tors, I venture to think that that is not correct, and if there has been default and failure to perform a duty incumbent upon them by law, then the duty of the presbytery to compel them to do so does come into operation. I apprehend, therefore, in the first place, that there is no question whatever as to the jurisdiction of the presbytery to pronounce the judgment which is the subject of complaint.

But, in the next place, the ground upon which objection was taken to the judgment was that no notice had been given to the appellant of the proceedings intended to be taken by the presbytery. Now, after what has been stated by your Lordships so very clearly, and with reference to the documents, particularly the intimation of the meeting of the 8th of May, which must have been known to Mr Walker, who was present in the church when the intimation was given, I think it is plain that he did receive due notice that the presbytery intended to exercise their jurisdiction, and having received such notice it was his duty, if he intended to combat any resolution which they might adopt in the way of taking possession of his property for adding it to the churchyard, to have attended the meeting of the presbytery; but he failed to do so. And even after the notice of the 11th of May was given to him, intimating that they were about to take further steps in the matter, he failed to appear before the presbytery on the 17th. He did not avail himself of the opportunity which the law afforded to him of stating his views to the presbytery, and, if they refused to adopt his views, of taking an appeal to the Sheriff. In having thus neglected to avail himself of the opportunity given to him by the presbytery of stating his objections to any designation of his land, I think he has put himself out of Court. He is not in a position to say that the land has been taken without due notice, and therefore I venture to think that upon that ground the judgment which was adopted by the Lord Ordinary, and adopted also by the late Lord Ardmillan, is not well founded, but that the opinions of the other learned Judges below are entitled to the greater weight.

I do not think it necessary to trouble your Lordships by going over the details of the documents, because those have been sufficiently brought before your Lordships; but it is of importance to keep in view what has been stated by my noble and learned friend who has last spoken, that there is no allegation of a breach of a statutory form on the part of the presbytery; neither is there any allegation of there being any deviation from any customary procedure on the part of the presbytery. That, I think, has been clearly brought out in the opinion of the Lord President, and has not been challenged by anything which has been stated at the bar.

That being so, my Lords, I think there was jurisdiction on the part of the presbytery, and there was due notice given of the intention to exercise that jurisdiction in the way of dealing with this particular piece of land which is the subject of dispute. I do not go into the question as to whether there is not a strong reason for presuming that all the facts were substantially known to Mr Walker. I venture, however, to think that the impression which must be left on the mind of everybody is that it is very difficult to conceive that he was in ignorance of the meetings of the presbytery with reference to this piece of ground, in which he held so great an interest. Therefore I think, under the whole circumstances of the case, your Lordships will be of opinion that the interlocutor appealed against ought to be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Mr Cotton and Mr J. M. Duncan. Agents—Drummond & Reid, W.S., Edinburgh, and Mr Robertson, Westminster.

Counsel for Respondents—Mr and Mr Gloag. Agents—Mackenzie & Kermack, W.S., Edinburgh, and W. A. Loch, Westminster.

Thursday, November 30.

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

Process—Competency—Instance—River—Pollution.

In an action by several riparian proprietors against the proprietors of several paper-mills situated on the banks of the stream, to have them prevented from polluting the water, the defenders pleaded that the action was incompetent, in respect (1) that it was raised by several pursuers, each with a separate interest and cause of action; and (2) that it was directed against several unconnected defenders.—*Held* (*aff.* judgment of Court of Session) that the action was competent, there being community of interest among the pursuers, and a common ground of action against the defenders.

Process—Conjunction—River.

Three actions were raised by riparian proprietors against the proprietors of paper-mills on the stream to have them prevented from polluting the water.—*Held* (*aff.* judgment of Court of Session) that it was competent and advisable to conjoin the actions, although one of the pursuers of two of the actions was not a party to the third, and although the defenders in the actions were different.

This was an appeal in conjoined actions at the instance of riparian proprietors on the river North Esk, against certain paper-makers whose works were upon that river.

The original action was brought in 1841, and was ultimately insisted in by the Duke of Buccleuch, Viscount Melville, Sir James William Drummond of Hawthornden, and Robert Brown, Esq. of Firth, against Messrs Alexander Cowan & Sons, paper-makers, Valleyfield, William Somerville & Sons, paper-makers, Dalmore Mills, and Alexander Annandale & Son, paper-makers, Polton Paper Mills. Valleyfield and Dalmore were further up the stream than the properties of any of the pursuers, and Polton Paper Mills were below the properties of Firth and Hawthornden, but above the properties of the other pursuers.

The pursuers averred that the defenders by their paper-works greatly polluted the river, so as to make it unfit for domestic purposes or for the use of cattle, destroyed the trout in it, and deprived the stream of its ornamental character

as it passed through the pursuers' pleasure grounds. The summons concluded for declarator that the defenders had a good and undoubted right to have the water of the North Esk transmitted to them in a state fit for the use and enjoyment of man and beast, and that the defenders had no right to pollute the said water; and further, for interdict against the defenders discharging into the said water from their respective paper-works any impure stuff or matter of any kind, whereby the said water might be polluted or rendered unfit for domestic use, or the use of cattle, or whereby the amenity of the said stream might in any way be destroyed.

The pleas of the defender were, *inter alia*, to the following effect:—(1) The action is incompetent. (2) The several pursuers are not entitled to sue this action jointly, or to maintain it against several defenders, in respect that their rights and interests are different. (3) The summons being libelled and the action laid at the instance of the pursuers jointly, the action ought to be dismissed, in respect the summons does not set forth a joint cause or causes of action which the pursuers are entitled jointly to sue and maintain. (4) The causes of action alleged in the summons against the defenders respectively being essentially separate and distinct, and none of the defenders being responsible or liable for the acts or conduct of the others, but each only for his own acts and conduct, it was unfair, oppressive, and illegal to include the whole in one summons, and on this account the action ought to be dismissed.

On 23d January 1864 the Lord Ordinary (Ormidale) repelled the said pleas-in-law, and on 9th February 1864 the Second Division adhered.

