consequences of vitious intromission. Universal liability is by no means the necessary consequence of vitious intromission, and in the present case I would be slow to sustain any claim of universal liability against the defender. But if there has been *de facto* intromission without a title with the estate of a deceased to a certain extent, it cannot on any good ground be contended that the good faith of the intromitter affords defence against a claim to that, or to a less extent, by a creditor of the deceased." The other Judges concurred, and it appears that the case was one in which the *bona fides* of the intromitter was unusually clear, for the deceased was a woman who had borne an illegitimate child, leaving some money on deposit-receipt, and the bank where it was deposited paid it, on the footing that the amount was not sufficient to warrant the expense of confirmation, on receiving a discharge from the whole of the deceased's relatives; and yet the defender was held a vitious intromitter to the extent of the money—about £90—which he had received from the bank without taking out confirmation, and responsible on that ground to a certain creditor of the deceased woman in a claim within that amount.

If the principles applied in *Wilson* v. *Taylor* were sound, it seems to me that they lead straight to the decision of this case in favour of the pursuer to the extent of £46, 5s. 7d. The amount of the cheque was undoubtedly part of the estate of the deceased James Christie at the time of his death. He alone had the right to cash it. What he was to do with the proceeds afterwards was for subsequent adjustment. The defender admittedly intromitted with the cheque, first by abstracting it from the repositories of the deceased, and then by exchanging it for another cheque in his own favour. This was, in my opinion, a vitious intromission, both because it was intromission without the shadow of a title, and also because there was a certain amount of clandestinity in it, at all events as regards the pursuer. Lastly, no amount of honest belief that the cattle were the property of himself and his family could save him from the consequences of intromission to the extent of the amount intermeddled with. I should therefore be in favour of recalling the Sheriff's interlocutor and giving decree for £46, 5s. 7d., with expenses in both Courts.

But your Lordships are deciding otherwise. I cannot pretend to regard your decision otherwise than with regret and apprehension. It not only defeats a just claim, with which the Sheriff himself expresses "much sympathy," but it rewards with success a proceeding of the most irregular and, as I think, most reprehensible kind. If that were all, its effects might end with the case in hand. But I am apprehensive that it will encourage the belief among people who already perhaps have not too scrupulous a regard for regularity of procedure, and who certainly have unusual facilities for tampering with the moveable funds of deceased persons, that they are safe to disregard the check—"the only effectual check" as Mr Bell describes it—afforded by confirmation, and to act upon their own ideas of what they are pleased to consider equity.

The Court pronounced this interlocutor—

"Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore affirm the said interlocutor: Of new assoilzie the defender from the conclusions of the action, and decern. . . ."

Counsel for the Pursuer (Appellant)—M'Lennan, K.C.—Spens. Agent—George Stewart, S.S.C.

Counsel for the Defender (Respondent)—Murray—Munro. Agents—Murray, Lawson, & Darling, S.S.C.

Friday, December 20.

FIRST DIVISION.

[Sheriff Court at Hamilton.

FLEMINGS *v.* GEMMILL AND OTHERS.

Process — Summons — Decree — Defenders Sued Jointly and Severally — Decree against Some of a Plurality of Defenders Sued Jointly and Severally — Competency.

Where a summons concludes for payment against a number of defenders "jointly and severally," it is competent to grant decree against some of them, the others being assoilzied.

River—Pollution—Interdict—Reparation—Landlord and Tenant—Title to Sue—Liability for Pollution of Proprietor of Houses though not in Occupation thereof—Liability of Every Contributor to Pollution—Damage.

Tenants in a farm sued a number of upper proprietors on a stream which flowed through their farm, to have them interdicted from polluting the stream, and for damage alleged to have been caused to their cattle through drinking the water of the polluted stream, some having died, the milk production having been diminished, and the general health and consequently value of the herd having deteriorated.

