

[21st March, 1842.]

WILLIAM BAIRD and Co. of Gartsherry Iron Works,
Appellants.

JAMES B. NEILSON, and Others, *Respondents.*

Construction — In an agreement for compromising a question, as to whether a patent had been violated, whereby the party agreed to pay the patentee so much per ton on goods manufactured “in any of the modes heretofore practised by him, or in any other mode falling under the description” in the patent, held, “that the modes heretofore practised” were embraced, whether falling within the patent or not.

Suspension. — A party raising by suspension a question, confined to his *liability* under an agreement, cannot, in the same process, be relieved in regard to the *manner* in which the liability is attempted to be enforced.

Diligence. — Horning, upon an agreement to render an account, exhibit books in support of it, and pay according to the account, is competent.

IN the month of November, 1833, the appellants and respondents entered into an agreement, the respondents being parties thereto of the first part, and the appellants of the second part, which was in these terms, — “Whereas the said James Beaumont Neilson obtained Letters-Patent, bearing date the first day of October, eighteen hundred and twenty-eight, for the sole and exclusive use and privilege in that part of the United Kingdom called Scotland, of an invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus is required, for the term of fourteen years from the date of the

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“ said letters-patent; and whereas the said James Beaumont
“ Neilson, together with the said Charles Macintosh, Colin
“ Dunlop, and John Wilson, are now jointly interested in the
“ said patent, and in the benefits resulting therefrom; and
“ whereas, by contract and agreement entered into between
“ the said parties, dated the twenty-eighth of March, and seven-
“ teenth and eighteenth of April, eighteen hundred and thirty-
“ two, and recorded in the books of Council and Session the
“ sixth day of August thereafter, the said first parties did, in
“ pursuance of the said agreement therein recited, and in con-
“ sideration of the reservation and covenants therein contained,
“ give and grant unto the said second parties, full and free
“ license and permission to use and exercise the said invention
“ mentioned in the said letters-patent and specification thereof,
“ as far as the same related to the use thereof in blowing the
“ smelting or blast-furnaces situated at Gartsherry, but not else-
“ where, upon the terms and conditions therein mentioned, for
“ all the remainder then to come of the term of fourteen years
“ granted by the said letters-patent; and whereas the said first
“ parties did, in virtue of letters of horning raised at their
“ instance against the said second parties, dated and signeted the
“ fifth day of August, eighteen hundred and thirty-two, charge
“ the said second parties to implement and perform the obliga-
“ tions and stipulations undertaken by them in the said contract
“ and agreement; and whereas the said second parties brought a
“ suspension of the charge, upon the ground, *inter alia*, that the
“ said letters-patent were void and ineffectual, and that the
“ apparatus by which they, the said second parties, had applied,
“ and were applying heated air in blowing the smelting or blast-
“ furnaces at Gartsherry, did not fall under that invention, the
“ exclusive use of which was granted by the said letters-patent;
“ and whereas the said bill of suspension was reported to the
“ Lords of the First Division of the Court of Session, and was

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“ by them passed upon caution, and the expedite letters of suspen-
“ sion are now in dependence before Lord Corehouse, Ordinary ;
“ and whereas the said first parties, in consequence of the con-
“ tinued refusal of the said second parties to implement and
“ perform the obligations and stipulations incumbent on them by
“ the foresaid contract and agreement, and in virtue of the
“ powers which, by the said contract and agreement, were
“ reserved to them, did, by the deed of revocation, dated the
“ twenty-seventh, and registered in the books of Council and
“ Session the twenty-eighth day of February, eighteen hundred
“ and thirty-three, but under the reservations therein expressed,
“ revoke and annul the license and permission granted to the
“ said second parties, by the contract of license before recited,
“ to use and exercise the said invention mentioned in the letters-
“ patent before recited, and in the specification thereof before
“ referred to : And whereas the said first parties did thereafter
“ institute an action of declarator against the said second parties,
“ for having it found and declared, that the foresaid contract and
“ agreement was, under the reservations contained in the said
“ deed of revocation, void and null : And whereas the said first
“ party did also, upon the fifteenth day of March last, present a
“ bill of suspension and interdict to the Lords of Council and
“ Session against the said second parties, praying that their
“ Lordships might interdict and prohibit the said second parties
“ from applying, by means of the apparatus then used by them,
“ heated air for the purpose of smelting iron from the ore at
“ their said works at Gartsherry aforesaid, or elsewhere : And
“ whereas, while the interdict prayed for by the said bill of sus-
“ pension was refused, the said bill of suspension itself was passed
“ for the purpose of trying the merits of the question which was
“ thereby raised : And whereas, all the said processes of suspen-
“ sion and declarator between the said parties, are now in depen-
“ dence before the Lord Corehouse, Ordinary : And whereas it

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“ has been agreed between the said parties, — First, That the
“ said William Baird, Alexander Baird, James Baird, Douglas
“ Baird, and George Baird, as copartners foresaid, should dis-
“ charge the process of suspension first before recited, brought
“ by them as aforesaid, in which they not only disputed the
“ validity of the said patent, but denied that the mode pursued
“ by them in the application of heated air to the smelting of iron
“ from the ore at their works at Gartsherry aforesaid, fell under
“ the invention, the exclusive use of which was granted by the
“ foresaid letters-patent. Secondly, That the said James Beau-
“ mont Neilson, Charles Macintosh, Colin Dunlop, and John
“ Wilson, should, in consideration of the present payment by
“ the said second parties of four hundred pounds, to be accepted
“ by the said first parties in full of one shilling per ton upon the
“ whole iron smelted by the said William Baird, Alexander
“ Baird, James Baird, Douglas Baird, and George Baird, as
“ copartners foresaid, at their said works at Gartsherry, by
“ means of heated air, in whatever way applied, from the time
“ of the erection of their said works, until the eleventh day of
“ November current, in like manner discharge and pass from the
“ letters of horning raised by them against the said second parties,
“ the charge given to the said second parties under the said
“ letters of horning, and the foresaid process of suspension
“ brought by them, the said first parties, for having the said
“ William Baird, Alexander Baird, James Baird, Douglas Baird,
“ and George Baird, as copartners foresaid, prohibited and dis-
“ charged from applying heated air by means of the apparatus
“ then used by them in the smelting of iron from the ore, at
“ their said works at Gartsherry. And thirdly, That the said
“ James Beaumont Neilson, Charles Macintosh, Colin Dunlop,
“ and John Wilson, should, in consideration of the payment at
“ the terms and in the manner after-mentioned, of one shilling
“ per ton upon the whole iron which has been or shall be smelted

