questrated at his own petition, and he set forth Chalmers as a concurring creditor in virtue of the bill, which the pursuer said he had retired. In his state of affairs, too, he gave Chalmers as a creditor on the alleged retired bill. A dividend of 18s. per £ was paid from the pursuer's estate to the ranking creditors, and he ultimately got his discharge without composition under the sequestration. The sequestration occurred in September 1865, and this action was raised in February 1872.

The pursuer pleaded—"(1) The apprehension and detention of the pursuer having been in the circumstances wrongful and illegal, the defenders are liable in damages to the pursuer. (2) The pursuer having, through the foresaid wrongful and illegal proceedings, sustained loss, injury, and damage to the extent libelled, is entitled to decree against the defenders in terms of the conclusions of the summons, with expenses."

The defender James Robertson pleaded—"(1) The pursuer having been sequestrated and not retrocessed in his estate, has no title to sue the present action. (2) The pursuer is barred from insisting in the present action in respect of the sequestration of his estates and proceedings therein. (3) The present action is, in the circumstances, barred by *mora*, taciturnity, and acquiescence. (4) The statements and pleas of the pursuer are irrelevant, and the defender ought to be assoilzied. (5) The statements of the pursuer, so far as the defender is concerned, being unfounded in fact, and his pleas untenable in law, the defender ought to be assoilzied, with expenses."

The pursuer allowed the defender Allan to be assoilzied, and the Lord Ordinary thereupon issued the interlocutor which was reclaimed against.

Authorities: — *Drummond* v. *Drummond*, 7 W. and S. (H. of L.); Dickson on Evidence, § 1291, § 1296.

At advising:—

Lord Justice-Clerk—This case is one which has raised certain questions attended with some difficulty. The foundation of the action is a wrongous apprehension of Gordon, the pursuer, in 1865, and the action itself is not raised until the year 1872, or no less than seven years later. On behalf of the pursuer it has been maintained that the real creditor was the defender Robertson, but he, on the other hand says he had nothing to do with the transaction at all, except in the character of agent for Chalmers. [*His Lordship here proceeded to quote the statements in Art.* 4 *of the condescendence.*] The pursuer further avers, that notwithstanding the terms of the letter of protection Robertson proceeded to put him in jail—(*Art.* 6). My Lords, it is maintained that this is a relevant statement, and I do not say that in the abstract it is not so, but there is in it disclosed a letter; that letter is nowhere to be found, we have no knowledge from evidence of any kind what its contents were, and any statements on this matter that are before the Court are extremely vague and unsatisfactory. As to the precise terms of the letter, it would be necessary to have a specific allegation. I am not prepared to say that these statements might not be proved by parole evidence without a proving of the tenor, but that matter I should not desire to decide. On the face of this record it is clearly a case that should not be sent to trial at all. It is evident this debt was settled under the sequestration in 1865, in which the pursuer paid 18s, in the pound, It has been stated to us that there might be a foundation for an action for wrongous apprehension even without this document, but the general view I am disposed to take of this action is that being raised on the footing of a written document which has disappeared, it is essential for your Lordships to have before you statements of the most specific nature, (1) as to the very terms of the letter which has disappeared, and (2) as to how that disappearance took place without any attempt at the recovery of the lost document.

As to the question of title, it is another matter; I am for dismissing the action.

Lord Cowan—The circumstances in this case are very remarkable and special. I feel it a duty to apply to the record the strictest principle of construction in order to ascertain the foundation of the action, and that I find it impossible to do without discovering the basis of everything to be the breach of the obligation not to take action on the bill, an obligation contained in that missing letter. That letter being thus the very foundation of this action, on that ground alone I am satisfied there is no relevant basis for action on this record. I have always understood, and I am still entirely of opinion, that an action of proving the tenor was an essential preliminary to any proceedings on a document which had been lost, or of which the terms had been left unproven, and I have no hesitation in thinking that this action ought to be dismissed, and not sent to a jury.

Lord Benholme—As the record stands, I think we should not affirm the interlocutor until the party has either proved the tenor or given us a statement that he is not prepared to do so.

