generally, I am of opinion, upon the ground I have stated, that his Lordship has disposed rightly of this objection.

There is a second objection, which the Lord Ordinary has repelled, to the effect that the expenses incurred by Mr Tait in an earlier stage of this action should fall upon himself personally or upon his constituents' share of the trust-estate. I think that question must be held to have been decided when judgment was given at that stage of the case, and that we cannot entertain any question as to expenses disposed of by previous interlocutor.

On the whole matter, I am of opinion that we should adhere to his Lordship's interlocutor.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

On the question of expenses, the pursuer and nominal raiser argued that he should not be found personally liable. The question determined in this action was one on which it would have been necessary in any event to get a judicial decision, and if the trustee had raised an action before paying the landlord's claim to enable the landlord and Geddie to fight it out, he would have been entitled to his expenses out of the trust-estate.

LORD KINNEAR — Two points which require consideration are raised by Mr Johnston's motion. The first is as regards the question of the proof. I think with the Lord Ordinary that some proof was necessary. Our judgment has proceeded upon it, and I am not prepared to say that we can blame one party more than the other for any excessive length. Therefore I think that we cannot give effect to Mr Johnston's objection on that point.

As to the other, it is perfectly true that by the course proceedings have taken Mr Tait, if found liable in expenses in the terms proposed by Mr Campbell, will have an expense thrown on him which in ordinary circumstances he would not have been called upon to bear, because he would not have been required to pay the expenses of the litigation required to determine the question between the landlord and tenant. But that unfortunately is due to his own precipitate action. If he was only a stakeholder, and if before paying the money he had taken care to see that the rights of parties were judicially determined, he would not have incurred any expense, because the landlord must either have given up his claim or paid his opponent's costs if he litigated unsuccessfully. But then it is just part of the error which we have found in the course of procedure, that the trustee is forced to take up Mr Balfour's claim, and he cannot maintain it except under the ordinary condition of paying expenses if he fails.

The LORD PRESIDENT and LORD ADAM concurred.

The Court adhered to the interlocutor of the Lord Ordinary, "with this variation, that they find the pursuer and nominal raiser personally liable to the objector James Geddie in the expenses found due to the said objector by the said interlocutor; find the pursuer and nominal raiser personally liable to the said objector in expenses since the date of said interlocutor; and find that the pursuer and nominal raiser is not entitled to charge his own expenses against the objector's share of the fund *in medio*, reserving to the pursuer and nominal raiser all right of relief competent to him with reference to the said expenses and the expenses hereinbefore decerned for, other than against the objector and his share of the fund *in medio*."

Counsel for the Pursuer and Nominal Raiser — H. Johnston — Cook. Agents — Graham, Johnston, & Fleming, W.S.

Counsel for the Defender and Objector — Dundas — W. Campbell. Agent — Thomas White, S.S.C.

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*Tuesday, February* 16.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## HENRY THOMSON & COMPANY *v.* DAILLY.

*Reparation — Measure of Damages — Substantial Damages Granted where No Specific Damage Proved—Expense of Detecting Fraud—Tender.*

In an action of declarator and interdict and for £500 damages against a public-house keeper for fraudulently selling as whisky manufactured or blended by the pursuers, whisky not so manufactured or blended, the defender admitted that his object in doing this was to discourage the sale of the pursuers' whisky, upon which his profit was less than on other whiskies.

*Held* that, although no specific damage was proved, it was a legitimate inference that the defender's fraudulent conduct, which was intended to have that effect, had caused substantial injury to the pursuers' trade, and accordingly the Court (altering the judgment of the Lord Ordinary) *assessed* the damage to the pursuers at £100.

*Opinion reserved*—Whether in estimating the amount of damages the sum necessarily expended by the pursuers in detecting the fraud should be taken into account.

*Opinion reserved*—Whether an offer of a sum by the defender to the pursuers, accompanied by declaration that the pursuers' case was unfounded and untrue, could be regarded as a judicial tender in dealing with the question of expenses.

In February 1896 Henry Thomson & Company, wholesale Irish whisky merchants, Newry, Ireland, raised an action against Daniel Dailly junior, wine and spirit merchant, Dundee, concluding for (1) declarator that the defender was not entitled to sell or offer for sale, by himself or others acting under or for him, as whisky manufac-

tured or blended by or for the pursuers, whisky not manufactured or blended by or for the pursuers, or to supply in implement of orders or requests for Henry Thomson's whisky, or Henry Thomson & Company's whisky, or of similar orders or requests, whisky not manufactured or blended by or for the pursuers; (2) interdict against the defender selling or supplying such whisky; and (3) £500 damages.

