dubiety about it I think he may be appealed to still to make it clear. I concur that the Lord Ordinary's interlocutor should be affirmed, and with expenses.

LORD RUTHERFURD CLARK—This action was raised for the purpose of having it declared that the pursuers, in virtue of Mr Grierson's award, were entitled to have the joint-money divided between them in the ratio of the local rates. In my opinion they are not so entitled, and I do not think Mr Grierson's award gives them right to that. I concur in the Lord Ordinary's opinion of the construction of the decree-arbitral, and I also concur in the result at which he has come.

LORD LEE—I prefer to put my opinion entirely upon the ground which has been stated by your Lordship and by the Lord Ordinary. I am not competent to interpret this decision of Mr Grierson from anything I have heard in the argument addressed to us. It is a very technical matter, and my opinion can be stated in a very few words. The theory of the pursuers' summons is, that they are entitled to call upon the Court to enforce Mr Grierson's award as regulating this division of the traffic. Whether Grierson's award shall be the same as Beale's or entirely different, Grierson's award is to rule. According to the argument the view would seem to be that Grierson had found out a mistake in Beale's decision. It was frankly expressed, in short, that Mr Grierson's award involves a review of Mr Beale's. Now, that is entirely inconsistent, as your Lordship has pointed out, with the terms of the agreement between the parties. The contract is, that this matter, as a special matter involving technical skill and experience, is to be regulated by the decision of Mr Beale, and of nobody else. When I am asked, therefore, to examine the decision of Mr Grierson, and to pronounce a decree that Mr Grierson's award is to be enforced against the other party, I am bound to look in the record for some reason why Grierson should rule. I find none. I say the pursuers' allegations are entirely irrelevant to support the conclusions of the summons, because his allegation shows that the matter to which he refers in his summons was entirely left to the decision of Beale. I agree with the remark made by Lord Rutherfurd Clark in the course of the discussion that this matter is not so distinctly raised in the pleadings as it might have been. I think the defenders made a mistake in pleading *ultra fines compromissi*, which implies that there was some agreement to refer the matter to Mr Grierson. That is not an objection at all, and this third plea is rather misleading, and altogether inconsistent with the plea we are going to sustain, which is, that there never was nor could be any decision by Mr Grierson without a totally new agreement, and no new agreement referring the matter to Mr Grierson has been alleged to exist.

The Court adhered.

Counsel for the reclaimers—Low—C. S. Dickson. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondents—D.-F. Balfour, Q.C.—Ferguson. Agents—T. J. Gordon & Falconer, W.S.

Wednesday, July 9.

SECOND DIVISION.

[Lord Trayner, Ordinary.

PICKARD & CURRY *v.* PRESCOTT.

Patent—Prior Publication—Proof.

In an action for infringement of letters-patent dated July 24, 1885, it was proved that a foreign review dated June 30, 1885, contained a description of an article which was admittedly identical with the patent. The agents in Great Britain for the sale of the review deponed that in 1885 they supplied it to two medical institutions and to three customers in monthly parts. Their periodical book showed that one of these customers had been supplied with the June number on 10th July. He could not say when the number had been delivered to him or when he had read it. *Held* that the evidence was sufficient to establish publication of the article in the United Kingdom prior to 24th July 1885.

In January 1889 Messrs Pickard & Curry, ophthalmic opticians, 195 Great Portland Street, London, raised this action of suspension and interdict against George Prescott, ophthalmic optician, 33 Lothian Road, Edinburgh, to have him restrained from the infringement of letters-patent granted to the complainers on 24th July 1885 for "improvements in the bridges of pince-nez or double eye-glasses."

