turb the distribution, which was made of it in that process, by the interlocutors which she seeks to reduce. I so find accordingly, and assoilzie the defenders from the action, with expenses."

The pursuer reclaimed, and after a debate before the Second Division, (to which the cause had been transferred from the First), the cause was appointed to be heard before seven Judges.

A settlement was thereupon adjusted between the parties, and the cause was taken out of Court.

Counsel for Pursuer—Adam—Kinnear. Agents—H. & H. Tod, W.S.

Counsel for Peter Denny's Trustees—M'Laren. Agents—Murray, Beith, & Murray, W.S.

Counsel for James Donald and Others — R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Tuesday, October 30.

FIRST DIVISION.

[Sheriff of Lanarkshire.

EADIE *v.* HUNT.

Sheriff—Process—Taking of Proofs by Short-hand.

Observed (*per* the Lord President) that where proofs are taken by a short-hand writer under the Sheriff Court Act 1853 (16 and 17 Vic. cap. 80), sec. 10, and the Act 37 and 38 Vic. cap. 64, sec. 4, it is the duty of the Sheriff to dictate the evidence, and that the practice of having it taken down at length, in the form of question and answer, is not sanctioned by the statutes, and is highly inconvenient in its results.

Wednesday, October 31.

FIRST DIVISION.

[Bill Chamber, Lord Shand.

LAING'S PATENT SEWING MACHINE COMPANY *v.* NORRIE & SONS.

Process—Suspension and Interdict—Title to be sisted as Defender.

Where the respondent in a note of suspension and interdict for breach of patent had failed to appear, the Court *refused* to allow third parties—who averred that the machine, the breach of patent of which was complained of, was patented by them, and was in fact being worked by the respondent under arrangement with them—to sist themselves as defenders in the case—*diss.* Lord Shand, who held that as they had the direct interest in the question, they had a title to compear and prevent interdict being granted.

This was a note of suspension and interdict brought by Laing's Patent Overhead Hand-stitch Sewing Machine Company, Dundee, against Charles Norrie & Sons, calenderers, Dundee, for using a sewing machine said to be in violation of the letters-patent obtained by James Laing (whose assignees the pursuers were) in 1874 for improvements in Overhead Sewing Machines.

The respondents failed to appear, but appearance was made for Mr Abbot Glenday, of Dundee, who asked permission to sist himself as defender, stating that he was agent for Messrs Detrick and Webster, proprietors of a patent for "improvements in sewing machines for stitching sacks, &c.," under letters-patent dated subsequently to those of Mr Laing. Mr Glenday, (Detrick and Webster were then absent from Scotland) further stated that Messrs Norrie & Sons were working a machine made in terms of said (Detrick and Webster's) letters-patent, and that the machine they worked was in no way an infringement of Laing's patent, and on these grounds craved to be sisted as respondent in the action.

The Lord Ordinary (SHAND) considered that sufficient interest had been shown to entitle Mr Glenday to be sisted, and on 3d August 1877 pronounced an interlocutor sisting Glenday as a respondent and passing the note, but refusing interdict *in hoc statu.*

The complainers reclaimed.

When the case was heard, it was stated for Mr Glenday and his constituents, and they were allowed to put in a minute to the effect, that the machine complained of was made under their direction, and that they had placed it in the hands of Messrs Norrie, under an arrangement that it should be worked by them for the proprietors of the patent in order that it might be exhibited in operation; that it was so wrought for about six months, and was being so wrought when the note was presented. That Messrs Norrie had no interest in the machine, and that they stopped working it when the note of suspension and interdict was served.

Authorities quoted—*Bontine* v. *Dunlop*, January 15, 1823, 2 S. 115; *Marquis of Douglas* v. *Earl of Dalhousie*, Nov. 15, 1811, F.C.; *Chanter* v. *Thoms*, February 20, 1845, 7 D. 465.; Shand's Practice, vol. i. 489, and cases cited therein.

At advising—

LORD PRESIDENT—This is a note of suspension and interdict presented by a limited company, said to be assignees of a patent for an improvement in sewing machines, first sealed in December 1874, and afterwards altered by disclaimer in 1877. It alleges that Messrs Norrie & Sons, who are calenderers in Dundee, have been using a machine in contravention of these letters-patent, and it craves for interdict against them for infringing the patent. Now, Messrs Norrie & Sons, the only respondents called, have not appeared in the Bill Chamber, and but for what has taken place interim interdict would have been granted in terms of the prayer. But another party appeared—a Mr Glenday—and said he was agent in this country for two gentlemen in California, who aver that they have a patent subsequent in date to Laing's, but nevertheless a good patent, and further that the machine used by Norrie & Sons is constructed according to their patent, and that there was no infringement of Laing's. Mr Glenday has asked to be sisted as representative of these two gentlemen in California, and the Lord Ordinary sisted him. When the case came here it appeared that if any one was to be sisted, the parties themselves should be. The statement made now in the compearer's minute is, that the machine complained of was made under the directions of

