public; and the operations sought to be enforced by this petition require to be well considered, and it is right to see if the application is justifiable and that they are properly executed. Mr Shand argues that the Board of Supervision have no power to come to this Court unless there is obstruction to the drainage operations being carried through. The words of the Act, however, are—"in case any local authority shall refuse or neglect to do what is herein or otherwise required by law of them." "Neglect" is sufficient to entitle the Board to come forward. That there has been delay here in doing what is necessary for the sanitary condition of the burgh there can be no doubt, but the causes of that delay have been fully stated out he part of the Local Authority; and the course which your Lordships propose will bring matters into the condition which the health of the community requires. Since a specific scheme is referred to, we will delay to see how it is being carried out.

LORD BENHOLME—This petition raises a question of great importance. It is the first application of the kind presented by the Board of Supervision. I cannot object to what your Lordship proposes, and in making an observation as to the peculiar position in which this Local Authority is placed, I must not be held as differing from the course proposed.

The burgh of Montrose has been always considered a peculiarly healthy place of residence. It has a remarkable basin of water in its neighbourhood, filling and emptying with the tide, causing a great body of water to pass up and down alternately with great force and rapidity through a narrow channel, which is spanned by a draw bridge. This creates a sort of natural drainage, or, at least, a motion of the atmosphere, to which some think the peculiar healthiness of the burgh is due. I do not make that observation to suggest a doubt as to the propriety, or even necessity, of a regular system of drainage, or to insinuate that the Board of Supervision have been premature in their application; but to show that we should proceed with peculiar tenderness in dealing with these Police Commissioners, because it may be extremely difficult for men to determine what, on the whole, is the best system of drainage for the burgh. The basin to which I have referred, while it seems to suggest a facility of drainage, also suggests an inconvenience; for while the sewage at one time of the tide would be rapidly swept down into the sea, at another it might be swept up into the basin and be deposited at low tide upon its dry area. It will be extremely difficult to connect the proposed drainage with the sea.

Farther, I understand that some attempt is being made to utilise the drainage by irrigating some extensive links of sandy surface belonging to the town, which might afford a remuneration for the expense of the drainage operations. The practicability or possibility of this seems another reason why full time should be given to the local authority to consider the best mode in which the thing can be done. The question of time is not of much consequence in this case, as the burgh is exceptionally healthy. The Commissioners, I feel satisfied, will not propose any scheme which would be insufficient or abortive, but will, within a reasonable time, bring forward one complete and effectual scheme, whether in combination with irrigation or not. We cannot dismiss this petition: that is out of the question. But we can pause so as to allow the Commissioners a reasonable time to consider what scheme they may advance.

LORD NEAVES—I have arrived at the same conclusion. There is no doubt that there has been practical obstruction by the Local Authority, and that this petition has been properly brought by the Board of Supervision, but at the same time every sinner who repents ought to be treated with leniency, especially when he admits his sin. The Court has been told that there is a proposal for a united scheme of drainage, but, whatever kind of system may be thought of, the Court will see that it is thorough and complete. It may be that the intention is to drain the town properly, but your Lordships must see that there is not linked to the proposed scheme some provision calculated to delay it or diminish its efficacy.

The Court pronounced the following interlocutor—

> "Appoint the respondents to report within three months from this date what steps they have adopted to carry out the objects referred to in the answers: *Quoad ultra* supersede consideration of the case."

Counsel for Petitioners—Miller. Q.C., and Gloag. Agents—Murray & Falconer, W.S.

Counsel for Respondents—Lord Advocate and Shand. Agents—Webster & Will, S.S.C.

Friday, December 6.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ROBERTSON *v.* STEWART AND LIVINGSTON.

Nuisance—Pollution—Water, property and use of—Remit—Liability of Landlord.