The respondent stated that similar inventions were disclosed by certain letters-patent and trade catalogues, and on 29th October 1889 he amended his record so as to include among the alleged prior publications "Notice or article entitled 'Pince-nez pour les Astigmates,' by Dr Mottais of Angers, which appeared in the monthly number of the *Revue Generale d'Ophtalmologie* for June 1885, vol. iv., pp. 253-4, and which notice or article was published and sold generally in the United Kingdom in June and July 1885, and in particular was sold by Messrs Williams & Norgate, Edinburgh and London, agents for the sale, on 10th July 1885, and was deposited about the same date in the libraries of the Ophthalmic Hospital and the Medico-Chirurgical Society, both in London."

He pleaded, *inter alia*—"(2) The alleged letters-patent founded on by the complainers are null and void or invalid, in respect—1st. The said William Curry and Joseph Fidoe Pickard were not the first and true inventors of the alleged invention described in the letters-patent and specifica-

tion; 2nd. The alleged invention was publicly known prior to the date of the letters-patent."

It was admitted by the complainers that the article in the *Revue* described a pince-nez which was practically the same as their patented improvement, and therefore when the case came on for proof on 1st November 1889, of consent of parties proof was led first with reference to this alleged publication.

George Prescott, the respondent, deponed —"[Shown a copy of the issue of 30th June 1885 of the *Revue Generale d'Ophtalmologie*, and referred to p. 11]—I first saw that issue of the *Revue* and the illustration on p. 11 at the time of publication, immediately after 30th June 1885. It was brought to me at my own house by a Dublin oculist, Dr Storey. I afterwards saw another copy in the possession of Dr Fitzgerald, Surgeon-Oculist to the Queen in Ireland. This was a day or two after Dr Storey had brought me the copy. (Q) Was it before the end of July 1885?—(A) Certainly. . . . *Cross.*—I fix the date when I saw the copy of the *Revue Generale d'Ophtalmologie* to which I have spoken by the date of that particular number, 30th June. That is the date when the *Revue* was printed in Paris. When Dr Storey brought the copy to me he said, 'Here's something new,' or 'I have just got this,' or words to that effect. I have no distinct recollection of the date when he brought it. I have no note or record to enable me to fix the date. It was not in June 1885. (Q) May it have been in August? —(A) The matter was not impressed on my mind at the time, but I don't think so. (Q) But as to any date in July or any other month you are not prepared to speak?—(A) No, I can only say I saw it when it was published in Ireland."

Otto Schulze deponed—"I am manager in Edinburgh for Messrs Williams & Norgate, foreign booksellers. We have a house in London as well as in Edinburgh. We are agents in Great Britain for the sale of the *Revue Generale d'Ophtalmologie*, which is published monthly in Paris. We are mentioned as agents for it in the catalogues published to the trade. We supply it to various individuals, and also to institutions. We supply it to the Ophthalmic Hospital, London, and to the Medico-Chirurgical Society, London. These copies are supplied from the London house. In Edinburgh we supply it to Dr George Berry. I exhibit our periodical book, from which it would appear that Dr Berry was supplied with the sixth month's issue of 1885 on 10th July of the same year. That would be the number of 30th June. . . . *Cross.*—Besides Dr Berry and the institutions I have mentioned, we supplied copies of the *Revue Generale d'Ophtalmologie* in 1885 to Dr Nettleship and to Bell & Taylor, or Mr Bell Taylor. To the best of my belief these were the only copies that were coming into this country at that time. The interval between the date of publication and the time when such foreign publications come into the hands of booksellers or agents here for distribution is very uncertain. I cannot say whether we had copies of the *Revue Generale d'Ophtalmologie* for sale in our shops in 1885; we may or we may not. The copies I have mentioned were all supplied to order. In supplying them we acted as agents. Our periodical book shows the date of delivery of the various papers. The numbers running from one to twelve are the months of the year. The number above the figure six I take to be ten, not twenty. . . . The figures showing the July delivery of the June periodical are not very clear. . . . The figures record the delivery made in the month under which they occur. The record of the seventh month, July, is 27/6. (Q) Does not that record that the delivery in fact made in July of the number of the seventh month was on 27th June?—(A) Yes. . . . *By the Court.*—(Q) Is the result of your reading of the book that this June number of the *Revue Generale* was delivered to Dr Berry on 10th July?—(A) Yes."