Held (1) that the tenants had as good a title to prevent the pollution as the proprietor would have had, the tenant being by force of the lease the assignee of the proprietor's title to every extent that was necessary for his protection in the lease; (2) that the defenders, though they were not the occupiers of the houses from which the pollution came, and consequently were not the immediate authors thereof, were responsible, inasmuch as it was the natural consequence of the way the houses were constructed, these having, though fitted

with dry closets only, drains with syvers and jaw-boxes, through which pollution might be conveyed to the stream; (3) that if it were established that a defender contributed materially to the pollution, he might be held liable jointly and severally with the others for the damage caused; (4) that damage to the general health of the cattle might be established without any specific ailment being proved; and (5) that in such a case interdict *de plano* should not be granted—*i.e.*, before the defenders had had an opportunity of adopting remedial measures.

On 4th July 1906 Alexander Fleming, James Fleming, and John Fleming, all farmers at South Netherburn Farm, in the parish of Dalserf, Lanarkshire, raised an action in the Sheriff Court at Hamilton against James Gemmill, coalmaster, Glasgow and Netherburn; James Nimmo & Company, Limited, coalmasters, Glasgow and Netherburn; William Barr & Sons, coalmasters, Larkhall; the United Collieries, Limited, coalmasters, Glasgow and Netherburn; William Cooper, bricklayer, Blackwood, by Kirkmuirhill; and Charles Surgeoner, grocer, Netherburn, "all jointly and severally." In it they prayed the Court "(*First*) To ordain each of the defenders to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried from their collieries, works, houses or offices, and others attached to same, into the stream or burn known as the Netherburn Burn or Dalserf Burn, at any point in the course of said burn on the pursuers' farm of South Netherburn, or at any portion of its course prior to entering on the lands of said farm, any poisonous, noxious, or polluting liquid, whereby the water of the said burn is rendered unfit for the use of man or beast, and in particular all sewage and coal washings; and (*Second*) to grant a decree against the above-named defenders, ordaining them, jointly and severally, to pay to the pursuers (*First*) the sum of £60 sterling, (*Second*) the sum of £78 sterling, and (*Third*) the sum of £176 sterling. . . . . ." The sum first sued for was alleged damage through the death of three heifers and a cow; the sum second sued for was alleged damage through reduced amount of milk produced by the herd of cattle on pursuers' farm; the sum third sued for was alleged damage through general deterioration in health and depreciation in value of the herd.

On 26th March 1907 the Sheriff-Substitute (THOMSON), after a proof, pronounced this interlocutor—"*Finds in fact* (1) That the pursuers, who are tenants of the farm of South Netherburn, keep a stock of cattle on said farm, and water their cattle from the Netherburn and from the Broomfield Burn, which joins the Netherburn; (2) that illness broke out among pursuers' cattle in the autumn of 1905, and continued till the end of April 1906; (3) that this illness was caused by the cattle drinking the water of the Netherburn, which was contaminated with sewage; (4) that all the defenders, except the said James Nimmo & Company, the United Collieries, Limited, and William Cooper, contributed to the pollution of the Netherburn with sewage; (5) that as the result of the illness, two heifers and one cow died, the milk supply from January to May was diminished, and eight or ten of pursuers' cattle fell off in condition: *Finds in law*, in these circumstances, that the defenders (other than the three above excepted) are liable in damages to the pursuers for the loss thus resulting from the pollution of the burn: Assesses the damages at £115: Therefore ordains the defenders, James Gemmill, William Barr & Sons, and Charles Surgeoner, in terms of the first prayer of the petition; and decerns and ordains these defenders, James Gemmill, William Barr & Sons, and Charles Surgeoner, all conjunctly and severally, to make payment to the pursuers of £115 sterling; and finds them liable to the pursuers, conjunctly and severally, in expenses. . . ."

Note.—". . . [*After reviewing evidence*] . . . A question of law remains whether I can award the pursuers damages against the defenders who have polluted the stream, in view of the fact that the other defenders must be assoilzied, and that the pursuers' conclusions are for a joint and several decree against all the defenders. The point of law thus involved will have to be settled some day; at present it is, I think, open to question. There have been opinions both ways in the Supreme Court, and the result here would be so hard to the pursuers if I were to refuse them damages against the parties proved to be at fault, after a very long proof, that I am disposed to give them decree. I have the authority of Lord Moncreiff in *Robinson* v. *Reid's Trustees*, 2 F. 928, in support of this course—see also *Douglas* v. *Hogarth*, 4 F. 148, and *Baird's Trustees* v. *Leechman*, 10 S.L.T. 515.

