Angus Macleod, Maryland

OPINION of LORD HUNTER

In Causa

ARGYLLSHIRE WEAVERS LIMITED
and OTHERS

against

A. MACAULAY (TWEEDS) LIMITED
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In the first conclusion of the summons, as amended in the course of the proof, the pursuers seek declarator that they are entitled to produce, process and market as "Harris Tweed" cloth made from pure virgin wool produced in Scotland, dyed and spun in the Outer Hebrides or elsewhere in Scotland, handwoven by the Islanders in the Outer Hebrides and finished in the Outer Hebrides or elsewhere in Scotland and to dispose of said cloth in Scotland or elsewhere as Harris Tweed. The terms of the declaratory conclusion are substantially re-echoed in part of the conclusion for interdict which follows. That second conclusion, which counsel for the pursuers indicated was the main conclusion of the summons, is as amended in the following terms:

"To interdict the defenders or anyone on their behalf
"from wrongfully asserting in Scotland or elsewhere
"that the pursuers' production, processing, marketing
"and disposal in Scotland or elsewhere as Harris Tweed
"of cloth made from pure wool produced in Scotland,
"dyed and spun in the Outer Hebrides or elsewhere in
"Scotland, handwoven by the Islanders in the Outer
"Hebrides /

"Hebrides and finished in the Outer Hebrides "or elsewhere in Scotland is not the produc- "tion, processing, marketing and disposal of "Harris Tweed."

No point was made with regard to the use of the phrase "Pure Wool" in this conclusion as contrasted with the phrase "Pure Virgin Wool" in the declaratory conclusion, though in the light of the evidence the difference seems surprising. Although there are distinct differences between the operations of the respective pursuers, to which I will draw attention later in this opinion, counsel for the pursuers conceded in the course of the hearing on evidence that all the pursuers must stand or fall together. Whether or not it was necessary to make the foregoing concession as a technical matter of pleading, it was certainly quite natural that the concession should be made since the language of the conclusions as now amended, has in substance been borrowed from an interpretation clause contained in the Memorandum of Association of Independent Harris Tweed Producers Limited (hereinafter referred to for brevity as 'I.H.T.P.'), a Company which was incorporated on 5th November 1958 and of which the pursuers are the members.

The interpretation clause to which I have just referred is (as amended by Special Resolution passed at /

at an extraordinary general meeting of the Company on 29th January 1959) in the following terms:-

"In this Memorandum the following expressions have "the following meanings, viz:-

"(i) 'Harris Tweed' means cloth made from pure "virgin wool produced in Scotland, dyed and spun "in the Outer Hebrides or elsewhere in Scotland, "hand-woven by the Islanders in the Outer "Hebrides, and finished in the Outer Hebrides or "elsewhere in Scotland."

The foregoing definition (to which I will refer as "The I.H.T.P. definition") is the one which the pursuers in effect supported, though it is by no means the only attempt which has been made over the years to define for particular purposes the meaning or a meaning of the term "Harris Tweed". Some of these attempts will be referred to later in this opinion but for the present I need only quote one, namely a definition contained in amended Regulations governing the use of what was usually referred to in evidence as the "Orb" Trade Mark, a certification trade mark which is called in the relative Regulations "The Harris Tweed Trade "Mark". The amended Regulations containing the definition to which I refer were approved by the Board of Trade on 18th September 1934 and came into force /

force on 19th November 1934. For the sake of brevity I will refer to the definition in question as "the "1934 definition", the term which was used as a matter of convenience during the proof. The 1934 definition ran as follows, viz:-

" 'Harris Tweed' means a Tweed made from pure "virgin wool produced in Scotland, spun, dyed, and "finished in the Outer Hebrides and handwoven by "the Islanders at their own homes in the Islands of "Lewis, Harris, Uist, Barra and their several "purtenances and all known as the Outer Hebrides".

This was the definition which in effect was supported by the defenders, who maintain inter alia that only cloth conforming to that definition may lawfully be described and marketed as Harris Tweed. I have quoted the foregoing definitions at this stage in an endeavour to give a general indication at the outset of the main issues about which the parties are in conflict, and in each case I have used the words "in "effect" advisedly since I do not conceive it to be the function of the Court in the present action to approve or disapprove of either or any definition as the proper definition of Harris Tweed. The function of the Court, as I understand it, is to give effect or otherwise to the pursuers' conclusions for declarator and interdict, which is in my opinion a somewhat different /

different matter, whatever the direct or indirect consequences of a decision one way or another may be.

The first distinction which one notices between the two definitions is that the I.H.T.P. definition starts with the words " 'Harris Tweed' means cloth", whereas the opening words of the 1934 definition are " 'Harris Tweed' means a Tweed". Not very much was made of this distinction either in evidence or in argument, advisedly no doubt, but there is some evidence that cloth could be made to the I.H.T.P. definition which would not in fact be tweed or which, in any event, might lack the characteristics including texture, appearance and a rough handle coupled with extremely good wearing qualities which several witnesses, who were well qualified to express an opinion, regarded as typical of Harris Tweed. There was evidence that while tweed is cloth, cloth need not necessarily be tweed. This apparently applies even to hand-woven cloth, since it was said to be possible to produce a hand-woven worsted. I cannot find that on this matter there is any convincing evidence to the contrary effect. The reasons, if any, for the use of the word "cloth" in the I.H.T.P. definition were not satisfactorily explained but, if /

if the attempt was to define a cloth which might legitimately be marketed and disposed of as a tweed and consequently as "Harris Tweed", this does not seem a particularly good start.

Both definitions included the requirement that the material should be made from pure virgin wool produced in Scotland. Pure virgin wool means pure new wool as opposed to shoddy or wool which has previously been manufactured into cloth. The phrase "produced in Scotland" was assumed by both sides to mean "produced from Scottish flocks", that is, presumably, flocks pastured north of the border. The defenders' contention was that the requirement that the wool should be produced in Scotland was an absolute requirement and that no cloth could legitimately be described and marketed as Harris Tweed unless that requirement had been strictly complied with in its production. The pursuers on the other hand maintained, though perhaps at times rather faintly, that a cloth could still legitimately be described and marketed as Harris Tweed even if the wool used was non-Scottish or alternatively a blend containing a mixture of Scottish and non-Scottish wools. As examples of non-Scottish wools, which it was contended might be so used, reference was made to English /

English, Welsh and Colonial wools, of which last category New Zealand cross-bred was given as an example. The foregoing contention of the pursuers assumes some importance in relation to the tweed producing and marketing operations of the respective pursuers prior to the amendment of the I.H.T.P. definition on 29th January 1959, since until then all the pursuers to a greater or less degree were using non-Scottish wool in the production of cloth which, according to them, reached the eventual purchaser under the name "Harris Tweed". Sometimes the proportion of non-Scottish wool incorporated in the blends of wool used by the pursuers prior to January 1959 was substantial. For example, in the case of the first and fourth named pursuers there were times when the proportion of non-Scottish wool admittedly reached 50% during the material period, and in the case of the second and third named pursuers quite a large proportion of English and Welsh wools were at times used in the blends from which their tweed was produced during that period. Reference will also be made in the course of this Opinion to the use by certain producers other than the pursuers of yarn containing non-Scottish wools, and the history of the supply to the islands of mainland spun yarn, either directly /

directly or through producers, has some bearing on this branch of the case. At various times yarn so supplied, for example by the businesses referred to in the evidence as the old or small Highland mills, by the second-named pursuers and by other spinners or producers such as Lumbs of Elland in Yorkshire and the original Scottish Crofter Weavers Limited, contained at least an admixture of non-Scottish wool. Over the years some Island producers at times used yarn containing substantial quantities of non-Scottish wool, though not always knowingly. Of these MacLennan & MacLennan of Stornoway, in respect of their operations up to 1961, may be referred to as an example.

This brings me to a distinction between the two definitions which has raised probably the greatest controversy in the case, namely the requirements supported by the pursuers, on the one hand, and by the defenders, on the other, as to the locality in which the processes of dyeing, spinning, and finishing must be carried out to entitle the finished article to be sold as Harris Tweed. The defenders contend that these processes must be carried out in the Outer Hebrides if the product is to be legitimately described and marketed as Harris Tweed. The pursuers, on the other hand, maintain that it is enough if these /

these processes are carried out somewhere in Scotland, that is either in the Outer Hebrides or on the mainland of Scotland or presumably in the Inner Hebrides or in other islands forming part of Scotland, such as Orkney and Shetland. In the I.H.T.P. definition the formula used in relation to the foregoing processes, read short, is as follows:-

"Dyed and spun in the Outer Hebrides or elsewhere "in Scotland, ... and finished in the Outer "Hebrides or elsewhere in Scotland".

This is in my opinion a somewhat odd formula, and I am disposed to think that counsel for the defenders had some grounds for his suggestion that there was an ulterior purpose in the repeated use of the words "Outer Hebrides" in the I.H.T.P. definition when in fact these words need only have been used once, namely, in connection with the handweaving. Certainly the explanations given by the pursuers for the use of this particular formula struck me as a good deal less than convincing and even a little less than candid. To a lawyer who had listened attentively to the massive proof in the present case, and even to a reasonably careful reader who had some knowledge of Scottish geography, it would probably be obvious enough that the phrase "in the Outer Hebrides or elsewhere in "Scotland" is nothing more than an elaborate way of saying /

saying "in Scotland". To the mind of a casual and less careful reader, however, it is at least possible that the portmanteau phrase used in the I.H.T.P. definition might convey the picture of the Long Island stretching romantically from the Butt of Lewis to Barra Head rather than the more mundane enchantments of Paisley or Galashiels, or even Oban, Pitlochry or Aberdeen. In fact none of the pursuers have carried out any dyeing, spinning or finishing in the Outer Hebrides, and they admit on record that they do not have any intention of doing so. It is the pursuers' contention that the finished article may legitimately be marketed and disposed of as Harris Tweed even if the wool from which it is produced has been dyed and spun in mainland mills at Oban or Pitlochry or Keith or elsewhere in Scotland and even if the tweed has been finished in such mainland mills or, to take another example, in one of the wellknown finishing plants at Paisley or in the Borders.

The pursuers' contention involves that a producer having a mill on the mainland of Scotland may perform all the processes in his own mill there, with the single exception of handweaving, and could legitimately sell the eventual product as Harris Tweed. The pursuers did not shrink from presenting their case thus and indeed they must put their case at /

at least as high as this since it is in fact their own modus operandi. Certain of the pursuers' witnesses went even further and suggested that the product might may still legitimately be marketed and disposed of as Harris Tweed even if the dyeing and spinning processes were carried out in England, for example, by Lumbs of Elland in Yorkshire. The justification put forward for this extreme contention was much the same as that put forward in relation to the use of non-Scottish wool, namely that such yarn had in fact sometimes been used in the past in the manufacture of an article which reached the eventual purchaser under the name "Harris Tweed".

The final important point of difference between the two definitions is related to the locality and conditions in which the handweaving should be done. The parties, it should be noted, are in agreement that the product, in order that it may lawfully and legitimately be marketed and disposed of as Harris Tweed, must be handwoven by the Islanders in the Outer Hebrides. Even if the parties were not in agreement the foregoing proposition has, in my opinion, been clearly established by the evidence. However, although there was this measure of agreement between the parties with regard to the handweaving, there still remained a considerable area of dispute with regard to this process.

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In the 1934 definition, the phrase used is "handwoven by the Islanders at their own homes in "the islands of Lewis, Harris, Uist, Barra and their "several purtenances and all known as the Outer "Hebrides". The phrase used in the I.H.T.P. definition, on the other hand, is "hand-woven by "the Islanders in the Outer Hebrides". In the pursuers' first and second conclusions the words "by the Islanders" were at first omitted, but this was cured by an amendment in the course of the proof which brought the conclusions into line in this respect with the I.H.T.P. definition. The essential distinction between the portions of the respective definitions which I have just quoted is the inclusion in the 1934 definition of the words "at their own homes" and the omission of these or similar words from the I.H.T.P. definition. That there was a real and valid reason for the inclusion of these words in the 1934 definition will appear in the sequel. I am also satisfied that the practical and social consequences of their inclusion are, or should be, far-reaching. On the other hand, the omission of the words from the I.H.T.P. definition was inevitable if the definition was designed to cover the /

the actual modus operandi of the first and fourth named pursuers, at any rate in the southern islands.

I propose to turn next to the history of tweed production in the Outer Hebrides and elsewhere which forms the background to the present dispute. In order to make that history intelligible I shall first attempt to describe the main processes which were mentioned in evidence as taking place between the time when wool leaves the sheep's back and the marketing of the finished article. Some of these processes are illustrated in the book of photographs produced (No. 330 of Process).

The wool in its raw state is greasy and dirty and contains foreign bodies. The greasy wool has therefore to be washed or scoured. If more than one type of wool is to be used the various types of wool, for example, Blackface, Cheviot, half-bred or cross-bred, have to be blended or mixed together. This may be done by placing the different wools one on top of another in layers and then taking off a slice vertically and thereafter mixing together the wools contained in the slice. When wool has to be transported by land or sea it is usually packed in large bales or "sheets".

Next follows the process of dyeing which in wool used for Harris Tweed has traditionally been done "in "the /

"the wool". About this particular matter there was little conflict in the evidence and it was agreed that the effect of dyeing in the wool is in general to make the colours much more fast than they would be if the dyeing were to be done "in the yarn" or "in the piece", that is, after the processes of spinning or weaving respectively.

Sometimes after the wool is dyed it may be blended or mixed with wool of other colours to produce a desired shade. This blending of colours must be distinguished from the blending of wools which I have already described and there are some passages in the evidence where it is essential to bear this distinction in mind.

The next process after dyeing is carding which involves the combing out of the wool either by hand or in carding machines. The main object of this process is to separate and straighten out the strands of wool as far as possible and also to remove any impurities which may still remain imbedded in the wool. Sometimes when the wool was extremely tangled it was subjected to a process of teasing, and in a mill it is usual to carry out this process before carding. Oil is added to the wool before machine /

machine c rding to make the wool pass through the machinery more smoothly and to reduce fibre damage and breakage. Carding by hand is an extremely laborious process, requiring much more expenditure of time even than hand-spinning. The product of carding is referred to as "sliver" or "rovings".

The next process is spinning which, when done by hand, is carried out on a spinning wheel. When machinery is used the spinning is done on either mule or frame spindles, and the yarn is wound on to paper tubes called cops and sometimes thereafter on to larger tubes called cheeses. The effect of spinning is to put a twist into the strands of wool with the object of producing a thread which can be woven and which will not be so readily liable to breakage in that process. There is evidence that in the case of Harris/ yarn, the twist is in the opposite direction to that normally used in Scottish woollen yarn but in the same direction as that used in yarn for worsted. More twist is usually put into warp yarn than into weft, the object of this apparently being to make the warp yarn smoother and stronger than the weft. The warp yarn is the yarn which will in due course be placed lengthwise /

lengthwise in the loom. The weft (anglice woof) yarn is the yarn which will be carried by the shuttle across the web in the course of weaving.

The next process after spinning is known as warping, which was regarded by most of the witnesses as a process separate from but ancillary to weaving. The object of this process is to arrange the warp yarns or threads in the correct order and arrangement to produce the desired colours and pattern in the web. The process of warping is carried out in the case of Harris Tweed either by the method known as stake warping, which is illustrated in one of the photographs in No. 330 of Process, or sometimes by means of a hand-operated revolving drum called a warp mill. For the purposes of transport, the warper chains off the warp by plaiting the yarn rather like a girl's pigtail and, before the warp threads are attached for weaving on looms of the type now generally used in the Outer Hebrides, they are wound on to a drum known as a beam. This latter process is called beaming. At one time many, if not most, of the weavers did their own warping but for a good many years there have been specialist warpers in the Outer Hebrides who are sometimes highly skilled and who /

who now normally confine themselves to that single process. One effect of the 1939-45 war was that the warpers tended to become concentrated in the mills or in the premises of producers. Despite this, warping in the islands has continued to be a hand process. The weft yarn is wound onto bobbins or "pirns" before being used on the loom. This process, which is known as winding or weft-filling, is regarded as ancillary to weaving and is normally carried out by the weaver.

The next stage is the weaving of the yarn into a web of greasy tweed. In the Outer Hebrides this process was originally carried out on traditional wooden hand-looms of different designs, some very rudimentary. At the present day, however, practically all the handweaving is done on Hattersley Domestic Looms, one of which is illustrated in No. 183 of Process. Hattersley Domestic Looms are motivated by foot pedals and are fitted with flying shuttles. The web of cloth so woven is single width, normally about 28 inches wide after shrinking, and tweeds may be of different lengths, though lengths between 75 and 100 lineal yards or say 35 to 40 weavers yards are not uncommon. Power-loomed tweed is normally made in double width, about

54 /

54 inches wide, and there is no dispute between the parties that such tweed if described and marketed by the name "Harris Tweed", as it sometimes has been, would be a fake. This point at least is, in my opinion, conclusively established by the evidence and, even if the power-looming were to be carried out in the Outer Hebrides, such cloth would be no less a fake. It is, however, right to say that there is no definite evidence of this particular deception ever having been practised by an island producer.

When the cloth emerges from the hand-loom in the form of greasy tweed it resembles a rough Hessian and would not in normal circumstances be marketable to the eventual purchaser in that state. It has accordingly to be finished and this process consists basically of darning, washing or scouring, rubbing or milling, tentering and drying. Cropping may also be carried out. The hand process of finishing, known as the waulking of the tweed (in Gaelic Luadh, anglice kneading), was much practised at one time in the Outer Hebrides. The waulking was usually carried out by a team of women with rudimentary appliances, including tubs or the barn door in or on which the web was laid, and was something of a social event often /

often being accompanied by songs which were chanted while the women tramped on the web or thumped, squeezed and slapped it with their hands. The machine processes of finishing are much more highly developed though less musical, and tend to produce a more uniform article. Some of these machine processes are illustrated in photographs contained in No. 330 of process. The finished product may be sold by the producer either as a whole tweed or, less usually at the present day, in lengths.

There is evidence that cloth was woven from local wool on hand looms in both Harris and Lewis for some hundreds of years before the present century. Weaving of a similar character was probably also taking place during that period in the Southern Islands of North Uist, Benbecula, South Uist, and Barra, in St. Kilda, and also in many of the smaller Islands of the Outer Hebrides. This early period and the subsequent history almost up to the outbreak of the Great War is dealt with in considerable detail in the Scott Report, No. 185 of Process, a scholarly and fascinating document published in 1913 which was accepted by counsel on both sides and by several of the witnesses as being authoritative. The author of that report was Professor /

Professor Scott of St. Andrews University, who later occupied the Adam Smith Chair of Political Economy at Glasgow University. The Scott Report refers to the original handwoven material as plaiding and it appears that blankets and probably other woollen articles were also made. In the Gaelic the cloth produced for plaiding seems originally to have been referred to as "Clo" (the spelling is mine) which means, simply, cloth. As time went on the Island Blackface sheep, which were introduced to the Islands during the latter half of the eighteenth century, became the main source of wool for the spinners and weavers in the Outer Hebrides and it seems probable that in most communities there were individuals who specialised in weaving and who might, for reward, no doubt often in kind, produce cloth from yarn spun by others. As late as the second quarter of the nineteenth century, however, the weaving of cloth, amongst the crofting communities in the Outer Hebrides at any rate, was still designed entirely, or almost entirely, to meet purely local demands. There is evidence that the cloth woven in those days in Harris was sometimes dyed in bright and attractive colours, of which no doubt the well known crotal shade would be one. The dyes were obtained by boiling and processing vegetable matter such as rock lichens and parts of /

of flowers or roots of certain plants. In Lewis, when the cloth was dyed, the tendency apparently was to use darker colours such as black and dark blue which possibly was more serviceable for use by the large seafaring, whaling and fishing community in that part of the Long Island. The Scott Report (at p. 33) describes the position reached by the middle of the nineteenth century as follows:-

"The Long Island, and particularly Harris, had long "been known for the excellence of the weaving done "there. Up to the middle of the nineteenth century "the cloth was produced mainly for home use or for a "purely local market".

In order to understand the steps which were taken to introduce the cloth made in the Islands, and in particular Harris, to a wider market, it is necessary to remember that during the second quarter of the nineteenth century the populations of the Outer Hebrides despite emigration had been in a state of great poverty and distress and that as a result of lack of employment, the decline of fishing and the failure of the potato crop many families were in a state of near or actual starvation. These events are not forgotten and they form the local background to the initial development of the Harris Tweed industry. During the nineteenth century the tendency was for large parts of the Outer Hebrides to fall into the ownership /

ownership of single proprietors, one of the attractions no doubt being the sport which those large estates provided. It is not surprising that the plight of the inhabitants who lived on their estates should awaken the practical sympathy and benevolence of those of great position who were thus brought into contact with them. In the middle of the nineteenth century the estate of Harris was owned by the Dunmore family who, according to the evidence, continued to own that part of the estate which was known as South Harris until as late as 1918. In the Scott Report (at p.33) the first germ of the Harris Tweed industry is described as follows:-

"In 1844" (this date may be a little inaccurate since there is evidence that the Earl of Dunmore died in 1843 when his son was an infant) "the Earl "of Dunmore directed some of the weavers in Harris "to copy the Murray tartan in 'tweed', and the result "was so successful that he adopted it for his keepers, "gillies, and other retainers, besides using it for "his own wear. It was seen that a material could "be produced for which an outside sale might be "hoped, and Lady Dunmore devoted much time and "thought to the introducing of the tweed to her "friends, and then to the improving of the process "of production. From this period may be dated "the/

"the beginning of the Harris Tweed industry,
"though the ultimate cause is to be traced still
"further back to the skill in spinning and weaving
"of the workers and their natural taste in the
"blending of colours. In the early stages of
"production for an outside market there were many
"difficulties to be overcome. The first tweeds
"of the Harris type seem to have been rather
"pronounced checks, of a rough type in texture,
"and it was necessary to devise new blends of the
"natural dyes and to diminish the too great
"irregularity in spinning and weaving".

Lady Dunmore is said to have sold the first tweeds from Harris in London in the late 1840's, and there is little doubt that by her activities in the interests of the people of Harris she was largely responsible for commercializing and developing the Harris Tweed industry in that part of the Outer Hebrides. It appears that the first market for Harris Tweed was among the quality who had their headquarters in London and would sometimes clothe themselves in the material when they went into the countryside to indulge in sports such as stalking, shooting or fishing. It is clear that the tweed which Lady Dunmore was the first to put on the London market was a wholly hand-made article produced in its entirety/

entirety by crofters or cottars in Harris from the wool of the Island Black-face. In all probability, in those early days much, if not all, of the wool in a tweed would be the clip from the producer's own sheep. The imprint of a home or cottage industry was thus planted firmly on the marketed product from the very beginning and I have no doubt that this factor, coupled often with an instinct of charity or feelings of romance on the part of the purchaser, helped to give the tweed a social cachet, now more prosaically called a selling point.

From this tiny beginning, the market for the wholly hand-made and wholly island-produced material known as Harris Tweed greatly expanded and extended during the latter half of the nineteenth century. It is significant that those who performed the functions which would normally be carried out by selling agents continued for the most part to be charitably disposed ladies following in the tradition of Lady Dunmore, a tradition which, it may be observed, is by no means to be sneered at even if one's attention were to be confined solely to its economic consequences in the Outer Hebrides, which have been immense and also it would seem beneficial. The tradition to which I have referred is not without importance in other respects since it demonstrates that the original market/

market for the product was created at least as much for social, economic and benevolent reasons as for those of mere commercial advantage. This attitude was reflected to some extent in the purchasers as well as in the selling agents and, as the evidence in the present case shows, the attitude still persists in some quarters at the present day not only in the United Kingdom but elsewhere, including the United States of America.

In 1859 a Mrs. Thomas visited Harris - her husband was a Naval Officer engaged on surveying work who took a great interest in the Long Island - and she subsequently created a market in Edinburgh for articles made by the women of Harris. Mrs. Thomas continued for a good many years to sell on behalf of the women of Harris their products, which included tweed. In 1888 Mrs. Thomas moved to London where for three years she ran a depot for these products in Berners Street. It is interesting to observe that in Harris at least by this time weaving as well as spinning appears to have become an activity of the women-folk rather than of the men. Speaking generally, this situation has persisted in Harris up to the present day.

According to the Scott Report the making of tweed in South Uist for sale in London was begun in 1877. At that time the islands of Benbecula, South Uist and Barra/

Barra were owned by the Cathcart family, and the method of disposing of the tweed was that Lady Gordon Cathcart bought the goods from the makers and then sent the tweed to Messrs. Parfitt of 75 Jermyn Street. Thus the tweed from South Uist spread beyond its local market in much the same way and, no doubt, for much the same reasons as tweed from Harris.

It is probable that from a comparatively early stage sporting visitors to the Long Island and others would purchase an occasional length of tweed direct from producers in Harris and elsewhere in the Outer Hebrides. As time went on it is also likely that some of the producers made direct contact with outside markets, for example, tailors in London. Some of the local "merchants", who ran the general stores or shops scattered about the islands, began to enter the trade to an increasing degree, usually as a sideline to their other activities. These merchants for many years greatly influenced the trade in tweed from the Outer Hebrides, and some have still quite a large interest in it. Indeed more than one of the larger businesses now in the Harris Tweed industry were in origin local merchants or shopkeepers. It must be said that the influence of the merchants was in a good many cases baneful, particularly when, as often happened, they dealt with the producers not in cash but/

but in kind, with the result that something like a truck system was liable to develop. The crofters, who could supply wool, and spinners and weavers, who could carry out the services of spinning and weaving, were often in debt to the merchants and dependent upon them for supplies such as groceries which the merchant was prepared to trade in exchange for goods and services. As a result control of the production of tweed sometimes got very largely into the hands of the local merchant, with results not always beneficial to the producers or to the customers or to the trade in general. These comments, however, apply with particular force to the developments which took place in Lewis, a chapter of the history to which I will now turn.

As I have already said there had for a very long time been a certain amount of weaving of cloth in Lewis as well as in Harris, but the commercial production of tweed for outside markets started much later in Lewis than it did in Harris or even in the Southern Islands. The reasons for this were partly fortuitous. In 1844 the estate of Lewis was purchased by Sir James Mathieson, an East India merchant with a very long purse. When the period of distress and famine came to the Long Island, Sir James Mathieson spent what were then vast sums not only on immediate relief but on/

on many schemes, intended to be permanent, of which hardly a trace remains today, but which for the time being employed a considerable amount of labour. Thus there was not at that time in Lewis the same incentive or necessity to weave tweed for sale in outside markets as there was in Harris and the Southern Islands. In 1878 Sir James Mathieson died, and almost immediately a cold wind blew through Lewis. Probably as a result the people of Lewis were attracted to the trade in tweed, which was beginning to flourish in Harris, and it has been suggested that the first web of tweed offered for outside sale from Lewis was made in 1881. As might be expected, the spread into Lewis of the production of tweed for outside sale was a gradual process and quite naturally it began in the parish of Lochs, which is situated in the southern part of Lewis adjacent to the boundary with Harris. It was also not unnatural that the wholly hand-made product from Lewis should begin to be sold under the same name as was being used for the tweed from the adjoining area, since a market had already been made for that tweed in the way described. One gathers, however, that this development was from an early stage unwelcome to the producers in Harris for reasons which are sufficiently obvious. In the course of the years the commercial production of tweed spread northwards through Lewis, first/

first to Uig and Stornoway and thereafter up the west coast as far as Ness in the extreme north of the island. The evidence indicates that this spread of commercial production of tweed towards the north of Lewis was not complete until shortly before the outbreak of the Great War, and even then the numbers of weavers in all parts of Lewis were very much smaller than the numbers at the present day. In Lewis, unlike Harris, it was andis usual for the weaving to be done by men. This may have been due to the use of heavier types of loom, but was in any event probably traditional.

Two passages in the Scott Report (at pp. 35 and 38) summarise the position reached in the 1870's and 1880's in the following way:-

"In the seventies and eighties there were some "indications that the Highland hand-made tweed "industry might have a future. In Harris besides "the depot in London, a trade had been established "with some of the dealers in cloth in large towns "in England and Scotland."

"A certain development in the home industries of "the Highlands may be traced in the first half of the "last quarter of the last century ... The Harris "tweed industry had extended from Harris on the one "side to Uist, and on the other to Lewis. A "market/

"market had been obtained both in London through a "depot and by agents, while relations had been "established with dealers in tweed".

The last decade of the nineteenth century was noteworthy for an increasing degree of organisation amongst those who were championing and helping to develop the home industries of the Highlands and Islands, still largely from benevolent and philanthropic motives. Towards the end of the decade the Government, after the usual paraphernalia of committees and commissions, took a hand with the passing of the Congested Districts (Scotland) Act 1897. In 1889 the Scottish Home Industries Association had been founded, the then Duchess of Sutherland being the moving spirit in that organisation. The Association, which was incorporated in 1896, opened a depot in London and one of its branches, which covered inter alia the Uists, Benbecula, Harris and Lewis, subsequently opened one or more depots at various dates in all these islands. It is interesting to find a depot being opened in North Uist and there is evidence that, at any rate in the early 1900s, a wholly hand-made tweed was being produced in that Island for outside sale as Harris Tweed, although it does not seem that the trade ever prospered there to any great extent. In 1889 there was /

was formed at Inverness another organisation called the Highland Home Industries and Arts Association, which did not propose to set up any shops or permanent commercial organisation, but endeavoured to obtain sales of products of home industries at exhibitions in certain of the Highland counties. The organisation also operated, though probably at a later date, through representatives in certain areas, including the Islands. One suspects that there was at this time some competition between the aristocratic ladies who were active in promoting the outside marketing of tweed from the Outer Hebrides, and in 1899 another collecting and selling agency, called the Crofters Agency, was set up by Mrs. Stewart Mackenzie of Seaforth (the future Lady Seaforth), with headquarters in London. It is pretty plain that Mrs. Stewart Mackenzie, who is a great name in the development of the Harris Tweed industry, did not greatly care for some of the developments which were even then beginning to take place in Lewis and possibly also, though to a minor extent, in Harris. She was also manifestly disturbed at what was happening in places far from the Outer Hebrides and, as will be seen, she reacted energetically /

energetically and with some success against some of the more damaging activities which by the turn of the century or soon thereafter were beginning to affect the market in Harris Tweed.

It was in this latter period of the nineteenth century that two great drawbacks became manifest in the Harris Tweed industry, namely lack of a commercial organisation, particularly for selling, and lack of working capital in the hands of the producers in the Islands, particularly the hand-spinners and weavers themselves. These two drawbacks have continued to affect portions at least of the industry in the Outer Hebrides up to the present day, and have had considerable influence in bringing into existence some at least of the issues which have led to the present litigation. But under whatever drawbacks the industry laboured at the time with which I am dealing it is my opinion that the product of the industry, namely tweed wholly hand-made and produced in its entirety in the Outer Hebrides, had by the end of the nineteenth century obtained a market among the discriminating and had, under the name "Harris Tweed", after half a century of sale in --- outside markets achieved a not inconsiderable /

inconsiderable reputation with the public, particularly in England. In the Outer Hebrides tweed had long been referred to in the Gaelic as "Clo Mhor" (again my own spelling), a term of uncertain derivation which means simply "the great "cloth". Sometimes tweed was and is referred to in the Gaelic simply as "Clo". I gather that reference in the Gaelic to Harris Tweed as "Clo Hearach", the literal translation, is rare.

In a monograph (No. 496 of Process) entitled "Harris Tweed: A Growing Highland Industry" by Mr. H. A. Moisley, who gave evidence in the course of the defenders' proof, the situation at the end of the nineteenth century is summarised at p. 355, in my opinion accurately, thus:

"In the latter years of the nineteenth century, as a "result of competition from small local mills, "domestic spinning and weaving declined and almost "disappeared in the mainland Highlands; but in the "Hebrides, encouraged by the proprietors, by local "shopkeepers, and by non-profit-making groups such "as 'Scottish Home Industries Association' and 'the "'Crofters Agency', it grew and prospered. By this "time the Blackface sheep was well established and "with it a greatly increased annual clip of raw "wool. But the cost of freight made sale of "fleeces /

"fleeces less attractive than domestic spinning, "particularly to crofting families, each with only "a few fleeces but with plenty of time on their "hands. In addition there was the growing "recognition of the particular value of tweed for "'country' use, and an increasing fashion for "handicraft products - a reaction against the "uniformity of machine-made goods. At that time "every web of tweed was unique and could never be "exactly reproduced. The 'glamour of homespun', "the association with the Hebrides, the thatched "cottage, the peat fire, the natural dyes of moor "and shore - all contributed to the vogue for "tweed, which became known by the name of its "principal, but by no means sole source, Harris".

From 1900 onwards it is much more difficult to give a consecutive and orderly account of the history of the production of tweed in the Outer Hebrides for outside markets. There are a number of reasons for this. One reason is that developments went on at a different pace in different areas of the Outer Hebrides. This was to some extent connected with the employment and use in certain areas of mechanised processes and their products. Another reason is that the industry was beset at intervals /

intervals throughout the following 60 years by a succession of crises, some internal and others external, including the effects of two World Wars and their respective aftermaths, as well as commercial and economic causes over which the inhabitants of the Islands had little control. During both World Wars, and particularly that of 1914/18, there was a vast exodus of manpower from the Outer Hebrides, probably far greater in proportion to the numbers of the population than in any other part of the United Kingdom. Moreover, during the periods of peace lack of employment has been chronic in the Islands. Partly as a result of these facts, benevolent and philanthropic impulses, as well as considerations of mere commercial advantage, continued to affect the development of the industry though, as time has gone on, the direct influence of philanthropic bodies at the selling end of the industry has waned.

In the first few years of the twentieth century various events happened which demonstrate not only that Harris Tweed had achieved a market and reputation with the purchasing public in Great Britain and probably also in small areas abroad but also that the market and reputation of the product had become sufficiently valuable to encourage capital outlay on /

on machinery and to attract the envious attention of trade competitors of one sort or another. Imitation, it has been said, is the sincerest form of flattery and, when the demand for a hand-made or quality product begins to outstrip the supply, there are usually at hand those who are prepared to assist in meeting that demand, often by supplying a cheaper and inferior product and frequently without much scruple about the methods to be adopted in disposing of their goods. As will appear it would be a mistake to suppose that even the Islanders were totally immune from the temptations to which manufacturers of cloth, more sophisticated and experienced than themselves, have so often succumbed, with the result, for example, that worsted is produced far from the village of its origin and by methods never so much as contemplated by its early makers and that, according to some of the evidence in the present case, even homespun may have become a term of doubtful meaning. Moreover, as the evidence in the present case shows, many Hebrideans, both native and adopted, are far from lacking in commercial ability, although this may sometimes not be blatantly obvious on superficial acquaintance. Mr. Diplock, the Secretary of the Retail Trading Standards Association, who in company with /

with Mr. Blair Macnaughton visited Stornoway and other parts of Lewis in the autumn of 1958 in order to meet a number of those engaged in the production of tweed, felt the situation there was "an amalgam of Alice in "Wonderland and the Thirty Nine Steps". This is a possible reaction from a stranger, though it is fair to say that the Islanders' impression of Mr. Diplock is less extravagantly and more realistically recorded. At least one of them gained the impression that Mr. Diplock was determined to persuade them that his opinion was correct and that they should act in accordance with it. This impression was, I think, not far off the mark, and the approaches of Mr. Diplock and Mr. Blair Macnaughton appear to have met with no success.

The Congested Districts Board formed under the Act of 1897 had the function inter alia of aiding and developing spinning, weaving and other home industries in congested districts. The Board were instrumental in having an instructor in the production of tweed appointed in Lewis. They also supplied large dyeing boilers to at least one district in Lewis, namely Uig, and it appears from the evidence that similar boilers came to be used in other districts including Lochs. These large boilers enabled long webs of tweed /

tweed to be made in regular colours. It was difficult to achieve this when dyes were prepared in small pots which had till then been the usual method. There is some evidence that by this time the natural dyes produced in the Islands were being supplemented to a certain extent by chemical dyes which were available at some of the depots of the Scottish Home Industries Association.

Much more important events were, however, taking place in the field of carding. As I have said, carding when done by hand is an extremely laborious and time-consuming process, and this led to the development among some producers of practices which are described in the following passage at p. 46 of the Scott Report:

"In the early years of the industry the wool had "all been carded by hand. This process took a "long time, and a practice had grown up of sending "the wool to the mills on the mainland to be "carded. But there was a great temptation to have "it spun also and returned in the form of yarn. "Thus the only hand-work in the tweed made of such "yarn was the weaving, and in fact a different "fabric, as compared with the original Harris tweed, "would be produced. It was thought that the "erection of a carding mill (which did not spin the "carded wool) in the Islands would prevent the "introduction /

"introduction of mill-spun yarn, and accordingly "Sir Samuel Scott erected one outside Tarbert, "Harris, in 1900, and by 1903 another had been "started at Stornoway by Mr. Aeneas M'Kenzie".

The mills on the mainland which engaged in carding, and sometimes spinning on commission, of wool sent to them from the Islands were usually small mills in the Highlands, sometimes referred to as the old Highland mills, such as Hunters of Brora, who seem from a comparatively early stage to have had a particular reputation with some producers for this kind of work. The trade was sufficiently common to be given a name "the baggy trade" and, as well as Hunters of Brora, some other small Highland mills, such as Frasers of Dufftown (previously Huntly Woollen Mills), Black of Wick, Pringle of Inverness and Laidlaws of Keith, engaged in it at various times. Sir Samuel Scott was at the time in question the proprietor of the North Harris estate. The carding mill, which he erected at Tarbert and which was sometimes referred to as the North Harris Carding Mill, was originally operated by water power and was at a later stage in its history taken over by the Harris Handwoven Tweed Company Limited, /

Limited, the sixth-named defenders. Another small carding mill, known as the South Harris Carding Mill, was erected in 1904 at Deracleit about two miles south of Tarbert by Mr. Roderick Smith, Sub-Postmaster and Tweed Merchant, and continued to operate until 1959, though latterly on a diminishing scale. The carding mill started at Stornoway in 1903 by Mr. Aeneas M'Kenzie was the Patent Slip Mill, which is now operated by S. A. Newall & Sons Limited, the fifth-named defenders.

The result of the developments referred to in the preceding paragraph was that machine-carding continued to supplement and to some extent supplant hand-carding. It is noteworthy, however, as the author of the Scott Report points out, that one of the objects of providing carding mills on the Islands was to reduce the temptation to which some producers were already succumbing of having their wool mill-spun as well as machine-carded on the mainland. The use of mill-spun yarn was, however, in my opinion, at that time nothing more than a method by which the demand for the genuine hand-spun article was sometimes met. This was accepted in terms by Mr. James MacDonald during his cross-examination and there is other evidence pointing to the /

the same conclusion. I am satisfied that a tweed advertised or expressly offered as containing mill-spun yarn would not in the early years of the twentieth century have been accepted by any knowledgeable purchaser as genuine Harris Tweed. I am also satisfied that no such purchaser would at that time have purchased as genuine Harris Tweed cloth which to his knowledge had not been wholly produced in the Outer Hebrides.

Although the developments affecting the industry were taking place most rapidly in Lewis, a number of steps were at the same time being taken to expand the production of tweed in Harris itself and in the Southern Islands. During 1902 and 1903 the Scottish Home Industries Association opened a number of additional depots, and it appears that the Association for a few years succeeded in increasing its turnover in the areas which it served, including Harris and the Southern Islands. It was, however, in Lewis that the really dramatic increase in turn-over took place at this time, possibly assisted to some extent by Royal patronage of the handmade product during a visit by their late Majesties King Edward VII and Queen Alexandra to Stornoway in 1902. According to figures given in the Scott Report (at p. 48) there had/

had been 55 looms in Lewis in 1899 which compares with an estimate of over 200 looms in Harris at the same date. The figures for Lewis increased to 161 looms in 1906 and an estimate of 250 to 300 looms in 1911. These were probably all wooden looms of various types, some being of local manufacture. The Scott Report at p. 48 also contains certain estimates of the value of tweed produced in Lewis during 1903, 1904 and 1905 amounting to £8,000, £15,000 and £20,460 respectively, the average price being 2/8d. per yard. While the foregoing figures cannot necessarily be accepted as accurate, it is apparent that the production of tweed in Lewis was at this time increasing by leaps and bounds and that the production there was beginning to include material of inferior quality. It is interesting and probably significant, to find the Lewis product sometimes referred to during this period as "Lewis Tweed". With regard to this phase the following comments amongst others are made at p.49 of the Scott Report:-

"The Harris tweed industry did not escape the changes "of fortune to which larger trades are liable. In "1903 it was reported that the workers could not "supply the whole demand, and the rapid growth in "the output in 1904 and 1905 indicated the danger "of/

"of over-production. But, while this phase of "the trade would have been distressing to the "workers, there was a more serious element in the "situation, which would be likely to influence the "whole future of the industry. The rapid increase "in output in Lewis suggests the reflection, which "is confirmed by other evidence, that mill-spun "yarn was being introduced in considerable quantities."

The statement in the final sentence just quoted is borne out by other evidence led in the present case and I am satisfied not only that some of the Island producers, particularly in Lewis, were by this time sending out Island wool to be woven on commission at mainland mills and returned in the form of yarn, but also that some of them were already going so far as to import mainland yarn, the supplies of which were probably for the most part taken from certain of the small Highland mills already referred to.

The practices which have been mentioned, coupled probably with the prospect of a further degree of mechanisation in Lewis itself in the form particularly of installation of spinning machinery, caused perturbation amongst those who were producing and marketing the handmade Island product. Fears were/

were also entertained as early as this that cheap imitations which were not only mill-spun but power-loomed might be finding their way to the ultimate purchaser under the name "Harris Tweed". This fear was expressed, for example, in the Uist Report of 1904 (No. 336 of Process p. 6) and was not long in being realised. In fact such imitations had probably been on the market for some time though no doubt it was difficult ------ to obtain evidence sufficient to bring a successful prosecution under the Merchandise Marks Act then in force, a difficulty which has by no means decreased with the years. During 1906 a Mr. Henry Lyons was convicted in London of a contravention of Section 2 of the Merchandise Marks Act 1857 in respect of a sale by him as "Harris Tweed" of a suit made from cloth mill-spun and power-loomed in a mill at Huddersfield. The extent of the fraud and the effrontery of the advertising by the accused were equalled in degree only by his lamentations on being convicted. Even at this distance of time one cannot feel much sympathy for him. This prosecution seems to have resulted from an agitation by the Scottish Home Industries Association which had succeeded in stirring the Board of Trade into activity. The episode is fully documented/

documented in the evidence and need not be described in detail. The public reports of the case, however, leave a strong impression that Harris Tweed was then recognised as a handmade article entirely produced in the Outer Hebrides, from one part of which it had received its name. Moreover, it is clear that the Lyons' prosecution had a considerable influence on the further steps which were taken in the next few years to protect what was in my opinion at that time the genuine article.

From 1906 onwards a series of meetings and much discussion took place in Stornoway, Harris and other parts of the Outer Hebrides to consider what steps should be taken to protect genuine Harris Tweed. One step which the interested parties undoubtedly had in mind at that time was the obtaining of a trade mark. There was also activity in London by the marketing bodies there under the leadership of Mrs. Stewart Mackenzie and the Duchess of Sutherland respectively. One gains the impression that at this time the producers in Harris, who had formed a voluntary body called the Harris Tweed Association, still had objections to the producers in Lewis using the name Harris Tweed, even for the wholly handmade product and/

and
/that Mrs. Stewart Mackenzie was inclined to sympathise with this view. The Duchess of Sutherland, representing the viewpoint of the Scottish Home Industries Association of which she was still President, supported the view that the name Harris Tweed should be used for the wholly handmade product, whether it was produced in Harris or Lewis or any other part of the Outer Hebrides. The Stornoway merchants in the handmade article, who had formed themselves into the Lewis Harris Tweed Association, were of the same opinion and held a conference, reported in the "Highland News" on 16th March 1907, which was attended by the Duchess of Sutherland, the leading Stornoway traders in homespun tweeds and other individuals, including Major Mathieson, ex-Provost Smith, Provost Anderson and Mr. Wigglesworth, director of Messrs. J. G. Hardy Ltd., London. The following resolution was adopted:-

"that in view of the desirability of having one "trade mark established for the tweed made in the "Long Island, or Outer Hebrides, and known as "'Harris Tweed', it is unanimously agreed to unite "with the Scottish Home Industries Association in "having the proposed trade mark passed by the Board "of/

"of Trade, and the meeting expresses the hope that "Mrs. Mackenzie of Seaforth will also join in this "matter".