The pursuer averred — "(Cond. 2) The pursuers have recently become aware that the defender has been in the habit of wilfully and fraudulently in his said shop selling as the pursuers' whisky in reply to orders or requests for that whisky, whisky or other liquor not manufactured or blended by them, and known by the defender not to be manufactured or blended by or for the pursuers, on the false pretence made by the defender or by his shopmen and servants that such whisky or other liquor was whisky manufactured or blended by the pursuers. The whisky or other liquor sold by the defender was of a quality greatly inferior to the whisky manufactured or blended by the pursuers." The pursuer then gave several specific instances of such sales by the defender, and further averred—"The whole of said sales were made fraudulently by the defender or his servants, they well knowing that the whisky sold as the pursuers' was not their manufacture or blend." "(Cond. 6) By the defender's said wilful and illegal actings the pursuers have suffered loss, injury, and damage, which they estimate at the sum sued for, owing to an inferior whisky being supplied as their whisky to customers who ask for same. The pursuers not merely lose the profit which they would make upon the sales of such whisky, but the reputation of their whisky is seriously injured. The pursuers believe and aver that the said fraudulent sales have been very numerous and extensive."

The pursuers pleaded—"(1) The defender having wilfully and fraudulently offered for sale and sold as whisky manufactured or blended by the pursuers whisky which was not so manufactured or blended, the pursuers are entitled to decree of declarator and to interdict as craved. (2) The defender having by his illegal and fraudulent actings caused loss to the pursuers to the extent of the sum sued for, they are entitled to decree therefor with expenses."

On 10th March 1896 the defender lodged the following tender—"Kennedy for the defender stated that the defender, while affirming that he had never by himself, or persons acting under or for him, knowingly sold or offered for sale, or supplied as the pursuers' whisky, whisky which was not the pursuers', and absolutely disclaiming any intention or desire to do so, was anxious to avoid a protracted and expensive contest with the pursuers, especially as having been in business only six years he was not in a position to devote the necessary time and means to such contest, from which in no event would any advantage result to him, and therefore, solely with the view of preventing further litigations, but without prejudice to his pleas-in-law in the event of this tender not being accepted, offered, and hereby offers to consent to decree being pronounced in terms of the conclusions for declarator and interdict, and tendered, and hereby tenders, the sum of fifty guineas together with the expenses of process to date, as the same may be taxed by the Auditor, in full of the remaining conclusions of the summons."

This tender was not accepted and the action proceeded. Proof was allowed, the result of which is given in the note to the Lord Ordinary's interlocutor.

On 26th November 1896 the Lord Ordinary (PEARSON) pronounced the following interlocutor—"Finds and declares, interdicts, prohibits, and discharges in terms of the conclusions of the summons: Ordains the defender to pay to the pursuers the sum of ten pounds (£10) sterling in name of damages; and decerns: And in respect of the defender's minute of tender lodged on 10th March 1886, finds the pursuers entitled to expenses down to said date: Finds the defender entitled to expenses thereafter."

*Note.*—"The pursuers, an old-established firm of whisky blenders at Newry, Ireland, ask for interdict and damages against the defender, a wine and spirit merchant in Dundee, on the ground that, in implement of orders for the pursuers' whisky he has been in the habit of knowingly supplying whisky not blended by the pursuers. The pursuers' blend is well known in the market as Henry Thomson and Company's old Irish whisky. It is distinctive in flavour and colour, and remarkably constant in its special properties, even under chemical analysis; and as a rule experts can quite readily single it out from among other whiskies. There is a very large sale for it in Scotland, and the annual turnover in the Dundee district, which extends to Aberdeen, is from £15,000 to £20,000.

"The defender has been a customer of the pursuers, through their Glasgow agent, since he acquired his present business from a Mr Macfarlane's representatives in December 1889; but his purchases of their whisky have been few and small. All that he got was in capsuled quart bottles, packed in two-dozen cases, the bottles being square shaped, with a distinctive green and gold label.

"The instances founded on by the pursuers occurred at various dates during the year 1895—five in January and February, one in May, and the rest in October and November. They produce thirty-five samples in all, representing thirty-four separate purchases.

"The questions I have to consider are—(1) whether the whisky sold in the defender's shop on these occasions was Henry Thomson's whisky? and (2) if not, whether it was sold wilfully as and for Henry Thomson's in the knowledge that it was not?