The extract from the periodical book was in these terms:—

"*Revue d'Ophtalmologie.*

"G. Berry, 1885.

"28/2	22/3	16/4	20/5	20/6	10/7	27/6	2/10
1	2	3	4	5	6	7	8
		30/10	3/12	3/12	22/2		
		9	10	11	12"		

Dr George Berry deponed—"I am a doctor of medicine in Edinburgh, and a specialist in ophthalmology. I know the *Revue Generale d'Ophtalmologie*. I have taken it in since it began, in 1882. . . . The copy produced in process is mine. I have no particular recollection of getting the part of 30th June 1885. The parts are delivered to me by Messrs Williams & Norgate shortly after they are published. The pencil writing upon my copy of 30th June 1885 is in my handwriting. The writing is 'If you think well of this please make me one to show patients.' I must have written that at the time. I remember of writing something and sending it to Pickard & Curry. To the best of my recollection I sent them the June No. of the *Revue* with the note I have just read upon it. I considered the pince-nez figured in the paper was a novelty. I had not seen it before. I think it is very likely I would send the paper with note upon it to Pickard & Curry soon after I got it through Williams & Norgate, but I do not remember that. *Cross.*—I have no copy of any letter sending the paper to complainers. It came back with a letter. I have not got the letter that came back with it. I do not keep my letters. I do not think I had any correspondence with them in 1885 except on this matter. I am not prepared to say anything about the date of the letter. The *Revue* may have lain in my possession some time unopened. [Shown copy letter by complainers to witness, dated 4th September 1885.] That is the letter I received from complainers in reply to my communication. It must have been shortly before that that I sent the *Revue* to them. I would receive the reply probably in the course of a week I should think. (Q) Are

you satisfied now that you had not read the *Revue* or seen this drawing until the latter part of August?—(A) No, I cannot be sure. I may have been away on a holiday at the time. I cannot remember that I was in the country in July that year."

William Curry deponed—"My late partner, Joseph Fidoe Pickard, and I were the sole inventors of the pince-nez described in our provisional specification of 24th July 1885. We made the drawings about the middle of March, and sent them to a house in London to be forwarded to Paris for execution, because we were afraid, if we carried them out in our own shop, the design would be divulged and copied before it was protected. It was about the middle of March that we sent the design to Paris, and about 20th or 30th May we got back the finished article which we exhibited to the patent authorities. It was three or four weeks after that before we gave our solicitors instructions to get protection. I had not at that time seen the June copy of the *Revue Generale d'Ophtalmologie* of 1885. As near as I can judge, the first time I saw it was on 25th August 1885, when it was brought to me by Mr Long, an ophthalmic surgeon at Middlesex Hospital. (Shown copy letter by complainers to Dr Berry, Edinburgh, dated 4th September 1885.) That letter was written in reply to one by Dr Berry to us asking if we had seen the article in the *Revue*. I do not think he sent the copy of the *Revue* to us. I should not like to say positively that we did not get the copy he has produced with the pencil note upon it, but my impression is that it did not come. I wrote in reply to Dr Berry the same day as we received his communication; I always write in course of post, or I make an apology for not doing it. I am satisfied that it was in the month of September that I received the communication from him."

The letter referred to was in these terms:—"Sir—We think the writer in the *Revue* has a certain amount of assurance, but we fully expected this. The fact is we have made the folder and patented it in England. Stupidly we kept the thing in abeyance before going to the Patent Office, and asked among others several French workmen at what price they could make them. This, we presume, was the idea that struck the writer in the *Revue*. It matters little to us, as we shall be protected in England, and that is all we care for."

In cross-examination as a witness on the merits, Dr Berry deponed—"When I saw the article in the *Revue Generale d'Ophthalmologie* of 30th June 1885, the pince-nez there described struck me as a novelty. It occurred to me it might be useful. I wrote to the complainers—'If you think well of this, please make me one to show patients.' I sent that to them in the first few days of September, or the last few days of August 1885."

