Lord Chelmsford—I think the appellant ought to have all the costs occasioned by your opposition on that point.

Lord Advocate—That would be merely the attendance of the agent. The appeal was presented after a lapse of close upon five years, and it was presented by a party who is in precisely the same position now as he was throughout in the Court of Session. A petition against the competency of the appeal was presented, and an agent appeared before the Appeal Committee, to whom it was remitted, and the Appeal Committee reserved the question for the consideration of this House.

Lord Chancellor—I think, my Lords, it would be much better to use words which do not anticipate the function of the taxation of costs, but which express the principle upon which the House proceeds; and, with that view, I propose to your Lordships these words—"the costs occasioned by the presentation of a petition against the competency of the appeal."

Counsel for Appellant—Dean of Faculty (Gordon) Q.C., and J Anderson, Q.C. Agents—Adam & Sang, W.S., and W. Robertson, Westminster.

Counsel for Respondent — Lord Advocate (Young), Q.C., Solicitor-General (Jessel), and Lee. Agents—Mackenzie & Kermack, W.S., and Loch & Maclaurin, Westminster.

COURT OF SESSION.

Tuesdays, June 3 and 10.

SECOND DIVISION.

DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS.

(*Ante*, vol. ii. 253; vol. iii. 61 and 138; vol. iv. 190; 2 Macph. 653; 4 Macph. 475; 5 Macph. 214 and 1054.)

River—Pollution—Nuisance—Motion for Decree—Declaratory Conclusions—Interdict.

The pursuers, proprietors of lands on the banks of a private stream, holding the verdict of a jury in their favour, moved for decree in terms of the conclusions of the summons of declarator against the defenders, paper manufacturers on the banks of the stream, to have the water transmitted to them in a state fit for primary purposes; and also for interdict. — *Held* (1) that they were entitled to the declarator; and (2) that interdict must also be granted—the defenders having stated (after a short delay for consideration) that they had no proposal to make by which the nuisance complained of might be abated.

This case has been in various forms before the Court of Session since 1841. The pursuers are the Duke of Buccleuch, Lord Melville, and Sir W. Drummond, riparian proprietors on the North Esk, and the defenders are proprietors of mills on the banks of that stream. A jury trial of eleven days' duration commenced on July 30, 1866, and the issues sent to the special jury then empannelled were as follows:—

"1. Whether, between 1st January 1835 and 1st October 1853, the defenders, the first-mentioned firm of Alexander Cowan & Sons, did, by discharging refuse or impure matter at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, or any of them, pollute the water of the stream or river called the North Esk, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"2. Whether, between 1st October 1853 and 20th May 1864, the defenders Alexander Cowan & Sons, the present occupants of said mills, did, by discharging refuse or impure matter at or near their said mills, or any of them, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"3. Whether, between 1st January 1835 and 15th May 1856, the defenders, the first-mentioned firm of William Somerville & Son, did, by discharging refuse or impure matter at or near their mill called Dalmore Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"4. Whether, between 15th May 1856 and 20th May 1864, the defenders William Somerville & Son, the present occupants of said Dalmore Mill, did, by discharging refuse or impure matter at or near their said mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"5. Whether, between 1st January 1835 and 1st July 1856, the defenders, the first-mentioned firm of Alexander Annandale & Son, did, by discharging refuse or impure matter at or near their mills called Polton Papermills, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"6. Whether, between 1st July 1856 and 20th May 1864, the defenders Alexander Annandale & Son, the present occupants of said Polton Papermills, did, by discharging refuse or impure matter at or near their said mills, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"7. Whether, between 15th May 1856 and 20th May 1864, the defenders James Brown & Company did, by discharging refuse or impure matter at or near their mill called Esk Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"8. Whether, between 1st May 1848 and 20th May 1864, the defender Archibald Fullerton Somerville did, by discharging refuse or impure matter at or near his mill called Kevock Mill, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"9. Whether, between 1st January 1843 and 20th May 1864, the defenders William Tod & Son

did, by discharging refuse or impure matter at or near their mill called St Leonard's Mill, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them."

The general evidence of the case consisted of the testimony of parties who had resided from infancy on the banks of the stream, and who spoke to its present state of pollution, whereas previously it had been pure, and had been used for watering cattle, for domestic purposes, as a trouting stream, and otherwise. A number of witnesses were examined as to the quality and amount of the materials used in the mills at different periods; and also the evidence of several experts was taken.

The general evidence of the defenders was with the view of showing that the regulations referred to in the evidence of Professor Christison had been complied with; that everything that could be reasonably expected had been done by the defenders to purify the water as it issued from their mills; and that the pollution of the river was in great measure caused by other manufactories, and more particularly by the sewage of the town of Dalkeith.

The following are the more important portions of the Lord Justice-Clerk's charge:—"The nature of the action, which was brought by the pursuers into Court so far back as 1841—and the subsequent actions are precisely of the same character, and are merely intended to bring into the field different sets of defenders—is this—In their summons they demand, in the first place, that the Court shall interdict the defenders from polluting the stream; and, in the second place, they ask, in the event of interdict not being granted in these terms, that the defenders shall be put under some reasonable regulations, whereby the effect of their operations shall not be to pollute the stream. Now, what I have to tell you in regard to an action of this kind is, that it is an appeal to what is properly called the equitable jurisdiction of the Court; and that when an issue is sent to a jury to try a case of this kind, it is not at all like an issue in most cases, where the verdict of the jury is immediately followed by a judgment out and out in favour of the one party or the other. On the contrary, in the present case the question of fact is sent to be tried by you in the first instance—whether there is in point of fact a pollution of this river by the defenders; and if that fact shall be ascertained to the effect of your finding that there is a pollution of the river by the defenders, the legal effect comes to be judged of afterwards, and the remedy to prevent the pollution for the future is a matter entirely in the discretion of the Court, and is not at present a subject for your consideration at all. But it does not in the least degree follow, nor is it for one moment to be contemplated as a possible result, that merely because you return a verdict affirming that the river has been polluted by the defenders, there is therefore at once to be a judgment of the Court putting a stop to the future operations of these mills. The precise words of the issues and the exact questions of fact on which you are to return an answer I will explain to you immediately; but before doing so there is another matter of law in regard to which I must give you certain explanations and directions, and that is in regard to the relative rights of proprietors of a stream of this kind, who may be classed as upper and lower proprietors. The mutual obligations of parties so situated are very clearly and distinctly defined and fixed in our law, and the principles of the law regulating such rights are founded on such obvious considerations of justice as well as public policy that you will at once appreciate and understand them when I state them to you, and you will find them of the utmost value in the consideration of the evidence in this case. But, in the first place, it is necessary to state to you a distinction which has been greatly lost sight of in the course of the argument from the bar, and that is the distinction between public and private waters. A public river—that is, a river which is fit for navigation—navigation of any kind, not merely by vessels of large burthen but by boats, whether it be fresh water or salt water, whether it be a tidal river or a river in which the tide does not ebb and flow—is public property. It is vested in the Crown for public uses, and chiefly for the uses of navigation; and to such public uses all private rights are subordinate. No man who has a property on the banks of such a stream as that can set up any title or interest in himself which shall for one moment be allowed to compete with the public uses to which that river is dedicated. The property of the river is in the Crown, not in the proprietors of the banks. It is vested in the Crown for the protection and promotion of public rights and uses. But in regard to a private stream—that is to say, a stream which is not navigable—precisely the reverse is the case; because, when a proprietor has both the banks of a stream of that kind, he is also absolute proprietor of the bed of the river. It is part of his estate; and there can be no better illustration of that than to consider for a moment how some of the defenders have treated this stream as it passes through their properties. They carry off the entire water out of the bed of the river into a mill-lade, sometimes of very great length, and serving in one case no less than four different paper-mills before it is returned to the stream. That could not be done with a public river, and the reason why it can be done with a stream like this is simply because the bed of the river is the property of those millowners who so use it; and they are entitled to use the water in any way they like as it passes through their property, subject to certain conditions; and these conditions are, that they shall send down the water to their neighbours below, undiminished in quantity, and unimpaired in quality. Now, these are plain simple rules, applicable to the correlative rights and obligations of upper and lower proprietors in a private river. No doubt it may be said, and truly said, that the conditions which I have mentioned must suffer certain limitations. There is a certain diminution in the quantity of the water as it is used by every person in passing through his property. There is a certain consumption of water for domestic uses, and there is an evaporation going on constantly in the stream, which will diminish the quantity by natural causes, and therefore it cannot be said absolutely that the water is sent down from the upper to the lower proprietor quite undiminished. The meaning of the condition is this, that it shall be sent down undiminished by anything except the natural and primary use of it by the people on its banks. And as regards the matter of purity, it is impossible in the nature of things that a running stream should