Circumstances in which it was held—(1) that a nuisance was occasioned by both a smell or unpleasant and offensive odours emanating from a farina manufactory, and by the pollution of a burn occasioned by the said operations; (2) that the said burn was not a stream dedicated to manufacturing purposes, and that it had not for the prescriptive period been so polluted as to be unfit for primary uses; and (3) that the defenders were not entitled so to carry on the manufacture of farina as to cause a nuisance to the pursuer, either by offensive smell or by pollution of the stream.

Remit made to a chemist to examine the farina manufactory, and water courses and works therewith connected, and to report whether the smell emitted from the said manufactory, and the pollution of the stream occasioned by the said manufactory, could be prevented or abated, and in what manner.

One of the defenders was proprietor of the farina mill, and of the property on which it was situated, and the stream polluted was the boundary of the property. He averred that he had not caused or authorised the nuisance, and stated that he had let the mill under the condition that the tenant should not have anything about the farina works or elsewhere that should be a nuisance to the property or the

public. The proprietor therefore pleaded that he was entitled to absolvitor from the conclusions of the action relating to the nuisance. He, however, further pleaded, in defence, that he had the right to use the water of the stream for manufacturing purposes, and, in cross-examination of the pursuer's witnesses, he endeavoured to prove that in reality there was no nuisance. *Held* that he must be dealt with as a defender.

This was an action of declarator and interdict raised by Mr Robertson of Endradynate, Perthshire, against Mr Alexander Stewart of Derculich, and Mr Donald Livingston. The action was brought on account of a nuisance which the pursuer alleged was caused by a farina mill situated on the lands of Derculich, and occupied by the defender Mr Livingston. The estates of Endradynate and Derculich adjoin, and are divided by a burn called the Derculich Burn, near which the farina mill in question is situated. The nuisance was said to arise in two ways—(1) by offensive smell, which the pursuer alleged injuriously affected his mansion-house, lodge, and avenue; and (2) by pollution of the stream so serious as to destroy it—according to the pursuer's averment—for primary uses. The pursuer also complained that the defenders diverted the water of the stream to a greater extent and for other purposes than it was in use to be diverted prior to the operations complained of, and pleaded that they were not entitled to do so. The summons therefore contained conclusions of declarator and interdict to the effect that the defenders should be prevented from carrying on the farina manufacture, or at least from carrying it on in a manner injurious to the pursuer; and that the defenders should be prevented from polluting the stream, and from diverting the water from it to a greater extent, or for other purposes than it was in use to be diverted formerly.

The defender Mr Stewart averred that, in virtue of his titles and the possession and immemorial custom which had followed thereon, he was entitled to use the water of the Derculich Burn in such quantities as he might find necessary from time to time for manufacturing purposes. He therefore pleaded that the pursuer's averments as to an additional quantity of water having been diverted from the stream by the tenant were irrelevant, and insufficient to support the relative conclusions of the action. The said defender further pleaded, that the pursuer and his predecessors having recognised and acquiesced in the said use and control of the water of the said burn by the defender and his predecessors, the pursuer was barred from now objecting to such use and control being continued, and the defender not having caused or authorised any pollution of the Derculich Burn, or any nuisance in connection with the farina works, he was entitled to absolvitor from the conclusions of the action relating to such alleged pollution and nuisance. In support of this plea, the defenders produced the minute of lease under which the defender Donald Livingston held the mill, and in which he bound and obliged himself not to have anything about the farina works, or elsewhere, that should be a nuisance to the property or to the public.

The defender Donald Livingston in the first place denied the pursuer's allegations as to the nuisance. He further pleaded that the water of the said stream not having been diverted by the defender to any greater extent than it had for time immemorial been in use to be diverted, or so as to injure the rights of the pursuer, was entitled to absolvitor, and that the pursuer and his authors having acquiesced in the operations complained of, were barred from obtaining decree in terms of the conclusions of the summons."

The Lord Ordinary allowed the parties a proof before answer, and under reservation of all pleas. A proof was accordingly led, and the result will be sufficiently gathered from the Lord Ordinary's interlocutor and subjoined note, and from the opinion of the Lord President.

