whatsoever." I refer to the judgment of Lord Young in the Court below, whose reasoning is to my mind entirely satisfactory, and I agree with his Lordship in thinking that the appellant's claim to be considered an heir of provision and tailzie is a hopeless contention.

Lord Fitzgerald—My Lords, at the close of the clear and most able argument of the learned Lord Advocate we were all agreed in opinion, but having regard to the magnitude of the stake we took time to consider the authorities which had been referred to, and also to see whether there was any question in the case necessary for our decision which we might require to be debated by the counsel for the respondents. My Lords, our further consideration has raised no difficulty, and we are all of opinion that the interlocutor of the Lord Ordinary of the 25th June 1881, sustained by the interlocutor of the Lords of the Second Division of the Court of Session was correct in law, and ought to be affirmed, and that the appeal to your Lordships' House should be dismissed.

My Lords, I entirely concur in the opinions which have been expressed by my noble and learned friends, and in the reasons which they have given for their conclusions. There is but one matter on which I desire to add a word to what has fallen from my noble and learned friends. My Lords, I am desirous for special reasons to avoid entanglement on the technical expressions of Scotch law; but divested of technicality it appears from the pleadings that the object of the pursuer was to obtain the reduction of the deed of entail of 1859, and a declaration that in implement of the directions of Colonel Gordon, the truster, contained in the trust-disposition of 1853, the trustees should execute a deed of entail in favour of the pursuer and the heirs whatsoever of his body.

The learned Lord Advocate admitted that in order to sustain the pursuer's contention he was bound to establish two propositions—first, that in the interpretation of the first disposition of 1853 we should read the destination to John Gordon as a destination to him and the heirs of his body, for otherwise a destination to him as institute and his heirs whatsoever would not be a good tailzied destination, and he would take in fee; and secondly, that according to what he alleged to be the true intention of the truster, we should interpret the disposition of 1853 as if it contained a declaration "*tertio*" that after the words "and failing such nomination, or of the persons so to be named and their heirs whatsoever," and between those words and the limitation "then to my own heirs whomsoever and their assignees," there should be a series of limitations in accordance with the settlement of 1833, or at least a limitation to the pursuer and his heirs whatsoever.

The necessity of establishing this second contention was manifest, for otherwise, following the exact words of the trust-disposition of 1853, a destination terminating in the heirs whatsoever of the entailer, and not limited to any particular description, would operate to close the entail, and the last substitute John Gordon would be enabled to dispose of the fee. It is on the second proposition alone that I desire to make an observation, as it seems to me to raise a question of construction, to be determined not by any rule of law confined to Scotland, but by a rule of law applicable to every part alike of the United Kingdom.

My Lords, I confess that I was somewhat startled by the second contention of the pursuer, so ably and perseveringly insisted upon by the learned counsel. My Lords, I quite agree that if it is necessary in order to effectuate the intention of the truster, we should apply to the trust-disposition that flexibility of interpretation so often followed in cases of executory instruments. But there is another rule applicable to trust-dispositions of an executory character, and which in my judgment ought to govern us in the construction of the trust-disposition of 1853, and that rule is, that where the truster (as in the present instance) has used terms of art, that is to say, technical terms, which have a known technical and settled meaning, we are bound to give them that settled and technical meaning, unless by necessary implication or some declaration of intention it is manifest that the truster intended them in some other and different sense.

My Lords, it could not be alleged that Colonel John Gordon of Cluny was inexperienced in Scottish conveyancing, or unused to technical terms, and I have not been able to lead myself to think that there is any reason why we should not give effect to the technical terms which he has used in the trust-disposition of 1853, according to their technical and established sense.

My Lords, in agreeing with your Lordships' judgment in a cause in which the subject of litigation is of such magnitude, it is gratifying to know that we are following a long train of Scottish decision, and that we are echoing the opinions of four most learned Judges who at present shed lustre on the Scottish bench.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuer—Lord Advocate Balfour—Benjamin, Q.C. Agents—A. P. Purves, W.S., and A. Beveridge.

Counsel for Defenders—Solicitor-General Asher—Davey, Q.C. Agents — Skene, Edwards, & Bilton, W.S., and Martin & Leslie.

Wednesday, July 26.