not receive in its course certain impurities as it passes along. The action of nature is inconsistent with such a condition as that; but the meaning of the condition is this, that no unnecessary or artificial impurity shall be put into the stream, so as thereby to affect the purity of the water as it passes to the proprietors or inhabitants below. You can see, therefore, gentlemen, that in dealing with a case of this kind, it is quite in vain to appeal to the condition of such rivers as the Forth or Clyde, or any of our public rivers used for public purposes. You will at once see that no question like the present could by possibility arise in regard to these rivers; that it is only on a private stream, such as the North Esk, that a question of pollution of this kind could possibly be raised. . . . . It was said—and a great deal of the case turns on the view that may be taken of this—that to entitle any one of the pursuers to obtain a verdict against the particular defender, he must prove that that defender has polluted the stream within his property. Now, that means that it is incumbent on the pursuers to prove that one of these mills—say the furthest up—would be sufficient of itself to pollute the river on his property, although all the other mills were stopped—I must tell you that that is not good law, and not the true construction of these issues. The law which I give to you on that matter is this, and I beg your particular attention to it—'It is not indispensable for each of the pursuers to prove that any one of the mills would of itself, if all the other mills were stopped, be sufficient to pollute the river to the effect of creating a nuisance to him. It is sufficient to entitle each of the pursuers to a verdict on any one of the issues to prove that the river is polluted by the mills belonging to the defenders generally, to the effect of producing a nuisance to him, and that the defenders on that particular issue materially contribute to the production of the nuisance to him. But it is indispensable for each pursuer to prove that the river is polluted by the mills of the defenders so as to produce a nuisance to him, independently of any nuisance to the other pursuers, or any of them, and that each of the defenders against whom he asks a verdict materially contributes to the production of such nuisance to him.'

"I have (continued his Lordship) put this in the shape in which I have now read it for the convenience of my friends at the bar, but I will explain it a little more, lest you should not have followed the concise language in which it is put. What is meant is just this: It may be alleged that if there were only one paper-mill on this stream, say one of the mills of the Messrs Cowan, the action of that mill alone would not be sufficient to create a nuisance by itself at Melville and Dalkeith. That is very possible, and it may even be possible that any one of these mills, no matter where situated, would not be of itself sufficient to pollute this stream so as to create a nuisance, because you will at once see that pollution is a matter of degree. In one sense of the word, every running stream is polluted to a certain extent, as I said before, by natural causes, or by the carelessness of the inhabitants on its banks in allowing small impure matters to pass into the stream. But then the stream has a restorative power in itself which very soon gets the better of these, and so it may be that the river has so much restorative power in itself that the erection of one manufactory of a particular kind on it will not pollute it to such an extent as to make a nuisance, and yet that the erection if several will pollute it, so as to render it quite unfit for the primary use of water. Now, it must be obvious to you, and that is the meaning of the direction in point of law that I have to give to you, that it would put an end altogether to any possibility of the proprietors on the banks of a stream like this complaining of a manufacturing nuisance, if they were not entitled to complain when the extent of manufacture has reached to that point that it produces pollution. So long as no pollution is produced they cannot complain of the existence of a manufactory. They have no title to complain. Their single title to complain is that they are hurt when the water on their property is polluted by that means, and until they are so injured they cannot complain; but when the extent of the manufacture has become such as to produce pollution, then the title to complain arises. Now, gentlemen, I think that will enable you to understand without much difficulty the question which is to be tried under these issues, and also the case you have to determine as between each pursuer and each separate defender. And now I proceed to give you some general views as to the application of the evidence which you have heard. The case of the pursuers is this—that before 1835, or thereabouts, this river was in such a state of purity as to be fit for all the ordinary and primary uses of running water. Now, the primary uses of running water, as the water is actually used and enjoyed, will vary a good deal according to the size and nature of the stream. A very small rill close to its fountain-head will be the purest of all running streams probably (unless it happens to come from a polluted source), and there it will be the best adapted and most used for primary purposes. But after the stream has run through a peaty district, or a coaly district, or any other district, it is likely to communicate some impurities to it and it will no longer be so elegible for drinking purposes, but still it is not a river thereby unfitted for primary uses generally. River water—that is to say, the water of a considerable stream—is never by any one thought good drinking water, though there is no particular source of pollution in it. Its long exposure to the air is of itself sufficient to make it less agreeable as drinking water, and the various small pollutions it receives in its course all contribute to the same result. But still that is not a river which has changed its character. It is in its natural condition, and is still suitable for the primary purposes of water generally—for washing, bleaching, cooking, (it may be under certain limits), for watering cattle, and the like. Now, that is the condition in which the pursuers say this river was before 1835, or thereabouts, and their case was that from that time it began to be polluted in such a way by the operations of the papermakers as to convert it from a water fit for primary uses into a water unfit for primary uses. Now, that is what is called pollution, and if the pursuers make out their case to that effect, then they are entitled to ask you to affirm that these defenders have polluted the river, because pollution just consists in rendering water so impure that whereas before it was fit for the primary uses of water it is now unfit. But the Dean of Faculty said to you, and said very properly and very soundly, except in regard to a particular turn of expression which I shall endeavour to correct, that if from time immemorial