The Lord Ordinary (TRAYNER) upon 26th November 1889 granted interdict as craved.

"*Opinion.*—The complainers in 1885 obtained a patent for improvements in the bridges of pince-nez or double eye-glasses which they aver the respondent has been infringing. The alleged infringement is denied upon record, but that denial was not maintained, as I understood, in the debate which followed the proof. If, however, the alleged infringement is still disputed, I am satisfied that infringement on the part of the respondent has been proved. The real question in the case I take to be whether the patent on which the complainer founds is valid? To its validity a variety of objections are stated, but I do not think it necessary to notice any except these three—(1) prior publication, (2) prior use, and (3) that the specification and relative drawings do not sufficiently distinguish between what is old and not claimed, and what is new and claimed by the complainers.

"1. Prior publication. An article (with drawings) appeared in the *Revue Generale d'Ophtalmologie* published in Paris on 30th June 1885, which it is admitted by the complainers described a pince-nez not distinguishable from their patented improvement. The sole question therefore with regard to that article is, whether the respondent has proved its publication within the United Kingdom prior to the 24th July 1885, being the date of the complainer's provisional specification?

"The evidence relating to this matter is short and easily summarised. The respondent says that he was shown the *Revue* in Dublin, but he cannot fix the date when it was shown to him. It was 'at the time of publication immediately after 30th June,' at all events 'before the end of July,' but as 'to any date in July or any other month,' he is not prepared to speak. This is so indefinite on the material question, the question namely of date, that I regard the respondent's evidence as of no value; it certainly is not proof of publication before the 24th July. The respondent's evidence is open also to this observation, that no attempt has been made to corroborate it by the evidence of the two doctors, who are said to have shown him the *Revue*. That fact suggests either that the evidence of these gentlemen would have been adverse to the respondent, or that, at least, it would not aid him, not being more precise as to date than his own. The evidence of Mr Schulze is equally valueless. A copy of the *Revue* was forwarded through his agency to Dr Berry in Edinburgh, but when that copy of the *Revue* reached Edinburgh, or was delivered to Dr Berry, Mr Schulze of his own knowledge knows nothing. He can only say that he finds an entry in a book (not made by himself) indicating that the *Revue* was received in Edinburgh, and delivered to Dr Berry on the 10th July 1885. But I cannot place reliance on the mere book entry, as I find from the book itself that it is not always accurate. The entries in the book represent that the June number of the *Revue* was delivered on the 10th July, and that the July number was delivered on 27th June—that is, the July number was delivered before the June number was published. Dr Berry cannot say when the *Revue* for June was delivered to him. This is really the whole evidence bearing

upon this part of the case, and I cannot suppose there is room for difference of opinion as to its effect. I regard it as utterly insufficient to establish publication of the article in question in the United Kingdom prior to 24th July 1885." . . .

The respondent reclaimed, and argued—The *Revue Generale d'Ophtalmologie* was published in this country prior to the date of the letters-patent, and admittedly described a pince-nez practically identical with the complainers' patent. The date of the publication in France was 30th June 1885. There was sufficient evidence that it was delivered to Dr Berry in Edinburgh on 10th July, and although there was no direct evidence on the subject, it might therefore be presumed that it had been delivered to the other persons and institutions specified by the witness Schulze. There was therefore sufficient publication. All that was necessary for such prior publication as would prevent a patent being taken out for the same article as there described was, that the book containing the description should be in this country in such a way as to be accessible to the public, and it was not necessary to prove that anyone had actually read the article in which was the description—*Loch* v. *Hague*, , 1838, 1 Webster's Patent Cases, 202; *Betts* v. *Neilson* and *Betts* v. *de Virte*, February 8, 1868, L.R., 3 Chan. App. 429; *Harris* v. *Rothwell*, April 5, 1887, L.R., 35 Ch. Div. 416; *Lang* v. *Gisborne*, May 29, 1862, 31 Bevan's Reps. 131; *Patterson* v. *Gas Light and Coke Company*, December 13, 1877, L.R., 3 App. Cas. 239; *Betts* v. *Menzies & Wildey*, June 5, 1862, 10 Clark (H.L. Cases), 117.