The following is the Lord Ordinary's interlocutor:—

"*Edinburgh, 19th March* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process: Finds (first) that it is sufficiently proved in point of fact that for sometime previous to the raising of the present action, and in particular during the summer and autumn of the year 1871, the defender Donald Livingston so carried on the manufacture of farina or starch from potatoes at the mill occupied by him on the lands of Derculich as to cause a nuisance to the pursuer: Finds (second) that the said nuisance was occasioned both by smell or unpleasant and offensive odours emanating from the said defender's manufactory, and from refuse produced therein, and by the pollution of the Derculich Burn, occasioned by the said defender's operations: Finds (third) that the Derculich Burn is not a stream dedicated to manufacturing purposes, and that it has not for the prescriptive period been so polluted as to be unfit for the primary uses: Finds, in point of law (fourth), that the defenders are not entitled so to carry on the manufacture of farina or starch at the mill of Derculich aforesaid as to cause a nuisance to the pursuer, either by offensive smell or by pollution of the said stream; and with these findings, and before further answer, appoints the cause to be enrolled, that the defenders, or either of them, may state whether, and how, they are prepared to abate the said nuisance in time to come, or that a remit may be made for ascertaining how the said nuisance may be abated, or for such further proceedings as may be necessary: Finds the pursuer entitled to expenses up to this date, reserving for after consideration whether there should be any, and what, modification of said expenses in reference to the pursuer's pleas as to the quantity of water diverted or abstracted by the defenders, and remits the account of said expenses to the Auditor of Court to tax the same and to report.

"*Note.*—This case has been litigated with great keenness on both sides, and it has been very fully and ably argued both on the questions of fact and on the questions of law which it involves. Both in fact and in law the case is attended with difficulty and nicety.

"The Lord Ordinary has embodied the results at which he has arrived in the preceding interlocutor. The first three findings are findings in point of fact; the fourth is a finding in point of law. These findings will ultimately lead to the disposal of the action; but the Lord Ordinary cannot proceed further at present, because the defenders are entitled to suggest means by which the nuisance may be abated without abolishing or discontinuing their manufacture. For example—the offensive smells may perhaps be prevented by covering the

tanks or receptacles from which the smells proceed, and the pollution of the burn may perhaps be prevented by making a settling pond, or by washing the potatoes in tanks, or in some other place than in the open mill-lade. Into these matters, however, the Lord Ordinary cannot at present enter, and he may probably require the assistance of a skilled reporter.

"I. The Lord Ordinary's first finding is that a nuisance has been caused to the pursuer by the mill in question.

"This is really a jury question, and the Lord Ordinary has dealt with it as such. There is conflicting evidence, and the Lord Ordinary is far from saying that there is no difficulty in weighing and deciding upon that evidence. It is certainly not a very strong case of nuisance. The nuisance is not constant, and in ordinary circumstances it is not very great. When the supply of diseased potatoes is small, when the weather is cold, when the wind is in a particular direction, or when the burn is in flood, very little annoyance, or no annoyance at all, may be caused to the pursuer; and even when there may be unpleasant odour or a polluted stream, feelings of good neighbourhood might induce persons in the pursuer's position to overlook the matter, and put up with what many would hold to be a very trifling inconvenience.

"Still the pursuer is entitled to insist in his absolute right, and the Lord Ordinary has found himself obliged to hold that at least sometimes, and in circumstances occurring more or less frequently, the defenders' mill has occasioned a nuisance both by causing offensive odours and by polluting the stream. In particular, it seems to be established that the nuisance was more frequent, more continuous, and greater in degree during the summer and autumn of 1871—that is, during the period immediately preceding the raising of the present action—than it had been during previous years. It may even be true that, but for the considerable failure of the potato crop in 1871, and the greatly-increased manufacture at the defenders' mill that year, this action would never have been raised; and it seems to be true that a large and offensive tank, which was in operation in 1871, has, since this action was raised, been removed. Still, if only in 1871 a nuisance was caused, this would justify the action and entitle the pursuer to some remedy, or to some security that in future years the nuisance should not be repeated.