(Before Lord Chancellor Selborne, Lords O'Hagan, Blackburn, and Watson.)

INGLIS *v.* THE SHOTTS IRON COMPANY.

(*Ante*, vol. xviii. p. 653, and 8 R. 1006.)

Nuisance—Property—Interdict—Nuisance from Sulphurous Fumes.

The calcining operations of a mining company were found to have damaged the plantations belonging to a proprietor whose estate adjoined their works. It was *held* (*aff.* the judgment of the Court of Session) that the proprietor was entitled to protect himself by interdict, and that, in the whole circumstances of the case, the operations complained of should not be allowed to take place within one mile of the complainer's

lands; but (*varying* the judgment of the Court of Session) that the interdict should not absolutely prohibit calcining, but should prohibit the company from calcining in the manner hitherto practised by them, or in any other way that might damage the plantations or estate of the complainer by noxious vapour.

This case was decided by a judgment of the Second Division of the Court of Session on July 20, 1881, reported *ante*, vol. xviii. p. 653, and 8 R. 1006.

The Shotts Company now appealed, arguing, in the first place, that the state of the plantations attributed to the effect of their workings was in truth due to natural causes and neglect on the part of the complainer; and, in the second place, that the terms of the interdict were too wide, both in respect that all kinds of calcination were absolutely prohibited, and that the distance within which the prohibition was to take effect, viz., one mile, was excessive.

At delivering judgment—

Lord Chancellor— My Lords, there is, I think, no question of law in this case, the doctrine of *Hole* v. *Barlow*, 27 L.J., C.P. 207, having been overruled in England, and having been in my opinion rightly rejected as erroneous in principle by the majority of the Judges in the Court below.

The question of fact, whether the operations of the appellants have been attended with damage to the plantations of the respondent, is one on which none of your Lordships entertain any doubt after the conclusion of the arguments in support of the appeal, in the course of which the whole evidence in the case was fully read. I agree generally with the estimate of the effect of that evidence formed by the Lord Ordinary and by the Second Division of the Court of Session, and it is therefore unnecessary to observe upon it in detail. The conflict, which at first sight seems considerable, is as to matters of opinion rather than matters of fact, and I think the direct evidence relative to the facts of the actual case is entitled to much more weight than any inferences drawn from what is represented as the effect of operations more or less similar in other places.

It is unfortunately much too common in cases of this kind for scientific witnesses to differ from each other on points as to which it might have been expected *a priori* that there would be no room for such controversy, and when these differences do exist, judges or juries must, as in all other cases, decide as well as they can between them. Here it is not, and it cannot be denied, that by the operations in question large quantities of sulphurous acid have been during considerable periods of time continually discharged into the air in the form of vapours, noxious in that state, and which, unless neutralised by mixture with ammoniacal vapours converting them into sulphate of ammonia, must soon have become changed into sulphuric acid, a substance very much more noxious.

[His Lordship then referred to the evidence of scientific witnesses as to the presence of sulphuric acid, and its destructive effect on trees.]

There is much and trustworthy evidence to the effect that the plantations presented generally a healthy and thriving appearance until the operations in question began in 1877, and that from that time forwards their appearance began to change, that a large number of trees which had previously been or seemed healthy became more or less blasted and diseased, and many died, and that this mischief was progressive, especially in the lines of those winds which most frequently blew the smoke from the bings over the estate.

It was attempted by the appellants to account for all this mischief by natural causes, and to meet the difficulty arising from the coincidence of time by suggesting that the effects of those causes may have been aggravated by the prevalence at that time of unusually wet and cold seasons, and that the trees only then attained that stage of their growth at which such effects would be likely to be developed. I have no doubt that to some extent the natural causes suggested by the appellants' witnesses, or some of them, were really in operation in these, as they would probably be in most, plantations similarly situated, and planted or managed on a similar system. It is also highly probable that when to the ordinary operation of such natural causes was superadded the deleterious influence of sulphurous vapours, those trees which from wet or bad soil, from overcrowding, from want of light and air, or from any other source of disease or decay, were weaker than the rest, might suffer most or soonest. Whatever might be the causes at work, it is perfectly consistent with experience that strong plants would resist them longer and better than weak, and that a noxious vapour or fluid descending more or less intermittently in a diluted state might operate upon the stronger plants only as a slow poison requiring continuance during a considerable space of time before its effects would become fully manifest. This might well account for much difference in the appearance of neighbouring trees even of the same kind.