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“ by the said William Baird, Alexander Baird, James Baird,
“ Douglas Baird, and George Baird, as copartners foresaid, from
“ the said eleventh day of November current, till the expiry of
“ the term granted by the foresaid letters-patent, by the use of
“ heated air in any of the modes heretofore applied, or in any
“ other mode falling under the said patent, to be hereafter
“ applied by the said William Baird, Alexander Baird, James
“ Baird, Douglas Baird, and George Baird, as copartners fore-
“ said, or their said successors, should grant to them, the said
“ William Baird, Alexander Baird, James Baird, Douglas
“ Baird, and George Baird, as copartners foresaid, upon the
“ terms and conditions, and subject to the conditions hereinafter-
“ mentioned, a license to use and exercise the invention described
“ in the said letters-patent and specification thereof, at the iron
“ works situated at Gartsherry aforesaid, or that may be erected
“ by them on the estate of Woodhall, in the parish of Bothwell,
“ and county of Lanark, in so far, but in so far only, as the said
“ invention is applicable to the smelting of iron from the ore in
“ blast furnaces: And seeing that, in pursuance of the said
“ agreement, the said William Baird, Alexander Baird, James
“ Baird, Douglas Baird, and George Baird, as copartners fore-
“ said, have, upon the one part, now paid down to the said
“ James Beaumont Neilson, Charles Macintosh, Colin Dunlop,
“ and John Wilson, the said sum of four hundred pounds ster-
“ ling, in full of the said stipulated payment, in full of the rate
“ of one shilling per ton on the iron smelted from the ore in the
“ furnaces of the said second parties at Gartsherry aforesaid,
“ previous to the said eleventh day of November current, by the
“ use of heated air, in whatever way applied, at their said works,
“ the receipt of which sum is hereby acknowledged, and all
“ exceptions to the contrary for ever renounced; and have also
“ discharged and passed from, as they do hereby discharge and
“ pass from, the process of suspension first before recited pur-

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“ sued by them the said second parties against the first parties,
“ on the grounds that the said patent was void and ineffectual,
“ and that the means used by them, the said second parties, for
“ applying heated air in the smelting of iron at their said works,
“ did not fall within the invention, the exclusive use of which was
“ granted by the said patent: Therefore, and in implement of
“ the obligations incumbent on them by the said agreement, the
“ said James Beaumont Neilson, Charles Macintosh, Colin Dun-
“ lop, and John Wilson, have discharged and passed from, as
“ they do hereby discharge and pass from, the letters of horning
“ raised by them, as before mentioned, against the said William
“ Baird, Alexander Baird, James Baird, Douglas Baird, and
“ George Baird, as copartners foresaid, the charge given to them,
“ the said second parties under the said letters of horning, and
“ the foresaid process of suspension now depending in Court at
“ the instance of the said first parties against the said second
“ parties, together also with all claims and demands of every
“ description competent to them, the said first parties, against
“ the said second parties, by reason of the infringement or inva-
“ sion of the said patent right by the said second parties: And
“ farther, the said James Beaumont Neilson, Charles Macintosh,
“ Colin Dunlop, and John Wilson, in consideration of the reser-
“ vation and covenants herein before written, and in farther pur-
“ suance of the said agreement, have given and granted, as they
“ do hereby give and grant, unto the said William Baird,
“ Alexander Baird, James Baird, Douglas Baird, and George
“ Baird, as copartners carrying on business as aforesaid under
“ the firm of William Baird and Company, and to their succes-
“ sors in their said works at Gartsherry, full and free license and
“ permission to use and exercise the said invention mentioned
“ in the said letters-patent, and in the specification thereof, in so
“ far, but in so far only, as the said invention may be used in
“ blowing the smelting or blast furnaces erected or to be erected

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“ by the said second parties at their said works at Gartsherry
“ aforesaid, or at any works which they may erect upon the estate
“ of Woodhall aforesaid, for all the remainder now to come of the
“ period of fourteen years granted by the said letters-patent,
“ yielding and paying therefor unto the said James Beaumont
“ Neilson, Charles Macintosh, Colin Dunlop, and John Wilson,
“ and to the survivors or survivor of them, and to the executors
“ of the survivor, for behoof of themselves, and the heirs of the
“ deceaser, and to the assignees of the survivors or survivor of
“ them, or of the executors of such survivor, the sum of one
“ shilling for every ton of iron which has been smelted, or may
“ be smelted at their said works between the said eleventh day
“ of November current, and the expiry of the time granted by
“ the said letters-patent, by the application or use of heated air
“ in any of the modes heretofore practised by the said second
“ parties at their said works, or in any other mode falling under
“ the description in the said patent or in the specification there-
“ of, — such payment, except the last payment, to be made half-
“ yearly at the terms of Candlemas and Lammas in each year,
“ beginning as at the term of Candlemas, eighteen hundred and
“ thirty-four, for the term preceding; and the last payment to
“ be made on the day of the expiration of the said term, with a
“ fifth part farther of each term’s payment of liquidate penalty
“ in case of failure in the punctual payment thereof, besides the
“ lawful interest of each term’s payment from the time when it
“ becomes due till payment. For which causes, and on the other
“ part, the said William Baird, Alexander Baird, James Baird,
“ Douglas Baird, and George Baird, bind and oblige themselves
“ and their respective heirs, executors, and successors whomso-
“ ever, conjunctly and severally, and the said Company of
“ William Baird and Company, from time to time to content and
“ pay or cause to be paid, to the said James Beaumont Neilson,
“ Charles Macintosh, Colin Dunlop, and John Wilson, and

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“ theirs aforesaid, the sum aforesaid of one shilling for every ton
 “ of iron smelted, or to be smelted, as aforesaid, on the days
 “ before specified, whereupon the same shall be payable, with
 “ penalty and interest aforesaid in case of failure ; and the said
 “ William Baird, Alexander Baird, James Baird, Douglas Baird,
 “ and George Baird, farther bind and oblige the said William
 “ Baird and Company, and themselves as individuals, and theirs
 “ aforesaid, during the continuance of this license, to render to
 “ the said Charles Macintosh, Colin Dunlop, James Beaumont
 “ Neilson, and John Wilson, and theirs aforesaid, a just and
 “ true account or particular in writing to be verified by affidavit
 “ if required, such affidavit to be sworn before a Magistrate, of
 “ the number of tons of iron smelted in manner foresaid, in each
 “ and every week up to the period in which the sums payable in
 “ virtue of these presents shall become payable, and also, if re-
 “ quired, to produce all books, accounts, and writings, relating
 “ to the quantity of iron smelted, as aforesaid, kept at the said
 “ works, by means of a reference to which the amount of iron so
 “ smelted may be ascertained. Providing always, as it is hereby
 “ expressly provided and declared, that it shall not be lawful to,
 “ nor in the power of the said William Baird and Company, or
 “ of the said William Baird, Alexander Baird, James Baird,
 “ Douglas Baird, and George Baird, or theirs aforesaid, during
 “ the subsistence of this license, directly or indirectly to chal-
 “ lenge the validity or effect of the foresaid patent, or to suspend
 “ any charge that may be given them or theirs aforesaid for pay-
 “ ment of the sums to become due from them or theirs aforesaid,
 “ under these presents, or for implement of the obligations here-
 “ by incumbent on them, on any ground or pretext whatever, so
 “ long as the said letters-patent are not declared void and null,
 “ as is hereinafter provided for. And the said William Baird,
 “ Alexander Baird, James Baird, Douglas Baird, and George
 “ Baird, farther undertake and bind and oblige the said William