"The Lord Ordinary abstains from any analysis of the evidence of nuisance. From the nature of the case the evidence is limited. The pursuer's mansion-house and lodge seem to be the only houses injuriously affected; for although Mr Livingston's house is near his work, he cannot complain of his own manufactory. It was only on rare ocasions, too, that the smell reached the pursuer's mansion-house; but the Lord Ordinary thinks that it amounts to a nuisance if it pervaded with sufficient constancy or frequency the avenue or approach thereto. Then the pollution of the stream seems to have been not inconsiderable. Fifty cartloads of diseased potatoes for a considerable period were daily washed in the lade, and this at intervals during the working day. It may be that the stream, after each washing, soon ran itself clear, but then it was very soon polluted again by the next washing. The pursuer seems well entitled to complain of this.

"On the whole, although not a very clamant case, the Lord Ordinary thinks that during 1871, at least, the nuisance is proved.

"There is no dispute as to the particular mode in which the nuisance is caused, viz., (1) by offensive smell; (2) by pollution of the stream.

"A considerable part of the proof was directed against offensive deposits of manure made up of the refuse of the mill. There is no special conclusion as to these, and they were treated simply as the mode in which the manufacture was conducted so as to cause offence. To some extent these deposits have now been removed, or are in course of being removed, and it was stated that they would not be renewed. This belongs, however, rather to the abatement of the nuisance than to the proof of its existence.

"III. The third finding in the preceding interlocutor raises questions of some nicety both in point of fact and in regard to the legal effect of the alleged facts.

"(1) The defenders urged that they had absolute right to the water, to take any quantity of it, and to use it for any purpose, in particular for manufacturing purposes. On this point the landlord of Derculich Mill relied on his titles, and on the past history of the stream. The Lord Ordinary is of opinion that, on a fair reading of the titles, they do not support the defender's contention. No doubt the defenders, Stewart's trustees, have a grant of Derculich Loch and of the streams therefrom, but they have so only as proprietors of the meal-mill of Derculich and of the mill lands thereof. The meal-mill and its lands are far further up than the farina work, and have nothing to do therewith. All the water from the meal-mill is restored to the burn long before it enters the lands on which the farina mill is situated, and which are held by different titles. The defenders cannot use the titles of one estate as giving them a right to divert or use the water for a different estate far further down the stream.

"(2) The defenders contended that Derculich Burn was dedicated to manufacturing purposes, and was no longer applicable to the primary uses. The defenders have failed to instruct this. No doubt there was at one time a waulk or dye-mill about a mile further up the stream, but this only existed for a few years, and it has been discontinued and in ruins for at least half a century. It does not appear that even when it existed it created any nuisance or material pollution of the stream. The other mills upon the stream merely used the water as a motive power, and did not in any way pollute it, for it is impossible to hold that the accidental escape of sawdust or of lint dressings into the stream would ever give any right permanently to pollute it, so as to unfit it for its primary uses.

"The only other ground upon which it was maintained that the stream had been dedicated to polluting manufactures was that at one time holes or pits for steeping lint existed on or near the stream. But although a lint hole causes for a week or a fortnight an offensive smell, this occurred only once a year, and acquiescence therein would not entitle the defender to carry on his present manufacture, if it really causes a nuisance. If the water from the lint holes was returned to the stream it might pollute it, but probably only for an hour, and that only once a year; and such as it was, the steeping of lint has been discontinued for about forty years. Such uses, it is thought, are quite insufficient to establish that the Derculich

Burn is a manufacturing stream, and that parties residing thereon have no right to insist that its water shall be applicable to the primary uses.