"The remaining question is as to the amount of damages which should be awarded to the pursuers. For the two heifers and a cow which died I award £10, £11, and £14, or £35 in all. The third heifer probably died of lead poisoning. For deficiency in milk I award £30. . . . For depreciation in the value of the cattle a large sum is claimed. The pursuer Alexander Fleming suggests £200. . . . I think I may allow £50 on this head. These three sums of £35, £30, and £50 amount to £115, for which I pronounce decree."

The defenders (Gemmill, William Barr & Sons, and Surgeoner) appealed, and argued —Before going into the merits of the cause it was desired to raise the question of the competency of the decree pronounced by the Sheriff-Substitute. The action sought decree for a sum of damages against six defenders jointly and severally. The decree granted was against three. That was incompetent. Though this had not been expressly decided, there was an abundance of dicta on the matter—*Robinson* v. *Reid's Trustees*, May 31, 1900, 2 F. 928, Lord Moncreiff, at p. 931, 37 S.L.R. 718; *Douglas* v. *Hogarth*, November 19, 1901, 4 F. 148, Lord Trayner, at p. 150, 39 S.L.R. 118;

Baird's Trustees v. *Leechman and Others*, December 20, 1902, 10 S.L.T. 515, Lord Kyllachy, at p. 516; *Mackersy* v. *Davis & Sons, Limited*, February 16, 1895, 22 R. 368, Lord M'Laren, at p. 370, 32 S.L.R. 277, *followed* in *Wallace* v. *Braid and Others*, July 19, 1898, 6 S.L.T. 118. To make such a decree competent some such words as "and severally," or "severally or one or more of them," should have been inserted in the prayer—*Cook* v. *Barnton Hotel Company, Limited*, June 12, 1900, 2 F. 1011, 37 S.L.R. 757; *Caughie* v. *Robertson & Company, Limited*, October 15, 1897, 25 R. 1, Lord Moncreiff at p. 3, 35 S.L.R. 3.

Argued for the respondents (pursuers)—The decree was competent. Both by practice and decision the words "jointly and severally" in a summons had a supplementary meaning in addition to the primary meaning of the separate words. The prayer was in effect a triple one for (1) joint liability, (2) several liability, and (3) each according to his own liability. That certain defenders were not found liable did not free the remainder from joint and several liability—*Leslie's Representatives* v. *Lumsden*, December 17, 1851, 14 D. 213, Lord Justice-Clerk Hope at p. 216; *Braidwoods* v. *Bonnington Sugar Refining Company, Limited, and Others*, June 23, 1866, 2 S.L.R. 152. The pursuers here could not make certain who had really done the damage.

At advising—

LORD PRESIDENT—In this case a farmer, the land in whose occupation bounds a certain stream, raised an action in the Sheriff Court against six persons whom he alleged polluted the stream, and the prayer of the petition was to ordain each of the defenders to abstain from causing a flow from their collieries or works or offices of noxious matters of various sorts, and "(second) to grant a decree against the above-named defenders, ordaining them, jointly and severally, to pay to the pursuer" certain sums of money which the pursuer alleges were the value of cattle which he lost through their being poisoned by the deleterious ingredients of the stream which they had drunk. There was a long proof on the matter, and the Sheriff-Substitute eventually found that the pollution had been caused by three of the defenders and not by the other three; and accordingly he pronounced an interlocutor in terms of the prayer against each of the three defenders, ordaining them to abstain, and granting decree jointly and severally against them for certain sums of money, being the sums at which he assessed the damage. An appeal was taken against that by the three persons found liable, but before going into the question of the merits the point was raised by their counsel that the decree given by the Sheriff was wrong, because it was impossible for the Sheriff to grant such a decree upon the prayer of the petition, in respect that the petition having asked for a decree for payment against six defenders, jointly and severally, it was impossible to grant decree jointly and severally against only three of the defenders.