before 1835, it could be shown that on this river the primary uses had been superseded by other and secondary uses, then the pursuers cannot prevail, because the thing that they are complaining of is the pollution by these defenders after 1835—that is to say, the conversion of that water after 1835 from one state to another state—not a mere deterioration of it, but a conversion of it from one intelligible and distinct condition to another and different condition, constituting pollution. The Dean of Faculty said that if the primary uses had from time immemorial been subordinated to other uses, that would sufficiently bar the pursuers from claiming a verdict. Now, that is a little ambiguous. It may mean that this river had been used before 1835 for manufacturing purposes but it may have been used for manufacturing purposes, and many rivers have been so used, without polluting the stream in the legal sense of the term—that is to say, without superseding and putting an end to the primary uses of the water—and if that were the meaning of the phrase, then it would not be sound in point of law. It is quite sound to say, and that is the most material point for your consideration, that if it be shown that from time immemorial this river has been devoted to such purposes as to render it unfit for the primary uses, then the pursuers cannot prevail. But if, on the other hand, they have satisfied you on the evidence that before 1835 this water was fit for the primary uses of water, and was so used, and and that after 1835 it has, by the operations of the defenders, been rendered unfit to be used for these purposes, then they are entitled to prevail, unless there be some other ground on which their case can be met and their rights voided.

After referring to the evidence, his Lordship proceeded:—"Now, gentlemen, it is necessary to be very careful in dealing with this part of the case. I must beg your particular attention to one or two observations here as to the bearing of that part of the evidence. A river may be polluted from a variety of causes, and by a variety of persons. It may either be polluted by a number of different persons doing the same thing, putting in the same kind of impurity, or it may be polluted by a number of different persons putting in different kinds of impurities. Now, when the lower proprietors and inhabitants upon a stream find themselves injured by such pollution, they are, of course, entitled to complain, but it must be obvious to you at once that if the pollution is very various, and a great many persons are engaged in different kinds of pollution, it is not possible to put them all down at once without difficulty; and, therefore, as a general rule, when pursuers in such an action as this complain that a particular manufactory or set of manufactories is polluting the water, it is no answer to them, and no defence in such an action to say—'Well, but other people are polluting it too.' It is a different thing, and I will consider it immediately, if they can say the pursuers are doing the very same thing; but if all they can say is, 'Other people are polluting the stream as well as we', that is no justification of their proceedings, because the plain answer to them is—'Very well, if other people are polluting it, we shall challenge them too, and put an end to their pollution as well as yours; but in the meantime stop your pollution, and then we will deal with the others.' Therefore, gentlemen, it appears to me that a great deal of the evidence you have heard about sewage which is thrown into this river has not much to do with the case. If the village of Lasswade discharges its sewage into this river it is doing what is illegal, and may be stopped if it has the effect of polluting the river. But the village of Lasswade is not represented by any of the pursuers of this action. Something was said about Lord Melville being superior of the ground at Lasswade. I am sure I do not know whether that is the case or not, but though it were the case, it would not affect the question in the slightest degree, because nobody can know better than you that a feuar is just as much the independent lord of his estate as the biggest nobleman in this land, and nobody can interfere with him in the exercise of his rights of property. Therefore, to say that the superior of land is answerable for impurities thrown into a river by persons who happen to hold from him a feu, would be the most unreasonable thing in the world. So, in regard to the town of Dalkeith, it is quite in vain to say that the town of Dalkeith throwing sewage into this river is the same thing as the Duke of Buccleuch throwing sewage into it. Do you imagine that the town of Dalkeith is under the control of the Duke of Buccleuch, or can he by his own orders and direction prevent pollution from going on? The remedy he has against the town of Dalkeith is the same as against these defenders—to convene them in an action of law, and get the nuisance abated by that means. Therefore, as far as that is concerned, it has really little to do with the case. But there is another point in connection with this part of the defence which also requires separate attention. It is said that Lord Melville is himself the cause of the pollution in the river. That, if it be made out, is a much more important defence, as far as that part of the river is concerned. Now, how does this matter stand? In the first place, it is said he was himself at one time the owner of a paper-mill. Now, that is quite true, but that paper-mill existed only when paper mills did not pollute the river, if you are satisfied about the condition of the river before 1835. It came to an end in 1828, and it is not said that any of the paper-mills on the Esk, or all of them put together, polluted the river so early as 1828. The amount of manufacture was not so large as to produce that effect. The water still remained, according to the evidence of the pursuers, in a condition to be used for primary purposes. Therefore, so far as that paper-mill is concerned, it does not appear to me that it affects the position of Lord Melville as pursuer. But, then, he has got a carpet factory. They say that is a source of pollution of the river, and so it undoubtedly is. I do not think it is possible to have listened to the evidence without coming to the conclusion that that carpet manufactory pollutes the water; and, gentlemen, it comes to be a question of law how far Lord Melville is answerable for that. He is not the manufacturer. He is only the landlord and owner of the mill. Now, we have not had attention particularly called to the terms of the lease which he has granted to the tenants, and it depends entirely upon the terms of that lease whether he is answerable for the pollution that has taken place. If the lease authorises the pollution, then the landlord is responsible. If the lease does not authorise pollution, and the tenant, without any authority from the landlord, commits