And the fact also relied upon by the appellants, that some of the trees and plants which withered and died were more distant from the bings than others which did not in like manner suffer (including some hedges and low shrubs very near the Incline No. 1), is of much less weight than at first sight it might seem to be when the variations of atmospheric influences, on which the incidence of the deleterious vapours must always depend, are taken into account. The vapour might not be converted from sulphurous into sulphuric acid until it had travelled some distance, and as Mr Dupré, the appellants' witness, said in cross-examination, "the places at which the fumes would alight would no doubt vary according to the aerial conditions at the time, within limits. Primarily the fumes start upwards. They may or may not be earlier or later brought to the ground according to lateral winds and other conditions, and in certain conditions portions comparatively near the bing may be less affected than portions further away."

Without dwelling further on the general case, I content myself with adding that the natural causes alleged by the appellants appear to me to be inadequate to account for the appearances and facts in and subsequent to 1877, described in the evidence of the pursuer and those of his witnesses who were best acquainted with the woods, and in the tabulated statements which are printed in the appendix to the case.

It being therefore clear to my mind that the

respondent is entitled to an interdict against the continuance of the operations of the appellants, so as to prevent further damage to his plantations and estate, the question which remains is as to the proper form and extent of that interdict. The Court of Session has prohibited the appellants "in all time coming from calcining ironstone or iron ore, or burning blaes, on any part of the lands of Penicuik within one mile of the pursuer's lands." The appellants object to this as too wide, first, because the prohibition is absolute against any calcining at all within that distance, even by processes different from that hitherto adopted by them, and even if by any alteration or improvement of those processes all discharge of noxious vapours capable of doing damage to the plantations of the respondent should be avoided; and secondly, because they say that the interdict ought to have been general against calcining so as to do damage to the respondent's plantations or estate, without fixing any distance, or at all events, without fixing so great a distance as one mile.

The first of these objections appears to me to be well founded in principle. The evidence, according to the view which your Lordships take of it, proves that the operations of the appellants, as hitherto carried on by them, have been, and if continued to be carried on in the same manner will continue to be, injurious to the respondent's estate. The interdict, therefore, may probably prohibit the continuance of those operations in that manner, but I am of opinion that so far as it goes beyond this it ought to be qualified, so as only to prohibit any other manner of calcining which may cause noxious vapours to pass over and occasion damage to the respondent's plantations or estate. The order appealed against ought therefore to be varied in that way, but I do not think that such a variation only ought to affect the costs of the appeal.

The more important question is that as to the limitation of distance. There is, I think, no valid objection to fixing a specified distance for the purpose of such an interdict if it is justified by the evidence. If so justified, it is practically convenient, and may usefully narrow the field of any future controversy between the parties. By the conclusion of the summons it was asked that a limit of two miles should be fixed. The Court below has thought one mile proper, and your Lordships ought not, I think, to reverse the order in that respect unless you see reason, after fully considering the evidence, to think that it does or may unduly restrict the rights of the appellants.

After full consideration of the arguments of the Lord Advocate for the respondent, and of the Attorney-General in reply, I have myself come to the conclusion that there is sufficient proof of sulphurous fumes likely to cause damage to the respondent's plantations having been carried by certain winds to several parts of the respondent's estate, and other places, distant not less than one mile from the bings from which those fumes proceeded, and consequently that the limit of one mile fixed by the Court of Session is justified by the evidence in this case . . . . . .

I am therefore unable to say that the Court of Session has done wrong in prohibiting the continuance of the calcining operations, so far as relates to the manner in which they have hitherto been carried on, within the distance of one mile from the respondent's estate.

I propose to move your Lordships to vary the interlocutor granting the interdict by adding after the words "within one mile of the pursuer's lands" the following words, "in the manner hitherto pursued by them, or in any other manner whereby noxious vapour may be caused to pass over the pursuer's lands, or any part thereof, to the damage or injury of the pursuer's plantations or estate;" and subject to that variation to affirm the interlocutor appealed from, and to order the appellants to pay the costs of this appeal.