Lord Neaves—I think we should dismiss. The pursuer comes here and tells us that Chalmers was not his creditor in 1865. In the sequestration he swore he was so. Then next he tells us that Robertson, being the true creditor, granted him a letter to protect him against the diligence, but we have no evidence of this, and the letter is not forthcoming. One thing is certain, that Gordon, the pursuer, got his discharge from bankruptcy in 1865 on giving up to his creditors the whole of his assets whatsoever.

I cannot conceive an action brought under more unfavourable circumstances, or giving rise to a more personal bar than the present.

The Court dismissed the action, with expenses.

Counsel for Pursuer (Respondent)—Trayner and J. A. Reid. Agents—Philip, Laing & Monro, W.S.

Counsel for Defender (Reclaimer)—Millar, Q.C. Mair and Gibson. Agent—Wm Officer, S.S.C.

I., Clerk.

Wednesday, October 29.

SECOND DIVISION.

JAMES BROWN & CO., *v.* THE DUKE OF BUCCLEUCH, &C.

River—Pollution—Interim Interdict—Remit.

Interim interdict was applied for and granted by the Lord Ordinary against a certain mill-owner, said to have polluted a stream. The defender boxed a minute setting forth the im-

provements effected to obviate pollution, and moved the Court to recall the interim interdict. *Held* that the interim interdict must be continued, and before further answer remitted to a skilled person to inquire and report.

This case came up by reclaiming-note against an interlocutor of the Lord Ordinary on the Bills (SHAND) granting interim interdict against the reclaimers and respondents, paper manufacturers, and owners of the Esk Mill, on the Esk. The action was supplementary to one for interdict at the instance of the Duke of Buccleuch and others against the papermakers on the banks of the Esk generally (*ante*, vol. x. p. 494).

For the reclaimers and respondents it was stated that in the month of September 1865 the Duke of Buccleuch and others raised an action of suspension and interdict against the whole of the paper mill-owners on the banks of the Esk, for polluting the stream and rendering it unfit for ordinary uses. The Esk Mill, owned by the reclaimers, was then owned by the late Thomas M'Dougall, who carried on business under the firm of James Brown & Co. The result of the action in 1866 was to establish the existence of pollution against the millowners, but under an arrangement between the parties, no further steps were taken until Feb. 1873, when interdict was moved for against those defenders, and granted by the Court. At that time the firm of James Brown & Co. had become extinct, and accordingly the Esk Mill was not represented before the Court; and the interdict then granted was solely in respect of pollution established in 1866, prior to 1873. The present reclaimers, the new proprietors of the Esk Mill (which they purchased in 1871 from the trustees of the late owner, and held on a singular title) were no parties to that action, and did not represent the owner of the mill called in the action. They were therefore totally unconnected, it was maintained, with all previous proceedings—the previous proprietor being dead at the time at which the interdict was granted. [Lord Neaves—The trustees should have been sisted.] In these circumstances, the present action was brought by the Duke of Buccleuch and others against the owners of the Esk Mill, in July 1873, for interdict in exactly the same terms as that granted against the other millowners, defenders to the first action. The petitioners put on record an averment that the present owners of the mill had continued to pollute the stream since October 1871, when they acquired it, and, in answer, the defenders denied the truth of this allegation. On that statement the Lord Ordinary granted interim interdict. Of course the respondents had no objection to passing the note, in order that the question might be tried, whether or not pollution had ceased, but they complained of the interim interdict on the ground that there was nothing to corroborate the statement that they had committed this nuisance. They submitted therefore that the complainers should go on and prove their case. [Lord Neaves—You come into a mill which has been polluting, and which is bought by the sons from their father.] The verdict was as to pollution prior only to 1866. [Lord Justice-Clerk—Following upon that verdict there is an interlocutor granting interdict against the other parties continuing to pollute the stream. Now, what reasonable objection have you to being put in the same position?] From 1871 the new proprietors have never polluted the stream. [Lord Justice Clerk—Then an interdict will not affect you.] It is a serious thing to be interdicted and rendered liable to be brought into Court for breach of interdict on frivolous cause. [Lord Justice-Clerk—If you are prepared now to make any statement to show that this mill does not pollute the stream, I do not see any objection to that.] We are prepared to do that. This mill has been carried on since 1871 in an entirely different way from what it had been prior to that time.

