v. *Drysdale*, May 22, 1827, 5 S. 689; *M'Target* v. *M'Target*, May 12, 1829, 7 S. 591; *Miller* v. *Ure*, June 23, 1838, 16 S. 1204.

At advising—

Lord President—The question which we have to decide here is, whether a multiplepoinding is competent or not. The Sheriff-Substitute and the Sheriff have found that it is not, on the ground that there is no double distress. Now the fund *in medio* is the price of the out-going tenants' crop, which is due by the in-coming tenant as purchaser to the out-going tenant as seller, and the arresting creditor lays claim to this sum on the one hand, and on the other hand there is the landlord, who claims the whole fund. Now it is difficult to understand what is double distress if this is not. The landlord's right rests on an agreement between the in-coming and out-going tenants, and it appears to me that there are two questions, 1st, Whether the landlord can found on the agreement at all; and 2dly, Whether the agreement is a good one? To say that there is no double distress seems to me impossible, and the multiplepoinding is therefore competent. It is much to be regretted that the action was ever brought at all, but certainly there is a question in it, and the Sheriff has assumed that the arrester has created no *nexus* over any fund—which is just the question on the merits which has to be tried. I am for recalling the Sheriff's interlocutor and sending the case back to him.

Lord Deas—The Sheriff-Substitute was right in giving no reason for his decision, for the reasons which the Sheriff gives are all in favour of an opposite conclusion. If it turns out that there was no necessity for a multiplepoinding, the party causing it, and not the fund, will have to pay. It is a question whether the landlord, who is not a party to the agreement, may not have a *jus quæsitum*. Then as to the arrestment, if Mr Reid's view were carried out there would be no need for it at all; but of course when we get upon the merits it may turn out that there were circumstances which made it necessary. Meantime, I strongly advise the parties to consider whether they cannot come to some arrangement.

Lord Ardmillan—I am strongly of the same opinion, and, especially, I concur in Lord Deas' last remark. It seems to me that there is a prospect here which would not be pleasant to most people, at least to those who dislike litigation. There really is no question which could not be settled in half-an-hour by the parties themselves. We cannot, however, enter into the merits at present, and we must sustain the competency of the action.

Lord Mure—I agree with your Lordships in regretting the litigation which has taken place, but on the question of competency I entertain no doubt. One party is claiming the whole fund, and another half of it,—a clearer case of double distress I never saw.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute, of date 22d May, and of the Sheriff, of date 2d July 1874: Repel the objections to the competency of the action, and remit to the Sheriff to proceed further in the cause; Find the respondent John Henderson Milne entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellants—J. A. Reid. Agent—David H. Wilson, S.S.C.

Counsel for Respondent—Mackintosh and Keir. Agent—

Tuesday, November 24.

FIRST DIVISION.

[Lord Young, Ordinary.

HARRISONS *v.* ANDERSTON FOUNDRY CO.

Patent—Jury trial.

In a case of suspension and interdict against an infringement of patent, the respondent averred prior use, and stated on record a number of letters patent, and of places where the prior use was said to have taken place. Issues were ordered, and the complainer asked for more specific information of (1) the passages in the various letters patent, and (2) the places where prior use took place. *Held* that if such information had been given it must have been by amendment of record, but that the complainer was not entitled to ask for it.

The pursuers in this case raised an action against the defenders on the ground of infringement of patent. Issues were ordered, and at adjustment the pursuers asked for further specification of (1) former patents; (2) prior use. Lord Young reported the case, and issued the following interlocutor:—

"*Edinburgh*, 16*th November* 1874.—The Lord Ordinary having heard counsel for the parties on the issues proposed for the trial of the cause, reports the same, and the whole case, to the First Division of the Court, and grants warrant to enrol in the rolls of the Inner House.

"*Note.*—I have taken the exceptional course of reporting the case at this stage in the special circumstances which I shall briefly explain, and with a view to promote the reasonable desire of the parties to have the case tried at the ensuing sittings of the First Division of the Court.

"The suspenders complain of an infringement of a patent, and seek by interdict to restrain the respondents from continuing the alleged infringement. The respondents impugn the validity of the patent on the grounds,—1st, that the patentees are not the first and true inventors; 2d, prior use; and 3d, inutility. The issue proposed by the complainers is in common form, and was not ob-

jected to. The counter-issues proposed by the respondents are also in common form, and were not objected to in point of form or expression.

