taining the first plea in law we should find that no relevant or sufficient statement has been made or proved to support the conclusions of the summons.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the reclaiming-note for Mrs Frances Sophia Rainsford or M'Lellan against Lord Shand's interlocutor of 6th August 1874, Recal the said interlocutor, and find that no relevant or sufficient statements have been made or proved to support the conclusions of the summons as against the defender Mrs M'Lellan; therefore dismiss the action as against her, and decern; find her entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for the Reclaimer (Defender)—Asher and Robertson. Agents—Gillespie & Paterson, W.S.

Counsel for the Respondent (Pursuer)—Dean of Faculty (Clark), Q.C., and W. A. Brown. Agents—Mitchell & Baxter, W.S.

Tuesday, January 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

HUME AND OTHERS *v.* YOUNG, TROTTER & CO.

Process—Jury Trial—Competency—Nuisance—Judicature Act, 1825, § 28—*Procedure Act*, 1850, § 49—*Evidence Act*, 1866, § 4—*Court of Session Act*, 1868—*A.S. 10th March* 1870.

Held that in an action for nuisance the case must be tried by a jury unless both parties consent that it should be tried otherwise, or on "special cause shown," and that in every case it is a question of circumstances whether or not there is "special cause."

Jury Trial—Special Cause—Evidence Act, 1866, § 4.

Circumstances in which *held* that special cause had not been shown why an action for nuisance should not be tried by jury.

This was an action brought by certain reparian proprietors on the banks of the Whitadder for interdict against the owners of the Chirnside paper mill, to prevent them from polluting the stream, so as to render it unfit for primary uses.

The pursuers moved the Lord Ordinary to take the proof himself, whereas the defenders maintained that it should be tried by jury.

The Lord Ordinary (MACKENZIE), reported the case to the First Division, and pointed out that the question must be governed by the interpretation of the provisions contained in 6 Geo. IV., c. 20, § 28; 13 and 14 Vict., c. 36, § 49; 28 and 29 Vict., c. 112, § 4; 31 and 32 Vict., c. 100, § 27, subsections 3 and 4; Act of Sederunt, 10th March 1870, § 1, subsections 3 and 5.

The pursuers argued that it was quite competent for the Lord Ordinary to take the proof himself. This was a case in which such a course was advisable, for (1) There was a plea of prescription which was founded not only upon the use by the defenders when the mill was in its present situation, but when it was several miles further up the river. (2) There was a plea founded on pollution of the river from other sources, such as to render it unfit for primary uses, and extending over the prescriptive period. (3) A great amount of scientific evidence would require to be led. In these circumstances a jury were not so well qualified to judge as the Lord Ordinary.

The defenders argued, the Lord Ordinary could take the proof in a case of this description, but only (1) On the motion of both parties; or (2) Upon special cause shown. Here there was no special cause, but the case was one peculiarly fitted for trial by jury.

At advising—

LORD PRESIDENT—Under the 28th section of the Judicature Act there is an enumeration of causes which are required by the statute to be tried by Jury. The first relaxation of that rule is contained in the Act of 13 and 14 Vict., c. 36. The 49th section of the Act provides—"That in any cause before the Court of Session, not falling within the causes specially enumerated in the Judicature Act as appropriate to be tried by Jury, it shall be competent to the Lord Ordinary, before whom such cause depends, with the consent of both parties, or upon the motion of one party, with leave of the Inner House obtained upon the report of the Lord Ordinary, or to the Court when the cause comes into the Inner House, to appoint the evidence in such case, or any portion of such evidence, to be taken by commission: Provided always, that it shall be competent for the Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel or nuisance, or properly and in substance an action of damages."

It is obvious that the Legislature in passing this enactment thought that actions of libel, nuisance, and damages should not be tried in any other way than by Jury. The only alteration made on the rule since the enactment I have just quoted is contained in the 4th section of the Act 29 and 30 Vict. c. 112. It is there enacted:—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof in any cause which may be in dependence before him, notwithstanding the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, section twenty-eight, and the provisions contained in the Act passed in the thirteenth and fourteenth years of the reign of His present Majesty, chapter thirty-six, section forty-nine, and the judgment to be pronounced by him upon such proof shall be subject to review in the like manner as other judgments pronounced by him."

Here, then, is a further relaxation of the rule, and it is made competent to try the class of cases before restricted to trial by Jury without a Jury on condition either of consent of parties or if special cause be shown. There is apparently nothing in the Court of Session Act of 1868, or in the Act of Sederunt following thereon dealing with this matter, and therefore I am of opinion that we can lay down no general rule for the guidance of the Outer House in cases of this sort, for the Lord Ordinary can proceed only on consent of parties or on special cause shown in the particular case. I confess I can't see anything special in this case, and unless special cause is shown we are bound to

leave the case to be tried by Jury. I further think that the case is a very proper one to go to a Jury, and I do not see that it involves any special difficulty.