The complainers disputed the allegation that the reclaimers were singular successors to the late proprietor, and maintained that they were merely taking the mill as part of their share of their father's estate.

The defenders were ready to produce their titles in support of their assertion. [Lord Neaves—It comes to this, that a process of interdict ceases when a man sells his property.] If a man in 1866 carried on his business improperly, it is not to be assumed that a man who came into the business in 1871 meant to do the same. [Lord Justice-Clerk—I think you are overstating your case. If you simply say that, if you had been a party to the case in February 1873, you could then have stated that the pollution had been obviated by the new proprietors, we might allow you to take the course now, without granting interim interdict in the meantime.] This suggestion was acted upon, and the defenders agreed to put in a minute stating the new mode of working the mill, which was said to have obviated the pollution.

The minute having been boxed, the case came up again for consideration, and defender's counsel contended that there was set forth in the minute such a change in the mode of conducting the manufacture of paper in their mill as practically and really to amount to a total change of the subject to which the previous interdict referred, and further, they were ready to prove that the pollution of the river had been prevented by the new mode of working thus introduced.

At advising—

LORD JUSTICE-CLERK — In this case I do not think that there is any foundation for the plea which has been maintained upon the ground that this is a singular succession in the will. No doubt if there had been a long interval, and if nothing had been doing upon the former verdict, the new proprietor might have simply to say that he was not doing anything that would entitle the complainer to object. But that is not the state of it. There is a clear inheritance here, I think, of the injury as well as of the mill itself. The present respondents were partners of the party in the original action, and they became partners before the last trial, and before the verdict; and although it is a question how far they are absolutely bound by the verdict, and the application of it, which had taken place in their absence, it is impossible to deny that on this question of *interim* interdict they are to a large extent implicated by it. The verdict establishes that the stream was polluted by the operations in this paper-mill before 1864. They say that these operations have ceased to be injurious since; but it is for them to prove that. On the other hand, I by no means think that it is a light matter to interdict manufacturers of this description, with very large interests involved, unless there is a clear ground for it. I entirely concur in the view which was taken by the Lord President, who presided at the trial, who not only laid it down

to the jury, but enforced it very strongly, that the finding of the fact of pollution by no means necessarily implied that there was to be a general interdict against a manufacturer, but only such remedy as the Court might think sufficient to protect the interests of the complainers, without unreasonably interfering with those of the respondents.

The present application is an application for an interdict against these paper-mills, founded partly upon the previous proceedings, and partly on alleged acts of pollution by these respondents themseves. Whether the complainers are entitled *de plano* in respect of the verdict, to the application of it with regard to the other parties, to get an interdict upon passed note, is another question. Mr Johnstone says he is entitled, without proof of subsequent wrong-doing, to have that interdict; and it is said that if they don't do any harm they won't be hurt by it. But every one must know perfectly well, in the first place, as Mr Asher suggested, that there are accidental causes over which the greatest care cannot possibly altogether guard; but, second, it is a question of degree, and there might be in regard to the letter of the interdict a breach, though in reality, and in the substance of the rights affected, there was no breach at all.

But the question now arises on the statement that has been put in, in this reclaiming note, on the subject of interim-interdict, What course we are to follow. I think if this statement had been put in upon the motion for the application of the verdict, the course which we should have followed would have been this:—We invited the parties to state whether they had any suggestion to make, or any statement to make as to what they were willing to do, and the parties who were then present declined to make any statement. But if the present parties—Brown & Co.—had come forward then, and had made the statement which they have now made, I think we should have granted interim-interdict, but we should have allowed them to prove that statement before final interdict had passed against them. I think, on the whole, justice would be done to the parties if we follow something of the same course in this application. The Lord Ordinary has granted interim interdict, and that is reclaimed against on the ground that the nuisance is abated. I am not for recalling that interim interdict, but what I would propose to do would be to remit to some person of skill to examine and report on the state of the river and the statements contained in the minute, and in the meanwhile continue the interdict. If the reporter states plainly and clearly that the nuisance is abated, it will then be for us to consider whether the interim interdict should be continued. On the other hand, if he reports that it is not abated, then our course is quite clear, viz., to continue the interdict. And in that way I think the interests of both parties will be sufficiently protected.