Thereafter two other actions of declarator and interdict were brought, the one by the Duke of Buccleuch, Viscount Melville, and Sir James William Drummond, against Alexander Cowan & Sons (the partners being different from the original firm of Alexander Cowan & Sons), James Brown & Co., paper-makers, Esk Mill, and William Somerville & Son, paper makers at Dalmore Mill; and the other action, by the Duke of Buccleuch and Viscount Melville only, against Alexander Annandale & Sons of Polton Mill, Alexander Fullerton Somerville, paper-maker at Kevock Mill, and William Tod & Son, paper-makers at St Leonard's Mill. The reason why Sir James Drummond was not a party to this third action was because Polton was situated lower down the river than his property of Hawthornden, and Kevock Mill was not used as a paper-mill till after the date of the action of 1841.

In these two latter actions it was averred, *inter alia*, that the defenders' works had increased, and that a greater amount of polluting matter was put into the stream, and that the nuisance had consequently become still more intolerable.

The cases were reported on the issues, and the Second Division, on the motion of the pursuers, conjoined the three actions by interlocutor of 23d February 1866.

The conjoined actions were subsequently tried by jury on 30th July and following days, and the jury returned a verdict for the pursuers on all the issues, and thereafter the defenders, under an agreement with the pursuers, conducted experiments with a view of abating the nuisance. In 1873 the pursuers moved for decree. The Court pronounced decree of declarator; and the defenders having stated that they had no proposals to make for abating the nuisance, and did not move for further inquiry, the Court further granted the interdict.

The defenders, Cowan and others, appealed.

At delivering judgment—

Lord Chancellor—My Lords, there is no question but that the subject-matter which is brought under your Lordships' consideration in this case is one the importance of which to the appellants can hardly be overstated. At the same time, your Lordships have had the advantage of a most able argument, which has submitted to you every topic which could be urged on behalf of the view taken by the appellants. You have the unanimous decision of the Court of Session in Scotland, and I think I speak correctly when I say that the arguments of the appellants have not raised in the minds of any of your Lordships any doubt as to the correctness of that decision. Under these circumstances I think your Lordships are prepared, without further argument, to dispose of the question which is now raised.

My Lords, the action is one instituted in Scotland with reference to an alleged pollution of the river called the North Esk. A number of riparian proprietors are proceeding against a certain number of owners of paper-mills upon the Esk, and the summons alleges pollution of the river by those owners of paper-mills. The objections which have been urged on the part of the appellants resolve themselves really into one principal objection, and that is that it was not competent, either in the shape of one original action or in the shape of a conjunction of several actions, for different riparian owners to pursue the various owners of paper-mills in one proceeding with regard to the pollution of the same river.

My Lords, this objection is, as your Lordships will at once see, an objection with reference to procedure and practice, and to a certain extent an objection with reference to the exercise of the discretion of the Court below. The uniform practice of your Lordships' House has been, in matters of procedure and practice, and still more in matters of discretion, unless your Lordships are satisfied that the Court below have entirely overstepped the limits of their jurisdiction, to lend the greatest possible weight to the opinions which they have expressed as to procedure and practice; and, above all, where the Judges of the Court below are unanimous as to a matter of procedure and practice, not to differ from that opinion unless your Lordships are perfectly satisfied that that opinion is founded upon erroneous principles.

Now, my Lords, for the purpose of determining the competency of the action—the competency as to the parties—and with reference to the objection which I have stated, we must take the allegations which are found in the pleadings upon both sides, and look at those allegations as explaining what the character of the case made by the pursuers is; and I will, in the first place, with regard to the record, direct your Lordships' attention to the particular relief which is asked in the original action in this case.

My Lords, I can very well understand *a priori*, and without reference to any authorities, that if you have a proceeding sounding in damages, in

which pursuers ask for damages against a number of defenders, it may very well be said that there is an inconvenience almost amounting to an impossibility in joining in a case of that kind a number of pursuers in an action against a number of defenders. I may express what I mean in this way—Suppose four riparian owners, A, B, C, and D, commence a proceeding against four owners of separate mills, W, X, Y, and Z, for the pollution of a river—a proceeding in which the pursuers seek to recover damages against the defenders—there the jury or the tribunal, whichever it might be, which would have to inquire into and assess the damages, would have first to take the case of the millowner W, and, having ascertained that he was liable in damages, they would have to find out what damages he had to pay, first to the riparian owner A, then to the riparian owner B, then to C, and then to D. The amount of damage might be, and in 99 cases out of a 100 would be, different as to those different riparian owners, and a different inquiry and an assessment of a different sum would have to take place as to each of them. So, my Lords, it may be with regard to the defenders; when you had ascertained the sum which would have to be paid by W by way of damages to each of the four riparian owners, you would then have to proceed to the case of X. It is almost impossible that the damage occasioned by W should be exactly the same as the damage occasioned by X. You would have, therefore, in the case of X and of Y and of Z, to ascertain as to each of them the damage which he had done, and again, the damage which he had done to each riparian owner. My Lords, the inconvenience of a proceeding of that kind is so great that, although it is not a point for your Lordships' decision in the present case, and I do not desire to be taken as expressing any final opinion upon it, I can well understand that by reason of that inconvenience it might well be held that it was incompetent to join together the pursuers whom I have described and the defenders whom I have indicated, in one and the same proceeding.

But, my Lords, when I turn to the nature of the present proceeding, I find that it is as different as anything well can be from a proceeding sounding in damages. Your Lordships find that there are three different subjects to which the conclusion of the summons points—I refer to the summons in the original action, which in this respect is the same as the summons in the later actions. The first object is that it "should be found and declared" . . . "that the pursuers have good and undoubted right to have the water of the North Esk, so far as it flows through or by their properties, transmitted in a state fit for the use and enjoyment of man and beast; and that the said defenders have no right to pollute or adulterate the water, nor to use it or the channel of the stream in any way or for any purpose such as to render the water noxious or unwholesome, or unfit for all its natural primary purposes to the pursuers, or in any way to destroy the amenity of the stream"—that is to say, that there may be a declaration that the natural right to the running stream in its natural condition, which *prima facie* would be possessed by these riparian owners, has not been in this particular instance taken away or abridged, or in any way affected by any right acquired by those who are said to be polluting the stream.

