quite out of place here; there is nothing here to be interpreted. What words could the defender use to make it clearer that he meant that he had had supper at the Albany Hotel, and that he had been overcharged for it? This is not one of that class of cases where there is anything ambiguous in the words that are taken as the libel. I think it was the late Lord Cockburn who used the illustration that one person meeting another might libel that other person by saying "Good morning," or "How are you my fine fellow," in a particular way. He might have meant by these words to say "You are the greatest scoundrel unhung." The words might be innuendoed to mean that, and evidence brought forward to show that when the person used these apparently innocent words he meant something libellous, and that those who heard him understood the words so. That is "innuendoing a nod," but that is not the case here. I wish to make it quite plain that in my opinion no innuendo is needed.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court substituted the issue proposed by the pursuer for that approved of by the Lord Ordinary, and appointed the cause to be tried at the sittings.

Counsel for Pursuer — Comrie Thomson—Rhind Agent—William Officer, S.S.C.

Counsel for Respondent—Pearson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

HOUSE OF LORDS.

Monday, March 1.

(Before Earl of Selborne, Lord Watson, Lord Bramwell, Lord Fitzgerald, Lord Halsbury, and Lord Ashbourne.)

HISLOP *v.* FLEMING.

(*Ante*, vol. xx. p. 298, 10 R. 426.)

Process—Appeal—Judicature Act (6 *Geo. IV. c.* 120), *sec.* 40—*Finding of Fact.*

Held that a finding "that the ignition of any heap or bing of 'blaes'" on certain lands "would cause material discomfort and annoyance to the pursuers" of a process of interdict, was a finding of fact within the meaning of the Judicature Act 1825, and not capable of being reviewed by the House of Lords on appeal.

Property—Neighbourhood—Nuisance — Superior and Vassal—Interdict.

The proprietor of an estate situated on the outskirts of a large city worked out the minerals and then proceeded to feu out the land for dwelling-houses of a superior class, there being left upon his land adjoining the feus large bings or heaps of mineral refuse or "blaes." After feuing had gone on to a considerable extent he proceeded to set fire to these bings, with the result of causing material discomfort to the feuars by the smoke thence arising. *Held* (*aff.* judgment of Second Division) that the feuars were entitled to interdict against the burning of the bings in such a manner as to cause material discomfort and annoyance to them.

This case is reported *ante*, vol. xx. p. 298, and (under date December 22, 1882) 10 R. 426.

The defenders, Fleming and another (Kelvinside Estate Company Trustees) appealed.

The interlocutor of the Second Division was as follows:—"Find that in the circumstances of the case it is unnecessary to pronounce any order in regard to the blaes-heap or bing of blaes on Semple's Farm, Kelvinside (Addie's pit, number 6): *quoad ultra*, find that the ignition of any other heap or bing of blaes of said farm, or in the vicinity of the pursuers' lands, would cause material discomfort and annoyance to the pursuers: Therefore sustain the appeal: Recal the interlocutor of the Sheriff of 13th July last: Affirm the interlocutor of the Sheriff-Substitute of 17th April last: Of new interdict the defenders from burning or calcining the said heaps or bings of blaes other than the heap or bing number 6 pit: Find the pursuers entitled to expenses."

At delivering judgment—

Earl of Selborne—My Lords, I believe all your Lordships are clearly of opinion that in substance the interlocutor appealed from is right. The sole question on which you thought it necessary to hear the Solicitor-General is one really of form and not of substance.

The first question which was argued was to what extent this interlocutor now under appeal was appealable under the Scotch Judicature Act. Now, by that Act it is laid down in the clearest possible terms that a judgment of this nature "shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor." The Act assumes, rationally I should say, that a finding must be either of fact or of law. Here you have a finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' lands would cause material discomfort and annoyance to the pursuers," and upon that a conclusion introduced by the word "therefore" is founded. Is that fact or is it law? The appellants do not pretend to say that it is law, and if it be not law it would seem from the very terms of the Act which I have read that it cannot be the subject of appeal. It is suggested that it is neither fact nor law; not fact because it relates to something which it is said is prospective, future, not actually in existence. Well, it is very difficult to follow such an argument, especially if, as here, it is not an immaterial finding, but a finding most material for the conclusions built upon it. Nobody can say that without such a finding it would be right to grant an interdict. The thing had not actually happened in that particular case, and of course, therefore, the finding of a fact as a thing past was impossible. Well, then, it is a most strange proposition that a finding so material as to jus-

tify a conclusion of law, though not itself a finding of law, is not a finding of fact within the meaning of the Judicature Act. In truth, even if one were to pass from law to practical reason, it is clear that there is a fallacy in saying that because the word "would" is a word of futurity the words "would cause" do not mean something which is properly a fact. It is a fact in nature which leads to the certainty being scientifically ascertained that from that fact in nature a certain consequence will follow.