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“ Baird and Company, and themselves as individuals, and theirs
“ aforesaid, not to make use of the said invention under or by
“ virtue of the license hereby granted, for any other purpose
“ than for smelting of ironstone or iron-ore, and that nowhere
“ than at their works situated at Gartsherry, or at Woodhall
“ aforesaid, according to the meaning of these presents: Pro-
“ vided also, that nothing herein contained shall extend to
“ abridge or prejudice the right or power of the said Charles
“ Macintosh, Colin Dunlop, James Beaumont Neilson, and John
“ Wilson, or theirs aforesaid, to use, and exercise, and vend the
“ said invention, and grant a license or licenses in that behalf to
“ any person or persons within the terms of the said letters-patent;
“ but that they, the said Charles Macintosh, Colin Dunlop,
“ James Beaumont Neilson, and John Wilson, and theirs afore-
“ said, and their future assignees or grantees respectively, shall,
“ or may use, exercise, and vend the said invention in such and
“ the same manner as if these presents had not been made; it
“ being always understood, that from and after the date of these
“ presents, the said patentees shall not be at liberty to grant
“ licenses unto any other party in the same trade with the said
“ second party at a lower rate than that herein stipulated, without
“ communicating the same reduction per ton to the said second
“ party, without prejudice to the said first parties granting
“ licenses for the full period to run of the said patent at such a
“ slump price as they may consider to be fair and reasonable:
“ And provided also, that if, during the remainder of the term
“ of the said patent, any action, suit, or other proceeding, shall
“ be brought or instituted, under or in consequence of which, or
“ by any other means or proceedings, the said letters-patent shall
“ become void, all sums of money whatsoever which previously,
“ and up to the day on which the said letters-patent shall have
“ become void, shall have been paid or become payable to the
“ said Charles Macintosh, Colin Dunlop, James Beaumont

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“ Neilson, and John Wilson, and theirs aforesaid, under the pro-
“ visions herein contained, shall, notwithstanding any such action,
“ suit, or other proceeding, and notwithstanding the event there-
“ of, be retained by the said Charles Macintosh, Colin Dunlop,
“ James Beaumont Neilson, and John Wilson, and theirs afore-
“ said, and be recoverable by them from, and be paid to them
“ and theirs aforesaid, by the said William Baird and Company,
“ and the said William Baird, Alexander Baird, James Baird,
“ Douglas Baird, and George Baird, as individuals, and theirs
“ aforesaid, in the same way, in every respect, as if no such action
“ or other proceeding had taken place; but the subsequent or
“ suspended payments shall not be payable. And the said
“ Charles Macintosh, Colin Dunlop, James Beaumont Neilson,
“ and John Wilson, for themselves and theirs aforesaid, jointly
“ and separately, do hereby covenant, promise, and agree, from
“ time to time, at their own expense, to prosecute, without any
“ unreasonable delay, all parties infringing the said patent, in so
“ far as the same is applicable to the smelting of iron from iron-
“ stone or ore, but not farther; or to adopt such other proceed-
“ ings as shall restrain the parties so infringing the same, from the
“ illegal use of the invention thereby protected, upon notice
“ thereof in writing being given to them by the said William
“ Baird, Alexander Baird, James Baird, Douglas Baird, and
“ George Baird, and theirs aforesaid. But if, from any cause
“ whatever, the said Charles Macintosh, Colin Dunlop, James
“ Beaumont Neilson, and John Wilson, and theirs aforesaid, shall
“ not take any proceedings in law or in equity against the said
“ parties so infringing the said patent, then the said William
“ Baird, Alexander Baird, James Baird, Douglas Baird, and
“ George Baird, and theirs aforesaid, shall be at liberty to use
“ and exercise the said invention, without making any payment
“ for the same, so long as the said Charles Macintosh, Colin
“ Dunlop, James Beaumont Neilson, and John Wilson, and theirs

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“ aforesaid, shall abstain from taking any such proceedings as
“ aforesaid; and that in case the said Charles Macintosh, Colin
“ Dunlop, James Beaumont Neilson, and John Wilson, shall
“ finally determine not to take any such proceedings against any
“ party or parties infringing the said patent, then that these pre-
“ sents, and the covenants and agreements herein contained,
“ shall be void and of no effect: Provided always, and it is hereby
“ declared, that in case any of the payments hereinbefore re-
“ served, shall be in arrear for the space of forty days, the same
“ having been lawfully demanded ten days previously to the expira-
“ tion of the said forty days; or if the said William Baird and
“ Company, William Baird, Alexander Baird, James Baird,
“ Douglas Baird, and George Baird, and theirs aforesaid, shall
“ use the said invention, except for the purpose of smelting iron
“ as aforesaid, or elsewhere than in their blast-furnaces situated
“ at Gartsherry, or at Woodhall aforesaid, or shall do or
“ execute any act, deed, matter, or thing whatsoever, by reason
“ whereof the said letters-patent may become void or voidable,
“ — then, and in any such cases, it shall be lawful for the said
“ Charles Macintosh, Colin Dunlop, James Beaumont Neilson,
“ and John Wilson, and theirs aforesaid, by any deed to revoke
“ and annul these presents, and the same shall thereupon be
“ void; but subject, and without prejudice, to any of the provi-
“ sions and obligations herein contained, previously exigible
“ from, or prestable by, the said second party; which provisions
“ and obligations shall continue in full force; and both parties
“ oblige themselves, and theirs aforesaid, to implement and fulfil
“ their respective parts of the premises to each other, under the
“ penalty of five hundred pounds sterling, to be paid by the
“ party failing to the party performing, besides performance.
“ Consenting to the registration hereof in the books of Council
“ and Session, or others competent, therein to remain for pre-
“ servation, and that letters of horning, on six days’ charge, and

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“ all other necessary execution, may pass upon a decree to be
 “ interponed hereto in common form ; and for that purpose, the
 “ parties hereto constitute John Hope and James Miller, junior,
 “ Esquires, advocates, their prors. &c. In witness whereof,” &c.