The second object of the action is, that the defenders may be "prohibited and interdicted from discharging into the water of the Esk from their respective paper-works any impure stuff or matter of any kind, whereby the 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 right of the pursuers therein in any way injured or affected"—that is to say, an interdict following the declarator, and protecting the right which in the first instance is sought to be declared; and then, in the alternative, "it ought and should be found and declared that in the event of the defenders, or any of them, being found entitled to continue the use of the water, or any portion thereof, for all or any of the works mentioned, that they are bound and obliged to make use of the water in the manner least injurious to the pursuers, and to use all necessary and proper precautions, by filtration and otherwise, to restore the water to the stream, after having been used at the works respectively, in as pure a state and condition as possible."

My Lords, along with that conclusion of the summons, your Lordships will probably take those averments in the condescendence and in the replies, to which in the course of the argument your Lordships' attention was directed. Those are averments asserting upon the part of the pursuers a course of pollution of the river, uniform in this respect, that it comes from the different paper-mills used by the different defenders in the manufacture of paper, the process of the manufacture of paper being asserted to be of the same or of a similar kind; and the defenders make defences to these averments which are identical in point of expression and in point of allegation.

Now, my Lords, I do not mean to say that even in this case (I am still considering the *a priori* arguments for or against the united action) there may not be inconveniences in having to try the action which it is proposed to try by the summons to which I have referred. The nature of the case is such that, tried in any way, either in a joint action or in a separate action, great and grave inconvenience and difficulty will be experienced by any Court upon which the task of trying the action devolves. But, my Lords, I have no hesitation in saying that, as a balance of convenience and inconvenience, it appears to me that, looking at the subjects of relief which are comprised in this summons, the convenience of dealing with these matters of relief in one conjunct action rather than in separate actions preponderates immensely in favour of the conjunct action. Take, for example, the intermediate conclusion of the summons with regard to an interdict; supposing an interdict had been granted in five or six different actions, and it became a question as to whether that interdict had or had not been obeyed, it would be utterly impossible for any Court to answer that question without having before it the whole of the defenders, in order that the Court might know to the conduct of which of the defenders the continued pollution of the river was to be attributed. And, my Lords, so also with regard to the pollution before the interdict was granted. The experience of any of your Lordships who have observed trials of this kind will have shown you that where the proceeding is directed

against one individual simply for polluting a river, it is always a topic of defence with that one person that the pollution either comes altogether from the works of some other person upon the river, or comes from the works of that other person in so great a degree as to render the pollution of the individual actually sued not worthy the attention of the Court. My Lords, it is therefore only where you can have placed face to face before you the various persons who are said to be polluting the same stream by the same process and by similar acts, that you can decide whether they are all culpable or not, and whether there shall be a declaration with regard to all of them or not, and if anything is to be done which bears the aspect of an intermediate course—anything in the way of remedy,—how that shall be carried out as between the different persons before the Court.

Those, my Lords, are the considerations which, altogether irrespective of authority, if we were to ook at this matter as a matter of procedure or matter of practice, and to ask which practice and which procedure is the more convenient—those, I say, are the considerations which would naturally occur to my mind, and which I submit for the approval of your Lordships. We must, however, be regulated by the well-established rules of procedure and practice upon the subject; and however convenient the course which I have indicated may be, if there are rules of procedure against it, those rules must not be departed from, at all events merely by the decision of a Court; if they are to be altered, they must be altered in the proper and regular way.

But, my Lords, are there such rules of procedure and practice in Scotland as render an action such as I have described incompetent?

My Lords, in turning to examine that question, I will submit to your Lordships that you must keep distinct arguments drawn from English procedure and practice, although they may be convenient for illustration. The procedure in this country of the Courts, both of Equity and of Common Law, has been very well known, and in the Common Law Courts of this country has long been of a very rigid and exact description. That is a procedure generally between one person and another person—between A and B—the one almost always suing the other for damages; a single issue is raised and is adjusted between the two litigants, and the right of the plaintiff is established or is denied as against the particular defendant. Even in this country, so rigid and so inconvenient at times was the process of procedure at common law found to be, that in the Court of Chancery it has been very much relaxed, and much greater latitude has been allowed there in the joinder of different parties having an interest in the same subject-matter. Your Lordships were referred, in the course of the very able argument by Mr Davey, to a well-known proceeding in the Court of Chancery, called a Bill of Peace, a bill not of very common occurrence, but of which there have been instances even within living memory—a bill which brings before the Court a number of persons having, not identical rights, but rights in regard to the same subject-matter, who are making claims and asserting those rights, and who are brought together to have something like a declarator made in the presence of the whole, with regard to the nature and extent of those rights, in order in that way to give quiet and peaceful possession to the plaintiff who brings them before the Court. In one point of view, the present proceeding, if we put aside the more active part of the relief sought, namely the interdict, bears a certain analogy to a bill for a quiet possession. My Lords, the tendency in this country, as has been pointed out, with reference to recent legislation, has been very much to enlarge the power of bringing parties having several interests, or interests in the alternative, before the Court.

But, my Lords, passing from the English practice, which, after all, can only be referred to as an illustration, and coming to the Scotch practice, what do your Lordships find to be the state of the authorities? The competency of joining in an action of this kind several pursuers appears to me to be put beyond all doubt by the authorities which have been referred to. Your Lordships have the case of the *River Don*, where the upper heritors appear to have maintained an action for the purpose of having removed a fence or weir or impediment of some kind which was placed across the river lower down, and which interfered with the passage of salmon up to the various lands of the upper heritors. Your Lordships have the case of *Lord Moray*, where one general act done by the order of Lord Moray, affecting a number of persons, each in his own premises, namely, the carrying of certain drainage from a suburb of Edinburgh to the village of Stockbridge, was made the subject of proceedings, and those proceedings were maintained successfully by several pursuers of the same character as the pursuer in the present case. And, my Lords, there is no authority produced the other way—as to the question of pursuers joining; therefore the authorities appear to be quite clear and quite satisfactory; and, indeed, the argument was not directed at all so strongly as against the case of the junction of the pursuers as against the junction of the defenders.