"But the complainers require (statement 7) from the respondents further specification than the record gives of their statements with respect to prior invention and use; and it is with reference to the proper mode of directing the respondents to comply with this desire (if it should be thought reasonable, as I think it is), that I have reported the case at this stage. The doubt is whether, when a party maintains such pleas as the counter-issues proposed by the respondents are founded on, there is any other way of compelling him to give more specific information than by refusing his issues, unless he shall amend his record? In short, whether it is competent, after the adjustment of issues, to order further specification, for the reasonable information and guidance of the other party. From the position taken by the parties, it was obvious that, in whatever way I decided the controversy between them, there would be a reclaiming note; and I therefore (with the assent of both, as I understood), report the matter, as the course whereby the judgment of the Court may be obtained with the least hindrance to the progress of the case.

"My own opinion is that the respondents are entitled to the issues which they propose; and that by allowing the issues the complainers are not precluded from applying to the Court for an order on the respondents to furnish them with such further specification as they (I think reasonably) require. Such an order has been made of consent; and I should, for my part, be prepared to decide that it may be made without consent, or in the face of opposition. Information so ordered to be furnished by one party to the other for his guidance may not be such as ought to be, or conveniently can be, set forth on record, and I should not be disposed to regard it as of exactly the same technical character. The rules of candour and good faith would of course be enforced, and indeed are unlikely to be violated. But, consistently with these, the party furnishing the information, whether voluntarily or in obedience to an order of Court, might, in my opinion, be properly allowed at the trial to go beyond it to such extent as the Judge thought fair and reasonable in the circumstances.

"The record is perhaps not the place to specify the particular passages of books or specifications intended to be relied on; and if a note of them should be furnished to the opposite party, I think no more ought to be required at the trial than a substantial observance of the good faith of such note, regarded as notice,—without precluding the party from founding on other passages similar in character subsequently discovered—notice of which was not purposely withheld, and reference to which may be allowed without prejudice to the reasonable interests of the adversary. I venture to offer these remarks in support of the preference I should feel to the one mode of giving the information required rather than the other, and also with reference to the alarm which the respondents seemed to feel, that by giving the information required of them they would be deprived of the benefit which they might take from the more minute and careful investigation and consideration of the case which will probably precede the trial.

"It may be, and probably is, quite possible so to amend the record as to keep the respondents reasonably safe, while giving all the information that can properly be required of them; and I do not forget Lord Campbell's commendation of our records, which he illustrated by reference to this very subject of notice in patent cases.

"Therefore, although, on the whole, I have the preference which I have ventured to express, I think it is precisely a subject which it is important to have settled one way or the other, without its very much signifying which."

Authorities—*Neilson* v. *Househill Coal Co.*, Nov. 15, 1842, 5 D. 86; *Sykes* v. *Wilson*, Feb. 2, 1866, 4 Macph. 349; *Jones* v. *Berger*, Jan. 28, 1843, 12 L.J. C.P., 179; *Morgan* v. *Fuller*, April 28, 1866, 2 Law Rep. Eq. 297.

At advising—

LORD PRESIDENT—The question here is, whether we are to allow or disallow the first and second counter issues for the defenders. There is no question whether the pursuers are entitled to more information or notice except in the shape of an amendment of record; indeed I do not think any other mode is competent. In the case of the *Househill Coal Co.* there was a want of notice of certain examples of prior use on record, and that was supplemented, as the defenders thought, by lodging a note of instances which they said they meant to prove on the trial, but the presiding Judge refused to admit evidence of one of these, because they were not on record, and a note was not the manner in which such notice ought to be given—a view which was adhered to by the Second Division, who affirmed his ruling. The point, however, is properly raised here, for the objection applies to all the instances. As regards the defenders' first allegation of this nature, it is as follows:—"Quintin Whyte and John Whyte, in whose favour the letters-patent libelled on were granted, were not the first and true inventors of the alleged invention described in the said letters-patent and specification, and the said inventiou was not first published in Great Britain by the said Quintin Whyte and John Whyte, or either of them. The said alleged invention was published, and was publicly known and used in Great Britain prior to the date of the said letters-patent;" and then comes a long list of letters-patent. The pursuer says this is not a sufficient averment, because it sets him to hunt through the letters-patent. The answer to this is fairly enough that the defenders mean to rely upon the whole of them. Indeed, I can easily see that if this objection is to be sustained the defenders would be so tied down in the trial that there would be no end of the wrangling as to how much it was competent for him to read. So far as convenience is concerned, it is all one way. I may say also that I have tried a good many patent cases, and seen letters-patent put in evidence, but I never saw a specification asked for of lines and passages. The plausibility of the demand really arises from the number of patents named, which I daresay will cause a great deal of trouble, but that is not a sufficient reason. As regards prior use, the number of places where it is said the pursuer's invention was used is considerable both in Glasgow and in other towns, and one would think that if so many as are named and designed were publicly using the thing, the pursuer will easily find out what the defenders mean to rely on. The practice also is consistent with the

defender's way of making his account. In the *Househill* case, place, but no time, was specified, and if the time was prior to the letters-patent there is no reason for limiting the defender in point of time. I am for approving of the issues.