"In order to succeed, the pursuers must make out their case quite clearly; and to begin with, everything must be presumed in favour of the honesty of the retail trader. Even if it be proved that he supplied another whisky as Henry Thomson's, that will not be enough if the facts are consistent with its having been done not wilfully but through inadvertence or inno-

cent mistake. In my opinion, the pursuers have discharged the onus which lies upon them. I regard their case as being adequately and, indeed, amply proved.

"The first question divides itself into two,—First, are the samples submitted and founded on by the pursuers the genuine 'Henry Thomson'? and, second, are those samples the very whisky that was sold in the defender's shop on the various occasions libelled?

"On the question which of the samples are genuine 'Henry Thomson,' the parties are not very far apart. It is common ground that Nos. 9 and 12 are genuine, these being sold as unopened quart bottles, corked and capsuled and bearing the pursuers' label. Each party founds on the genuineness of these instances as favouring his contention, the idea being that these bottles were saved from being dishonestly dealt with by his opponent by reason of their being corked and capsuled. There remain thirty-two samples, and of these I take it to be conclusively proved that twenty-five are not Henry Thomson's whisky but something quite different. The trade experts, indeed, to whose evidence one naturally looks in the first instance on this question of identity of the whiskies, show a singular divergence as to some of these samples; but I may say, that where the trade experts on the two sides of this case differ, I prefer, without hesitation, those adduced by the pursuers, as being on the whole superior in intelligence and accuracy. It is not necessary, however, to weigh their evidence very nicely, for the defender's own scientific witnesses are clear upon the point, namely, that of the thirty-one samples submitted to them, only six are genuine 'Henry Thomson'—these six including Nos. 9 and 12 above mentioned.

"Then the next question comes up—Are these samples really and truly the whiskies bought in the defender's shop on the occasions libelled? Now, in the first instance, it lies upon the pursuers to make out the affirmative; and I may say at once that in my opinion they have succeeded in doing so. Assuming honesty, I think that after making all allowances for the risks incident to the journeyings and handlings of so many samples, the pursuers have excluded the possibility of maintaining, on reasonable grounds, that the samples are not substantially as they left the defender's premises, or that they have been mixed with others or exchanged with others through mistake or reckless handling. The impression to this effect made on my mind during the proof has been confirmed by a careful study of the printed evidence. Within certain limits this is not disputed by the defender. He does not suggest that when once the samples got into the hands of the law agents, or of the skilled witnesses, the risk of such mistake need be regarded. But he does suggest that at the earlier stages of their history, either in the hands of the original purchasers, or of the Messrs Younger and Mr Laird, or even of the pursuer's representatives in Glasgow, these samples were either dishonestly tampered with or were treated so recklessly and with such a lack of ordinary care as to be thoroughly unreliable. In my opinion the latter alternative is excluded by the evidence. Were the samples, then, tampered with, and by whom?

"I do not think I lay an undue burden on the defender when I say that if the facts compel him to this alternative, as I think they do, he must show that it furnishes not merely a possible but a reasonable explanation, having regard to the evidence as a whole. Now, I do not think he succeeds in bringing it up to that, though he makes a case worthy of careful consideration. He points to the fact that the primary evidence is in the main the evidence of detectives, amateur or professional, whose interest it is to prove their case, and not the evidence of *bona fide* customers. He points to the analysis of certain pairs of samples which he contends have been proved to have been served to purchasers out of the same bottle, and which differ so much that the experts say it is impossible. Further, he furnished his own expert witnesses (though not the pursuers' ones) with sample bottles of all the whiskies which he says he kept in stock in 1895, and finds that upon analysis the pursuers' samples do not correspond to the contents of any of these any more than to genuine 'Henry Thomson.' He also observes upon the evidence of the actual purchasers in various particulars, *e.g.*, that of Graham and Turner, as to their having gone into a close to seal up and label the samples they had just purchased in the defender's shop, while the description they give of it does not correspond to any existing close. Then there is this remarkable fact, that in January, and again in May, it was distinctly brought to the defender's knowledge that samples were being obtained at his shop for analysis; and there is a certain antecedent improbability in his continuing to act dishonestly in the knowledge of this fact. And there is the incident of Morton's sample (No. 7), where the shopman's attention being directed to the matter by a friend in the shop, he sealed up then and there the remainder of the bottle out of which the sample was taken, and it turns out to be genuine 'Thomson.' There is some doubt as to whether the sample is genuine 'Thomson.' But the defender takes it either way, and urges that if it is not genuine, it must have been tampered with.