Perhaps, at this time of day it is curious that the point is not perfectly settled, but counsel were unable to bring to our notice any authority deciding the matter, though there are many *obiter dicta* on one side and on the other. In that state of matters one must take up the matter on principle, and on principle I confess I do not think there is really much in the argument for the appellants. I can quite understand that for precaution's sake the common form of prayer has been more ample than the form in this case—that is to say, I think the common form of prayer or conclusion in a summons has been to find the defenders liable "jointly and severally or severally," or in some cases where special caution is taken such words may be added as these—"or as their several liability may be determined in the course of the process to follow hereon." But while that is so I do not doubt that under a prayer or a conclusion asking for a joint and several decree, it is quite possible to give decree in any form that joint and several liability admits of. As to what joint and several liability really means there can be no doubt. Mr Bell in his Principles, for instance, in section 56 says quite clearly that joint and several obligation means that "each is liable for the whole or for a share," and there is a passage to the same effect in the Commentaries. It would seem to me an absurd result that if in a prayer or conclusion you echo the words of obligation, you could not get all that the law says the obligation truly means, and upon that very short ground I put my judgment. But I have also discovered an old case which without settling the point seems to me to show that that is the same view as was held in old times. The case is that of *Hay* v. *Elphinston*, January 11, 1763, M. 14,658. What happened, as narrated in the report, was this—"James Hay brought an action against Charles Elphinston and John Gray, and also against James Hamilton of Hutchison, concluding for damages and expenses on account of their having wrongfully adjudged him to serve as a soldier during the subsistence of the Press Acts in the years 1757 and 1758.

"The Court by interlocutor of the 6th of August 1762 found the whole defenders conjunctly and severally liable in £200 of damage and expenses.

"The defenders having reclaimed by joint petition, which came to be moved on the last day of the session, it was refused as to Mr Elphinston and Mr Gray, but as some of the Judges seemed to be of opinion that Mr Hamilton was not equally guilty, the pursuer, in order to be free of any further litigation, agreed at the bar to pass from that gentleman, upon which he was assoilzied.

"The pursuer having extracted the decreet, and charged Mr Elphinston and Mr Gray with horning, a bill of suspension was offered in their names, in which, besides repeating the argument pleaded for them in the original cause, they further insisted

that in respect of the pursuer's passing from the other defender Mr Hamilton, they could only be liable in two-thirds of the sum charged for."

In that they were found to be wrong, and the inference to be drawn from the procedure in the action seems to me to be this. At that time reclaiming petitions were dealt with upon their own merits, and it was not necessary as it is now, according to our practice, to recal the interlocutor reclaimed against, at least in part, before proceeding to vary it. An interlocutor used to be pronounced which gave effect to the alteration desired by the Court without disturbing the original judgment, and that was what was done here; the reclaiming petition was refused as to Mr Elphinston and Mr Gray, and upon counsel at the bar passing from Mr Hamilton, that gentleman was assoilzied. But the old decree was left alone, and I think it is quite clear that the decree which the pursuer extracted was the original decree in which the three defenders were found jointly and severally liable—that is to say, he went upon the old decree, and he charged Elphinston and Gray alone. That does not settle the point in the present action, but it shows, I think, that if the doctrine urged on the other side had been right, there would have been open a defence which obviously was not considered open, namely, that a decree against three defenders jointly and severally could never be a good basis for a charge against two defenders jointly and severally, where the third defender had in the meantime been assoilzied. Accordingly I have no doubt that the Sheriff here is right in so far as regards the question of the competency of the decree.

LORD M'LAREN — When an action is brought against several persons without the addition of words descriptive of the nature of their liability, then I take it that even if one of them should be assoilzied, or if the pursuer should pass from his action against him, the instance would still be good against the defenders who remained, the only question being whether they were liable jointly or severally. In the case I am now putting I think the better opinion is that they would only be liable jointly unless words denoting several liability were added. But then in order to avoid such a result, under which the pursuer would lose a part of his claim, the law authorises the use of the words "jointly and severally." These seem to me to cover the whole ground. The word "severally" implies that against whatever number of defenders a man proceeds, each is liable for the whole sum sued for, and the word "jointly" or "conjunctly" secures to those against whom the decree is made operative the right of rateable relief against the persons who have not paid. This, as I have said, seems to me to cover the whole ground. I am unable to see that the addition of the words "and severally" or the words "or severally" to the description in which "severally" is already contained can have any meaning at all, and it seems to me that the suggested addition is mere surplusage. I think that the conclusion as it stands is rightly framed, and that under such a conclusion it is perfectly competent to pronounce a decree in the terms pronounced by the Sheriff.