LORD DEAS—The leading question here is, whether we are to follow our own or the English practice. I am of opinion that if there were any amendment necessary it would be an amendment of record; that is our practice, and I think it is the best. Then comes the question whether any amendment is necessary. That is always a question of circumstances. The extent of the inquiry thrown on the other party may be so oppressive as to call for specification, but as the case stands I agree with your Lordship.

LORD ARDMILLAN—I agree that the record is the proper place to give the complainer the information he asks for, but the defender's second and third statements give him as much information as he is entitled to. The difficulty has been urged arising from the number of books in one case, and of instances of use in the other. In spite of that, I do not think that the mere multiplication is an element in determining this question. If the defender is not bound to give one page or line, why should he be bound to give ten? The obligation which rests on him in regard to one is the same as that which rests on him as regards ten. I am of opinion that there is no sufficient ground for an amendment of the record.

LORD MURE—Both the points before us are substantially settled by the case of *Neilson* v. *Househill Coal Co.* As to the first—the way in which notice must be given—a note was given in, and when it was proposed to prove the places so stated the Court held that the defender was not entitled to prove them. That judgment was affirmed, and it was laid down that the proper and only way was amendment of the record. As to the second point, that case settled it also. There were there a great many books and several patents referred to, and the reference to them was simply by their year. There is also as much information given here as to places as was given in the *Househill* case. In the present instance half the places named are in Glasgow, and there are only five places mentioned altogether as against four in the *Househill* case. On both grounds I concur.

The Court pronounced the following interlocutor:—

> "Approve of the issues No. 32 and 38 of process respectively, and appoint them to be the issues for the trial of the cause: Find the pursuers liable in expenses since the Lord Ordinary's interlocutor, and remit to the Auditor to tax the amount of said expenses and report to the Lord Ordinary; and remit to the Lord Ordinary, with power to his Lordship to decern for the said expenses."

Counsel for the Complainers—Dean of Faculty (Clark), Q.C., Asher, and Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondents—Solicitor-General (Watson), Q.C., Balfour, and Campbell. Agents—Davidson & Syme, W.S.

Tuesday, November 24.

FIRST DIVISION.

ROBERT SHIELDS *v.* NORTH BRITISH RAILWAY COMPANY.

Jury trial—Bodily injury—Partial recovery—New trial.

The pursuer of an action against a railway company obtained from a jury damages for bodily injury, producing paralysis. Before the verdict was applied he partially recovered. *Held* that this partial recovery was not a sufficient ground for a new trial.

The pursuer of this action obtained £3000 damages for bodily injuries, and the case was tried at the July Sittings, 1874. The defenders obtained a rule to show cause why a new trial should not be granted on the ground of excessive damages, and that the pursuer had, in whole or in part, recovered since the trial.

At advising—

LORD DEAS—The main ground on which a new trial is asked is that the pursuer is now much recovered from the condition in which he was at the trial—in fact that he is substantially recovered I do not think it necessary to consider whether substantial recovery is a competent ground on which to ask for a new trial; if so, it would require a very strong case, and I think there is no such strong case here, for even taking it on the affidavits for the Railway Company, I should think it impossible to say that the pursuer has substantially recovered. I shall not go into details, but there is nothing in the facts spoken to that of itself would indicate that. It is worthy of remark that on the defender's side there are no medical certificates There are, on the other side, by eminent men who were examined at the trial, and there was nothing to prevent the defender from giving such evidence at the same time. Dr M'Leod is the only witness who negatives the idea that the pursuer was suffering from proper paralysis. He seems to mean that there was no organic lesion such as the doctors on the other side said there was. I do not know what he thinks of the subject now, and any opinion on the point is left wholly to the doctors who were called at the trial for the pursuer, and they are satisfied that there was and is organic lesion. That there may be and is partial recovery is beyond a doubt; we have all seen again and again that paralysed people have partially recovered. I see nothing here to show that the same thing may not be the case now. The doctors say so, and yet they adhere to the opinion that there is actual and proper paralysis. If it were proved that the pursuer had so far recovered as to be able to conduct his business, that might possibly have raised a question; but no one says so, and there is no such strong case of recovery since the trial as to raise the question. Then the only other ground is excess of damages; that is quite a different and a very ordinary ground for granting a new trial. It is quite plain from what has been said that the injury is a serious one. If I had been on the jury I do not think I should have given quite so much; but that is no reason for interference with the verdict, and I think the rule should be discharged on both grounds.