In the year 1840, the appellants recorded this agreement, and took out an extract with the following decree interponed in terms of the clause of registration : —

“ And the said Lords grant warrant to messengers at arms,
 “ in her Majesty’s name and authority, to charge the party or
 “ parties, defender or defenders aforesaid, personally, or at his,
 “ her, or their respective dwelling-place or places, if within Scot-
 “ land, and if furth thereof, by delivering a copy or copies of
 “ charge at the office of the keeper of the record of edictal cita-
 “ tions at Edinburgh, to pay, implement, and perform the hail-
 “ foresaid sum or sums, or obligations, or any of them, all in
 “ terms, and to the effect contained in the decree and extract
 “ above written, and here referred to and held as repeated
 “ *brevitatis causa* ; and that to the said party or parties, pursuer
 “ or pursuers aforesaid, within six days if within Scotland, and if
 “ furth thereof, within sixty days next after he, she, or they, are
 “ respectively charged to that effect, under the pain of poinding
 “ and imprisonment, the term or terms of payment being always
 “ first come and bygone, and also under deduction of any sum
 “ or sums paid to account (if any) : And also grant warrant to
 “ arrest the said party or parties’, defender or defenders’ readiest
 “ goods, gear, debts and sums of money, in payment and satis-
 “ faction of the said obligations or any of them ; and if the said
 “ party or parties, defender or defenders, fail to obey the said
 “ charge, then to poind the said party or parties’ readiest goods,
 “ gear, and other effects, and if needful for effecting the said
 “ poinding, grant warrant to open all shut and lockfast places,
 “ in form as effeirs.”

The respondents gave the appellants a charge of horning upon

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this extract. The appellants thereupon presented a note of suspension of the charge, with an offer “to find caution in common form.”

The first ten articles of the Statement of Facts lodged by the appellants in support of their note of suspension, set out the proceedings detailed in the agreement, forming the ground of charge, and the making of that agreement. The 11th and 12th articles were in these terms: —

“ 11. The chargers have now recorded the aforesaid agreement or license, and raised thereon letters of horning, in virtue of which, the complainers have been charged to render an account, verified by affidavit sworn before a magistrate, of the iron smelted by them at their works, by means of Mr Neilson’s patent, or by any mode falling under the description in the said patent, or in the specification thereof; and to produce all books, accounts, and writings relating to the quantity of iron smelted by them as aforesaid, from the 1st of August, 1839 to the 2d of February, 1840. But the complainers aver and offer to prove, that they have not, during the aforesaid period, at their works at Gartsherry, or elsewhere, used the patent process in the smelting of iron, or any mode or process of smelting falling under the description in the patent, or in the specification thereof; — on the contrary, they have used, and continue to use, in the smelting of iron, a process which is altogether different in principle, and in the mode or use, from the alleged patent or invention, and which consequently does not fall under the patent or description given in the relative specification of the alleged invention of Mr Neilson.”

“ 12. By the agreement of 1833, the complainers obtained the chargers’ license or permission to use Mr Neilson’s invention, if they thought proper to do so, and if they availed themselves of the permission, they engaged to pay the stipulated license duty or consideration. But it was not obligatory on them to

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“ use the invention, or to pay the stipulated duty whether they
 “ used it or not; or if they did not use the invention, they could
 “ not be required to render any account of their operations, or
 “ produce their books and accounts of different operations alto-
 “ gether, so as to disclose their transactions to the chargers; —
 “ yet that seems to be the object of the chargers; for the com-
 “ plainers informed them, before the agreement was put upon
 “ record, that they had not used the patent process, or any mode
 “ of manufacture falling under the description of it since the 1st
 “ of August, 1839.”

The 13th and 14th articles set forth statements to shew, that the patent of the respondents was void, and were followed by this: —

“ But it is needless to go into these matters, because the case
 “ of the complainers simply is, that they could not be compelled,
 “ even in an ordinary action on the contract, and still less by a
 “ vague charge of this description, to render an account of iron
 “ smelted *by a process which they aver and offer to instruct they*
 “ *have not used.*”

The pleas founded upon these statements, were in these terms: —

“ I. The charge is inept, in so far as nothing can follow upon
 “ it, there being no liquid ground of debt; and, in the circum-
 “ stances, the chargers ought, if they aver that the complainers
 “ have used the patent process in the smelting of iron at their
 “ works, from the 1st of August, 1839, to have constituted their
 “ claim in an ordinary action of debt.”

“ II. At all events, as the complainers have not used the
 “ patent process, or any mode falling under the description
 “ thereof given in the specification, since the 1st of August, 1839,
 “ they are not liable to render the account, or to exhibit their

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“ books in terms of the charge which they have received ; nor,
 “ as there has been no failure on their part to implement the
 “ agreement or license, are they liable to pay the penalty stipu-
 “ lated in case of such failure.”

The answer of the respondents to the articles of the appellants' statement, which have been noticed, was in these terms : —

“ XI. Admitted that the license of 1833 has been recorded,
 “ and that the complainers have been charged by virtue of letters
 “ of horning to implement the obligations undertaken by them
 “ in the said agreement, for the period between Lammas, 1839,
 “ and Candlemas, 1840. *Quoad ultra*, denied, under this ex-
 “ planation, that the complainers have admitted, both judicially
 “ and extrajudicially, and more particularly in the narrative o
 “ the agreement of 1833, which terminated the former litigation,
 “ that they have used the patent process at the Gartsherry Iron
 “ Works, and that they have farther practically admitted the use
 “ of it, by paying to the chargers one shilling per ton upon the
 “ iron smelted at Gartsherry, as the stipulated price of the pri-
 “ vilege of using the patent process. They have not, in the pre-
 “ sent statement of facts, ventured to allege that any change
 “ whatever has been made in the state of their works at Gart-
 “ sherry, or in the mode of smelting iron there, since the time
 “ when they admit that they used the patent process.”

“ XII. Admitted that the complainers extrajudicially refused
 “ to implement their obligations under the agreement of 1833,
 “ and that this refusal applies to the period subsequent to 1st
 “ August, 1839. *Quoad ultra*, denied, under reference to the
 “ agreement.”