LORD DEAS concurred.

LORD ARDMILLAN—As the law and practice of the Court stands, this is a case which would go to a jury. It is one of the enumerated causes, and its natural and appropriate course is that it be tried by a jury. The defender desires that it may be so tried. So we have not the consent of both parties to a trial without a jury.

There remains the power given to the Lord Ordinary to dispense with a jury, and try it by a proof under the Evidence Act, in respect of *special cause*—a cause peculiar to *this* case. But I cannot perceive such special cause. There can be no departure without consent and without special cause, from the general rule. I therefore agree with your Lordship.

LORD MURE concurred.

The Court held that the case must be tried by Jury.

Counsel for the Pursuers—Balfour. Agents—Webster & Will, S.S.C.

Counsel for the Defenders—Solicitor-General (Watson) and Macdonald. Agents—Murray & Anderson, W.S.

Tuesday, January 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ARMSTRONG AND OTHERS *v.* M'GREGOR & CO.

Sale—Ship—Usage of Trade.

In a case where a ship was sold "with all belonging to her on board and on shore,"—*held* that the contract carried the chronometer, unless excluded either expressly or by usage of trade, which in point of fact had not been proved.

Messrs Handyside & Henderson, shipowners, Glasgow, on January 30, 1871, sold the s.s. Macedon to Messrs Armstrong, "with all belonging to her, on board and on shore." The question was, whether this contract carried the ship's chronometer. At the time of the sale the chronometer was in the hands of Messrs M'Gregor, chronometer makers, for the purpose of being put in order. Just before the vessel sailed the chronometer was brought on board by Messrs M'Gregor, who were ignorant that a sale had taken place, and was brought back to Glasgow after the voyage and again taken on shore by Messrs M'Gregor. While it was in their hands it was claimed by Messrs Handyside and Henderson and by Messrs Armstrong, and they accordingly raised this multiplepoinding in order to have the rights of parties determined.

The Sheriff-Substitute (BUNTINE) pronounced the following interlocutor:—

"*Glasgow, 29th April* 1874.—Having heard parties' procurators on the proof and whole process, and made avizandum, Finds that the chronometer in question is the property of the claimants William John Armstrong and others, having been included in the memorandum of sale of the s.s. Macedon, No. 11/1 of process: Therefore, in the original action at the instance of William John Armstrong and others against D. M'Gregor & Company, repels the defences, and ordains the defenders within six days to deliver over to the pursuers the chronometer in question, under certification. (2) In respect of the above finding in the said first action, dismisses the action of multiplepoinding, reserving to pronounce further, and to dispose of the question of expenses.

"*Note.*—The question in this case is, Whether a chronometer belonging to the owners of a ship passes to the purchaser under a clause in the bill of sale, 'with all belonging to her on board and on shore.' The chronometer happened to be on shore at the time of the sale, but this circumstance does not affect the result of the case; as, if it were truly one of the belongings of the ship, it does not matter whether it was on board or on shore. After a careful consideration of the evidence, the Sheriff-Substitute is of opinion that Messrs Handyside & Henderson, and their agent Mr Wilkie, who sold the vessel, never imagined that this clause included the chronometer; while, with equal honesty the purchasers believed that they bought the ship with everything on board of her, or on shore, which was necessary to her proper navigation. In these circumstances it is important to consider if, in common and in maritime practice, a chronometer is a necessary appurtenance of a ship.

"That the possession of a chronometer was necessary for the proper navigation of this ship is evident from the fact that she had one during all the time that she belonged to Messrs Handyside & Henderson; and when the Messrs Armstrong were deprived of the use of the chronometer in question in this case, they immediately supplied another. It may be that by the rules of the Board of Trade there is no obligation upon owners to have a chronometer on board of a vessel; still, in the case of owners with the reputation of the parties to this cause, a chronometer is, and very properly, a necessary appurtenance of their sea-going ships.

The next consideration of importance is, that the ship was bought for the purpose of immediate use, and it must have been in the view of both purchaser and seller that nothing required to be done in the way of supplying fittings or gear to enable her to start immediately for Gibraltar.

"It was as if they had bought the ship as she sailed on her voyage. In such a case, unquestionably a chronometer, the property of the owners, would pass if not specially excepted, and it was so decided in the case of *Langton* v. *Horton*, Law Journal Rep., new series, vol. ii. p. 299, 6th June 1842; 20 L. J. Chanc.

"The fact that in this case the chronometer was on shore for the purpose of being repaired is not material. The law on this point is well stated in Parsons on Shipping, vol. i. p. 79, *et seq.*:—'Everything on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances.'

"It is quite true that the usage of the port must be considered, because things 'may be part and parcel of a ship at one time and place, and under some circumstances, and not at others.'

"Most properly, therefore, it was attempted by