The view expressed in the resolution just quoted was eventually accepted, both by the producers in Harris and by Mrs. Stewart Mackenzie, though not before competing applications for trade marks had been made to the Board of Trade. As it happens the first effective step had been taken by the indefatigable Mrs. Stewart Mackenzie, who in early 1907 had obtained a registered trade mark for "Hand Spun, Hand Woven Tweeds, (in the piece) in Harris and Long Islands (Outer Hebrides) Wool". This was the "Seagull" trade mark illustrated in No. 456 of Process, and was almost certainly the trade mark referred to in articles in the "Highland News" on 2nd and 16th March 1907 (pp. 12 and 13 of No. 445 of Process). The reference to the crest of the Earl of Dunmore in the foregoing article remains unexplained, since the Orb and Cross did not appear in the original trade mark obtained by Mrs. Stewart Mackenzie, to which reference has just been made.

The evidence shows that one reason why the producers in Harris were inclined to resist a trade mark which covered the whole of the Outer Hebrides was that producers/

producers in Lewis, and particularly Lewis spinners, might as a result find an excuse to market the product of mill-spun yarn as Harris Tweed. This fear no doubt arose partly as a result of the erection in 1906 by Kenneth Mackenzie of a carding and spinning mill in Lewis Street, Stornoway, and the installation of spinning machinery in the Patent Slip Mill when it was taken over by a Mr. Morrison in about 1908. It is clear that these developments led to an almost immediate decline in hand-spinning in Lewis. The situation at this time is described in the Scott Report in the following passage (at p. 49):-

"The available evidence tends to show that the "production of tweed in Lewis kept on increasing, "but that hand-spinning was declining. The "carding mill at Stornoway added spinning machinery, "and a second mill of similar character was started. "There were thus two kinds of hand-woven tweed - "the one containing all or part mill-spun yarn and "the other all hand-spun yarn. Most of the Harris "tweed makers" (i.e. the makers located in Harris) "produced the latter kind; but, even there, it was "found that yarn from the mills was being used. "The merchants there began to require a declaration "from those who sold this tweed in the following "form:-

" 'I/

" 'I hereby guarantee that the length of tweed
" 'as described below is entirely hand-spun,
" 'hand-woven, and home-dyed Harris Tweed.
" 'Signature .....
'Address .....
" 'Description of Tweed (Colour and Design)
" 'No.' ".

Mrs. Stewart Mackenzie and those other persons who had perceived that one form of protection for the genuine article might lie in a trade mark were equally alive to the danger of the article produced from mill-spun yarn being passed off as Harris Tweed. Their policy accordingly was to endeavour to obtain a standardization trade mark, now called a certification trade mark, for the handmade article produced entirely in the Outer Hebrides which was in their opinion, and also in mine, the only article which could at that time legitimately be described and marketed as Harris Tweed. The provisions relating to standardization trade marks were at that time contained in Section 62 of the Trade Marks Act 1905, which then provided as follows:

"Where any association or person undertakes the
"examination of any goods in respect of origin,
"material/

"material, mode of manufacture, quality, "accuracy, or other characteristic, and certifies "the result of such examination by mark used upon "or in connexion with such goods, the Board of "Trade may, if they shall judge it to be to the public "advantage, permit such association or person to "register such mark as a trade mark in respect of "such goods, whether or not such association or "person be a trading association or trader or "possessed of a goodwill in connexion with such "examination and certifying. When so registered "such trade mark shall be deemed in all respects to "be a registered trade mark, and such association or "person to be the proprietor thereof, save that such "trade mark shall be transmissible or assignable "only by permission of the Board of Trade".

The first step taken by those who were seeking a standardization mark was to form the Harris Tweed Association Limited, which was incorporated on 9th December 1909 and is the sixteenth-named defender. The Memorandum and Articles of Association of the foregoing Association (to which I will refer for brevity as "the H.T.A.") is No. 181 of Process. The objects of the H.T.A. were inter alia as follows:-

"The/

"The objects for which the Company is established
"are the protection of the interests of manufacturers
"and merchants of and dealers in tweed made in the
"Highlands of Harris, Lewis and Uist in Scotland,
"and to promote the manufacture and sale of such
"tweed. To protect the trade against offences
"under the Merchandise Marks Acts and otherwise
"to prevent the use of false trade marks and
"descriptions in respect of tweed made in imitation
"thereof. And in furtherance of such objects:-

"(a) To register a trade mark or trade marks
"under the powers given by Section 62 of the Trade
"Marks Act, 1905, and to use such trade mark or
"trade marks and to register any such trade mark as
"a general trade mark or in respect to any specified
"goods or classes of goods as may be arranged or
"approved of by the Board of Trade. The Company
"to have complete control over the said trade mark
"and to permit such person or persons or incorporated
"body to use such trade mark on such conditions
"as it may think fit .....

"(g) To print and publish any newspapers,
"periodicals, reports, books or leaflets that the
"Company may think desirable for the promotion of
"its objects .....

"(p)/

"(p) To take any such legal proceedings as "may be necessary or advisable from time to time "against any person, persons or incorporated body "which infringes or illegally uses the registered "trade mark of this Company, and also so to do "against any person, persons, or incorporated body "which wrongly describes goods manufactured or sold "by them or gives false or inaccurate guarantees "with regard to same .....

"(r) To do all such other things as are "incidental and conducive to the attainment of the "above objects ....."

Initially the Committee of Management of the H.T.A. consisted of six persons, two nominated by the Crofters Association, two by the Scottish Home Industries Association, and two by the merchants of Harris and other districts who dealt in the tweed. Mrs. Stewart Mackenzie became the first chairman. The H.T.A. immediately took steps to present to the Board of Trade an application for a standardization trade mark dated 23rd February 1910 (No. 445 of Process/

Process pp. 36 seq.). The application contains the following statements which are of interest as showing the contentions which presumably were fully considered by the Board of Trade before the Board took action:-

"The Company" (i.e. the H.T.A.) "has been formed "by various persons and Associations interested "in the welfare of the crofters of the Outer "Hebrides who are engaged in the manufacture of "Tweeds, and the sole object of the Association is "to encourage and foster such industry by such "steps as may be deemed expedient, and incidentally "to prevent as far as possible the fraudulent "substitution of machine made Tweeds as genuine "Home Spun Tweed made by the crofters of the Outer "Hebrides (which comprise the Islands of Harris, "Lewis and Uist), and which Tweed has long been "called and recognised both by the trade and public "as 'Harris Tweed', the name 'Harris' being "originally derived from the Parish of Harris in "the Long Island, which forms part of the Outer "Hebrides.

"One of the objects of the Company as expressed "in the Memorandum of Association is the obtaining "of a Trade Mark under Section 62 of the Trade Marks "Act /

"Act of 1905 for the purpose of application to "genuine Harris Tweed to enable the trade and "public to readily discriminate between the genuine "Harris Tweed and imitation Tweed, it having long "been a grievance of the crofters, and those inter- "ested in their behalf, that large quantities of "machine made Tweed are constantly sold as genuine " 'Harris Tweed', meaning thereby the Tweed made by "the crofters of the Outer Hebrides.

"The industry is a struggling Home industry "producing Tweed of considerable merit, and the "only practical manner in which the trade and public "can be educated to discriminate between the genuine "and the imitation 'Harris Tweed' is by the applica- "tion of a standardising mark uniformly to all "genuine Tweed, and the Association has consequently "applied for registration of the mark which forms "the subject of the above numbered application, with "a view to its application, under such Rules and "Regulations as the Board of Trade may direct, to "genuine Harris Tweed, it being intended that the "actual place of manufacture shall in every case be "applied with the Trade Mark according to whether "the Tweed is made in the Island of Lewis, in the "Parish of Harris or in the Island of Uist".

The /

The previous applications for standardization marks were withdrawn, and it appears that Mrs. Stewart Mackenzie at the same time agreed to the "Seagull" mark being altered by deletion from the mark of the words "Harris and Long Island".

In due course the H.T.A., described as "an "Association for the Protection of the Harris Tweed "Industry", were under date 15th December 1909 registered as the proprietors of the Standardization (Certification) Trade Mark No. 319214 in Class 34 (Schedule III) in respect of Harris Tweed. It seems that, although the date of registration was 15th December 1909, the actual decision of the Board of Trade was not given until 1911, and this probably accounts for the fact that stamping did not begin until that year and also for the fact that in the evidence in the "Embargo" case (Crofter Hand Woven Harris Tweed Co. v. Veitch 1940 S.C. 141, 1942 S.C. (H.L.) 1) the mark was referred to as the Trade Mark of 1911. Full information relating to the mark is given in No. 182 of Process, which includes a representation of the mark, namely the Orb and Cross with the words "Harris Tweed" subjoined. The Regulations made by the Board of Trade, together with the amendments made thereto from time to time, appear in /

in full in the same number of process. The 1909 Regulations contained inter alia the following definitions:-

"Within the meaning of these Regulations, 'The
" 'Harris Tweed Trade Mark' hereinafter called the
"Trade Mark means the Trade Mark allowed by the
"Board of Trade to be registered under the pro-
"visions of Section 62 of the Trade Mark Act, 1905,
"as a mark of origin and mode of manufacture and
"No. 319214 in No. 1691 of the 'Trade Marks Journal'.
".....
" 'Harris Tweed' means a Tweed, Hand Spun, hand
"woven dyed and finished by hand in the Islands of
"Lewis, Harris, Uist, Barra and their several
"purtenances and all known as the Outer Hebrides."

The Regulations also provided that the Harris Tweed Trade Mark was the absolute property of the Harris Tweed Association Limited and should be under the sole control of the Association and should not be applied by any person except by or under the sanction of an Agent duly appointed by the Committee of Management of the Association. Amongst the conditions for the use of the mark was included the following:

"Wherever the Harris Tweed Trade Mark is used there
"shall be added in legible characters to the Harris
"Tweed Trade Mark the words 'Made in Harris', or
" 'Made /

"'Made in Lewis' or 'Made in Uist' or 'Made in "'Barra' as the case may be."

The Regulations concluded with the following conditions, viz.

"The Committee of Management of the Association may "with the sanction of the Board of Trade from time "to time alter these Regulations or make new "Regulations wholly or in part in lieu thereof.

"The Board of Trade reserves to themselves the "right to cancel the Mark at any future time if in "their opinion it should appear advisable so to do "and their decision upon this point shall be con- "clusive."

It will be observed from the foregoing quotations from the Regulations that the Harris Tweed Trade Mark was registered as a mark of origin and mode of manufacture, and, having regard to the provisions of Section 62 of the Trade Marks Act 1905, it is reasonable to assume that the Board of Trade judged it to be to the public advantage to permit the H.T.A. to register the mark as a Trade Mark in respect of Harris Tweed.

The Scott Report (at p. 50) describes the situation which resulted from the granting of the standardization trade mark as follows:-

"This Association" (i.e. the H.T.A.) "began to apply "the trade mark early in 1911; but it was alleged "that tweed, containing mill-spun yarn, was still "sold /

"sold as 'Harris Tweed'. Certainly in the first "eight or nine months of 1911 there was quite a "boom in the weaving industry in Lewis, which then "began to decline through over-production and "inferior workmanship. The Harris Tweed Associa- "tion decided to take action and brought a case in "November against a tailor, who was charged with "selling tweed made of machine-spun yarn as genuine "Harris tweed. This summons was dismissed. No "doubt the case contributed towards increasing the "depression in the Lewis tweed industry. During "the first quarter of 1912, sales were very slow, "and the merchants of Stornoway opened negotiations "with the Harris Tweed Association for the intro- "duction of the trade mark in Lewis, on condition "that they should have representation on the "Committee of Management".

It appears that by 1912 less than half the tweed being produced in the Outer Hebrides was entitled to be stamped, and the figures given in Table I at page 358 of No. 496 of Process are probably as accurate as any estimate based on contemporary reports and other material is likely to be. These figures correspond fairly closely with the figure of 350,000 yards of tweed produced in Lewis in 1911 which is given in the Scott Report at p. 62. Some of the tweed produced in Lewis /

Lewis either partly or wholly from mill-spun yarn was probably still reaching the market under the name "Harris Tweed". Indeed the amount may for a time have been substantial, particularly in the case of tweed woven with hand-spun weft but with mill-spun warp, which could readily deceive even the initiated as it was probably designed to do. Certainly it is not easy to see what purpose there was in the practice referred to unless it was to imitate the wholly hand-spun tweed by partially concealing the mill-spun element. I am afraid I must say that in my opinion what has recently come to be known in some areas as 50/50 tweed was a deception, and continues to be a deception where mainland millspun yarn is used. The deception is perhaps usually more ladylike now than it was in Lewis during the first decade of the 20th century. This could possibly be said even of the comic, though somewhat deplorable, events described in the evidence of Mrs. Margaret McLellan and Mr. Angus McIntyre, whom I did not think quite so ingenuous as they made themselves out to be and the demand for whose 50/50 product appears to have fallen off very soon after their unauthorised use of the stamp came to an end. Mr. James McDonald describes /

describes as having taken place in Lochs during his youth practices which can only be characterised as thoroughly dishonest. Apparently some of the crofters in that area imported from the mainland mills yarn in white hanks and then proceeded to dye it in the yarn and use it as warp together with hand-spun weft. If the finished article of such manufacture was passed off as Harris Tweed it was in my opinion spurious not only because it contained mill-spun yarn, but also because the warp was dyed not in the wool, which is agreed on all hands to have been one of the outstanding features of Harris Tweed since it began to be sold in outside markets, but in the yarn. Mr. James McDonald describes this practice as if it was quite common at that time. If so, it is not surprising that the producers in Harris of the genuine article regarded their neighbours in Lewis with some suspicion.

Mr. John Mackenzie in his evidence supplied a modern example of a somewhat different, though no more commendable, character relating to 50/50 tweed. Mr. John Mackenzie, in addition to acting as supervisor in Lewis on behalf of the original company called Scottish Crofter Weavers Ltd., and later of the third-named pursuers, carried on a small business of his own in tweed. One of his products was a 50/50 /

50/50 tweed which he sold under the name "Glen "Arnol". The label supplied with this tweed is illustrated as label No. 13 in No. 298 of Process and contains the legand " 'Glen Arnol' hand spun "weft Harris Tweed handwoven by the crofters in "Outer Hebrides". The label contains a picture of a croft and in the foreground there appear to be a number of sheep, presumably Island Blackface. Mr. John Mackenzie's 50/50 tweed was in fact woven from millspun warp supplied by Lumbs of Elland, and from handspun weft the sliver for which had also been prepared and supplied by Lumbs of Elland. The hand-spinning of the weft was carried out by a lady in Stornoway. It is clear from the evidence of Mr. P. Lumb, of Lumbs of Elland, that neither the millspun warp, nor the sliver for the weft contained 100% Scottish wool; indeed they may not have been wholly composed of British wool, and it is quite possible that on a number of occasions no Scottish wool at all was contained in either the millspun yarn or the sliver for the weft. There is a good deal of evidence to support the view, which I accept, that it is an essential feature of genuine Harris Tweed that it should be made from 100% pure virgin wool produced in Scotland, and I understood from Mr. John Mackenzie's /

Mackenzie's evidence that this was his own view, since at pp. 1503-1504 he gave the following evidence:

"Q. And if you look at page 2 of the letter, which "is on page 203 of the file", (No. 445 of Process) "and if you look at the last sentence of the para- "graph at the top of that page do you see Mr. "Simpson writes as follows, 'Our contention is " ' that Harris Tweed is a type tweed made from " 'pure virgin Scottish wool handwoven by crofters " 'at their crofts in the Scottish Outer Hebrides'. "A. Yes. Q. Does that coincide with your view "as to what Harris Tweed is? A. Well precisely, "precisely Sir. I think that Harris Tweed is "beginning to be as difficult to define as the "Scottish bagpipes now!"

Thus on his own showing, Mr. John Mackenzie's 50/50 tweed was not genuine Harris Tweed. Mr. John Mackenzie, it may be noted, for many years used note-paper which amongst its headings contained the legend "World Famed Harris Tweeds, Genuine Handwoven "Homespuns Only". It is rather revealing to see how Mr. John Mackenzie dealt with this situation in the course of his cross-examination (at pp. 1506-1507):

"Q. And do you see that on your note-paper you "refer to world famed Harris Tweeds? A. Yes. "Q. And then Genuine Handwoven Homespuns Only? A. "Yes. /

"Yes. Q. What did you mean by homespuns? A. I "rather think as it happened that I was not too "happy about that. I rather think that it was a "mistake made by the printers. Q. A mistake that "continued for about twenty years? A. It was like this, "that when I got my supply of these they lasted a "long, long time, I got a very big quantity of them, "although at the moment I do sell Scottish Homespuns "from the Hebrides." By the Court "Q. On whose "instructions was this note paper prepared? A. On "my own, My Lord, on my own instructions, but it may "have been partly due to my lack of knowledge of the "right term to use. I agree that it might have been "just as much my own mistake as the printers." Cross-examination continued "Q. In any event anyone "dealing with you by correspondence would see your "note paper which stated that you dealt in genuine "handwoven homespuns only? A. Yes. Only - well, "I really do not know how to answer that one."

It seems hardly necessary to make any comment on the foregoing passage. No doubt even after stamping had begun attempts continued to be made to pass off the partly or wholly mill-spun product as Harris Tweed, but my study of the available evidence suggests that this became more difficult for a period after 1911 and that the granting of the standardization trade mark, coupled with the prosecution of that year, which is referred /

referred to in the passage from the Scott Report quoted above and documented at pp. 32 - 35 of No. 445 of Process, had some effect in preventing the practice referred to. It should be noted that the prosecution of 1911 was unsuccessful because of failure to establish fraud on the part of the accused, who was a tailor. It is significant that in 1912, no doubt as a result of the negotiations referred to in the Scott Report, the Committee of Management of the H.T.A. was increased in numbers from six to eight in order to include two members of the Lewis Harris Tweed Association. This suggests that a real effort was being made to stop the undesirable practices which had developed in Lewis.

It is likely that the Scott Report, when it was presented to Parliament as a Command Paper, had an even more salutary effect, coming as it did on top of the registration of the standardization mark, and more particularly in view of some of the conclusions which were expressed by the author. After describing tweed wholly handmade and tweed handmade except for machine carding, but in both cases wholly the product of the Islands, the Scott Report (at p. 61) continued as follows:-

"There remains a third type of tweed, in which

"all processes, up to and including the spinning, "have been performed by machinery. Thus the "person who proposes to offer a web for sale "purchases the yarn from the mill, winds it for "the weaver, has it woven and hand-finished. "This industry was being prosecuted vigorously "in Lewis during the earlier part of 1911. Or, "again, the yarn for the warp may be machine-spun "- that for the woof hand-spun.

"It has already been shown that some of those "who are acquainted with the characteristics of "Highland tweeds lay stress on hand-carding, "others again upon hand-spinning. In Lewis "there is a type of opinion which professes to "prefer machine-spun yarn, according to one "point of view, for the warp in order to strengthen "it or, according to another, for both warp and "woof. But in ordinary trade, tweeds made in "Lewis, by either of these methods, are rarely "sold as containing machine-spun yarn; and most "of them find their market, somewhere or other, as "'Harris Tweed'. The temptation towards "misdescription is apparent. It may be calculated "that the cost of production of a tweed, made "altogether of machine-spun yarn, but hand-woven "and hand-finished, is at present (i.e. 1911/12) "between /

"between 1s. 9d. and 1s. 10d. a yard. If it "passes as Harris tweed, there is a profit of "1s. a yard, or nearly £3 on a web. Great "ingenuity is exercised in fostering this "impression".

The author of the Report then goes on to describe methods of mis-description and deception which might be characterised as oriental. If Professor Scott had known that, after a yachting visit by a Mr. Lumb, a Yorkshire mill-owner, to Balallan in Lochs, which took place about 1912, English millspun yarn had begun to find its way into cloth which may have been passed off as Harris Tweed, one imagines that his strictures would have been even more severe.

Several further passages from the Scott Report on pp. 62 and 63 point to the conclusion, which was in my opinion sound, that the article produced from millspun yarn was not "true" or "real" or "genuine" Harris Tweed. Indeed a new trade term "Stornoway "Tweeds" had come into vogue to describe the inferior millspun material produced in Lewis, and there are indications in the evidence that such terms as "Lewis Tweeds" or even "Lewis Homespuns" were also beginning to be used as names for tweeds, partly or wholly composed of millspun yarn.

Apparently /

Apparently by late 1911 and early 1912 it was proving difficult to get rid of the inferior "Stornoway "Tweeds", a difficulty which was avoided in some cases, according to Professor Scott, "through a "web being sold as genuine Harris Tweed, which, of "course, it was not". This is very forthright language, with which, on the basis of the evidence led in the present case, I fully agree.
Professor Scott also expressed the opinion with regard to the tweed industry in Lewis that, apart from the question of commercial morality, the outlook at the end of 1911 was exceedingly bad and that bad dyeing and inferior work were positively inviting the competition of the power loom. The consideration of these matters in the Scott Report ends with the suggestion that the tweed produced in Lewis wholly or partly from mill-spun yarn should be marketed as Lewis tweed, and the chapter concludes with the following pungent comments:-

"It cannot be too strongly insisted that, if "tweed of this type were seriously attempted, it "would have to be sold on its merits. Indeed, "the masquerading of Lewis tweed as Harris tweed "has already gone on too long. In the second "place, for this new development to succeed, "instruction /

"instruction of the workers would be necessary,
"which could be combined with the teaching of those
"who were giving their attention to the making of
"real Harris tweed in Lewis. The solution of the
"problem of the Lewis tweed industry which has been
"suggested presents several advantages. It would
"substitute a fair and healthy competition, as
"between the new Lewis tweed and the Harris tweed
"made there, for that which previously existed
"between inferior 'Stornoway tweed' and real Harris
"tweed, and which involved dishonesty sooner or
"later. If nothing else were gained, the improve-
"ment in commercial morality would be an end of
"some value. Healthy competition would compel the
"workers to use their best efforts to bring out
"the respective merits of hand-spun and machine-
"spun yarns."

The foregoing comments were reinforced by the author's further consideration, particularly at pp.132 seq. of the Report, of the events which had taken place between the Spring of 1912 and that of 1913.

Thus, at the outbreak of the Great War of 1914-1918 the reputation of the name "Harris Tweed" remained, in my opinion, a reputation attached to the hand-made tweed produced in its entirety in the Outer Hebrides, that is tweed which at least conformed to /

to the 1909 definition. That definition, in my opinion, probably assumed that the wool would be part of the Hebridean clip. In any event I do not think it was ever contemplated that non-Scottish wool could be used as raw material for genuine Harris Tweed. Carding was not mentioned in the 1909 definition, and machine-carding as an ancillary process does not seem to have been frowned on to any great extent. On the whole, despite the assaults made by those who with a greater or less degree of dishonesty endeavoured to pass off as Harris Tweed a wholly or partly mill-spun product, the genuine Harris Tweed was still in my opinion holding its own when the great exodus of the male population of the Outer Hebrides, and in particular Lewis, took place in August 1914.

There is little evidence as to what happened with regard to tweed production in the Outer Hebrides during the years of the Great War. It appears, however, that hand-spinning largely died out in Lewis, possibly because some of the looms had to be operated by women and girls. The controversies were dormant, and possibly the H.T.A. became less of a force. The members of the Committee of Management were far separated and were growing older. One can really only form a judgment of what was occurring from a consideration of the pre-1914 evidence, coupled with the evidence /

evidence of what followed the Armistice of November 1918. In the meantime a new figure had appeared on the scene, namely Lord Leverhulme, who was full of ideas as to how the Islands might be organised, but who was, it seems, unable to attract for long the support or enthusiasm of their inhabitants. Lord Leverhulme purchased the estate of Lewis in about 1917, and the estates of South Harris and North Harris during the following two years. He soon acquired an active interest in the production of tweed as well as in many other schemes and activities.

At the date of Lord Leverhulme's purchase of the estate of Lewis there were still two carding and spinning mills in Stornoway, namely the Lewis Street Mill of Kenneth MacKenzies and the Patent Slip Mill, the latter of which had been taken over towards the end of the 1914/18 War by the firm of S. A. Newall & Sons, the predecessors of the fifth-named defenders. The Newall family had originally been farmers who came from Yorkshire to a farm in Lewis called Aignish. Later they began to carry on a butcher's business in Stornoway, and, after their farm was raided, they concentrated on this business. As a sideline to the butcher's business they had started dealing in tweed, no doubt, as so often happened in those days in the case of shopkeepers in various /

various parts of the islands, largely on a barter basis with customers who lacked the means to conduct business in cash. At a very early stage Lord Leverhulme endeavoured to purchase both of the spinning mills. He was unable to come to terms with Newalls, but in 1918 he was successful in purchasing Kenneth MacKenzies. The MacKenzie family apparently retained an interest in the company called Kenneth MacKenzie Limited, which with Lord Leverhulme as the major shareholder took over the running of the business. That Company is the third-named defender in the present action.

When Lord Leverhulme purchased the North Harris Estate he acquired with it the North Harris Carding Mill. In 1920 or 1921, or possibly 1922, he extended that mill and installed spinning plant. The company which ran the mill was originally named the Lewis and Harris Handwoven Tweed Company Limited, which I understand later became the Harris Handwoven Tweed Company Limited, the sixth-named defenders. This mill was intended mainly to engage in commission spinning though it did produce yarn on the company's own account as well. It was also proposed, as will be seen, that the company should produce its own cloth. Later on, in 1922 or 1923, Lord Leverhulme started another carding and spinning mill at Geocrab. This seems /

seems to have been largely a philanthropic gesture to serve certain outlying districts in Harris by carrying out machine carding or commission spinning, and the mill was run by the company which operated the North Harris Mill at Tarbert. The number of spinning mills on the islands was in this way raised to four by about 1922 or 1923.

In pre-war days both Kenneth MacKenzies and the Patent Slip Mill had probably been engaged mainly in machine carding or spinning wool on commission for crofters or other producers, though they also engaged in the production of yarn, probably with the main object of keeping plant employed, and in addition carried out some merchanting of tweeds produced by crofters. The evidence shows that in the post-war period they were turning to the production of a substantial amount of tweed on their own account, although they continued to spin on commission and no doubt also to deal in tweed purchased from producers, some of which would still be the genuine handmade article produced in its entirety in the Islands. The production by the mills of their own tweed necessarily involved the purchase of suitable wool from mainland sources if supplies could not be obtained in the Islands. It also involved dyeing on /

on a larger scale than had so far been attempted, and it does not appear that there were as yet any large or modern dyeing plants in Stornoway or anywhere else in the Outer Hebrides. Moreover, instead of the mills carrying out carding and spinning on commission for crofters or producers of tweed, the tendency now was for the mills to put out yarn for weaving on commission by the crofters. This was no new thing in the experience, at any rate, of some of the weavers since weaving on commission of yarn spun or supplied by others had been not uncommon for a good many years. In some communities, particularly where merchants had been active in the production or marketing of tweed, commission weaving was no doubt already fairly well organised locally. It was indeed one of the methods by which mainland millspun yarn could be introduced by the merchant or producer without anyone being much the wiser. It seems likely also that the eyes of the Stornoway mills and some other large producers were at this time turning to the mainland in the search for greater and more efficient finishing facilities, though this was probably a somewhat later development than the other uses made of mainland processes. The foregoing tendencies were no doubt accelerated by the post-war boom period in tweed production, which was not long in producing the sort of consequences /

consequences which are often associated with such periods and the urge for quick profits on the part of some people which seems to be inseparable from them.

There is evidence that in the early post-war period Kenneth Mackenzies had gone so far as to introduce some looms into their Mill, an entirely new departure which seems originally to have been connected to some extent with the idea of training girls from the rural areas in weaving. The evidence suggests that Lord Leverhulme was inclined to favour complete mill production of tweed under a brand name, and certainly the commercial advantages to the mills of concentrating the weavers in the mill or in premises adjacent thereto are obvious enough. Lord Leverhulme encouraged the introduction of Hattersley domestic looms to the Islands, and a number of these were installed at Kenneth MacKenzies' Mill. This example was later followed, though not on a large scale, by Newalls and also by some of the independent producers, including for example, the firm of Malcolm Macleod of 20 Balallan, who introduced a few looms into his premises about 1929. "Independent producer" is the name which came to be used for producers in the Islands who, unlike the converters, had no spinning capacity /

capacity of their own and who had, therefore, to obtain their yarn from either hand or machine spinners. It is clear, however, that those who worked on looms installed at the producer's premises formed a very small part of the total weaving force, the vast majority of whom worked at their own looms in the close vicinity of the cottages or houses in which they lived and in some cases actually inside these cottages or houses. There is evidence that, in some instances where weavers worked in the mills or in other producers' premises, those so engaged were either under training or acting as pattern-weavers. The tendency to instal looms in the premises of the mills or other producers was extremely short-lived. The practice never took hold, and was brought to an end by the events of 1934. I am satisfied from the evidence that the "cottage" or "home" or "croft" aspect of the production of genuine Harris Tweed has never been materially departed from in relation to the handweaving process.

The Leverhulme period also saw the inception or extension of certain tendencies in relation to other processes, and in particular dyeing, spinning and finishing, which require careful consideration. It is /

is probable that a certain amount of dyeing on behalf of Island producers had already taken place on the mainland in pre-1914 days, for example in the case of coloured yarn supplied from some of the old Highland mills. Much of the wool which was spun on commission at that time on the mainland had, however, already been dyed by the crofters or producers in the Islands. Moreover, there is evidence, as I have already indicated, that in Lochs at any rate, yarn imported from such sources as Macnaughtons of Pitlochry, Laidlaws of Keith, Holm Mills of Inverness, Hunter of Brora, Black of Wick and Huntly Woollen Mills, was sent to the Islands in white hanks and dyed locally in the yarn. It cannot, accordingly, be assumed that the mainland millspun yarn imported in to the Islands was invariably or even substantially dyed on the mainland. In my opinion the probability is that the Stornoway mills were the first to carry out dyeing on the mainland to any substantial extent, and their example may have been followed by some others of the larger Island producers. It was perhaps not unnatural that the Stornoway mills should succumb to this temptation. They had already turned to the mainland for additional supplies of wool, which had been blended and scoured for them as a service by the wool /

wool merchants. No doubt it was an advantage to the Stornoway mills to make use of the skills of dyers, for example in the Borders, who had much longer experience in modern dyeing processes than they themselves could possibly have had. Demands for new colours and shades provided an additional temptation to those who produced from millspun yarn to seek mainland assistance in dyeing. There is evidence that even before 1914 Kenneth Mackenzies had had some dyeing carried out by Kemp Blair & Co., Dyers and Finishers of Galashiels, and this appears to have continued on an increasing scale after the 1914-18 War. Later Kemp Blair & Co. also started dyeing for Newalls, and there is evidence that dyeing was carried out at various times for producers in the Outer Hebrides not only by Kemp Blair & Co. but also by other mainland firms, such as Turnbulls of Hawick, some of the Highland mills and at least one English mill, namely Lumbs of Elland. Kenneth Mackenzies and Newalls still continued, however, to buy as much dyed wool as they could from the crofters and they also sent out for dyeing by the crofters mainland wool which had been shipped to them at Stornoway.

There is also little doubt that during the Leverhulme period the use of millspun yarn substantially /

substantially increased, particularly in Lewis, and that a significant proportion of the mill spun yarn used had been spun in mills on the Scottish mainland. Lumbs of Elland were also probably making a contribution. The use of substantial quantities of mainland millspun yarn during this period and subsequently up to 1934 is amply vouched by the proof, and I do not think it is necessary to refer to the extremely voluminous evidence on the matter in any detail as the point was really conceded by counsel for the defenders. It is not easy to say how large a proportion of the millspun yarn came, during this period, from sources other than spinners on the Islands and most of the evidence on the matter was surprisingly speculative. Probably the proportion of mainland millspun yarn to the whole at some times during the 1920s may have amounted to as much as 50 per cent, but I doubt if it ever amounted to much more.

It is also probable, in my opinion, that some finishing was already being done on the mainland during the Leverhulme period. It is, however, by no means clear at what stage mainland finishing began to take place on a substantial scale. Although there were at this time no finishing plants on the Islands, the weight of the evidence suggests that the larger producers /

producers, and in particular the mills, did not use mainland finishing on a large scale until the mid-1920s, and many of the small producers, particularly outside the Stornoway area, could probably still rely on hand-finishing for some years after that. Paisley finishers, such as Seedhills, Fultons and McHardies, from the mid-1920s at times did a good deal of finishing of tweeds sent to them by producers in the Outer Hebrides and Seedhills had started doing some finishing for Kenneth Mackenzies during the early 1920s. Newalls apparently came to Seedhills rather later, though there is evidence of some finishing having been done for Newalls by Huntly Woollen Mills beginning as early as November 1920 and continuing for a year or two thereafter. Thus some producers had begun to resort to mainland finishing during the Leverhulme period, although it was some time later that the real outburst of mainland finishing took place.

It was contended by the pursuers that all, or a large proportion, of the tweed produced by the methods above described reached the eventual purchaser under the name "Harris Tweed". Certainly there is a good deal of evidence to support this proposition, though I am not convinced that the practice of selling the machine-processed article, including /

including the partly mainland-processed article, under the name "Harris Tweed" to the eventual purchaser was anything like as common then as it became in the period from 1925 to 1934. What is important, however, is to discover what the public understood they were being supplied with during this period, when they asked to be supplied or were supplied with cloth called "Harris Tweed". Before I deal with this, however, I find it necessary to make certain general comments which apply not only to this particular period, but to other periods as well. In the vast mass of evidence led on both sides in the present case there is hardly any part of the field of production that is not covered in meticulous detail by a large number and variety of witnesses. It is very easy to point to evidence of this character and to assert that it must have been well known that wools other than Hebridean or even Scottish wools, and mill and machine processes, including processes carried out on the mainland and even in England, were involved in the production of cloth and probably a large amount of cloth which reached the final purchasers under the name "Harris Tweed". No doubt these facts were known to some people in the Islands and elsewhere who were engaged or had an interest in the production processes. It is another thing to say, however, that these facts were /

known to people outside the production circle, far less to the public at large. The original market for Harris Tweed and what still remains one of the main markets, namely London, was far from the Outer Hebrides and, even in the 1920s and 1930s, outside visitors to the Outer Hebrides must have been comparatively few. One wonders how many of these visitors were aware even of the existence of the Stornoway and Tarbert Mills, much less the activities in which they were engaged. Partly for the foregoing reasons no doubt, and partly because there was a great deal of deliberate concealment as well as of active misdescription, one finds that much of the evidence of those who were interested directly or indirectly in the marketing of the cloth is singularly unhelpful and sometimes singularly ill-informed. This applies not only to many of the trade witnesses, but also to some of those who might be called professional or expert witnesses. As to what the public understood during the various periods and as to the knowledge and belief of the final purchaser on which the reputation of a commodity and the goodwill of those who produce it must eventually depend, the field is quite remarkably bare. But where such evidence does emerge, sometimes in a most illuminating way and from quite unexpected sources, it demonstrates in my opinion that /

that the reputation of Harris Tweed with the public, - during the 1920s in particular, was based on the reputation of an article very different from and considerably more rare than the imitation, for it was no less, which more often than not was being supplied to meet the demand for the genuine article. I shall deal with some of this evidence when considering the period immediately before the great controversy, which had developed in the late 1920s and early 1930s, came out into the open, as it did about 1932. In the meantime I will merely state my conclusion that the deceptions, to which the Scott Report had drawn attention in 1913, still continued, probably on an even more extensive scale. That Professor Scott did recognise these deceptions for what they were is, I think, due partly to the fact that he studied the final market just as closely as he did the methods of production and intermediate marketing. I have found Mr. Moisley's evidence instructive for the same reason, since he did not lose sight of the attitude, belief and understanding of members of the purchasing public and the information which they might be expected to receive from those who directly supplied them. Reports such as the Report of the Lewis Association (No. 186 of Process) and the Report on the Crofter Woollen ---------- Industry /

Industry (No. 187 of Process), which perhaps naturally concentrated on the production side and on information obtained largely from that quarter, are in my opinion less helpful in solving the problems which arise in the present case. Indeed these reports express some conclusions which are in my opinion surprising in the light of the comprehensive evidence to which I have listened in the present case.

It is I think instructive when approaching some of the problems which arise in a case like the present to search for clues amongst the contemporary actings and statements of interested parties. In the early 1920s Kenneth Mackenzies and Newalls were on the way to becoming, if they had not already become, the single largest/producers of tweed in the Islands and it is the pursuers' contention that it was these firms, amongst others, who built up the reputation of Harris Tweed by the use of mainland yarn. In my opinion the evidence points in a somewhat different direction and my conclusion is that the reputation of Harris Tweed had been made before either Kenneth Mackenzies or Newalls spun a single yarn and that in the 1920s that reputation still survived. The use of mainland yarn and of other mainland processes was, in my opinion, like the use of millspun yarn, not adopted /

adopted either with the object or the result of creating a reputation for the imitation product on its own merits, but with the object and result of meeting with the imitation a demand created by the reputation of the genuine article. One way, and perhaps the best way, to acquire a reputation for a product is to produce it under a particular name, market it under that name and ensure that it reaches the eventual purchaser under that name, and in such a way that the eventual purchaser may understand what article he is being supplied with. Yet when one looks at what the producers of the imitation article said and did in the early 1920s one finds statements and actions which are curiously ambivalent. Moreover, so far as the evidence in the present case shows, those producers who, during the Leverhulme period and later, made use of mill and mainland processes were singularly coy about disclosing these matters to the public. Indeed I was told that the vast research of the parties had unearthed only one published document, between the date of the Scott Report and the outbreak of the public controversy in about 1932, which disclosed that millspun yarn was still being used in the production of what are called in one part of the document "Harris Tweeds" and in others /

others "Lewis and Harris Tweeds" and "Harris and "Lewis Tweeds". The document, of which a copy may be found in No. 445 of Process pp. 51 seq., is a report in the Overseas Daily Mail dated 29th November 1919 and has the appearance of being based to some extent on what would now be called a "hand-out" by Kenneth Mackenzie Ltd, who were then controlled by Lord Leverhulme. Island millspun yarn is mentioned but not mainland millspun yarn, though powerloomed imitations are deprecated. Quite apart from the use of the ambiguous terms "Lewis and Harris Tweeds" and "Harris and Lewis Tweeds" the article speaks with two voices, since in the first paragraph under the heading "World Wide Reputation" it refers to what must in my opinion be what I have called the genuine handmade article. The pre-war output figures alone are sufficient to demonstrate this quite apart from the reference to hand-spinners. It is interesting to note that Kenneth Mackenzie Ltd., who are said to have done some advertising during the 1920s, employed in their advertisements and in their marketing the term "Harris and Lewis Tweed" as well as "Harris "Tweed", and that according to Col. Macarthur and Mr. James Macdonald they were describing and selling their millspun tweeds as "Lewis Tweed" and "Lewis and Harris "Tweed". /

"Tweed". I cannot understand the purpose of using such terms as "Lewis Tweed" and "Lewis and Harris "Tweed" or "Harris and Lewis Tweed", the latter of which is described by one witness as "a composite "term", unless it was either to distinguish the mill-spun and mill processed article from the genuine article, or alternatively to create confusion and make it more difficult to prove instances of misdescription or passing off in the event of the article reaching the ultimate purchaser far away from the Outer Hebrides under the name "Harris Tweed".

Newalls also began advertising at least as early as 1920 and as is shown by an examination of advertisements in No. 336 of Process, they used over a period of years the formula "Real Harris, Lewis and "Shetland Homespuns" and "Real Harris, Lewis, Shetland "and Donegal Homespuns". According to Mr. R. M. McLeod (at p. 4077 of the evidence) Newalls also advertised tweeds under the names "Lewis and Harris "Homespun, Harris Tweeds, Shetlands and Donegals". Here again one finds the terms "Harris and Lewis" and "Lewis and Harris" used, and there were in the evidence instances of other producers having used these phrases in connection with the marketing of their tweeds. According to Mr. Lawrence (at p.2898 of the evidence) the late Mr. David Tolmie, who during some /

some periods imported mainland millspun yarn, sold tweed made from such yarn as "Lewis Tweed" and on his notepaper advertised "Lewis and Harris Tweed". Newalls' Shetland and Donegal "type" tweeds were made in Lewis, and one wonders what was the method of production of the cloth described as "Lewis Homespuns" particularly as patterns seem to have been available on application. If large converters and producers such as Kenneth Mackenzies and Newalls at that time engaged in procedures such as I have described, it is not surprising that some smaller producers followed suit and that imports of millspun yarn from the mainland increased, finding their way no doubt into a great deal of cloth which reached the ultimate purchaser at any rate under the name "Harris Tweed", whatever ambiguous terms may have been used earlier in the marketing sequence. Some producers of the millspun article adopted methods of marketing which were less open to criticism. For example the Lewis and Harris Handwoven Tweed Company Limited, which not only carried out machine-carding and commission spinning, but also proceeded to produce tweed made from mill-spun yarn, marketed some at any rate of its own product as "Macloom Tweed", an idea apparently of Lord Leverhulme's which may also have been put into effect at /

at Kenneth Mackenzies, though this is not clear from the evidence. To confer a brand name upon the mill-spun article was open to far less criticism than the sort of practices which had been adopted elsewhere, and I have come to think that it is very unfortunate from the point of view of commercial morality that this example was not followed more generally. Though even such a course might be open to abuse, I am of opinion that the method followed in marketing Macloom Tweed was a great deal more straightforward than methods adopted by some others of the producers in Lewis at that time and since. The method adopted with Macloom Tweed, if I have understood it correctly, seems to have been similar to that adopted in more recent times by Stephen Burns Limited, the seventh-named defenders, for their Hebridean Tweed, which was a tweed hand-woven in the Outer Hebrides from yarn not necessarily spun in the Islands or from wholly Scottish wools and not necessarily finished in the Islands, but which was marketed under its brand name on its own merits and not as Harris Tweed. I should, perhaps, note here in parenthesis that the averments of the pursuers in Article 2 of the Condescendence relating to the seventh-named defenders are not in my opinion proved. In this connection I thought Mr. B. M. Burns a witness of credit.