LORD PEARSON—The defenders here, six in number, were sued for payment of three separate sums of money, which they were to be ordained jointly and severally to pay to the pursuers, to make good certain damage sustained by them. Three of the defenders have been assoilzied, and the remaining defenders now take the objection that no decree can pass against them for want of the words "or severally, or one or more of them," or some similar words in the conclusion of the summons. The expression "jointly and severally" was originally part of the language of obligation, and imported a reserved right, on the part of the creditor of two or more persons in a divisible obligation, to hold them bound either each for his own share or each for the whole. The question as to the effect of using the expression in the pecuniary conclusion of a summons seems not to have been definitely settled in practice. Perhaps it would be more apt to use the expression "jointly or severally" in a summons. But I see no reason why the expression here used should not be regarded as sufficient to warrant the Court in pronouncing decree against all, or against each, or against one or more, even in different shares, according to the view which the Court takes of the liabilities of the various defenders on the merits, and this even although one or more of the defenders may be assoilzied.

The LORD PRESIDENT intimated that LORD KINNEAR concurred.

Thereafter the appellants further argued —(1) The pursuers were not *in titulo* to prosecute this action. They were but tenants, and the proprietor only had the right to insist on receiving the water of a stream from the upper proprietor unchanged in quantity and quality—*Duke of Buccleuch, &c.* v. *Cowan, &c.*, December 21, 1866, 5 Macph. 214, Lord Justice-Clerk Inglis at p. 216, 3 S.L.R. 138; *Armistead* v. *Bowerman*, July 3, 1888, 15 R. 814, 25 S.L.R. 612. As tenants to have a right of action they must prove nuisance at common law. (2) Further, this action was wrongly brought against the defenders, they being the owners of the property. As owners they were not liable merely *ex dominio* for their tenants' doings, but only if the matter complained of arose from the condition of the subjects let or the purpose for which they were let—*Duke of Buccleuch, &c.* v. *Cowan, &c. ut sup.*, Lord Justice-Clerk Inglis at p. 219; *Hamilton* v. *Dunn*, July 30, 1838, 3 Sh. and M. 356, Lord Chancellor Cottenham at p. 379; *Weston* v. *Incorporation of Tailors of Potterrow*, July 10, 1839, 1 D. 1218; *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92. Here the houses were not designed to cause pollution, and the owners were not liable

in interdict or damages for the tenants' misconduct. The tenants were the true authors of the pollution, and the pursuers should go against them—*Caledonian Railway Company* v. *Baird & Company*, June 14, 1876, 3 R. 839, Lord Gifford at p. 848–9, 13 S.L.R. 527. A landlord was not liable for all the wrongful acts of his tenants in polluting, if he had no reason to foresee pollution as a result of the drainage system—Lord Justice-Clerk Moncreiff at pp. 844–5. In the present case the drains were not meant to convey sewage to the stream. Further, the remedies by interdict and damages were distinct. Interdict was directed against a recurrence of the act complained of or in anticipation of its occurrence. Damages were sued for some act done in the past. A tenant had not the full rights of a proprietor in suing for interdict against pollution; he could not select among defenders, but must show that if interdict were granted the evil complained of would be cured. It might be more convenient to obtain interdict against the landlord than the tenant, but that did not also make the landlord liable in damages. To do that fault or negligence must be proved against the landlord, and that had not been done here—*Weston* v. *Incorporation of Tailors of Potterrow, ut sup.*, Lord Medwyn at p. 1226, and Lord Justice-Clerk Boyle at p. 1230. Nor was it competent to single out and select various polluters and to impose liability on them *singuli in solidum*. To do that the pursuers must prove concerted action on the part of the defenders—*Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*, June 5, 1894, 21 R. (H.L.) 39, Lord Watson at pp. 43 and 45, 31 S.L.R. 937. *Smith* v. *O'Reilly & Others*, February 13, 1800, Hume's Dec. 605, did not apply here, since here the element of concerted purpose was wanting, and that was necessary to infer *in solidum* liability—Stair, i, 9, 5; Bell's Prin., sec. 550. In any case the Court had right to be informed how far each defender had contributed to the pollution—*Duke of Atholl and Others* v. *Dalgleish and Others*, June 20, 1822, 1 S. 511. Where there was an obligation to relieve among defenders the pursuer must convene them all. In the course of the argument the Court referred to *Rich* v. *Basterfield*, 4 C.B. 783, 16 L.J., C.P. 273, and *Harris* v. *James*, 45 L.J., Q.B. 545, 35 L.T. 240, as English authority on the responsibility of a landlord for his tenant's actings.