The first article in the Statement of facts for the respondents was thus expressed : —

“ 1. The chargers take leave to refer to the narrative of the
 “ license and deed of agreement of November, 1833, for a correct
 “ history of the legal proceedings formerly depending between

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“ themselves and the complainers. In these proceedings, the
“ complainers not only challenged the validity of the patent, but
“ maintained also in the same terms, and on the same grounds,
“ as they are now maintaining, that they were not using the
“ patent process at the Gartsherry Iron Works, and that con-
“ sequently, as they were not exercising the permission granted
“ them by the former license of 1832, they were not liable to
“ implement the obligations undertaken by them under that
“ license. The whole of these proceedings were taken out of
“ Court upon a compromise, under which it was agreed that the
“ complainers should pay the chargers a sum of L.400, in full of
“ 1s. per ton upon the whole iron smelted by the complainers at
“ their works at Gartsherry by means of heated air, in whatever
“ way applied, from the time of the erection of these works to
“ the date of the new license and agreement; and farther, that
“ the complainers should take a new license from the chargers,
“ by which they should be bound during the remaining period
“ of the subsistence of the patent, to pay to the chargers 1s. per
“ ton upon the whole iron smelted, or to be smelted, at Gart-
“ sherry, by the use of heated air in any of the modes heretofore
“ applied, or in any other mode falling under the said patent.
“ The complainers thus not only acknowledged the validity of
“ the patent, but farther deliberately admitted that the process
“ used by them at Gartsherry ever since the erection of their
“ works, fell under, and was protected by, the letters patent.
“ They have not now averred, or offered to prove, that any
“ change has since taken place in the mode of smelting iron at
“ the Gartsherry Works. On occasion of the said compromise,
“ the complainers also agreed to discharge, and did subsequently
“ discharge, the process of suspension maintained by them, on
“ the ground of the invalidity of the patent, and on the ground
“ that the process used by them at Gartsherry did not fall under
“ the patent. No change of circumstances has taken place since

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“ that process was so discharged, and the presentation of this
“ note of suspension is an attempt to revive the former process
“ under the same circumstances, and on the same grounds of
“ fact and law.”

The fourth article was in these terms: —

“ The present charge was given for the purpose of compelling
“ payment of the sums due at Candlemas, and performance of
“ the other obligations incumbent on the complainers applicable
“ to the half year preceding that term; and the chargers main-
“ tain their right to demand payment and performance accord-
“ ingly. But they make no demand for payment or performance
“ under the license, for any period subsequent to Candlemas,
“ 1840. On the contrary, as the complainers have allowed the
“ payments applicable to the half year prior to Candlemas, 1840,
“ to remain unpaid for more than forty days, notwithstanding
“ repeated demands of payment on the part of the chargers, and
“ have by presenting this note of suspension, clearly intimated
“ their intention not to implement and fulfil their obligations
“ under the deed of agreement and license, the chargers have
“ resolved to exercise the power of revocation competent to them
“ in such cases under the said deed. They do therefore hereby
“ revoke and recal the license and permission granted by them
“ in favour of the complainers, in November, 1833, to exercise
“ and use the invention for which Mr Neilson obtained his let-
“ ters-patent in 1828, and they hereby declare the said license
“ and permission null and void in all time to come, and protest
“ that the complainers shall have no right to use or exercise the
“ said patent invention, under or by virtue of the license which
“ is hereby revoked and recalled, or upon any other ground or
“ pretence whatever, in all time coming, during the subsistence
“ of the patent.”

The pleas in law of the respondents were: —

“ 1. The charge is in all respects valid and regular, proceed-

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“ ing upon a registered contract of agreement, containing obli-
 “ gations prestable by the complainers; and the chargers are
 “ entitled, by means of the said charge, to enforce payment and
 “ performance in terms of the contract.”

“ 2. The complainers have set forth no relevant or sufficient
 “ grounds of suspension, and they are barred by the former legal
 “ proceedings detailed in the narrative of their license, as well
 “ as by the terms of that license itself, from maintaining that the
 “ process of smelting iron used at their works does not fall under
 “ the patent, especially as they have condescended on no change
 “ of circumstances since the license was granted and accepted,
 “ and have not averred or offered to prove in what respects the
 “ mode of smelting iron now used by them differs from that for-
 “ merly in use at their works, which admittedly fell under, and
 “ was protected by the patent.”

“ 3. No ground of fact or law has been stated by the com-
 “ plainers sufficient, in the circumstances, to justify the passing
 “ of their note of suspension.”

“ 4. In consequence of the failure of the complainers to im-
 “ plement the obligations incumbent on them under their agree-
 “ ment with the chargers, the chargers are entitled to revoke the
 “ license granted by them to the complainers under the said
 “ agreement, and the same has been validly revoked and recalled
 “ by them, and is null and void accordingly, in all time
 “ coming.”

On advising the note of suspension and the statements of the parties, the First Division of the Court of Session pronounced the following interlocutor upon the 26th May, 1840: — “ The
 “ Lords, upon the report of Lord Gillies, Ordinary, and having
 “ heard counsel for the parties, refuse the note of suspension,
 “ and find the respondents entitled to expenses.”

The appeal was taken against this interlocutor.

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Mr Attorney-General, Mr Kelly, and Mr Gordon for appellants. — I. The meaning of the agreement was, that the appellants admitted that they had violated the patent, and agreed to pay for any of the modes which they had theretofore used, falling under the patent, or for any other mode which they might use, falling under the patent. If, therefore, the appellants have not been using any mode falling within the patent, there is no payment exigible under the agreement, nor any account of workings to be kept. The agreement was first a compromise as to whether the previous use was within the patent, but did not embrace any other use which might not be within the patent.

[*Lord Cottenham.* — The effect of such a compromise would have been to leave the question open the next day.]

Lord Brougham. — You have not averred that you have changed your mode of working.]

The agreement was, that the uses previous to it should be held to be within the patent, and the averment on the record by the appellants was, that they had not used any mode within the patent, that is, coming within the agreement; this is equivalent to an averment that they had changed the mode of working from what it was previous to the agreement..

[*Lord Cottenham.* — The only ground on which you asked the interposition of the Court was, that the mode used was not within the patent; but the agreement precluded your doing so.]

There was nothing, in common sense, why the parties should have agreed to pay, in regard to a mode not within the patent, and it will be difficult to give a meaning to the words, “other modes,” unless they are limited to modes falling within the patent. If so, then “falling under the description” applies to the “modes heretofore practised,” as well as to “any other modes.” This, then, leaves it open to the appellants to shew, under the agreement, that the modes “heretofore practised,” were not within the patent.