"(3) The defenders pleaded the pursuer's acquiescence as a bar to the present action. It appears to be true that the pursuer and his father, from friendly feelings, were very unwilling to take proceedings against the defender Mr Livingston, and they appear to have submitted for a good many years to what they considered a grievance and an annoyance. But last year things became worse than ever, and it would be most unfair, as well as most unfortunate, to hold that delay or reluctance to challenge an incipient and a growing nuisance will cut off altogether the right to challenge it to whatever height it may be carried. The cases regarding acquiescence in encroachments or buildings do not apply to a case like the present, where admittedly the pursuer has no right to stop the defenders from building what they please on their own land; and the Lord Ordinary thinks that the pursuer's forbearance in past years does not prevent him from vindicating his legal rights.

"The Lord Ordinary's finding in point of law needs no remark. If the Lord Ordinary is right in his findings in point of fact there cannot be much dispute about the law applicable to the case.

"The Lord Ordinary has found both the landlord and the tenant liable in the expenses hitherto incurred. No doubt the landlords did not directly create the nuisance. But they appeared and resisted decree, although the pursuer only concluded for expenses against such of the defenders as might appear and resist. Still further, the landlords raised very important questions upon the titles, *inter alia* claiming right to the whole water "for manufacturing purposes." In these pleas the landlords have been unsuccessful. There may possibly be some ground for modifying the pursuer's expenses in respect that he claimed too broadly a right to stop the diversion of the stream otherwise than by the old lade and for the old purposes. This formed a very small part of the case, however, and the Lord Ordinary reserves its effect on the expenses till the account is seen. If there is room for modification at all, it will be very slight."

On 16th May the Lord Ordinary pronounced this further interlocutor:—"The Lord Ordinary having heard parties' procurators, before further answer, remits to Mr James Dewar, lecturer on chemistry, Edinburgh, to inspect and examine the farina or starch manufactory carried on by the defender Livingston at the mill of Derculich, and water courses and works therewith connected, and to report whether the smell and effluvia emitted from the said manufactory, and the pollution of the water of Derculich occasioned by said manufactory, can be prevented or abated, and in what manner; and also to report on any special points which any of the parties may suggest as material in the present case."

Against these interlocutors the defender Donald Livingston reclaimed.

It was argued for him that as the situation of the Farina Mill had been the site of a mill from time immemorial, and as it was a work profitable to the landlord and the public, and as the smell and pollution had not been proved to be so offensive as to destroy the comfort of life, it could not be held to be a nuisance. Further, that as the pursuer had allowed the mill to continue in operation for many years without any complaint, and had himself made use of it, he was therefore barred from objecting to the manufacture being continued. *Righby* v. *Beardmore*, 10 Macph. 568; *Hart* v. *Taylor*, 4 Murray 307; *Dewer* v. *Fraser*, M. 12,803; *Magistrates of Linlithgow* v. *Elphinston*, M. 12,805.

It was argued for Mr Stewart that there were no grounds of decree against him. He had nothing to do with the nuisance, for the lands were expressly let under the condition that the manufacture was not to be carried on in such a way as to create a nuisance. Although a landlord was liable if he let his lands for a purpose which necessarily created a nuisance, yet he was not liable if the tenant, departing from the proper use, created a nuisance. Therefore it was argued that the action should be dismissed *quoad* the defender Mr Stewart. *Collins* v. *Hamilton and Mackay*, 15 S. 895; *Dunn* v. *Hamilton*, 15 S. 853; *Rich* v. *Basterfield*, 16 L.J. (Common Pleas) 273.

It was argued for the pursuer that the findings of the Lord Ordinary had been rightly directed against the landlord, because, in the first place, it was not entirely a question of nuisance, but was also a question of right between the proprietors of the stream; and, in the second place, because the landlord opposed the pursuer's conclusions and supported the other defender, on the ground that, by his title and by immemorial use, he had the exclusive possession and control of the burn for manufacturing purposes. It was argued that it had been proved that the landlord had no such right to the stream, and that therefore effect must be given to the pursuer's plea that the defenders were not entitled to pollute the stream so as to render it unfit for primary purposes, or to divert the water therefrom to a greater extent than it was in use to be diverted prior to the operations complained of. In regard to the nuisance, it was argued that the averments of the pursuer had been clearly proved. *Dunn* v. *Hamilton*, 3 Shaw and M'Lean, H.L. 356; *Duke of Buccleuch* v. *Cowan*, 5 Macph. 214; *Cowan* v. *Lord Kinnaird*, 4 Macph. 236.