Lord O'Hagan—My Lords, I do not propose to occupy the time of the House by discussing at any length the great masses of evidence on either side which have already received ample consideration from your Lordships. I shall only indicate the grounds on which I concur with the opinion just delivered by my noble and learned friend.

The real question is one of fact. The conflict of proof is as great as the issue is important, but we have the judgment of the Lord Ordinary, sustained by those of the Lords of the Second Division, pronouncing in favour of the respondent as to the existence of an injury to his property, produced more or less by the works of the appellants. I say more or less, because Lord Young, who differed in the result from his colleagues, admitted that damage was done to the respondent's plantations by Incline No. 1, though he held that there was a failure of proof of such damage by Incline No. 2 and New Hearths. I think that the evidence preponderates strongly in support of the respondent's case, and that the appeal cannot be allowed. As to the existence of an injury to the plantations on the estate, the proofs on both sides combine to establish it. They concur in showing that in the year 1877, and in subsequent years, substantial damage was done. The controversy is as to the cause of that damage. The appellants say it had its origin in overcrowding and overshading, bad drainage and wet soil, the evil effects of the roots of old trees and the injudicious planting of new ones, the influence of weather, and other things. The respondent asserts that it was produced by the process of calcination, instituted by the appellants at three several places in the neighbourhood of his property, and blighting his trees to a considerable distance with sulphur fumes, which were fatal, wherever they were present, to the health and verdure of the woods. We have to determine to which of these causes the mischief, which was admittedly accomplished somehow, may justly be ascribed.

To me the proof as to the comparative condition of things before 1877 and afterwards appears on this issue very persuasive for the respondent. Up to that time it exhibits the trees as having been in a flourishing condition. Till then there had been no complaint, and no ground for any. But in that year the calcination commenced; contemporaneously with it the condition of the woods was altered for the worse, and from that time forth, at all events, the state of the trees was perceptibly and increasingly deteriorated. The leaves were scorched, the tissues were destroyed, the growth was stunted, and fungi seized upon the roots.

The witnesses to the change are beyond impeachment either as to their means of knowledge or their intentional veracity. The respondent himself, and several persons skilled in forestry

who were long familiar with the locality, depone to it, and leave no room for reasonable doubt that at that particular time some evil agency not before operative began to alter the condition of the woods. The argument *post hoc propter hoc* is not always a sound one, but if we are satisfied, with the Court below, that the diffusion of sulphurous fumes from the open bings was followed by damage to the plantations falling under their influence which had enjoyed vigour and health before, the conclusion that they stood to each other in the relation of cause and consequence seems very reasonable. And it becomes more so when we consider, assuming that the fact of the change is satisfactorily shown, how inadequate is the theory of the defence to account for it. The operation of the injurious influences on which it relies, such as the injudicious planting and the ill-drained soil, would be comparatively slow, and produce material effects only in a gradual fashion, but the proof represents the injury as having been rapidly created, and soon after the commencement of the calcination, which, on the other hand, must have acted quickly if at all, and made itself manifest, as the respondent says it did, by the injurious effects of the noxious fumes upon the theretofore healthy trees. I do not think that slowly acting natural causes can reasonably be supposed to have produced the rapid deterioration of the trees, even though all allowance be made for the assistance alleged to have been afforded to them by unfavourable weather.

Although the evidence, as in cases like this is usual, is very conflicting, it seems clear enough that the process of calcination at the open bings necessarily diffused large quantities of sulphurous acid, which were borne to considerable distances, in various directions, and at various altitudes, through the respondent's estate from 1877 till 1881. . . . .

And finally, by the observation of witnesses seemingly quite faithworthy, and as to this of witnesses on both sides, the injured trees are shown to have exhibited largely the "distinctive marks" described by the scientific testimony as belonging to the action of sulphurous acid. In addition we have the results of the tests applied for the respondent, proving the presence of such acid upon the leaves and various parts of the plantation, and at various distances from the bings, to which the smoke from them had brought it in varying quantities. And further, in corroboration of this part of the respondent's case, he produced several persons who had smelt the sulphur diffused by the calcinator, and tested it in many places, some of them a mile away . . . . .