But, my Lords, how do the authorities stand with regard to a joinder of defenders in a case of this kind? In the first place, I must point out to your Lordships what seems to me to be a matter to which your Lordships should give the greatest possible weight. There is no authority produced in any decided case, or in any book of practice, which negatives the right and competency in a case of this kind of bringing before the Court several defenders. On the other hand, your Lordships have—what I have before referred to—the unanimous opinion of the Judges of the Court in the present case that such a proceeding is competent and is not at variance with the known and recognised procedure. Now, my Lords, if the practice is one entirely consistent with the whole spirit of the procedure in Scotland, exactly what your Lordships would expect would be that there would be no case actually decided and recorded upon the subject, because it would not occur to any person to make and record an objection to that which was really a part of the ordinary procedure of the Courts of the country.

But, my Lords, further than that, your Lordships happen to have a case recorded in which, although it is perfectly true no objection such as is taken here was taken, yet a similar objection might have been taken, and from the fact that the objection was not taken I infer that the

joinders in that particular instance of various defenders was assumed by every person to be consistent with the ordinary procedure in Scotland. I refer to *Lord Breadalbane's* case—the case of the sheep drovers—which came before your Lordships' House. There Lord Breadalbane brought before the Court several persons who were united in interest only in this way, that they all alleged that they had a right, in driving sheep from certain farms in the north of Scotland towards the south, not only to use a roadway—the right to use which, indeed, was not in any way denied—but that they were entitled every ten or twenty miles to halt the droves of sheep and to pasture them in the neighbouring land of Lord Breadalbane, or what were called the stances, which really were parts of the hill-side. Lord Breadalbane united together as defenders 17, 18, or 20 of those persons who asserted a right of that kind; he brought them before the Court for the purpose of obtaining a declarator and an interdict; he succeeded in doing so, and the objection, my Lords, was never taken that it was wrong or contrary to Scotch procedure to join those various defenders together.

My Lords, there is a still further authority which would shew the right of joining together defenders in this way. There is an Act of Parliament applying to Scotland—the 48th of George III. chap. 151—which provides "That where any action, matter, process, complaint, or cause has been brought before one of the said Divisions or the Lords Ordinary thereof, the other Division or the Lords Ordinary thereof shall remit any action process, matter, complaint, or cause subsequently brought before them relating to the same subject, matter, or thing, or having a connection or contingency therewith, to the consideration of the Division or Lords Ordinary before whom the first cause, action, process, complaint, or matter had been previously brought, which remit shall be made in such form and manner as is now used, or as shall be established by future regulations" from time to time. Therefore, my Lords, if there had in this case been separate actions brought by these pursuers against the different owners of these mills, it would have been obligatory upon the Division of the Court before which they were brought to send the second and subsequent of those actions to the Lord Ordinary who had seisin or possession of the first, and they must all have stood before that same Judge, and it would have been for that one Judge to consider what under those circumstances he ought to have done. I took the liberty of asking the learned counsel whether he could shew that it would have been *ultra vires* of that Lord Ordinary to have joined those actions if he had thought that they were so connected in point of evidence and in point of interest that it would be more convenient that they should be tried on one occasion by one jury than that they should be tried on different occasions before different juries. The learned counsel doubted the power of the Lord Ordinary, but no authority was adduced to shew that the Lord Ordinary had not such a power.

My Lords, the Act of Parliament evidently indicates that the remit is to be made for some practical purpose. There can be no practical purpose, as indeed was pointed out by the Lord Justice-Clerk, except that the Lord Ordinary when he has the different actions before him may consider what is the best course to adopt, whether to join them together or to sist all but one—to wait until that one is tried—that is to say, it is in the discretion of the Lord Ordinary which course he will adopt. But, my Lords, if it is in the discretion of the Lord Ordinary to join together a number of actions brought by these pursuers against each polluter of the river, I ask why is it to be held to be contrary to procedure, or contrary to competency, that in the first instance the pursuers should join the various persons said to be polluting in the same way the same river in one and the same action? It appears to me that there is nothing in reason or in principle which could lead your Lordships to hold that the learned Judges of the Court of Session were wrong when they affirmed that such an action was competent in Scotland.

My Lords, that really exhausts all that I have to submit to your Lordships upon the subject. It appears to me to be perfectly clear that the action is competent as regards the joinder of the pursuers. It appears to me that although the authority is not so distinct for the joinder of the different defenders, there is authority for their joinder; there is the united testimony of the Judges in the present case that such joinder is consistent with the Scottish procedure; there is every argument of convenience for having this whole question decided in one litigation between the different parties, and therefore the objection as to competency entirely fails.

My Lords, some argument was adduced with regard to the form of the issues, but that came I think in the result not to be really insisted upon before your Lordships. Whether, if your Lordships had now the settling of the issues, some words might or might not with advantage be altered, I do not stop to inquire. It appears to me that in substance these different issues presented to the jury the various questions which had to be decided, and there is nothing before your Lordships to lead you to suppose that there has been any miscarriage of justice in the determination which has been elicited from the jury.

My Lords, upon the whole, I submit to your Lordships that this appeal fails, and that it must be dismissed, with costs.

Lord Penzance—My Lords, If I trouble your Lordships with but very few remarks upon the present case, it will not be because I do not thoroughly estimate the great importance of the issues in question to the appellants, nor will it be because I have failed to appreciate the excellence of the arguments which have been addressed to your Lordships at the bar; but the matter has been so completely gone into by the Lord Chancellor, and I so entirely agree with everything that has fallen from him, that very little on my part needs to be added.

My Lords, I view this question as after all but a very short one. A great deal has been said in argument, and one can well understand that it should be said, about the convenience or the inconvenience of adopting this or that course; but after all, I apprehend that the question before your Lordships to-day is not whether it is most convenient that this or that procedure should be adopted, but whether, as a matter of fact, the procedure in the present case is or is not consistent with the existing practice of the

Court in Scotland? and that really is but a very short and simple question.