the pollution, then the tenant only is answerable, not the landlord. That is a question which has been decided upon various occasions, and rests obviously upon very clear and sound principles. So that unless it could be shown by the defenders that the tenant of the carpet manufactory was authorised by his lease to pollute the water and carry on such operations as would pollute the water, Lord Melville cannot be made answerable for that. Now, gentlemen, there are just one or two other special matters that I think it necessary to say a word upon before concluding. In the first place, to revert for a few moments to the question as to the condition of the water before this alleged pollution began. You will, of course, understand that in order to prove pollution and entitle the proprietors and inhabitants upon the banks of the river to complain, it is not indispensable that the water previously should have been of the highest possible character. The character of water as drinking water, or as water for watering cattle and for washing and other domestic purposes, varies much; and what is called fair river water—an expression used by some of the witnesses—is water that is applicable generally to these primary purposes, without being of the highest possible quality, without being equal to the spring water found in the same neighbourhood. If it be good river water, then it must be protected from pollution; and the question, therefore, in that early period, is not whether there were any works upon this stream, or any discharges into the stream, that might possibly deteriorate its quality. That may be, and yet the water may be fit for primary purposes; and, if it be fit for primary purposes, it will still be a water that the inhabitants on the banks are entitled to have protected against pollution. Now, there are discharges of iron from the coal mines, there is a peaty admixture, and there are waulk mills, and other little works on the river, from which there no doubt proceeds a certain amount of impurities, but these are very small in quantity, and have little effect on the river. So it was with the paper-mills as they existed in the early part of this century; they were innocuous, and did not convert the water into water not fit for the primary purposes. That really concludes all that I think necessary to say for your guidance in considering the evidence. Let me just, in conclusion, once more say this—you will require to consider the case of each pursuer against each defender. For example, beginning with the proprietor of Hawthornden as pursuer, you will require to consider his complaint as against each separate mill—first the Messrs Cowan's; second, Mr Brown's, or Esk Mill; and third, Mr Sommerville's or Dalmore Mill. If you find the water at Hawthornden polluted with this slimy mud, or other causes, and conclude that it comes from the paper-mills, it does not necessarily follow that any of it comes from the Valleyfield Mill. That is the question for your consideration. It may all come from Dalmore, or it may come partly from Dalmore and partly from Esk Mill, and none from Valleyfield Mill; or it may come from all three. You have heard the evidence—I need not go back on it again; but it seems to me a most important part of the evidence—as to the effect of floods on the river in carrying down this deposit, however near it may have been originally deposited to the mills that produce it. You will consider whether the existence of the Messrs Cowan's mill and their production of this matter, even supposing it to be deposited close to their own mills, does or does not materially contribute to the pollution at Hawthornden. If you think it does not, you will of course find a verdict in favour of the Messrs Cowan. If you think Esk Mill does not contribute to it, you will find a verdict in favour of that mill; and if you think there is no pollution at all from any mill, you will find for the whole of the defenders in regard to the proprietor at Hawthornden. When you come to the other two pursuers, at Lasswade and Dalkeith, you have exactly the same process to go through. Take Lord Melville, in the first place, and say whether the water in his estate is polluted, and then say whether all of the mills above it—that is to say, the whole of these mills represented by the defenders—do each and all of them materially contribute to the production of that pollution, or whether you trace it to the lower mills only, and find that it is not contributed to by the mills higher up. Then take the case of the Duke of Buccleuch, and deal with it in exactly the same way. I think, gentlemen, you will find, if you consider the issues in that way, that although this is a case which has naturally led to the collection of a great mass of evidence, it is not in itself the complicated case that it was represented. The questions which I have thus endeavoured to present to you are, I think, plain questions in themselves. They may be difficult to solve, because of the great mass of evidence and contrariety of the evidence. Quite true, but the questions in themselves are perfectly plain and distinct, and I am quite sure, from the great attention you have given to this case—the unwearied and assiduous attention you have given to it—you will in the end come to a perfectly sound and just conclusion on the whole matter."

The jury found for the pursuers the Duke of Buccleuch and Lord Melville on all the issues, and for Sir W. Drummond on the 1st, 2d, 3d, 4th, and 7th issues.

The defenders excepted to the charge; and the reported rubric is as follows:—

"In an action at the instance of proprietors of lands on the banks of a private stream against paper manufacturers whose works were situated at different places on the banks of the stream, to have the defenders interdicted from polluting the stream, separate issues as against each of the defenders were sent to trial before the same jury. The issues were, whether the defenders (in the particular issue) 'did, by discharging refuse or impure matter at or near their mills, pollute the water of the stream to the nuisance of the pursuers or their authors, or of one or more of them.'—*Held*, on a bill of exceptions, that the presiding Judge had properly directed the jury (1) 'That an upper proprietor is not entitled to throw impurities, and especially artificial impurities, into the stream, so as to pollute the water as it passes through the estate of a lower proprietor; that the lower proprietor is entitled to complain of such pollution as renders the water unfit for primary purposes; but that it will be a good defence against such a complaint that the stream has been for time immemorial devoted to secondary purposes, such as manufactories, so as to supersede and abrogate the primary purposes: (2) That it is sufficient to entitle a pursuer to a verdict on any one of the issues to prove that the river is polluted by the mills belong-

ing to the defenders generally, to the effect of producing a nuisance to him, and that the defenders in that issue materially contribute to the production of the nuisance to him.' *Observations* on the rights of proprietors on the banks of a private stream."

After hearing Counsel for both parties, the Court on 21st Dec. 1866 pronounced an interlocutor disallowing the exceptions, and finding the defenders liable to the pursuers in the expenses incurred in the discussion on the bill. Subsequently on 17th July 1867, the case came before the Court on the question of expenses in carrying out an interim arrangement under an interlocutor pronounced of consent, with a view to supersede further litigation. It was then held that these were not expenses *in causa*.

Nothing further occurred in the cause until the present motion of the pursuers for decree in terms of the conclusions of the summons of declarator and interdict.

Argued for pursuers — The motion is for decree in terms of the conclusions of the summons of declarator, and for interdict as craved. The pursuers are *riparian* proprietors on the Esk, and the defenders paper-makers on that stream. After remit to certain skilled persons in 1841, a set of regulations were framed with consent of both parties, so as to mitigate the nuisance, and under these the works were carried on till about 1860, when the nuisance complained of was much increased by the introduction of esparto grass. On 20th May 1864 new actions by the same parties were brought, concluding in the same terms (1), for declarator that they were entitled to have the water of the stream transmitted to them in a state fit for primary purposes, and (2), for interdict against the pollution. The Court conjoined all these actions, and repelled a plea of acquiescence, there being no relevant averment on record to sustain it. Further, counter issues of acquiescence and prescription as proposed by the defenders were disallowed. The issues as finally adjusted asked generally whether from 1835 downwards the defenders had polluted the stream to the nuisance of the pursuers; and the verdict (on all the issues favourable to the pursuers) was applied by the Court by interlocutor of 7th March 1867. A motion for a new trial and a bill of exceptions were subsequently disposed of, and a minute of agreement was entered into between the parties, which provided that the pursuers had been requested, "not to proceed further at present in the said conjoined actions, to which the pursuers have agreed, but that only on the terms and conditions underwritten;" and the first of these is, "that the whole pleas stated for the pursuers in the conjoined actions are hereby expressly reserved full and entire," and that by entering into the agreement they should not be held to have abandoned any plea competent to them. The second is, that the delay which had taken place in following up the verdict, and the further delay granted by the pursuers under the agreement, should not at any time be pleaded against them by the defenders, said delay having been granted by the pursuers solely for the benefit and at the request of the defenders." The pursuers' position, consequently, is the same as if they had come to the Court immediately on the disposal of the bill of exceptions, with all the defenders' pleas repelled, and with a verdict in their favour. The issues all ask the same general question —that referred to—and the verdict answers it in the affirmative, and the conclusion of the summons is for declarator, "that the pursuers have good and undoubted right to have the water of the North Esk, so far as it flows by or through their properties, transmitted in a state fit for the enjoyment and use of man and beast, and that the defenders have no right to pollute or adulterate the said water, nor to use it or the channel of the stream in any way or for any purpose such as to render the said water noxious or unwholesome, or unfit for its natural primary purposes to the pursuers, or in any way to destroy the amenity of the stream; and the defenders ought and should be prohibited and interdicted from discharging into the said water of the North Esk from their respective paper works any impure stuff or matter of any kind, whereby the said water in its progress through or along the property of the pursuers, or any of them, may be polluted or rendered unfit for domestic use, or for the use of cattle, or its amenity in any way diminished, or the rights of the pursuers therein in any way injured or affected." The Court can only find the riparian proprietors entitled to have the water transmitted to them unpolluted. The law is clearly on the pursuer's side in that, and the jury, as to the facts, have found that it is not so transmitted.