"Of these contentions of the defender, some are stated more absolutely than is warranted by the proof, and the pursuers have their reply to them on the evidence. Thus, the evidence that each pair of samples was taken out of the same bottle is by no means conclusive. The obscurity in the evidence about the close has, I think, little significance, and does not raise any doubt in my mind as to the good faith of witnesses, who struck me as being in other respects honest and trustworthy. Again, the fact of the defender having had warning early in the day is double-edged. It deserves to be taken account of in estimating the probabilities of the case; but if the pursuers'

case on the samples is otherwise sufficiently made out, then the defender's knowledge makes the rest of their case much easier, for it practically excludes the theory of mistake or inadvertence on the part of the defender, even if that were not sufficiently excluded by the multiplicity of the instances.

"Giving all due weight to the considerations urged by the defender, I am of opinion that they are overborne by the facts of the case. I cannot adopt the suggestion that the samples were tampered with, either by the purchasers, or by the Youngers or Laird, or by the pursuers' Glasgow representatives. The last suggestion has nothing at all to commend it for acceptance, and I dismiss it. The purchasers are a very varied list, with varying experience and power of observation; but I feel bound to say that they impressed me strongly as being honest and reliable witnesses. I certainly cannot for a moment attribute to them that participation in a widespread conspiracy to manufacture evidence and injure the defender which one theory of the defender's case postulates. The alternative is, that it was done by the Youngers if it was done at all. Now, the defender attacks the Younger family as having too many irons in the fire, as being mixed up in businesses which (it was suggested, but not proved) are shady, and as being the most probable source of the conspiracy. I must say I could detect nothing in the demeanour of any of them which would afford any ground for the imputation of either carelessness or dishonesty. They seemed to me to be clear-headed, accurate, and straightforward, and they gave no indication either of having anything to conceal or of pushing the case against the defender. I do not believe that the samples were tampered with in their hands. Moreover, it is not as if the question of tampering with samples were confined to those which passed through the hands of the Youngers. Sample No. 6, purchased by Mrs Fraser, an acute and capable witness, was (as I understand it) not in the Youngers' hands at all, but was handed direct by Butter to Mr Macalister, the pursuers' representative in Dundee district. That seems to me a negative instance of considerable weight.

"On the third question, whether the whisky was so supplied knowingly, I am dispensed from saying much. As I have already observed, mistake or inadvertence on the part of the defender is out of the case, according to the evidence on both sides. This is not a case where the defender, not professing to sell or to keep Henry Thomson's whisky at all, may have furnished an Irish whisky to those asking for 'Thomson,' on the footing that it was reasonable fulfilment of the request. The defender professed to keep and supply 'Thomson' whisky, and had a conspicuous sign conspicuously displayed over the bar to that effect. The samples were asked for as Henry Thomson & Company's old Irish whisky, or in similar unmistakable terms, and they were habitually supplied out of a labelled 'Henry Thomson' bottle, and (though in one case this is left in some doubt) at a 'Henry Thomson' price, where the quantity taken was sufficient to indicate the price.

"The defender says he desired to discourage the sale of Henry Thomson's whisky, because he made relatively more profit out of cheaper whiskies. He certainly had very little 'Thomson' to go on with, and there is a remarkable falling off in the turnover of Thomson's whisky in his establishment compared with what it was in Macfarlane's time, though this is no doubt partly attributable to the difference in the class of customers as explained in the evidence. But the defender got so little of Thomson's whisky during his seven years of the business, including two dozen to start with, two dozen ordered in December 1889, and two dozen more in May 1892, that the pursuers submitted figures to show that unless he was selling other whiskies as 'Henry Thomson's,' he had not enough on his own showing to supply the demand. But their figures fall short of demonstration, and I do not proceed on this as a ground of judgment. There is, however, a significant admission by the defender, which shows that he was eking out his supply. He had no 'Henry Thomson' in bulk—it was all in bottle. Whisky sold in bulk is over-proof, and requires to be watered; not so with bottled whisky, which is furnished as a specific merchantable article ready for consumption. Now, the defender says—'It is possible that I may have watered Henry Thomson's whisky in bottle. (Q) Was that when you were wanting to discourage the sale of it? —(A) I cannot say that would be the reason of it; it would be to get a little more profit out of it.' It is impossible to say how much there is behind this admission. But it is quite possible that one who did that not very flagrant thing might think it even comparatively meritorious, as well as safer under the Food and Drugs Act, to fill it up with cheap whisky instead of Dundee water. At all events, one who admits even so much does not hold a very secure position from which to make kindred charges against others.

"As to the amount to be awarded in name of damages, the pursuers asked for an exemplary sum. In my opinion, however, the proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuers' firm, and I therefore propose to follow the course adopted in a previous case at the instance of the same pursuers, and to award £10.

