the lieges, or that it is necessary, in the public interest, that the same should be fenced: Therefore dismisses the petition."

The Sheriff (PATTISON) recalled this interlocutor, and found, *inter alia*, "That the said mill-lade, in its present state, is dangerous to the public: Finds that the petitioner does not ask to have a fence erected on any part of the Common Haugh at a distance from the mill-lade, but asks to have it erected at the side of the mill-lade between the Common Haugh and run of water therein; Finds that the Magistrates and Town-Council of Hawick have not alleged any servitude as existing in their favour, or in favour of the inhabitants of Hawick, drawing water from the said mill-lade, or of otherwise using the same, or made any averment relevant or sufficient to infer a servitude in favour of themselves or the inhabitants: Finds that their averments in regard to the use of said water by the inhabitants of Hawick are not relevant as a defence against the prayer of the present petition: Therefore, repels the whole pleas of the said respondents, and ordains the said John Wilson & Son, Dicksons & Laings, and William Watson & Sons, forthwith to erect a sufficient wall and fence along the said mill-lade where it adjoins the said Common Haugh."

The Magistrates appealed.

WATSON and H. J. MONCREIFF for them.

The Solicitor-General (CLARK) and FRASER for the respondents.

At advising—

LORD NEAVES—This is a case of a peculiar kind. It is an application at the instance of the Procurator-Fiscal of Roxburghshire against certain parties who are mill-owners and proprietors of a mill-lade skirting the haugh, which belongs to the town of Hawick. The allegation is that the mill-lade, which is below the level of the ground and at present is accessible to all, is in a dangerous condition, and the Procurator-Fiscal's object is to have it rendered more safe for the public and particularly for young children, by placing a wall along the town side of the lade. This is therefore a summary application *ad factum præstandum* in order to abate a nuisance.

In considering the case I do not mean to lay down any general rule, and it would be difficult to do so, as to the duties of procurators-fiscal. I do not enter upon the question, whether the Procurator-Fiscal is intended to enter upon a crusade upon all lochs, streams, and waterfalls, with a view of rendering them safe for persons of tender years, I am not prepared to affirm such a proposition. The peculiarity of the case is that the mill-owners who were convened along with the Magistrates of Hawick, and who are proprietors of the mill-lade, have never sisted themselves and are willing to be decerned to erect the fence at their own expense. The only parties who resist are the Magistrates of Hawick. And when we look at their statement there is no objection to the title of the prosecutor nor to the relevancy. Their objection is on the merits solely. That being so, it is not our duty to find out objections unless it is quite clear that the application was incompetent. What we have to deal with is the application of the Procurator-Fiscal which has been considered by the Sheriff, and which we are now asked to overturn. It might have been more desirable for us to see exactly how the title of the ground stood, but it seems to be admitted that the haugh is vested in the magistrates for the benefit of the public. There is a difficulty on the part of the Procurator-Fiscal, that he is not seeking to prevent a recent nuisance, but one which is admitted to have existed for the last seventy years. It has been proved that the haugh has been used for the purpose of bleaching, and young persons have been in use to bathe in the mill-lade. An objection is raised that the fence proposed will encroach upon the haugh. But from all that I see the fence is to be erected on the retaining wall of the mill-lade. Now a *mill*-lade is a kind of box, and the proprietor of the lade is proprietor also of the bottom and sides, so far as they are necessary to support the lade. If therefore the fence is erected on the wall of the mill-lade, it is no encroachment on the *solum* of the haugh.

What other objection is there? It is said that the inhabitants have the right of bathing in the lade, and of drawing water from it. But I do not understand that it is proposed to interfere with the right of access in any way. I suppose that the gates which it is proposed to erect will be provided with steps by which the water may be reached. I do not see any reason for preventing the mill-owners from erecting the fence on their wall, and so making the public safe. This is a very material consideration for owners of mill-lades, who are liable in damages if any accident should happen from their lades not being properly fenced.

I should not like that the Magistrates should be prevented from stating any objections to the access which is proposed, and therefore I propose that we should repel the reasons of appeal, and remit the case back to the Sheriff, to give the Magistrates an opportunity of stating any objections they may have.

The other Judges concurred.

Agents for the Magistrates—Scott Moncreiff & Dalgety, W. S.

Agents for the Procurator-Fiscal—Pattison & Rhind, W.S.

Wednesday, May 24.

FIRST DIVISION.

SELIGMANN *v.* THE FLENSBURG STEAM SHIPPING COMPANY, *et e contra.*

Reparation—Damages—Collision at Sea—Merchant Shipping Amendment Act, 25 *and* 26 *Vict.*, *c.* 3, § 54. Where, in an action of damages arising out of a collision at sea, the jury had found for the pursuer, who was the owner of the injured ship, and had assessed the damage at the £8 per ton of the tonnage of the defender's vessel, the full amount allowed by the 54th sect. of the Merchant Shipping Amendment Act, 1862, *held* that it was no ground for a motion for a new trial that the jury had not apportioned the damages, or given any indication in their verdict that the sum given was not all due to the shipowner, but was apportionable between him and the owners of the cargo.

Observed that the proper course was still open to the defenders to secure themselves if they thought they were in danger.

These were counter actions of damage arising out of a collision which took place in the Firth of Forth on December 15, 1870, between the steam ship "Flora" of Glasgow, belonging to Mr Seligmann, merchant in Glasgow, and the steam ship

"Prima," belonging to the Flensburg Steam Shipping Company.