Lord Neaves.—You don't ask any special interdict against any particular thing?

The pursuers ask a declarator of their rights, and interdict against the defenders' discharging into the water from their respective works any impure stuff or matter of any kind, whereby the water may be polluted. If interdict be granted it must be obeyed, if not, the case will be proved in an action for breach of interdict.

Lord Cowan.—In the course of the discussion, and in the record, there were particular things set forth by which the water was polluted, particularly the esparto. You got your interdict in general terms, and you are referring to the general conclusions of the summons. Are you not to apply that to any particular thing in this action?

The reference is to all impure polluting matters. The defenders may to-morrow begin using a new chemical substance (and these chemicals are perhaps the most noxious of all), so that it becomes impossible for the pursuers to go into detail. In the case of *Rigby* v. *Beardmore*, 10 Macph. 568, the conclusions were somewhat different, but the Lord President gave decree in almost the very words of this conclusion. The interlocutor pronounced by the Court found "That the experiments or operations of the defender since the institution of this action have not had the effect of preventing the water of the Carntyre Burn from being polluted by the impurities or refuse discharged into it by the defender: Adhere to the Lord Ordinary's interlocutor of 17th June 1871; repel the defences; and find and declare that the pursuers are entitled to have the water of the Carntyre Burn, as it flows by or through their property, transmitted to them in a state fit for the use of man and beast, and for the other primary uses of running water; and interdict and prohibit the defenders from discharging into the said Carntyre Burn, from his dye-work, impure or noxious matter of any kind, having the effect of polluting the said water in its progress by or through the pursuer's property, and rendering it unfit for the primary uses of running water; and decern." This is not quite in terms of the conclu-

sions of the summons, but the words are almost those used in the conclusions of this summons, both as regards the declaration of right, and the interdict following thereon. In England it has repeatedly been found that the remedy is a matter with which the Court cannot deal — that the pursuers are not bound to point out any means whereby the works can be carried on so as to mitigate the nuisance, — all that the Court has to do is to declare the pursuers' right, and to grant an injunction against the infringement thereof. It is for the defenders, who are doing an illegal act, to find out how they can carry on their works without causing a nuisance.

Argued for defenders. — Although the verdict in this case was given in 1866, the motion is now made exactly as though it followed at once thereon. With that verdict the pursuers now come, and say they are entitled to decree in terms of the conclusions of the summons. That is not the view presented to the jury by the presiding Judge. His Lordship said, "Now, gentlemen, I begin by explaining to you one thing, which I think has not been very clearly explained to you upon either side of the bar, and that is, the precise nature of the action which is in dependence between these parties, and the effect of your verdict, if it shall be pronounced in favour of the pursuers. It seemed to be represented on the part of the pursuers, that if they obtained a verdict it would merely give them a sort of power of requiring the defenders from time to time to make such improvements upon their works as might be considered necessary or desirable for the purification of the river, without the necessity of obtaining any formal judgment of the Court following upon the verdict. On the other hand, it was represented to you by the defenders,—or at least it seemed to me to be represented,—whether I fully appreciated the view of the learned counsel or not I shall not pretend to say,—that the effect of a verdict in favour of the pursuers in this case would be, as they expressed it, to put down these mills, to stop this manufacture altogether upon the River Esk, and to annihilate the sources of commercial prosperity, and the whole industry which pervades this part of the country. Now, neither of these views is accurate. The nature of the action, which was brought by the pursuers so far back as in the year 1841,—and the subsequent actions are precisely of the same character, and are merely intended to bring into the field different sets of defenders,—is this:—They demand in the summons that the Court shall interdict the defenders from polluting the stream. That is the first conclusion of the summons; and the second is, that in the event of such an interdict not being granted in these terms, the defenders shall be put under some reasonable regulations, whereby the effect of their operations shall not be to pollute this stream. Now, gentlemen, what I have to tell you in regard to an action of that kind is, that it is an appeal to what is properly called the equitable jurisdiction of the Court, and where an issue is sent to a jury to be tried in a case of that kind, it is not at all like an issue in most cases, where the verdict of a jury is immediately followed by judgment out and out, in favour of one party or the other. On the contrary, in the present case the question of fact is sent to be tried by you in the first instance, whether there is in point of fact a pollution of the river by the defenders; and if that fact shall be ascertained to the effect of your finding that there is a pollution of the river by the defenders, the legal effect comes to be judged of afterwards, and the remedy which is to be given to prevent pollution for the future is a matter entirely in the discretion of the Court, and is not at present a subject for your consideration at all. But it does not in the least degree follow, nor is it for one moment to be contemplated as a possible result, that merely because you return a verdict affirming that this river has been polluted by the defenders, therefore there is at once to be a judgment of the Court putting a stop altogether to the future working of these mills." Interdict is now asked against that which has been in the past found an essential part of the operations.

Lord Neaves—You mean to say that you cannot carry on the works without polluting the water?

Hitherto it has been so. But the matter may be now suggested for judicial inquiry as to whether such a result cannot be accomplished, and whether an attempt should not be made under the eye of the Court, by some person judicially appointed, to ascertain whether the manufacture cannot be carried on consistently with the non-pollution of the river to the nuisance of the pursuers. The whole case was not sent to the jury. The Lord President distinctly pointed that out. He says:—"This is not at all a case where you have an issue traversing the whole case, the verdict upon which is forthwith to imply decree exhausting the whole conclusions. It is an appeal to the equitable jurisdiction of the Court." There is one matter in dispute,—pollution or not, to the nuisance of the pursuers. The pursuers can merely take the benefit of the verdict to this extent, that they can say it is an established fact that there has been pollution. The defenders ask that the case shall be dealt with on the footing on which it was presented to the jury by the presiding Judge,—viz., that the verdict was not to imply that there should be decree in terms of the summons, but simply to subject the defenders to reasonable regulations with reference to the rights of the pursuer. An opportunity is now sought for submitting a scheme, and a reasonable time for seeing how the works could be carried on.

Lord Neaves—You have had a good deal of time. In the meantime, are you to go on as you have been doing?