When we come to examine that question, I admit that we are met with some difficulty by reason of the very meagre materials that are afforded us upon which to form a conclusion as to what the practice of the Court in Scotland is. But, my Lords, I conceive that where the Court has by a unanimous decision affirmed that this proceeding is entirely within the limits of its own practice and procedure, something very much stronger than any argument as to such a procedure being inconvenient ought to be required before your Lordships can come to a conclusion that a decision affirming that procedure ought to be reversed. And, indeed, I think that under the circumstances, the Scotch Court having affirmed the existence of the procedure, the onus is cast upon the appellants to satisfy your Lordships that that conclusion is wrong, and to satisfy your Lordships that the conclusion is wrong, by referring you to some distinct precedent, decision, or authority to the contrary effect.

Now, my Lords, when we look at the question in that point of view, it cannot be said that the appellants have fulfilled that function. They have wholly failed to lay before your Lordships' House anything in the shape of a decision contrary to the decision which is now appealed from; but they have adduced a great deal in the way of argument tending to show that such a practice might be inconvenient. And here, my Lords, I will observe that there is a constant tendency in the argument of a case of this kind to draw analogies from the law of England, and I think your Lordships cannot be too much upon your guard against importing into a question which is purely a Scotch question, relating to the practice of the Scotch Courts, conclusions drawn from a practice purely English, namely, the procedure of the Courts of this country. As the Lord Chancellor has said, there is no doubt whatever that, as far as common law is concerned, the Courts in this country have been bound, most of them, by inflexible rules, handed down in great measure from the time of the Plantagenets, and until certain modern statutes were passed there was no possibility of altering or improving them.

But, my Lords, when I inquire in this case as to the Scotch practice, I am struck at once by the great dissimilarity that there is between the practice in Scotland and the practice of the Courts in this country, because, to take for instance one of the cases which have been cited, the case of *Revie and Bell* v. *Murdoch*, which was the case where two men were thrown out of a gig by reason of somebody's negligence in leaving a heap of rubbish out in the road, it was held in the Court in Scotland that those two men could join together in an action. That, I need hardly say, is a matter which is entirely inconsistent with any practice in this country. They were independent persons, each having independent causes of action, each having received independent injuries, and each was entitled to a personal action. No doubt the cause of action would be similar in each case, but there was no community between the two plaintiffs which according to English practice would admit of their being joined in one action. The next case cited was the case of *Hawkes* v. *Mowatt*. That was an action of slander by two pursuers against one defender, who had said that they were robbing swindling rascals. It was quite consistent with the practice of the Scotch Court that that should be a joint action; but that again is wholly at variance with English notions upon the subject.

But, my Lords, I think an even stronger illustration is found in the case of *Douglas*, which has been alluded to in the argument. On page 22 of the respondent's case we have the judgment of the Lord Justice-Clerk in the case, and your Lordships find that he said, after alluding to an Act of Regulations which was passed in 1695—"It is not pretended that this regulation can receive, or even has received, literal obedience. On the contrary, the object of the provision, much more limited than the words seem to import, is well known, historically, to have been the prevention of a practice, formerly prevalent, of embracing in one summons actions against debtors more than six in number, each defender being pursued on a separate ground of debt unconnected with the debts of the other defenders called." Strange as this may sound to modern ears, there is no doubt of the fact, for it is distinctly stated by Sir George Mackenzie, writing before the Act of Regulations in the year 1674. In the fourth book and first title of his Institutions he says, "Though the accumulation of several actions into one libel was not allowed by the civil law, yet it is allowed by ours, in which we may not only pursue several persons for several debts in one libel, which we call by a general name, an Action against Debtors, but we may likewise accumulate several conclusions against one and the same person, though they be of different natures, as reductions, improbations, and declarations of property, and actions of general and special declarator—in all which it is a general rule, *quot articuli tot libelli.*"

That, my Lords, is a general statement of what the old law of Scotland was, and it is utterly at variance with the English practice upon the subject. Although it is quite true that this practice with regard to debts, as the learned Judge goes on to point out, has long since been disused, and has not for the last 100 or 200 years been followed, still here is a statement which shows that the old law of Scotland was, in this respect of joining both plaintiffs and defenders together, so widely at variance with the English law that we need not be astonished to find that in such a case as the present, although this joining of plaintiffs and defenders is a thing which according to the English law we could not support, yet according to the Scotch law it might be the most natural thing in the world.

Now, my Lords, it seems to me that, there being no authority whatever against this conjoint proceeding, there being the statement of the Court itself that it is according to practice, and there being, from the authorities I have just alluded to, proof that the procedure in Scotland differs widely from the procedure in England in this respect, I think there can be no more natural conclusion to arrive at than that this conjoint proceeding is quite consistent with the practice of the Court in Scotland; and I venture to say that that is really the whole question before your Lordships upon the present occasion.

But as a very able argument has been addressed to us with regard to the convenience and inconvenience of the matter, and as distinctions have been taken by the learned counsel, according to

which, supposing that those distinctions are correct, although the defenders might in some cases be joined, they could not be joined in such a case as this, I will trouble your Lordships with one or two remarks, and one or two only, upon the subject. It has been argued that the cause of action in such a case as the present against each defender is wholly separate and distinct and unconnected with that against the others, and it is upon this proposition that the chief reliance is placed against the competency of the action. But the cause of action in each case is not the mere act of pouring polluting matter into the river, for the quantity might be insufficient to do mischief by reason of dilution, or the water might purify itself as flowing water does, so that the cause of action is not complete until the result of rendering the water unfit for the pursuers' use has been brought about. This result may in some cases perhaps be traced to the individual act of one of the defenders, but in the majority of cases the reverse is the case, and the extent of deterioration in the water worked by the polluting acts of several other defenders would have to be inquired into. This establishes, I think, a very obvious connection between the several defenders. The cause of action against each of them depends upon the ultimate impurity of the water when it reaches the pursuers' lands, and that ultimate impurity is the joint result of the acts of all of them. The main ground, therefore, upon which the incompetency of the present action is vested appears to me to fail.

But if I turn to the question of convenience, I think the case is even stronger for the respondents, for the choice, as a matter of convenience, lies between investigating this joint result and determining the share which each defender may have in it in the presence of all the defenders on the one hand, or trying the effect of each defender's acts separately, and in the absence of the others, on the other hand. Even in the case of damages there would be much to be said under such circumstances in favour of a joint trial, but in such a case as the present, which is one not of damages, but of declarator and interdict, the convenience and even justice of the case is, in my opinion, best met by a joint proceeding.