While /

While production of tweed boomed in the way and by the methods described, the producers of the genuine article, mainly in Harris itself, were passing through a very difficult period. They could not compete in price with the variety of imitations now on the market. As is shown by the figures in No. 447 of Process p. 115 comparatively small quantities of tweed were being orb-stamped during this period, and the H.T.A. was at this time weak and it seems rather inactive, which was no doubt in large measure due to lack of financial resources. In 1924 Lord Leverhulme gave up his development schemes in Lewis and about the same time the whole shareholding in Kenneth Mackenzie Limited was bought back by the Mackenzie family. After Lord Leverhulme's death in 1925 the Lewis and Harris Handwoven Tweed Company Limited was taken over by a Mr. Robertson, who had been factor for Lord Leverhulme in Harris, and the name of the Company was at some time thereafter changed to the Harris Handwoven Tweed Company Limited. I cannot find that by the end of the Leverhulme period tweed made from millspun yarn had obtained any reputation on its own merits, still less a reputation as genuine Harris Tweed. I am prepared to accept that large quantities of tweed made from millspun yarn did probably reach the ultimate purchaser under the name "Harris /

"Harris Tweed", but it did so in my opinion by stealth and deception and without any disclosure to the purchasing public of the fact that it was not the same article as the genuine handmade article wholly produced in the Outer Hebrides, the demand for which still in my opinion made the sale of the imitation possible. That this was appreciated by the large producers is I think plain from the fact that although they must have been well aware, if it was the fact, that large quantities of their wholly or partly mill-spun product were reaching the public under the name "Harris Tweed", yet they shrank from themselves clearly advertising or marketing it under that name. This is a typical passing off situation where the original producer creates the opportunity for eventual sale of the imitation under the name of the genuine article, but avoids committing himself too deeply in that enterprise. Having regard to the ease of imitation in this particular case and the weakness of those who were still producing and marketing the genuine article and temporarily of the H.T.A., it is not surprising that the imitation article began to be passed off as Harris Tweed in the final market at a large and increasing rate with some of the results that had been foreseen in the Scott Report. What I have said with regard to the article produced /

produced from millspun yarn applies with redoubled force to the article produced wholly or partly from mainland millspun yarn which seems, even as early as this, often to have contained a proportion, and sometimes a very large proportion, of non-Scottish wool. The whole weight of the evidence shows that the introduction of this imported material into tweed hand-woven in the Outer Hebrides was not disclosed to or known by the purchasing public and as will be seen, for example, from evidence relating to an even later date than 1925, sometimes even the producers themselves were unaware of the admixture of non-Scottish wools. It was not until almost the final stages of the conflict that led up to the present litigation that this particular matter was brought out into the open. My conclusion accordingly is that up to 1925 the selling of the millspun article and particularly the mainland millspun article remained a deception open to all the criticisms that were levelled at it in the Scott Report, though no doubt a deception on a larger scale. The evidence also demonstrates, in my opinion, that during the period 1918 to 1925 the large producers at any rate were considerably more cautious than some Lewis producers had been in the period 1900 to 1914, and their /

their caution, particularly in advertising and marketing the millspun article under a variety of names other than Harris Tweed, makes it all the more difficult to say that the millspun article was acquiring a legitimate reputation on its own merits as Harris Tweed in any, and in particular in the final, market.

The next period between 1925 and 1934 was one of crisis for the tweed industry in the Outer Hebrides and it was also a period of which those who were marketing much cloth which was sold in the final market under the name "Harris Tweed" have small reason to be proud. I except, of course, those who were still producing and marketing the handmade article which was entirely produced in the Outer Hebrides and also those, and there were some, who made it clear to a greater or less degree that the article being produced by them was something different from genuine Harris Tweed or was an imitation of that material. For part of the period after 1925 the post-war boom continued to bring in its wake further evil consequences, which contributed in due course to a recession in sales of hand-woven tweed from the Islands causing widespread alarm, particularly among the more far-seeing members of the population of the Outer Hebrides. The economic dependence /

dependence of a substantial part of the population of Harris and Lewis, and particularly the latter, on tweed production was obviously considerable, and the people of Harris and Lewis had for long regarded the name "Harris Tweed" as their birthright - a phrase which occurs many times in the evidence and is not without some significance. The people of Harris in particular were already protesting that their birthright was being filched away and there is no doubt that attempts were being made to do this in an increasing degree. Lord Leverhulme had at least wished to see as many as possible of the processes carried out in the Islands, so far at any rate as was consistent with mass production. With his departure, however even worse abuses than those which I have already described developed. Millspun yarn continued to be imported, and at least one additional mainland spinner entered the field, namely, Smiths of Peterhead. Mr. Lawrence, who is a director of Thomas Smith and Company (Peterhead) Limited and also chairman and managing director of Thomas Smith and Company (Stornoway) Limited and who impressed me as a witness on whose evidence reliance could be placed, made the /

the following significant observation (at p. 2894 of the evidence) about the yarn supplied to the Outer Hebrides at that time by Smiths of Peterhead:-

"Q. What governed your choice of blend for Harris "yarn? A. I think what would give us strength, "and an attempt, looking back on it perhaps not too "honestly, to make the cloth or the yarn as like "the original Harris yarn as possible."

One finds both in this and in the subsequent period mainland yarn described by a number of the suppliers as Harris "type" yarn. In such a context the word "type" tends to have a sinister connotation, and one may compare the meaning which attaches to the word in other trades, e.g. the wine trade. Smiths of Peterhead supplied mainland yarn amongst others to Kenneth Macleod, Shawbost, the predecessor of the fourth-named defender who developed a large tweed business from a shop in Shawbost, to Malcolm Macleod, Balallan, to whom reference has already been made, and to James MacDonald, Stornoway, a name of which more will be heard. Mr. James MacDonald was the agent or representative in Stornoway of a wholesale provision business run by Todds of Leith. For a time Mr. James MacDonald merchanted and later produced some tweed on his own account as a sideline. In 1930 together/

together with his employers he founded the business of James MacDonald & Company, Limited, now the second-named defenders, who fairly quickly became substantial independent producers of tweed. For the next 30 odd years Mr. James MacDonald moves through the story rather like a chameleon, and it is no exaggeration to say that at one time or another he has been on almost every possible side in the controversies of that period. He must plainly have been a most astute businessman and his evidence, which was given on commission, is an object lesson to those not familiar with a type of commercial approach which no doubt is to be found amongst Hebrideans as well as elsewhere. At the same time it is fair to say that his evidence includes occasional blinding and wholly delightful flashes of candour.

In 1927, for the first time, a mainland spinner began production of tweed handwoven in the Outer Hebrides in the capacity of a converter, in the sense that millspun yarn produced by the spinner at his mill on the mainland was handwoven for the spinner in the Islands and the tweed thereafter finished by or on behalf of the spinner. The firm was A. & J. Macnaughton of Pitlochry, whose business was taken over by the second-named pursuer in 1957. So far as appears/

appears from the evidence the spinning and finishing were carried out at the firm's premises at Pitlochry. The handweaving was done in a shed or depot just up from the pier at Tarbert, Harris, where Macnaughtons of Pitlochry had installed about four looms, namely two wooden looms and two, or possibly more, Hattersley looms. As is shown by the Weaving Record (No. 290 of Process) the production of greasy tweed at the depot was on a small scale and it came to an end, significantly in my opinion, in 1934 when the looms were sold and the depot closed. This brief incursion by Macnaughtons of Pitlochry into the actual production of tweed, which was handwoven in the Outer Hebrides and which I am prepared to accept reached the market under the name "Harris Tweed" has all the appearance of a subterfuge. So far as I can see the only sensible object of the modus operandi described must have been to obtain by that method the selling advantages attaching to the use, legitimate or illegitimate, of the name "Harris Tweed". Otherwise one cannot imagine any mainland spinner shipping his yarn all the way from Pitlochry to Tarbert, taking it into a shed at the end of the pier there, having it woven in the shed and then immediately shipping it in the greasy state all the way back/

back to Pitlochry for finishing. This operation included a number of the vices to which some producers in Lewis, particularly the Stornoway mills, were being tempted, and it contained the additional vice, in particular, that the whole operation was being controlled by a producer not in the Outer Hebrides but on the mainland, with the result that by far the greater share of the value of processing together with all the profits went into mainland pockets. It is difficult to imagine that the philanthropic buyer of Harris Tweed would conceive that the price paid by him would be disposed of in such a way. The yarn supplied by Macnaughtons of Pitlochry for their own production was millspun from wool which the evidence shows was probably not wholly Scottish. The handweaving was done for them under semi-factory conditions and not even a modicum of finishing was carried out in the Islands. There is no evidence that the ultimate purchaser was given any information about the extent to which the production processes had been carried out elsewhere than in the Outer Hebrides or even that wools other than Island wool, or for that matter Scottish wool, had been used. It is not surprising and, as I have said, it is probably no coincidence that in 1934 Macnaughtons of Pitlochry closed their depot/

depot in Harris and brought to an end their Tarbert operation of which, incidentally, no specific mention was made in their letter to the Registrar of Trade Marks dated 4th October, 1933 (No. 445 of Process, p. 120). Macnaughtons of Pitlochry thereafter continued for some years to supply mainland millspun yarn to customers in the Outer Hebrides, as they had probably done to some extent both before and during the period 1927-1934, but as will be seen there was a fairly lengthy interval of years before they once more attempted to have their own yarn handwoven in the Islands and to sell their product under the name "Harris Tweed".

In 1929 Mr. C. M. Orrock, whose father had been Lord Leverhulme's factor in Lewis, started a firm in Stornoway to which he gave the name Maclennan & Maclennan. This firm had from an early date a registered trade mark "CEEMO" and at different times the firm produced at least two different types of cloth, both handwoven. One of these cloths contained large percentages of camel hair and lambswool in the yarn and is said to have been sold under the name "Camlan". The other was a tweed made from millspun yarn which was sold by Maclennan & Maclennan sometimes under the name "Harris Tweed", usually with the prefix "CEEMO" and/

and sometimes apparently under the name "CEEMO HOMESPUNS". A label supplied by Maclennan & Maclennan up to about 1957 for use with such cloth contained the word "CEEMO" in large capitals and in one corner the legend "Guaranteed Crofter Handwoven Harris Tweed" (No. 298 of Process, Label No. 9). The rest of the picture appears to be a croft and includes animals, presumably representing Island sheep. Mr. Orrock seems to have concentrated on producing a softer tweed suitable for ladies wear and, perhaps partly for this reason, his firm imported in the early years and also later a good deal of English millspun yarn, particularly from Lumbs of Elland, though Scottish mainland-spun yarn was used in greater quantities, Laidlaws of Keith and Hunters of Brora being in this case the main Scottish suppliers. Some supplies of Island millspun yarn were taken, but not a great deal. In the early years all the finishing was carried out on the mainland, the chief finishers then used being McHardies of Paisley. A summary of the yarn purchased and payments for finishing made by Maclennan & Maclennan from 1929 onwards is contained in No. 248 of Process. According to one witness there was a joke made in the Gaelic with regard to the tweed produced by Maclennan & Maclennan, which may be rendered in semi-translation:

"This/

"This is not Clo Hearach, but Clo Orrock". In my opinion this very typical Celtic pun bore out the maxim that the truth is often spoken in jest.

In about 1930 or 1931 Smiths of Peterhead, who had, as I have said previously, been supplying yarn to customers in the Outer Hebrides, moved into the production on their own account of tweed handwoven in the Outer Hebrides. They were the second mainland spinner to attempt converting, but the technique which they adopted differed from that of Macnaughtons of Pitlochry. What they did was first to spin the yarn, which incidentally contained a substantial proportion of non-Scottish wool, at their mill at Peterhead. They shipped the yarn to Stornoway and went through the motions of selling the yarn to merchants or weavers in the Outer Hebrides. They next bought back the greasy tweed which had been handwoven from that yarn, and shipped it in the greasy state to the mainland. They then finished the tweed in their mill at Peterhead, and the product was sold under the name "Harris Tweed". Mr. Lawrence in his evidence (at p. 2900) described the <u>modus operandi</u> thus:

"We sold yarn and bought back raw cloth, and we "thought, or we tried to deceive ourselves into "thinking/

"thinking that we were doing something a little
"more correct than merely using the facilities
"that were on the Island to make our own cloth.
"We sold yarn and bought back raw cloth."

The witness contrasted this method with that adopted by Macnaughtons of Pitlochry and later added (at p.2901):

"Well, that is why I thought I made clear we thought
"by doing that we might put a different facade on
"to the thing".

The production by Smiths of Peterhead had probably by 1934 reached some 50,000 lineal yards of tweed per year, and it is interesting to observe that, although the people on the production side of the business were prepared to adopt the methods described in order to meet the requirements of the bunch trade for "repeats", those employees of the business who were responsible for sales felt some qualms about what was being done and, according to Mr. Lawrence, were vocal in expressing their misgivings. One reason at least for this feeling of uneasiness is of some significance. Smiths of Peterhead had an associated company, Alexanders Kirkburn Mills Limited, which amongst other functions carried out marketing. For a long time Alexanders had purchased individual pieces of tweed/

tweed from the crofters and had distributed them throughout the trade. This was thought by Smiths of Peterhead and by Alexanders to be genuine Harris Tweed and it was felt that the tweed produced by Smiths of Peterhead themselves under the new scheme was not the same thing as Alexanders had been selling as Harris Tweed up to that time. My impression is that by this time a good deal of confusion was beginning to develop in many quarters as to what article might legitimately be marketed as Harris Tweed and that outsiders were becoming not only even less scrupulous but also less cautious about taking advantage of the selling power of the name. The expression "Harris Tweed" may even have been on the way to becoming a purely generic term, though the misgivings expressed by those on the sales side of Smiths of Peterhead tend in my opinion to show that the ultimate purchaser was still looking for the genuine handmade article wholly produced in the Outer Hebrides and not a millspun and mill finished imitation produced amongst others by a mainland converter. At the very lowest I am satisfied that the purchasing public expected to receive an article, all the processes in the manufacture of which, including hand-weaving, had been carried out in the Islands.

The/

The last mainland firm to enter the production of tweed handwoven in the Outer Hebrides before 1934 was A. & J. Macnab Limited of Slateford, who had no spinning capacity and had previously purchased tweed from Island sources. In about 1932 or 1933 the Company started sending yarn, which was manufactured on their behalf by Patons & Baldwins at Alloa and despatched by them to Stornoway, to be handwoven in the Islands on commission. The wool used for the yarn was probably not wholly Scottish and much, if not all, of the finishing was done on the mainland, some at A. & J. Macnab's own premises at Slateford and some at Seedhills in Paisley. Although the other mainland firms who had entered the production of tweed at this stage are not shown to have advertised their wares, an enlightening advertisement by A. & J. Macnab Limited emerged during the crossexamination of Mr. Young. This advertisement consisted of a booklet entitled "Homespuns of Scotland", part of which was reprinted in the "Outfitter" magazine for 26th August 1933. Copies of the relative pages from the "Outfitter" appear at pp. 53 and 54 of No. 336 of Process. I am prepared to accept that A. & J. Macnab Limited were probably in 1933 supplying to the trade small quantities of the genuine handmade article wholly/

wholly produced in the Outer Hebrides, but by far the greater proportion of their supplies to the trade at that time probably contained yarn millspun on the mainland or in the Islands and was also probably finished on the mainland. Yet the advertisement is related entirely to the handmade article wholly produced in the Outer Hebrides. This in my opinion is a typical example of the manner in which, even as late as 1933, the demand for the genuine article was being met by an imitation and in which the selling power of the name "Harris Tweed" was being abused. It is significant also that A. & J. Macnab Limited, like a good many others, used in the course of their marketing the ambiguous description "Harris and Lewis Tweeds" not only as the selling name of the article, but also on their labels and in their advertisements (see e.g. No. 336 of Process pp. 43 and 44). No doubt much of this tweed also may have reached the ultimate purchaser under the name "Harris Tweed", though this is not clearly established.

While the foregoing developments were taking place the Stornoway mills were continuing to increase their production of yarn and also of finished tweed. Additions were made to spindle capacity and a considerably/

considerably increased proportion of the tweed hand-woven on commission for the mills in the Outer Hebrides began to be sent to the mainland for finishing. The reason for this increase in mainland finishing, to which the independent producers were also resorting to a greater extent than before, was the increasing demand by the bunch trade for "repeats" and for a uniform finish. A number of the large multiples such as Montague Burton began to come to the Islands for supplies of tweed during this period. Nevertheless, even in Lewis, a substantial quantity of hand-finishing was still being carried out. When tweeds were finished on the mainland during this period I am not satisfied that any disclosure of that fact was made to the immediate purchaser, still less to the members of the public to whom the ultimate sales were made. A letter from Seedhills of Paisley to Newalls dated 8th November 1932 (No. 299 of Process p. 45) suggests a policy of non-disclosure, if not of active concealment, and I was not wholly satisfied by the explanation of this letter which was proferred by Mr. Ross. In the early 1930's some of the finishers, including Seedhills of Paisley, and also apparently some producers of cloth, which no doubt reached the ultimate purchaser under the name "Harris Tweed", even went so far as to spray the cloth with a scent which was referred to as "The /

"The Harris Tweed Aroma" or "Perfume". The object of this spraying process was to give the cloth the smell which was associated by the public with the genuine hand-made article. This smell in the case of the genuine article was probably derived from the use of vegetable dye in the process of hand dyeing and the spraying on of the imitation scent, which was a chemical compound, was sometimes called "crotal "spraying" or "impregnating with Harris Odour". In my opinion the use of such methods was a clear recognition by those who were producing the imitation that the public were still expecting to receive the genuine hand-made article when they ordered Harris Tweed. Mr. Ross gave the following significant answer when he was being asked in cross-examination (at p. 2391) about crotal spraying:

"Q. Now was this something that was sprayed on the "tweed to give it the same smell as the old hand "spun, handwoven, hand finished look? A. It was "an imitation as near as we could possibly get. "We sprayed it on".

It is interesting to find in a letter from Newalls to Seedhills of Paisley dated 14th October 1933 (No. 299 of Process p. 180), in which instructions were given to despatch, apparently to a customer in the United States of America, a number of pieces of tweed after impregnating them with Harris odour, a reproduction of a trade mark of Newalls bearing beneath it the legend 'Harris Tweed Homespun & "Handwoven /

"Handwoven By The Crofters in Harris & Lewis In Their "Own Cottages". This may go some distance towards explaining the advertisements by Newalls to which I have already referred in which the words "Real Harris, "Lewis, Shetland and Donegal Homespuns" were used.

During this period the business of James Macdonald was being considerably developed and it was incorporated as a limited company in about 1930. This business made use of millspun yarn said to have come mainly from Macnaughtons of Pitlochry, Holm Mills, Inverness, Huntly Woollen Mills and Smiths of Peterhead. To begin with James Macdonald had their tweeds finished by hand in the Islands, but later they used mainland finishers - at that time I think McHardies of Paisley. According to Mr. James Macdonald his firm did not trouble whether or not the wool was Scottish and he says that the product was all sold as Harris Tweed. One of the assertions of this witness is that "There was no question then as to "what was Harris Tweed, what was genuine Harris Tweed "or what was not. Up to 1934 it was a question if you "made the tweed that the buyer approved of, that was "all that mattered". This assertion is not borne out by the evidence. There was in fact a very real question then as to what was Harris Tweed, and as to what was genuine and what was not. No doubt other producers /

producers adopted the same robust attitude as Mr. James Macdonald though I find it impossible to credit that they or the buyers were insensible to the selling value of the name "Harris Tweed". In the early 1930s James Macdonald Limited decided to become converters. They started installing spinning machinery and finishing plant in 1933, and both these plants were ready for operation by 1934. As will be seen these developments were extremely well timed.

At the same time as the foregoing developments were going on in Stornoway and on the mainland some producers in the rural areas of the Outer Hebrides were beginning to follow suit though probably at a more leisurely pace. Mr. C. J. Macdonald, who impressed me as a careful and knowledgeable witness, gave in his evidence an illuminating picture of some of the things which were happening in Balallan during the late 1920s and early 1930s. Balallan was in the Parish of Lochs and was probably at that time, after Stornoway, one of the most advanced districts in the production of tweed in Lewis. Mr. Macdonald's recollection is that the buying in of millspun yarn in quantity from the mainland and Island mills by at least one producer in that area was connected with the appearance of a large multiple, namely Montague Burton, as a purchaser of tweed in about 1929. Mr. Macdonald /

Macdonald says that mainland finishing started for the same reason and was used when ten or more pieces were ordered.

The post-war boom appears to have reached its maximum in the Islands about 1928 or 1929 and there was a rather serious recession, particularly in price, in the early 1930s. By that time, as one would expect, imitation had once more spread beyond the Outer Hebrides and indeed beyond Scotland. There is evidence that powerloomed imitations were making their appearance in various markets, and I am satisfied that such imitations were being produced in a number of areas such as the Borders and England, Yorkshire in particular being mentioned, and also abroad in Japan and in the United States. By this time there was a good deal of confusion in the Outer Hebrides and in some trade circles as to what material might or might not legitimately be sold as Harris Tweed, and the less scrupulous took advantage of this to such an extent that, as I have indicated, if matters had been allowed to continue unchecked the expression "Harris Tweed" would have been in danger of becoming a purely generic term. An example of one of the things that was happening is illustrated by a newspaper article published in 1932 or 1933 of which a copy is contained in No. 335 of Process at p. 66. From this article it appears that Selfridge & Co. Ltd, the large store in London, had in good faith advertised /

advertised as "Harris Tweed" a power woven cloth and, when challenged, had discovered that 1,300 yards of cloth had been sold to them as "Genuine Harris hand-woven" with the word "Tweed" omitted, although they had in fact ordered Harris Tweed. This is typical of the sort of expedient which was in my opinion being adopted at that time in the first and intermediate markets, namely to use an ambiguous or misleading name or expression with the intention, and often with the result, that cloth which had not originally been described or marketed in terms as "Harris Tweed' reached the ultimate purchaser under that name. By such methods the purchaser, without knowing it, received an imitation instead of the genuine article. It is interesting to note that Selfridge & Co. Ltd. in their advertisement had said with regard to Harris Tweed - "This famous cloth needs "no introduction as it is so well known" - and that they considered it necessary that the fabric should conform to the 1909 definition. Selfridge & Co. Ltd. are reported as saying: "The fabric which we "bought as Harris Tweed was made upon the mainland, "woven by machinery, and in other ways did not "correspond to the definite description of the Board "of Trade. When the manufacturer was faced with these "facts he very blandly replied that unless we sold "these goods as Harris Tweed we would not sell any..."

It is possible to dredge up from the evidence in the present case a great variety of names some of which were undoubtedly used with the results described. To give some examples, these names range from such expressions as "Lewis Tweeds", "Stornoway Tweeds", "Lewis and Harris Tweeds", "Harris and Lewis Tweeds", "Real Harris and Lewis Homespuns", "Ceemo Homespuns" (which were not in fact home spun), "Aoo Harris "Tweeds", "Island Harris Tweeds", "Handwoven Tweeds "from the Islands of Lewis and Harris", "Genuine "Harris Hand-woven" (which was a power-loomed imitation) and "Llanharris Tweed" (which no doubt had some Welsh connection) to the more blatant "Harris Style "Tweeds" or "Harris type Tweeds" and the fairly honest "Real and Imitation Harris Tweeds" or "Imitation Harris makes".

By 1934, as a result of the developments which I have described, various types of cloth had at one time or another reached and were reaching the ultimate purchaser under the name "Harris Tweed". These included (1) tweed handspun, handwoven and hand finished in the Outer Hebrides, both stamped and unstamped; (2) the tweed which came to be called 50/50 tweed and which was often in my opinion disposed of as handspun tweed although in fact, often unknown to the purchaser only the weft was handspun; (3) Island-commissioned /

commissioned millspun tweed which was hand finished in the Islands; (4) Mainland-commissioned millspun tweed which was hand finished in the Islands; (5) tweed handwoven from both Island and mainland yarns and hand finished in the Islands; (6) tweed handwoven from both Island and mainland yarns and finished in a mill on the mainland; and (7) tweed powerloomed in the Borders, in Yorkshire and elsewhere. It is probable that a substantial portion, if not the greater part, of categories 1 to 3 were still being made from Island wool. It would be surprising if any of category 7 ever saw the Outer Hebrides. It is small wonder that Mr. Colledge, a very experienced witness, when referring to this period made the following observations: "It was getting to be an "awful ramp" and later "All sorts of rubbish came up". He even gave one example of a cloth sold under the name "Harris Tweed", which in fact contained 90% cotton. Nevertheless despite these developments I am satisfied that the public still retained the impression of Harris Tweed as an article wholly handmade and entirely produced in the Outer Hebrides, an impression which, in my opinion, the producers and the trade did nothing to dispel and indeed did much to preserve. So far as the evidence on this matter goes it suggests, in my opinion, that the picture and reputation of Harris Tweed in the public mind was still that of what I have called the genuine hand made article. /

article and certainly of an article wholly made in the Outer Hebrides. Dr. Fraser Darling in cross-examination (at p. 1462) agreed that up until about 1934 the average member of the public still thought of genuine Harris Tweed as the old original hand made product. Mr. G. D. Maclean, who was well aware of what was going on in the Islands at that time, gave the following evidence in cross-examination at p. 1665:-

"Q. Is it not the case that at least until 1934 "the public image of genuine Harris Tweed was the "original homespun handwoven article? A. That is "the case".

Mr. Moisley's impression, and I think it was a correct impression, was that the public thought that Harris Tweed was being solely produced in the Hebrides. Mr. Shaw Grant, an impressive witness on whose evidence I would be disposed to place a good deal of reliance described the position when he first became editor of the Stornoway Gazette in 1932 in the following way (at pp. 6333-6334 of the evidence):-

"Q. When you first became Editor of the Gazette in "1932 so far as you could make out was there a fair "proportion of tweed being produced by the crofters "themselves? A. A very considerable proportion of "tweed was being produced by the crofters them-"selves, as I understand it, and sold in individual "pieces/

"pieces either to the Mills or to small shopkeepers "or small merchants in town and country. Q. Had "you any idea as to the proportion of that type of "trade to the mill production? A. No precise idea "at all, but my general impression at that time is "that that was the bulk of the trade so far as it "hit the public eye. Q. Do you know of anyone "advertising or publishing the fact that tweed was "made from mill spun yarn? A. No. Q. Do you know "of anyone at that time who advertised that tweed "was being processed in any way on the mainland? "A. Who advertised - you mean? Q. Or let it be "known publicly? A. No. The trade at that time "was entirely represented to the public, or largely "represented to the public, as a complete crofter "product, and that was the prevailing impression "and there was a very strong impression that that "was the genuine background at that time. Q. When "you say a product of the crofters what exactly do "you mean? A. I mean that the general impression "in the public mind at that time was that the cloth "was entirely made in the Islands by the crofters "and that mills did not come into it at all. Mill "was rather a dirty word".

Mr. Shaw Grant also expressed the opinion in a passage of his evidence, to which I will be referring in another connection later, that at that time (i.e. in /

in 1934) all Harris Tweed was being sold pretty well on the reputation of the entire hand product. It was submitted by the pursuers that such ignorance on the part of the public could not be credited, bearing in mind what a very small proportion of the cloth that reached the eventual purchaser as Harris Tweed had in fact at that time been wholly hand-made in the Outer Hebrides, but, as Mr. Shaw Grant pointed out, even a large company engaged in retailing cloth, such as Gordon Selfridge & Co. Ltd., considered that Harris Tweed to be genuine must conform with the 1909 Definition. I have already referred to the statement which that company made to the press in 1932 or 1933. It is also significant that Mr. Lawrence, in a passage to which I have already referred, contrasts the different outlook on the production and sales side respectively even inside a single comparatively small business such as Smiths of Peterhead. One of the reasons for the attitude of the purchasing public to which I have referred was given by Mr. Shaw Grant in a passage from his cross-examination at pp. 6408-6409 as follows:-

"Q. What I was wondering was standing those being "the facts how are you able to say that in the "public mind at that time Harris Tweed was looked "upon as a wholly hand produced cloth which was "wholly produced in the Islands? A. Well, because "there has always been a sort of mystique about "Harris /

"Harris Tweed, and there still is to a certain "extent, poems have been written about it and have "appeared in Punch, and that sort of thing, and the "whole of that background existed, and that was the "main advertising factor until the Orb Trade Mark "came along and it was put in a different position. "Q. Even since the Orb Trade Mark the mystique has "been preserved? A. That I think is a legitimate "criticism of the Harris Tweed Association, and I "have made it myself, but at least they have "publicised the Definition and let it be known what "their tweed is".

The difficulties of dealing with a situation such as I have been describing must obviously have been very considerable. Prosecution under the Merchandise Marks Act in England could very well come to grief before a Magistrate, a danger which was emphasised by the failure of the prosecution in 1911. In Scotland criminal proceedings depended on action being initiated and the prosecution conducted by the Crown. Anyone who held a watching brief during the lengthy summary proceedings in Henderson & Turnbull v. Adair 1939 J.C. 83, which was a relatively simple case compared with the present, and who has also listened to the evidence in the present case (and it so happens that I have had both these experiences) would have a very keen appreciation of the sheer practical weight of the difficulties in preparation and presentation /

presentation with which a prosecutor in a "Harris "Tweed" prosecution would have been faced. An action for passing off even in the 1920s or 1930s would probably have been an equally tremendous enterprise, and it is to be borne in mind that J. Bollinger v. Costa Brava Wine Co. (1960) 1 Ch. 262 had not yet been decided.

Fortunately before the even worse abuses to which I have referred had developed to any extent a number of people had begun to be active once more in the interests of the Islanders. The lead was again taken by persons whose motives were largely philanthropic. Lady Seaforth was still a member of the Committee of Management of the H.T.A., and in about 1927 or 1928 steps were taken to introduce new blood into that organisation. As a result Mr. Wigglesworth of John G. Hardy & Co. and Mr. Ellis of the Crofters Agency became members of the Committee of Management, and from that time onwards the H.T.A. began to exert an increasing influence on the various interests in the Islands which had in my opinion for some time been dominated by purely selfish and often short sighted motives. The first step taken by the H.T.A. after the election of these new members was to write a letter threatening Kenneth MacKenzies and Newalls with proceedings unless they ceased selling as "Harris Tweed" tweed which was made from millspun yarn. /

yarn. Kenneth MacKenzies and Newalls consulted Colonel McArthur who had been for some years a solicitor in Lochmaddy and later in Stornoway, but in 1926 had joined a firm in Inverness. I may mention incidentally that in 1929 Colonel McArthur became a director of Kenneth MacKenzie Ltd as the representative of a family trust. In 1932 he became a member of the H.T.A. and was elected to its Committee of Management. When Colonel McArthur was consulted by the mills about the letters from the H.T.A. his advice was that the mills should seek to have the 1909 definition altered to bring it "in line with the "general practice then prevailing in the Island". The mills appear to have decided that it was prudent to negotiate, and Colonel McArthur had a number of meetings on their behalf with the H.T.A. There were very lengthy discussions on the subject of altering the 1909 definition and eventually the H.T.A. themselves decided that it would be desirable to seek an alteration. It is apparent that there were those on both sides who concluded at an early stage that the solution should be found in some sort of compromise. There were, however, others whose personal or sectional interests made them less willing to reach agreement and it is no surprise to find that those who represented or spoke for the inhabitants of Harris and the rural areas of Lewis were probably the least easily persuaded to the eventual solution.

At the same time as discussions were proceeding between /

between the H.T.A. and the Stornoway mills, and indeed, probably as a result of these discussions, a public controversy began to develop. This was conducted mainly in the Outer Hebrides at meetings in various parts of Lewis and Harris, as well as in the local press, but also attracted attention further afield. The recession in the industry in the Islands in the early 1930s and anxiety caused by severe falls in the prices paid for the tweed handwoven there gave added point to the controversy. One of those who took a close and active interest in the situation was the then Member of Parliament for the Western Isles, Mr. T. B. Wilson Ramsay. Mr. Wilson Ramsay concerned himself mainly with bringing the views of the various and often conflicting interests to the notice of the Board of Trade, which was the Government department principally concerned. He also wrote letters to the press which show that he, like some others, was well aware of the dangers which would probably threaten the Island industry in the future if drastic steps were not taken (see e.g. his letter to the Stornoway Gazette dated 16th March 1934 in No. 445 of Process pp. 60 to 61). It appears that Mr. Wilson Ramsay at one time contemplated becoming a member of the H.T.A. and of its Committee of Management as did Lord Fincastle, who was the son of the then Earl of Dunmore and a direct descendent of the Lady Dunmore who many years before had done much to encourage the Island /

Island industry. In the event neither of these gentlemen became members of the H.T.A., but Lord Fincastle on 4th November 1933 wrote a letter, which was published in the Stornoway Gazette of 8th December 1933 (No. 445 of Process pp. 58-59). That letter is rather too long for reproduction here, but I have come to think that it was prophetic. Another gentleman who took a leading part in the controversy was the Reverend Murdo Macrae of Kinloch, a Free Church Minister in Lewis. The Reverend Murdo Macrae agreed that both the importation of yarn from outside the Islands and also mainland finishing ought to be stopped, No. 430 of Process. But as the champion of the rural weavers he found himself in conflict with the Stornoway mills. Once a formula satisfactory to the weavers had been found, as happened at a very late stage of the controversy, the Reverend Murdo Macrae supported the alteration in the definition finally proposed and became, and remained for many years, a member of the H.T.A. and of its Committee of Management. Mr. James Macdonald also took a fairly leading part in the controversy and some of the views which he expressed at that time, including a suggestion for an amende d definition of Harris Tweed for the purposes of the Mark, are to be found in a letter from him to the Stornoway Gazette of 27th April 1934 (No. 445 of Process pp. 91 to 94).

The /

The amended definition suggested in that letter was

"'Harris Tweed' means a tweed from pure virgin
"wool produced in Scotland, spun, hand-warped,
"handwoven and finished in the Islands of Lewis,
"Harris, Uist, Barra, and their several purtenances
"and all known as the Outer Hebrides".

In the final paragraph of this letter Mr. James MacDonald made the following statement:

"I understand that the byelaws of the stamp which
"has been lodged with the Patent Office embodies
"that all tweeds will be handwoven by the crofters.
"In the event of the stamp being granted, crofters
"need not believe the report that tweeds will be
"woven on the premises of the local mills".

Mr. James MacDonald can certainly lay no claim to having been consistent over the years, except in relation to his own immediate business interests, though no doubt a good deal of water has flowed underneath the bridges since 1934. At any rate he then publicly supported the views that Harris Tweed should be tweed from pure Scottish virgin wool, that it should be hand-warped, that it should be handwoven by the crofters and not on mill premises and that the main processes or the majority of them should be carried out in the Outer Hebrides.

It appears that as early as August 1932 the then Secretary of the H.T.A. had had a meeting with an official of the Patent Office Trade Marks Branch at which /

which a proposed alteration of the certification Trade Mark No. 319214 was discussed. It may be noted that the original Regulations of 1909 had provided inter alia: "The Committee of Management of the "Association may with the sanction of the Board of "Trade from time to time alter these Regulations or "make new Regulations wholly or in part in lieu there-"of". By 1933 quite a large measure of agreement had been reached amongst the interested parties in the Outer Hebrides as to what might be proposed to be included in the amended Regulations. But it was not until 1934 that general agreement was finally obtained. The interests in Harris, who had originally been resolutely opposed to the admission of millspun yarn in any shape or form, eventually accepted that the proposed amended definition might allow for millspun yarn provided that the yarn was spun in the Outer Hebrides, thus ensuring that the tweed remained an island product. No doubt it was partly to satisfy this group that provision was made in the amended Regulations, for which application was eventually made, for the addition in the case of tweeds made entirely from handspun yarn of the word "Handspun". The rural weavers and their main champion, the Reverend Murdo Macrae, were also eventually persuaded to accept the /

the formula "Handwoven by the Islanders at their "own homes in the Islands of Lewis, Harris, Uist, "Barra and their several purtenances and all known "as the Outer Hebrides." The words "at their own "homes" were, in my opinion, designed to ensure that the handweaving at least remained a home or cottage or (using the word in a wide and rather inaccurate sense) "crofter" industry, and in particular to prevent any concentration of weavers in mills or factories, a development which, in my opinion, would have been and would be entirely contrary to the whole "image" or ethos of Harris Tweed. The particular phrase "at their own homes" seems originally to have occurred to Mr. Newall Senior, and was offered and accepted as a form of words which met the demand by the rural weavers that the tendency which, as I have said, was beginning to appear on a small scale of installing looms in the mills and sometimes even in producers' premises, should not be allowed to develop. The word "Islanders", it may be observed, was used in preference to the word "crofters", because the latter word was thought to have a more limited signification than was appropriate.

On 23rd June 1933 the new Secretary of the H.T.A., who had very recently been appointed to that office, wrote a preliminary letter to an official of the/

the Patent Office Trade Marks Branch with regard to the proposed amendments to the Regulations and the definition to be contained therein. The formal application was contained in a letter from the Secretary of the H.T.A. to the Registrar dated 30th June 1933 (No. 445 of Process pp. 107 and 109). Oddly enough both these letters contained obvious, though different, mistakes in the amended definition proposed. Those mistakes were not satisfactorily explained in the evidence, though perhaps they may have been partly due to the inexperience of the new Secretary who at that time was not a full-time official. Nevertheless, it does look as if the dyeing process was not mentioned in the original application since the word "dyed" does not appear in the letter from the Registrar to Messrs. Campbell, Smith, Mathison & Oliphant, dated 29th September 1933 (No. 445 of Process p. 117). It is also clear that at this stage the phrase "by the Islanders at their own homes" had not yet emerged.

The Registrar thereafter circularised various interested parties and by letter dated 29th August 1933 (No. 445 of Process p. 112) informed the H.T.A. that this had been done. In this letter the Registrar in the third last paragraph made the following/

following statement:-

"I am to add that, since the Mark contains the "words, and is registered for, "Harris Tweed", the "Board will require to be satisfied that any "definition, which is to be accepted is a defini- "tion of a material properly called 'Harris Tweed'."

The Registrar also raised a question as to whether tweed woven on Hattersley looms could properly be described as handwoven. This latter question appears to have been resolved without difficulty, and the evidence led in the present case bears out that weaving on such looms is properly described as handweaving.

The application to the Board of Trade by the H.T.A. produced two written protests or objections to which reference was made in the evidence. The first was on behalf of A. & J. Macnab Limited by a letter from their solicitors dated 25th September 1933 (No. 445 of Process p. 115), and the second by A. & J. Macnaughton in a letter dated 4th October 1933 (No. 445 of Process p. 120). Smiths of Peterhead were also in contact with the Board of Trade, though the only correspondence extant is considerably later in date, (Nos. 376 and 377 of Process). The protests by A. & J. Macnab Limited and A. & J. Macnaughton speak for themselves and it is not practicable to refer/

refer in detail to them and to the correspondence which followed. Both firms drew attention to the quite substantial quantities of mainland millspun yarn then being sent by them to the Islands which, they maintained, was indispensable to the industry. It is interesting to note that A. & J. Macnab Limited suggested "as a suitable new definition" the following-

"'Harris Tweed' means a tweed made from pure virgin "wool produced in Scotland and from yarn spun on "the Islands of Lewis, Harris, Uist, Barra and "their several purtenances, and all known as the "Outer Hebrides, or on the Mainland of Scotland, "and hand-warped and hand-woven in the said Islands."

The words "or on the Mainland of Scotland" are added almost in parenthesis by the same sort of technique as was later employed in the I.H.T.P. definition. It may be observed that both A. & J. Macnab Limited and A. & J. Macnaughton were forthright in these two letters about the use being made of mainland millspun yarn which forms a contrast with the advertising of the former Company to which I have already referred. One also notes that the definition proposed by A. & J. Macnab Limited would have required the use of pure Scottish virgin wool. No express mention was made by A. & J. Macnaughton of their operations at Tarbert or of their use of non-Scottish wools.

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The attitude of the H.T.A. to mainland spun yarn was expressed in paragraph 3 of their letter to the Registrar dated 7th October 1933 (No. 445 of Process p. 121) as follows:-

"It is impossible to allow the tweeds made of yarn "spun on the mainland of Scotland to be stamped, for "the obvious reason of impossibility of control. "Nothing could prevent an unscrupulous trader "importing yarn into Scotland and shipping it to "the Islands as yarn spun in Scotland."

This comment was, in my opinion, wholly sound and the evidence in the present case shows how easy it was to get English-spun or even Belgian-spun yarn into the Islands, in small quantities at any rate, without the fact becoming known to anyone outside a comparatively small circle at the production end. It may be observed in passing that, so far as the evidence discloses, no one suggested in the early 1930s that the proposed amended definition ought to cater for yarn spun in England or indeed anywhere but Scotland, still less for yarn spun wholly or partly from non-Scottish wools, though it is apparently the fact that such yarn was finding its way to the Islands from at least one English firm, namely, Lumbs of Elland. The evidence shows, in my opinion, that had a member of the purchasing public been told at that time that cloth purchased/

purchased by him under the name "Harris Tweed" contained such ingredients, he would not have been satisfied that he had been sold the genuine article. Indeed, as I have already said, the probability is that at that time, despite the considerable use which was in fact being made of mainland millspun yarn and of mainland finishing, the purchasing public still expected to receive the wholly handmade article entirely produced in the Outer Hebrides, or at least an article wholly produced in the Islands. It is in my opinion significant that, after the publication in 1919 of the article in the "Overseas Daily Mail" (No. 445 of Process p. 51), to which I have already referred, the vast research of Counsel unearthed no other public reference to the use of even Island millspun yarn until 1932 (see No. 336 of Process p. 48).

By early 1934 the Board of Trade seem to have wished to delay a decision on the proposed amendment of the Regulations, partly because of the conflicting views expressed by various interests and partly because of the prospect of the passing into law of the Merchandise Marks (Trade Descriptions) Bill of 1934 (No. 359 of Process) (sometimes referred to as "the "Runciman Bill"), an event which never happened. Delay was strenuously resisted by the H.T.A. and they reacted very strongly in a letter to the Registrar dated/

dated 31st January 1934 (No. 445 of Process p. 131). In this letter the Secretary of the H.T.A. stated inter alia:-

"My Committee feel it was never intended that the "makers on the mainland should be able to use the "name of Harris Tweed for their goods, or supply "yarns at low prices which, when woven into cloth, "are sold as Harris Tweed, and they have little "doubt that it is from this section of the trade the "opposition you mention arises".

A series of meetings followed in London and also in many parts of Lewis and Harris, and eventually on 4th June 1934 (No. 445 of Process p. 137) the H.T.A. submitted to the Registrar what they described as "The following new definition of the Harris Tweed "Trade Mark", videlicet,

"Harris Tweed means a Tweed made from pure virgin "wool produced in Scotland, spun, dyed, and finished "in the Outer Hebrides and handwoven by the Islanders "at their own homes in the Islands of Lewis, Harris, "Uist, Barra, and their several purtenances and all "known as the Outer Hebrides."

This definition, which in due course became the 1934 definition, had apparently emerged from a meeting of the crofters and cottars of Lewis and Harris held at Tarbert on 2nd May 1934, in which the Reverend Murdo Macrae took a leading part, and a meeting of the Committee/

Committee of Management of the H.T.A. in London on 1st June 1934 at which a deputation of ministers from rural areas in Lewis, including the Reverend Murdo Macrae, were present. The H.T.A. also proposed that "No. 8 of the Regulations", which was in fact the fourth paragraph from the end of the Regulations, should be amended to read as follows:-

"Wherever the Harris Tweed Trade Mark is used "there shall be added in legible characters to the "Harris Tweed Trade Mark the words 'Made in Harris' "or 'Made in Lewis' or 'Made in Uist' or 'Made in "Barra' as the case may be, and for the purpose of "distinction there shall also be added the word "'Handspun' in the case of Tweeds made entirely from "handspun yarn."

It is plain from the evidence that after some severe discussion almost every type of Island opinion from the mills to the rural weavers supported, or very quickly came to support, the foregoing proposals, the exceptions being some of those producers who had a business interest in the importation of yarn from outside the Islands. Even of these exceptions some had a change of heart, and there is to be found amongst the correspondence a letter to the Secretary of the H.T.A. from Kenneth Macleod of Shawbost dated 20th June 1934 (No. 445 of Process p. 143) in which he/

he stated:-

"On Wednesday the 13th inst. I supported the decision "of the Lewis Harris Tweed Association to include the "use of Imported Yarn in the Suggested New Definition "for the amended Harris Tweed Trade Mark, but since "then I have decided to support the definition "adopted by the Harris Tweed Association at the recent "meeting in London as I deem it necessary for the "welfare of the Industry to confine entirely each "process of manufacture to the Outer Hebrides."

The main factors which had influenced the producers who wished to continue the import of mainland spun yarn, who were in a majority of 7 to 4 in the Lewis Harris Tweed Association at the meeting of that Association on 13th June 1934, was in my opinion the fear that they might not get fair treatment either in delivery dates or price from the Stornoway mills and in some cases their determination to import cheap yarn and undersell their larger competitors in the market for tweed.

Finally, after further meetings in London and in the Islands the Board of Trade on 8th September 1934 sanctioned as from 19th November 1934 the amendments of the Regulations applied for, with the exception that in the replacement of the fourth paragraph from the end of the Regulations they substituted for the word "Made", wherever/

wherever it appeared, the word "Woven". Thus the 1934 definition, which has already been quoted in this Opinion, came into being. The relative documents may be found in No. 445 of Process pp. 147 seq. and No. 182 of Process "B".