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[*Lord Brougham.* — This use of the word “other,” though not quite correct, is common, as, in the Scots statutes “contrary “the laws of God and all other human laws,” — not meaning by that, that the laws of God are human, but to embrace all other laws, such laws being human.]

II. But whatever may be the proper construction of the agreement, there must be judicial inquiry as to the rights of the parties under it. The effect of the judgment in the Court below is to prevent any inquiry into the validity of the agreement, or the regularity of the proceedings which have been adopted under it. The decree upon which these proceedings have been taken was one made without any inquiry or discussion whatever, and obtained as of course by the mere registration of the agreement. That decree orders the party to perform all the matters covenanted in the agreement, and the letters of horning are in the same terms. But if the Court will not interfere, as by their judgment they have refused to do, who is to judge whether the matters covenanted have or have not been performed? who is to judge of the correctness of the account kept by the appellants? or of the sufficiency of the affidavit in support of it? or as to the mode of working they have been adopting, whether coming within the agreement or not? It is impossible that the agreement can be enforced without judicial intervention. To deny this would be to give to the parties a right to help themselves at their own hand, and hale each other to prison, to demand the penalty of L.500, as well as the 1s. per ton.

[*Lord Cottenham.* — Is there any allegation on the record that the party is doubly charged for the 1s. per ton and the penalty.]

The first and second pleas substantially raise that question.

[*Lord Cottenham.* — If the Court had held you liable to pay 1s. per ton, could you have taken this proceeding to protect

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yourself against the penalty until the amount payable was ascertained?]

Yes.

[*Lord Cottenham.* — Then you must have stated facts to lay ground for the interposition of the Court.]

The penalty was not agreed upon as liquidated damages, and it is therefore subject to an equitable restriction, *Stair*, I. 10. 14. *Wright v. Macgregor*, 4 *S. and D.* 434. In *Johnson's Trustees v. Johnson*, 19 *F. C.* p. 625, it was held, that the penalty is not the damage ascertained, but the amount within which the damage, when ascertained, is to be limited.

[*Lord Cottenham.* — That question cannot arise here, the only question raised by the suspension is, whether you have infringed the patent; you did not say you had offered to pay the 1s. per ton, and suspension was not asked on the ground of ascertaining what was due under the agreement.

Lord Brougham. — That brings the question entirely to that of violation of the agreement.]

The first plea seems to raise the question as to what was due, and it is impossible to say what the parties are entitled to under the agreement without judicial inquiry. In the proceedings adopted by the respondents, though interdict was refused, yet an account of our workings was ordered to be kept by us; this of itself would be sufficient to warrant the relief we ask.

[*Lord Campbell.* — If you had averred that you were not using the mode used before the agreement, and had changed your works, no doubt the note of suspension would have been passed.]

But there was debateable matter as to the construction of the agreement; it was open to ascertain whether what was being done was a violation of the patent, though it might be a matter of proof against appellants, that what was being done was the same as had been done previous to the agreement.

[*Lord Brougham.* — The Court could have entertained the question of construction in the suspension.]

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Lord Campbell. — We are of opinion that the appellants were not entitled to adopt the mode of manufacture used previous to the agreement. We are of opinion that they were concluded as to this by the agreement. The counsel for the respondents need not therefore address themselves to the argument as to the construction of the agreement.

Mr Solicitor-General and Mr Anderson for the respondents. — We apprehend that disposes of the case.

[*Lord Brougham.* — Advert to the issue between the parties. You have not said that they have changed their works.]

The eleventh article of our answer and our second plea substantially do raise that question.

[*Lord Brougham.* — That is all as to use being within the patent.]

The appellants say we have not smelted within the patent. We answer, you have smelted as you did prior to the agreement, and by it you are concluded as to whether that is within the patent or not; and we say the suspension is not relevant, because they have not averred any change in their works. If they are entitled to say that the mode used before the agreement was not within the patent, then the appellants may be entitled to suspension; but if they are not entitled to say so, as the House seems to hold, then they cannot be entitled to suspension. The case, as it now stands, is, whether the party, alleging that he was working exactly as he had done before the agreement, is entitled to this suspension.

[*Lord Brougham.* — Don't you put it on the record as whether the working was within the patent? and does not that bring it within the power of the Court to say whether it was or not?]

The pleading may be formally wrong, but substantially the question raised is, that the mode used before and after the agreement is the same.

[*Lord Campbell.* — According to our construction of the

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agreement, the statement that the use before it was not within the patent, is wholly immaterial.]

Exactly; and moreover, the respondents were not bound to raise the issue in one form or another. They had their agreement, and they asked enforcement of it. It was for the appellants to raise the question in such form as might displace the respondents' right. But our third plea was broad enough to raise the issue in either form.

[*Lord Campbell.* — We should like to hear you as to how the sum payable was to be ascertained in this mode of proceeding, and as to proceeding for the penalty as well.]

The decree upon the registration did not merely order the party to pay 1s. per ton, leaving the amount to be ascertained in any way; the mode of accounting was ascertained. The effect of the decree, therefore, was the same as of a decree formally pronounced by the Court ordering a party to account, and the competency of this mode of proceeding was determined in *Fisher v. Syme*, 7 S. 97. There diligence was sustained for a debt not otherwise liquidated than by an account certified by the officer of the party using the diligence. The decree here orders the party to give an account; if we attempt to levy a larger sum than appears to be due upon the account, his remedy will then be open by suspension.

With regard to the penalty, no question was raised as to this in the Court below; it was not made any substantive ground for suspension, it is not so put forward in the cases to this House, and has been raised for the first time at the bar. The second plea of the appellants merely raises a question as to their liability to pay the penalty, as not having failed to implement the agreement; no where do they complain of being doubly charged. If the L.500 is not liquidated damages, but a penalty, they may present a suspension to-morrow.

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[*Lord Campbell.* — You say the judgment here only repels these reasons of suspension.]

Exactly. But *Wright v. M'Gregor* shews —

[*Lord Campbell.* — It is better for you to rest satisfied that the question does not arise on the record, than to deal with it as if raised.]

Certainly, there is nothing to hinder the party to-morrow to bring a new suspension on this ground, but on this record there is no such question raised.

[*Lord Brougham.* — An irrelevant issue was raised as to the construction of the agreement, and was irrelevantly followed by you.]