It seems to me that the various classes of evidence to which I have shortly adverted fully sustain the view suggested by the state of things which arose in 1877. Soon after the commencement of the calciuation noxious matter is largely cast abroad, with probable injury of a kind definitely described to the trees it might affect; its actual presence upon them is shown by chemical tests and careful examination; and their new condition, contrasted with that in which they had been before, is exactly such as it was calculated to produce. I think that in these circumstances the respondent has established his contention, and that he is entitled to the interdict pronounced by the Lord Ordinary and the Court of Session, as well because of the injury he has already sustained as for the prevention of future and perhaps more serious mischief. It does not seem to me that the evidence of the appellants is at all sufficient to encounter the case so made against them. I see no reason, however, to impeach it as in any way inconsistent with the truth. The natural causes of deterioration to the woods, on which I have already observed, may have existed to a large extent; there may have been wetness of soil and injudicious planting under deciduous trees, and interruption of growth by roots which should have been removed. But these and the other matters on which the appellants rely do not appear to me to account sufficiently for the proved condition of the woods and the changes accomplished in 1877. It is necessary to the argument derived from them that we should eliminate all the proof as to the action of the bings, the discharge from them of the sulphurous fumes, and the presence of destructive acid upon the trees. If we attribute any evil influence to these things, the respondent is not disentitled to the intervention of the law for his protection from it, even though the condition of the grounds, or his own neglect or error, may have aggravated its injurious consequences.

If there were question of the amount of his damages and his right to compensation, it might be important to show that only to a certain extent he had suffered from the calcining operation, so as to relieve the appellants from responsibility for results produced by other causes. But it is enough for the maintenance of the interdict that they have been proved to some substantial extent to have given ground for complaint heretofore and for apprehension hereafter, and this being established, the appellants' proof, even if assumed to be true, fails to warrant their conclusion.

I do not go into further detail as to that proof. It has been very ably dealt with in the judgment of the Lord Justice-Clerk, with which in all its parts I fully concur. Neither do I feel at liberty to speak at any length as to the distances to which the sulphur fumes are proved to have been carried.

The entire evidence bearing upon that important matter, on which I had meant to comment, has been so minutely discussed by my noble and learned friend, that it is impossible to add anything usefully to his exhaustive observations. I shall only say that they convey the view which I was led to adopt on a careful consideration of the very able arguments of the Lord Advocate and the Attorney-General. I have no doubt that the Court of Session had abundant ground for holding that the fumes emitted by the bings were carried with the smoke at least a mile through the respondent's woods, and I have heard no sufficient reason for doubting that according to Scots practice or any other it was quite within its competence to select that limit for the operation of its interdict. It is important, however, that your Lordships should not be misunderstood as to your affirmation in this respect of the decision of the Court of Session. You do not, as I apprehend, mean to fix any absolute rule settling the distance within which in such cases an interdict should be allowed to operate. The special circumstances must determine in every instance the action of the Court, and according to them, *e.g.*, the lie of the ground, the mode of calcina-

tion, the existence or the absence of precautions against injury, the prevalence of particular winds at particular seasons, the height and disposition of the trees — the interdict may probably be allowed to have efficacy to a wider or more limited extent. We judge as best we can upon the evidence before us. Other evidence between other parties may probably induce a different ruling, and your Lordships do not design to make in this respect a rigidly binding precedent.

In another particular I agree with my noble and learned friend the terms of the interdict should properly be altered. As it stands it forbids all calcining in any circumstances and under any conditions or modifications within a mile of the bings. The prohibition is too large and stringent. It is conceivable that the process of calcination may, now or hereafter, be capable of being conducted in such a way as to make it possible so to deal with the fumes that they may be innocuous to a neighbourhood. We have before us incidentally, and without any view to this special point, evidence as to variance in the character of that process. In Durham and in Dalry it is carried on, not in open bings scattering broadcast without check or stay the noxious vapours, but in kilns, which may possibly render it less injurious. We cannot say how far industrial invention may go in discovering the means of making it more consistent with the health of vegetable life; and your Lordships would not desire, if this could be accomplished, to forbid or to restrict such operations as those of the appellants. I am quite of opinion that in this regard the interlocutor should be varied according to the view of the Lord Chancellor. In other respects I think it should be affirmed with costs, with the variation proposed by my noble and learned friend.