The complainers argued—There was here no sufficient proof of publication. There was no case where time had run so fine as here. It was a question of days whether the *Revue* had been read before 24th July 1885. Publication involved the idea of adding to the public stock of knowledge. The respondent must therefore show either that the invention was sufficiently known to individuals in this country, or such circumstances as to warrant the inference that the public had become possessed of knowledge of the invention. The proof failed on both points. No individuals were proved to have seen the article before 24th July 1885. Prescott could only fix the date by the date of the publication, but he would have required to show that it arrived in Dublin on that date, and that he saw it immediately. He could not do so, and where was Dr Storey? Proof of delivery to Dr Berry depended on Williams & Norgate's book. If accuracy was needed anywhere it was in fixing a date which would be fatal to a patent. The book could not be regarded as a safe guide, for on its face there was a manifest inaccuracy Besides, even if true, when did Dr Berry get the information? He could not say, and circumstances pointed to the beginning of September or end of August. The natural conclusion from the facts was, that even assuming Berry got the *Revue* shortly after its publication, he did not at once read it. But it was only by reading it that the public stock of knowledge was added to. This was a different case from a person purchasing a book for the purpose of reading; it was merely a monthly publication sent out in the ordinary course of business. There was simply no evidence of delivery to the other individuals, and the institutions named by Schulze. The proof also failed on the second ground. There was no fair inference from the circumstances that the article had been seen by anyone in sufficient time. But, as previously shown, there was no proof to lead to the conclusion that this publication had been seen by anyone, and there could be no addition to the public knowledge unless Dr Berry had seen the article before the patent was taken out. The knowledge of the article had not been brought home to a sufficient number of people to prove publication—*Otto* v. *Steel*, December 11, 1885, L.R., 31 Chan. Div. 241; *Lang* v. *Gisborne*, 31 Bevan, 133, qualified by *Plimpton* v. *Malcolmson*, March 2, 1876, L.R., 3 Chan. Div. 531; *United Telephone Company* v. *Harrison, Cox-Walker, & Company*, May 19, 1882, L.R., 21 Chan. Div. 720; *Plimpton* v. *Spiller*, June 26, 1877, L.R., 6 Chan. Div. 412.

At advising—

LORD JUSTICE-CLERK—So far as this case has gone the only question for consideration is that of prior publication, and in the view that I take of that matter it seems to me to be unnecessary that we should go further.

It appears that the date of this patent is 24th July 1885. It also appears that the description of an article practically the same as the patent was published in Paris on 30th June 1885, and certain copies of the magazine containing the description were forwarded to Williams & Norgate, who have a house in Edinburgh, and through whom orders for foreign publications may be given. It appears from the evidence of Schulze that the June number of this *Revue Generale d'Ophtalmologie*, containing the article founded on by the defenders, was delivered to Dr Berry on the 10th July 1885. It was argued for the pursuer that this was not distinctly proved. I think it was proved as well as could be expected in a matter of this kind. It was proved that this review was not delivered regularly, but sometimes earlier, sometimes later, the times varying from three days after publication to thirty. But Williams & Norgate bring their book into Court, in which is set down the day when this number of the review was delivered to Dr Berry, and they say that their entry in the book means that it was delivered upon the 10th day of the seventh month, and I do not doubt the accuracy of the evidence. It was said that we could not rely upon the accuracy of this entry, because the next entry is, on the face of it, quite wrong, but the mistake there is an obvious clerical error. It is plain that there may be manifest errors in any book, but we are not to assume from the presence of one error that all the entries in the book are inaccurate. If that was to be the rule, then

I think no book at all could be accepted as accurate. I think that the evidence of Schulze and the entry in the book are sufficient to prove that this review was delivered to Dr Berry upon that day.