The alternative is, that the water shall remain impure during that interval, or that all the works are to be stopped. Now that is a matter for the equitable jurisdiction of the Court. Which is the greater evil,—to stop the works, or to allow the water to be polluted for a week or two, till something is done? We say that we can abate the nuisance; but if we are wrong in this, the alternative becomes a breach of interdict. This becomes a serious risk to any manufacturer, as the result of the failure of his experiments. The defenders affirm that the nuisance is abated, and that remit should be made to a man of skill to report. The only finding can be that the river was polluted by the defenders; but that may have been either by polluting a river which was not polluted before, or by materially increasing the pollution which was in the river at that time. If the latter were the case, how is the condition of the stream at the time at which the pollution is said to have begun to be ascertained?

Lord Neaves—Then we can never give a decree in this declarator.

Lord Justice-Clerk.—One of the exceptions which you argued was a direction in point of law which was asked by the defenders, "that if the jury are satisfied that the primary uses of the water are destroyed at Melville and Dalkeith, with the consent or with the acquiescence of the pursuers, by causes arising below St Leonard's Mill, for which none of the defenders are responsible, they must find for the defenders on all the issues as far as regards the Duke of Buccleuch and Lord Melville."—In other words, the allegation is that the primary uses were destroyed irrespective of the mills.

That was a supposition of the fact on which the legal direction was asked. It did not ascertain that the water was pure.

Lord Justice-Clerk.—But the judge refused to lay that down, and that was sustained, and therefore, if the fact was so it was irrelevant.

The idea of the defenders was that the pursuers were so using the stream themselves as to destroy the purity of it within their own grounds by their own operations, and that that was sufficient to bar them from complaining of anything above.

To give the pursuers a declarator as to the pollution of the stream in terms of the conclusion of the summons would materially injure the defenders; it assumes the water as always in a state of purity, and nothing has been found to ascertain the existence of that right.

Pursuers in reply—There is here the verdict of a jury, and to the directions given in point of law by the presiding Judge a bill of exceptions was brought before this Court, and the soundness of the law delivered, and the directions given, were unanimously affirmed.

Lord Neaves—The pursuers must prove that there was pollution which made the nuisance.

Lord Cowan—And on that ground the issue of acquiescence was refused as unnecessary?

It was refused so far as acquiescence might involve a certain amount of knowledge on on the part of individual pursuers, but the issues are settled on the footing that it was quite open to the jury to find that nuisance was not established because the river was already diverted from the primary purposes. Two circumstances were established—that there was pollution to the nuisance of the pursuers, and that the defenders were the persons who each and all of them had polluted the river, and were polluting it. If there was no right, there was no title; and if this river was dedicated to secondary purposes, the pursuers never had at the outset of the action any right or title to raise it. The whole purpose of the action was to establish in the first place that the river was still available for primary purposes but for this pollution; and second, that it was polluted because impure matter was discharged into a river so situated, and therefore the very first question at issue was the question of right. In England the Courts do not indulge the parties with a series of experiments in which the Court is to aid them in finding out some mode of undoing the illegal acts of which they have already been guilty.—Att.-Gen., v. *Colney Hatch Asylum*, 1868, 4 Chan. App., p. 153; Lord Chancellor Hatherley's judgment. These are the principles by which such questions should be governed. The pursuers submit that they are entitled to decree of declarator. Certainly there is nothing to hinder that, it is merely an ascertainment of their rights; and further, they ask the Court to exhaust the cause by giving decree of interdict.

The Defenders in reply.—In trying the case, it would have been a perfectly good answer, that the river was polluted before the defenders' operations began; and that their operations did not materially add to the pollution that then existed. The verdict establishes conclusively that they have polluted the stream; but in what sense they have polluted the stream the verdict does not in any way establish. It is no answer to say that their allegation was that the river had never been polluted, and had never been devoted to secondary purposes prior to the time when this action commenced. The only thing that was tried under this issue was pollution to the nuisance of the pursuers. The verdict does not furnish any information enabling the Court to dispose of the declaratory conclusion.

Lord Justice Clerk—The great difficulty I should feel about that is, that it would rather seem to have been a foregone conclusion before the case was tried. If the issue was not relevant to try the question in the summons, it never would have been granted, and its having been granted forecloses that.

It was not decided that a verdict in favour of the pursuer in terms of this issue decided his right to obtain decree of declarator in terms of the conclusion of the summons. The pursuers, by taking their issue in that particular form, have put themselves in a very difficult position—failing as it does to establish facts on which the interposition of the Court must necessarily depend. It is all very well to say that they did not intend to put into issue anything except the question whether the river was made unfit for primary purposes (assuming it to have been fit before) by the operations of the defenders, but the defenders complain that in point of fact they did not put that question in issue; and, having put another question in issue, now seek, not having established the facts on which their case is based, to get a declarator as if these facts had been determined by the finding of the Court or the verdict of the jury. As to the question of interdict, the pursuers seek that for the purpose of vigorously enforcing it as against the defenders, and subjecting them to the pains of a breach of interdict if at any future time there shall flow from their works any discharge which will cause the river to be polluted. It has not been the practice to grant such an interdict without judicial inquiry. The words of the learned Judge at the trial as plainly as possible express that that was not his view,—"what I have to tell you," he says, "in regard to an action of that kind is, that it is an appeal to what is properly called the equitable jurisdiction of the Court, and when an issue is sent to a jury to be tried in a case of that kind, it is not at all like an issue in most cases, where the verdict of a jury is immediately followed by judgment out and out, in favour of one party or the other. On the contrary, in the present case the question of fact is sent to be tried by you in the first instance, whether there is, in point of fact, a pollution of the river by the defenders, and if that fact shall be ascertained to the effect of your finding that there is a pollution of the river by the defenders, the legal effect comes to be judged of afterwards, and the remedy which is to be given to prevent pollution for the future is a matter entirely in the discretion of the Court, and is not a subject

for your consideration at all. But it does not in the least degree follow, nor is it for one moment to be contemplated as a possible result, that merely because you return a verdict affirming that this river has been polluted by the defenders, therefore there is at once to be a judgment of the Court putting a stop altogether to the future working of these mills." It is not like an issue in most cases, where the verdict of a jury is immediately followed by a judgment out and out in favour of one party or the other. Now the motion of the pursuers at this moment is to have judgment out and out in their favour. What more can they ask except decree in terms of the conclusions of the libel.

LORD-JUSTICE-CLERK—If it turns out that you cannot carry on your works without polluting the stream, then it is a possible result that your works will be stopped.

The verdict established the existence of the nuisance, and by so establishing it let in the equitable jurisdiction of the Court. We may refer to the last reported case on the subject (*Robertson* v. *Stewart and Livingstone*, 10 Scottish Law Rep., p. 99, Dec. 6, 1872), and to the circumstances therein, and especially to the Lord President's opinion. The proceedings in England in such cases are hardly to be adopted here, as we do not know to what extent the Courts may have power to interfere. Had this motion been made in 1866, time would have been given. The position is exactly that in which we then stood, and time should now be given. If the pursuers are not desirous of stopping these mills, then it would lie before the Court to institute regulations under which they might be carried on.