"Since the above was written I have been informed that the defender lodged a minute of tender on 10th March 1896, and I have heard counsel as to the bearing on which it has on the question of expenses. The defender argues that it has effect as an ordinary judicial tender, and that while he is liable in expenses down to its date, he is entitled to expenses thereafter. The pursuers urge that owing to the qualifications with which the minute is introduced, it is not to be regarded as a tender at all. I have considered its terms carefully in

reference to the rule that a judicial tender must be precise and unconditional, or, as it is sometimes put, unqualified. I think this tender is so within the meaning of that rule. The affirmation of innocence and of the desire to avoid litigation with which it is prefaced does not amount to a condition or qualification intrinsic to the offer made; the best test of that being that, if the tender had been accepted, the pursuers would have got decree in terms of the whole conclusions of their summons, subject only to the variance in the amount of damages. But the pursuers say that they are now entitled to more than decree in terms of the conclusions; that the proof having been led, and it being proved that on various occasions the defender knowingly and wrongfully sold as whisky blended by the pursuers whisky which was not so blended, they are entitled to have a finding to that effect inserted in the interlocutor as introductory to the decree of interdict, a result which certainly would not have been reached had the tender been accepted. In this view they would to that extent get more than was tendered, as the finding would (I am informed) be inserted in the extract decree. If this is the true criterion, it would follow that I can make the tender good or bad according as I withhold or give such a finding—a startling result. I had been disposed to insert such a finding when originally considering the case until I found that in the case of *Begg* decree was given simply in terms of the conclusions, which were the same as those in the present action. I am not disposed to insert the finding now merely for the purpose of enabling the pursuers to exclude the tender, even assuming it would have that effect I accordingly uphold the defender's contention on this point."

The pursuer reclaimed, and argued—(1) The amount of damages awarded by the Lord Ordinary was too small. The defender admitted that he did everything in his power to discourage the sale of the pursuers' whisky, and he had used illegitimate means of doing so by watering it in bottle, and selling inferior kinds of whisky when asked for the pursuers'. The sales had on this account fallen off, and the pursuers' trade and good name had been seriously injured. If a man sells fraudulently a different kind of whisky from that asked, he is bound to account for the profit thus illegally made by him. A sum of £64 had been expended by the pursuers in detecting the fraud, and this ought to be paid by the defender, just as in shipping cases surveyors' fees were charged as part of the damages. The sum concluded for was not too much at which to assess the damages. (2) In any event, the pursuers were entitled to expenses. The tender made was really a conditional tender. If the pursuers had accepted it they would have been held as accepting the narrative as true.

Argued for defender—(1) As to increase of damages, there were no elements in this case in which the Court could give more damages than had been awarded. No special damage at all had been proved, there was no proof of loss of trade on account of the defender's action—in fact the sale of the pursuers' whisky in Scotland was increasing. Except in cases of defamation, only nominal damages were awarded where there was no proof of special damage —*Morton* v. *Barclay*, March 15, 1824, 3 Murray, 401. Where the action was one for *solatium* the amount of damage was a matter for the jury, but where the action was one for damages for loss of trade or anything that could be brought within precise limits, then if no special damage was proved by the pursuer, nominal damages only were given—*Leather Cloth Company* v. *Hirschfield* [1865], L.R., 1 Eq. 290. (2) As to the tender, the argument of the pursuers proceeded on the view that in order to make a tender good the defender is bound not only to agree to the conclusions of the summons but also admit every particular fault alleged against him in the condescendence. This was not the case. If a defender is not bound to admit the whole truth of the grounds of action, he is entitled to say in his tender—"I don't admit the grounds of the action, but I am willing to agree to the conclusions of the summons." The defender in making a tender was entitled to reserve his statements and pleas, and also to deny that the pursuers had a claim against him at all.—*Strachan* v. *Munro*, July 5, 1845, 7 D. 993; *MacKarsie* v. *Dickson*, November 28, 1848, 11 D. 164; *Mitchells* v. *Nicoll*, May 24, 1890, 17 R. 795.