I think it may be fairly then deduced that as the London house of Williams & Norgate had been able to deliver the book in Edinburgh by the 10th July, that it had also supplied the institutions and other persons mentioned in the proof before that date, although no trace of that fact can now be got. I think, therefore, there is sufficient evidence of the delivery of the publication by the 10th July.

This being all the evidence we have, the question is whether it is enough to prove publication in this country. In my opinion it is. If it is proved that the review was delivered to Dr Berry and others on 10th July, it must be taken to have been published to them. Whether or not that presumption could have been overcome by the pursuers showing that although delivery had been made, still that knowledge of the article relating to this invention had not reached them by that date, I do not say. It is not necessary to decide that question, and I say nothing about it.

I hold that there was sufficient publication by the description in the review of this kind of pince-nez, and that after such prior publication in this country it is not possible for anyone to get a good patent for an article of the kind described in this *Revue*. I think we must alter the Lord Ordinary's interlocutor.

LORD YOUNG—I am of the same opinion, and what your Lordship has said is probably enough for the decision of the case. What the pursuer claims here to be his invention protected by patent is described in an article in the June number of this review, which I think came early in July to this country, and was supplied by Williams & Norgate to various of their customers before the date of the patent.

I think it is satisfactorily proved that a copy was given to Dr Berry upon the 10th July. I think it is also proved that copies were sent by that date to the Ophthalmic Hospital, London, and to the Medico-Chirurgical Society there, to Dr Nettleship and to Mr Bell Taylor. I think that these deliveries were made in due course of business after the arrival of the copies of the *Revue* in this country. I think also that with the evidence of Schulze and Berry before them, if the pursuers wished to prove that these deliveries were not made until after the 10th July 1885, it was incumbent upon them to lead evidence to that effect.

The complaint they made at first was that this defence had been sprung upon them at a late period in the case, and that they were taken by surprise. Now, surprise is always a good ground on which to make application for time to lead evidence against the matter suddenly raised. But no application of that kind was made here, and when I asked the pursuers' counsel whether he had discovered any new facts relating to this matter which he wished to prove, the answer was in the negative.

I am therefore constrained to hold that the pursuer is not the first and true inventor of this article. Indeed, that is really the question we have to try, the proof of publication is only made for the purpose of showing that the first and true inventor had not kept his invention secret and locked up, but had given the benefit of it to the public of this country. I am of opinion, and without any difficulty, that the Lord Ordinary's interlocutor must be altered in regard to this matter.

LORD RUTHERFURD CLARK—I am far from being so clear as your Lordships in regard to this matter, but I do not differ.

LORD LEE—I think there is evidence in this case that the *Revue* in question was sent into this country for sale, and that it was sold prior to 10th July. This is not the case of depositing a document or book in a public library. It was held in one case that even although the book had been deposited in a public library for a long time, as no one knew of its existence, that its presence would not invalidate a patent of an article acquired after it had come into this country. This is a case of a foreign publication exposed for sale in this country, and sold in due course of business. I agree with your Lordships.

The Court pronounced this judgment:—

"The Lords having heard counsel for the parties on the reclaiming-note for the respondent against Lord Trayner's interlocutor of 26th November 1889, Find that the monthly number of the *Revue Generale d'Ophtalmologie* for June 1885, containing the notes or article by Dr Mottais of Angers, referred to in statement 2 for the respondent, and which describes the invention claimed by the complainers, was published in the United Kingdom prior to 24th July 1885: Therefore find that the letters-patent founded on are invalid: Recal the said interlocutor: Repel the reasons of suspension, and refuse the interdict: Find the complainers liable to the respondent in expenses," &c.

Counsel for the Appellant — Graham Murray — W. C. Smith. Agent — Thos. Temple Muir, S.S.C.

Counsel for the Respondent—Low—Boyd. Agent—William Boyd, W.S.