At advising—

Lord President—The pursuer of this action complains of a nuisance arising from a farina mill occupied and carried on by the defender Livingston upon the property of the other defenders, and situated on a small stream which divides the pursuer's property from theirs. This nuisance consists partly of an offensive odour which pollutes the air, and partly of offensive refuse which flows from the manufactory into the stream, and pollutes the water. The object of the action is to secure to the pursuer protection against that nuisance in time to come, and so the conclusions are partly for interdict, and partly for declarator. There is no conclusion for damages, and therefore the continuation of the nuisance, and the length of time which it has endured, comes to be of comparatively little importance. In regard to the existence of the nuisance, the Lord Ordinary has found it proved "that for some time previous to the raising of the present action" (2d December 1871), "and, in particular, during the summer and autumn of the year 1871, the defender Donald Livingston so carried on the manufacture of farina or starch from potatoes at the mill occupied by him on the lands of Derculich, as to cause a nuisance to the pursuer."

Now, it appears to me, my Lords, that it is almost impossible to dispute the soundness of that finding in point of fact. No doubt this nuisance is not very great, and is very inferior in its effects and consequences to many others upon which we have been called to decide. Still, it is indisputable that it is a nuisance both as regards smell and pollution of the water. No doubt it was worse in the summer and autumn of 1871, and the defender has tried to maintain that it has been proved that there really was no nuisance until that time. I do not consider that the fair result of the evidence. If it existed, however, in 1871, then the pursuer had the right to complain of it, and to raise this action. It is a common thing for defenders in actions like this to say that the pursuer has made his complaint, and raised his action, either too late or too soon. But this pursuer, in my opinion, has hit upon the exact time when the nuisance was worst, —he did not cry out before he was hurt, but was prompt to take steps when the nuisance became too offensive. Therefore, I am of opinion that there can be no doubt as to the correctness of the Lord Ordinary's first finding. Then he finds, in the second place, that the nuisance is occasioned by the smell and refuse from the manufactory, and by the pollution of the Derculich Burn; and, in the third place, that the Derculich Burn is not a stream dedicated to manufacturing purposes, &c., following up these findings in fact with a finding in point of law, that the defenders are not entitled so to carry on their manufacture so as to cause the nuisance complained of by the pursuer. Now, these two last findings, numbers 3 and 4, are directed against both sets of defenders. The first two findings are findings against the defender Livingston alone, who is the party who directly causes the nuisance. But the Lord Ordinary has found against the proprietors, the other defenders, that "the Derculich Burn is not a stream dedicated to manufacturing purposes, and that it has not for the prescriptive period been so polluted as to be unfit for the primary uses;" and that both of the defenders are not entitled "so to carry on the manufacture of farina or starch . . . as to cause a nuisance to the pursuer." As far as the defender Livingston is concerned, these latter findings raise no new issue—his case was already settled by the first findings. But the other defenders maintained that these findings should not have been directed against them. They hold that they are not parties to the making of the nuisance. They say that they let the mill to the tenant, but gave him no authority to carry on this work so as to create a nuisance. That would have been a satisfactory and conclusive statement in a different state of this record and proof, if these defenders had come forward and disclaimed Livingston's proceedings, and said they were anxious that the water should be preserved clean and fit for primary uses. Had that been their attitude, they were not obliged to appear, because the conclusion for expenses is only directed against those defenders who appear to oppose the conclusions of the action. They, however, chose to appear, and opposed the pursuer's conclusions, and that upon grounds which are negatived, and I think rightly negatived, by this interlocutor which is now before us. In their answer to the second article of the condescendence, they say—"for manufacturing purposes the present defenders and their predecessors and authors have, from time immemorial, or at least for forty years, had exclusive possession and control of the said burn under their titles. The water of the burn has, during that time, been used by the present defenders and their foresaids in driving various mills after mentioned belonging to them." Then their second plea in law is as follows:—"In virtue of their titles, and the possession which has followed thereon, the present defenders are entitled to use the water of the Derculich Burn in such quantities as they find necessary from time to time for manufacturing purposes." If that plea is not maintained to defend Livingston's proceedings, it is difficult to see why it is maintained at all. That becomes plain too upon looking at the proof, because there it appears that they endeavoured in their cross-examination of the pursuer's witnesses to prove that Livingston does not in reality create any nuisance at all. I think that the finding of the Lord Ordinary against these defenders is not only right, but absolutely necessary to put down the contention that the water has become dedicated to manufacturing purposes, and so is lost for its primary uses, and that therefore they are entitled to make what use of it they please without considering the pursuer's right to a primary use of the water. On these grounds I consider the Lord Ordinary's interlocutor right, both in fact and law. The Lord Ordinary concludes with—"appoints the cause to be enrolled, that the defenders, or either of them, may state whether and how they are prepared to abate the said nuisance in time to come, or that a remit may be made for ascertaining how the said nuisance may be abated." As I understand, neither of the defenders availed themselves of this—they did not desire to state any mode in which they were prepared to abate the nuisance, nor were they prepared to have an inquiry under a remit. In consequence of their silence the Lord Ordinary pronounced another interlocutor, which is also before us, and under review. By this interlocutor he "remits to Mr James Dewar, lecturer of chemistry, Edinburgh, to inspect and examine the farina or starch manufactory carried on by the defender Livingston at the mill of Derculich, and water courses and works therewith connected, and to report whether the smell and effluvia emitted from the said manufactory, and the pollution of the water of Derculich occasioned by said manufactory, can be prevented or abated, and in what manner." This was undoubtedly intended by the Lord Ordinary to be an interlocutor in favour of the defenders, and was meant to give them an opportunity of devising, with the help of a chemist, means by which they might carry on their operations in an inoffensive way. They, however, object to this interlocutor as strongly as to the other, and, in fact, have a quarrel with the Lord Ordinary on every point.