LORD BENHOLME—They desire to stop them if they cannot be carried on without creating a nuisance. If they can be carried on without creating a nuisance, then they have no desire to stop them.

At advising—

LORD COWAN—I think it is a necessary consequence of the procedure that has hitherto taken place in this case, that the pursuers are entitled to have decree of declarator in terms of the conclusion of the summons. It seems to me a very extraordinary thing to say that after a verdict upon issues that were so carefully adjusted to try the merits of the whole of this cause, the pursuers are not entitled to have findings. At all events, if so, what are these but just a declarator in terms of the conclusion of the summons? One of the defenders' pleas was, that the river had been polluted from time immemorial, and had been in fact a ditch or drain receiving all sorts of pollution from its source to its mouth, so that to complain of the defenders' operations having created the nuisance alleged, was contrary to clear reason and legal principle. I need not refer to the allegations on record to that effect, because they are not disputed, and there were three or four pleas to the effect that that being the condition of the river in point of fact, there was no room for the allegation of nuisance at all. Of course these allegations were denied, and therefore it came to be one of the matters of fact to be tried before the jury. When the issues came to be adjusted, it was matter of discussion and matter of decision that it was not necessary, having regard to the general terms of the issue granted, that there should be any distinct issue taken in reference to the defences pleaded for the defenders. There was a distinct judgment to that effect, and I was rather surprised to hear from the Solicitor-General that it had not been considered by the Court.

By interlocutor of 10th February 1866, the Court repel the plea of "acquiescence stated for all the defenders in the three conjoined actions, being the second plea for the defenders Annandale in the first action, and the third plea in law for all the other defenders in all the three conjoined actions, in respect there are no relevant averments on record to support the said plea: Find that it is not necessary to propose or send to the jury any further issues for the purpose of trying any question of fact raised by the defenders." Now, although I cannot find in the report of the case the ground upon which the Court decided that matter when they adjusted the issue, I have not the slightest doubt, from looking at the papers now before me, and from my recollection of the anxious discussion which took place, that it was discussed before us whether there should be counter issues or not. Counter issues were proposed, but the Court said that having given a general issue it was unnecessary to have a special issue applicable to the defenders stated, because there could not be a verdict of nuisance without taking into view that which was inherently an essential answer to the question of nuisance. That being so, and the case having now come back to us, why is it that we are not to give some effect to the verdict which has been returned on issues adjusted to try the cause? I cannot understand why it should be so. The Solicitor-General stated that the Court were not in the habit of giving an abstract declarator or recognition of a legal right. That is quite true; but when the legal right is *de facto* disputed, and attempted to be destroyed, the Court invariably grant a declarator. In this particular case I can understand that the declarator is the more necessary because of the nature of the defences which went to negative that right, and to set up the right of the defenders to innovate upon it. Therefore it seems to me consistent with principles and with procedure in this Court, as well as the pleadings in this cause, that we should now at this stage find and declare in terms of the declaratory conclusion of the summons. As regards the conclusion for interdict, I have some difficulty. I have difficulty in granting interdict in the general terms in which it is expressed in the summons. It is not exactly in terms of the declaratory conclusion. There is a difference which may or may not be material, and there is a question whether, if granted at all, it should be granted in the terms here asked. But apart from the precise terms in which it should be granted. the question is whether we are now to grant an interdict, or whether, in respect of the statement of the defenders' counsel, we should not at least delay pronouncing that general interdict. In general, when a right is declared which has been innovated upon, that is followed up with interdict; but it is impossible to forget the condition of this river as having been used for so long a period of time by the papermakers, and that valuable property has been placed on the banks of it, which has been a source of industry and profit for a long period. Therefore a general interdict seems to me to be a sort of ultimate remedy which we must give to the pursuers only if the defenders are unable to escape from it by showing that they can do something in the

way of abating the nuisance. That I understand to be the principle of the English cases. If I understand the proposal made by the defenders aright, I think it just comes to this, that they propose that there should be a minute put in, stating that the defenders, all of them, either conjunctly or severally, are willing to do certain things, and that they will undertake to do them, because unless the minute comes up to that I suspect it will not have much weight with the Court. They must state that they will do something or other to abate the nuisance. Therefore I think that, before answer, we should have that minute put in. We shall see what is stated and proposed, but if the proposal merely comes to this, that the Court are to take on themselves the responsibility of remitting to some man of skill, and to get his report as to what is to be done, and that a new course of litigation is to be entered on, I don't think the minute would be of much moment in the way of preventing our granting interdict. I have to suggest, therefore, that we should allow the defenders to put in a minute stating what they propose doing to abate the nuisance, and what they undertake to do so as to escape from the interdict which must inevitably follow, unless this minute be sufficient.

Lord Benholme—My opinion is very decided in this case. I think it is a logical conclusion from the verdict and the procedure that has gone before that the pursuers should get decree in terms of their declarator and their interdict. It was stated in an English case, and stated I think rightly, that it did not signify how many people were interested in maintaining an illegal act, but that if it was 10,000 it was the same thing as if it was one. Now, varying the illustration, to my mind it is of no consequence whether these defenders have a great interest in continuing the nuisance or not, or whether their interests to the amount to £10 or £20, or to the amount of £100,000 or £200,000, are involved in this illegal act. I would grant the interdict without reference at all to the amount of interest involved. If it is found that it is an illegal thing for them to pollute this stream, I would grant interdict against their doing it.

Lord Neaves—I confess I feel a little difficulty about this. So far as regards one part of it, I do not think we can hesitate to give decree in terms of the declaratory conclusion. That is not an abstract decree at all. It was necessary to have a declarator, because the operations that were struck at were not a very recent innovation, but had been going on for some time, and therefore the pursuers' right required to be made clear. That has now been done by the verdict; and I have no hesitation about granting the decree of declarator. I am not sure that even there the question of amenity should be introduced. In regard to the question of interdict, I do not say that Lord Benholme's view is not the correct one in substance; but the course which I should prefer, particularly looking to what has been done in other cases, is that we should decern in terms of the declaratory conclusion, whether with or without the reference to the amenity, as your Lordships may think right, and that before going further we should appoint or allow the defenders, if so advised, to make such a statement as will raise that important question. We shall then see what they offer, because hitherto their tone has been that this cannot be done. I think that before answer we should allow them, if so advised, to state what they propose, as a reason for our refusing or modifying the interdict. I confess I think that the legal right of the pursuers is to have the interdict; but I would not grant interdict in terms of the last line and a-half of what is asked, because it is too vague — to interdict a party against violating the rights of the pursuer, without naming the right established in the declarator, is quite irregular and unsatisfactory—it is suspending over a party's head a sword which may fall on him without his knowing it.