Whatever may have been the precise legal consequences of the amendments made to the Regulations in 1934, the practical consequences were drastic and immediate. The vast majority of the Islanders were in my opinion convinced that the Government had defined the material which alone could in future legitimately be described and marketed as Harris Tweed. No doubt this was a misconception of the true legal position, but, in view of the circumstances and particularly the many meetings and hotly contested private and public arguments and negotiations which had led up to the 1934 amendments, it is not in the least surprising that such a view was very generally held by the uninitiated, both in the Islands and elsewhere. But what is even more striking is that persons and firms who were much more sophisticated in the ways of commerce than either the Islanders or ordinary members of the public also made radical changes in their procedures which it is impossible in my opinion to disconnect causally from the coming into being of the 1934 Definition. The evidence suggests to me that some at least of the mainland interests, and in particular/

particular the only two existing mainland converters, considered that it would be impossible or at least dangerous to continue with their pre-1934 procedures. Regarding the matter as one of probability it is impossible to avoid the inference that the departure of A. & J. Macnaughton from Tarbert and the cessation in 1934 of their operations there were caused at least in part by the amendments to the Regulations which were impending. Smiths of Peterhead at about the same time took drastic action, which may have been partly brought about by the threat of the Runciman Bill and the persuasion of Mr. Wilson Ramsay M.P., but was nevertheless contributed to in my opinion by the proposed change of the definition and by a distinct feeling, particularly on the sales side of the business, that Harris Tweed should be produced in the Islands and that the article which they were marketing as converters by the methods already described was an imitation. It is perhaps worth noting that Mr. James Macdonald, who was at one time prior to 1934 a customer of Smiths of Peterhead, appears to have been critical of their pre-1934 operations, and he went so far as to tell Mr. Lawrence on one occasion at that time that if he had a claymore he would put it through him. Even the Lewis Harris Tweed Association, which contained amongst its members some Island producers who for their own business/

business reasons supported the use of mainland spun yarn but not latterly of mainland finishing, appear to have considered that the operations by mainland converters were illegitimate, upon the view no doubt that the material produced by such converters could not be regarded as in any real sense an Island product. I regard the evidence of Mr. Lawrence with regard to this particular period and the action then taken by Smiths of Peterhead as very significant, and it is interesting to note that Mr. Lawrence gained the impression that the official of the Board of Trade, with whom he had discussions prior to his firm's move in 1934, thought that the article then being produced by Smiths of Peterhead as converters was an imitation. The steps taken by Smiths of Peterhead consisted of the building of new premises in Stornoway in which they installed carding and spinning machinery, partly transferred from their Peterhead mill, and also dyeing and finishing plant. The building of the mill in Stornoway began in September or October 1934 and the plant there was in operation by April or May 1935. These steps involved very heavy capital outlay for a comparatively small family business and I doubt whether the steps would have been taken had the firm believed that they could continue their pre-1934 methods of production and legitimately describe and market the material produced/

produced in that way as Harris Tweed. In due course a new company was formed to operate the Stornoway business, namely Thomas Smith & Co. (Stornoway) Ltd. of which, as I have said, Mr. Lawrence is now Chairman and Managing Director. It is not very clear from the evidence what effect the events of 1934 had on the operations of A. & J. Macnab Limited. The letter from this Company's solicitors to the Registrar of Trade Marks (No. 445 of Process p. 115) to which I have already referred, appears to have assumed that the projected change in the definition might cut off supplies of imported yarn. I am prepared to accept that A. & J. Macnab Limited after 1934 continued to deal in tweed produced from mainland-spun yarn, if for no other reason because of the references made to the company in the document No. 224 of Process, which bears to be a Report or Minute of the meeting of the Scottish District Wool Rationing Committee on 26th April 1940. If the figures given in No. 232 of Process are any guide, and if Mr. Young is right in his recollection that A. & J. Macnab Limited obtained most of their supplies of mainland yarn from Patons and Baldwins, the operations by A. & J. Macnab Limited during this period as producers must have been on a very small scale. The probability moreover is that A. & J. Macnab Limited continued to market their product under the ambiguous descriptions/

descriptions to which I have already referred, and in the light of the evidence I do no think very much can be made of the operations of this Company either before or after 1934. According to Mr. Young, much of whose evidence was rather vague and in part admittedly hearsay, A. & J. Macnab Limited having apparently operated to some slight extent in the immediate post-war years faded out of the picture entirely about 1951. A curious feature of the operations of A. & J. Macnab Limited is that, although this company appear to have supported the view that Harris Tweed ought to be made from pure virgin wool produced in Scotland, they nevertheless probably used some yarn which contained at least a proportion of non-Scottish wool. As will be seen, they were not the only firm who sinned in this respect, either unwittingly or against the light.

On the Islands 1934 was a year of major reorganisation, some of it of a radical character, and what was done was in my opinion the direct consequence of the steps which were being taken, with eventual success, to have the definition contained in the Regulations altered. Mr. James Macdonald on this occasion showed the skill in timing which has apparently never deserted him, and the new mill of James Macdonald Limited which was equipped vertically for dyeing, spinning and finishing, was in operation by the/

the time the amendment came into effect. It may be observed that Mr. James Macdonald, so far from suggesting that the foregoing action by his Company was not necessary, was disposed at the time to make a virtue of the necessity. In the letter published in the Stornoway Gazette on 27th April 1934, to which I have already referred (No. 445 of Processpp. 91 seq.) he made inter alia the following statement:

"I am further accused of building up my business "on imported yarn. I do not dispute the fact that "the beginning of my Harris tweed business was "built up on imported yarn, but that is no argument "on the present question. I soon realised the detri- "mental effect imported yarn had on my business and "consequently made every possible effort to provide "my own good quality."

Putting the matter at its lowest this does not suggest any exuberant confidence in the propriety of using mainland-spun yarn in the course of manufacture of Harris Tweed.

It had at one time been contemplated that a dyeing, spinning and finishing mill might be set up in the Islands which would not itself produce or market tweed. The main object of such a step would have been to satisfy the demands of the smaller Island producers who felt that they were, and would in future be, at a disadvantage in having to rely for their dyeing, spinning/

ning and finishing on the Stornoway mills who were their largest competitors in the selling market. The project never came to anything however, and in the end agreement could not be reached even on a less ambitious proposal that a separate company should be set up which would carry out dyeing and finishing for Kenneth Mackenzies and Newalls as well as any other customers who should care to make use of the new company's services. In the event, Newalls installed their own finishing plant and later their own dyeing plant. Kenneth Mackenzies decided to do their own dyeing and finishing through an associated company set up for this purpose. This company was an off-shoot of Kemp Blair & Co. of Galashiels and was given the name Kemp & Co. (Stornoway) Ltd. It was originally jointly owned by Kemp Blair & Co. and Kenneth Mackenzies, but is now a wholly owned subsidiary of the latter company. The original Chairman and Managing Director of Kemp & Co. (Stornoway) Ltd. was Mr. Kemp Colledge of Galashiels, who took a great interest in the position in the Outer Hebrides, and in addition to his activities in connection with Kemp & Co. (Stornoway) Ltd. was also for a considerable number of years Managing Director of the Harris Handwoven Tweed Co. Ltd. of Tarbert which also became a subsidiary of Kenneth Mackenzies. Probably owing to the delays caused by the unsuccessful negotiations/

negotiations between Kemp Blair & Co., Kenneth Mackenzies and Newalls, the dyeing and finishing plant of Kemp & Co. (Stornoway) Ltd. was not ready for operation until a few months after the coming into force of the 1934 amendments. This placed Kenneth Mackenzies in a position of some difficulty which had to be dealt with by their arranging with James Macdonald & Co. and Newalls to carry out dyeing and finishing respectively on their behalf. That Kenneth Mackenzies were not the only producers who found themselves in difficulties during what might be called the transitional period is evidenced by a letter from the Secretary of the Harris Tweed Association to the Comptroller, Industrial Property Department, Board of Trade dated 9th October 1934 (No. 445 of Process p. 151). Requests were in consequence made by some producers to have the date for the coming into force of the amended Regulations postponed, but this was opposed by other interests, including in particular the weavers, and the Harris Tweed Association represented successfully to the Board of Trade that there should be no postponement. It is probable that some tweed produced before the amendments came into force was disposed of over a period subsequent to 19th November 1934, and that a proportion at least of this tweed was marketed under the name "Harris "Tweed/

"Tweed", but my impression from the evidence is that the transitional period was short and this is borne out by the stamping figures in No. 447 of Process p. 115. While therefore the practical consequences of the 1934 amendments did not take place over-night, the transition was nevertheless affected in what, considering the practical difficulties, was a very short period. This is also borne out by the figures in Schedule 2 in No. 510 of Process, which was prepared by the pursuers after the proof. This document is presumably not unduly favourable to the defenders and must be read with some reservations, one of which is that over the years a certain amount of cloth was probably produced and marketed which qualified for the Orb stamp, but which for one reason or another was not in fact stamped.

I am satisfied that as a direct result of the coming into force of the amended Regulations, there occurred a rapid and drastic reduction in the use of mainland processes by producers in the Islands. Some producers and some weavers in the Islands did however continue to import mainland-spun yarn in quantities which fluctuated over the years, but which were always small in comparison with the quantities of yarn dyed and spun in the Outer Hebrides where there have been substantial increases in spindle capacity. Some producers/

producers in the Islands also continued to make use of mainland finishing, but this again was on a small scale in comparison with the amount of finishing carried out in the Islands, where additional finishing plants also have been installed. I am prepared to accept that a substantial proportion of the cloth so produced reached the eventual purchaser under the name "Harris Tweed", but once more one finds a dearth of evidence to suggest that any disclosure was made to the eventual purchaser of such cloth that the material had undergone important processes elsewhere than in the Outer Hebrides. As time went on the H.T.A. carried out intensive advertising which I am satisfied projected an image of Harris Tweed as a product entirely made and produced in the Outer Hebrides from pure Scottish virgin wool by the processes described in the 1934 definition, and therefore, in my opinion, consolidated inter alia the idea which I have held the purchasing public had all along entertained with the wholly hand-made product in their mind, namely that all the processes of manufacture of Harris Tweed were carried out in the Islands. What was effected by the amendment of the Regulations and by the intensive advertising campaign by the H.T.A. which almost immediately followed was to disclose to the public that the raw material was pure virgin wool produced in Scotland and by clear inference at least that certain of the processes /

processes, namely dyeing, spinning and finishing, although carried out in the Outer Hebrides, might be carried out by machinery. From the very beginning of their advertising in the mid 1930's the H.T.A. concentrated particularly on four matters, namely (1) the fact that the cloth was entirely made and wholly produced in the Islands, "the home of Harris Tweed", (2) the actual terms of the 1934 Definition which were repeated over and over again, including the requirements of pure virgin Scottish wool and hand-weaving by the Islanders at their own homes, (3) the Orb Mark itself, and last but by no means least (4) the name "Harris Tweed". From 1935 until very recently, the H.T.A., in the sphere of advertising cloth marketed as Harris Tweed, had the field almost to itself, and an extract from the Board of Trade Journal dated 21st March 1958 (No. 434 of Process) which was referred to in evidence, gives some idea of the impact of that advertising. Until I.H.T.P. began their operations, one searches in vain for a public assertion or even implication in the form of advertisement that a cloth produced otherwise than from the raw material by the methods and in the locality required by the 1934 Definition could legitimately be described by or marketed or sold under the name "Harris Tweed".

I /

I was referred amongst many other advertisements to a series of advertisements in the "Outfitter" of 6th June 1936. Maclennan & Maclennan were one of the firms, perhaps the most important at that time, who followed a policy of importing mainland yarn. Not only is there no disclosure of this in their advertisement, but the words "Harris Tweed" are notable by their absence. The product of Maclennan & Maclennan is advertised not as Harris Tweed but as "Ceemo Homespuns". In that year all the yarn used by Maclennan & Maclennan appears from No. 248 of Process to have been imported from the mainland, the main suppliers to that firm being then Laidlaws of Keith and Hunters of Brora. Maclennan & Maclennan's finishing was carried out in that year by McHardies of Paisley. In these circumstances I consider it significant that the material so produced was described in the advertisement by a brand name rather than by the name "Harris Tweed", and I note that as late as 15th November 1938 when giving his evidence at the proof in Crofter Handwoven Harris Tweed Co. Ltd. v. Veitch cit. supra the late Mr. Orrock in answer to the Court gave the following evidence (No. 323 of Process p. 27 C-E):

"By the Court Q. Let me understand your position. "You manufacture tweeds which you sell under the "Trade Mark names 'Cam-lan' and 'Ceemo'? A. Yes.

"Q. /

"Q. Do you also manufacture any other tweeds which "are not sold under these names or are all your "tweeds sold under these two Trade Mark names? "A. Yes; the 'Ceemo' tweeds really can be sold "as 'Ceemo' Home Spuns to suit the Central European "market or, if need be, I sell them as 'Ceemo' "Hand Woven Harris Tweed. Q. But do you sell any "tweed other than under one or other of these names? "A. Oh, no. Q. Your tweed is all sold under one "or other of these two names? A. Yes."

I am far from satisfied on the evidence that Maclennan & Maclennan during the years immediately following the coming into force of the 1934 Definition carried on in an open manner any substantial trade in an article expressly described by them as "Harris Tweed". In an advertisement in the same issue of the "Outfitter", David Tolmie described his product as "Harris Tweed" but it is not clear whether this was, in fact, an article produced from Island - or Mainland - spun yarn, since there is evidence that for a period after the coming into force of the new Regulations, David Tolmie made use of Island-spun yarn. The late Mr. David Tolmie was a small producer who had started operations in 1928 and had made some use, prior to 1934, of mainland-spun yarn. He was for a time the Chairman of the Lewis Harris Tweed Association /

Association, and the fourteenth-named defenders eventually took over his business.

The coming into force of the 1934 Definition brought to an end some of the other serious abuses which had begun to develop during the period of rapid expansion, particularly from 1925 onwards. The Stornoway mills immediately got rid of the looms which had been installed in their premises, though a few looms for pattern weaving were retained. Concentrations of looms in producers' premises in other parts of the Islands were also fairly quickly dispersed, sometimes under pressure from the local inspectors and stampers of the H.T.A. Any tendency to depart from the cottage or home or "croft" flavour of the hand-weaving process was thus in my opinion nipped in the bud, and with the exception of certain operations carried out in recent years in South Uist by the first and fourth-named pursuers, which I shall consider in due course, the tendency has never re-emerged . It may be noted in this connection that the aspect of home weaving was emphasised not only in the negotiations which led up to the amendment of the Regulations in 1934 but also, as has been pointed out, in the 1934 Definition itself and by quotation of and reference to that Definition in the H.T.A. advertising campaign. Another abuse which the /

the coming into force of the 1934 Definition brought to an end was the powerlooming on any substantial scale of imitation Harris Tweed in the Borders and in Yorkshire and elsewhere, though no doubt there may have been surreptitious attempts to pass off material of this character as Harris Tweed from time to time since 1934. I was rather struck with the following passage at pp. 6721-6722 from the evidence of Mr. Kemp Colledge on this particular matter, which really speaks for itself:

"Q. You told us that your Company or the Companies "with which you were associated and other companies "were producing a Harris Tweed, producing a cloth "in the Borders and selling it as Harris Tweed? "A. Yes, that was common. Q. And in Yorkshire "too? A. Yes. Q. Why did you stop? A. The "Mark, the people would not have it. Of course, "after all is said and done, we all know in the "world there are people who will represent a "thing as being what it is not, and therefore when "the public get a guarantee they go for the "guarantee. Q. So that in 1934 the Border "Producers stopped producing a cloth and selling "it as Harris Tweed? A. Yes, I do not think any- "body ever made any attempt after that. Q. And "did the same take place in Yorkshire? A. I "presume /

"presume so, I do not think there is any doubt "about that. The boost that Harris Tweed got "from that, of course, is obvious from the figures, "you see what effect it had."

From whatever point of view one approaches the evidence relating to the immediate effects of the amendments made to the Regulations in 1934, it is apparent that from a practical point of view the confusion and indefiniteness of the immediately preceding period was forcibly removed. Much that had been indefinite and vague became sharply defined, and many practices which had wavered on or beyond the borderline of fraud were given up. I do not think Mr. Shaw Grant was far off the mark when he said in evidence that it was generally accepted that the Board of Trade's action defined Harris Tweed. In a passage from his cross-examination Mr. Shaw Grant made a comment about the change wrought by the amendment to the Regulations in 1934 which is, in my opinion, both accurate and perceptive. It was put to him (at p. 6407) that a considerable quantity of mainland yarn was then being used in the production of the tweed which was being sold as Harris Tweed, and he gave the following answer:

"A. Undoubtedly, but I think it is only right "to add at that time all Harris Tweed was being sold "pretty well on the reputation of the entire "hand /

"hand product, and almost everyone in the trade was a "little bit uneasy about the situation which had de- "veloped, and those of us who were concerned with the "welfare of the Island but not directly involved in "the trade were very relieved when the 1934 Definition "brought the situation into the light of day, and "made the whole thing legitimate as you might say".

One of the most important features of what happened in 1934 consisted in the public disclosure that a tweed could be stamped with the Harris Tweed Trade Mark, although only one of the processes, namely weaving, had been carried out by hand. It seems not unreasonable to say that in these circumstances the use of pure virgin wool produced on the mainland of Scotland as well as in the Islands and of machine processes for dyeing, spinning and finishing was made "legitimate", particularly when the amendments made to the Regulations were followed up by intensive advertising of Harris Tweed by the H.T.A. coupled with the emphasis on the 1934 Definition to which I have already referred. But the disclosure with regard to the processes went hand in hand with three requirements which were repeatedly referred to and which, in my opinion, are shown to have been accepted by the public as essential requirements in the case of material legitimately described and marketed as and under the name "Harris Tweed", namely (1) that it should be tweed /

tweed made from pure virgin wool produced in Scotland, (2) that the hand-weaving should be carried out at the homes of the Islanders and (3) that what are understood by the public to be the main and important processes of manufacture, namely dyeing, spinning, hand-weaving and finishing should be carried out in the Outer Hebrides. All these requirements have, in my opinion, affected the mind of the purchasing public over the years and I am satisfied that they continue to do so. All are in greater or less degree inherited from the original hand-made product. The evidence satisfies me that both before and after 1934 members of the purchasing public when they asked for Harris Tweed expected to be supplied with a tweed wholly produced in the Outer Hebrides, and as a practical / matter the requirements of the 1934 Definition with regard to the main processes of manufacture in effect ensure this. Before 1934 the purchasing public, no doubt, were often supplied unawares with an article which was not so produced. This happened much less often after 1934 when the public had what Mr. Kemp Colledge called a "guarantee", and the alert purchaser could insist on seeing the Orb Stamp which certified the origin and mode of manufacture of the cloth. Since 1934, and indeed since 1909, the presence of the Orb Stamp has in my opinion been the only /

only reasonably certain method by which a member of the purchasing public could assure himself or herself that the article being supplied was genuine Harris Tweed. It may, in my opinion, be said with truth that those persons in the Islands who had made the name of Harris Tweed through the marketing of the original hand-made and wholly Island produced article and those other persons who were responsible through the H.T.A. for obtaining the original registration of the Orb Mark conferred, by their agreement to the 1934 amendments, a benefit not only upon those who were in effect their respective successors but also upon the public. From that time onwards the producers of the vast majority of the cloth sold as Harris Tweed were able to be, or to make themselves, or in some cases to be made, honest; and the purchasing public for their part were enabled to satisfy themselves as to the origin and mode of manufacture of the material.

I have so far been considering the practical results of the amendments to the Regulations in 1934, and the consequences which the amendments were thought by the interested parties and by the public to have brought about. As I have said, there was some misconception as to the precise legal effect of what had occurred, but I doubt whether the misconception was /

was as fundamental as counsel for the pursuers contended. Section 62 of the Trade Marks Act 1905, as amended by the Second Schedule of the Trade Marks Act 1919, provided inter alia as follows:-

"Where any association or person undertakes to "certify the origin, material, mode of manufacture, "quality, accuracy or other characteristic of any "goods by mark used upon or in connection with such "goods, the Board of Trade, if and so long as they "are satisfied that such association or person is "competent to certify as aforesaid, may, if they "shall judge it to be to the public advantage, "permit such association or person to register "such mark as a trade mark in respect of such goods, "whether or not such association or person be a "trading association or trader or possessed of good "will in connection with such certifying."

The section is quoted as it stood in 1934; it has since been repealed and re-enacted in an amended form. Having regard to the foregoing provisions the Board of Trade must, in my opinion, have considered in 1934 that the H.T.A. were competent to certify the origin and mode of manufacture of the goods, namely "Harris "Tweed" as defined in the Regulations, and I can hardly imagine that the Board of Trade would at that time have approved the amendments to the Regulations unless /

unless they had judged it to be to the public advantage to do so. Indeed, it is in my opinion clear from the evidence that the situation which had developed by 1934 called clamantly for such action by the Board of Trade. Moreover, although the 1934 Definition was a definition approved by the Board of Trade for the purposes of the Regulations, and was therefore a definition but not necessarily in law the only definition of "Harris Tweed", it would in my opinion be very surprising, having regard to all that had happened and to the Board's own actions, if the Board of Trade considered that an article not answering to the amended Definition could at that time legitimately be described and sold as Harris Tweed. The Orb Mark, be it noted, continued to be called "The Harris Tweed Trade Mark" and the object was not only that the H.T.A. should determine that the goods were entitled to be stamped with the mark but also that they should certify, for the benefit amongst others of the purchasing public, the origin and mode of manufacture of the goods. These were the two central matters around which the controversy had at that time been raging. In these circumstances I find it very difficult to credit that the Board of Trade in 1934 approved of amendments to the Regulations which to their knowledge would have prevented cloth which was /

was being legitimately described and sold as Harris Tweed from qualifying for stamping with the only existing standardization or certification mark for such goods.

Once the situation had settled down to some extent, it became apparent that a certain amount of mainland-spun yarn was still being imported by certain of the smaller Island producers, and that use was still also being made on a limited scale of mainland finishing. The figures brought together in No. 510 of Process give some idea of the position with regard to mainland-spun yarn, though these figures must be taken subject to the comments which I have already made. One of the Island producers who made use of mainland-spun yarn, and also to some extent of Yorkshire-spun yarn, were Maclennan & Maclennan to whose operations I have already made some reference. Another was the Crofter Hand Woven Harris Tweed Co. Ltd. run by Mr. Murdo McLean, who was throughout a supporter of the use of mainland-spun yarn. This Company appears to have produced subsequent to 1934 some cloth which it sold at any rate at times as Harris Tweed, though it also produced cloth which was marketed as "Croflan" which seems to have been made from Cheviot yarn, though the name is said to have been derived from "crofter" and "flannel". There were /

were also a number of other small producers in Stornoway and its environs and elsewhere in the Islands who used mainland-spun yarn in varying quantities. Some appear to have used both mainland- and Island-spun yarn at various times, and it appears that in 1936 or 1937 a number of small producers, possibly including Mr. David Tolmie, who had since 1934 been using Island- spun yarn went over to mainland-spun yarn, because there was a substantial price differential at that time. According to Mr. Lawrence the mills had over-bought wool at high prices in order to fulfil the requirements of themselves and their Island customers, and they were caught with excessive stocks at a time when there was a substantial fall in wool prices. Something of this sort did I think happen, since there was a sudden increase in the amount of mainland-spun yarn imported at that time which is not fully accounted for by the operations of the original Scottish Crofter Weavers Ltd. which I shall be considering in a moment. Of the cloth which was being produced in this way by small Island producers, a proportion did in my opinion reach both the intermediate and eventual purchaser under the name "Harris Tweed", but it is not in my opinion proved that the use made of mainland processes was ever disclosed, in particular to the eventual /

eventual purchaser, by advertisement or otherwise.

Meanwhile the production of Orb-stamped Harris Tweed was increasing substantially each year, as the stamping figures in No. 447 of Process p. 115 demonstrate. It should be noted, incidentally, that in that document the yardage figure for 1937 should be 2,672,775, so that there was a fairly steady increase in yardage throughout the period from 1935 to 1940. It is no exaggeration to say, as in fact the late Mr. David Tolmie stated at p. 202 of No. 323 of Process, that during that period by far the most of the tweed manufactured in the Island of Lewis was manufactured from Island-spun yarn, and the same applies to the Outer Hebrides as a whole. It may be added that whereas it is highly probable that all the Orb-stamped tweed was described, marketed and sold at each stage of the marketing sequence under the name "Harris Tweed" as well as being stamped inter alia with that name every few yards, it is by no means clear what proportion of the non Orb-stamped cloth was so described, marketed and sold. Moreover a substantial proportion of the mainland-spun yarn used from 1937 onwards was being imported into the Islands by the original Scottish Crofter Weavers Ltd.

The original Scottish Crofters Weavers Ltd. which commenced operations in 1937 was incorporated on /

on 31st March of that year. I refer to this Company as the original Scottish Crofter Weavers Ltd. in order to distinguish it from the third-named pursuer, which was incorporated on 30th December 1955 under the same name after the original Scottish Crofter Weavers Ltd. had gone into voluntary liquidation. The history and operations of the original Scottish Crofter Weavers Ltd. are described in the evidence of Mr. C. G. Brown and are referred to in the evidence of several other witnesses, including Mr. John Mackenzie who as I have said acted as supervisor for the company in Lewis. Yardage figures relating to the company's operations are contained in No. 261 and the following numbers of Process. The moving spirit in the Company was Mr. J. M. Simpson, who had considerable practical knowledge and experience, and the Company's headquarters were situated in an old warehouse in Aberdeen. In 1937 Mr. Simpson was intending to leave his employment with another business and no doubt he had observed the position which Harris Tweed was taking in the market. The original Scottish Crofter Weavers did no manufacturing themselves. Apart from sorting out, selling and despatching the finished product, which was done in and from their Aberdeen warehouse, they had all the processes of manufacture carried out elsewhere. To begin with the Company carried out what was called "some /

"some Homespun business", which apparently consisted of production of a powerloomed cloth. Thereafter they did "a certain amount of Shetland business and "a little bit of Donegal business", and they seem also to have sold a light-weight tweed which was produced by a company in St. Andrews and was called "St. "Andrews Sportswear". They also began to produce a tweed which was handwoven in Lewis and which became, eventually, the largest part of their total business. For the tweed which was handwoven in Lewis the company at first purchased wool and had it spun into yarn on their behalf, but very soon the practice was adopted of purchasing yarn direct, the main suppliers used being Laidlaws of Keith, Hunters of Brora, Smiths of Peterhead, Wright of Hawick and Lumbs of Elland. Over the years, Lumbs of Elland were the company's largest suppliers of yarn, and the company in their turn were for a considerable period Lumbs' largest customers for Harris "type" yarn. The handweaving was arranged by supervisors who acted for the company in Lewis and who carried out at least some of the warping. The company had no capital assets in the Outer Hebrides. The firms used for finishing were at various times Seedhill of Paisley, Fultons of Paisley and Dobson of Galashiels. In addition to the tweed so produced the company, for most at any rate of its life, produced a range of tweed which qualified /

qualified for and was stamped with the Orb mark, but the quantities of Orb tweed produced were considerably smaller than those of their other tweed handwoven in Lewis. A brand name "Croftweb" was at first used for the latter tweed, but eventually the Company registered the name "Hebratex" which was thereafter always used and is now used by the third-named pursuers. Sometimes the product was sold as Hebratex Harris Tweed, particularly in some markets abroad. For example a sale of the article in South Africa under the name Harris Tweed came under challenge at one time from a director of Newalls, but the evidence shows that the cloth was also referred to on occasion simply as "Hebratex" or "Hebratex Harris Handwoven" or "Light "Hebratex Harris Handwoven". This is reminiscent of practices to which I have already referred in other connections. The Hebratex Tweed was, according to Mr. Brown, sold as Harris Tweed under a label description that it was pure Scottish wool handwoven in the Island of Lewis. Some advertising was done by the company but this was not on a large scale and the terms of the advertisements do not appear. According to Mr. Brown brochures were sent out calling the cloth Harris Tweed and saying it was woven at the Islanders' homes in the Island of Lewis, and Mr. Brown also says that the tweed was stamped at intervals with the words "Hebratex Fabric" "Harris Tweed" and "Handwoven in the "Island of Lewis".

During /

During its lifetime the original Scottish Crofter Weavers Ltd. from time to time came under considerable pressure from the H.T.A. and this pressure increased as the years went on. Moreover, it is apparent from the evidence of Mr. Brown that the Company from the very beginning met resistance in the market which was based upon doubts as to the genuineness of its Hebratex Fabric even though it compared well in quality with Orb Tweed and was cheaper. It is significant that this resistance did not become less with the years, but according to Mr. Brown, steadily increased. At one stage during the war the pressure became such that the Company seriously considered operating spinning plant of its own on the Island. It appears also that the Crown considered a prosecution in Scotland but no proceedings were taken, partly it seems because of lack of evidence and partly because the authorities were apprehensive as to the effect which such proceedings might have on the market for Harris Tweed. Indeed it seems to have been feared that the result of proceedings might be that the name "Harris Tweed" might become purely generic, though in my opinion this particular danger had, at any rate for the time being, passed. The circumstances which gave rise to a prosecution of the original Scottish Crofter Weavers Co. Ltd. being considered, appear from correspondence during 1944 /

1944 (No. 445 of Process pp. 152 seq.) in the course of which an official of the Board of Trade reported to the H.T.A. that a piece of tweed stamped by the Company as "Hand Woven Harris Tweed Woven in Lewis" had been power-loomed at Smiths of Peterhead from Yorkshire yarn. This led to correspondence between the solicitors of the H.T.A. and the original Scottish Crofter Weavers Ltd., but in the event the necessary evidence does not seem to have been forthcoming from the Board of Trade (See No. 445 of Process p. 164). It did, however, emerge from the evidence of Mr. Brown that some years earlier the late Mr. Simpson had knowingly despatched to a customer abroad as Harris Tweed or at any rate as Hebratex Harris Tweed cloth which he had had power loomed because of his inability to meet an order with handwoven material. This demonstrates how easy it would be for producers to dispose of gross imitations if it once came to be recognised that Harris Tweed could be substantially, that is as regards all the main processes except weaving, a mainland product. The late Mr. Simpson was obviously much respected by those who knew him, and he himself brought his action in this instance to the notice of his Board who, according to Mr. Brown, disapproved of what had been done. All traders are by no means so scrupulous and some of the evidence /

evidence in the present case shows that even the word "mainland" may become blurred to such an extent that it might well be employed by interested parties to include England as well as Scotland, though I do not think it would occur to anyone to refer to England as the "mainland" in relation to the Outer Hebrides except for some oblique purpose.

It is clear from the evidence that Mr. Simpson held the view that the Hebratex fabric produced by the original Scottish Crofter Weavers Ltd. was genuine Harris Tweed upon the ground that his Company were, to use Mr. Brown's words, "selling historical "Harris Tweed, traditional Harris Tweed as it was "originally made". This point was expressed in several different ways by Mr. Brown in the course of his evidence, but if it in fact represented the views of Mr. Simpson and of the company, as I think it did, it was in my opinion misconceived. The traditional Harris Tweed, namely the Tweed which was originally sold in the commercial market and made a name for itself and its producers as Harris Tweed, was in my opinion the wholly hand-made product entirely produced in the Outer Hebrides. I am far from satisfied by the evidence that the commercial reputation of Harris Tweed was built on mainland yarn, still less on yarn millspun in Yorkshire. The converse is /

is in my opinion much nearer the truth, namely that mainland millspun yarn and sometimes Yorkshire millspun yarn were used in order to produce an imitation out of which quick and easy profits might be made under cover of the reputation and name of the genuine article. Mr. Shaw Grant put the point in the following way in the course of his cross-examination at p. 6432:

"Q. But you cannot get away, if you look at "it historically from the mainland association "with the Harris Tweed Industry? A. One "can indeed, it has been argued that the Harris "Tweed Industry has in part been built up on "mainland yarn, but that I think is entirely "wrong, the use of mainland yarn has been built up "on Harris Tweed, which is an entirely different "situation."

This brings me to what is one of the most extraordinary features of the operations of the original Scottish Crofter Weavers Ltd. It was the opinion of the late Mr. Simpson, and according to Mr. Brown of the company, as well as of the company's supervisor in Lewis, that Harris Tweed must be made from pure virgin Scottish wool. Mr. Brown said this repeatedly in the course of his evidence, and that Mr. Simpson's view was to the effect stated is plain from the letter dated 28th December 1953 from Mr. Simpson, writing on behalf of the /

the company, to Mr. John Mackenzie, the company's supervisor in Lewis (No. 445 of Process pp. 202 seq.). This letter was written at a time when the original Scottish Crofter Weavers Ltd. had come under renewed pressure from the H.T.A. and the letter contains (at p. 203) inter alia the following statement:

"Our contention is that Harris Tweed is 'A type
"'tweed made from pure virgin Scottish wool hand-
"'woven by crofters at their crofts in the Scottish
"'Outer Hebrides', and that the 'Orb' mark and
"specification was never intended to exclude Tweed
"which answered the above specification and was
"produced long before Stornoway mills existed."

Much the same view is expressed in a letter from the Company's solicitors to the solicitors of the H.T.A. dated 24th May 1952, which is to be found at page 312 of No. 445 of Process. My impression from the evidence is that on occasions when the original Scottish Crofter Weavers Ltd. came under pressure with regard to the genuineness of their Hebratex fabric, Mr. Simpson tended to seek assurances that the wool being supplied to his company was 100% pure virgin Scottish wool. At p. 2221 of the Evidence Mr. P. Lumb gave the following rather revealing evidence:

"Q. So far as the content of your yarn is
"concerned /

"concerned I understand that it was always 100 per "cent virgin wool? A. Correct. Q. But that "your recollection is that Scottish Crofter Weavers "asked you to make it 100 per cent Scottish virgin "wool and you indicated to them that you could not, "or it was indicated to them that you could not do "this? A. It was not that they always asked us "to make it from 100 per cent Scottish wool or that "it was being asked for every year, but at certain "periods Scottish Crofter Weavers were always having "to fight a battle against the Orb Stamp, and there "were certain times they asked us if we would make it "from 100 per cent Scottish wool."

Mr. Brown (at p. 2569) says that when the genuineness of the company's Hebratex fabric was questioned by customers, which happened quite frequently, one of the matters stated in the stereotype letters sent out by Mr. Simpson was that the company's product was made of Scottish wool. This is what one would expect in the circumstances, yet it is clear from the evidence, including in particular that of Mr. Lumb, that the yarn used by the original Scottish Crofter Weavers Ltd. for their Hebratex fabric was not, and could not have been, 100 per cent Scottish wool. Indeed it is probable that there were occasions when the Hebratex fabric did not contain any Scottish wool at all.

The result is that when the original Scottish Crofter Weavers /

Weavers Ltd. sold their Hebratex fabric under the name "Harris Tweed" they were selling material which was not Harris Tweed, either in the opinion of the company or of the late Mr. Simpson, the company's Managing Director, or of their Lewis supervisor. The position becomes even stranger in the light of Mr. Lumb's evidence at p. 2216 that his company never gave an assurance that the yarn supplied by them was made from 100 per cent Scottish wool. This is in direct conflict with a letter from Mr. Simpson to Mr. John Mackenzie dated 21st May 1952 (No. 445 of Process pp. 169 seq.) which contains inter alia the following statement:

"I have just returned from a hurried visit to Yorkshire
"where I met Messrs. Lumb and discussed with them
"several matters touching particularly the approach
"we have had from the Solicitors of the Harris
"Tweed Association. While we have imparted no
"information to them other than maintaining the
"correctness of our Tweed to qualify for the
"description 'Harris Tweed', we have thought it
"desirable to check up with Lumb's on the question
"of Scottish wool content in all the Hebridean yarn
"they supply to us. They confirm that this is
"100% Scottish virgin wool, and they have never at
"any time supplied other than Scottish wool in
"yarn, which was destined for weaving of Harris Tweed".

Yet, /

Yet, as I have pointed out, it is apparent from the evidence of Mr. P. Lumb, including the passages already referred to that so far from this being the case, the yarn which they supplied, not only to the original Scottish Crofter Weavers Ltd., but to their other Island customers, never contained 100% Scottish wool. The foregoing conflict of evidence was not in my opinion satisfactorily resolved, but it does emerge quite plainly that Mr. Simpson, like a number of other witnesses to whose views on such a subject I would attach weight, considered that at any rate by 1952 a cloth not made from 100% Scottish wool could not legitimately be described and marketed as Harris Tweed. Mr. Simpson, it may here be noted, was also a strong supporter of the view that the hand-weaving of Harris Tweed must be done by the crofters in or at their crofts.

I shall complete the history of the original Scottish Crofter Weavers Ltd. when I come to deal with the period subsequent to the 1939-45 War, but my conclusion from the evidence which I have been considering is that the operations of that company cannot be regarded as including the production of genuine Harris Tweed, except for that part of the company's trade which was devoted to tweed which qualified for the Orb /

Orb mark. The Hebratex fabric produced by the company was not, in my opinion, legitimately described or marketed as Harris Tweed, but was an imitation. This, in my opinion, has quite important repercussions on the pursuers' case, since the operations of the original Scottish Crofter Weavers Ltd. were with the doubtful exception of those of A. & J. Macnab Ltd., the only bridge relied on by counsel for the pursuers so far as mainland production was concerned between the activities of the mainland producers who gave up their operations in 1934, and the activities of the respective pursuers which began nearly twenty years later. If that bridge is removed, as I think it has been as a result of the proof, the attempt by the pursuers to establish continuous production of Harris Tweed by mainland producers over the period from 1927 to 1960 is much weakened.

It appears that in 1937 and 1938 the issue with regard to the continued importation of mainland yarn by certain persons and firms in Lewis came to a head. Since 1934 labour had been organising and the great majority of those employed in the mills, both at warping and at the other processes, particularly spinning, joined the Transport and General Workers Union which also had as its members all those employed as dockers in the harbour at Stornoway. A majority of /

of the weavers also joined the union during this period, forming their own section. They were not treated as employed persons but as out-workers, and are now self-employed for the purposes of National Insurance. The control of the union over the dock labour at Stornoway was apparently seen by those employed in the mills as a weapon which might be used to prevent or at any rate make more difficult the import of mainland yarn, and it was the use of this weapon which led to the "Embargo Case" Crofter Hand-Woven Harris Tweed Co. v. Veitch and Anr. 1940 S.C. 141, 1942 S.C. (H.L.) 1. The reports of this case in the Court of Session and in the House of Lords, together with the appendices Nos. 171, 323, 324 and 325 of Process, tell the story of what occurred so far as it was proved at the time, and I shrink from attempting to retell the story in my own words. The actual decision in the case has little or no bearing on the issues in the present action, and I am satisfied that the question as to what material could legitimately be described and marketed as Harris Tweed was touched on only very superficially in the evidence in that case. This is not surprising, since the question as to what was or what was not Harris Tweed and what material could or could not be described and sold by that name did not arise for decision. Indeed many of the parties /

parties interested in that question, including the H.T.A., were not in the process. It seems unfortunate, therefore, that so much emphasis has been laid on certain passing observations made in the case referred to, and in particular on a passage from the speech of the Lord Chancellor (1942 S.C. (H.L.) at p. 4) when he said in the course of narrative:

> "Cloth made out of mainland yarn could not carry the
> " 'Stamp', though it could be sold as Harris Tweed
> "as having been woven in the Island".

I do not profess to have read all the evidence in the Embargo Case, nor was I invited to, but the passages to which I was referred by counsel seem, with the greatest respect, an exiguous and somewhat one-sided basis on which to have expressed such a view. I cannot imagine that, if the detailed evidence to which I have listened had been before the Court, the conclusion would necessarily have been the same. Certainly the narrative could hardly have been disposed of in a single paragraph nor could the proposition, which I have quoted, have been put forward as if it were a fact not in dispute. It is obvious, also, that the situation which both the Court of Session and the House of Lords had in mind was not one in which large mainland converters or producers claimed a right to sell their product as Harris Tweed, but one in which to adopt the words of Viscount Maugham /

Maugham (1942 S.C. (H.L.) at p. 12): "Small pro-"ducers, carried on their somewhat humble businesses "in the Isle of Lewis, where they were weaving a tweed "called Harris tweed from yarn spun on the mainland." It is indeed not clear that any mainland firm was operating at the time of the Embargo, which was put on in February 1938 for a very short period before being lifted as a result of an Interim Interdict pronounced by the Court. I am not satisfied that A. & J. Macnab Ltd. were operating at that time, and it is not proved that the original Scottish Crofter Weavers Ltd. had by then begun producing their Hebratex fabric. This is borne out by the fact that the financial support for the petitioners in the Embargo case, who were small producers, came from A. & J. Macnaughton and Laidlaws of Keith, whose interest at that time was not as producers of a finished article but merely as exporters of mainland-spun yarn to the Islands. The position with regard to a small and humble Island producer, with his or her own clientèle, might be very different from that of a large mainland converter who did little more than go through the motions of production in the Outer Hebrides by adopting expedients such as those which were adopted before 1934 by A. & J. Macnaughton and Smiths of Peterhead, or those which I shall describe when I come to deal with /

with the pursuers' operations. When the observations made in the House of Lords in the Embargo case became known in the Islands there was some consternation, since there seemed to be re-opened old issues which I am satisfied the great majority of those in the Islands thought had been resolved by the amendments made to the Regulations in 1934.

Counsel for the pursuers subjected the H.T.A. to considerable criticism upon the ground that they had been dilatory in taking action against those who made use of mainland yarn, and had, in spite of writing threatening letters, shrunk from proceeding against a number of small Island producers whose operations they criticised and attacked. There is some basis for this criticism and one example is a correspondence (No. 252 of Process) which took place between the solicitors of the H.T.A. and Maclennan & Maclennan and their solicitors during 1938. This correspondence which contained threat and counter threat, ended without either party putting their threats into effect, but the honours were probably with Maclennan & Maclennan. It is easy, however, to understand why the H.T.A. should have been unwilling to put the matter to the test in 1938 in proceedings against a small Island producer, and particularly in criminal proceedings. The form of proceedings would /

would in my opinion at that time have presented great difficulties, and the taking of criminal proceedings in Scotland would have depended upon action taken by the Crown. A prosecution under the Merchandise Marks Act would, at the very lowest, have been a substantial undertaking, and the task of bringing home a criminal charge in the case of one of the small Island producers perhaps seemed formidable. I think there were good reasons of policy, very similar to those which had operated in the past, for adopting measures of persuasion and pressure, which incidentally had produced some successful results, in preference to litigation. Moreover failure in either civil or criminal proceedings through inability to prove the material facts or through use of the wrong procedure might have been extremely dangerous. The H.T.A. adopted the same technique and were subjected to the same criticism in other cases, for example in their dealings with the Clansman Tweed Co. in 1951 (No. 445 of Process pp. 267 seq.) and with the original Scottish Crofter Weavers Ltd. in 1952 (No. 445 of Process pp. 305 seq.) Again the solicitors for the H.T.A. concluded the correspondence somewhat lamely, but in these instances it is not difficult to see why litigation was avoided, and it may be added that a great deal more is known about the operations of /

of these companies as a result of the documents recovered and evidence led in the present case than were known to the H.T.A. at the time. The Clansman Tweed Co. were in any event very small fry, while within a matter of months serious negotiations were proceeding with the original Scottish Crofter Weavers Ltd. in the hope that they would undertake in future 100% Orb production. It cannot at any rate be said that the H.T.A. let the matter pass unchallenged, and the failure to take proceedings under the Merchandise Marks Act in Scotland was not a matter for which the H.T.A. themselves can be held responsible. There is not in my opinion evidence of acquiescence by either the H.T.A. or the Orb producers of the kind indicated by Lord President Clyde in Ben Challum Ltd. v. Buchanan 1955 S.C. 348 at pp. 355-356. In late 1951 correspondence was initiated by the Secretary of the H.T.A. with Mr. James Macdonald in respect of the use of a certain label by Macdonald's Tweeds Ltd., the fourth-named pursuers, and this proved to be the opening round in the lengthy controversy which has eventually led to litigation both in Scotland and England. In order to maintain chronological sequence, it will however be more convenient to deal with that matter in connection with the operations of the first and fourth-named pursuers in due course.