If your Lordships agree with me that the Lord Ordinary's interlocutor is correct, then effect must be given to the conclusions of the action. I understand the defenders to say that they wish a judgment aye or no upon the question of nuisance. They say the mill must either go on as it does at present or not at all.

But if they find that the Court agrees with the Lord Ordinary, they may perhaps even yet, if they desire it, get some such remit as was suggested and ordered by the Lord Ordinary.

Lord Deas could not come to any other conclusion than that come to by his Lordship; and he

thought that an opportunity should still be given to the defenders to accept a remit.

LORD ARDMILLAN—There are some nuisances so serious—so intolerable—so plainly beyond the reach or hope of removal or diminution—that there is no doubt, and no alternative. The process which, in a situation not protected by prescription or dedication to manufacturing purposes, causes such a nuisance, must be put an end to. The law absolutely forbids it. But sometimes there occurs a case where, in the course of a manufacture, not in itself unlawful, a nuisance has arisen, which, though sufficiently offensive to entitle a neighbour to complain, is not necessarily, and at all times, a nuisance, but to which mitigation or alleviation may be given by the skill and exertions of the manufacturer; and there may well be conceived a case where the ends of justice and the reasonable rights and interests of the complainers would be sufficiently protected by such mitigation reducing the nuisance to a point where the interposition of law is not appropriate.

It is not every slight pollution of a stream, nor every disagreeable odour, that is to be dealt with as a nuisance, and put down by authority of law. The expression "abatement of nuisance" does not necessarily mean the entire and absolute removal of all pollution of stream, and all disagreeable odour, but such diminution of pollution and of smell as to render it such as ought fairly and reasonably to be submitted to.