LORD JUSTICE-CLERK—The question here has really come to be one regarding the expenses of the action. The case is certainly a very peculiar one. The Lord Ordinary has disposed of it upon the footing that the defender has been guilty for a considerable time of intentional fraud in dealing with the pursuers' whisky. Now, that is certainly a serious matter in any trade carried on upon that footing, and it is by no means an easy thing to estimate what is the amount of damage which has been caused in consequence of such a proceeding. The defender in the case has declined to impugn the findings of the Lord Ordinary, and has acquiesced in the judgment in which he has been held guilty of that substantial fraud for a considerable time. Now, various questions have been raised before us, the real point between the parties being that as the Lord Ordinary has given a sum of damages which turns out to be less than the sum which had been tendered by the defender, the judgment is such that a very large part of the very heavy expenses incurred in this case have been awarded to the unsuccessful defender. Arguments have been brought before us for the purpose of increasing the damage by bringing in items which presumably the Lord Ordinary did not take into consideration, otherwise he could not have awarded such a sum. It is said that part of the damage suffered by the pursuers consisted in the expenses they were put to in establishing fraudulent conduct so as to enable them to prove

ultimately that the defender was acting in that manner, by sending persons to purchase whisky at his place and thereby obtaining evidence of the frauds committed which could be proved directly. Certainly we have no case quoted to us in which it has been inferred that such an item—although it is an item which in many cases must be incurred—is one by which damage is caused to a party by such acts as the defender is said to have committed. There were cases referred to in the course of the discussion in which evidence is practically arranged for, as, for example, the case of a person committing a series of thefts, by test letters passed through the Post Office. It is difficult to see how such an investigation—though necessary in the interest of the party—could be held to be part of the damages caused by the person who does the wrong. But I give no opinion upon that, for I have not seen sufficient ground at present for dealing with that matter so as to raise the damages in this case. I think the case can be disposed of on another ground, and a sound ground, without entering into that question at all. The Lord Ordinary, considering the question of damages, has set forth that "the proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuers' firm, and I therefore propose to follow the course adopted in a previous case at the instance of the same pursuers and to award £10." If that sentence was one stating reasons which induced the Lord Ordinary to award this sum of £10 I should certainly not have interfered with the amount, because it always is an inadvisable thing, except upon strong grounds, to interfere with the amount of damages ascertained originally by the Lord Ordinary; but I must say I do not think that statement is one which gives any reason save that the same award of damages was given in another case. There might be different conditions. The question might depend in great measure upon how the things were done, and to what extent they were done or were being done, that caused the damage or injury. But for a Judge to take one case, although brought by the same person, and having ascertained that in that case an award of £10 had been made, to say "Because it is not very easy to estimate the amount of loss sustained by the pursuers' firm in this case I will therefore give the same award as in the other case," is not a safe mode of proceeding. Now, it is perfectly true that in this case, as the Lord Ordinary says, it is not easy to make a safe calculation of the exact damage, but that is just what occurs in a great many cases. It must be estimated in a reasonable way. If it cannot be estimated with exactitude one must form one's opinion as a juryman would of the damage due upon the whole circumstances of the case, and make the best reasonable estimate that one can. In this case I cannot for one moment say that, making the most reasonable estimate I can, I would have arrived at such a sum as £10. This is a matter of trade dealing, and trade dealing carried on upon a very large scale, and it is one in which, if one set to work to diminish the sales of a particular article that was offered to the public, the damage that would be done by such a proceeding may be very large, and indeed may be estimated to be considerable. Now, in this case it is quite certain, on defender's own statements, that he was anxious to damage the sale of the whisky of the pursuers, that is to say, that he was anxious to induce people not to buy that whisky when they wanted it, but to buy other whisky, and the mode he took to do that has been found—and the finding has been acquiesced in—a fraudulent mode, by selling as Thomson's whisky when people wanted to have it, something which was not Thomson's whisky, with the result that when people found what they believed Thomson's whisky to be inferior they ceased to purchase it. His object may have been to make them cease purchasing Thomson's whisky from him, but the injury did not by any means stop there. If persons have been induced to buy a particular article made by a particular maker, and an inferior article is sold to them under the same name and appearance, they form an opinion that the manufacture of that article is deteriorating, and that they are sending out inferior quality while still selling it at the old high price, and they not only cease to buy it for themselves but they naturally discourage other people from buying it. It is quite a reasonable deduction from the whole of this case that persons induced to buy this whisky ceased to buy, and also informed others that Messrs Thomson's whisky was not so good as it was, and therefore led other people not to buy it. Now, a fraud of that kind in a peculiar trade like this is necessarily a serious fraud, and proceeding on the view which I take that it is a serious fraud, I think it must be dealt with as a serious fraud in the question of damages. It is not easy by any means to estimate the amount of damage, as the Lord Ordinary truly says, but I certainly think it cannot be estimated except at a very considerable sum, and, giving the best consideration I have been able to give to it, the opinion I have formed, proceeding upon what the Lord Ordinary has said in this particular case, is that £100 would be a very suitable sum of damages to give against this defender for his fraudulent conduct. Therefore I move your Lordships to alter the interlocutor of the Lord Ordinary and assess the damages at £100, finding the defender liable in expenses.