Mr Attorney in reply. — The diligence was sustained in *Fisher v. Syme* because the sum due had been ascertained in the mode prescribed by the agreement, and so was liquidated. Here the sum due under the stipulation as to 1s. per ton has not in any way been ascertained. Still less has the penalty been modified, as confessedly it must be. The incompetency of the diligence upon the illiquid nature of the debt was distinctly raised by the first plea in law of the appellants, to which no answer was made. What conclusion could have been come to by the mere production of the books? was the party to help himself out of the books? As to the penalty, it was payable on a contingency, and the appellants were not bound to shew that they had not incurred that contingency.

LORD BROUGHAM. — My Lords, I think, in this case, that your Lordships can have no question that the interlocutor of the Court below is well founded, and ought to be affirmed.

The first question raised, is upon the construction of this instrument, and it appears to me, with great submission to your Lordships, that there can be no doubt whatever of the true con-

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struction to be put upon the words in the instrument, “ the
“ number of tons of iron smelted in manner aforesaid,” which
refer, of course, to the previous description given of the mode of
smelting used by the present appellants, the suspenders, below,
which is described in the following words: “ By the application
“ or use of heated air in any of the modes heretofore practised by
“ the said parties at their works, or in any other mode falling
“ under the description in the said patent, or in the specification
“ thereof.” Taking the whole of this instrument together, I
think it is perfectly plain what the parties on either side had in
view in the agreement. There had been great disputes between
them before, turning upon two points, which two points, I am
sorry to say, have been raised again, though this agreement was
intended to have prevented their again raising them, — one on
the validity or invalidity of the patent, and the other whether or
not Messrs Baird had, in their works, used the process of the
patent. Now, in order to put an end, as it appears to me, for
the future, to all such disputes, as well as to ascertain what was
to be done with respect to determining the disputes as to the pro-
cess, they appear to have agreed, that whether the process used
by Messrs Baird had fallen within the patent and specification
or not, there was equally to be paid the specified sum. The
words used are, “ The modes heretofore practised by the said
“ second parties,” that is, the Messrs Baird, “ at their works, or
“ in any other mode falling under the description in the said
“ patent, or in the specification thereof.” That is to say, that
if the process continued to be used was the same with the process
previously used, they were to pay in respect of it, as if it were within
the patent; or if, on the other hand, it was a departure from the
process which had been previously used, but falling within the
patent, that still with respect to that process, they should pay.

Now, I cannot go along with the construction which gives such
an effect to the word “ or,” as to construe this into a distinct

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admission of the party, that the previous process was within the patent. I think that it is used in a sense in which it is frequently used, not very accurately certainly. The words are these, “the
“ modes heretofore practised by the second parties, at their said
“ works, or any other mode falling under the description in the
“ said patent, or the specifications thereof,” — that is, any other mode, such mode falling within the description of the patent; in other words, provided such other mode be a mode falling within the description of the patent. I apprehend that to be the true meaning, though not certainly a very correct, yet not a very unusual application of the word, “or.”

Such being the case, therefore, whether the process used by Messrs Baird fell within the patent, or specification, or not, became immaterial, provided it was a continuation of the process they had theretofore used. When the charge is given upon these proceedings, and the bill of suspension is brought to suspend that charge, the question is, whether or not the case made for the bill of suspension is sufficient to warrant the Court in suspending the charge? Now, what have they pleaded? Their statement and their plea really amount to this, partly that the patent was invalid, and partly that the process used by them was not a process within the patent, which appears to be perfectly immaterial according to the construction which, I humbly think, ought to be put upon the agreement, that whether the process used was within the patent or not, still, if it was a process previously used in those works, it was struck at, and they were bound to pay the one shilling a ton.

It is true, that the respondents did not distinctly meet that statement in the bill of suspension, in a manner the most correct and the most simple in which it might have been met, for it would have been much better if they had said, You have stated an immaterial ground; you have brought forward, on behalf of your bill of suspension, a wholly immaterial and irrelevant plea; for

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whether the process used by you fell within the patent and specification or not, is rendered immaterial by the obligations you have incurred by the instrument in question. Instead of that, they rather followed them into that immaterial plea, and negatived it. Instead of saying, it is quite irrelevant, they have said, be it relevant or not, you are wrong; be it immaterial or material, you were precluded from denying that your process is the process of the patent, because you have in that instrument admitted that your process was the process of the patent, and that the case depended upon that. Upon the true construction, as I conceive, of that instrument, that would have been ill founded, for I do not conceive they had so admitted.

But whether the charger is correct or not, they meet his allegation on what is really material. The charger being possessed of that which may be considered a judgment on a registered instrument giving him a right to execution upon that registration, it is for the suspender to displace the diligence, — to shew the Court that the charger has no right to avail himself of that diligence. He has not done that effectually, and consequently, the charger has a right to use his diligence, the suspender having failed in his application to suspend the diligence.

My Lords, I am, upon the whole, of opinion also, that there is no ground for the other argument urged here on the part of the appellant, that the conclusion of the Court below is incompetent. The matter brought before the Court below was the validity of the patent, but still more the conclusion that the process which had been employed was the patent process. The discussion turned much more upon the latter ground. In my humble opinion, the judgment of the Court below, refusing the note of suspension, and sending the case back to the Lord Ordinary to proceed, is well founded, and ought to be affirmed by your Lordships.

Lord Cottenham. — My Lords, I am of the same opinion

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with my noble and learned friend. If the question had turned upon the words which are to be found in the license, without any recital, I should have thought that they clearly expressed the intention of the parties, that the shilling a ton was to be paid for all iron made by the process covered by the letters patent, or by any process which had been used by the party before the date of that letter of license. But when the recitals to that instrument are looked to, they seem to me to put the question beyond all doubt. It appears by the recital, that a question had arisen whether the process heretofore used had been or not within the terms of the letters patent, and the agreement is that they shall terminate that contest, by paying one shilling a ton for iron made by means of heated air, in whatever way applied. That expression occurs twice in the recitals: “The use of heated air
“ in any of the modes heretofore practised by the said parties, at
“ their said works, or in any other mode falling under the de-
“ scription in the patent, or in the specification thereof;” and that was absolutely necessary in order to put an end to the contest which had arisen between these parties, which contest was first of all, as to the validity of the patent which was put an end to by this agreement, and secondly, whether or not the process had been a violation of the patent; and for the purpose of putting an end to this part of the contest, they agreed, that this sum should be paid on all iron made by means of heated air, in whatever way applied. It does not actually amount to an admission, that the mode used had been within the terms of the patent, but it amounts to this, that for the purpose of terminating the difference, it shall be deemed as if it had been within the terms of the patent, the one being to pay, and the other to receive, the one shilling a ton. Then, when the parties come to contract for the future, they say, one shilling a ton shall be paid for every ton made by means of the application of heated air “in any of the modes heretofore practised by the said second parties, at their said works, or in any

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“ other mode falling under the description in the said patent.” These terms are very explicit; they seem to me to leave no doubt of the intention of the parties, who had agreed; as to the time past, to consider that all modes by which iron had been smelted should be subject to the payment of one shilling a ton, and that as to the future, they should pay one shilling a ton for all iron smelted in any manner; according to the terms of the patent, or in any manner heretofore used, which, for the purpose of this contract, should be equally subject to the one shilling a ton, leaving open the question, whether that smelted before the contest of 1833, had been within the terms of the patent or not.