Argued for the pursuers (respondents)—Here the defenders' tenants had polluted the stream and the defenders themselves were liable, the construction of the premises and their drainage system being an implied authorisation to pollute—*Duke of Buccleuch, &c.* v. *Cowan, &c., cit. sup.*, Lord Justice-Clerk Inglis at p. 219. The defenders were liable for their tenants' misuse of the drainage system, which they should have foreseen, the tenants being of the class they were—*Caledonian Railway Company* v. *Baird & Company, ut sup.* In any case an action for interdict would be good against the defenders as landlords —*Dunn* v. *Hamilton, ut sup.*, Lord President Hope at p. 872—even if negligence were not proved. As to damages, the landlord might not be liable merely *ex dominio*, but his fault or negligence would subject him thereto—*Weston* v. *Incorporation of Tailors of Potterrow, ut sup.*, Lord Medwyn at p. 1226, and Lord Justice-Clerk Boyle at p. 1230. As to the pursuers' title to sue, a riparian proprietor had interest to sue if his property on the banks of a stream was injured, and this right was transferred to his tenant by his lease as to an action both for interdict, and also for damages—*Collins* v. *Hamilton*, March 28, 1837, 15 S. 895. As to the joint delinquency of the defenders, the *onus* was on them to show that there were other polluters unconvened. If it was proved that those defenders called were polluters, then the element of *unum negotium* came in, and they were liable *singuli in solidum* —*Smith* v. *O'Reilly, ut sup.*, note. The case of the *Duke of Atholl* v. *Dalgleish, &c.*, was distinct from the present, the acts complained of being separate and separable, while here the polluters could not be distinguished one from another as to their acts.

Lord President—In this case questions have been raised both of fact and law. The case is a long one and there is a great deal of evidence, which I do not propose to analyse, because upon the result of it I come to the same conclusion as the Judge of first instance. I think it is proved that this stream is polluted, and that there is a material contribution from each of the three defenders, Gemmill, Barr, and Surgeoner. But I propose to say a word or two upon the questions of law that were raised in a very anxious and good argument at the Bar. First, the defenders raised the question of the title of the pursuers. They said that even admitting that there was pollution which rendered the stream less pure than it was before, and of which a proprietor could have complained, the right of a tenant was somewhat less; that a tenant could not complain of the mere deterioration of the quality of the water, but must raise the question to something equivalent to nuisance; and that the pursuers' case has fallen short of the proof which was necessary for that. I do not think there is any difference in the quality of the title, if I may use such an expression, of the proprietor and of the tenant in this matter. It seems to me that the tenant is the assignee of the landlord's title by the mere force of the lease to every extent that it is necessary to give it to him for his protection in the lease, and inasmuch as the subjects let include a stream, one of the natural uses of which is to water cattle at it, it seems to me that the tenant has every right which the landlord had to maintain the purity of the stream. In other words, he is the assignee of the landlord's title in so far as it is necessary for his own protection in the subjects let.