I agree with the Lord Ordinary in the view which he takes of the evidence. I think that a nuisance to a considerable extent has been proved to be caused by the Farina Manufactory,—both as regards the pollution of the stream and as regards the offensive smell. I think it clear that the stream has not been dedicated to manufacturing purposes, and that there has been no prescription. I do not refer to the details of the evidence. I have read it all carefully, and I have come to the conclusion that both the pollution of the stream and the offensiveness of smell has been sufficiently proved to an extent amounting to nuisance.

There is no prescription to protect against complaint, and neighbourly acquiescence in an increasing annoyance seems to have reached its limit in 1871, when it became (as some of the witnesses say) intolerable.

Many of the remarks made by the defenders' counsel would have great weight if accompanied by a *bona fide* effort to mitigate the nuisance; and any considerable mitigation obtained by earnest endeavour in a friendly spirit, though involving some expense, could not fail to produce a good impression, and, it may be, a favourable result. I do not think that this is such a case of nuisance as would necessarily have required the interposition of law at once to put down the Farina Manufactory, if reasonable mitigation thereof had been proposed. It is by no means a very serious or aggravated case of nuisance. It is not constant, it is only occasionally that it reaches the mansion-house, and it is in certain periods and states of weather so slight as to be within the reach of reasonable forbearance.

It has occurred to me, and I suggested it during the discussion, that a strenuous effort under skilful advice ought to be made to remove the nuisance if possible, or so far to mitigate and alleviate it, both as regards the burn and the smell, as to leave no ground for reasonable complaints.

The defenders, however, have hitherto declined to act on this suggestion.

We are therefore under the necessity of dealing with the case as it stands on the proof.

I am of opinion that a nuisance has been proved of which the pursuer is entitled to complain, and in respect of which the pursuer is entitled to demand its abatement, and accordingly I concur in the Lord Ordinary's judgment, and in the remarks which have been made by your Lordship.

On the separate pleas maintained by the landlord I, am further of opinion that, looking to the terms of the lease to the defender Livingston, and to the pleas maintained, and the course of examination pursued by the landlord, he must remain as a defender, and be dealt with as a defender, and that the Lord Ordinary has rightly dealt with him in this interlocutor.

I give no opinion as to a trifling diversion of the burn for ordinary purposes. But in judging of the plea for the landlord, we must bear in mind that the water of the burn was diverted for the special purpose of working the Farina Mill, which caused the nuisance.

If the other defender, the tenant, is correct in alleging that the nuisance is unavoidable—inseparable from the working of the mill—incapable of mitigation or diminution—then the landlord, who granted the lease, and authorised the working of a mill necessarily creating a nuisance, and who supplied the burn water for the purpose of that working, cannot escape from responsibility.

The Court adhered to both interlocutors of the Lord Ordinary.

Counsel for the Pursuer—The Lord Advocate, Solicitor-General, and Adam. Agents—Adam, Kirk, & Robertson, W.S.

Counsel for the Defender Mr Stewart—Shand and Moncrieff. Agents—Mitchell & Baxter, W.S.

Counsel for the Defender Mr Livingston—Miller and Hunter. Agents—Skene & Peacock, W.S.

Friday, December 6.

FIRST DIVISION.

(Before seven Judges.)

NICHOLSON *v.* WRIGHT.

Arrestment—Preference—Sequestration.

A executes a trust-deed for behoof of creditors within sixty days of notour bankruptcy, and subsequently is sequestrated more than four months after the date of notour bankruptcy. Arrestments duly used by non-acceeding creditors in the hands of the private trustee *held* to give a preferable claim in the sequestration.

The estates of Joseph Gracie, grocer, Dumfries, were sequestrated on 18th April 1871. On 22d May 1871 Johnston & Wright lodged a claim to be ranked preferably for the sum of £48, 15s. 10d. The grounds of the claim were these:—On 22d November 1870 the bankrupt Gracie had executed a trust-disposition *omnium bonorum* for behoof of his creditors in favour of William Gordon as trustee. Gordon accepted office and proceeded to wind up. On 26th November and 5th December 1870, arrestments were laid on by Johnston & Wright (two creditors who, it was admitted, had not ac-