Lord Justice-Clerk—I do not object to the suggestion which has been made by Lord Cowan, and mainly on this ground, that the matter of interdict is a question of possession. Possession has lain over a very long time since the verdict, and I do not see that any substantial injury will accrue to either party by our having a specific statement made on the part of the defenders, or some of them, as to what they have done, or what they are ready to oblige themselves to do, in the way of abating this nuisance. I am entirely of opinion that the amount of interest involved is of no moment whatever, and I have never been able to understand how, upon a question of this kind, it can possibly affect the legal right that in doing an illegal act other parties have acquired a very large and substantial interest in doing it. That all goes to the relevancy of the action; but that has been conclusively fixed, and it has also been fixed, in my opinion, that the issue is an issue to try the questions raised in controversy by the conclusions of the summons—to try the whole of these questions and to try nothing else. A good deal has been founded on what is said to have been stated to the jury. These statements are not before us judicially, and I do not wish to express any opinion on that matter; but it does not appear to me that either of the views stated were matter for the jury's consideration at all. They were trying a question of fact, and the legal result of that fact when found was entirely for the Court. Nor could it affect the jury's decision what the legal result might be after the fact was found; and therefore, although this may be called an application to the equitable jurisdiction of the Court, it is only so in this sense, that every application for interdict is an application to the equitable jurisdiction of the Court. If we declare the right, and find that the right has been violated, the conclusion for interdict follows as a matter of course, unless there be some clear mode of vindicating the right which has been already declared. On the whole matter, I am for giving decree in terms of the declaratory conclusion; and as regards the interdict, which is a mere question of possession, I do not see that we are at all fettered, or that we have our hands tied by allowing the parties to make such a statement which may, even if interposed between them and the verdict, be of material importance if any question of breach of interdict should afterwards have to be considered.

The Court granted decree of declarator.

Subsequently—the defenders having stated that after considering their position they had no proposal to make—the pursuers moved for interdict in terms of the conclusion of the summons.

Lord Justice-Clerk—I am not sure that the interdict should not follow the issues. It would

then be substantially against discharging refuse matter at or near the mills, and thereby polluting the water of the said stream, to the nuisance or injury of the pursuers. No doubt that is a general interdict, but I don't see that we can very well prevent that.

LORD BENHOLME—I quite agree.

LORD NEAVES—I do not think it can be said to be improperly general, because the issue is in these terms. But the difficulty is, they are not in the conclusions.

LORD JUSTICE-CLERK—It is deduced from the conclusions as being the substance of them. I think the interdict should simply follow the terms affirmed by the jury. It does not follow that the Court meant to grant an issue up to all the conclusions of the summons. I will frame an interlocutor granting the interdict as near as may be in the terms found by the jury.

Counsel for Pursuers—Watson and Johnstone. Agents—Gordon & Strathearn, W.S.

Counsel for Defenders—Solicitor-General (Clark), Q.C., and Asher. Agents—White-Millar, Allardice, & Robson, W.S.

Thursday, June 19.

SECOND DIVISION.

[Lord Shand, Ordinary.

GIBB *v.* CITY OF EDINBURGH BREWERY CO.

Jury Trial—Motion to vary Issue—Privilege—Charge—Diligence.

A bill having been protested against A, and he having been charged thereon notwithstanding payment of the contents—*held*, in adjusting issues in an action of damages at his instance, that this was not a case of privilege, a charge being a diligence, not a judicial act, and that it was not consequently necessary to aver malice.

On 11th June the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary approves of the Issue, No. 14 of process, as the issue for the trial of the cause: Appoints the trial to take place before the Lord Ordinary, with a jury, at Edinburgh, on Friday the 27th day of June current, at half-past ten o'clock forenoon: Grants diligence at the instance of the parties against witnesses, and ordains a precept to be issued to the Sheriff for summoning a jury accordingly.

"*Note.*—The Lord Ordinary being of opinion that the facts, as stated on record by the pursuer, do not disclose a case of privilege on the part of the defenders, in obtaining and executing the diligence complained of, has approved of the issue in the terms adjusted in No. 14 of process. Should the case, on the facts as disclosed at the trial, appear to the Lord Ordinary to be one of privilege, the Lord Ordinary will then direct the jury that malice and want of probable cause must be proved in order to entitle the pursuer to a verdict in his favour."

The defender wished the issue taken in this case to be varied, and moved the Court to do so. The ground alleged was that the case, being one of privilege, an averment of malice was necessary. The motion was opposed by the pursuer. The issue was as follows—

"It being admitted that on or about 6th February 1872 the pursuer accepted a bill for £23, 10s., payable three months after date, drawn on behalf of the defenders by James Nisbet, then their *interim* managing director,

"Whether, on or about 20th May 1872, the defenders wrongfully caused the said bill to be protested against the pursuer, and the pursuer to be charged thereon, notwithstanding that payment of the contents of the said bill had been made by the pursuer on or about the 17th day of May 1872, to the loss, injury, and damage of the pursuer. Damages *laid at* £500."

Argued for the defenders—There was no issuable matter apart from malice and want of probable cause. The wrong-doing had begun on the part of the pursuer, who admittedly had been in delay in paying the bill from 9th May 1872 till 17th May. The charge which was given on the 20th May was withdrawn two days afterwards. It was held in *Davies'* case that regard could not be had to the publication of the Black Lists. What the pursuer complained of was therefore simply that the defenders had represented him to the Keeper of the Record, and to himself, to be eleven days behind in making payment, while admittedly he had been eight days behind.

In the case of *Gardner* it had been settled that the mere recording of a protest was not actionable unless it had been done maliciously. In the case of *Doyle* there had been imprisonment, and the illegality of the imprisonment was held to give a ground of action without proof of malice and want of probable cause. The present case was something between the two, for there had been a charge given. A charge was not itself diligence, though it contained an intimation that diligence would be done if it was not obeyed. In *Ormiston* it was held that a charge given wrongfully was not a good ground of action. The case of *Davies* was also an authority in point, for though the Court may have proceeded to some extent on the fact that Davies & Company could have prevented decree passing by seeing that the action was taken out of Court, a similar feature existed in the present case, as the pursuer could have gone to the defenders and got up the bill from them, and so ensured that no protest should be taken.

Authorities—*Davies*, 5 Macph. 842; *Gardner*, 2 Macph. 1183; *Doyle*, 23 D, 13; *Ormiston*, 4 Macph. 488.

Argued for the pursuer—This was not a case of privilege at all. A charge was in every sense diligence.

At advising—

LORD COWAN—In this case the Lord Ordinary considers an issue simply resting upon the fact of the wrongful act of the defenders to be sufficient, whereas the defenders' counsel desires that the question of malice should be inserted. That there exists in this matter an essential distinction between judicial proceedings and diligence cannot be doubted. I entirely, on this point, agree with the view indicated by Lord Neaves during the progress of the discussion. That a charge on a decree is not diligence, but a judicial act, I have never heard maintained until now. A charge is the commencement of diligence; it is the first stage therein,