The second point is this: Those persons who are attacked, that is to say, the de-

fenders, are landlords but not occupiers. They are proprietors of different blocks of houses from which the pollution comes, and it was very strenuously argued that they were not liable because the wrong, if wrong there was, had been done by the action of their tenants and not by their action. In other words, that the filth which found its way into the stream was not anything for which they were directly responsible. In particular, it was pointed out that they had taken proper precautions in the planning out of their houses to arrange that filthy matter should not get into the stream by the establishment of dry closets, which of course have no drains communicating with the stream. The state of facts, however, is that while there were these dry closets there was also a liquid system of drains to which access was got by open syvers and jawboxes in front of the various cottages. This liquid system was run through a sort of cesspool, and then was irrigated upon the land which was upon the banks of the stream. Now upon this matter also there is a good deal of authority, and the difficulty in each case I think is to settle into which of the two categories the case is to fall. I take cases as representing the extremity, so to speak, on one side and on the other. As the one extreme I take the position of Lord Melville in the case of the *Duke of Buccleuch* v. *Cowan*, February 23, 1866, 4 Macph. 475. As the other extreme I take the case of the *Caledonian Railway Company* v. *Baird & Company*, 14th June 1876, 3 R. 839. Now in Lord Melville's case the *species facti* was this: Lord Melville, as proprietor of Melville Castle, joined along with the Duke of Buccleuch, who was proprietor of Dalkeith Palace, and Sir James Drummond, the proprietor of Hawthornden, in order to object to the pollution of the Esk by the paper manufacturers. Lord Melville himself had a property which he let as a mill. Against Lord Melville it was urged that he could not object because he himself—if there was pollution from the mill—was the author of it in respect that he was the proprietor. Lord Justice-Clerk Inglis laid it down that that depended on the terms of the lease, and that if Lord Melville had not by the terms of his lease in any way shown that he gave his tenants right to pollute, then the pollution was their act, and not his act. The case on the other hand of the *Caledonian Railway Company* v. *Baird & Company*, was a case where the Caledonian Railway Company, who had private rights in a canal, objected to the pollution of the water by the inhabitants of a mining village which belonged to Messrs Baird. The Messrs Baird had, as here, made provision for a system of dry closets, but none the less the pollution found its way into the canal, and the Court held that the Messrs Baird could be interdicted because they were responsible for what was happening. It is true that in that case the Messrs Baird seem to have assumed responsibility for what their tenants were doing, and further, that these miners were tenants at will—that is to say, their tenancy depended upon their being employed, and they were all on terms of contract which permitted of their being turned out on the shortest notice. But none the less in that case the law was pretty clearly laid down that if a landlord erects his premises in such a way that what may be called the natural result will be pollution, he will be liable, although in one sense he is not the person who personally contributes to the pollution. The truth is, it would be a very unfortunate result if it were otherwise, because if you had, in one sense, to catch the actual offenders, you would have to proceed to interdict every man, woman, and child living in the place. On the other hand, it is quite clear that where the pollution is due to the ultroneous act of the tenant and is not a thing which the landlord could foresee, then the landlord cannot be liable. In the case of *Baird* that very point was put by Lord Gifford, who observed that the landlord could not have been held answerable if the miner had run out of his cottage at night with refuse and thrown it into the stream.

When I come to apply the law to the facts in this case, the view I take of it is this: Although no doubt there was this provision of earth closets, there still was an *opus manufactum*, namely, the drain, by which impurities, put in at the syvers and jawboxes, would sooner or later find their way to the stream; and it would be childish not to suppose, from the known habits of such persons as the tenants of these cottages, that pollution would ensue. It is clear that, apart from the grosser form of sewage, there are many forms of sewage which certainly cause pollution, and which may find their way into the stream by means of a drain which is open as a receptacle for any slops that may be put into it. Therefore as this *opus manufactum* exists I think the landlord must be responsible for what happens in consequence of it.

Then there comes the question of what is to be done. The tenant, I think, is entitled to interdict, but, on the other hand, it has been your Lordships' invariable custom in cases of this sort never to grant interdict *de plano* as has been done in this case. Therefore I think the defenders here ought to have an opportunity themselves of submitting some scheme which may remedy the pollution complained of.