Mr Glenday, and that it was placed by him in the hands of Messrs Norrie & Sons, to be wrought by them for the proprietors of the patent, in order that the public might see it in operation; that it was so wrought by Messrs Norrie for six months; and was being wrought when the note was presented. It was also explained, but not stated in the minute, that it did work in sewing bags for the Messrs Norrie, and that the product went into Messrs Norrie's stock, and that the profits of its work accrued to them. Now, in these circumstances, the two gentlemen wished to be sisted as defenders to resist the note of suspension and interdict, on the ground that the machine was not a violation of Laing's patent, but was made under their own. This proposition has been resisted, and it seems very clear to me that the complainers are entitled to suspension and interdict against Messrs Norrie, in respect that they (the respondents) have failed, or rather have refused, to appear, and have by their refusal confessed that the ground of complaint is good, and that the machine used by them is a violation of Laing's patent.

If such judgment is to go against Messrs Norrie, the question arises—Is it proper (even supposing it to be competent) that under the same note the question as to whether the patent was really violated should be tried between the complainers and other persons who were never even called in the original note? I confess the proposal is totally new to me, and there seem to me very grave objections to acceding to it. I doubt much whether the process as it stands is calculated to try the question at all. The question in fact is the violation of the patent by the Messrs Norrie, and it would be strange indeed if, after judgment was given against Messrs Norrie, interdicting them from using the machine because it was a violation of the patent, the Court should be called on in another action to say that it (Norries' machine) was not in truth a violation of Laing's patent, and that they could not have been interdicted, had they not submitted by their non-appearance to the present note.

Without saying that what is now asked is incompetent in every case, I am clearly of opinion that it would be wrong to grant it in the present circumstances, and I am therefore for recalling the Lord Ordinary's interlocutor.

Lord Deas—I am entirely of the same opinion as your Lordship. This is a very peculiar course to attempt to take in an application for an interdict, which is a quasi-criminal question, and may be attended with criminal consequences. An interdict can only be granted on the precise terms of the prayer, and Messrs Norrie & Sons are the only respondents called in the note; but now it is proposed to substitute another party, and to defend the case without the original respondent appearing at all, and though he is perfectly at liberty and able to come if he likes. I never have seen such a thing attempted before, and it is difficult to forsee the confusion which might arise were such a course adopted. If the original party had appeared, then perhaps some one else might have come forward and said that he had an interest to assist in defending the case, but even then only the party interdicted could have been gone against. But the proposed course seems quite contrary to all notions of a process of interdict. Principle as well as justice is against it. Even if the prayer of this note be granted there can be no evil consequences to the persons who wish to come in, as the result as regards them will go for nothing.

Lord Mure—In this case the complainers are in possession of a patent acquired at considerable cost. Messrs Norrie & Sons when called as respondents to a note of suspension and interdict do not appear, and that being so, I can see no reason why we should refuse the usual interdict. As to the question whether Mr Glenday should be sisted and take up the process of suspension, it appears to me that it is unusual to allow another person in such cases to come forward as a defender, on the ground that he too has a patent. I think his remedy is to raise an action to have his patent proved a good one. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

Lord Shand—Notwithstanding the views expressed by your Lordships in this case, I remain of the opinion to which I gave effect in the Bill Chamber when the case first came before me. I think the compearers Mr Detrick and Mr Webster, and Mr Glenday as their mandatory, should be sisted as respondents, and that interdict should not be granted. It has been explained that when the answers were originally lodged Mr Glenday had not had an opportunity of communicating with his constituents in America, but that he undertook before the meeting of the Court to have their authority to sist them as parties to the cause.

I presume that your Lordships have taken the case on the footing that what is stated in the minute is correct. There the compearers offer to prove that the machine, the use of which is complained of, was worked in the premises of Messrs Norrie & Sons solely with the view of enabling the public to see it in operation, and that this was done under an arrangement with them as proprietors of the patent. The machine, though worked by Norrie & Sons, was really worked by them for the parties who now compear, and who are the proprietors of it. It results from this statement that the question in dispute is really one between the complainers and Detrick and Webster, who are in fact the parties interested in any interdict; and it is on the broad ground that the act complained of is theirs, and that they have the true interest in the action, that I hold they should be sisted as respondents. It was an incident merely in the use of the machine, for the purpose explained, that the bags sewed belonged to Norrie & Sons. That circumstance gave them no real interest to litigate the question of alleged infringement of the complainers' patent raised in the case, and accordingly, having no interest, they have declined to appear. I can well understand that they decline to involve themselves in a litigation which does not really concern them. But in this class of cases, I think it may often happen that a third party has a clear interest to be sisted as a defender, and that great hardship might arise if this were not allowed. Illustrations of such cases occur readily enough. Suppose a servant doing some lawful act by order of his master, finds proceedings taken against himself by way of com-