LORD YOUNG—I agree in the conclusion at which your Lordship has arrived. The action is directed against the defenders for interdict of certain conduct on his part, and also for damages in respect of that conduct. The pursuers' case is substantially set out in condescendence 2—[*His Lordship read it.*] Now, I think the case so averred by the pursuers is not only found proved by the Lord Ordinary, but it is admitted by the defender that he sold as the pursuers' whisky an article which he knew to be not the pursuers' whisky. Indeed, in his evidence he admits that he did this having a

desire to put down, and keep down, the sale of the pursuers' whisky. In article 6 of the condescendence the consequence of this is averred by the pursuers—[*His Lordship read the condescendence.*] So that the damages are sought upon the ground that this fraudulent conduct on the part of the defender in selling as the pursuers' whisky, whisky which the defender knew was not theirs, damaged their trade, and damaged it to the extent stated, as the natural consequence of such conduct, and that this is found proved. There is no doubt that it was so intended, for the defender in his evidence says that the demand for the pursuers' whisky was worth discouraging because he could make more out of other whiskies. He says—"I did not succeed in materially diminishing the demand for Henry Thomson's whisky, and took what I thought was the most effective means with that end in view." Then it is put to him—"Have you any doubt that the most effective way of accomplishing your avowed object of discouraging the sale of Thomson's whisky would be to give a bad article of some other kind for it?"—(A) "It would be a mode as I said before. I told my shopman that I wanted to discourage the sale of Henry Thomson's whisky, and I told him to try and discourage it as best he could." Now, that being the view arrived at in the judgment of the Lord Ordinary, and, as I have pointed out, practically admitted by the defender, the only question is one of damages. Now, this is not a count and reckoning to see what the profits are on the one hand or the exact loss on the other, but a general action of damages, — a question as to the amount of damages in an action by a sufferer from a course of misconduct against the party who is guilty of that misconduct. One question argued was whether it would be reasonable in estimating the amount of damages to take into account the expenses to which the pursuers were necessarily put in detecting it. Now, I, with your Lordship, desire to express no opinion upon that. I avow it all the more readily, and I think all the more properly, because this is not put forward as a claim. The claim of damage as put on record is solely founded upon this, that the pursuers' trade was damaged by conduct which had a tendency to damage it, and which was intended to have that effect; and we must estimate the damage generally as best we can. Now, doing that here upon the evidence before us, which is to the effect, not only that this conduct was pursued, and pursued with that aim and object, but that it was followed by a very notable falling off in the sales of the pursuers' whisky in Dundee, I think there is ground for giving a substantial sum of damages, which the Lord Ordinary has not done, and without entering on that matter, therefore, of the legitimacy of including or taking into account in estimating the damages the expenses to which the pursuers were properly put in taking proper and reasonable measures to detect the fraud, I agree with your Lordship that the damage might with propriety be estimated at £100, and that removes any necessity whatever for considering any specialities in the tender here. I avoid giving any opinion upon the question, upon which something was said on both sides, only observing that I think tenders in such terms as this ought to be avoided, and that when a tender is made it ought not to be accompanied with emphatic declarations that the pursuers' case is unfounded and untrue. I altogether abstain from expressing any opinion judicially as to the right of the pursuers of an action upon such allegations—because a great deal might depend upon the nature of the allegations—as are made here, to accept or reject a sum of damages offered accompanied by a statement, and qualified by that statement, that the ground upon which the claim is made is absolutely untrue. I avoid that here almost necessarily, because the question does not arise and is of no practical importance, if we are of opinion that the damages offered in this tender are not such as the pursuers are entitled to. I think, therefore, the Lord Ordinary's judgment may be affirmed, substituting only £100 for the £10 which he gave, and finding the pursuers entitled to expenses against the defender.