The issue sent to the jury in the first case, viz., that in which Mr Seligmann, the owner of the "Flora," was pursuer, and the Flensburg Steam Shipping Company the defenders, was as follows: "Whether, on or about the 15th day of December 1870, in the Firth of Forth, the said steam ship 'Prima' came into collision with the said steam ship 'Flora,' whereby the 'Flora' was injured, through the fault of the defenders, to the loss, injury, and damage of the pursuer."

Damages laid at £15,000.

In the second action, viz., that in which the Flensburg Steam Shipping Company were pursuers, and Mr Seligmann defender, was in the same terms, transposing the names of the ships. Damages laid at £2000.

The jury found for the pursuer on the issue in the first case, and, in accordance with the direction of the Court, which was not objected to by the defenders at the time, assessed the damages at £4360, the full amount of the limit allowed by the Merchant Shipping Amendment Act, 1862, viz., at the rate of £8 per ton of the tonnage of the "Prima." On the issue in the second case they found for the defender.

The defenders in the first case obtained a rule to show cause why a new trial should not be granted; not so much upon the ground that the verdict was contrary to evidence, as that in giving their verdict the jury had not qualified it, as they should have done, in such a way as to show that the sum of damages awarded was apportionable between the pursuer, the owner of the vessel, and the owners of the cargo, whoever they might be, and was not all due to the pursuer individually. To leave the verdict as it was, they argued, was to leave them in a position of having a verdict standing against them for an amount of damages which they were not due to the pursuer.

The Court granted the rule.

WATSON and ASHER to show cause.

SHAND and MACLEAN in reply.

At advising—

LORD PRESIDENT—I think the objection made to the verdict by the defenders, the Flensburg Steam Shipping Company, is unfounded. It is not disputed that the verdict is in accordance with the evidence in so far as it ascribes fault to the defenders' vessel, the "Prima." It results from this that the defenders are liable in damages up to the limit fixed by the statute 25 and 26 Vict., c. 63, § 54, at £8 per ton of the tonnage of the vessel doing the damage. The full amount has been assessed by the jury. The original statute of 1854, § 514, makes provision for the appearance of other parties suffering damage, and for the apportionment of this sum of damages; but if no other claimant appears the pursuer is entitled to the whole of it. No other claimant has appeared, at least as yet, but that does not affect the present question, which is as to the existing verdict. I can see no reason for disturbing that verdict. Of course, if the party against whom it has been given conceives himself in danger, he will consider whether he will take the statutory remedy.

Agent for Mr Seligmann — James Webster, S.S.C.

Agents for the Flensburg Steam Shipping Company—Duncan & Mann, S.S.C.

Wednesday, May 24.

SECOND DIVISION.

BROWN *v.* STEWART, MOIR & MUIR.

Cautioner—Letter of Guarantee—Giving Time. A granted a letter of guarantee to B & Co. by which he became security to the amount of £50 for "all goods supplied by them to C & Co." The previous course of dealing between C & Co. and B & Co. was to settle accounts monthly, under discount at 6½ per cent. for prompt payment and 2½ per cent. discount for payment within a month. *Held* that A was not released from his obligation by the fact of B & Co. having accepted the bills of C & Co. at one month's date in payment of accounts due to them.

This was an action at the instance of Stewart, Moir & Muir, muslin manufacturers, Glasgow, for the price of goods sold by them to J. Nelson Ramsay & Co., Glasgow, and for which the defender, John Brown, grocer, Glasgow, was liable under a letter of guarantee granted by him to the pursuers.

The letter of guarantee was in the following terms:—"I hereby become security to you for all goods supplied by you to Messrs J. Nelson Ramsay & Co., 11 West Nile Street, between the sum of twenty-five and seventy-five pounds sterling; that is to say, when their account exceeds twenty-five pounds I will be responsible for the difference between that and seventy-five pounds, you assuming the responsibility of the first twenty-five pounds. JOHN BROWN."

Inter alia, the defender pleaded — "(1) The document founded on is not holograph of the defender, and is not tested properly. It is not stamped. It therefore constitutes no valid obligation on the defender. (5) The pursuers took bills or promissory notes from J. Nelson Ramsay & Co. for the amount of the account in question, and discharged the said account, or otherwise they, without the defender's knowledge or consent, gave to the said J. Nelson Ramsay & Co. time and indulgence beyond the ordinary period of credit, and they, by one or other of these acts, freed and liberated the defender from his liability, if it ever existed."

The Sheriff-substitute (DICKSON) held that the defender had been freed from his obligation, and issued an interlocutor to the following effect:—"Finds that prior to the granting of the said letter of guarantee the pursuers had supplied to the said J. N. Ramsay & Co. goods as in the account libelled on, and that upon the footing of the usual credit in the trade, which was that the accounts should be made up and rendered monthly—on the 20th of each month—and paid cash, under deduction of certain discount, at the expiry of that month, or on an early day in the following month; and that it was not consistent with the practice of the trade, or the usual course of dealing between the parties prior to the said letter being granted, to settle the said accounts by bill: Finds that the pursuers did, on 1st June, settle the amount due by J. N. Ramsay & Co. on that date by taking from the said firm two bills at one month's date, for £45, and £39, 11s. 7d. respectively, drawn by the pursuers on and accepted by the said firm; but finds it not proved that the account sued on was therefore