plaint or interdict, he may very well decline to appear as defender. Is decree then to go against the servant even though the master come forward and say—"It is I who have the real interest to defend the case, as the act was in fact mine, and I mean to go on to its completion?" Again, a tenant on a farm performs some operation with the authority of his landlord, which is afterwards objected to, and a case is brought against him; he may not choose to run the risk or incur the expense of defending himself. The landlord comes forward as defender, as the act was really his; should he not be allowed to do so, to the effect of trying the lawfulness of the act complained of? This case has actually occurred, and the decision is, in my opinion, a direct authority for the compearers here. In the case of the *Marquis of Douglas* v. *The Earl of Dalhousie*, a tenant, in a complaint directed against him only, was ordained to remove a mill-dam, constructed by him, obstructing the public road. He presented a bill of suspension, on the ground that he had acted under authority of the Road Trustees, which was passed. At the expiry of his lease he gave in a letter disclaiming the process, and the Lord Ordinary on that ground dismissed the suspension. After the interlocutor became final the landlord craved leave to sist himself in the process at the tenant's instance. The Lord Ordinary found him entitled to compear, on the ground that his interest as proprietor was "more at stake than that of Thom (the tenant) ever was or could have been," and the Court adhered. That case is *a fortiori* of the present, for the decree involved not merely an interdict, but an order to remove the work complained of, and the importance of the case in the present question is this—that it was not considered necessary for the landlord to adopt a new proceeding. He simply took up the existing case at his tenant's instance, suspending a decree granted against his tenant only. Having been allowed to take his tenant's place in the suspension, it follows that he would have been entitled to compear in the original complaint itself as a respondent, on the ground that it was really his interest which was the subject of the action.

Again, in the case of heirs of entail, the nearest heirs may refuse to defend an action, either because they think there is no good defence or for want of funds; another heir, however, may come in and compear to the effect of preventing the original decree being granted even against the only persons called as defenders—and other similar illustrations might be given. If, then, the real interest can be shown to be in the compearing parties here, I think on principle and authority they should be sisted as respondents. What are the facts? The compearers not merely say—We have heard that Messrs Norrie have used a machine of ours, and desire to defend their act, but we were in fact using the machine ourselves, and the use complained of being ours, we maintain it was lawful, and mean to justify it, and we object to an interdict being granted in respect of that use, and on the footing that it was unlawful. I think this is a case of direct interest and title to compear and to prevent interdict being granted. I regret the decision your Lordships have come to, for I think a certain amount of hardship and injustice are suffered by Detrick and Webster, who must stand by and see interdict granted in such circumstances, and are not allowed to take advantage of the existing process to try the lawfulness of an act which was really theirs. The effect of an interdict must be prejudicial to their patent right.

It has been suggested that this process is not fitted to try the question, but with that I cannot concur. If the compearers were sisted as respondents, I do not doubt that the Court could make the decree distinctly apply to them. Again, it has been said that the compearers should bring an action of declarator to support their patent; but this, if it were necessary, would of itself sufficiently illustrate the hardship to the compearers in having to stand by while decree is given in this action, and then bring an action of declarator in which the *onus* lies on them. What they want to try is whether they have in fact infringed Laing's patent. I think they are truly defenders in that question, and it is for that reason they want to compear, and ought to be allowed to do so in place of being compelled to raise a process of declarator. As to an observation about the criminal nature of this cause, I must observe that I know nothing criminal in a case of interdict like this which raises in a convenient form a simple question of civil right. If a person violates an order of this Court, and commits a breach of interdict, then that case becomes quasi-criminal, but at present the case is purely a civil one. I am of opinion that the compearing parties should be sisted as respondents, and as the interest in the question in dispute is truly theirs, I think they have a title and interest to resist an interdict being granted against Norrie & Sons; and accordingly that interim interdict should be refused.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming-note for the complainers against Lord Shand's interlocutor, dated 3rd August 1877, with the minute for Edington Detrick and William Webster, and Robert Abbot Glenday, their mandatory, dated 29th October 1877, No. 19 of process, Refuse to sist the said minuters in terms of their minute, and appoint said minute to be withdrawn from the proceedings; Recal the Lord Ordinary's said interlocutor: Appoint the answers lodged in name of the said Robert Abbot Glenday to be withdrawn from the proceedings, and remit to the Lord Ordinary in the Bill Chamber, in respect of no answers for Charles Norrie & Sons, the only respondents called, to pass the note, and grant interim interdict as prayed."

Counsel for Complainers (Reclaimers)—Balfour—Mackintosh. Agents—Davidson & Syme, W.S.

Counsel for Minuters (Respondents)—Asher—J. P. B. Robertson. Agent—A. Morison, S.S.C.