My Lords, I will not dwell further upon that point, but will simply say that I entertain no doubt that within the meaning of the Judicature Act that is a finding of fact and unappealable; and having got so far, it appears to me also to follow as a certain inference that it is a right conclusion of law from that finding of fact that an interdict against a thing which would cause such material discomfort and annoyance is proper to be granted. The word "material" is of great importance there; it excludes any sentimental, speculative, trivial discomfort or personal annoyance of that kind—a thing which the law may be said to take no notice of and have no care for.

Of all the cases in England I think one of the earliest cases of brickmaking was *Walter* v. *Selfe* before Vice-Chancellor Knight-Bruce [April 15, 1851, 20 L.J., Ch. 433]; and all the cases which have followed it, and the cases at law also, have laid down this proposition in substance, and very nearly in words—if I am not mistaken—that what causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property is to be restrained, subject of course to any findings which the particular circumstances or the particular case may raise, and that although the evidence does not go to the length of proving that health is in danger, I will say no more than that the conclusion seems necessarily and properly to follow.

Therefore all that remains is to consider whether the form of this interlocutor is such that it ought to remain without alteration. I speak here with diffidence in the presence of my noble and learned friend who will presently address your Lordships, and who is more familiar than I can pretend to be with the usual course of the Court of Session in all matters of form; but I understand from my noble and learned friend that it is his impression that it is not usual at once to affirm an interlocutor containing an interdict, and to go on to pronounce a new interdict in the order of affirmance, unless, indeed, it is meant to interdict something more than has been interdicted by the interlocutor affirmed, and therefore that in that respect it may be more convenient to place the effect of the new interdict beyond all doubt by, in point of form, recalling the interdict in the interlocutor which is in substance affirmed and embodying the whole interdict which is to be operative in the order of the Inner House; and my noble and learned friend will state to your Lordships the manner in which he conceives that that ought to be done.

But then remains the question, whether the interdict should be so absolute as it appears here and in the interlocutor of the Sheriff-Substitute to be, against any burning or calcining of the heaps or bings of blaes, which we all agree are only those four which are mentioned in the interlocutor of the Sheriff-Substitute, other than bing No. 6? It has been suggested at the bar that possible inconvenience of an unnecessary kind, not beneficial to the pursuers and injurious to the defenders, might arise if the terms of the interdict are so absolute as they are there expressed to be. I own, my Lords, that I feel to a certain extent hesitation and difficulty, more of a technical than of a substantial kind, upon this point, and for this reason, that the finding is that the ignition of any other heap or bing would cause material discomfort and annoyance, and the interdict is only against burning or calcining. Well, "burning" and "ignition" *prima facie* seem to be very much the same thing. Whether any of the calcining is possible without burning I will not undertake to say, but I rather suppose that it was thought not to be so. Therefore technically it would seem that the interdict and the finding of fact upon which it is founded are co-extensive, at least so far as burning goes, and therefore that we cannot disturb the finding of fact. The other is a proper conclusion from it. My Lords, although it be a proper conclusion in that technical sense, yet I do not think it is the only way in which effect can properly be given to the finding of fact. That finding is reasonably to be understood with reference to those matters which are not in controversy, and from them I think your Lordships can collect that an ordinary open-air burning was what was in view, and was the only fact about which the parties came to the Court, and that none of them had any idea of any possible modes of dealing with these heaps which might involve the use of fire without producing the discomfort and annoyance complained of by the pursuers. And on the whole I cannot help thinking that it may be safer and quite consistent with justice, while adhering in substance to the interlocutor, to modify it in the way which has been suggested, that is to say, to interdict absolutely the burning or calcining of any of these heaps or bings of blaes in the manner which is complained of by the pursuers, adding, as was added in the *Shotts* case [26th July 1882, *ante*, vol. xix, p. 902, and 9 R. (H. of L.) 78], "or in any other manner so as to cause material discomfort and annoyance to the pursuers." Justice would be done in that way. It is not authorising new experiments—it is not inviting experiments which may produce discomfort and annoyance to the pursuers, because it would be as much a breach of that interdict to use any other method which had that effect as it would be to go on with the old method.

My Lords, I therefore move your Lordships, with those variations, to affirm the interlocutor. My Lords, I cannot help thinking that those variations ought to make no difference at all in the costs of the appeal, which ought to be paid by the appellants.

LORD WATSON—My Lords, I so entirely concur in what has been said by the noble and learned Earl, that it is not necessary for me to say more than a single word with regard to the merits of this appeal.