The /

The Embargo case, though hotly contested, does not seem to have produced any immediate practical result since no attempt was made to re-impose the Embargo which had been lifted as a result of the Interim Interdict at an early stage of the proceedings. No doubt, the fact that the country was by the date of the decision in the House of Lords in the middle of a war had its effect. Meanwhile, with the exception of the Hebridean clip, wool rationing had come into force and was to remain in force throughout the war and for some years thereafter. A picture of the position with regard to supplies of wool for the manufacture of Harris and Hebridean Tweeds during the period of wool rationing is given in what bears to be a Minute of a Meeting of the Scottish District Wool Rationing Committee on 26th April 1940 (No. 224 of Process), a document which contains some rather surprising mistakes, considering that it was probably produced by the late Mr. Barr who was for many years the Secretary of the National Association of Scottish Woollen Manufacturers. Amongst other things the H.T.A. is wrongly named in the document and its position and functions inaccurately described. This document, like the Embargo case and two reports of Committees to which I will be referring, was concerned principally, if not entirely, with the position /

position at the production end. It indicates in a general way what was in fact going on at that end, but it is not concerned with the information which was either provided for, or available to, the eventual purchaser of the product. It recognises that in fact mainland-spun yarn was still being imported into the Islands in quantities which are I think shown with reasonable accuracy in No. 196 of Process from which it is possible to work out proportionate figures, though it must be borne in mind that the figures do not include the Hebridean clip which was probably spun in its entirety or almost in its entirety in the Islands. The document is not in my opinion an official approval or recognition of any right in any producer to describe and market as Harris Tweed cloth made from mainland-spun yarn, still less from English-spun yarn, or tweed made wholly, or partially, from non-Scottish wool. It may be observed, from the reference to "Harris and Hebridean Tweeds", that the document assumes that not all tweed handwoven in the Outer Hebrides was necessarily Harris Tweed. The document No. 232 of Process shows the allocations made to the Island and mainland spinners respectively for a four monthly period in 1948, and probably these figures bear a reasonable relation to the proportions of yarn spun or supplied by the various firms concerned /

concerned out of non-Hebridean wool during the pre-war period which was taken as the guide for rationing. Some firms, however, do not seem to have taken up their ration, or if they did they did not sell the yarn spun from it to the Islands. Of these, A. & J. Macnaughton appear to have been an example.

During the early years of the war, it became increasingly difficult to obtain supplies of woollen yarn, and, mainly for this reason, there was a very substantial reduction in the quantities of tweed hand-woven in the Islands. From 1942 onwards industry in the Islands was "concentrated" under the wartime Concentration of Industry Orders, and this led to closure for a considerable period of certain of the plants including Smith's dyeing and finishing plant, the work of which was concentrated with Kemp & Co. (Stornoway) Ltd., and also substantial portions of the spinning capacity of Kenneth Mackenzies and Newalls. Production fell to its lowest in 1943, after which there was a slow increase in yardage until 1945, followed by very large increases in the immediate post-war years. During the war and immediate post-war years it did not prove easy to operate a rationing system with coupons, particularly in the case of small producers, and there is little doubt that a black market in tweed did develop in the /

the Islands with the sort of consequences which were familiar in the case of other commodities in different parts of the country, including cash transactions in breach of price regulations, evasion of purchase tax and so on.

It was natural in view of what had happened immediately prior to and during the war that some anxiety should be felt, in the Islands in particular, as to what was going to happen in the post-war era. Tweed production had become a very important source of livelihood not only in Stornoway but also in the rural areas of the Islands, and other sources of employment, such as fishing, were seen to be fading away. During the war a local and unofficial voluntary body called The Lewis Association produced a number of reports on matters of importance to the Island, and one of these reports was on the subject of Harris Tweed. The way in which this report, which is contained in No. 186 of Process and in fact consisted of majority and minority reports, was produced is fully described in the evidence of Mr. Shaw Grant who was the Secretary of the Association. There was great controversy in the Association with regard to this report, and the small independent producers were fairly strongly represented, having as their leading spokesman, the late Mr. Stephen McLean, a local solicitor who was the son of Mr. Murdo McLean of /

of Crofter Hand Woven Harris Tweed Co. to whom reference has already been made. Mr. Stephen McLean, as one would expect, made full use of what had been said obiter in the Embargo case. It is apparent that the majority were influenced by the fear that the small producers might not be able to obtain adequate supplies of yarn from the Island mills and my opinion is that no-one was contemplating that mainland converters would enter the field in the post-war era and attempt to sell their product as Harris Tweed. The Majority and Minority Reports, read as a whole, do not in my opinion give any real assistance to either side in the present case, though they do show to what extent self-interest still operated in the Islands, and also establish that the continued use of some mainland yarn was well known at the production end, a fact which is not in dispute. Paragraph 14 of the Majority Report suggests a fear that the words "Harris Tweed" had become generic, but a desire that only tweed "manufactured within the Outer Hebrides" could legally be described as "Harris Tweed". Paragraph 35 of the Majority Report is just an echo of the obiter dictum of the Lord Chancellor in the Embargo case, and the statement in this paragraph that at one stage in its development the industry depended almost entirely for its yarn supplies on the mainland /

mainland is not borne out by the evidence in the present action. The majority recommendations, so far as they contemplated as one alternative solution the amendment of the Orb mark to permit the use of mainland yarn, demanded at least that the yarn should be of specified quality, and of Scottish manufacture. The Reports were distributed to the members of the Association who were mainly local, and copies were sent to the Secretary of State for Scotland, the Crofter Woollen Committee, the Board of Trade, the Member of Parliament for the Western Isles, the H.T.A., the Transport and General Workers Union and the appropriate local authorities. The Majority Report is dated 13th October 1944.

In September 1943 the Scottish Council on Industry appointed a Committee of Inquiry with the following terms of reference:

"To enquire into the present position of all "branches of the woollen industry in the Highlands "and Islands with reference to wool production "and manufacture both of factory and home-made "origin, and to make recommendations upon:-

"(1) The adoption of distinctive trade marks and "certificates of quality for genuine hand-made and "factory products;

"(2) Methods of obtaining and preparing yarn for "the /

"the crofting communities by the establishment of "small scale carding and spinning mills or otherwise;

"(3) Improvement in design and technique in the "industry, including Shetland knitting;

"(4) The system of marketing;

"(5) The possibilities of other lines of manufac- "ture."

This Committee reported in May 1945 and No. 187 of Process is a copy of their Report. Chapter II of the Report deals with the Harris Tweed Industry, and in paragraphs 128-131 of Chapter V, there are incorporated certain comments on trade descriptions with particular reference to the Orb mark and the descriptive words "Harris Tweed". The Report is too lengthy for detailed consideration, but its approach is quite naturally mainly concerned with production and this may account for the fact that somewhat different conclusions were reached by the Committee from those at which I have arrived on the basis of the evidence led in the present case. In particular the Committee appear to have accepted as a fact "that the wide "reputation of Harris Tweed had been established by "tweed from mainland spun yarn", whereas my conclusion from the evidence led is that this is a misconception. The Committee do not appear to have taken evidence in any formal way, and no doubt it heard many conflicting views expressed, mainly by producers. I do not think it /

it unnatural that the sympathies of such a Committee should have been with the small producers in preference to the Stornoway mills, particularly after what had happened at the time of the Embargo in 1938. In paragraphs 30 and 37 of the Committee's Report there can be found further echoes of the obiter dicta in the Embargo case, and one notices among the names of the witnesses that of the late Mr. Stephen McLean. In paragraph 42 of the Report the Committee refer to "the policy of the Board of Trade which is naturally "to fortify the legal standing of the Harris Tweed "Trade Mark by ensuring that in respect of all the "manufacturing processes the term "Harris Tweed" shall "come to mean what it says." This bears out what I have said when considering the various effects of the amendments made to the Regulations in 1934, and in my opinion these amendments, coupled with the publicity and advertising carried out by the H.T.A., did in fact achieve that object very soon after 1934. It is interesting to note that the Committee supported the registration and use of a "Hebridean" Mark to cover "all textiles, and not tweed merely, handwoven in the "Outer Hebrides or in the Western Islands of Scotland "by the inhabitants at their own homes or in their "own townships,". In the course of paragraph 60-65 inclusive /

inclusive the Committee subjected the H.T.A. and particularly its constitution to some adverse criticism. The Committee also considered that weaving in small workshops ought to be permitted, but recognised that in the case of Orb tweed this would involve an alteration in the Regulations applicable to the Orb mark. The Committee also seem to have recognised in paragraphs 70 and 142 that such a step would involve some form of licensing.

Towards the end of the war tweed production again began to rise and a very large increase in yardage produced took place in the immediate post-war years. The usual evils of rationing became manifest, ranging from a scramble for yarn to the appearance in the Islands of the "spiv". Almost any sort of cloth would sell and there was an obvious temptation to the less scrupulous to obtain yarn supplies from any source they could. Even Belgian yarn was imported by one firm for a time, bearing out the fear expressed many years before in the letter from the H.T.A. to the Comptroller General of the Patent Office dated 7th October 1933 (No. 445 of Process p. 121) in a passage which has already been quoted. The great demand for tweed in the immediate post-war era is evidenced by the fact that there was a tendency for many weavers to start /

start production on their own account and the remarkable figures shown in No. 372 of Process bear out one's impression that profitable sales could be made even by those who had no semblance of a marketing organisation. In 1946 there were 50 producers in Lewis who made use of the Orb Stamp, in 1947 840, in 1948 1,010, in 1949 421, in 1950 190 and in 1951 190. In 1952 the numbers had fallen to 78. This suggests a very unhealthy state of affairs, particularly as it probably does not show the whole picture, and it was a state of affairs in which, as one would expect, imports of mainland yarn were on the increase reaching their maximum significantly in 1948. Possibly it was for these reasons amongst others that care was taken in the General Apparel and Textiles (Manufacturers' Maximum Prices and Charges) Orders of 1946 and 1947 (Nos. 357 and 358 of Process) to use the non-committal phrase "goods being tweed (including Harris Tweed) hand "woven in the Outer Hebrides", and in one of the explanatory notes the expression "Harris Tweed and "other tweed handwoven in the Outer Hebrides". Once more in my opinion the use of mainland yarn was, as in the past, a mere expedient or device by means of which an imitation was sold under cover of the reputation and name of the genuine article. From 1948 onwards the use of mainland-spun yarn by Island producers has /

has steadily decreased, in part because of easing of the yarn supply situation when it became possible for the existing, and also new, Island mills to bring additional spinning machinery into operation, and in part as a result of the activities of the H.T.A. One result of the situation in the immediate post-war period was that weavers were tempted to weave rather loosely in order to produce a greater yardage of tweed from a given quantity of yarn. To deal with this tendency, the Regulations for the certification mark were once again amended on 19th June 1946 in order to add the following condition:

"The Agents before affixing the Trade Mark to "Tweed brought to them shall satisfy themselves "that the same is entitled to be marked therewith "and shall not affix the Trade Mark to any Tweed "which contains less than 18 picks and 18 ends per "square inch of finished tweed." (No. 182 of Process "C").

I am satisfied that this step had a beneficial effect on quality since it became impossible to have such loose woven tweed stamped with the Orb.

When rationing with its attendant evils came to an end, the H.T.A. was able to take some more effective steps with the object of preventing sales under the name "Harris Tweed" of tweed made from mainland yarn /

yarn and in some cases finished on the mainland. Some unsuccessful steps taken at that time have already been referred to, but it is apparent that the pressure exerted did have considerable effects. Mr. C. J. Macdonald's account (at pp. 5769 seq.) of the subsequent history of the various petitioners in the Embargo case, shows that in most cases the use of mainland-spun yarn had ceased by the early 1950's, either because the firms concerned were going out of business or because they were going over to Island-spun yarn. Many other Island producers, including certain of the defenders in the present action, went over wholly to Island-spun yarn about 1956 and 1957, some no doubt under pressure. One practice which it was not easy to detect except over a long period was that of mixing Island-spun and mainland-spun yarn and producing therefrom a tweed which was sold under the name "Harris Tweed". Indeed such cloth was sometimes presented by the producer for stamping with the Orb mark. By laborious methods this practice was stopped in several instances, particularly about 1956 and 1957. The offenders were small producers and included at least one of the parties called as defenders in the present action, namely the thirteenth-named defender.

Meanwhile

Meanwhile the Original Scottish Crofter Weavers Ltd. had towards the end of 1955 left the field and gone into voluntary liquidation. The company had again been under pressure from the H.T.A. since 1952 when there was correspondence between its solicitors and those of the H.T.A. to which I have already made a reference. In 1953 and 1954 the Company were considering going over wholly to Orb production and there were lengthy negotiations with representatives of the H.T.A., but, for reasons which were not established, an experiment with Island yarn proved unprofitable. About this time Mr. Simpson became ill, an event which, coupled with difficulties in foreign markets, made it impossible for the company to continue its operations. On 30th December 1955 a new company was incorporated under the same name, and it is this company which is the third-named pursuer. The new Scottish Crofter Weavers Ltd. became an associated company of Laidlaws of Keith, and the assets of the original Scottish Crofter Weavers Ltd. were purchased by the new Scottish Crofter Weavers Ltd. from the liquidator.

In 1957 Maclennan and Maclennan were taken over by a Yorkshire Company, and the evidence, particularly in No. 248 of Process, shows that part of their operations became even more open to criticism than they had been hitherto, though for a time towards the very end (in/

(in 1959 and 1960) they had part of their production stamped with the Orb, which suggests that they had begun to waver (No. 367 of Process). Maclennan & Maclennan had always used substantial quantities of English-spun yarn, and even larger quantities of yarn containing non-Scottish wools, such as that spun by Laidlaws of Keith. They had always done a good deal of finishing on the mainland, but they now turned in substantial measure to finishing in England by Holroyds of Leeds though they also in the last three years did a fair amount of finishing in the Islands, probably to get the Orb stamp for a proportion of their production. Their product was latterly sold/at Bradford under the brand name "Ceemo" and was usually, in my opinion, described as "Harris Tweed". Labels used by the firm during this final period are illustrated as Labels Nos. 8 and 26 of No. 298 of Process. The gradual deterioration of this company's operations up to 1961 shows how easy it is in a situation of this sort to descend to the grosser forms of imitation. A pamphlet prepared by Maclennan & Maclennan towards the end of this period was referred to in evidence and is No. 251 of Process. This document proceeds by question and answer and is mainly notable for what it does not disclose. It contains on the front the legend "Harris "Tweed An Island Handicraft". To describe Maclennan & Maclennan's non-Orb product during the last four years of/

of their operations prior to 1961 as an Island handicraft was, in my opinion, a misuse of language. It may also be noted that on this pamphlet there is printed a copy of label No. 8 which uses the not wholly accurate statement, which is sometimes found elsewhere, "Handwoven by "the Crofters". In 1961 Maclennan & Maclennan were once more taken over and proceeded to produce new types of cloth which were sold under names other than Harris Tweed. It should be made clear that the company is in respect of its present operations in no way concerned with the present litigation, to which it is not a party.

By 1959 or 1960 the amount of mainland-spun yarn being used by Island producers had been reduced to a mere trickle. One of these producers was the Clansman Tweed Co. Ltd., which had been incorporated in 1948 and whose activities are described by the witness, Mrs. Margaret Mackenzie, a member of the Tolmie family who is the Managing Director of the Company. It may perhaps be mentioned in passing that the witness Mr. Creasey, who had been purchasing tweed from this company during the utility period, stopped buying their product in 1952 when he discovered that it did not qualify for the Orb label. The Report No. 496 of Process, of which Mr. Moisley was the author, gives at p. 364 the following estimates of the approximate proportion of tweed woven for the various types of producer/

producer in 1959 or 1960 as follows:

"Woven in Lewis

"(a) For Lewis mill-producers ..... 56%) Using island-
"(b) For Lewis "small" producers .. 28%) spun yarn.
"(c) For Lewis "small" producers .. 2%) Using main-
"(d) For mainland producers ..... 7%) land yarn

"Woven in other islands

"For mainland producers ..... 7%) Using main-land yarn. "

The figures given by Mr. Moisley are fairly well in line with the calculations made in No. 510 of Process. The two last items in Mr. Moisley's estimates, each of 7% represent the hand-weaving carried out in the Islands by and for the pursuers. Thus of the total proportion of mainland yarn amounting to 16%, no less than 14% was used in production by four mainland converters or producers, of which one was solely and another mainly a marketing organisation, and only 2% in production by Island producers.

I now turn to the operations of the mainland converters and producers who in 1959 or 1960 were responsible for the total proportion amounting to approximately 14% to which I have just referred. In 1946 Mr. James Macdonald relinquished his interest in James Macdonald Ltd., the second-named defenders, and went/

went to Oban. On 12th September 1946 he formed Macdonald's Tweeds Ltd., the fourth-named pursuers, which was a family company in which the shares were held by Mr. James Macdonald and his immediate family. The company was controlled by Mr. James Macdonald until 21st December 1959 when it was taken over together with Argyllshire Weavers Ltd., the first-named pursuers, (now renamed Grampian Textiles Ltd.), by Grampian Holdings Ltd. who subsequently in August 1961 took over Laidlaws of Keith and also the new Scottish Crofter Weavers Ltd., the third-named pursuers. Argyllshire Weavers Ltd. was also a family company, and was formed by Mr. James Macdonald on 1st March 1952. Both Macdonald's Tweeds Ltd. and Argyllshire Weavers Ltd. had their headquarters in Oban. Macdonald's Tweeds Ltd. in 1946 built a modern mill in Oban, which initially had capacity for blending, scouring, dyeing, teasing, warping, winding, weaving and finishing. Wool was sent both to the Borders and to Yorkshire to be carded and spun, and yarn was also bought in from various sources. In 1949 carding and spinning machinery were installed. From 1946 onwards Macdonald's Tweeds Ltd. produced a hand-woven tweed. The weaving of this tweed was carried out on Hattersley looms by weavers, a proportion of whom were brought/

brought for the purpose from Lewis to Oban. According to the evidence of Mr. James Macdonald and Mr. Chalmers, this hand-woven tweed was sold sometimes as Argyll tweed, sometimes just as tweed or hand-woven tweed, and to one customer, namely Montague Burton, as Laird Tweed. The evidence indicates that, at any rate as time went on, the tweed made by Macdonald's Tweeds Ltd. began to reach some of the eventual purchasers under the name "Harris Tweed", and according to Mr. James Macdonald, it was identical to the cloth which he had produced in Stornoway. Towards the end of 1949 Macdonald's Tweeds Ltd. installed a number of power looms on which they produced overcoatings, double width tweeds, Saxonies, worsteds, half-and-half worsteds and wool and also tartans. According to Mr. Chalmers, Macdonald's Tweeds Ltd. between 1946 and 1952 were not producing or marketing Harris Tweed. The passage from the evidence of Mr. James Macdonald in chief at pp. 21-22 in which he described his company's methods of trading between 1946 and 1951 deserves quotation in full:

"Q. At Oban did you set up the firm of Macdonald's "Tweeds Limited and did you build a large modern Mill? "A. That is right. Q. After 1946 and between that "date and 1951 what sort of Tweed were they producing "there/

"there? A. Identical to what I produced in Stornoway.
"Q. What were you selling it as between 1946 and 1951?
"A. First we were selling it under the name of Laird
"Tweed to a certain firm. Then we began selling as
"Argyll Tweed and we used to sell some as just Tweed.
"Q. Handwoven Tweed? A. Handwoven Tweed. Q. Did
"you do any advertising from Oban of your own Argyll
"Tweeds? A. No, I never believed in advertising
"strange as it may seem to you. I believed in
"giving service to the customers instead. Q. When
"you were producing your Argyll Tweeds and your Laird
"Tweed in Oban were you invoicing the Tweed as such
"to the customers? A. We always invoiced our Tweeds
"as Tweeds. Q. Just as Tweeds. I would like you to
"look at a production. Just before you do so let
"me give you a fuller opportunity of explaining your
"last answer. You said you always just invoiced
"your Tweeds as Tweeds. Can you tell us why you
"did that, why you didn't invoice them as a particular
"type of Tweed from Oban? A. Why was I going to?
"I can't ask you a question but why should I invoice
"them as anything else but Tweed when I can sell them
"as Tweed. Q. Had it been your practice to invoice
"Tweed as Tweed without specifying what sort they were
"before, even when you were in Stornoway? A. No. Q. In Stornoway
"you/

"you invoiced them as Harris Tweed? A. Yes, I "believe I did. Q. Why was it you changed your "practice when you came to Oban when you tell us you "were producing exactly the same Tweed as you pro- "duced in Stornoway. Why was it you changed your "practice and instead of invoicing it as Harris "Tweed just invoicing it as Tweed. There must be "a reason and we may as well arrive at it now? "A. Well, it is a very difficult question for me to "answer to be quite honest with you. I suppose "the correct answer would be that the less you put "on paper the easier it is to keep out of trouble".

Mr. Chalmers was quite unable to give any explanation why from the beginning in Oban nothing apart from "Tweed" was designated in the invoices. If Mr. James Macdonald was both cautious and scrupulous about what he put on paper, he was less so about what he put on the labels which he provided to some of his customers. It emerged quite plainly from the evidence, including that of Mr. James Macdonald and Mr. Chalmers themselves, that at least as early as the end of 1950 Macdonald's Tweeds Ltd., the fourth-named pursuers were supplying to their customers a Harris Tweed label, which is label No. 24 in No. 298 of Process, and which reads as follows: "Harris Tweed, Guaranteed Handwoven. "Made /

"Made in Scotland". The words "Made in Scotland" if intended to apply to the labels were the reverse of the truth, since the labels were made in Northampton. The relative order and acknowledgment forms for these labels are contained in No. 455 of Process at pp. 1739, 1740, 1742 and 1746. Mr. Chalmers was very uneasy when evidence was elicited from him about the use of Harris Tweed labels by the company at a time when all the weaving was being done in Oban, and I need only refer to his evidence at pp. 981-988 to show the extent of his discomfiture. He admitted inter alia that the customers of the fourth-named pursuers were being supplied with Harris Tweed labels to be attached to cloth which was handwoven at Oban, but which had been invoiced only as Tweed, and that it was quite obvious that their customers had sold as Harris Tweed something which was handwoven on the mainland. If there was one matter on which the evidence in the present case was overwhelming it was that it is and always has been an essential feature of Harris Tweed that it should be handwoven in the Outer Hebrides. Mr. James Macdonald dealt with this aspect of his company's operations in the following passage of his cross-examination at pp. 69-70

"Q. And then of course the position is that if a "customer wanted a Harris Tweed label you were "prepared /

"prepared to supply this, too? A. We were "supplying some. Q. I think as early as 1950? "A. The date I cannot be too sure about. Q. I "wonder if you could look at No. 455 of Process, "at p. 1739. I think you should look at p. 1739, "you see that is an acknowledgement of an order "from Phipps & Son Ltd. to Macdonald's Tweeds "Limited dated 19th September 1950 for labels "bearing the words Harris Tweed guaranteed hand- "woven made in Scotland? A. Yes. Q. So the "position is this, that Macdonald's Tweeds Limited "in Oban were producing a tweed which looked like "the Harris Tweed produced by James Macdonald "Limited in Stornoway and that they were prepared "to supply Harris Tweed labels for that tweed? "A. That is correct. Why shouldn't they? I am "not asking a question. I am not asking a question "when I say that, the fact remains that these "tweeds were exactly identical to what I was making "in Stornoway on the same looms, on the same machines. "Why should they not be sold as Harris Tweed. "Q. Why didn't you invoice it as Harris Tweed? "A. I always found that the less you put on paper "the better. Q. When you were in Stornoway "between 1934 and 1946 weren't you invoicing your "tweed as Harris Tweed? A. Yes. Q. What caused "the /

"the change when you came to Oban? A. Well, there "is the Harris Tweed Association, for instance. "They were watching me like a cat watching a mouse. "Everything I did they were just dropping on me."

This evidence demonstrates a number of things in addition to the fact that the H.T.A. were far from inactive. It shows that Mr. James Macdonald lacked the courage of his convictions, if they were in fact his convictions. It shows that he felt himself to be on the defensive, which, considering the evidence as to what his company was doing, is not at all surprising. It also shows that he was making it as difficult as possible for his own company to be caught out, by preventing proof of a sale by it of its product under the name "Harris Tweed" and by letting the deception take place further down the line. It is interesting to see how neatly these particular activities of the fourth-named pursuers fit with the well known dictum of James L. J. in Singer Manufacturing Co. v. Loog (1879) 18 Ch. D. 395 at p. 412, which was cited with approval by Lord Macnaghten in the leading case of Reddaway v. Banham (1896) A.C. 199 at pp. 215-216:

"No man is entitled to represent his goods as being "the goods of another man; and no man is permitted "to /

"to use any mark, sign or symbol, device or other "means, whereby, without making a direct false "representation himself to a purchaser who purchases "from him, he enables such purchaser to tell a lie "or to make a false representation to somebody else "who is the ultimate customer".

Mr. James Macdonald went on at p. 71 to make it quite clear that this was precisely the technique being adopted by his company:

"Q. How did the customers get to know you were "prepared to provide them with labels bearing the "words Harris Tweed? A. I am afraid that was the "responsibility of our Agents. Once they got to "know it I don't need to tell you that textile "Agents and all kinds of Agents take the easiest "line of selling. Q. They presumably were selling "it as Harris Tweed and the customers were asking "for labels marked accordingly? A. More than "likely that was the position but that was between the "Agent and the customer".

If this was the attitude adopted by the Agents of Macdonald's Tweeds Ltd., and subsequently of Argyllshire Weavers Ltd., the assurances given to traders that certain material was "genuine Harris "Tweed" which were from the evidence often accepted with what seems to me to have been credulous and even starry-eyed /

starry-eyed trust were certainly not very valuable. That Macdonald's Tweeds Ltd. were at the time in question producing an imitation of Harris Tweed is undoubted and the statement by Mr. James Macdonald that he was producing tweeds exactly identical to what he was making in Stornoway is contrary to the fact. None of the processes, not even the hand-weaving, were carried out in the Outer Hebrides. Sometimes they were not even carried out in Scotland, and the wool was not wholly Scottish. The position was rendered all the worse by the fact that the imitation was a good one and by no means easy to detect. To put the matter quite bluntly the fourth-named pursuers were engaged in what I believe has been called on the other side of the Atlantic "a species of "commercial hitch-hiking".

As was bound to happen sooner or later, one of the labels which had been printed on the instructions of Macdonald's Tweeds Ltd., found its way to the H.T.A. and the correspondence relating to this matter is to be found in No. 445 of Process pp. 229 seq. On 14th November 1951 the Secretary of the H.T.A. wrote to Mr. James Macdonald, Macdonald's Tweeds Ltd. in the following terms:

"I expect you will be surprised to hear from me but "I have had a letter today reporting that you are "selling /

"selling tweed as Harris Tweed and supplying a "label with the words 'Harris Tweed Guaranteed "'Handwoven'. I will be very much obliged if you "will let me know whether this is correct. I do "not want to do anything further in the matter until "I hear from you".

Mr. Chalmers said with regard to this letter that he could "remember a certain amount of commotion it "caused". This was a considerable understatement. The immediate results were that Mr. James Macdonald consulted counsel and a decision was reached to carry out hand-weaving in the Outer Hebrides. South Uist was chosen, and a weaving depot, in which 14 looms were originally installed, was opened very quickly at Lochboisdale, and another larger one at Eochar at the other end of the Island later on. In both these depots there were concentrations of looms, and hand-weaving was carried out under factory conditions. The witness Dr. Kissling had for some time been attempting with a degree of success to revive the making of the traditional hand-spun handwoven article in the Southern Islands. The activities which Dr. Kissling was endeavouring to encourage were, however, superseded by operations on the part of the fourth-named pursuers which were at the opposite pole from what he was attempting and which, in my opinion, were a /

a mere commercial device the sole object of which was to attach to their product the name "Harris Tweed" and to make use in that way of the geographical and other selling points which that name conveyed to the purchasing public. These operations were a travesty of the traditional methods and location of Harris Tweed production. All the processes carried out by or on behalf of the fourth-named pursuers, apart from hand-weaving, were carried out on the mainland. Even the warping and beaming were done in Oban and a substantial proportion of the wool used was non-Scottish. Moreover the producer was located on the mainland, where all the profit went.

Against the foregoing background the reply of Mr. James Macdonald to the letter from the H.T.A. of 31st October 1951 to which reference has been made is of some interest. That reply was dated 3rd December 1951 and is to be found at page 232 of No. 445 of Process. After an explanation of the delay in replying which hardly did justice to the considerable activities on the part of Mr. James Macdonald and his company, which had meanwhile been taking place, the material part of the letter proceeded as follows:

"With regard to your question as to whether we are "selling /

"selling Harris Tweed. You can take my word for "it, as you used to do, that since we came to Oban "we have not sold, invoiced or confirmed any of our "Handwoven Tweeds as Harris Tweed, but we may inform "you that from now onwards we are going to make and "sell some Harris Tweed as we have now bought "premises in Lochboisdale, South Uist, where we are "going to weave Harris Tweed, and we claim to be "entirely within our rights to do so in view of the "Lord Chancellor's judgement against John Vitch" (sic) "and others, (in other words the well-known "Yarn Bargo case)".

This letter, which was represented as having been a challenge, was in fact a composition of some ingenuity savouring of evasion. It contained a specific statement that the fourth-named pursuers had not sold, invoiced or confirmed any of their hand-woven tweeds as Harris Tweed, which once more suggests that Mr. James Macdonald lacked the courage of his conviction, if indeed he was so convinced, that the name Harris Tweed had become purely generic, or, as he put it in his later letter to the H.T.A. dated 14th May 1952 (No. 445 of Process p. 240) "typical". The letter of 3rd December 1951 avoided the issue about the label by maintaining complete silence on that subject. Having regard to the facts which have now been disclosed by documents recovered in the course of /

of the present action, that silence was certainly prudent. The letter also contained the cautious statement that "we" are going to make and sell "some" Harris Tweed which, as it is now easy to see, opened up a number of escape routes for Mr. James Macdonald and the fourth-named pursuers should they be faced with litigation or prosecution. Various other steps were taken by the fourth-named pursuers and by Mr. Macdonald at this time, of which it is sufficient to say that they were not calculated to make it easy for the H.T.A. to get a decision on the merits of the dispute in a test case brought against Mr. James Macdonald's companies or one or other of them. It may also be observed that the tweed produced by the fourth-named pursuers continued to be invoiced simply as handwoven cloth without the addition of the name "Harris Tweed" until as late as 1956, by which time as will be seen the defensive advantages of this particular practice to Mr. James Macdonald and his companies had been much eroded.

The weaving depot which had been acquired by the fourth-named pursuers at Lochboisdale came into operation about March 1952, and the weaving depot at Eochar, which is at the other end of South Uist, was set up shortly afterwards. In both these depots handweaving /

handweaving was carried out under what can only be described as factory conditions, the weavers being treated as employed persons, though there was a certain elasticity about working hours. Normally each weaver would produce about two tweeds per week. The looms were supplied by and belonged to the fourth, named pursuers, whose foremen maintained and tuned them, and the instruction, training and work of the weavers was carried out under the supervision of these foremen or overseers employed by the fourth-named pursuers. It was interesting to hear Mr. John McIntyre, one of the weavers employed by the fourth-named pursuers at Eochar, refer (at p. 3388) to the fourth-named pursuers' premises at Eochar as "the mill". The original depot at Eochar housed thirty-two looms. An additional shed was later erected which housed another thirty-two looms, and which came into operation about May 1954. At the time of the proof the depot at Lochboisdale had been closed, but thirty-five to forty weavers were still working in the depot at Eochar. A proportion of the weavers trained by the fourth-named pursuers in their depots in South Uist subsequently took the looms and carried out handweaving at or near their homes, but no distinction was made between tweed so woven and tweed woven at the depots. At the time of the proof about thirty-four weavers were working at the north end

of /

of South Uist outside the depot, and, although there were a number of outworkers in other parts of South Uist and also in Eriskay, many of those who had been trained in the depots must have given up weaving afterwards. The fourth-named pursuers about October 1954 began to send quite large quantities of yarn to be handwoven on commission in Lewis. Owing to the greater experience and skill of the weavers in Lewis, the yarn sent there was left to be beamed by the weavers themselves. I understood from the evidence that the warping was sometimes carried out by agents in the Island, but even in the case of yarn woven in Lewis a proportion of the warping was done at Oban. In the case of the South Uist operations, however, all the warping and beaming was carried out in Oban, and even the weft threads were wound on to bobbins or pirns there. This was rendered necessary because of the lack of skill and experience of the weavers employed in South Uist. Some of the warping carried out by the fourth-named pursuers, both for Lewis and South Uist, was carried out by the use of power, a procedure which so far as the evidence discloses had never previously been adopted in the case of an article attempted to be marketed under the name "Harris Tweed", with the exception perhaps of powerwoven fakes.

On /

On 1st March 1952, just about the time when the operations in South Uist began, a new company called Argyllshire Weavers Ltd., the first-named pursuers, was formed by Mr. James Macdonald. This Company was used for the marketing of tweed produced by the fourth-named pursuers, and I find it difficult to avoid the inference that the use made of the new company was to some extent connected with the threat of action by the H.T.A. The approximate yardages sold by the first and fourth-named pursuers from March 1952 onwards are shown in No. 287 of Process. These figures are impressive in amount, but they become a great deal less impressive when the methods of production, processing, marketing and disposal have been disclosed. It is significant that, despite all that had happened and all that had been said, not a single yard of tweed was invoiced by the first-named pursuers as Harris Tweed for at least four years, although it was well-known to that company, as it had been well-known to the fourth-named pursuers, that a proportion at least of the tweed marketed by it was reaching the ultimate purchaser under the name "Harris Tweed". If the first-named pursuers and Mr. James Macdonald were all along satisfied that the material being woven by or for them in South Uist and later in Lewis was Harris Tweed, I am unable to understand why it was /

was not sold and invoiced as such by the first-named pursuers until 1956. They seem to have shrunk from hoisting their true colours. It is not as if there was not a good deal of correspondence with both their agents and customers over the thorny question as to whether the product was entitled to be sold as Harris Tweed. Much of this correspondence, which is too voluminous to refer to in detail, was put to Mr. Chalmers during his cross-examination, and some of the correspondence and of his answers are extremely revealing, both in respect of what is said and, in the case of the correspondence, perhaps even more what is not said. The first-named pursuers supplied Harris Tweed labels when requests were made for such labels, thus continuing a policy which had been instituted by the fourth-named pursuers in the circumstances already described. The explanation of the supply of these labels and indeed of most of the other actions of the first-and fourth-named pursuers was in my opinion quite simple, namely that once the immediate post-war shortage of cloth was over, unless the name Harris Tweed was applied to their product for the benefit of the ultimate purchaser, the product would not sell. Many events and actions can be traced back to this fundamental fact, and no attempt to suggest that their product was as good in quality /

quality as genuine Harris Tweed or looked or felt the same can conceal it. If the pursuers are of a different view and if they consider that the public will buy an article handwoven in the Outer Hebrides under another and unobjectionable name, they are no doubt at liberty to invite such purchases, following the course which was, for example, adopted by the seventh-named defenders when they marketed the material produced by them from mainland-spun yarn as "Hebridean Tweed". Such procedure would in my opinion have been a good deal more straightforward than the course which the pursuers chose to follow. The absence of the name "Harris Tweed" was, in my opinion, the reason why the first- and fourth-named pursuers' sales of Argyll Tweed died away, and it is for this reason that attempts to sell a competing article under a different name have always met with little success, and that so many determined attempts have been made over the years to whittle down the requirements for genuine Harris Tweed, while at the same time endeavours have been made to conceal from the purchasing public the absence in imitations of the selling points which attract the public in the case of the genuine article. It would have been the simplest /

simplest thing in the world for the first-named pursuers to invoice their product to their customers during the period 1952 to 1956 by the name "Harris "Tweed", and it is apparent from the correspondence that this might have set at rest some at least of the doubts which were entertained by customers. Yet the first-named pursuers did not take this obvious and simple course but preferred the more roundabout method of supplying labels and of giving verbal or written assurances, coupled with explanations which usually were not particularly revealing and frequently told less than the whole truth. Even the labels produced after 1952, which as one would expect omitted all reference to the true distinction between the product sold by the first-named pursuers and the article which qualified for the Orb stamp, contained, either intentionally or unintentionally, ambiguous and misleading matter. Thus label No. 15 in No. 298 of Process, which was used by the first and fourth-named pursuers, contained the legend "Handwoven by "the Crofters <u>of</u> the Hebrides" (my underlining) which was a beautifully ambiguous statement considering that a number of Lewis weavers were employed for a period of years at the Oban mill. The words "100% "Pure Virgin Wool Made in Scotland" are, to say the least, open to misconstruction in a case where the origin /

origin of the wool may be of the essence. Label No. 19 in No. 298 of Process, which was used by the first-named pursuers during 1952 and 1953 is open to the same sort of criticism, though in this case as in the case of label No. 24 (with which I have already dealt) the words "Made in Scotland" appeared "below "the line". Mr. Chalmers was cross-examined about these matters in some detail, in particular at pp. 914 and 984-988 of the evidence, and his discomfiture was obvious. The attempted explanation that the words "Made in Scotland" were intended to apply to the place of manufacture of the label accords ill with the terms of the letter from the first-named pursuers to the Gloucester Clothing Co., Ltd. dated 9th June 1952 (No. 453 of Process p. 1443) of which Mr. James Macdonald was the author. This is only one example among a good many others of a lack of candour on such important matters as the origin of the wool used in the product of the first- and fourth-named pursuers. Some of the effects in the case of the ultimate purchaser emerged very plainly in the evidence of Mr. Wilkinson and Mr. Stone, which I will consider in a little detail shortly, since both counsel quite correctly regarded these gentlemen as important witnesses.

Before /

Before I pass to that chapter of the evidence, however, I propose to refer to the post-war operations of A. & J. Macnaughton Ltd., the second-named pursuers, and the operations of the new Scottish Crofter Weavers Ltd., the third-named pursuers. In view of the concession made, after full consideration, by counsel for the pursuers that all the pursuers must, in effect, stand or fall together, the operations of these pursuers probably do not require such detailed treatment. It was assumed by counsel, and I think rightly assumed, that if the first- and fourth-named pursuers should succeed in the present action a fortiori the second- and third-named pursuers must also succeed. The post-war operations of the second-named pursuers began in 1953 and were preceded by a visit made to the Outer Hebrides by Mr. Blair Macnaughton, a director of the company, early in 1952. The date is significant. The immediate post-war boom was over. A recession had set in, and the second-named pursuers were looking for a way in which to employ their surplus capacity for spinning yarn. According to Mr. Blair Macnaughton (at p. 293) the purpose of the visit was "to resuscitate the business which had been "carried on, by us, for a long period of years, "that of selling completely spun yarn to the "Outer Hebrides." At page 294 Mr. Blair Macnaughton went on to say that the purpose of his company at that time /

time was "to pursue the logical business that had been "carried out by my firm for a period of some 30 years "of selling yarn to the Outer Hebrides, and that was "the intention when I went there in the first place". The second-named pursuers may also have been attracted by the fact that sales of Orb Harris Tweed were, despite the recession in the tweed trade generally, on the increase, as is evidenced by the stamping figures in No. 447 of Process p. 115.

The evidence appears to show that the second-named pursuers although they had received a war-time allocation of wool for their Hebridean trade, ceased supplying yarn to the Outer Hebrides in 1941 and did not again begin making any sales there until 1947. Their post-war trade in selling yarn to the Outer Hebrides was comparatively small and spasmodic, as is shown in No. 317 of Process, and has fallen away almost completely. They appear to have decided very quickly that there was no prospect of making substantial sales of yarn to producers or weavers in the Outer Hebrides. Mr. Morrison at p. 575 referring to Mr. Blair Macnaughton's visit to the Islands in 1952 put the matter thus:

"Q. What was the purpose of his visit, do you remember, "to the Islands in 1951 or thereabouts? A. To try "to/

"to revive the trade which we had before of selling "yarn to the weavers in the Islands. Q. Did you "have any success in trying to boost that trade? "A. I am afraid not. Q. Do you know what the "reason for that was? A. Just simply that they did "not seem to be interested."

In these circumstances the second-named pursuers decided as Mr. Morrison put it at p. 576 "to try and revive "the old method of sending yarn on our own account and "having it hand-woven in the Islands there". The "old method" to which Mr. Morrison refers in this passage of his evidence was the operation carried out at Tarbert by A. & J. Macnaughton on a very small scale between 1927 and 1934 to which I have already referred.

The subsequent operations of the second-named pursuers which began in 1953 or 1954 are described in the evidence of Mr. Blair Macnaughton and Mr. Morrison and for a summary of what was done, reference may be made to the evidence of the latter witness at pp. 576 seq. At first they sent yarn which had been spun at their mill at Pitlochry to Crofter Hand Woven Tweed Company, who had the yarn handwoven in the Islands and returned the tweed to Pitlochry in the greasy state/

state for finishing. When Crofter Hand Woven Tweed Co. went out of business very shortly thereafter, the second-named pursuers appointed an agent of their own in Lewis, the witness Mr. Ian Montgomery. The yarn supplied by the second-named pursuers, some of which was bought in from outside sources, such as Patons & Baldwins, contained a large proportion of non-Scottish wool, usually English and Welsh. Some of the yarn was stake-warped at Mr. Montgomery's premises at Araidvruaich in Lewis, but the greater proportion of the yarn was power warped at the Pitlochry mill, a departure similar to that already mentioned in the case of Macdonald's Tweeds Ltd. at Oban. The production was at first small, but increased fairly rapidly. Rather surprisingly no records were available for the period between 1953 and 1959, during which the second-named pursuers were also producing and marketing a single width tweed called by them "Pitlochry Homespun". In about 1956 the second-named pursuers started buying in additional yarn, which was sent direct to Mr. Montgomery, and according to Mr. Blair Macnaughton and Mr. Morrison the yardage of tweed produced by them in this way had increased from about 5,000 yards in 1953 or 1954 to something under 200,000 yards in 1958. The yardage figures for 1959 and subsequent years are shown in

No./

No. 289 of Process which was prepared from the I.H.T.P. levy figures, and which shows the second-named pursuers' yardages for 1959 and 1960 as 258,531 yards and 257,794 yards respectively. According to Mr. Blair Macnaughton and Mr. Morrison the tweed so produced by their company was disposed of as "Genuine Harris Tweed". One may remark in passing that in this context the word "genuine" has almost begun to acquire a connotation as sinister as the word "type". Until the formation of I.H.T.P. little advertising was carried out by the second-named pursuers and I am not satisfied that any adequate steps were taken, any more than in the period 1927 to 1934, to bring to the notice of the ultimate purchaser the essential differences between the material so produced and tweed which qualified for the Orb stamp, in particular that only one process, namely hand-weaving, was carried out in the Outer Hebrides and that a substantial proportion of the wool used was non-Scottish. The whole evidence satisfies me that the modus operandi adopted by the second-named pursuers from 1953 or 1954 onwards was a mere commercial device, less blatant perhaps than the method adopted at Tarbert between 1927 and 1934 and the South Uist operations of the first- and fourth-named pursuers, but nevertheless a device to enable/

enable the company to attach the name "Harris Tweed" to its product. Without the use made of that name and the selling points which in my opinion it conveyed to the mind of the ultimate purchasers, I am satisfied that the product of the second-named pursuers would not have sold.