Lord Blackburn—My Lords, I think, notwithstanding some expressions in Lord Young's judgment which seem to suggest a doubt on the subject, it must be taken to be the law that if it is proved that the operation of the defenders cause real substantial injury to the property of the pursuer, he is entitled to have an interdict to prevent them from that injury, even though it be impracticable to make use of the valuable minerals belonging to the defenders without doing such injury, so that the effect of the interdict is to prevent those minerals being used. I do not think it is proved by the evidence in this case that the interdict will produce such an effect; but if it were, I do not think it would deprive the pursuer of his right to protection for his property. But I quite agree that it is essential to the pursuer's case that he should distinctly prove that the defenders' operations do cause real substantial injury. Whether that is proved or not must in every such case depend upon the evidence in the particular case. *Salvin* v. *North Brancepeth Coal Company* (9 Chancery Appeals, page 705) was a case in which it was held that this was not proved, and the decision as to the fact was, I must assume, correct on the evidence in that case. It can be no guide for those who are to determine whether it was proved by other evidence in another case.

I have listened very attentively to the comments on the evidence made by the Attorney-General and Mr Davey for the appellants, but they failed to convince me that the finding in fact of the Lord Ordinary was wrong on this question of fact, and I agreed with the rest of your Lordships who heard the case in relieving the counsel for the respondents from arguing on the question whether there was sufficient damage shown to entitle the pursuer to an interdict to some extent.

I think that the disease which it is shown prevailed in the pursuer's plantation was not distinguishable by any certain marks from disease which might be caused by other causes. Bad drainage, insufficient thinning, and injudicious planting will all produce disease; and as plantations are managed roughly, I do not suppose there are many plantations in which some disease is not occasioned which would have been avoided if the trees in the plantation had been as carefully attended to as the trees in an orchard are; and this, I do not doubt, was to some extent the case in the pursuer's plantations. And independently of these causes, trees may become diseased sometimes from their having attained such a growth that their roots get into a stratum of bad soil, and sometimes from causes which cannot be pointed out, though there is no work throwing off fumes in the vicinity. But I think that the evidence here shows that there was a great and marked change in the health of the trees contemporaneously with the beginning of those works, and that it was such as in other localities does arise from sulphuric fumes, which do produce disease, and after time death, in plantations elsewhere; and though it is by no means shown by the evidence what is the minimum quantity of sulphurous fumes which will cause these results, it is shown that a very large quantity of sulphur was sent off from the different bings, which when the wind blew towards the pursuer's plantations would drift and did drift across them in quite sufficient quantities to account for the disease which did occur contemporaneously with the using of those works. This, I think, fully justified the finding of fact that real substantial damage had already deen done, and that if the works continued, that which was now disease would become death. I do not think it necessary, after what has been already said, to enter into details of the evidence. It was not suggested in the Court below that there was any mode by which these works could be carried on so as not to emit sulphur fumes so as to produce a nuisance, and no inquiry was made as to whether this could be practically done; but it is impossible to say that there may not at some future time be a mode discovered by which this may practically be done. I think, therefore, that the interdict should be altered in the mode proposed, and I agree that this alteration should not affect the costs.

I think that on the evidence produced in this case it is established that if the works are removed to some distance from their present position, but not so far as to prevent their being a nuisance to the pursuer, his plantations will not only be injured but destroyed during the time which would necessarily be occupied in proving that the works in their new position are injurious; and I think, that being so, it is necessary for the pursuer's protection to grant an interdict forbidding the carrying them on within a specified distance. What that distance should be is a much more diffcult question. I come, however, on the evidence produced in this case, to the conclusion

that it would not be safe to fix the distance at less than a mile. I wish to guard against its being supposed either that I think that in every case it must be necessary to fix so great a limit, or that in no case can it be necessary to fix a greater one. As far as I am concerned, I proceed entirely on the evidence in this particular case as applicable to this particular locality.

Lord Watson—My Lords, this appeal raises no question except one of fact.

Notwithstanding the minute and exhaustive criticism to which the evidence was subjected by the learned counsel for the appellants, I see no reason to doubt that it is sufficient to establish what the Court below have found, that the calcining operations of which the respondent complains have already caused appreciable damage to his property, and will, if permitted to continue, be productive of further and more serious damage.