Then when the party finds himself subject to this agreement; he applies to the Court to protect him against what he considers an improper use of the process of the Court; he states the ground on which he makes that application. The grounds are these,—In the 11th article of the statement of facts, they state it in these words, “ that the complainers have been charged to render an account, “ verified by affidavit, of the iron smelted by them at their works, “ by means of Mr Neilson’s patent, or by any mode falling under “ the description in the said patent, or in the specification thereof,” that is, in affirmance of one part of the proposition contained in the contract between the parties by the agreement of 1833, but they leave the other untouched. That may be perfectly true, according to the construction put upon the agreement, and yet they may have used this process before the contract of 1833, but which they now contend, as they did then contend, was not within the terms of the patent; that is not the averment, however, in the case. It is not, therefore, proving the affirmative of that, or assuming to prove the affirmative of that, which shews that they are not liable to the payment of one shilling a ton on all the iron made. That opens the issue again, which both parties intended

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should be concluded, that the process used before 1833 was the process which was covered by the patent.

My Lords, what was the real intention of the parties in making this agreement, whether they meant the words to have a meaning different from their obvious meaning, is a question not before us. The question is, whether the appellants have stated a case entitling them to the interposition of the Court; for they must state, and they must make out a case entitling them to interposition. In my opinion, they have not stated a case removing themselves from the payment of the one shilling a ton for the iron so made; and if there had not been a strange misconception of the agreement of the parties, I think there would have been no ground for the argument.

The only difficulty I have had, was in considering whether this process might not be used for the purpose of enabling the Court to adjudicate between the parties, as to what was to be paid, assuming that the iron had been made in the mode subjecting the suspenders to the payment of the one shilling a ton; but when I look to the statement of this case, I do not find any part of it in which they call upon the Court to protect them against the process beyond the amount of the liability which arises from the contract to pay one shilling a ton; they state that they are not liable to pay any thing, because the process they have used is not within the terms of the patent; and in page 4 they put that in the strongest possible light. They say, “It is needless to go into these matters, “because the case of the complainers simply is, that they could “not be compelled even in an ordinary action on the contract, “and still less by a vague charge of this description, to render “an account of iron smelted by a process which they aver and “offer to instruct they have not used.” So far, therefore from asking that they may have the assistance of the Court to ascertain whether they are liable to pay the whole, the ground on which

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they put their case is, that they have not used any process in respect of which they are liable to pay any thing. That will leave it open to the parties to apply to the Court for an interdict or any other process, as they may be advised. It is sufficient for us at present to say, that on the ground upon which they come here, they have failed in bringing forward any case; and upon a view of the whole case, I think your Lordships are justified in affirming the interlocutor.

Lord Campbell. — My Lords, I entirely agree in the view thus taken by my noble and learned friends who have preceded me. I have very little to add to the observations they have made. The construction of the agreement does not appear to me to admit of any reasonable doubt. There had been a former license granted to Baird and Company, and they had made iron by means of a certain process. A controversy arose whether that mode of making it was an infraction of the patent or not, and whether they were liable to pay the sum they had stipulated to pay, if they availed themselves of the license granted to them. It appears that there were legal proceedings arising out of that. To put an end to these, the parties came to an agreement in 1833; and, according to that agreement, a certain sum of money was to be paid for the iron which had been before made by Messrs Baird and Company according to the process they had adopted; and it was also agreed, that a certain sum of one shilling a ton should be paid thereafter for all iron which was made by them according to the mode they had before adopted, or any other mode which was within the patent. I am clearly of opinion, that this precludes Messrs Baird and Company from contesting that their former process was not within the patent, and that it rendered them liable to pay one shilling a ton for all iron made according to that process, whether within the patent or not. It would be monstrous to say, that Messrs Baird and Company having paid the L.400, if they continued the same process as they

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had used before, it would be open to them to contend that it was not within the patent, and that they were no longer liable, so as to revive all the controversy which it was the object of the agreement to put an end to.

Then, my Lords, the question arises, whether there may be a charge of horning on such an agreement. The parties have stipulated that there may be a charge of horning. That throws upon the suspender the shewing clearly, that by the law of Scotland such a process is incompetent. I think he has entirely failed in that. It appears to me clear, that, according to the law of Scotland, there may be this summary diligence when there is a sum of money to be paid, which may be rendered certain. It may be for payment of a sum of money, or *ad factum prestandum*. What is it he seeks by this charge of horning? He seeks, by this charge of horning, that an account shall be rendered; secondly, that the books shall be produced; thirdly, that one shilling per ton shall be paid; fourthly, that the penalty shall be paid. I conceive, that according to the well established practice of the law of Scotland, there may be summary diligence for all those objects.

Then, what is the ground of the suspension? It certainly lies upon the suspender to state some ground on which he calls upon the Court to interpose to prevent the charger having the benefit of his process. The only ground, the real ground, alleged, is, that the use that has been made of the hot air has not been according to the patent. There is no denial of having used hot air; there is no denial that it has been used in the same manner as it had been before 1833; but it is simply an allegation, and comes to this in substance, that it is not a use of hot air coming within the patent. But the object of the agreement was to put an end to that question: and, on the construction of the agreement, I am of opinion, that there is no ground at all for the suspension; and farther, I am of opinion, that letters of horning might issue.

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Then, with regard to whether the penalty can be recovered in addition to the shilling per ton, I beg it to be understood, that I give no opinion at all. I am of opinion that the question does not arise here. The suspender does not come forward and allege, as a ground for the suspension, that he has been charged the shilling per ton, and the L.500 penalty. If that had been the ground of his calling on the Court to interpose, they no doubt would have decided it: but, I apprehend, it is not necessary for the House to pronounce any thing upon that.

It appears to me, that the suspender has no right at all to the interposition of the Court, and that, therefore, the interlocutor disposing of that suspension ought to be affirmed.

Mr Solicitor General. — Your Lordships, I trust, will give us the costs of this appeal.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

ARCHIBALD GRAHAM. — ROY, BLUNT, and Co. Agents.