The operations of the new Scottish Crofter Weavers Ltd., the third-named pursuers, were on a considerably smaller and diminishing scale as is shown by the figures in Nos. 288 and 289 of Process. The new company was incorporated as I have said on 30th December 1955 and its operations are described in the evidence of Mr. R. A. Laidlaw. Much the same technique was adopted as had previously been employed by the original Scottish Crofter Weavers Ltd., the agents on the Islands being the witness Mr. John Mackenzie of Araidvruaich and his brother. At first the third-named pursuers used yarn spun by Lumbs of Elland, but they soon began to take their yarn from their associated company, Laidlaws of Keith. Laidlaw's yarn, like that of Lumb's, contained a substantial proportion of non-Scottish wool, including in the case of Laidlaws, some Colonial or Dominion wool. After being hand woven on commission in the Islands the greasy tweed was returned to the mainland for finishing. The tweed was marketed mainly abroad, in Europe and elsewhere/

elsewhere, and there were few sales, if any, in the home market. The product was generally sold as Hebratex Handwoven Harris Tweed and sometimes, particularly in the United States of America, as Hebratex Handwoven Tweed. Two of the labels supplied by the third-named pursuers are labels No. 6 and 7 reproduced in No. 298 of Process. Label No. 7 contains, it may be observed, the legend "Woven by the crofters "at their own cottages on the Island of Harris and "Lewis". There is little indication in the evidence of any steps taken to make the ultimate purchaser aware of the differences between tweed produced by the third-named pursuers and sold under the name "Harris Tweed" and tweed which qualified for the Orb stamp. Here again I am satisfied that the procedure used by the third-named pursuers was a mere device aimed at obtaining the use and advantages of the name "Harris Tweed" together with the selling points which attach to that name in the minds of the purchasing public. In the course of his cross-examination at pp. 747-748 Mr. Laidlaw put the matter quite plainly in the following passage:

"Q. I think the position was that so long as the "words 'Harris Tweed' didn't appear on the cloth, or "on the consignment notes or something else of that "nature it got into the United States? A. The position "was/

"was that it was practically impossible to sell "a cloth unless it was called Harris Tweed, and in "fact we may have sold an infinitesimal quantity but "it was only under the name Hebratex. No real "business could be done unless the cloth could be "termed Harris Tweed. Q. From that I take it you "would agree that you can have two cloths of "identical quality, and indeed you can have two cuts "of the same piece of tweed, and if you call one Harris "Tweed you can sell it, and if you call the other bit "another name you might not be able to sell it? "A. That is the position. Q. Is that the position? "A. That is the position in the United States. "Q. Only in the United States or generally? "A. Probably generally, but certainly in the United "States."

One other matter which emerged from Mr. Laidlaw's evidence is that the third-named pursuers sometimes provided power-woven samples, and in one case, which was disclosed by chance in Canada, a bunch had been supplied by them to a prospective agent which contained a power-loomed pattern which could not physically have been reproduced on a hand-loom (No. 327 of Process pattern 3381). This illustrates the sort of dangers which always appear to arise and develop when processes begin/

begin to be carried out elsewhere than in the Outer Hebrides, and particularly when production is carried out by or in close collaboration with mainland converters who have power looming capacity. In the course of his re-examination at pp. 769-770 Mr. Laidlaw made a statement to the effect that "the less you tell the customer "the better about certain things. It is better just "to deliver the lengths in the time required without "making any statement about it". This approximates to the philosophy expressed by Mr. James Macdonald in passages of his evidence to which I have already made reference, but it is not the method by which in law a reputation and goodwill may readily be obtained for a product and its producer.

It is apparent from the evidence that the attractions to the maker-up and retailer of cloth produced and put on the market by the pursuers by the methods above described was the fact that the material was cheaper than tweed stamped with the Orb, coupled with the possibility of being able to use the name "Harris "Tweed". The price differential is variously stated, but it appears to have amounted to 1/- and sometimes as much as 2/- per yard, and, to take another example, the price differential in a tweed jacket might amount to as much as 7/6d. The price attraction was naturally very/

very important at the cheaper end of the market, and it was that end of the market which was more receptive of what counsel for the pursuers at one stage of his submission referred to as "progressive ideas" on the subject of Harris Tweed. The word "progressive" was in this context borrowed from the evidence of Mr. Sinclair, who acted as one of the agents for the first- and fourth-named pursuers from 1949 onwards, at pp. 2105-2106. As I have already indicated, I have found the trade evidence a good deal less helpful than one would expect having regard to its volume, partly because of a remarkable lack of knowledge and information in some cases, partly because of a striking willingness, which seems to be general in the trade, to accept assurances by manufacturers and their agents and partly because the information given by the trade to the public seems often to have differed from such information as was given to them by the manufacturers, and in a good many cases even from the trade's own understanding of the situation. It would be quite impossible to deal in detail with the evidence of the trade witnesses adduced on one side and on the other. In general, however, the trade evidence adduced by the pursuers struck me, when closely examined, as rather scanty, and I certainly did not find it particularly convincing. The trade evidence/

evidence adduced in support of the defenders' case on the other hand was a good deal more convincing, though some of it was justifiably criticised upon the view that a number of these witnesses would not look beyond the Orb, but yet were not very clear as to why they believed that the pursuers' product could not be described and marketed as Harris Tweed. A few of the trade witnesses on both sides seemed unable to specify the methods and locality of manufacture and production which in their view qualified one cloth for the name "Harris Tweed" and disqualified another. On the whole counsel for the parties found it a good deal easier to pick holes in the evidence of their opponent's trade witnesses than to set up the evidence of their own, and, speaking for myself, I am inclined to think that more assistance can be obtained from some of the witnesses who are not connected, or not too closely connected, with the trade.

I was referred by both counsel in some considerable detail to the evidence of Mr. Wilkinson and Mr. Stone, and, while one does not wish to place too much emphasis on the evidence of two witnesses amongst so many, there is a good deal in the evidence of both which is very instructive in relation to the activities particularly of/

of the first- and fourth-named pursuers with which I have just dealt. Mr. Wilkinson since 1962 has been Chief Buyer for Montague Burton, who are according to his evidence, the largest multiple clothing business in Britain and have many retail shops throughout the country. The only tweed which Montague Burton will sell as Harris Tweed is tweed bearing the Orb stamp, and considering the long experience of Montague Burton with tweed produced in the Outer Hebrides, this is a fact of some significance. Mr. Wilkinson from 1948 to 1962 was employed as a cloth buyer by Hepworths Ltd., who are manufacturers and retailers of clothing on a fairly large scale, and who in 1960 had 38 retail branches in Scotland and 229 in England and Wales. This sounds a large number of shops, but in fact, according to Mr. Wilkinson, Montague Burton have very many more shops than Hepworths Ltd. The evidence of Mr. Wilkinson with regard to the operations of the latter firm are of particular interest as they, like Montague Burton, are, and were, in direct contact with the public. Hepworths Ltd. had until about 1950 sold only Harris Tweed which was stamped with the Orb. About 1950 they began to purchase supplies of non-Orb tweed from a firm called by Mr. Wilkinson Highland Tweeds Ltd. (probably Highland Tweeds (Scotland) Ltd.) which /

which had a registered office in Leeds. The tweed supplied by this firm was cheaper than Orb stamped Harris Tweed and shortage of supplies of Orb stamped Harris Tweed round about that time also had a bearing on the step taken by Hepworths Ltd. Highland Tweeds Ltd. at one time appear to have had carding and spinning plant at Stornoway, but some of their spinning and some at least of their dyeing and finishing were carried out on the "mainland", though it is not clear whether this was the mainland of Scotland or England or both. Mr. Wilkinson "took their word for it" that their product was "genuine" Harris Tweed. Mr. Wilkinson, according to his evidence, was assured that the cloth was woven on the Islands and "so far "as he knew" it was entirely 100% pure virgin wool. He says he knew spinning and finishing were carried out on the mainland and was under the impression that dyeing was also carried out there. When Hepworths Ltd. began to purchase this cloth Mr. Shuttleworth, the Managing Director of the Company, sent an explanatory circular to their managers dated 6th April 1950 (No. 445 of Process p. 227) which contained a wealth of inaccuracies and misinformation. Nothing could have been easier than to describe the differences between Orb stamped Harris Tweed and the material purchased from Highland Tweeds Ltd. by Hepworths /

Hepworths Ltd. but this is precisely what the circular did not do. What it did do was to state that in order to qualify for the use of the title of "Harris "Tweed", cloth must be hand-woven in the Islands forming the Outer Hebrides. The circular proceeded as follows:

"There are, however, two principal sources of "supply of this kind of tweed. Basically, both "sources of supply emanate from the crofters' "cottages where the hand looms are situated, but "some 50% of the total production is marketed "through the Harris Tweed Manufacturers' Association "and their registered trade mark is shown on the "label which bears the Orb and Sceptre insignia. "It is illegal to use this particular label with "any cloth which has not been marketed through the "Association.

"The second source of supply is of precisely "the same type of tweed, in fact in many cases it "is absolutely identical, but it is sold by the "crofters themselves direct to the trade, and as "such it qualifies for the title of Harris Tweed "but it cannot be used in conjunction with the "official trade mark of the Harris Tweed Association."

The greater part of the passage quoted was and is wholly misleading and the circular then proceeded with the /

the assertion that "a good proportion of our tweed "has recently been purchased direct from the crofters". According to Mr. Wilkinson not a single yard of tweed was ever purchased by Hepworths Ltd. direct from the crofters, and this indeed is manifest from other evidence led in the case. If Mr. Shuttleworth's information was passed on to the public, as one must assume it was intended to be, then the public were grossly misled.

In May 1952 Hepworths Ltd. began to buy what Mr. Wilkinson called "non-Orb/Harris Tweed" from the first-named pursuers and in the following year they purchased supplies of that article also from the second-named pursuers. The business between Hepworths Ltd. and the first-named pursuers was arranged by W. S. Carter Ltd. of Leeds who acted as agents for the latter. A letter to the first-named pursuers from their agents dated 21st May 1952 (No. 455 of Process p. 1750) shows that there was some discussion about the label to be supplied. The letter in question bears a facsimile of the label which had been supplied to Hepworths Ltd. by Highland Tweeds Ltd. which inter alia contained the ambiguous legend "Handwoven by the "Crofters of the Hebrides" (my underlining). The foregoing formula was used on the labels supplied by the first-named pursuers to Hepworths Ltd. (presumably label /

label No. 15 in No. 298 of Process) and later Hepworths Ltd. used labels No. 19 and 21 in No. 298 of Process. After Hepworths Ltd. began doing business with the first- and second-named pursuers, Highland Tweeds Ltd. faded out, and according to Mr. Wilkinson later went into liquidation.

On 24th February 1953 Mr. Shuttleworth sent a further circular (No. 445 of Process p. 250) to the managers of his company which is even more remarkable than its predecessor of 5th April 1950, to which I have already referred. The second circular need only be quoted to demonstrate its inaccuracies. It was in the following terms:

"Harris Tweed"

"On the 6th April, 1950, I outlined briefly the "marketing arrangements for Harris Tweed. It may "be that the time is now opportune for a reminder "in this connection.

"In order to qualify for the use of the title " 'Harris Tweed', cloth must be hand woven in the "Islands forming the Outer Hebrides. The crofters "who weave Harris Tweed on their hand looms are, of "course, free to market their product in any way "they choose. A proportion of the total production "is marketed through the Harris Tweed Manufacturers' "Association Limited, whose registered trade mark "is /

"is shown on the label which bears the orb and "sceptre insignia. This is the label which is so "freely publicised by the Association and it is "obviously illegal to use this particular label "with any cloth which has not been marketed through "the Association.

"The bulk of the Harris Tweed which we purchase "is bought from the crofters, by-passing the Harris "Tweed Association Limited, and we are thereby able "to offer similar or identical material at a con- "siderable price saving, and we use a Harris Tweed "label designed specifically for this purpose. "The only difference in this transaction is that "we are not entitled to use the label and registered "trade mark of the Harris Tweed Association Limited.

"If any of your customers enquire in regard to "the type of label supplied with our garments this "is the explanation which you must give and you must, "of course, be very careful that you do not in- "advertently use and display either labels or show "cards which are the property of the Harris Tweed "Association Limited."

Once more the simple explanation of the differences between Orb stamped Harris Tweed and the so-called "non-Orb Harris Tweed" is studiously omitted. Bearing in mind the nature of the first- and fourth-named pursuers' /

pursuers' operations in South Uist, to say that the bulk of the Harris Tweed purchased by Hepworths Ltd. was bought from the crofters was to draw the long bow with a vengeance. Yet it is apparent from complaints by customers of Hepworths Ltd. and the replies thereto, which are contained in No. 446 of Process pp. 155 seq., that this circular was being used as the basis for explanations to the public as late as 1960. For example in a letter to a Mr. S. Varley dated 30th September 1958 (No. 446 of Process p. 159) one of the managers of Hepworths Ltd. wrote inter alia as follows:

"You mention that the label is misleading. I "would, therefore, like to remove any doubt in your "mind that the material is undoubtedly genuine "Harris Tweed which is purchased by us direct from "the Crofters who hand weave the material. This "cloth is not, however, marketed through the Harris "Tweed Association whose official Association "label shows the Orb which is their Registered "Trade Mark.

"Our Suppliers are not Members of the Harris "Tweed Association, but this does not mean that the "cloth is not genuine Harris Tweed. The Harris "Tweed Association label is not the only label "which denotes genuine Harris Tweed."

The /

The statement that the material from which Mr. Varley's jacket had been manufactured had been purchased by Hepworths Ltd. direct from the crofters was untrue to the company's knowledge. Moreover, their suppliers could not be members of the Harris Tweed Association, a matter which the slightest enquiry would have demonstrated, and no cloth was or could then be marketed through the Harris Tweed Association. I must confess I find it most surprising that such information should have been put out by the Managing Director of Hepworths Ltd. to the managers of the company and so to the public, and that the true explanation of the differences between the respective cloths should have been avoided. Even the obiter dictum of the Lord Chancellor in the Embargo case, of which full use was made by the first-named pursuers in their dealings with their immediate customers when difficulties arose, was not used either by Mr. Shuttleworth in his circular or in the explanations by Hepworths Ltd. to members of the public to which I have referred. In my opinion, it is reasonable to infer from the evidence that if the actual differences between the respective cloths had been disclosed to the public and if the public had been made aware of the absence in the material stocked by Hepworths Ltd. of the selling points by which they were in my opinion attracted to make purchases of Harris /

Harris Tweed, then the "non-Orb Harris Tweed" offered by Hepworths Ltd. to the public would not have sold, even at lower prices than Orb-stamped Harris Tweed. It may be observed that Mr. Wilkinson himself recognised (at p. 2801 of the evidence) that the general public consider Harris Tweed is a product of a cottage or "crofter" industry. The tweed produced by the first- and fourth-named pursuers, which was hand-woven at depots at Lochboisdale and Eochar, was in no sense the product of a cottage industry in any of its processes. It may also be observed that Mr. Wilkinson was all along under the impression that the tweed purchased by Hepworths Ltd. from the first-named pursuers was made from 100% pure virgin Scottish wool, which until 1959 was contrary to the fact. Mr. Wilkinson agreed (at pp. 2778-2779 of the evidence) that Mr. Shuttleworth in 1950 would also be under that impression. A correspondence during August 1954 demonstrates that Hepworths Ltd. claimed that the tweed which they were purchasing from the first-named pursuers was made from pure virgin wool produced in Scotland. No. 445 of process pp. 263 seq. Indeed in a letter to the Secretary of the H.T.A. dated 12th August 1954 the Secretary of Hepworths Ltd. went so far as to say "The cloth we are using can be "termed genuine Harris Tweed because we have the "makers' /

'makers' guarantee that it is made from pure virgin "wool, produced in Scotland, and conforms in all ways "to use this term". (No. 445 of Process, p. 264). This was bad enough, but what leaves an even worse impression is that, although a copy of the letter was sent at the time to the first-named pursuers, the mis-statement was never corrected. Even in the reply to Hepworths Ltd. from the first-named pursuers dated 31st August 1954 (No. 455 of Process p. 1838) the fact that non-Scottish wools were being used is not made clear. It may be added that Hepworths Ltd. did not respond to the invitation to let the Secretary of the H.T.A. have the name of their supplier. (No. 445 of Process p. 265). Even as late as 11th November 1960 one finds a customer of Hepworths Ltd. being given, in a letter written on behalf of the Company's Managing Director, information which in addition to other inaccuracies implied that the "Genuine Harris Tweed" stocked by the Company was finished as well as hand-woven in the Outer Hebrides. That letter (No. 446 of Process p. 172) contains the following statements:-

"In regard to your request for genuine Harris Tweed, "I would explain that all our Harris Tweed is "genuine. This is purchased by us direct from the "crofters, but is not marketed through the Harris "Tweed /

"Tweed Association whose trade mark is the Orb. "The cloth we purchase is marketed through another "large Harris Tweed organisation - the independent "Harris Tweed Producers Association Ltd. All "Harris Tweed which is hand-woven and finished in "the Outer Hebrides is termed Genuine Harris Tweed, "but it is unfortunate that the advertisement in "the press by the Harris Tweed Association can to "some extent be misleading".

In the case of Highland Tweeds Ltd. Mr. Wilkinson's impression with regard to the wool content was even more astray, since in that case the wool came from Bradford already dyed. This is an example of the sort of thing which went on during the period of immediate post-war shortages when as I have said even Belgian yarn was imported into Lewis. In my opinion, the evidence relating to Hepworths Ltd. is explicable only upon the basis either that they were hopelessly misinformed, or that they deliberately misled the public with regard to the elementary facts. If the public had been informed of the true facts and if an accurate explanation had been given of the different methods and location of manufacture and production of the two articles, my impression from the evidence is that the product of the first-, second- and fourth-named pursuers not to speak of the product of Highland Tweeds /

Tweeds Ltd., would probably not have been accepted as genuine Harris Tweed by the ultimate purchaser. I may complete my consideration of Mr. Wilkinson's evidence by quoting a short passage from his cross-examination (at pp. 2783-2784 of the evidence) relating to Mr. Shuttleworth's second explanatory circular to which I have just referred

"So that again in 1953 Mr. Shuttleworth is "indicating to the managers of his shops that the "only material difference between stamped and "unstamped tweed is that the unstamped tweed is "purchased direct from the crofters? A. Yes. "Q. In 1953 were Messrs. Hepworths purchasing any "tweed direct from the crofters? A. No they were "not".

This passage demonstrates not only that there was complete silence on the true differences between Orb stamped Harris Tweed and the material purchased by Hepworths Ltd. from the first- and second-named pursuers, but also that the managers of Hepworths Ltd. were being encouraged to dispose of the latter article upon a false representation to the public that it was purchased by Hepworths Ltd. direct from crofters in the Outer Hebrides who produced it. That this was calculated to be a selling point with the purchasing public, there can in my opinion be no doubt.

I /

I now turn to the evidence of Mr. Maurice Stone, a Director of Mace, Rainbow and Stone Ltd., who engage in the manufacture and selling wholesale of ladies tweed coats and suits. Their production is of quality clothes for the cheaper end of the market. From 1934 onwards, Mace, Rainbow and Stone had purchased most of their Harris Tweed from James Macdonald Ltd., the second-named defenders, who were still supplying them in the late 1940's. After Macdonald's Tweeds Ltd. started operations in Oban, Mr. James Macdonald who was known to Mace, Rainbow and Stone tried to interest them in Argyll tweed but they were not prepared to purchase that cloth. Subsequently Mr. James Macdonald informed Mace , Rainbow and Stone that he was now manufacturing Harris Tweed and, according to Mr. Stone, Mace, Rainbow and Stone began to buy tweed from the fourth-named pursuers direct. Probably in fact the purchases were made from the first-named pursuers. Mr. Sinclair of W. G. Sinclair & Son Ltd., the first-named pursuers' London Agents, had something to do with obtaining the business as is shown by his letter to them dated 16th May 1952 (No. 455 of Process p. 1751). Mace, Rainbow and Stone were considerably influenced by the difference in price between Orb-stamped Harris Tweed and the article offered to them by Mr. James Macdonald, /

Macdonald and, in the trusting fashion which seems to be rather common with those purchasing cloth wholesale Mace, Rainbow and Stone accepted an assurance from Mr. James Macdonald that his material was "genuine "Harris Tweed". Mace, Rainbow and Stone were not the only purchasers to be influenced by the difference in price between the two articles, and it is my impression that this difference in price had a good deal to do with setting at rest the scruples of some of those who turned at or about this time from Orb-stamped Harris Tweed to the material produced and marketed by the first, second and fourth-named pursuers amongst others. The reactions of prospective purchasers to his salesmanship are quite significantly summarised by Mr. Sinclair in the answer in his cross-examination at pp. 2105-2106 of the evidence, to which I have already referred:

> "Yes, I had no difficulty up to a point with the "people who were progressive and listened to what "I had to say in regard to the manufacture of the "tweed. I had a lot of difficulty with some "sections of the trade".

My own impression from the evidence is that the price differential was in most cases the governing factor. In the case of Mace, Rainbow and Stone, labels were at /

at first supplied to them by either the fourth or, more probably, the first-named pursuers, but later from about 1955 or 1956 Mace, Rainbow and Stone used their own "Ormdale" labels which are illustrated in No. 286 of Process. It appears that at an early stage, Mace, Rainbow and Stone had some misgivings about the genuineness of the tweed which they had begun to purchase from the first and second-named pursuers. These misgivings may provide some explanation as to why, when a circular was sent by Mace, Rainbow and Stone to their agents dated 20th March 1953 (No. 273 of Process p. 2), nothing was said about the true differences between Orb-stamped Harris Tweed and the material which did not bear the Orb stamp. No reference was even made to the obiter dictum of the Lord Chancellor in the Embargo case, although Mr. Stone was apparently aware of that dictum. The instructions given to Mace, Rainbow and Stone's agents were simply to say that the reason the tweed did not bear the Orb mark was that the suppliers of the tweed were not members of the Harris Tweed Association. This reason was wholly inaccurate and misleading, and Mace, Rainbow and Stone did not explain that their suppliers could not, in any /

any event ----------, have been members of the Harris Tweed Association whether they had wanted to or not. On 24th September 1953 Mace, Rainbow and Stone wrote letters to both the first- and second-named pursuers in which they put a number of specific and, in my opinion, extremely pertinent questions. The first-named pursuers avoided giving specific replies to these questions, (No. 273 of Process). The second-named pursuers' replies in a letter dated 25th September 1953, which was unfortunately not put to Mr. Blair Macnaughton in cross-examination, included the assertion that the wool in the tweed supplied by them was 100% Scottish which other evidence in the case shows was contrary to the fact. It is apparent from Mr. Stone's evidence, for example at p. 2012 and pp. 2039 seq., that he regarded it as important that the wool should be 100% Scottish and that he had probably been so informed, not only by the second-named pursuers but also by the first-named pursuers. Certainly Mr. Stone appears to have believed that he was supplying garments made up from tweed which had been manufactured from 100% pure Scottish virgin wool, otherwise his communications, for example to his company's patent agents, are incomprehensible. He also regarded it as important, as /

as he says in terms in re-examination at pp. 2061-2062, that the weaving process should be carried out not in a mill but in or near the weaver's house and that the weaver should be self-employed. How he reconciled his purchases from the first-named pursuers with these views is not satisfactorily explained and one can only assume that he was not told, or did not appreciate, what was going on in Oban and in South Uist. On 1st December 1954, Mace, Rainbow and Stone sent out a further memorandum (No. 274 of Process) to their representatives, which once more instructed them as follows:

"Should the question be asked, why our cloth does "not carry the Board of Trade Label, the answer is "that our supplier is not a member of the Harris "Tweed Association".

This instruction was once more repeated in a further memorandum to the representatives of Mace, Rainbow and Stone dated 9th May 1955 (No. 279 of Process), which also contained the following statement:

"We must, however, draw your attention to the "following. Our Harris Tweed is Genuine Harris "Tweed and conforms entirely to the legal and trade "description of Harris Tweed. The label we place "on /

"on it is self-explanatory. The Association Mark "namely, an Orb surmounted by the Maltese Cross is "not a guarantee of quality but only certifies the "place of origin and method of manufacture of the "cloth. Whereas, the "ORMDALE" Trade-Mark applied "to a Harris Tweed garment is, in fact, a guarantee "of quality as we would not apply our Trade-Mark to "any cloth which did not conform to our high "standards. The "ORMDALE" Trade-Mark also "certifies that the cloth is Handwoven in the "Outer Hebrides from Pure Virgin Scotch Wool".

The final sentence of this memorandum demonstrates that Mace, Rainbow and Stone were representing that garments made up by them from tweed supplied by the first- and second-named pursuers were handwoven from pure virgin Scottish wool, a representation which was demonstrably contrary to the fact. They were thus party, however unwittingly, to a deception, and I may add that Mace, Rainbow and Stone appear to have been unwilling to disclose to their representatives and those purchasing from them the part played by mainland processes in the material purchased from the first- and second-named pursuers.

I have dwelt on the evidence of Mr. Wilkinson and Mr. Stone because they give perhaps the most detailed /

detailed picture of the sort of situation which was emerging during the period from the middle of 1952 onwards. If the object of Mr. James Macdonald, in addition to making profits for his companies, was to stir up confusion and to make it difficult for the H.T.A. and the Orb producers to take effective action, as I think it was, his efforts were fairly successful. On the other hand the H.T.A. were also having their successes and a good deal of progress was made, particularly with smaller producers in the Islands, some of whom have been called as defenders in the present action, in bringing to an end not only the more blatant abuses of the immediate post-war period but also the resort, which was often surreptitious, to mainland processes. This was largely effected by what was called a policy of peaceful persuasion, but the H.T.A. were also active in their attempts to thwart the increasing activity of the mainland converters who were now attempting to enter the field. As was natural they turned their attention to the markets of these converters, including for example, Hepworths Ltd. and Mace, Rainbow and Stone, and it is clear from the evidence that these activities had some success in preventing sales under the name "Harris Tweed" of the product of the mainland converters in spite of the price differential. /

differential. The activities of the H.T.A. as one would expect produced a reaction, and sometimes, as for example in the case of Mr. Stone, an indignant reaction. By 1955 or 1956 matters were beginning to come to a head. Apart from the imports of yarn into the Islands by the mainland converters, which were on the increase, the use of imported yarn had been reduced to almost neglibible proportions. A collision between the big battalions, the H.T.A. and the Orb producers, on the one hand, and the mainland converters and their customers, on the other, was however becoming inevitable. The latter half of the 1950's was spent in manoeuvring for position, and considering the complications of the situation it is not in the least surprising that the two sides devoted a considerable time to this preliminary marching and countermarching before combat was joined in 1960.

During the manoeuvring for position some initial successes went to the pursuers, but although some of these successes were dwelt on at great length in the evidence, I have come to think that they are a good deal less important than some of the witnesses represented them to be. The pursuers founded particularly on the actions of a body called the Retail Trading-Standards Association (Incorporated), hereinafter referred /

referred for brevity as the R.T.S.A., of which the witness Mr. Diplock has been Secretary since 1946 and Director since September 1952. Mr. Diplock was a very downright and also a very opinionated witness, and I must say at the outset that both his activities and his evidence would have carried a good deal more conviction if they had been less obviously partisan. The membership of the R.T.S.A. is described by Mr. Diplock at the outset of his evidence at pp. 1709 seq. and it is no doubt fairly impressive. Equally there is no doubt that the objects of the R.T.S.A. are to be commended, which I think makes it all the more unfortunate that in this particular matter the R.T.S.A. was led into attitudes and activities which, on examination, suggest strongly the taking of sides. In the R.T.S.A. booklet entitled "Standards of Retail Practice Piece Goods" published in February 1949 (No. 166 of Process) at p.28 there was contained as the definition of Harris Tweed the 1934 definition without the amendment of 1946. This was apparently a repetition of the pre-war position adopted by the R.T.S.A., but presumably the definition published in 1949 must have been approved by the Piece Goods Committee and the Council of Management of the R.T.S.A. before publication. This definition remained the/

the official definition promulgated by the R.T.S.A. until June 1956, when the amendment slip No. 169 of Process was issued with their Bulletin No. 148 of Process of that month. That amendment slip substituted a new definition of Harris Tweed. Mr. Diplock speaks of approaches having been made to the R.T.S.A. by various parties during the 1950's with a view to having the R.T.S.A. definition altered, including a visit by the late Mr. James Barr, the Secretary of the National Association of Scottish Woollen Manufacturers, an organisation of which the pursuers, but not the defenders, are members. There was also pressure by certain Bradford interests. My impression, however, is that what really set the R.T.S.A. on the path which it has since followed was a letter from the solicitors of the H.T.A. to Mr. Diplock dated 28th February 1955 (No. 446 of Process p. 12), with regard to certain jackets being sold by Selfridges Ltd., who were important members of Mr. Diplock's Association. The subsequent letters by Mr. Diplock dated 10th and 17th March 1955, so far from suggesting that the existing R.T.S.A. definition of Harris Tweed was wrong, emphasised that the tweed sold to Selfridges Ltd. and incorporated in the jackets was originally purchased in Stornoway from "a man with the not unlikely name of McPherson". It is perhaps

no/

no coincidence that, despite the very numerous dramatis personae in the present case, no Stornoway producer of genuine Harris Tweed has made an appearance, or even walked on, under the name of McPherson. Somewhat significantly the R.T.S.A. Bulletin for March 1955 contained a paragraph under the heading "Harris Tweed" in the following terms:

"The Association is constantly asked by its own "members and by members of the public whether a tweed "which does not bear the well-advertised mark of "the Harris Tweed Association can be sold as 'Harris "'Tweed'. The short answer to this question is that "any tweed which is manufactured in the Outer Hebrides "can quite properly be described as a Harris Tweed. "The addition of the mark of the Harris Tweed "Association to such a cloth means that the cloth is "made in accordance with the registered definition "of the Harris Tweed Trade Mark. This Trade Mark "is the mark of the Harris Tweed Association just "as the 'Kite' Mark is the registered mark of the "British Standards Institution.

"While dealing with the subject of tweeds it is "perhaps interesting to relate that the Association "was recently asked whether the Merchandise Marks "Act would be infringed if a Yorkshire-produced "machine/

"machine-spun tweed material were given the trade-
"name 'Lowland Homespun'!"

I do not think the pursuers can take much comfort from this paragraph which at least recognised that Harris Tweed must be "manufactured" in the Outer Hebrides and did not anywhere suggest that the existing definition in the R.T.S.A. booklet was wrong. The attempted explanation that the word "manufactured" used in a trade handbook, meant only the hand-weaving process struck me as lame in the extreme. There the matter might have rested but for a letter written by the H.T.A. to another member of the R.T.S.A., Marshall and Snelgrove of Bond Street and Park Road, Leeds, dated 28th December 1955 (No. 446 of Process p. 41). This letter and the subsequent correspondence speak for themselves and not only illustrate, but also go some way to explaining, the partisan attitude which Mr. Diplock was adopting. Mr. Diplock seems to have considered the letter from the H.T.A. to Marshall and Snelgrove "improper". At least he so stated in his letter to the solicitors of the H.T.A. dated 18th January 1956 (No. 446 of Process p. 47), though I must confess that I can see nothing improper about it, even if it be assumed that the views expressed were misconceived. At any rate the letter led to a meeting between/

between some of the interested parties on 10th February 1956, of which there is a written record in No. 446 of Process at pp. 56-57 which Mr. Diplock (at p. 1740 of the evidence) agreed was a reasonable account of what took place. It became clear that the source of the cbth and the label which had been referred to in the letter to Marshall and Snelgrove was Oban, and I am also satisfied that the yardage figures mentioned by Mr. Macdonald Junior at the meeting came as a complete, and no doubt unpleasant, surprise to the representatives of the H.T.A. It should of course be observed that at this stage the first and fourth-named pursuers were still making no differentiation in their records between the different types of hand-woven tweed marketed by them and were not yet invoicing any tweed as "Harris Tweed". In the whole circumstances it is not surprising that the H.T.A. were a good deal in the dark as to what was actually going on, and had, as the evidence shows, so far been in the position of having to chase one hare after another. The position of the H.T.A. was set forth in a lengthy letter dated 17th February 1956 by the late Mr. Ellis, then Chairman of the H.T.A., to Mr. Sebastian Earl of Selfridges Ltd., who was at that time Chairman of the R.T.S.A. (No. 446 of Process pp. 58 seq.). The invitation in this letter that the R.T.S.A. should hold/

hold their hand pending proceedings was in effect rejected by the reply of Mr. Earl dated 24th February 1956 (No. 446 of Process pp. 64 seq.), and almost immediately the R.T.S.A. Bulletin of February 1956 (No. 147 of Process) came out with an article under the heading "The meaning of Harris Tweed". This article expressed the view that tweed need not be marked with the Orb symbol of the H.T.A. in order to be Harris Tweed, a fact which was not disputed by the H.T.A. and which is not in dispute between the parties to the present action. The article also contained the following passage:

"Other tweeds, however, can equally be called 'Harris "Tweed', even though they may not have been manufac- "tured from yarns spun in the Outer Hebrides. For "many years such tweeds formed an integral part of "the pre-war production of Harris Tweed, being made "from virgin wool, spun on the Scottish mainland "and hand-woven in the Outer Hebrides. Today the "yardage of such cloth is again considerable - "probably exceeding 1,250,000 single-width yards. "R.T.S.A. recommends its members who are making "purchases of such Harris Tweed made from mainland- "spun yarn to ensure that invoices clearly state that "this product is made from Scottish-mainland-spun "virgin/

"virgin wool which has been hand-woven in the Outer "Hebrides."

What meaning the ordinary reader of the Bulletin would attach to the word "manufactured" in this context, or to the ambiguous phrase "Scottish-mainland-spun virgin "wool" it is difficult to say. Moreover, I do not think I was referred to a single invoice in which it was disclosed that the material was made from mainland-spun yarn. No mention was made in the foregoing article of dyeing or finishing. The evidence referred to is evidence of which, having listened to the proof in the present case, I have taken a somewhat different view from that expressed by the writer of the article in the R.T.S.A. Bulletin. The explanation of the R.T.S.A.'s previous definition, namely that it was "based on restricted conditions pertaining at the end of the War", will not in my opinion hold water, any more than will the alternative explanation, given by the Chairman of the R.T.S.A. in his annual report presented to the annual general meeting of members on 24th July 1956, that it was "an "oversight", (No. 156 of Process). A note was subjoined to the article in the Bulletin for February 1956 in the following terms:

"The views expressed above are not held by the Harris "Tweed Association Limited which has informed us that "it intends to seek Counsel's opinion. R.T.S.A. has "itself/

"itself already been guided by an opinion of Queen's "Counsel."

As I have already indicated the official amendment to the R.T.S.A. definition was issued with the Bulletin of June 1956 and was in the following terms:

"HARRIS TWEED. Hand-woven tweed made in the Outer "Hebrides. Harris Tweed is made from virgin wool "spun either in the Outer Hebrides or on the Scottish "mainland. Those tweeds which bear the 'Orb' mark of "the Harris Tweed Association Ltd. are guaranteed to "have been made from virgin Scottish wool, spun, dyed, "hand-woven and finished in the Outer Hebrides".

This definition is far from clear in its meaning owing to the use of the word "made" and the absence of any specific reference to dyeing and finishing. It would apparently allow virgin wool from any source in the world to be used, but would not permit spinning outside Scotland. If, as Mr. Diplock stated in evidence, the R.T.S.A. were "groping and fumbling for the truth" one may be permitted the comment that they were not so far being particularly successful. Their new definition would have allowed <u>inter alia</u> the use of non-Scottish wool, hand-weaving in mills or factories with unlimited concentrations of looms, and dyeing and finishing anywhere unless/

unless the word "made" was intended to include these processes. In his evidence Mr. Diplock did indeed go so far as to say at pp. 1732-1733 that "speaking for "the Retail Trade there would not be the slightest impor- "tance in the source of the wool whatever." This, however, was not the view taken by his Association when they promulgated yet another definition of Harris Tweed in 1960, (No. 167 of Process p. 25). In the meantime, at any rate, the various new definitions of Harris Tweed by the R.T.S.A. during 1956 appear to have suited the convenience of the first, second and fourth-named pursuers, and of those members of the R.T.S.A. who were using their product including Hepworths Ltd., Debenhams (which included Marshall and Snelgrove) and Town Tailors Ltd., all of whom were specifically mentioned by Mr. Diplock at the meeting on 10th February 1956.

The R.T.S.A. was not the only organisation which changed its definition at about this time. The International Wool Secretariat in its Sales Training Series had for a good many years used the definition of Harris Tweed contained in No. 193 of Process, but in July 1956, probably as a result of letters from Mace, Rainbow and Stone, coupled with the contemporaneous actions of the R.T.S.A., it adopted the following very/

very wide yet cautious formula:

"Harris Tweed

"Harris Tweed is a tweed which has been hand-woven "in the Outer Hebrides. Those tweeds which bear "the 'Orb' mark of the Harris Tweed Association Ltd. "are guaranteed to have been made from pure virgin "wool produced in Scotland, spun, dyed and finished "in the Outer Hebrides, and hand-woven by the islanders "in"(sic) "their own homes.

"According to various authorities, tweed cloth "made from yarn, hand or machine spun on the mainland, "can also be sold as 'Harris Tweed' if it has been "hand-woven in the islands of the Outer Hebrides." (No. 194 of Process). The National Association of Scottish Woollen Manufacturers is open to a similar charge of inconsistency. Its booklet "Scottish "Woollens" which was published in 1956 contained an article which supported the 1934 definition as confining the entire process of production of Harris Tweed to the Outer Hebrides. The writer of the original article was connected with one of the Stornoway mills, but the late Mr. Harrison, the General Editor, was very experienced in the woollen trade. This, however, did not prevent the Council of the National/

National Association of Scottish Woollen Manufacturers on 13th April 1956 noting its approval of the recent statement of the R.T.S.A. and even supporting the use of English-spun yarn. I must confess that I find it difficult to see how any real assistance is to be derived from the definitions promulgated by organisations whose opinions shifted about in this way. I found much more convincing Mr. Moisley's evidence (at p. 3859) about the little game which he played from time to time asking shop assistants about Harris Tweed. Mr. Moisley had just expressed the opinion that the association of Harris Tweed in the public mind with the Hebrides is that it has been wholly produced, and not just handwoven there, and he continued as follows:-

"If I might elaborate that answer, I tried "a little game from time to time, asking shop "assistants about it, and always you got the reply, " 'It is wholly produced in the Outer Hebrides' "even although it may not have the Orb. Q. Did "you inquire what was meant by being produced? "A. Yes. Q. What did he tell you? A. The cloth "has been manufactured there."

With this may be compared a question and answer in the evidence of Dr. Fraser Darling, who was a witness for the pursuers, at pp. 1477-1478:-

"Q. /

"Q. And would you not agree that the public "image of Harris Tweed is something that is "essentially a product of the Outer Hebrides? "A. Yes."

After the meeting of 10th February 1956 the H.T.A. cast around for some method of dealing with the threat presented by the mainland converters, which would be more effective than peaceful persuasion and pressure by letters. The history of the Spanish Champagne cases, which dealt with a situation intrinsically much more simple, appears to demonstrate the wisdom of avoiding a prosecution under the Merchandise Marks Act in England in such circumstances. Apparently such proceedings would probably have been before a Magistrate. A shareholder's action was advised and considered, but the preliminary steps were found to have been misdirected as the purchase of shares was made in the wrong company. It was decided in the end to adopt the same sort of procedure as was eventually resorted to in the Spanish Champagne case. J. Bollinger v. Costa Brava Wine Co. [1960] 1 Ch. 262. I do not consider that having regard to the complexity of the situation the H.T.A. were unduly slow in taking action, and it may be observed that they were meanwhile kept fairly busy by activities on the other side of the fence in which Mr. Diplock took an active part.

Mr. /

Mr. Diplock says at p. 1796 that he probably said to Mr. Blair Macnaughton "If you people don't "get together you will be picked off like sitting "ducks". "You people" were no doubt the mainland converters, plus Maclennan & Maclennan who were very shortly to be controlled from Yorkshire. I think Mr. Diplock's main spur at this time was the commercial interest of important members of his Association rather than a wholly disinterested crusade for truth in advertisement, though no doubt he had some justification for criticisms which he expressed very freely of some of the advertising carried out by the H.T.A. The late Mr. Ellis in his letter to Mr. Sebastian Earl dated 17th February 1956 referred to two such points of criticism by Mr. Diplock and conceded that they were well taken (No. 446 of Process p. 60). Mr. Diplock is found a good deal in correspondence and company with Mr. Blair Macnaughton during the period from 1956 onwards, and in a letter to Mr. Macnaughton dated 3rd December 1957 (No. 449 of Process p. 467) he talks of "our efforts" obviously in relation to the campaign against the H.T.A. In a letter to Mr. Macnaughton dated 6th December 1957 (No. 449 of Process p. 468), written at a time when the four pursuers and Maclennan & Maclennan were engaged in efforts to organise themselves, Mr. Diplock /

Diplock suggested yet another definition of Harris Tweed, and added the comment:

"One point seems rather important - should we say "that the yarns are made from one-hundred per cent "new Scottish wool? Personally I think we should."

It may be observed that at that time none of the five companies concerned were producing cloth which would have answered to this definition if 100% new Scottish wool had been included as a requirement.

In the event one of the greatest difficulties was to devise a definition which would cover all those producers who were endeavouring to create the new organisation, and even after a meeting at the Edinburgh Office of the National Association of Scottish Woollen Manufacturers on 28th January 1958, which was attended by representatives of the first, second and third-named pursuers and Maclennan & Maclennan as well as by Mr. Diplock and Mr. Aglen, the Secretary of the National Association of Scottish Woollen Manufacturers, it proved impossible to agree upon a definition which would be acceptable to all the interested parties. Eventually Maclennan & Maclennan, who were partly dependent on English spinning and probably also on English finishing, fell out, and application was made for registration of a company which became I.H.T.P. and was incorporated on 5th /

5th November 1958. The correspondence between the solicitors employed by the promoting companies and the registrar of companies is contained in No. 446 of Process pp. 129 seq. It is rather surprising to find in a letter dated 3rd May 1958 (No. 446 of Process p. 134) a statement by the promoters' solicitors to the effect that the promoters included in addition to the first, second and third-named pursuers, "a number of private individuals including "representatives of the Islanders who hand-weave the "tweed." There is no evidence to support the passage quoted, though it may have influenced the Board of Trade in suggesting as possible alternative names "Independent Harris Tweed Producers Ltd." or "Independent Harris Tweed Weavers Ltd." In any event the name eventually selected was "Independent Harris "Tweed Producers Ltd." Apart from the correspondence and what may be implied from the provisions of sections 17 and 18 of the Companies Act 1948, there is nothing to show what considerations led the Board of Trade to approve of this name. Nor is there any very helpful evidence as to what were the precise views of the Board of Trade at this time, though they appear, as one would expect, to have been fairly non-committal. Mr. Diplock appears to have had some contacts at various times with an official of the Board /

Board and several Members of Parliament had also been interesting themselves in the dispute. In my opinion the name chosen was a misnomer in both its aspects. The three original members of I.H.T.P. were not "independent producers" in the sense in which that term had been used in the past, nor was their product in my opinion Harris Tweed. The original definition of "Harris Tweed" adopted in the memorandum of I.H.T.P. was:

" 'Harris Tweed' means cloth made from pure virgin "wool dyed and spun in the Outer Hebrides or else- "where in Scotland, hand-woven by the Islanders in "the Outer Hebrides, and finished in the Outer "Hebrides or elsewhere in Scotland."

This definition, as will be seen, was later altered.