The respondent is therefore entitled to decree of interdict; but I agree with your Lordships that the fact that injury has arisen from the ordinary process of calcining ironstone in open bings does not warrant an absolute prohibition against calcining by any process whatever at any future time. The interlocutor of the Court of Session, varied in the manner proposed by your Lordship, will in my opinion meet the justice of the case. It will give the respondent the measure of protection to which he is entitled, and will not prevent the appellants from availing themselves of the resources of science, and resorting to some method of calcination by which the noxious fumes which have hitherto been allowed to escape into the air may be recovered or destroyed. I had an opportunity of considering in print the judgment delivered by the noble and learned Lord on the woolsack, and I so entirely concur in the observations therein made with respect to the leading features of the proof, that it is unnecessary for me to make any comment upon it.

Interlocutor of 18th March 1881, granting the interdict, varied by adding after the words "within one mile of the pursuer's lands" the following words — "in the manner hitherto practised by them, or in any other manner whereby noxious vapour may be caused to pass over the pursuer's lands, or any part thereof, to the damage or injury of the pursuer's plantations or estate"—subject to that variation the interlocutors appealed from affirmed. Appellants to pay the costs of the appeal.

Counsel for Pursuer—Lord Advocate Balfour—Solicitor-General Herschell. Agents—Inglis & Allan, W.S., and Connell, Hope, & Spens.

Counsel for Defenders—Attorney-General Sir Henry James—Davey, Q.C.—Young. Agents—Hope, Mann, & Kirk, W.S., and W. A. Loch.

Wednesday, July 26.

(Before Lords Blackburn, Watson, and Fitzgerald.)

COUNTESS OF ROTHES *v.* KIRKCALDY WATERWORKS COMMISSIONERS.

(*Ante*, vol. xvi. p. 585, and 6 R. 974.)

Reparation—Property—Damage done by Flood-water—Liability of Statutory Commissioners— Damnum fatale—*Kirkcaldy and Dysart Water-Works Act* 1867 (30 *and* 31 *Vict. cap. cxxxix*).

Statutory commissioners were authorised by Act of Parliament to construct waterworks, reservoirs, &c., under various conditions and restrictions, and, *inter alia*, that they should make good to a proprietor of lands, through which a burn that had been intercepted to feed one of their reservoirs passed in its subsequent course, any damage caused by reason of "any bursting or flood or escape of water" from the reservoir. *Held* (*diss.* Lord Blackburn, and *rev.* judgment of the Court of Session) that the commissioners were liable for damages to the lands of the inferior proprietor occasioned by a flood coming from their reservoir, whether that flood was or was not due to the existence of the reservoir.

This case was decided by the Second Division of the Court of Session on June 5, 1879, *ante*, vol. xvi. p. 585, and 6 R. 974. That Division assoilzied the defenders, adhering to the judgment of the Lord Ordinary (Lord Rutherfurd Clark). Lord Justice-Clerk Moncreiff dissented from the judgment, and the pursuer now appealed to the House of Lords.

At delivering judgment—

Lord Blackburn—My Lords, the question in this case depends entirely on the construction of two lines in the 43d section of the Kirkcaldy and Dysart Waterworks Act 1867, but though it lies in so small a compass it is one on which there has been a difference of opinion in the Court below, and there is also one in this House.

The Act in question authorised the commissioners to impound the waters of an affluent of the Lothrie Burn in a reservoir, and thence by aqueducts and pipes and filtering works to carry a supply of water to the towns of Kirkcaldy and Dysart. It required them also to make a compensation pond called the Ballo reservoir on the upper part of Lothrie Burn, and store up the water in it for the purpose of supplying compensation water to those interested in the lower part of the Lothrie Burn. The position and size of this Ballo reservoir are fixed with precision in the Act, and it is required that the works shall be securely made, and that a waste weir fifty feet wide shall be provided for the Ballo reservoir, so that the commissioners were left no discretion as to how they were to make and maintain this reservoir. If there came a fall of rain so great as to more than fill the reservoir, the surplus water must flow over the waste weir and thence flow down into the Lothrie Burn. To do anything to hinder this would have been a breach of the duty imposed by the Act upon the commissioners. What happened was, that there was a very unusual fall of rain—as much as six