I think it is perfectly clear that the Statute 6 Geo. IV., chap. 120, contemplated that there should be only two classes of findings—findings of fact and findings of law. It appears to me

that the finding which in this case is said to be matter of opinion and not matter of law, is, without entering into or noticing the somewhat metaphysical argument of the Lord Advocate, clearly a finding of fact within the meaning of the statute; and it appears to me to be equally clear that the necessary result of that finding is that the respondents are entitled to protection against the threatened operations of the appellants of which they complain. But I am not disposed to deal with the word "ignition" or to construe the word "ignition," as has been suggested by the counsel for the respondents. I think that word must be read with reference to the record, and it is plain that all that the complainers represented would be injurious to them would be this, that if the appellants went on to set fire to the bings still unconsumed, in the same way as they had set fire to the bing at pit number 6, the result would be to their nuisance. I do not think they meant to aver, and I do not think the Court meant to find, that by no possible means, either at present or in the coming future, would it be possible to set fire to that mineral without causing material discomfort and annoyance. If it should prove to be impossible, the variations of the interlocutor which have been proposed by the noble and learned Earl will give them full protection, as I understand his proposal to be that the appellants are to be interdicted from burning or calcining these heaps in the manner which they have previously practised with regard to the heap at pit number 6, or from calcining or burning them in any other manner so as to occasion material discomfort and annoyance to the pursuers. If that interdict is complied with it appears to me that the grievance complained of by the respondent altogether disappears. I do not think we need apprehend any breach of interdict, or that operations will go on to their annoyance or discomfort, because it is a very serious matter to commit a breach of interdict—it not only lays the party open to an action for the damages which his neighbour has sustained through his forbidden operations, but it subjects him to serious penalties either of imprisonment or fine in the discretion of the Court. These appear to me to be ample safeguards; and I do not think that any circumstances have been shown in this case which would warrant us in pronouncing such a judgment as that by no possibility can this proprietor in the future get rid (and it is desirable in the interest of all parties that he should get rid) of this material which is lying upon his ground by the agency of fire, even although the discoveries of science should enable him to do so without causing the slightest discomfort or annoyance to any resident in the vicinity.

Lord Bramwell—My Lords, I am entirely of the same opinion. I have no doubt that the finding which is in question is a finding of fact. But supposing it is not, it certainly is not a finding of law; and it is only in the case of a decision in point of law that such a proceeding as this is the subject of appeal. It is of no use for the appellants to make out that this is something (if such a thing is possible) which is neither fact or law, because unless they can make out that it is law there is no appeal.

With respect to the finding, it appears to me—judging it from an English lawyer's point of view—that it is a proper finding. The word "material" is one used continually in endeavouring to explain to a jury what it is which would constitute a nuisance, as distinguished from something which might indeed be perceptible but not of such a substantial character as to justify the interference of the Court or allow the maintenance of an action in conformity with the legal maxim, "*Lex non favet delicatorum votis.*" It appears to me to be a right finding.

Just one word as to the last point; because one would not like to alter the interdict if it was inconsistent with the opinion which we have expressed as to the finding. I cannot think that the word "ignition" in the finding means the mere setting fire to the heap. I think that we must give a sensible meaning to it, and we cannot suppose that the mere setting fire to the heap would cause a material discomfort and annoyance to the pursuers. I think that it was not the intention of the Court to affirm that it was so, because they proceed not to interdict an ignition but to interdict a burning or calcining. Well, but then the Solicitor-General says, that if you once light it you cannot put it out. That is more than we know. It may have been said so in the evidence, but it does not appear in the judgment, and for my own part I do not believe it. I think it is very probable that when the bulk of the heap was on fire it would be extremely difficult to put it out; but upon its first ignition I cannot see that it could not be put out by cuting off communication with the rest of the heap or by bringing something to bear upon it. At all events, we do not know that it could not be put out.

Therefore I read the word "ignition" in the findings as meaning the same thing as is interdicted, namely, "burning" Then if that is so, one must take it to be an interdict against the burning in such a way as to cause material discomfort and annoyance; consequently, I think that the proposed alteration may be properly made without any inconsistency with the opinions which have been expressed as to the finding or interdict.

Lord Fitzgerald—My Lords, I entirely concur, and it appears to me that there is only one question in the case, namely, whether the interlocutor of the Inner House has as a matter of fact found what is stated? That is to say, that the burning of these bings would create discomfort and annoyance to the neighbours.

I entirely adopt the construction put upon the statute by the noble and learned Earl who proposed the judgment. Then upon that finding a question of law has arisen as to whether the finding in fact was sufficient in law to warrant the interdict which has been made. But I observe that the learned Lord Advocate did not contest that proposition; he did not venture for a moment to say that it was not sufficient in law to maintain the interdict if there had been this finding in fact against which he could not appeal—in truth, it would have been useless for him to do so. There is no difference in this respect between the law of England and the law of Scotland; they rest upon the same principle; both acknowledge the undoubted right of the proprietor to the free and absolute use of his own property, but there is

this restraint or limitation imposed for the protection of his neighbour, that he is not so to use his property as to create that discomfort or annoyance to his neighbour which interferes with his legitimate enjoyment.