In the Autumn of 1958, before the incorporation of I.H.T.P. Mr. Diplock had paid his visit to the Outer Hebrides in company with Mr. Blair Macnaughton, and from the evidence I infer that the object of this visit was to persuade or concuss the Island interests into accepting a definition of Harris Tweed which would be satisfactory to the members of I.H.T.P. This was not a very hopeful prospect, and the visit appears to have been ineffective. It gave one of the Orb producers the opportunity of bringing to Mr. Diplock's attention a label of the second-named pursuers /

pursuers (label No. 20 in No. 298 of Process) the script of which, in respect of the words "Harris "Tweed", bears a striking resemblance to that on the Orb labels Nos. 1 to 5. Mr. A. M. McLeod says (at p. 2885) that he knew the R.T.S.A. were antagonistic to the Orb section of the industry, and I am satisfied that Mr. Diplock would not have agreed to any compromise definition which was likely to be in the least satisfactory to the Orb Producers or to the H.T.A. The letter from Mr. Diplock to Mr. Blair Macnaughton dated 15th October 1958 (No. 449 of Process p. 477) shows how closely involved Mr. Diplock was in the formation of I.H.T.P. and the attendant publicity. The R.T.S.A. greeted the formation of I.H.T.P. in its Bulletin for November 1958 (No. 152 of Process) with a considerable flourish of trumpets, in an article which included the inaccurate statement that the emblem illustrated was the registered trade mark of I.H.T.P. Counsel for the defenders was disposed to suggest that, in the light of this mistake, it ill became Mr. Diplock to indulge in lordly criticism of over-enthusiastic advertising by the H.T.A. This ~~seem~~ seemed a point well taken.

Very soon after its incorporation I.H.T.P. applied to Lyon for a coat of arms. The procedure occupied the /

the early months of 1959, and the application was opposed by the H.T.A. One result of the opposition and of pressure exercised by Lyon was that I.H.T.P. were compelled to include in their definition of Harris Tweed a requirement that the wool should be Scottish wool. The implication in Article 4 of the Condescendence at p. 29D of the Closed Record that the pursuers used nothing but Scottish wool is disproved by the evidence. I am satisfied that the pursuers only started using 100% Scottish wool in 1959, and that they did so as a result of pressure from Lyon. The Lyon proceedings are fully documented in No. 447 of Process pp. 1 seq. and were dealt with in some detail in the evidence. The observations of Lyon at p. 31 in No. 447 of Process may be noted. I.H.T.P. adopted their amended definition of Harris Tweed by Special Resolution on 29th January 1959. The amended definition has already been quoted, and it was followed fairly closely by the R.T.S.A. in the 1960 edition of their Standards of Retail Practice Piece Goods No. 167 of Process at p. 25, which also introduced the requirement that the wool should be Scottish. In respect of this requirement the R.T.S.A. thus went full circle. The grant of arms was followed by another enthusiastic article in the R.T.S.A. Bulletin for April 1959 (No. 154 of Process), and /

and the Bulletin of March 1960 (No. 155 of Process) greeted the disclaimer on 22nd March 1960 of the exclusive use of the word "Harris" apart from the mark in the Registration of the Certification Mark in the United States of America. Nos. 66 and 113 of Process. The events which led up to that disclaimer seem to have resulted from steps taken in that country by I.H.T.P., Mr. Blair Macnaughton, Mr. Stevens and Mr. Diplock, and it thereafter became possible for members of I.H.T.P. to get their product through the customs of the United States of America under the name "Harris Tweed" without the question being referred to the representatives of the H.T.A. there. In March 1960 an episode occurred in the Outer Hebrides on which counsel for the pursuers placed a good deal of emphasis, though it finds no place in the pursuers' pleadings. In that month letters were sent out by the second and fifth-named defenders to the weavers on their books, and I am prepared to accept that the object of these letters was to bring pressure on the weavers so circularised to weave island-spun yarn only. (No. 447 of Process pp. 63-66). Though this episode may, like some of the events connected with the Embargo of 1938, leave a somewhat unpleasant taste in one's mouth, it is in my opinion /

opinion a side issue which does not, in any event, assist the pursuers. If it is anything other than a prejudicial point, it appears to me to have been an action designed to prevent the weavers on the lists of two Orb producers from weaving yarn imported from the mainland, and to that extent to show that the Orb producers in question were not inactive. By this time very considerable yardages were being produced and marketed by the pursuers as is shown by the levy returns kept by I.H.T.P. (No. 289 of Process). Meanwhile Mr. James Macdonald had about the end of 1959 disposed of the shareholding in his companies to Grampian Holdings Ltd., and one feels the timing was again exact. On 6th July 1960 the first five defenders in the present action raised an action on behalf of themselves and all other makers of "Harris "Tweed" in the Outer Hebrides in the High Court of Justice, Chancery Division, in England against five defendants, who included the first three named pursuers in the present action, seeking certain injunctions to prevent the pursuers and others using the words "Harris "Tweed" in connection with the marketing and disposal of their own products. These injunctions were substantially in the terms set forth in Article 6 of the Condescendence. The defendants in these English proceedings included in addition to Argyllshire Weavers Ltd. /

Ltd., A. & J. Macnaughton Ltd. and the new Scottish Crofter Weavers Ltd., both Hepworths Ltd. and Independent Harris Tweed Producers Limited. After certain preliminary proceedings on the question of service out of the jurisdiction had taken place in the English action, the present action was commenced in February 1961.

Even after this very lengthy consideration of the history of the events which have led to the present action one feels that justice has hardly been done to the huge volume of information with which the Court has been provided as a result of the industry of the parties and their advisers. In such a situation it is almost impossible to avoid the criticism of seeming to over-emphasise some details of the facts and to have disregarded others. An attempt has however been made to give a picture of the whole background and history over the years, which may at least be adequate to enable proper consideration to be given to the grounds of the pursuers' action and the defences thereto.

Counsel for the pursuers stated that the purpose of the action was to protect the legitimate trade of the pursuers and to prevent allegations that their twood was not genuine. He did not abandon the position that he could still obtain a decree of declarator /

and I have come to think that in the case at least of the declarator it was a concession which could

declarator in the terms sought, even if his conclusion for interdict failed, but he made it very clear that the action was one of interdict mainly, and that the second conclusion was by far the more important to his clients. In my opinion, it is at least doubtful whether upon authority and in the circumstances of this case the conclusion for declarator could survive if the conclusion for interdict were to fail. But upon the view which I have taken of the case, it is unnecessary to decide that question. In my opinion a declarator in the form sought by the pursuers cannot be granted in the light of the evidence led. The parties to the present action are agreed that "Harris Tweed" has not become a purely generic name, and in my opinion this is in any event conclusively established by the evidence. As I have already indicated, Counsel for the pursuers conceded that the pursuers must in effect stand or fall together. This concession was made after the point had been explicitly put to counsel and after he had had an opportunity for deliberate consideration, and I have come to think that in the case at least of the declarator it was a concession which could not have been withheld. Moreover for practical reasons it is obvious that counsel for the pursuer could hardly have adopted any other attitude since the /

the formula used in the first and second conclusions of the summons, as amended, is based upon, and indeed, with one exception to which I have referred, follows word for word, the amended I.H.T.P. Definition contained in the special resolution passed on 29th January 1959 (No. 176 of Process). One result of the foregoing situation is that from a practical point of view the validity of the declarator sought can be tested by reference to the production, processing, marketing and disposal by the first and fourth-named pursuers of the tweed which they had handwoven in South Uist from 1952 onwards. These operations, though only from 1959 onwards, are covered both by the I.H.T.P. Definition and by the terms of the declaratory conclusion. This is, perhaps, not particularly surprising since in my opinion the I.H.T.P. Definition was framed so as to be sufficiently wide to cover the operations referred to.

I have already referred to the use of the word "cloth" and not "tweed" used both in the I.H.T.P. Definition and in the declaratory conclusion of the summons. Why the term "cloth" was selected remains something of a mystery, but it is difficult to imagine that the use of that word instead of the word "tweed" was a mere error without any object. The evidence suggests to me that the I.H.T.P. Definition was evolved after a good deal of discussion and thought, and /

and despite the fact that the first and second conclusions of the summons were amended in the course of the proof by the addition of the words "by the "Islanders" after the word "hand-woven" their terms also must presumably have been the result of careful deliberation. As I have already said, there is some evidence that material could be produced in accordance with the I.H.T.P. Definition which would answer the description of "cloth" but not of "tweed". I cannot find any satisfactory contradiction of that evidence. In these circumstances I am of opinion that the case in support of the declaratory conclusion collapses at the very outset upon the short ground that the Court is being invited by the pursuers to grant a declarator that they are entitled to produce, process and market as "Harris Tweed" material which, although it might fall within the I.H.T.P. Definition, might not even be tweed. It may be noted, moreover, that there is a substantial body of evidence to the effect that Harris Tweed is recognised as having certain distinctive characteristics, including amongst others that it is a single-width tweed with a particular appearance and somewhat rough handle, and that it possessed extremely good wearing qualities. Therefore it is by no means academic for the defenders to attack the declarator on a ground which, regarded /

regarded superficially, may appear narrow. It is in my opinion clear that those who produce tweed which qualifies for the Orb mark, including the defenders, produce a tweed with the sort of appearance, handle and wearing qualities which are recognised by the purchasing public as characteristic of Harris Tweed and to which it owes part of its reputation. The pursuers in my opinion have failed to prove that "cloth" produced in accordance with the formula adopted in the first conclusion of the Summons would necessarily have these well-known characteristics, or that it would necessarily even be tweed. Indeed, as I have said, there is evidence to the contrary which has not been contradicted.

The defenders also attacked that part of the pursuers' formula which relates to the hand-weaving process. The part of the formula relating to that process which is contained in the I.H.T.P. Definition, and in the first and second conclusions of the Summons as amended during the proof, is in the following terms videlicet: "hand-woven by the "Islanders in the Outer Hebrides". That this formula would cover hand-weaving on concentrations of looms in sheds, mills or factories was not, and could not be disputed. Indeed it is clear that the formula was designed to cover operations such as those carried out /

out by the fourth-named pursuers at Lochboisdale and Eochar in South Uist. Moreover, it would cover handweaving on concentrations of looms installed in unlimited numbers in the mill premises of large converters, such for example as the second, third and fifth-named defenders and Smiths of Stornoway. The evidence satisfies me that part of the reputation which Harris Tweed enjoys and has for long enjoyed with the purchasing public is based on the fact that it is not only a product of the Outer Hebrides, but also the product of a cottage or home industry. This part of the reputation of the material now survives very largely on the strength of the hand-weaving process, but I am satisfied from the evidence that in the mind of the purchasing public, and indeed also in the mind of the trade, it is an important factor and an important selling point that the main surviving hand-process should be carried out not under factory conditions but at the home, at the cottage, at the "croft" or however the witnesses with more or less accuracy chose to put it. The conception of a home or cottage product has always in my opinion been a very important feature and selling point of the genuine article. No doubt it may be said that the selling force of this part of the reputation of the material is sentimental and romantic /

romantic rather than practical, and that hand-weaving under factory conditions would have certain advantages for the weavers and might even produce a superior or certainly a more uniform material. That may or may not be so, but the fact remains in my opinion that one reason why Harris Tweed is purchased by the public, and also one of the reasons why producers and sellers of cloth, including the pursuers, are so anxious to make use of the name is its reputation as a home or cottage product. It is felt, and in my opinion rightly felt, by those who purchase Harris Tweed that they are assisting the inhabitants of remote islands to supplement the bare living which they are able to wrest from the soil or from the sea by engaging in their own time in weaving, not necessarily actually inside the home, but in its reasonably close vicinity. This conception has always in my opinion been in the mind of the purchasing public since Harris Tweed became a commercial article, and indeed it was one of the main objects of those who originally promoted its sale on a commercial basis to do that very thing. It was natural, therefore, that this central idea of the original enterprise should have been brought plainly to the notice of the purchasing public and that part of the appeal of the product should have been, and should have remained, an appeal to /

to the charitable, sentimental or romantic impulses of the purchasing public. Since 1934 that conception has been kept clearly before the purchasing public by the inclusion in the 1934 Definition of the words "at their own homes" and by the constant references to the conception and to these actual words in the massive advertising carried out in particular by the H.T.A. Any attempts by producers to concentrate looms in their premises have been in my opinion short lived, and, so far as concerns the ultimate purchaser, surreptitious. In my consideration of the evidence I have referred to certain concentrations of looms which took place prior to 1934 in the Islands and to the rooting out of that tendency which took place at the time when the Orb regulations were amended in that year. I have also referred to the circumstances under which the fourth-named pursuers arranged hand-weaving under factory or semi-factory conditions from 1952 onwards and their methods of disposing of material so woven. So far from the ultimate purchaser being informed that the material produced by the first and fourth-named pursuers was woven, not by the Islanders at their own homes, but by employed persons on looms provided by the converters concentrated in sheds or mills, the purchasers were told for example that the retailers' suppliers /

suppliers were not members of the H.T.A. or that the tweed was not marketed through the H.T.A. or even that the tweed, which was said in other respects to be identical to tweed stamped with the Orb, was "sold "by the Crofters themselves direct to the trade" or "purchased direct from the Crofters". Thus, to take one example, the wholly factory produced article emanating from the weaving mills of the fourth-named pursuers at Lochboisdale and Eochar reached the ultimate purchaser from Hepworths Ltd. under the guise of something purchased direct from the crofter, although, as Mr. Wilkinson says, Hepworths Ltd. were not purchasing any tweed direct from any crofter either in 1953 or 1960.

I should perhaps make reference at this point to the averment made by the pursuers in Article 2 of the Condescendence at pp. 9E to 10A of the Closed Record to the effect that some weavers working for Orb producers do not weave "at their own homes" in accordance with the Orb definition and that there are a number of weavers' sheds, where such weaving is done, erected on open ground at Inaclete Road, Stornoway. A good deal of evidence was led on this point, and there was considerable controversy as to the meaning of the words "at their own homes" contained in the 1934 Definition, though the controversy was perhaps somewhat muted by the time it came to the Hearing /

Hearing on Evidence. The difficulty on this point lies in the application of this part of the 1934 Definition to cases which are on the border line, since in my opinion it is in each case a question of circumstances whether a particular tweed qualifies in the respect that it has been hand-woven by the Islander at his or her own home. Clearly this part of the definition would exclude tweed which had been hand-woven on one of a concentration of looms in a mill or factory. Equally clearly it would include tweed hand-woven in one of the rooms of the house in which the weaver lives, or in a barn or shed immediately outside on the weaver's own ground. The expression is "at" not "in" their own homes, and in the case of a crofter it would in my opinion in general be difficult to contend that tweed hand-woven in a shed anywhere on his own croft was not hand-woven at his own home. On the other hand, I think in some of the cases referred to in the evidence, in Stornoway in particular, the Orb stamp ought not to have been applied, and it may be that there are a small number of cases outside Stornoway where the tenants of Local Authority houses who had their looms in weaving sheds situated on the land of neighbours or friends or on the common ought not to have had their tweed stamped with the Orb. One

can /

can understand the disinclination of the H.T.A. and their stampers to interpret this part of the definition too narrowly in practice, particularly in the case of the tenants of Local Authority houses, but I think it should have been borne in mind that there is a clear duty not to apply a certification mark except in accordance with the regulations applying to the mark, and also that in each case a declaration in the form of Nos. 360-364 of Process had to be executed. This matter would have given me some difficulty had my conclusion not been that the number of weavers and the amount of tweed which ~~was~~ were open to this particular attack ~~was~~ were tiny in comparison with the total number of weavers whose work qualified for the Orb and the total amount of tweed stamped with the Orb respectively. I do not consider that the small number of instances which were established by the evidence were sufficient to justify the conclusion that that part of the reputation of tweed qualifying for the Orb which is based, as I have held, on the hand-weaving process being a process carried out at the home, cottage or "croft" was obtained by the producers by means of a fraud. The present case is in my opinion very different in its circumstances from such cases as Bile Bean Manufacturing Co. Ltd. v. Davidson 1906, 8 F. 1181 which/

which was in this respect relied upon by counsel for the pursuers. What happened in the present case was that in a very small number of cases the stampers of the H.T.A. and the hand-weavers concerned gave an interpretation to the words "at their own homes" which was in my opinion too wide. Even assuming that the producers were aware of the circumstances of each particular case, I think it would be stretching matters much too far to hold that the part of the reputation of Harris Tweed which depends on hand-weaving at the home, cottage or "croft" has been built up dishonestly and that the traders concerned have been guilty of such misrepresentations with respect to their goods as to amount to a fraud on the public. Before I pass from this aspect of the case, I feel it right to make the comment that most of the small number of cases which were successfully attacked in this respect are probably traceable to a rule made by the Local Authority, which appears unrealistic and perhaps unfortunate when applied to communities now so largely dependent economically upon the hand-weaving of tweed.

The two grounds which I have already mentioned are in my opinion amply sufficient to justify the conclusion that the pursuers are not entitled to the declarator which they seek. It is therefore strictly unnecessary/

unnecessary to go further, and I certainly do not intend to be led into attempting a definition of Harris Tweed of my own. The Court is not called upon by the conclusions of the summons in the present action to lay down the widest possible definition under the umbrella of which material might be produced, processed, marketed and disposed of under the name "Harris Tweed". In any event I am respectfully of opinion that there is much force as well as much good sense in the observations in an analagous situation of Lord Greene M.R. in Wright Lyon and Co. Ltd. v. Wright 66 R.P.C. 149 at p. 152 to the effect that it is not the business of the Court to give instructions or hints to interested parties as to how near the wind they can sail. Assuming that the pursuers are entitled to an answer to their declaratory conclusion, the answer I would give is nay, and I have already given two specific reasons which in my opinion are sufficiently, and in the second case more than sufficiently, established by the evidence led. I would, however, be prepared to proceed upon further and even wider grounds. In my opinion the evidence establishes that a tweed to be legitimately described and marketed as Harris Tweed must at least conform to the requirements of the 1934 Definition, and indeed I would be prepared to hold upon the evidence that the/

the reputation of the genuine article with the purchasing public depends on its being a handwoven tweed wholly made, manufactured and produced in the Outer Hebrides from 100% pure Scottish virgin wool, and that the name "Harris Tweed" has become distinctive of a tweed so made, manufactured and produced. Probably as a practical matter compliance with the 1934 definition in effect involves that the tweed is a complete product of the Outer Hebrides, as I have already indicated. The defenders, or at least the majority of the defenders, have in my opinion established that their goods conform to all the foregoing requirements and have attached to them the reputation which results from conformity therewith, and I think the attempt by the pursuers to establish reliance by Orb producers on mainland processes, other than the blending and scouring of the raw material which was disclosed as being produced in Scotland, entirely failed with the exception that one or two of the small defenders made surreptitious use of mainland yarn before these practices were detected by the H.T.A. stampers in the mid-1950s and put an end to by action taken by the H.T.A. and the Stornoway mills. The material produced by the respective pursuers on the other hand in varying degrees falls short of conforming to these requirements, though the material which falls furthest short, namely the cloth hand-woven by employees of /

of the fourth-named pursuers under factory conditions in South Uist, would still be within the formula contained in the declaratory conclusion and in the I.H.T.P. Definition. In my opinion the declarator both in form and in fact is, like the operations of the pursuers to which I have referred earlier in this Opinion, a mere device designed to enable the pursuers, by attaching the name "Harris Tweed" to their product, to use the reputation attaching to the genuine article and to pass off their goods as the goods of other manufacturers and producers who include amongst their number the defenders, or in any event the majority of them. I should be sorry to think that the law of Scotland is unable to give protection to a class of producers or makers in a locality or region, such as was provided by the English Court in J. Bollinger v. Costa Brava Wine Co. Ltd. [1960] 1 Ch. 262, [1961] 1 W.L.R. 277, and I should not hesitate to follow the reasoning of that decision if I considered that the description of the present action by Counsel for the pursuers as "a passing "off action in reverse" was accurate rather than merely plausible. Whether an Island producer using some of the methods adopted by the pursuers could succeed in obtaining a declarator similar in terms to that sought by/

by the pursuers in the present action, it is unnecessary for me to say. I will only express the opinion that I think it extremely doubtful whether such a producer could succeed, judging at any rate by the evidence led with regard to the operations of firms and companies such as Maclennan & Maclennan and the Clansman Tweed Company. Similarly I do not find it necessary to decide whether an Island weaver-producer of 50/50 tweed who had supplied his or her own clientèle over the years with a product under the name "Harris "Tweed", which sometimes or even always contained an admixture of mainland-spun yarn, could succeed where the pursuers have failed. I have already commented on the methods adopted by some producers of 50/50 cloth, but it is sufficient to say for the purposes of the present action that the pursuers at any rate are not entitled to the declarator which they seek, and that the question whether any other producers are in the same or in a different position would, if it should arise, be matter for decision in another and different process.

It is clear that if the pursuers were to be granted the declarator which they seek the practical effect of a decision in their favour would be that the only manufacturing process which need have any connection at all/

all with the Outer Hebrides would be that of hand-weaving, and that that process could be carried out by employed persons on a concentration of looms in a mill or factory beside the pier-head at some convenient Island harbour. Artificiality could hardly be carried further, particularly when it is borne in mind that certain of the pursuers' witnesses maintained that the wool need not even be Scottish and that the remaining processes could be carried out, for example, in Yorkshire. When one enquires why such absurd stratagems should be adopted, as were adopted for example in South Uist by the first and fourth-named pursuers, and at Tarbert between 1927 and 1934 by A. & J. Macnaughton, the answer is plain. The object is to obtain the use of the name "Harris "Tweed" without which the eventual product would not in normal times sell. In short, the pursuers are in my opinion endeavouring by their declarator to attach to their product a name with which its association may be purely artificial in order to make use of the reputation and good will which has been gained by Island producers of what is in my opinion the genuine article. A good deal of evidence was led on either side with regard to the economic effects which might result from a decision one way or the other in the present action. Such consequences are not /

not in my opinion matters with which the Court can in the present case be concerned. On the other hand, I am satisfied that the reputation of Harris Tweed in the mind of the purchasing public has always been derived, not only from quality, but also partly from a public sympathy with the economic plight and hardships of the inhabitants of the Outer Hebrides. Stratagems aimed at the use of the name "Harris Tweed", which result in substantial diminution of the economic assistance which the product affords to the Islanders, in my opinion cut across the whole conception which exists and has for long existed in the public mind. It is beside the point to say that an equally good or even identical product could be produced elsewhere and by other methods. The fact is that locality of manufacture quite as much as, if not more than, method of manufacture has always formed an integral part of the reputation of Harris Tweed in the mind of the purchasing public. "People who buy this cloth", as Mr. Moisley put it at p. 3858 of the evidence, "are not only buying a piece of cloth; they are buy-"ing an association with the Hebrides". Hence for example the repeated, and except in a single instance unnecessary, use of the words "Outer Hebrides" in the I.H.T.P. Definition and in the first and second conclusions of the Summons in the present action. One aspect of the question with which I am at present dealing /

dealing is brought to a point in a passage from No. 496 of Process at page 370 (quoted by Mr. Moisley at p.3939 of his evidence) which is in the following terms:

"Scottish industry, lowland and highland alike, is "continuously bedevilled by problems of location. "Such industries as have overcome these problems have "done so by specialization, often relying on a unique "reputation as to quality, a reputation which in the "mind of the buyer is closely bound up with geographi- "cal origin. Thus a natural disadvantage is turned "to advantage. Harris Tweed is perhaps the extreme "example of this. The reputation gained by products "of cottage craftsmen has been transferred to those "of large-scale industry."

The article from which this passage has been quoted goes on to indicate, as is the fact, that the word "Harris" came in the context of the name "Harris Tweed" to be accepted as covering a wider geographical area than Harris itself, namely Lewis and Harris, and in my opinion it is clearly established by the evidence that in this context the word "Harris" has long been understood by both the trade and the purchasing public as a geographical term covering the whole of the Outer Hebrides. The aspect of the matter with which I have been dealing is even better put by Mr. Shaw Grant in a/

a passage from his evidence at pp. 6388-6389 which deserves quotation in full:

"Q. What is your personal view of a mainland manufac-
"turer producing yarn, sending it over to the Islands
"to have it handwoven, receiving back the unfinished
"cloth and having it finished on the mainland and
"marking" (?marketing) "it as Harris Tweed? A. I
"think it cuts right across the whole history and
"purpose of Harris Tweed as I understand it. The
"Harris Tweed trade was set up by people outside
"the Island in an effort to create employment and
"help the crofters in what is economically the
"most difficult part of Britain, with the possible
"exception of Shetland,and throughout the whole
"history of the industry it has been regarded that the
"function of the trade, the social function of the trade,
"as one might say was to provide the maximum benefit for
"the residents in the Island, particularly the residents
"in the rural areas, and the system which has grown up
"in recent years seems to me an attempt to get the
"maximum advantage from the reputation and the value
"of the name with the minimum contribution in employment
"to the area. To that extent it is quite contrary to
"my conception of what the Harris Tweed trade should be".

There is nothing in the passage just quoted with which

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on a consideration of the whole evidence led in the present case I would disagree, and I refer also to a further passage in Mr. Shaw Grant's evidence at p. 6401 where he expressed the opinion that "the "Harris Tweed industry must be concerned with the "economy of the Island because it is for that "purpose that the tweed came into existence, and that "the name was first publicised."

Before I pass from my consideration of the declaratory conclusion, I must refer to one further difficulty which, in my opinion, confronts the pursuers. I have already expressed doubts as to whether as matter of competency the declaratory conclusion could survive by itself, but in any event I would not be disposed, particularly in the absence from the process of interested parties and probably a good many of them, to pronounce a declarator which might have the effect of deciding ab ante and authoritatively and possibly for all time that any cloth produced by the pursuers by methods falling within the four corners of the formula which they have chosen could be produced, processed and marketed as Harris Tweed and disposed of anywhere in the world as "Harris Tweed". The case for granting the declarator sought in the present case certainly does not /

not seem any stronger than the proposition which failed in Callender's Cable & Construction Co. Ltd. v. Corporation of Glasgow 1900, 2 F. 397. Moreover a Court would, I think, hesitate to grant a declarator in the wide terms sought and, it would seem, with world-wide effect in a case where very far-reaching consequences might follow in relation, for example, to the Merchandise Marks Acts in the United Kingdom and similar legislation which no doubt exists elsewhere. However, as I have indicated, the case in support of the declarator has in my opinion on a number of grounds failed on the merits.

I now turn to the conclusion for interdict which counsel for the pursuers stated, rightly as I think, was the main conclusion of the Summons. Strictly it is perhaps not necessary for me to go further than to say that the opinions which I have formed on the merits with regard to the declaratory conclusion are also fatal to the pursuers' conclusion for interdict. It would, however, do less than justice to the elaborate arguments presented on both sides if I did not deal with the more detailed submissions of counsel, and particularly with an argument which was directed by counsel for the defenders to the whole question of the nature and form of action adopted by the pursuers.

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I have already indicated that I regard as unsound the description of the action as one of "passing off in "reverse", particularly if it is intended by that phrase to suggest that the defenders have to be regarded in all respects, including onus of proof, as if they had launched a passing off action against the pursuers. No doubt, even if the action were to be so regarded, what I have already said is sufficient to show that the defenders or some of them would succeed in such an action, but even as a purely practical matter I am unable to see how the pursuers can legitimately use an action in the present form in the way for which they contend, particularly as the selection of defenders appears to have been made on a somewhat arbitrary basis. The general connecting link between all the defenders is not easy to discover, though I was told that they in fact form the opposition to certain trade mark applications made in 1959 and 1960 by I.H.T.P. and its member companies, the pursuers. Those applications are not mentioned in the pleadings, but some reference was made to them in the course of the evidence. But, however the defenders have been selected, the fact that they happen to be rival traders does not appear to me to be essential to the conclusion for interdict. The pursuers would no doubt maintain that they should have /

have a remedy against anyone who made alleged wrongful assertions such as those complained of, whether or not the person who made the assertion was a rival trader. Thus, upon any view, the present action is wider in scope than a passing off action could be, even in reverse. It is perhaps unfortunate that the attention of the parties was not directed at an earlier stage of the proceedings to the question of the form of the action and the consequences of the pursuers having adopted that particular form. One result has been that I have heard a full argument on this particular aspect only from the defenders, since counsel for the pursuers was content to describe the action as one of "passing off in reverse" and approached his consideration of the evidence and his submissions in law on that basis. This he was perfectly entitled to do, though I have come to think that it might have been wiser to anticipate an argument along the lines which counsel for the defenders submitted with regard to the nature of the remedy sought and the requirements of our law in relation to that remedy.

The remedy which is sought by the pursuers in the second conclusion of the summons, to which I am inclined to think the first conclusion is merely ancillary, is that of interdict. The nature of this remedy /

remedy is well-known and is summarised in Burn-Murdoch on Interdict p. 1 para. 1. To qualify themselves for the remedy the pursuers must show that at the time of raising the action a wrong was in course of being done against them by the defenders, or that there are reasonable grounds for apprehension that such wrong is intended. In the present case the pursuers rely on alleged wrong-doing or violation of their rights by the defenders in the past, some of which wrong-doing may be said to be continuing, as evidence that such alleged wrong-doing or violation of the pursuers' rights may be continued or repeated. Thus it is of the essence for the pursuers to establish that they are faced with a threatened wrong by the defenders reasonably to be apprehended. It is therefore important to consider inter alia whether the matters on which they rely were in fact wrongs done to them by the defenders or violations of their rights by the defenders. These are matters which I will consider in due course. Meanwhile I must express the view that the form of the interdict sought in the present case is somewhat unusual in a number of respects, since it is designed according to its terms to prevent a wrongful assertion in Scotland or elsewhere of a certain proposition. Thus the remedy sought might affect an assertion by the defenders, or presumably /

presumably any of them, anywhere in the world to the effect stated, and, as the pursuers have jurisdiction against the defenders in the Court of Session, a breach of the interdict committed anywhere in the world might result in proceedings against such defender or defenders for breach of interdict with possible penal consequences of a most serious character. In such a situation it is in my opinion very necessary that the interdict sought should be framed in terms which would not leave any reasonable doubt in the minds of the defenders as to what they are forbidden to do. If the interdict sought was simply an interdict against making a certain assertion, no doubt the matter might be comparatively straightforward, but here the interdict sought is an interdict not merely against making an assertion, but an interdict prohibiting the wrongful assertion of the proposition in question. This introduces a number of complications and in particular it appears to assume that there might be circumstances in which the proposition might be asserted by the defenders or some or one of them without that assertion being wrongful. It would thus be left to the defenders to decide whether or not the circumstances were such as to make the assertion wrongful. As my later examination of the law will demonstrate, it might well be a matter /

matter of considerable difficulty, if such an interdict were to be pronounced, to decide whether the assertion was in the circumstances wrongfully made. This applies particularly in a case where the interdict sought has an effect which is world-wide and where the position might accordingly vary from country to country. In a case where the de quo is whether or not it is wrongful to assert that the production, processing, marketing and disposal by particular persons of a particular article under a certain name is not the production, processing, marketing and disposal of the article to which that name may legitimately or lawfully be attached, it is quite possible that the situation in one country might differ from that in another and that the same assertion might be wrongful if made in one country but not wrongful if made in another or even that the wrongfulness of the assertion in any particular country might be dependent on circumstances, for example if the assertion was made on a privileged occasion or in the course of a legal process. Moreover the assertion sought to be interdicted appears to me to contain an element of opinion on questions which have led to much difference of opinion between experienced witnesses in the present case. In the foregoing circumstances I would, in any event, have hesitated to grant an interdict in the terms sought since in my opinion they lack the precision which the Court requires when it is asked to grant this remedy. Burn-Murdoch on Interdict pp. 96-97 para. 108. It may be /

be added that the pursuers did not suggest any alternative form of words which might be free from criticism on the ground of undue vagueness, and no such form of words has occurred to me.

The wrong which is said to be apprehended by the pursuers is, putting the matter as simply as I can, that of a wrongful assertion relating to the goods produced by the pursuers. The nature of the wrong which the pursuers contend they have suffered, and of which they maintain a repetition is to be reasonably apprehended, falls in my opinion into the category which has been referred to in Scotland as verbal injury, and in England by a variety of terms, including the general description injurious falsehood, of which slander of goods and slander of title or property are examples. In Scotland the ingredients of the particular type of wrong with which the present action is in my opinion concerned are not particularly well illustrated by decision, possibly because the distinction between actions of slander proper involving injury to character or reputation and actions of verbal injury has not always been clearlymaintained, though they have been the subject of quite considerable academic discussion. The subject is dealt with in Burn-Murdoch on Interdict pp. 388-390 para. 380 from which passage it appears that in the view of the /

the learned author three requirements must be present to make false assertion relating to another's property or goods an actionable wrong. First, the pursuer must establish positively the falsity of the assertion complained of. There is no presumption in his favour, as there is in actions of defamation proper, that the statement is false. Second, the pursuer must prove that the false assertion was made maliciously. Malice is not presumed. Third, actual damage, or as it is called in England special damage, to the pursuer must be averred and proved. In an action of interdict, reasonable apprehension of such actual damage would no doubt be sufficient to qualify a pursuer for the preventive remedy, and in any event the law has now been amended by Section 14 of the Defamation Act 1952. The foregoing propositions are in my opinion supported not only by other Scottish textbook authority such as Cooper on Defamation 2nd Ed. pp. 8-13 and Glegg on Reparation 4th Ed. p. 158, but also by decisions of the Inner House. These decisions include Bruce v. Smith Ltd. 1898, 1 F. 327, where the reasons for omitting malice from the issue, an omission which is at first sight surprising, are explained by the Lord Ordinary at p. 332. I may also refer to Paterson v. Welch 1893, 20 R. 744, where Lord President Robertson, in an /

an opinion which was concurred in by Lords Adam and M'Laren, set forth in terms at p. 749 the three requirements to which I have referred. That decision has sometimes met with criticism, but it has never been overruled, and Section 14(b) of the Defamation Act 1952 by inference supports its soundness in at least one material respect. In England there is a good deal more authority on the subject, and the law appears to have been settled to the effect that in a case of slander of title or of goods there must be positive proof of falsity, malice and special damage. Clark and Linsell on Torts 12th Ed. para. 1668; Salmond on Torts 13th Ed. pp. 682-683, 685-686, Hatchard v. Mège (1887) 18 Q.B.D. 771 per Day J. at pp. 774-775.

In reaching the foregoing conclusions, I have not overlooked the possibility that recent developments in the law relating to negligent misstatement may suggest that the ratio of authorities such as Bruce v. Smith Ltd. and Paterson v. Welch may have to be re-examined and the whole law relating to deliberate misstatement reconsidered. These matters were only slightly touched upon in the course of the argument, but whatever view may be taken of the ingredients of verbal injury, the fundamental requirement must in my opinion be that the statement should be false /

false. Moreover, I can see no reason why, in circumstances such as the present the pursuers should not have to undertake the onus of proving falsity whatever the correct principle might eventually be found to be. I have already indicated, when dealing generally with this aspect of the case in my consideration of the conclusion for declarator, that material could be produced ~~with~~ which complied with the formula adopted in both conclusions but which was not Harris Tweed, as the meaning of that name and the reputation of the article which goes by that name are understood by the purchasing public. I am prepared to assume in favour of the pursuers that the use of the word "cloth" may not necessarily be a stumbling block in relation to the conclusion for interdict as it is in the case of the declaratory conclusion, though, if regard is had not only to the past but also to the future, the difficulty may nevertheless still be present despite the qualification implicit in the words "the pursuers' "production" and so on "of cloth". The omission of any qualification to prevent mill or factory weaving is, however, in my opinion just as fatal to the conclusion for interdict as to the conclusion for declarator, particularly as the case was presented on the basis that all the pursuers must stand or fall together. In the pursuers' formula there is no trace of the home or cottage or "croft"/

"croft" element in the production of the material, which in my opinion is one of the important selling points and elements in the reputation of the genuine article in the minds of the purchasing public. Moreover, as I have already indicated, the pursuers' product does not in my opinion measure up in a number of other important respects to the distinctive meaning which Harris Tweed has come to convey to the minds of the purchasing public. The article produced by the pursuers does not conform either to a primary meaning of tweed made or produced in Harris, or to a secondary meaning of tweed made or produced in the Outer Hebrides. Neither does it measure up to a secondary meaning of tweed wholly produced, or in any event produced as to the main processes of dyeing, spinning, hand-weaving and finishing in the Outer Hebrides from pure Scottish virgin wool. The secondary meaning of the name Harris Tweed has in my opinion never been extended further than tweeds produced within one or other of the foregoing limitations, as it is for example by producers who include the defenders, and I may add that the secondary meaning has in my opinion continued over a long period of years to convey a strong geographical flavour for reasons which I have already indicated. What the pursuers are attempting to do is to extend the secondary meaning which in my opinion has/

has been established, and to destroy in substantial measure the geographical significance and content of the name Harris Tweed. That geographical significance and content and the idea of Harris Tweed as the product of an island industry has always in my opinion been of central importance in a manner not dissimilar to the name Champagne, but with the added element of public benevolence towards the inhabitants of the locality or region of manufacture and production. I may observe in passing that if the pursuers are attempting to extend the secondary meaning of the name Harris Tweed, as I think they are, I see no reason why they should not undertake the onus of proving that the secondary meaning has in fact been so extended as to be applicable to their product. By the very way in which they have presented their case, the pursuers have really accepted that Harris Tweed has come to have a secondary meaning in the minds of the purchasing public, since they made it very clear both during the evidence and the hearing that in their submission the defenders are entitled to call the product made according to the formula contained in the 1934 Amendment "Harris Tweed", and to dispose of it under that name. The pursuers accepted that, to be genuine, Harris Tweed must be handwoven /

by the Islanders
handwoven/in the Outer Hebrides and, possibly, made from pure virgin wool produced in Scotland. If so, they recognise that a secondary meaning has been attached to the name Harris Tweed in the minds of the purchasing public, and they certainly did not have the hardihood to contend at any stage that Harris Tweed had become a name of purely generic meaning. If the latter had been their view, it is unlikely that they would have gone through the motions of having the tweed handwoven in the Outer Hebrides by one means or another. However that may be, the most extreme example of the pursuers' operations, namely those of the first and fourth-named pursuers carried out in Oban and South Uist, was in my opinion the merest travesty of what in the mind of the purchasing public is understood to be the locality and method of production of genuine Harris Tweed. The evidence led in the present case in my opinion bears this out, not only in the case of purchasers in the United Kingdom, but also, so far as the evidence goes, of purchasers elsewhere including the United States of America and Denmark. Thus, so far from the pursuers having succeeded in proving that the assertions complained of have been or would be false, the contrary is in my opinion established in relation to any areas to which evidence was directed. It may be added that until

1959 /

1959 all the pursuers were incorporating proportions, sometimes substantial, of non-Scottish wool in their product. In my opinion it has long been understood by the purchasing public that genuine Harris Tweed is made from pure virgin wool produced in Scotland, and that according to the great weight of the evidence, including some of that led on behalf of the pursuers, so-called "Harris Tweed" which contained non-Scottish wool or wools would and should be regarded as spurious. My conclusion accordingly is that it has not been proved by the pursuers that the assertion of which they complain as wrongful either has been or would be false, and if necessary I would be prepared to hold that the weight of the evidence points to the view that the assertion has been and would be true. Moreover, the use made by the pursuers of non-Scottish wool or wools prior to the change made under pressure from Lyon in 1959 places a further difficulty in the pursuers' path so far as concerns complaints of alleged false and wrongful assertions prior to that date. I should perhaps finally note here that the use in the conclusion for interdict of the phrase "Pure Wool" instead of the phrase "Pure Virgin Wool" would, in my opinion, itself be fatal to this conclusion.

I now turn to the specific matters complained of by /

by the pursuers on Record as constituting alleged wrongful assertions by the defenders. These specific matters, which constitute the essential basis in fact of the conclusion for interdict appear to fall into four chapters, and I propose to deal with them in the order in which they appear in the Closed Record. The evidence with regard to the position in the United States of America was most elaborate, and I am greatly indebted to both Mr. Gottesman and Mr. Graham for the assistance which they afforded to me on this branch of the case. It is, however, necessary to consider the position in the United States of America under reference to the pursuers' pleadings on this particular matter, which are contained in Article 3 of the Condescendence, and to seek therein the wrongful assertion of which complaint is sought to be made. There are, it may be noted, no averments by the pursuers in that Article of the Condescendence or anywhere else on Record with regard to any foreign law which is said to be applicable or under which any of the assertions complained of are said to have been wrongful. Still less is there any averment that the matters of which complaint is made in that Article were wrongs according to the law of the place where the assertions are said to have been made, presumably the United States of America or one or more of the States /

States thereof. I was simply invited, on the authority of Cheshire Private International Law 6th Ed. p. 131, Rodden v. Whatlings Ltd. 1961 S.C. 132 and Stuart v. Potter, Choate and Prentice 1911, 1 S.L.T 377 per Lord Salvesen at p. 382, to presume that the foreign law applicable was the same as the law of Scotland. I wish distinctly to reserve my opinion as to whether, in the circumstances as now disclosed by the evidence, such an approach is sound, but I am content for the purposes of the present Opinion to approach the matter on that basis, particularly as the averments in Article 3 of the Condescendence have been held relevant by the Inner House in relation to the conclusion for interdict. See opinions of Lord President at pp. 8-9 and Lord Guthrie at p. 9. I must also I think assume that when the case was in the Inner House their Lordships were able to spell out, from the averments in Article 3 of the Condescendence as amended, an offer by the pursuers to prove that the defenders had made a wrongful assertion or wrongful assertions in the United States of America of the type of which a repetition is sought to be prevented by the conclusion for interdict, namely a wrongful assertion or assertions that the pursuers' production, processing, marketing and disposal in Scotland or elsewhere as Harris Tweed of cloth made from pure wool /

wool produced in Scotland, dyed and spun in the Outer Hebrides or elsewhere in Scotland, handwoven by the Islanders in the Outer Hebrides and finished in the Outer Hebrides or elsewhere in Scotland is not the production, processing, marketing and disposal of Harris Tweed. Whether or not it has emerged from the evidence that such an assertion or assertions were in fact made by the defenders in the U.S.A. is, of course, another matter.

The introductory averment in Article 3 of the Condescendence upon which the remainder of the Condescendence appears to follow is in the following terms, videlicet:

"From about 1948, the particularly in 1956, the said "Harris Tweed Association Ltd., the defenders "sixteenth called, the registered proprietor of the "said certification trade mark, made certain false "misrepresentations and claims in the United States "of America to the United States Patent Office and "to the United States Customs Bureau in an endeavour "to obtain exclusive use of the words 'Harris Tweed' "in the United States of America".

It may be observed in relation to this averment that in 1948 the first and third-named pursuers were not in existence and the remaining pursuers were not on their own /

own showing engaged in the production, processing, marketing or disposal in Scotland or elsewhere as Harris Tweed of any cloth of any sort. The first-named pursuers through their witnesses anxiously disclaimed having done anything of the sort for reasons which are already apparent, and it was only in 1953, or at the earliest 1952, that the second-named pursuers for the first time since 1934 began to have any handweaving carried out in the Outer Hebrides. One may ask in these circumstances how the defenders could in 1948 or at any time prior at the earliest to 1952 have made a false, still less a wrongful assertion, of the type covered by the conclusion for interdict, or indeed any assertion about Harris Tweed which affected the pursuers in any degree. To this question counsel for the pursuers was in my opinion unable to provide an answer and no answer has occurred to me.

After the introductory averments to which I have referred there follows a history of the trade mark position in the United States of America up to the date when the Lanham Act of 1946 came into force on 5th July 1947. (No. 342 of Process). A good deal of evidence was devoted to this history, but there was in the end of the day little or no dispute about the facts up to that time. It appears, although it is not /

not so averred, that the Lanham Act for the first time made certification marks registrable under the law of the United States. I understood, however, that collective marks had been known to that law from 1920 onwards. It also appears that under that law a certification mark is a mark applied by a person or organisation other than a manufacturer for the purpose of certifying inter alia the regional or other origin or other characteristics of goods to which the mark is applied, whereas an ordinary trade mark is a mark owned and used by a manufacturer or trader himself to identify the goods as originating with him. It further appears that prior to the Lanham Act, the law of the United States and the practice of the Patent Office there did not allow the registration of words with a geographical signification, that is that if an application was made under the original Act of 1905 for a trade mark, or after 1920 for a collective trade mark, which included a geographical name either registration would be refused or registration would be granted provided there was a disclaimer of the geographical name. That law and practice are sufficient obviously to account for the disclaimers up to the year 1947 which are referred to in the pleadings. One important effect of the Lanham Act was, it appears, to allow the registration of a certification /

certification mark which included indications of regional origin where legitimate control was exercised over the use of that mark by the person or organisation doing the certification, and I understand that the Act did not make any distinction between a certification mark which had to be applied to all goods from a particular area and a certification mark which could voluntarily be applied to goods from a particular area.