LORD TRAYNER — I agree. I think your Lordships avoided expressing any opinion on the two questions principally debated before us — (1) As to the effect of the tender on the question whether it is an effective tender, looking to the terms in which it is expressed; and (2) whether the expenses of the detectives who actually discovered this fraud, and became witnesses to it afterwards, should be included or considered in estimating the damages due to the pursuers. I quite agree in the result at which your Lordships have arrived, that the £10 found due by the Lord Ordinary is quite inadequate in this case. I think it is a case certainly for exemplary damages. I do not say there should be vindictive damages on the one hand, and on the other I do not think the pursuers' case may not be regarded liberally, because the defender persistently over a long course of time had done all he could to hurt the pursuers' trade by deteriorating the character of the whisky he was selling. I am a little astonished, because it is unusual in cases of this kind, to find the defender as a witness acknowledging that in what he did he was doing all he could to injure Henry Thomson & Co.'s trade, not because the whisky was a bad thing to supply to his customers nor because he had a better to offer in its place, but simply because, according to his own evidence, his only object was the making of more profit for himself on something else. When you take that to be the object and purpose for which the defender acted fraudulently for a period of several months, and when you consider that he had made up his mind, before he began, that he would do all he could to discourage the demand for Henry Thomson & Company's whisky, that he did that with the

result, according again to his own statement, that the demand which existed ultimately got less, and that he adopted this mode for his own profit, and advised and instructed his shopman, while he was in charge, to carry on the same mode, I say, taking all that into consideration, I think this case points to the defender being made to suffer all that could reasonably be supposed to be the result of such conduct on the pursuers' trade. The Lord Ordinary says, in language which your Lordship quoted, that "the proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuers' firm." I fancy what his Lordship means is "any precise calculation," because "safe calculation" would affect a finding of £10 as much as £1000. But I agree with the Lord Ordinary in thinking that in this case no precise figure is positively proved as the substantial damage arising from the defender's conduct. I think, again, upon the defender's own evidence that there was damage done, because he says that the result of the discouragement of the trade was to decrease that trade. Therefore there was some damage done by the defender's wrongful and fraudulent proceedings. It was answered that there was no proof of damage, because it was said that Thomson's trade increased even in that district. That may be quite true, because it may be that there was an increase there in respect of the intrinsic value of the manufacture, notwithstanding what the defender had done to hurt it; but the necessary consequence of the defender's own statement is that the trade, now progressing favourably, would have progressed more favourably if the defender's fraud had not interfered with it, because he said himself that the demand for Thomson's whisky which existed when he went into that district and when he began his discouraging process certainly got less. In these circumstances, while it is impossible to say that the actual amount of damage done to the business was £20 or £2000, we can as a jury estimate reasonably what the loss may be that the pursuers sustained by the defender's conduct. Upon that matter I agree that, sitting as a jury, we are not giving the pursuers too much by assessing the damage by the defender's fraud at £100.

Lord Moncreiff — I am of the same opinion. I think this is a case in which the pursuers are entitled to substantial damages, and I do not think the sum of £100 is excessive. I think the Lord Ordinary has been influenced to a considerable extent by the sum awarded in the case of *Begg*. I was the Lord Ordinary in that case, and, speaking from recollection, the misdoings of Begg were trifling compared with the misdoings of the defender in the present case. I do not think that in *Begg's* case there was any evidence of any avowed intention on his part to injure the trade of the pursuers. That being so, I think the Lord Ordinary was probably misled in taking the sum awarded in that case. The present case is very different. The number of instances in which the defender is proved to have sold as the pursuers' whisky an adulterated whisky is six times as numerous at least as in *Begg's* case. He avows the intention in one way or another—although he does not admit that it was adulterated whisky that he endeavoured to substitute—of putting a stop to the sale. On the whole matter, I think £100 is not too large a sum to award.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find and declare, interdict, prohibit, and discharge in terms of the conclusions of the action: Ordain the defender to pay to the pursuers the sum of £100 sterling in name of damages: Decern, and find the defender liable in expenses."

Counsel for Pursuers — Balfour, Q.C. — Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for Defender—Jameson—N. J. D. Kennedy. Agents—Macpherson & Mackay, W.S.

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*Saturday, July* 17.

## FIRST DIVISION.

[Lord Low, Ordinary.

## PARK YARD COMPANY *v.* NORTH BRITISH RAILWAY COMPANY.

*Servitude — Way-Leave — Railway—Transmission of Obligation to Singular Successors.*

By an agreement entered into between a superior, his vassals, and two railway companies, it was provided that the first company should be allowed to lay down a tramway line on certain lands held by the superior, and on others held from him by the feuars. The successors of the vassals were not expressly bound by the agreement, but the successors of the company were taken bound to implement certain obligations which were also declared prestable to the successors of the superior. It was provided that in the event of the tramway ceasing to be used, the superior or his successors, without consents, and the feuars, with consent of the superior, might call upon the company or their successors to remove the tramway. Lastly, it was provided that "no warrandice and no privilege in perpetuity" was given by the superior and feuars, "but simply their respective consent" to the formation of the tramway.

By a further agreement arranged at the same time among the same parties, it was provided that the second railway company was to take over the line when made, and "thereafter in perpetuity work and manage