But there is another question in this case —the question of damage. The tenants here sue for damage to their cows, which ensued in respect of the effect on their health of the pollution, and that damage is divided into three heads. Three cows, that is, two heifers and a cow, died; there was a deficiency in milk in the whole herd, and there was a deterioration in the value of the herd of cattle themselves. The learned Sheriff-Substitute has granted for these three matters sums of £35, £30, and £50. Upon that also a legal question was raised, namely, as to whether there was conjunct and several liability in respect of the pollution for such damage.

It seems to me that there is. As soon as you find that there is a material contribution, then I think each person is, so to speak, *versans in illicito*, and he acts at the risk of being found jointly and severally liable along with other persons for the damage that may ensue.

But there remains the question of damage. Upon the second and third heads I think damage is proved—that is to say, I cannot doubt that these cattle were damaged by drinking bad water. There has been a good deal of somewhat startling evidence in this case as to the effect on the cattle of the water; but I cannot say that I think the evidence, although startling, is very satisfactory; and no wonder, as it is mostly brought out by reading an article of a well-known authority and then asking the witnesses if they agree with it. It seems to me that the article fails in this respect, that it does not exhaust the whole possibilities of the case. I do not think it helps the matter to show that you cannot have a specific disease without the bacteria or the microbe of that specific disease. That does not end the matter, because it does not exclude the possibility of the general health of any animal being reduced by the drinking of impure water; and although the Court is bound, as far as it can, to follow the course of scientific knowledge, and not to act upon antiquated notions, it does not seem to me that in this case we have yet had it proved that sewage is as good as pure water for cows.

Therefore upon the two latter heads I entertain no doubt. Of course on this matter of damage—it is a rough thing at best—I should not be disposed to alter the decision which the Sheriff-Substitute has come to. But upon the question of whether the cows that actually died, died of the sewage pollution, I think there is difficulty; and the conclusion that I have arrived at on that matter is that there must be a verdict of not proven. There is the unfortunate fact that in the only cow on which an autopsy was made the stomach disclosed lead. The symptoms of lead poisoning are perfectly consistent with the symptoms which were observed in the cows that died, and there is also the fact that the pursuers have not been able to exclude other sources of possible poisoning—namely, the Glasgow refuse which was upon the field, and which, containing paint pots, might supply the ingredients for lead poisoning. I think the case there has been left in an undetermined condition. Therefore I am for disallowing the first sum which is sued for, upon the ground that the pursuers have not satisfactorily shown that the death of the cattle was due to this cause. Upon the whole matter, I am for disallowing the first sum, decerning for the other two sums, and recalling the Sheriff's interlocutor so far as it interdicts, in order that the defenders may have an opportunity of submitting a scheme to somebody to be named by the Court, as is usual in these cases, before interdict should be pronounced against them.

LORD M'LAREN and LORD PEARSON concurred.

LORD KINNEAR was not present at the further hearing.

The Court pronounced this interlocutor—

"*Find in fact* (1) that the pursuers, who are tenants of the farm of South Netherburn, keep a stock of cattle on said farm and water their cattle from the Netherburn and from the Broomfield Burn which joins the Netherburn; (2) that all the defenders except James Nimmo & Company, The United Collieries, Limited, and William Cooper contributed to the pollution of the Netherburn with sewage; (3) that as the result of the pollution of the Netherburn, which was the natural water supply of the pursuers' cattle, the milk supply of the pursuers' cows from January to May was diminished and eight or ten of pursuers' cattle fell off in condition: *Find in law* in these circumstances that the defenders (other than the three above excepted) are liable in damages to the pursuers for the loss thus resulting from the pollution of the said burn: Assess the damages at £80: Therefore decern and ordain these defenders James Gemmill, William Barr & Sons, and Charles Surgeoner all conjunctly and severally to make payment to the pursuers of eighty pounds sterling and decern: Further, continue the cause that the said defenders last above mentioned may submit to the Court a scheme for the avoidance of pollution of said Netherburn: Find the pursuers entitled to additional expenses since the date of the said interlocutor of the Sheriff-Substitute, modified to three-quarters of the amount thereof as taxed: Remit," &c.

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