Now, my Lords, I am well aware, on the other hand, of the inconvenience to which the learned counsel averred. There is no doubt that there are never three prisoners tried, and there are never cases in which there are three defendants in a common law action, whose defences are separate, and there are never cases in which there are three or four parties in the Divorce Court or in the Probate Court, coming before a jury, where great inconvenience may not arise by reason of the several parties having separate interests, so that the defence of one party is not identical with that of the others, and still more, by reason of what is evidence against the one party not being evidence against the other. The strongest possible evidence against a man is a letter or paper written by the man himself; but such a letter, which is evidence only against the man who wrote it, may prejudice the jury against the other defendants, who never wrote the letter, and had no concern in it. Notwithstanding this inconvenience which arises where there are several parties joined together, I think the balance of convenience, on the whole, is in favour of a joint proceeding as against a separate proceeding in such a case as the present. But, again I say, I invite your Lordships to decide this question, not upon the question of convenience, but upon the only question which, according to my mind, arises in the case —aye or no—Is this in accordance with the practice of the Scotch Court? And as we have a unanimous statement of the Scotch Court upon that point, I would advise your Lordships to affirm that decision, unless you are satisfied that there has been some authority or proof adduced by the appellants that that decision is erroneous.

Lord O'Hagan—My Lords, I have given careful attention to the very able arguments addressed to us, but they have failed to satisfy me that your Lordships would be well advised in disturbing the unanimous decision of the Scottish Judges.

The question is one of local procedure and practice, and most fit to be dealt with by the local tribunals. Many subjects of controversy have been discussed, but they have really resolved themselves into a single one, the competency of the several actions. We have been relieved by the candid statement of the learned counsel from the consideration of the sufficiency of the issues, and the suggestion of "acquiescence" and the objection as to "conjunction" has been urged only as affecting the argument on "competency." Indeed, it could not have been otherwise judicially pressed, for the right of the Court to conjoin actions in proper circumstances has been established by ample authority; and its exercise being plainly within the discretion of the Judges, your Lordships would scarcely have departed from the ground of your ruling in *Wauchope* v. *The North British Railway Company*, 4 Macq. 248, or interfered in any way with the decision they have pronounced. The reasoning of counsel on the point of "conjunction" does not appear to me to have aided them in their denial of "competency;" and as to this, your Lordships would be slow, without coercive reason, to differ from the Judges in ascertaining the existence and effect of rules of procedure established by no written law, but originating in views of social convenience and the interests of suitors, with which their judicial experience must have made them especially conversant. I think, however, that on authority and principle the ruling of the Courts below was perfectly right.

Our duty is to discover as well as we can what has been the practice in Scotland with reference to the joinder of parties, and we have been assisted for this purpose by many authorities, to which I shall not, after the ample analysis they have undergone, particularly refer. The result of them to my mind very clearly is, that at least, as to pursuers, what was done in this case was fully warranted. Indeed, it was not ultimately denied by the learned counsel that when a single act which affects several persons is the subject of complaint, they may together sue the doer of it. In my opinion, this admission decides the case against the appellants. There is here in reality only one matter of complaint—the pollution of the river. One remedy is obtained—the issue of an interdict. To the single result which injures the pursuers, the defendants are contributories in different degrees. But the aim of the proceeding is not to affect each of them apart from the others, but to prevent the one conse-

quence of their combined action. Damages are not sought against them individually. The effort is to abate the mischief they all have wrongfully wrought. Thus regarded, on a fair consideration of the cases, and on the interpretation given to them on behalf of the appellant himself, the junction of the pursuers appears to me unimpracticable. They have a common interest in the stream—in its purity and its amenity. They suffer from a common grievance in its pollution. That grievance is created by the action of men engaged in the same trade, using the same machinery and materials, which conduce to the same injurious result, and thus the pursuers seek to obviate by a single judicial act equally restraining all who have produced it.

We have had many inapt illustrations and delusive analogies in the course of the argument; and I have been quite unable to appreciate the force of the distinction taken to-day between the case of persons sending pollution through the same pipe and of others sending it, with the same result, into the river. If there may be, as was conceded, joinder of the pursuers and defenders in the one case, I cannot imagine why they should not be joined in the other.

Then, as to the junction of defenders, much the same course of reasoning appears to me to apply. For this there is not, undoubtedly, the same clear authority as warrants the junction of pursuers, and, in the absence of it, the Judges rely on the want of any rule restraining them from the permission of a proceeding which they deem—and I conceive rightly—for general and individual interest alike, enabling all parties fully to secure their rights in the cheapest and most facile manner. If there be no authority in favour of that proceeding, there is no authority against it. In several instances, as in the *Breadalbane* case and *Lord Forbes'* case, we find defenders joined without objection; and there may be many such cases of which we have no account. The very generality of a practice may prevent the record of its common application. And in such a state of things it is not too much to say that the judicial affirmation of its existence and its nature is entitled to the highest consideration.

I do not trouble your Lordships with observations on the expediency of the course of which the appellants complain. It has already been demonstrated by my noble and learned friends. The convenience of having all persons affected by a process of this kind at once before the Court seems very manifest; and the extreme difficulty of working out such a process in the absence of the majority of them with justice to all is equally so. The cases might wear a different aspect if the pursuers sought damages instead of seeking declarator or interdict.

The argument *ab inconveniente* so strongly urged for the appellant appears to me, as to the Lord Chancellor, to tell the other way. No doubt, if parties are numerous and issues complicated, Judges may find their duties onerous, and juries may run the risk of applying for or against one party the evidence properly applicable to another. But these are inevitable incidents affecting every day the most serious criminal and civil trials; and the evil must be mitigated as best it may by the endurance of the Judges and the intelligence of the jury. On the other hand, as I have said, it is surely for the advantage of the satisfactory administration of justice that those who complain of a common injury, and those who are charged with the commission of it, should all be enabled to assert themselves before the same tribunal—especially when that tribunal has ample power to prevent any individual wrong by the shaping of separate issues and the regulation of the course and conduct of the trial.

On the whole, I have no doubt that the appeal should be dismissed.