Very shortly after the coming into force of the Lanham Act the H.T.A. made application for the registration in the United States Patent Office of the certification mark, consisting of the Orb and Cross with the words "Harris Tweed" subjoined, shown on the specimens presented with the application. The application which was filed on 27th September 1947 is No. 51 of Process, and the subsequent correspondence is reproduced in the succeeding numbers of Process contained in the file of American productions. By letter (No. 53 of Process) dated 18th February 1948 to the New York Attorneys who were the correspondents of the London Solicitors of the H.T.A., the examiner in the United States Patent Office made certain requests with regard to the application and stated inter alia

"The phrase 'Harris Tweed' should be disclaimed
"apart from the mark as shown on the drawing".

What /

What followed is described in detail in the evidence of Mr. Graham, who was a partner in another firm of lawyers in New York who specialised in trade mark matters. Mr. Graham was employed by the now deceased Mr. Stanley Brown, then the United States Representative of the H.T.A., to assist in certain aspects of the trade mark application, and he subsequently acted for the H.T.A. in a number of other matters. It was agreed that Mr. Graham should take up the case with the United States Patent Office and discuss registrability without disclaimer of the words "Harris Tweed" apart from the mark, on the authority that the mark was not descriptive of the goods but was an indication of regional origin under reference to Section 4 and Section 2(e) of the Lanham Act read together, (No. 54 of Process). Subsequently, on 20th May 1948 the New York Attorneys of the H.T.A. replied (No. 55 of Process) to the said letter of 18th February 1948 and, after two requests made in that letter had been dealt with, the reply proceeded as follows:

"It is noted that the phrase 'HARRIS TWEED' should "be disclaimed apart from the mark shown on the "drawing, but it is not believed that this "disclaimer should be required under the circum- "stances of this case. The application "specifically /

"specifically states that the mark applied for is a "certification mark, so that it is a mark of "regional origin, referred to in Section 4 of the "1946 Act, under which the application is filed.

"One of the primary objects for which the "applicant, a non-profit corporation, was created "was to prevent the misuse of the designation "'HARRIS TWEED' and to certify the regional origin "of this fabric. Pursuant to this object, "applicant has functioned and now functions as the "sole certifying authority in the entire world "respecting the origin of 'HARRIS TWEED'. As this "term serves to indicate regional origin within the "meaning of Section 4 of the said Act, and as the "mark for which registration is sought is a "certification mark, it is submitted that the "applicant is therefore entitled to registration of "the mark applied for without any disclaimer".

The terms of the final paragraph of this letter, which has just been quoted, were in fact drafted by Mr. Graham. The pursuers aver that the statement that the H.T. '. "has functioned and now functions as the "sole certifying authority in the entire world "respecting the origin of 'HARRIS TWEED'" was a false representation and that by reason of that false statement the H.T.A. was registered in the U.S.A. on 4th /

4th July 1950 as the owners of Certification Mark No. 527391 in Class 42 without disclaimer of the words "Harris Tweed" the word "Tweed" only being disclaimed. This is the first specific averment in Article 3 of the Condescendence of a false statement alleged to have been made by any of the defenders, and in my opinion the averment is not only not proved but is disproved. I do not see how anyone reading the passage complained of and having before him the Memorandum and Articles of the H.T.A. No. 181 of Process, together with the documents relating to the British Certification Mark No. 182 of Process and to the United States trade marks, could reasonably say that the statements in the passage referred to were false. In any normal sense the H.T.A. had functioned and in 1948 did function as a certifying authority respecting the origin of Harris Tweed. The certification mark called the Harris Tweed Trade Mark, which was a mark of origin and mode of manufacture, was the absolute property of the H.T.A. and under their sole control, and could be applied only by a person duly authorised through the Committee of Management of the H.T.A. There was no other such certifying authority in the entire world, so far as the evidence led in the present case goes. Thus the passage complained of ----------

was /

was in my opinion true. In any event the pursuers have not succeeded in proving that the statement was false, and I do not consider there was any substance in the submission by counsel for the pursuers that the H.T.A. were not such a certifying authority and that therefore there was no such certifying authority in the entire world. Mr. Graham in any event gave evidence (at pp. 17-18 of the Commission), which I accept, that he believed the statement at the time he wrote it and that, so far as he knows, it still is true so far as the United States is concerned. Moreover, there is no convincing evidence that the statement had any effect on the United States Patent Office or the Department of Commerce of which it formed part. No doubt these bodies had their own sources of information and advice and, after further discussions, the examiner in a letter dated 31st August 1948 (No. 57 of Process) waived the request for a disclaimer of "Harris" but stated that the word "Tweed" should be disclaimed. This request was acceded to by the New York Attorneys of the H.T.A. in a letter dated 10th September 1948 (No. 58 of Process) and eventually after further exchanges and some considerable delay the certification mark was registered on 4th July 1950 (No. 66 of Process). The statement in /

in the registration contains the following passage:

"The exclusive use of the word 'Tweed' is dis-
"claimed apart from the mark shown in the drawing."

I am unable on any view to see how the pursuers or any of them can have any justifiable complaint about these transactions, all of which took place at a time when as I have said none of the pursuers were engaged in the production, marketing or disposal of an article under the name "Harris Tweed" in any part of the world, much less in the United States of America and when two of them were not even in existence. Moreover, there is in my opinion a complete absence of evidence of malice in respect of these transactions. There was and could have been no intent to injure the pursuers or any of them, and there was in my opinion no improper motive disclosed. Mr. Graham who drafted the passage believed it to be accurate and this accords with my own opinion. It may be added that both those acting for the H.T.A. and those with whom they were dealing in the United States Patent Office were confronted with legislation which, so far as United States Law was concerned, was novel. In these circumstances it would not be surprising if there was some doubt as to the precise effect of the new provisions contained in the Lanham Act /

Act. It was in my opinion very natural that in the new situation those acting for the H.T.A. should have sought registration of the certification mark without disclaimer of the words "Harris Tweed". The submissions made by them were in any event not wholly successful as they were eventually requested to disclaim the word "Tweed" apart from the mark. There is moreover no evidence that the single false statement alleged to have been contained in the letter No. 55 of Process caused any actual loss or was calculated to cause any pecuniary damage to the pursuers or any of them. If accordingly for this purpose the law of the United States of America is to be presumed to be the same as the law of Scotland, I am satisfied that the evidence does not disclose any legal wrong done by the H.T.A. to the pursuers or any of them by the statement in the letter No. 55 of Process which is complained of. I am not even satisfied that any of the defenders, other than the H.T.A., could in any event be held responsible for any statement or statements made in the letter referred to in the circumstances which have been disclosed in the evidence. It should perhaps also be noted in conclusion that there is no averment or proof that the statement founded on constituted a wrong or was in any respect illegal /

illegal according to the law of the United States of America, and Mr. Graham stated specifically in his evidence taken before me on commission (at p. 90) that so far as he was concerned the H.T.A. had not done anything contrary to the law of the United States of America in obtaining its certification mark. In the end of the day, however, that part of the pursuers' case which is based on the passage from the letter No. 55 of Process, a letter which incidentally contained legal argument as well as statements of fact, fails on the short ground that in my opinion the statement complained of was true, that in any event the H.T.A. and Mr. Graham believed it to be true and that there is no evidence of malice or of intention to injure the pursuers or any of them by the statement made. There is no proof that the statement in question was, either quoad the pursuers or generally, a false still less a wrongful assertion, according either to the law of Scotland or to the law of the United States of America.

The second specific matter complained of in Article 3 of the Condescendence relates to certain allegedly false statements contained in a letter dated 17th April 1956 written by the late Mr. Stanley Brown, agent in the United States of the H.T.A., to Mr. Robert Dill, Collector at the Port of New York Customs House /

House (No. 68 of Process). It appears from the evidence of Mr.Graham that Mr. Brown had learned in some way that it might be possible to record the Certification Mark No. 527391 with the Bureau of Customs and that such recordation might, as a result of certain provisions of United States law, have the effect that goods which bore markings which in any way infringed the certification mark would be stopped at the port of entry and not allowed through the customs until the H.T.A. so authorised. Mr. Stanley Brown seems to have considered that this might be an effective method of keeping out of the United States tweed marked as Harris Tweed, but which was in his opinion not genuine. It was in these circumstances that the letter No. 68 of Process came to be written, and I shall deal in order with the specific matters of which the pursuers make complaint. Before I do so however I may remark that, considering that the events in the United States of America are placed in the forefront of the specific complaints made by the pursuers on Record and that a substantial amount of evidence was devoted to them, these events were passed over somewhat briefly in the submissions of counsel for the pursuers. The letter No. 68 of Process in particular received little detailed treatment. The first matter complained of on Record by the /

the pursuers in relation to that letter is an allegedly false statement "that the Orb definition was a "definition of Harris Tweed approved by the British "Board of Trade". This is a paraphrase of part of a passage in the letter, the meaning of which has never been entirely clear to me, but, whatever the passage may mean, I am unable to hold on the evidence that the statement complained of on Record was false. If the British Board of Trade when the Regulations were amended in 1934 did not approve a definition of Harris Tweed, I confess that I do not know what they did do. No doubt the definition was contained in regulations relating to the Harris Tweed Trade Mark, but the definition in those regulations was nevertheless approved as part of the regulations by the Board of Trade.

The other statement in the letter No. 68 of Process which is complained of as having been false was a statement said on Record to have been to the effect "that if the goods did not carry the mark "(misleadingly referred to as the 'Harris Tweed " 'Certification Mark') such goods were suspect of "being imitation." I will in this connection deal first with the interpolation in brackets. I am unable to see how the reference to the mark as the "Harris Tweed Certification Mark" could have misled the official to whom the letter No. 68 of Process was /

was addressed, or for that matter anyone else. A copy of the registration of the Certification Mark was attached to the letter, as the first paragraph of the letter shows, and the mark was referred to in that paragraph as "their" (i.e. the H.T.A.'s) "Certification Mark on Harris Tweed". It was thus made plain to anyone who read the letter that the "Harris Tweed Certification Mark" referred to therein was the mark mentioned in the first paragraph of the letter. In any event, having regard to the terms of the Registration No. 66 of Process, the phrase used was in my opinion a very natural way to refer to the mark, just as it is natural, and in my opinion correct, to refer to the mark registered in the United Kingdom as the "Harris Tweed Trade Mark", the name which has always been given to the mark in the Regulations approved by the Board of Trade. Counsel for the defenders was able to point out that in the Bulletin of the R.T.S.A. for March 1955 (No. 146 of Process) the Mark was referred to as "the Harris "Tweed Trade Mark." In the foregoing circumstances there is in my opinion no substance in the averment interpolated in brackets which I have quoted, and I do not think that in the end of the day counsel for the pursuers attempted to make anything of this particular matter.

I /

I turn accordingly to the second statement in the letter No. 63 of Process which is said by the pursuers to have been false, and my first comment is that the paraphrase by the pursuers in their pleadings of the passage in the letter is not an accurate paraphrase. What the late Mr. Stanley Brown in fact said in his letter relating to this matter, ran as follows:

> "However, in protecting the term Harris Tweed and "guarding against its misuse, our experience has "been that if the goods do not carry the Harris "Tweed Certification Mark, but are only stamped or "marked with the term Harris Tweed, such goods are "suspect of being imitation."

The writer of the letter, therefore, qualified the statement complained of by reference to "our "experience", that is presumably his own experience and the experience of the H.T.A. whom he represented in the United States of America. At any rate, on any reasonable interpretation of the letter, I am satisfied that it was their experience in the United States of America to which reference was thus made. It has not, in my opinion, been proved that this was not in fact the experience of the late Mr. Stanley Brown and of the H.T.A. in the United States of America. Indeed, such evidence as there is points in /

in the opposite direction. In any event even if the reference to "our experience" can reasonably be read as including experience not only in the United States of America but also elsewhere in the world, I do not think that anyone who has listened to the evidence led in the present case would have hesitated in 1956 to make the statement of which the pursuers complain on Record. That statement was in my opinion true, and I may add that on the basis of the evidence led in the present case the whole terms of the letter No. 68 of Process appear to me to have put the situation very candidly and accurately before the Collector for his consideration. It may be observed that the letter included the following paragraph:

"Some 2/3 million lineal yards of Harris Tweed
"are shipped by the Harris Tweed Industry to the
"U.S.A. each year and the customers are mostly
"garment manufacturers, although a relatively
"small quantity is imported by various woolen
"merchants or jobbers. So far as I know all of
"this Harris Tweed conforming to the Harris Tweed
"definition is stamped with the Harris Tweed
"Certification Mark, there may be, of course, a
"minute quantity which is genuine Harris Tweed,
"but for one reason or another is not stamped with
"our Certification Mark."

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That paragraph in my opinion made it clear that there might be small quantities of Harris Tweed entering the United States of America which was genuine Harris Tweed, in the sense that it qualified for the Orb mark without actually having been stamped with that mark. In the foregoing circumstances it has not in my opinion been proved that recordation of the mark with the Customs was obtained by any false statement or statements such as those complained of. Moreover, it is apparent that there was and still may be some doubt as to what the practical effect of recordation in such circumstances of a certification mark ought to be. The Collector seems to have been uncertain whether Section 42 of the Lanham Act applied in the case of a certification mark, and it is not established that he himself took any action on the letter No. 68 of Process. The matter was subsequently considered by the Bureau of Customs at Washington which formed part of the United States Treasury Department, and it was only after consideration of the position by that Bureau that recordation of the certification mark was made in the Treasury Department on 21st November 1956.(No. 81 of Process).

In the whole circumstances my conclusion is that the pursuers have failed to prove that the H.T.A., either by itself or through its attorneys or representatives /

representatives, made any false statement such as those alleged in Article 3 of the Condescendence. If necessary I would be prepared to hold that the contrary is established. The averment in the same Article of the Condescendence alleging a fraudulent course of conduct by the H.T.A. was in my opinion even further from being established, and I feel some doubt as to whether an enquiry could have been allowed at all into this branch of the pursuers' case without these averments of fraud. No doubt Mr. Graham, for reasons which he explains in his evidence, thought it was bad tactics to seek recordation, and said as much on one occasion to the late Mr. Stanley Brown. But Mr. Brown had received some encouragement from officials who might be presumed to know something about the matter, and as Mr. Brown is now dead it is only right to say that there is in my opinion not the slightest evidence of falsehood or fraud on his part. I may add that there is in my opinion no proof of malice in relation to any of the statements complained of in this Article of the Condescendence, although such proof is in my opinion required, not only on the general grounds already stated, but also on the ground that the letters Nos. 55 and 68 of Process were written to officials of Departments of the United States Government which had an interest.

In /

In the letter No. 55 of Process the attorneys of the H.T.A. were seeking registration without disclaimer under new legislation, which as it appeared to them might allow such registration. In the event the United States Patent Office waived their request for disclaimer of the word "Harris", but did require disclaimer of the word "Tweed" apart from the mark. In that requirement by the United States Patent Office the H.T.A. acquiesced (see Nos. 57 and 58 of Process). There is in my opinion a complete absence of evidence of improper motive on the part of those who were responsible for the final paragraph of the letter No. 55 of Process, including the single passage therein of which complaint is made. There is no proof of intent to injure the pursuers or any of them. At that time none of the pursuers were making any attempt to introduce into the United States of America or to sell on the market there any tweed which, even according to them, could legitimately pass under the name Harris Tweed. None of them were even producing such a tweed. The first and third-named pursuers did not as I have said exist at that time. The second-named pursuers were not then producing or exporting to the United States any tweed which they had handwoven in the Outer Hebrides. The fourth-named pursuers had not advanced further than /

than the manufacture in Oban of the tweed to which they gave the name Argyll Tweed. Any handweaving of tweed carried out by them was at that time done in Oban. Moreover, there is evidence that Mr. James Macdonald considered, for whatever reason, that there was no prospect of exporting to the United States of America the tweed produced and marketed by his companies. I am equally unable to find any proof of malice in relation to the statements made in the letter No. 68 of Process, of which complaint is made. In the light of the evidence led that letter appears to me to have been a reasonable presentation of the situation as known to the writer and to the H.T.A. Even if any of the statements complained of had been proved to be false, it would in my opinion have been impossible to hold that they or any of them were made from any improper motive, still less that they were made in the knowledge of the writer or of the H.T.A. that they were false. I have observed in connection with the failure of the pursuers to prove malice that the letters Nos. 55 and 68 of Process were letters written to officials of departments of the United States Government who had an interest in the matters to which the letters related. The H.T.A. also had a clear interest. In these circumstances, if I am to assume for the purpose of this case that the /

the law of the United States of America is the same as that of Scotland, there are grounds for requiring proof of malice additional to the general ground to which I have already referred.

For the foregoing reasons the pursuers' case based on alleged false statements in the letters Nos. 55 and 68 of Process has in my opinion failed upon the evidence. Counsel for the pursuers appeared to recognise the difficulties with which he was confronted in relation to the letter No. 68 of Process, since he hardly touched upon that letter as providing an independent ground. His contention upon the evidence led in support of the pursuers' averments in Article 3 of the Condescendence - and I noted its precise terms - was "that by making a false "declaration in No. 55 of Process the H.T.A. achieved "for producers who produced in accordance with the "Orb regulation, and who had their tweed stamped, a "complete monopoly in the sale of Harris Tweed in "the U.S.A. between 1956 and 1960 and kept out Harris "Tweed manufactured by the pursuers or others who "wished to get such Harris Tweed into the U.S.A." This puts almost the whole weight of the pursuers' case on to a false statement alleged to have been made in the letter No. 55 of Process, and treats the letter No. 68 of Process simply as a sequel of the /

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the earlier letter or indeed as part of the same transaction. There is, however, no proof that when the letter No. 55 of Process was written, either the H.T.A. or their representatives or advisers had in mind the step of recordation which was later taken. In any event the statement complained of in No. 55 of Process was not, in my opinion, in any sense a statement relating to any business carried on by the pursuers or any cloth produced, processed, marketed and disposed of by them as Harris Tweed. As this branch of the pursuers' case was finally presented, the wrong complained of did not in my opinion bear any resemblance to the alleged wrong against the repetition of which the conclusion for interdict is by its terms designed to protect the pursuers. In these circumstances I am inclined to think that there was force in the defenders' argument that even if the pursuers had sustained any actionable damage as a result of the matters complained of in Article 3 of the Condescendence that damage would have been the consequence of a completed wrong or wrongs of a different character from those covered by the second conclusion of the Summons, and that the pursuers could in any event, obtain no remedy therefor in the present process. Moreover, one would have thought that remedies would be available in the United States of /

of America if it were desired to challenge either the registration there of a certification mark or any part of such registration on proper grounds, or recordation of such a mark with the Customs or any steps taken in consequence of such recordation. I gathered from the evidence of Mr. Gottesman and Mr. Graham that such remedies do, and did, in fact exist. If the pursuers' substantial complaint is that their goods were wrongly kept out of the United States of America during the period in question as a result of some illegality in the registration of the certification mark in 1948, or in the recordation of the mark with the Customs in 1956, I should have thought that the obvious course would have been for them to take the appropriate proceedings in the Courts of the United States of America, and it appears from the evidence that the second-named pursuers or their customers had at least one opportunity of doing this during the period between 1956 and 1960. None of the other pursuers seem to have made much, if any, effort during the period in question to introduce into United States' markets cloth under the name of "Harris Tweed". I may add finally that Mr. Graham (at p. 90 of the commission) stated that the H.T.A. did not do anything illegal by recording their certification mark with the customs, and he went on /

on to say that they acted in accordance with clear-cut statutory authority, open to any registrant of a mark. I cannot find that this is anywhere effectively controverted.

Before I pass from my consideration of the matters covered by Article 3 of the Condescendence and the Answer thereto, I should refer to the events subsequent to 1956 to which a great deal of evidence was devoted. In the United States of America as in the United Kingdom both sides appear to have been engaged during this period in manoeuvring for position. Mr. Blair Macnaughton and Mr. Diplock appear, as in the United Kingdom, to have been the protagonists on the one side and the Harris Tweed Association and their representatives on the other. The Federal Trade Commission became active in the matter, having had their attention drawn by the opponents of the H.T.A. inter alia to the advertisement in the Daily News Record of 12th November 1957, which is the advertisement lettered D in No. 297 of Process. It is interesting to find in the first letter from the Federal Trade Commission to Mr. Graham dated 3rd March 1958 (No. 83 of Process) the following passage:

"It appears that said description is limited to a "particular Harris Tweed produced by members of the "Harris /

"Harris Tweed Association".

This misconception was very similar to that to which I have already drawn attention in the case of certain large makers-up and retailers in England. The eventual result of the steps taken on both sides in the United States of America was that the H.T.A. on 22nd March 1960 under pressure from officials of the Federal Trade Commission disclaimed the word "Harris" apart from the mark. There is, however, in my opinion no proof of any admission made by or on behalf of the H.T.A. that they made any of the statements complained of in Article 3 of the Condescendence either falsely or maliciously, nor is there in my opinion any evidence from which a fraudulent course of conduct on the part of the H.T.A. can justifiably be inferred. I may add finally, in connection with Article 3 of the Condescendence, that I find it impossible in any event to see how upon the evidence -- any of the defenders other than the H.T.A. could be held responsible for what was written in the letter No. 68 of Process any more than in the letter No. 55 of Process, and these are the only documents averred in that Article to have contained false statements.

I turn accordingly to the second specific matter on which the pursuers found as having been a wrong done to them, which may be repeated and should therefore/

therefore be prevented by the granting of interdict. The averments relating to this second specific matter are contained in Article 4 of the Condescendence, the introductory averments of which in my opinion convey a picture which to someone not conversant with the facts might be misleading. I have already referred to the formation of I.H.T.P. which, like the H.T.A., is a company limited by guarantee and not having a share capital. The pursuers' averments do not make it absolutely clear, though it is the fact, that the pursuers were and are the only members of I.H.T.P., and I have already indicated my doubts as to whether the term "independent producer", which in the past was usually employed to describe an Island producer who had no spinning capacity of his own, is apt to cover mainland converters engaged in operations such as those in which the pursuers have been and are engaged. At the time of the formation of I.H.T.P. on 5th November 1958, and for some time subsequently, quantities of non-Scottish wool or wools more or less substantial were being used by all the pursuers in the product which they claimed they were entitled to market as Harris Tweed. Mr. Diplock had a good deal to do with the steps that led up to the formation of I.H.T.P., and it/

it is therefore somewhat revealing to find him making the following statements in a letter to Mr. Blair Macnaughton dated 6th December 1957, part of which I have already quoted:

"I don't want to be caught napping if I am asked for "a quick definition of 'Harris Tweed' which would suit "all brands of thought in this country. Will you let "me know as soon as possible, therefore, if you approve "of the following:-

"'Harris Tweed is hand-woven in the Outer Hebrides "'from yarns spun and dyed either in these islands or "'on the Scottish mainland: the cloth is finished "'either in the Outer Hebrides or on the Scottish "'mainland'.

"One point seems rather important - should we say "that the yarns are made from one-hundred per cent. new "Scottish wool? Personally I think we should."

The final sentence of the above quotation suggests to me either that Mr. Diplock was unaware that non-Scottish wools were being used by those whom he was supporting, or that he disapproved of the use of such raw material in a cloth which was to be marketed as Harris Tweed. It may also be observed that Mr. Diplock's suggested "quick definition" would not have covered the material then being produced by Maclennan & Maclennan, who did not in/

in the event join I.H.T.P. The same sort of comments may be made with regard to the R.T.S.A. which, after some initial wavering, eventually committed itself to a definition of Harris Tweed which required the use of "pure virgin wool produced in Scotland" (see No. 167 of Process p. 25). The not wholly consistent statements and actions of the R.T.S.A. when altering their own definitions, or "firing shots across the bow" preparatory thereto, are open to the comment that they followed extremely closely the line of I.H.T.P. and those who organised its formation. The use of non-Scottish wools by its promoters was not the only target for criticism provided by I.H.T.P. at its inception. Apart from the repeated use of the words "Outer Hebrides" there is a lack of Island flavour about the membership of I.H.T.P. which made some of the criticisms of the H.T.A. along similar lines ring rather false. There was as I have shown a logical historical reason for the H.T.A. having its birth place in London. On the other hand of the "number "of private individuals including representatives of "the Islanders who hand-weave the tweed", mentioned in the letter to the Registrar of Companies from the solicitors for the promoters of I.H.T.P. dated 3rd May 1958 (No. 446 of Process p. 134), as being among the promoters, little if any trace can be found in the evidence/

evidence. Mr. Diplock and Mr. Macnaughton had visited the Islands together in the Autumn of 1958, but it appears that they were unable to enlist any really active support there or to persuade those who supported the Orb to agree to the definition proposed by those who wished to carry out all processes, apart from the hand-weaving, on the mainland of Scotland if not further afield, and perhaps also to permit the use of non-Scottish wools. Despite the lack of response in the Islands to their approaches, the enthusiasm of Mr. Diplock and Mr. Macnaughton was not diminished and the correspondence in No. 449 of Process, particularly at pp. 477 and 479, read together with the contemporary R.T.S.A. Bulletin for November 1958 (No. 152 of Process) give an indication of what was going on both behind the scenes and on stage.

Almost immediately after its incorporation I.H.T.P. as I have said petitioned Lyon for a grant of Ensigns Armorial, and the subsequent events and procedure are fully described in the documents already referred to and in the evidence of several witnesses, including in particular Mr. Stevens, whose firm acted for I.H.T.P., and, on the other side, Colonel McArthur. Lyon instructed that the petition should be intimated to the H.T.A., with a view to Answers being lodged/

lodged by them, if so advised. Such Answers were in due course lodged by the H.T.A., and it is to a statement made in these Answers that the complaint in Article 4 of the Condescendence in the present action is related. In order to understand that statement it is necessary to refer to the last paragraph of the Petition which was in the following terms:

"That the petitioner is desirous for the purposes "of encouraging handwoven Harris Tweed weaving, of "bearing and using such ensigns armorial as per- "missible according to the Law of Arms, and which "would in a lawful manner bear allusion to the "history of Harris".

Paragraphs 3 and 4 of the answers lodged by the H.T.A. (No. 447 of Process pp. 3-4) were in the following terms:

"3. The petitioners are a company who propose "trading for profit in what they call Harris Tweed, "their definition of which recites that it is "'cloth made from pure virgin wool dyed and spun "'in the Outer Hebrides or elsewhere in Scotland, "'hand-woven by the Islanders in the Outer Hebrides "'and finished in the Outer Hebrides or elsewhere "'in Scotland'. The wool thus used could be from "any source whatsoever and much of the processing "could, and it is believed would, be carried out on "the /

"the mainland and not in the Islands. Processes "such as dyeing, carding, spinning and finishing, "which have traditionally always been carried on in "the Islands and which are the costliest processes "in producing the tweed, would it is believed be "carried out on the mainland by the Petitioners, "none of whose members have a Mill in the Outer "Hebrides. The tweed they propose to trade in, "thus, would not be genuine Harris Tweed and the "use of arms connected with the Island of Harris "would not in the circumstances be justified.

"4. It is believed and averred that the "Petitioners desire to obtain a grant of arms "bearing an allusion to the history of Harris in "order that they may bear and use such ensigns "armorial commercially in trading for profit and "that they thereby seek to encroach on the "Islanders' industry by manufacturing a Tweed called "Harris Tweed, and yet, which does not comply with "the accepted definition of the Harris Tweed. This "would be to the severe prejudice of the Respondents "and those Islanders whose interest they represent".

The statement to which exception is taken by the pursuers in Article 4 of the Condescendence is the first part of the last sentence in paragraph 3 quoted above. That passage is the concluding passage of what /

what is in effect a legal argument, and it is itself legal argument, involving as it does questions of mixed fact and law. Even, however, if it is regarded as a pure statement of fact, it is not proved, for reasons which I have already indicated, to have been false. On the contrary my conclusion is that on the balance of probabilities it was a true statement. I have already expressed the opinion, based on the evidence led in the present case, that cloth which was made wholly or partly from non-Scottish wool, which was not necessarily handwoven by the Islanders at their own homes and which might be processed and manufactured, except for the handweaving, elsewhere than in the Outer Hebrides, could not legitimately be marketed or disposed of under the name "Harris "Tweed". There was in my opinion nothing false in the assertion which was made by the H.T.A. in the final sentence of paragraph 3 of their Answers, and this becomes all the clearer when the sentence is read as it must be, in its context. It may be noted that under pressure from Lyon I.H.T.P. altered their definition by limiting the raw material to "pure "virgin wool produced in Scotland", and as I have already said this involved an amendment of the Company's Memorandum of Association by Special Resolution passed on 29th January 1959. It also involved /

involved that from that time onwards the members of I.H.T.P. had to confine themselves to the use of Scottish wool, which was for them an entirely new departure. I find it difficult to believe that I.H.T.P. and its member companies would in the circumstances have taken such a course except under the pressure of what they believed was compelling necessity, particularly when it is borne in mind, without being in any way disparaging, that the object to be achieved was no more important commercially than the grant of Ensigns Armorial. I have also drawn attention to the continuing importance in the reputation of genuine Harris Tweed with the purchasing public of the home or cottage or "croft" element in the handweaving. There are some indications that this was recognised by I.H.T.P. themselves. For example in a letter dated 2nd March 1959 (No. 449 of Process p. 495), written to Lyon by the soliciters acting for I.H.T.P. at a time when Lyon had his opinion under reconsideration, there is contained inter alia the following statement:

"5(3). The Petitioners' position is based on the "fact that they have no mills in the Hebrides but "the crofter-weavers employed by their members "have suitable premises for hand-weaving at their "homes."

In relation to the operations of the fourth-named pursuers at /

at Lochboisdale and Eochar, which I have already described, and the marketing and disposal by the first-named pursuers of the tweed so produced, that statement was contrary to the facts. It is difficult to dismiss it as an oversight or error, particularly as the same sort of misrepresentation is to be found in a contemporaneous memorandum by I.H.T.P. to Colonel Radnor of the Federal Trade Commission (No. 452 of Process p. 1410B). It appears that Lyon was prepared to accept some Scottish mainland processes, though the selection of a MacLeod Bull's Head in Chief may have certain implications which are not immediately apparent to the uninitiated. Amongst other things the bull's stamping ground was, if I mistake not, on the mainland. I have already given my reasons for reaching the view that such mainland processes, either in Scotland or, should "mainland" be given a wider connotation, elsewhere, are foreign to the reputation with the public of Harris Tweed as a product of the Outer Hebrides, or at least a product in respect of which the main processes are carried out there.

Even if I had been able to find that the statement complained of in Article 4 of the Condescendence was untrue, I am satisfied that there is no proof of malice. Such proof appears to me to be required in this /

this instance, not only on the general ground which I have already stated, but also upon the additional ground that the statement was made by the H.T.A., in a matter where the company's interest was concerned, to Lyon sitting as is said in his Ministerial capacity. The H.T.A. after all were invited to submit Answers, or as they were later called, Representations. The only specific averment in Article 4 of the Condescendence inferring malice is the averment that the statement that the tweed in which the pursuers propose to trade "would not be genuine Harris Tweed" was untrue to the knowledge of the H.T.A. This is in my opinion not only not proved, but is disproved for reasons which I have already sufficiently elaborated. The pursuers on Record found on the reiteration by the defenders in their defence to the present action of the allegation that the cloth manufactured, processed and marketed by the pursuers is not genuine "Harris Tweed". I am unable to see how in the circumstances this assists the pursuers in any way in proving malice, or in supporting their conclusion for interdict. The defenders are fully entitled, and indeed bound, to deal in their defences with matters which the pursuers have put in issue by their pleadings. For the foregoing reasons my conclusion is that the statement complained of in Article/

Article 4 of the Condescendence has not been proved to have been a false assertion. On the contrary I think that the statement was in all the circumstances true. In any event malice is not in my opinion established, and I find some difficulty in seeing that the pursuers or any of them suffered or were liable to suffer any damage. Moreover, in this instance also, there appears in any event to be no ground for holding any defender other than the H.T.A. responsible for the statement of which complaint is made.

The third specific matter of which complaint is made by the pursuers in their pleadings relates to part of the contents of advertisements published by the H.T.A. The averments with regard to this matter are contained in Article 5 of the Condescendence which, considering the volume of evidence to which it has given birth, is remarkable both for its brevity and the general nature of its terms. The article begins with an averment that "in recent years" the H.T.A. have conducted an advertising campaign in the United Kingdom "and elsewhere" with a view to promoting the sale of Harris Tweed produced by the other defenders. The defenders admit that the H.T.A. have instituted advertising in the United Kingdom or elsewhere with a view to promoting the sale of Harris Tweed produced by/

by the other defenders. It is thus matter of admission that the object of the advertising by the H.T.A. was to promote the sale of Harris Tweed produced by the other defenders, and in any event the evidence in particular of Colonel McArthur in my opinion shows this to be the fact. This, in my opinion, is of some consequence in relation to the question of malice, since it at least makes it less easy for the pursuers to prove improper motive or intent to injure in connection with that part of the advertisements of which complaint is made. The advertising of the H.T.A. must also, in my opinion, be considered against the background of the Company's Memorandum of Association, and in particular the objects' clause which demonstrates that in advertising and thereby promoting the manufacture and sale of tweed made in the Islands, the H.T.A. were carrying out one of the main functions for which the company was formed.

The basis on averment of the pursuers' attack on the advertisements published by the H.T.A. is contained in two sentences in Article 5 of the Condescendence, which it is perhaps best to quote:

"Certain advertisements published in said campaign by "said association, with the knowledge of the other "defenders, were misleading and false in so far as they "represented to the public by their form and words that "tweed described as Harris Tweed which did not bear said "certification/

"certification trade mark aforesaid was 'not genuine' "or 'of doubtful origin and quality'. The pursuers "believe and aver that statements in said advertisements "were misleading and deceptive and likely to harm the "legitimate trade and good-will in Harris Tweed of the "pursuers and others in the United Kingdom, who do not "use or require to use said trade mark to market their "products as Harris Tweed".

It was not made clear to me what persons, firms or companies were intended to be covered by the words "and "others in the United Kingdom" used in the last sentence above quoted. No authority was cited for the proposition that the pursuers could obtain the interdict sought in the present action on the basis of a wrong done or threatened to be done to persons other than themselves. If the words "and others in the United Kingdom" are intended to include Island producers, such as those who produce 50/50 or other tweed with an admixture of larger or smaller quantities of Scottish mainland-spun yarn, the issues raised might possibly differ from those which have to be considered in the present action. I do not consider it either necessary or advisable to reach in the present process any conclusion on the position of such producers or any of them. Still less in my opinion can the pursuers found on any inaccurate or false statement which affected not themselves but only those/

those who produced and marketed the very small quantities of tweed which qualified under the 1934 Definition, but for one reason or another was not actually stamped with the Orb. I am prepared to assume that there were certain advertisements which offended in respect that they stated or at least implied that in order to be genuine Harris Tweed the material must not only comply with the 1934 Definition but must also actually be stamped with the Orb. If so, the advertisements in question may no doubt be criticised as inaccurate, but in my opinion it does not lie in the mouths of the pursuers or any of them to complain of such statements as a legal wrong done to them. In any event any advertisements which may have been objectionable in this respect appear from the evidence to have been discontinued, and in these circumstances there is in any event no threat proved which would in my opinion justify the granting of interdict. (See e.g. Nos. 431, 432 and 433 of Process; also No. 446 of Process p. 60). I am prepared to assume that there have occurred in some advertisements references to the 1934 Definition which went too far in claiming for it Government authority, and there are also references in certain of the American advertisements to the H.T.A. having been "created by special charter of the British Board of Trade" which cannot be commended as an accurate description of a company limited by guarantee and/

and not having a share capital, of which there is, according to Mr. Graham, no exact counterpart in the United States of America. I must confess, however, that I thought most of the criticisms of the H.T.A.'s advertisements somewhat overdone and also somewhat remote from the issues to which the conclusion for interdict in the present action is related.

Counsel for the parties were content that the advertisements, copies of which have been lodged in Process, should be left to speak for themselves. Reference was however made to a number of the advertisements by various witnesses in the course of the evidence and counsel for the pursuers dealt with a substantial proportion of them in the course of his submissions. Many of the copy advertisements are prior in date to 1952, and I must confess that I have the greatest difficulty in seeing how any of the pursuers can justifiably complain of what was said in advertisements during a period when none of them, so far as the evidence goes, were producing, marketing or disposing of tweed hand-woven in the Outer Hebrides or attempting to market or dispose of any tweed under the name "Harris Tweed". Moreover, the averments in Article 5 of the Condescendence relate only to advertisements published by/

by the H.T.A., which eliminates at least one advertisement by the third named defenders on which counsel for the pursuers founded. If one's attention is confined to advertisements published by the H.T.A. from 1952 onwards, it is by no means easy to discover in any of these advertisements statements which even on the pursuers' presentation were misleading and false in respect that "they represented to the public by their "form and words that tweed described as Harris Tweed "which did not bear said certification trade mark afore-"said was 'not genuine' or 'of doubtful origin and quality'". In any event, I am satisfied upon the evidence that the H.T.A. would have been well justified in stating the general proposition that tweed described as Harris Tweed which did not bear the certification mark was "of "doubtful origin and quality". Moreover, while for reasons which I have already indicated it might be inaccurate to state as a general proposition that tweed not actually stamped with the Orb was necessarily "not "genuine", such a statement made in relation to the tweed produced, processed, marketed and disposed of by the pursuers under the name "Harris Tweed" would not upon the evidence in my opinion have been false. On the contrary, so far as the evidence goes, such a statement relating/

relating to the pursuers' material would in my opinion have been true, in particular in the United Kingdom and in the United States of America, in which latter country according to Mr. Graham (at p. 208 of his evidence) the 1934 Definition was the only definition. In the course of his submissions counsel for the pursuers repeatedly pointed to advertisements both before and after 1952 which, according to him, stated or implied that tweed not conforming to the 1934 Definition was not genuine Harris Tweed, and I understood that he desired to found on these advertisements in support of the pursuers' averments in Article 5 of the Condescendence. This is not in my opinion the respect in which the pursuers offered upon these averments to prove that the advertisements complained of contained misleading and false statements, but, if it were, I have already said enough to demonstrate that in my opinion such a statement would not have been either false or wrongous so far as relating to the pursuers' businesses or any cloth produced, processed, marketed and disposed of by them under the name "Harris Tweed".

I am further of opinion that the pursuers have failed to prove malice in relation to any of the advertisements complained of, and I have already drawn attention to the/

the fact that in carrying out advertising with a view to the promotion of sales of Orb stamped tweed the H.T.A. were carrying out one of the main objects and duties for which they were incorporated. I may add that I consider it extremely doubtful whether the advertising carried out by the H.T.A. on the whole damaged the pursuers or any of them. The advertising by the H.T.A. created a vast demand for genuine Harris Tweed and the public appetite for that article became so considerable over the years that, as has been seen, imitation became a very tempting enterprise. In a final reckoning it may well be that the pursuers gained a good deal more financially from the effects of the H.T.A. advertising than they lost. I may also add in connection with the averments in Article 5 of the Condescendence that, upon the evidence, it would not in my opinion be justifiable or even possible to hold any defender other than the H.T.A. responsible for the advertisements, unless it were to be held that such responsibility arose merely from the fact of having tweed stamped and paying the appropriate levy, which would in my opinion be a somewhat remarkable proposition. In any event it may be observed that there is no clear averment that any of the defenders, other than the H.T.A., had knowledge that anything in the/

the advertisements was misleading or false, and even in the case of the H.T.A. the matter is not plainly put. Indeed, in my opinion, the whole averments in Article 5 of the Condescendence provide fertile ground for criticism, both on relevancy and in the light of the evidence led at the proof.

The fourth and final specific matter founded on by the pursuers is the subject of averment in Article 6 of the Condescendence, and relates to certain claims said to have been made by the first, second, third, fourth and fifth-named defenders in an action raised on behalf of themselves and all other makers of "Harris Tweed" in the Outer Hebrides in the High Court of Justice, Chancery Division, in England, against five defendants who include the first, second and third-named pursuers in the present action. After referring to certain injunctions sought or claimed in the said English proceedings, the pursuers' averments in Article 6 of the Condescendence proceed as follows:

"Said claims made by the plaintiffs, as representing "the present defenders, against the pursuers are "false and calumnious. The making of such public "claims in said form is intended to convey to the "public in England and elsewhere that the "defenders /

"defenders have a monopolistic right to the "words 'Harris Tweed', that they are the only law- "ful producers of Harris Tweed, and that the Harris "Tweed, produced, processed, marketed and disposed "of by the pursuers is not genuine Harris Tweed "and as such is an inferior article. Said claims "embodied in said public statements are entirely "untrue and such statements are calculated to cause "pecuniary damage to the pursuers by disparaging "their cloth and clothing made from such cloth. "The pursuers reserve all right competent to them "to claim damage against the defenders in "respect of said slander aforesaid".

I must confess that this branch of the pursuers' case has never appeared to me to be even statable, and I certainly received no enlightenment from the submissions on this matter of counsel for the pursuers which were of almost telegraphic brevity. It is not for me to say whether or not the action in England is well founded. I need only go so far as to say that the averments in Article 6 of the Condescendence which I have quoted above, and in particular the essential averments that the said claims are untrue in relation to the pursuers' cloth, have not in my opinion been proved by the pursuers for reasons which I have already stated. Moreover, in this case also, the /

the pursuers have in my opinion wholly failed to prove malice. Such proof would in my opinion be required on the general grounds which I have already dealt with, but this branch of the pursuers' case appears to me to enter the realm of judicial slander of goods, which would seem to demand proof of malice for yet another and additional reason. I do not know what the legal position in England may be. The pursuers did not enlighten me either upon averment or in evidence, as to the law of England on these matters, but if I am for this purpose to assume, as counsel for the pursuers suggested, that the law of England is the same as that of Scotland, proof of malice would in my opinion clearly be required. Scott v. Turnbull 1884, 11 R. 1131; M. v. H. 1908 S.C. 1130. There has been in relation to the statements complained of in this article of the condescendence no proof, and indeed it is even doubtful whether there is any averment, of facts and circumstances inferring malice such as entitled the pursuers to an enquiry in the cases of Webster v. Paterson & Sons 1910 S.C. 459 and Mitchell v. Smith 1919 S.C. 664. In these circumstances the specific complaints of wrongs alleged to have been done to the pursuers, to which Article 6 of the Condescendence is directed, have not /

not in my opinion been brought home by the evidence, and I am in any event by no means satisfied that there has as yet been publication of the statements complained of, at any rate if the principles of the law of Scotland are to be applied to that question.

I have accordingly reached the conclusion that none of the specific wrongs said to have been done or threatened to the pursuers by the defenders have been established by the evidence, nor in general am I satisfied that the pursuers have established any grounds upon which the interdict sought by them ought to be granted. It follows that the conclusion for interdict fails as well as that for declarator. Although I am inclined to think in the end of the day that the whole action may well be misconceived, I am content to rest my judgment upon the view that the pursuers have failed to prove the case averred on Record both in support of the declarator and of the interdict, and that they have in particular failed to prove that there has been any wrong to them completed, continuing or threatened by the defenders or any of them. In these circumstances I shall repel the first, second and fourth pleas-in-law for the pursuers, sustain the third, fourth, fifth and sixth pleas-in-law for the defenders, refuse the declarator and interdict concluded for and grant decree of absolvitor.

It /

It would be wrong for me to part from this heavy and extremely complicated case without repeating what I said at the conclusion of the evidence and of the hearing with regard to its preparation and presentation. I need hardly say that I am deeply indebted to counsel on both sides for the great assistance which they afforded to me. I was also greatly indebted to the parties and their advisers for the orderly manner in which the evidence, both oral and documentary, was presented. In particular the preparation and presentation of the documentary evidence and of the necessary copies reflects great credit on those who bore the responsibility for these matters. The assistance so given has greatly eased my task and has been an object lesson in the way in which a mass of documents should be organised in a litigation.