There being no question of law in contest at all before us, I forbear from making the observations which if it had been contested I might have thought proper to make; and I shall only remind your Lordships of this, that it was clearly impossible to maintain a proposition of law favourable to the appellants; for the language in this case is, sensible and personal discomfort, and that which creates in your neighbour sensible and personal discomfort is a nuisance which the law prohibits.

Lord Halsbury—My Lords, I am entirely of the same opinion. I should only like to say, with reference to the supposed difficulty in construing the language of futurity, that it appears to me that there is a fallacy involved in taking these words as if it was absolutely essential to establish a fact which is past in order to establish that the proposition is a proposition of fact only. A large quantity of gunpowder, say, has been held to be a nuisance if stored up in a place unfit for the purpose, so that its explosion would do mischief. The fact of the explosive character of the gunpowder is an existing fact, but could it be said that in arguing about the danger and unlawfulness of having a large quantity of gunpowder near you, if the language was such as to import futurity—namely, that it would explode and that it would do mischief if exploded—that was merely the language of conjecture and prophecy and not an allegation of fact? It appears to me to be strictly an allegation of fact. The quality of the thing is such that it is dangerous and likely to do mischief, and if an explosion should take place it would cause disaster and injury to others.

My Lords, there is only one other observation which I should like to make, and that is with reference to a phrase which occurs in the judgment of the Lord Justice-Clerk, which I think may give rise to error hereafter. If the Lord Justice-Clerk meant to convey that there was anything in the law which diminished the right of a man to complain of a nuisance because the nuisance existed before he went to it, I venture to think that neither in the law of England nor in that of Scotland is there any foundation for any such contention. It is clear that whether the man went to the nuisance or the nuisance came to the man, the rights are the same, and I think that the law of England has been settled, certainly for more than 200 years, by a judgment of Lord Chief-Justice Hyde with reference to a tan-yard, where that learned Judge pointed out that tanning was a lawful trade, for everybody wore shoes, and it was for the public advantage that shoes should be made, but he said that it must be in a convenient place. Unfortunately the term "convenient" there was misunderstood in much later times to refer to convenience which it was very difficult to distribute, because as my noble and learned friend said the last time your Lordships met, the question was, convenient to whom? But as used by the Lord Chief-Justice it had a very intelligible meaning—it meant so convenient in the use that it should not be a nuisance to anybody, and in that sense of course the decision was right.

My Lords, it seems to me to be established clearly and beyond all doubt by a current of authorities, and to have been expressed with a high degree of precision and logic in the judgment in *Bamford* v. *Turnley* [31 L.J., Q.B. 286], by my noble and learned friend on my right [Lord Bramwell], that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction; and it appears to me, looking at the facts of this case (if we had to look at fact, which we have not) they are amply sufficient to establish such a state of things.

Lord Ashbourne—My Lords, I entirely concur in the opinions which have been delivered by your Lordships, and in the reasons upon which those opinions are based—I may say that I myself entirely concur in the view that, assuming the facts to be proved as stated, the interdict awarded by the Court below was an appropriate and proper remedy. My Lords, I am equally satisfied that it is both in accordance with justice and eminently reasonable to qualify that interdict by taking note of the processes which science may hereafter discover and shew to be appropriate, so as to guard the possible use of these heaps in such a way as to avoid causing discomfort and annoyance to the pursuers and others entitled to complain.

My Lords, I may say with reference to the argument of the Solicitor-General, very concise and very clear, that I am not satisfied that the qualification proposed can occasion the slightest possible inconvenience or injustice to the pursuers. The introduction of the words which have been mentioned by my noble and learned friend near me, and by the noble and learned Earl on the woolsack, does not indicate or suggest any encouragement whatever to adopt any process which can by any possibility work out material discomfort or annoyance to the pursuers or to anybody else.

Interlocutor of Second Division varied by deleting the word "Affirm," and substituting therefor the words "Recal the interdict granted by;" and by inserting after the words "April last" the words "And *quoad ultra* affirm the said interlocutor;" and by inserting after the words "No. 6 pit" the words "in the manner practised by them in respect of the said heap or bing No. 6, or in any other manner so as to occasion material discomfort and annoyance to the pursuers or any of them."

With these variations, interlocutor appealed from affirmed. The appellants to pay the costs of this appeal.

Counsel for Pursuers (Respondents)—Solicitor-General Davey, Q.C.—Ure. Agent—Andrew Beveridge, for Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders (Appellants)—Lord Advocate Balfour, Q.C. — J. P. B. Robertson. Agents—Grahames, Currey, & Spens, for H. B. & F. J. Dewar, W.S.