Lord Blackburn—My Lords, I am also of opinion that the appeal should be dismissed. I apprehend that the important question is, What is the Scotch law and practice as to joining parties, either pursuers or defenders? And as to that I think this much has been shewn clearly enough in the course of the argument, that the law and practice of Scotland with reference to that matter is different from that of England. If I were called upon formally to deliver an opinion upon it, I should be inclined to say that it was better. Certainly it is not at all inconsistent with natural justice, but at all events it is different, and it is by the Scotch law and practice, and not by the English, that this matter has to be decided.

Now, I find on page 32 of the respondents' case that the Lord Justice-Clerk, in delivering judgment upon the point of conjoining the three actions, states, and no doubt perfectly accurately, that from the earliest times in Scotland it has always been the course as much as possible to bring all actions that have any *contingentia* with one another together, and let them be tried together and disposed of together. The consequence of such a conjunction must frequently be to unite pursuers or to unite defenders, who according to the English practice would not be united as plaintiffs, and would not be united as defendants.

Then, my Lords, comes the question, whether in this particular case it is competent, according to the Scotch law, to join together in one suit these different pursuers, they being several different heritors who have properties on different parts of the river Esk, and claiming a declaration that the river is to be kept clear of pollution, and asking for an interdict to be granted against the defenders, several paper manufacturers on different parts of the river Esk, who do separately (for I quite agree that there is not the slightest evidence of their acting in concert) pour polluting materials into the river, so that the pursuers are, as they allege, injured by their acts in the process of that manufacture. Now, as to the joining of the different pursuers together, I agree with what has been said by my noble and learned friend the Lord Chancellor, that the authority is very strong indeed, that where you have different pursuers with one interest as against one defender, those several pursuers may unite their cases.

Authorities have been produced of instances where several defenders were sued together. But those cases are not nearly so strong or so numerous as the cases of conjoint pursuers; and if I had been called upon before this case was decided to say whether such a rule of practice of Scotch law was made out, I should have felt considerable hesitation about it. But when I look at the decision which was come to unanimously by the Court below in this case, it is perfectly consistent, in my

mind, with justice that I have no hesitation in saying that I should act upon it.

I only wish, my Lords, clearly to guard myself against being supposed to say that I think that according to the Scotch law it can at all be said that any pursuers may join together. Still less can it be said that a pursuer may join any defenders together. I think what is laid down by the Court below furnishes a very good rule, at least so far as this case is concerned; it is necessary that the cause of action about which the pursuers complain should be to some extent a united one—it is necessary that there should be some *contingentia*. I will not now inquire how much *contingentia* there must be, but some there must be. In like manner, with defenders it must be shown that there is some *contingentia* in their acts. I think when you come to look at it you get the answer to the question what is the test, as far as this matter goes, very well indeed from what was said by the Lord Justice-Clerk (at page 13 of the respondent's case) when he was deciding the question of competency. He says there—"The object of this action is to protect the river Esk from pollution by the operations of the paper-makers upon the river. It appears to me that that simple statement of fact, and of the object of the action, at once suggests the extreme propriety and expediency of the proprietors who are injured being all here, on the one hand, and the paper-makers who are said to inflict injury being all here, on the other hand. No doubt, if there were any rule in our practice which rendered it incompetent for parties having all a common interest in a stream, to pursue an action against parties who all contribute exactly in the same way to the pollution of the stream, we must give effect to that rule of practice. But I know of no such rule." I may observe that some part of the argument at your Lordships' bar depended upon the word "exactly" in the sentence. The different paper-makers upon different parts of the river Esk, who put refuse into it at places which are miles distant from one another, may not, in one sense of the word, be said to be doing "exactly" the same thing, but in the ordinary use of the word it has that effect given to it, and that is the sense in which the Lord Justice-Clerk uses the term. He then proceeds to say—"And therefore I am bound to look upon this as a question depending upon general principles. I think the case will be most fully and fairly tried by having all the parties called who are interested on the one side or on the other."

Now, my Lords, I think, confining that test to the cases to which it properly applies, it enables us to say that the process of the Scotch Courts is perfectly just—that if two pursuers or two defenders are so to be united in one action, they must have a *contingentia* uniting the two—connecting them with each other—and it must go so far as to show that the whole case will be most fairly and properly tried, and justice will be best done—indeed, that it cannot well be done otherwise—by all the parties being brought into the action. Applying that principle to the present case, I do not think any one can dispute that the real question raised in it was, Whether or no the proprietors of land along the bank of the Esk had a right to prevent the paper-makers from polluting the river—each paper-maker doing it separately at his own mill—but the general effect being to produce one nuisance to the heritors. I think no one can doubt, looking at the nature of the proceeding, that it was one in which justice as well as convenience required, or made it in every way desirable, that all the parties interested should be brought before the Court together and their cases tried in one action. I do not think it necessary to inquire whether there are other cases in which it might be done, but it seems to me that here it was rightly done; and if it is once established that here it was competent to bring the first action, so it seems to me self-evident that the Court were quite right in conjoining the other actions with it. I do not think it necessary to say anything upon any other point.

Lord Gordon—My Lords, in this case I happened to be counsel for the parties—first, for one set of parties, the appellants, and afterwards for the other, the respondents. I do not know therefore that it would be expedient that I should take part in the expression of opinion in this case further than by saying that I concur in the views which have been expressed by your Lordships with reference to the import of the opinions of the Judges of the Court below, as to the procedure and practice which ought to regulate these matters. The question is one which depends peculiarly upon Scotch procedure and practice, and it has come before a tribunal composed chiefly of Judges from the other parts of the United Kingdom than Scotland. Due weight has been given to the opinions expressed in the Court below in this matter, which is a matter regulated by procedure and practice, and the result of the opinions expressed by your Lordships is clearly in accordance with the views which have been expressed by the Judges in the Court below. The Judges in the Court below were unanimous upon the point; no difference of opinion existed either on the part of the Lord Ordinary or on the part of the Judges of the Inner House; and it certainly must be very gratifying to us in Scotland to find that, without expressing entire approval of the views which regulate the procedure and practice in these matters in Scotland, your Lordships are of opinion that there are great conveniences in following such procedure and practice.

I will only observe that in looking over the proceedings I do not find that it is alleged that any injustice has resulted from the combination of the parties at the trial. On the contrary, I find that the appellants had recourse to two proceedings, which were open to them for impugning the verdict if they thought proper. The first was an exception to the law as laid down; that, however, was not insisted upon; they apparently departed from their right to proceed in that way, and it is not now before your Lordships. The other was an application for a new trial upon the ground of the verdict being contrary to the evidence, but with respect to that it appears that the order was discharged with the consent of the appellants themselves. I do not find, therefore, upon the papers before the House any allegation that there was any injustice resulting from the adoption of the course which the Court followed in obedience to the practice which regulates them in these matters; and I therefore feel that I may express my concurrence in your Lordships' judgment without impropriety, especially as my noble and learned friends who have already spoken have

expressed a unanimous opinion upon the subject.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Wednesday, November 22.

JAMIESON (BELHAVEN'S TRUSTEE) *v.* HARVIE.

Property—Superior and Vassal—Charter—Coal—Reserved Right.

By charter of *novodamus*, in 1708, the superior reserved the coal in certain lands, and in all the titles following upon that charter the coal was in like manner reserved. The coal was not worked till 1875, when the vassal attempted to do so, and the superior brought a note of suspension and interdict against him.—*Held* (*aff.* judgment of Court of Session) that the vassal could not plead in defence titles prior to 1708, as he was not able to connect himself with these titles.

This was an appeal in a note of suspension for William Harvie, Esq., of Brownlee, Lanarkshire, against George Auldjo Jamieson, C.A., Edinburgh (sole trust disponee of Lord Belhaven), and Archibald Russell, coalmaster in Glasgow. The note of suspension prayed the Court to interdict the respondents "from working, excavating, bringing to the surface and taking away, or in any way disposing of or interfering with the coal or coal-seams within the lands described in the titles of the said Lord Belhaven as 'the three-score and five acres of the five-pound land of Brownlee, lying on the south-west side thereof, and upon the east and north-east side of Garion-Gillburn, and next adjacent to the deceased Robert Hamilton's lands of Garion.'"

The suspender was superior of the sixty-five acres in question, of which the deceased Lord Belhaven was proprietor, and the ground of suspension was that the coal in the lands were reserved to the superior. Lord Belhaven's predecessors, the Hamiltons of Wishaw, had been proprietors of the sixty-five acres since 1708, in which year they acquired them by charter of *novodamus* from Daniel Carmichael of Mauldslie, therein described as "immediate lawful superior of the lands," by which he disponed—'All and Haill the said three score and five acres of the said five-pund Land of Brownlie, lying on the south-west side thereof, and upon the east and north-east side of Garine Gillburn, and next adjacent to the said William his lands of Gairen; together also with the said lands of Coblehaugh and Peelhouse, and all oyer pairts, pendicles, and pertinents of ye said five-pund land of Brownlie, lying on the west side of Gairen Gillburn; together also with the woods, fishings, and haill pertinents of the said lands hereby disponed: excepting and reserving to me, the said Mr Daniel Carmichael, and my heirs furth and from this present charter, the whole coals, coall-heughs of the said sixty-five acres of land above written, hereby disponed, with liberty and privilege to me and my foresaids to set down shanks, put in heads, make levels, and roads for coal-heughs in any part of the said sixty-five acres of land,—the said William Hamilton and his airs and successors being always satisfied for what damnage shall be sustained thereby in ye corns and grass of the said lands, all lying within the barony of Mauldslie and Brownlie, parochin of Carlouck and sheriffdom of Lanark."

The charter of *novodamus* further set forth that Hamilton of Wishaw had, by a disposition and procuratory of resignation *ad remanentiam*, disponed to Mr Daniel Carmichael, his immediate lawful superior of the lands and others mentioned in the deed, "all and haill the five-pound land of Brownlee, of old extent, with its parts and pertinents, reserving to him, the said William Hamilton, furth of the said disposition, the number of three score and five acres of the same lands, lying upon the south-west side thereof, and upon the east and north-east side of Garion-gill Burn; and also reserving to the said William Hamilton and his foresaids the lands of Coblehaugh and Peilhouse," and certain other pertinents. The disposition and procuratory of resignation was not at the date of this case extant, but the respondents founded upon the narrative in the charter of *novodamus* as showing that the sixty-five acres in question were not included in the resignation.

Of the same date with the said charter of *novodamus*, David Carmichael granted in favour of the said William Hamilton a charter of apprising and *novodamus*, whereby he disponed "to his well-beloved William Hamilton of Wishaw, his heirs and assignees whomsoever, All and haill the £5 land of Brownlee of old extent, together with all and sundry manor-places, houses, biggings, yards, orchards, woods, fishings, coals, coal-heughs, mosses, muirs, meadows, and haill other parts, pendicles, and pertinents of the same, lying and bounded in manner mentioned in and conform to the original rights and infeftments of the said lands; excepting always the feu-farm rights granted to Gavin and John Davidsons, portioners of Brownlee, and their authors, of a proportion of the said lands, and his right to the coals of the said parts, all lying within the barony of Mauldslie by annexation, parish of Carluke and sheriffdom of Lanark. Which lands and others above written, with their pertinents, were by said charter declared to have pertained heritably of before to the deceased Claud Hamilton of Garion, held by him, his predecessors and authors, immediately of him the said Daniel Carmichael, his predecessors and authors, and were duly and lawfully apprised, conform to the several decreets of apprising and decreet of adjudication (to all of which the said William Hamilton had acquired right), therein mentioned, obtained at the instance of Robert Whitehead of Parck, and others against the said deceased Claud Hamilton of Garion, as lawfully charged to enter heir in special to the deceased Claud Hamilton of Garion, his father, in the lands and others above specified."

In defence, Jamieson pleaded that he was entitled to go back beyond 1708, and found upon the titles in favour of the Hamiltons of Garion, who were the predecessors of the Hamiltons of Wishaw. Down to the year 1622 the whole five-pound land of Brownlee belonged both in property and superiority to Livingstone of Jerviswoode, who in that year feued out the whole of the land as follows:—