Lord Cowan—The only point brought before us by the reclaiming note is the question of interim interdict. It is not a question whether there shall be permanent interdict or not. That must be decided upon the state of the pleadings on the passed note; but the Lord Ordinary, while he has passed the note, has granted interim interdict; and I for one cannot consent, as the case presents itself now, to that interim interdict being recalled. I think there was a great fallacy in the argument addressed to us by Mr Asher, by which he thinks he can shake himself free entirely of the proceedings in the former part of the case. I think he is bound by them; and whether he is a singular successor possessing by a real title from the original owner, or whether he takes the subjects subject to the personal obligation imposed upon the parties in the original proceedings, I apprehend that these proceedings are necessarily before us in this question, and that we cannot hold that on that ground he is entitled to treat this litigation as if it were an entirely new litigation, for the first time bringing the question before the Court whether there is or is not pollution of the stream. Now that being so, what is the interim interdict that is asked? It is this—That they shall be prohibited from discharging into the water of the stream from their paper works any impure stuff or matter of any kind whereby the said water in its progress, &c.—[*Reads.*] Now, that is a very innocuous interim interdict, taking the statements that are made with reference to this mill; because in the minute "the respondents aver and offer to prove that the improvements and alterations in the mode of manufacture in their works have entirely obviated the pollution of the river Esk, which was found by the verdict of the jury to have existed prior to 1866." If that is so. the respondents can have no difficulty in letting the interdict stand; and it will only be placing them in the same position as the other mill-owners on the stream, who are under interdict not to pollute. I think it is very important that the whole of these parties, as they stood in the same position when the verdict was pronounced in 1866, should stand in the same situation now, unless they establish that they have cleared themselves of the acts of pollution, and are so conducting their works now as to cause no nuisance at all. I am so far from thinking that it is against the proprietors that they should wish to have all the mill-owners in the same position, that I think not one of them ought to escape unless he can show that he himself is entirely free from any act by which the stream is polluted. Therefore, at this stage of the cause, I cannot consent to a recall of the interim interdict. The only difficulty I have is, whether the inquiry which your Lordship suggests should be made now under this reclaiming note, or should be made after the passing of the note. Under the passed note there is a revision of the statements of the parties, when the whole facts are brought out for the consideration of the Court on a closed record; and the Lord Ordinary or the Court, on these statements, can remit to take evidence whether or not the stream is really in a polluted state or not. But at the same time, as your Lordship suggests that it would be better, while continuing the interim interdict, to see that, whether there is really ground for the statement that the stream is no longer polluted, it may be as well before farther argument to get a report from some person of skill. I certainly do not object to that course, though my own view rather is that the inquiry should be an inquiry after the note has been passed. When we were asked to grant interdict against the other parties, there can be no doubt that all of us considered that before putting them in such a perilous position we should pronounce the interlocutor to which your Lordship has referred, as following up the views of the Lord President at the trial—viz., that they should be asked to say whether they could suggest any course which would obviate the granting of the permanent inter-

dict. They refused to do so; and accordingly permanent interdict was granted. But that is not the position in which the question presents itself to us now. The question is one of interim interdict, and I desiderate any authority on which, in the state of this process, interim interdict should be refused pending the inquiry whether the new process spoken of has or has not been the means of stopping the pollution of the stream. I think we should continue the interim interdict unless, when the report is made to us, we should see cause to alter our views.

Lord Benholme—I am very clearly of opinion that we ought not to recal the *interim* interdict, but I am a little at a loss to know how in consistency with that course we can take the step which your Lordship suggests, of allowing the respondents to submit their operations to a scientific person or persons, because if the interim interdict is to take effect, one view of it may be that they cannot give that person an opportunity of saying whether what they do is prejudicial or not. It depends on whether they are in fact polluting the stream now, whether they are to be prevented altogether from shewing this scientific person that they are innocent, or getting his opinion upon the innocence of their conduct. I do not see my way to that. But I may have misunderstood your Lordship's proposal.

Lord Justice-Clerk—Interm interdict can at any time be taken off. The proposal is to continue the interim interdict before answer on the reclaiming note.

Lord Neaves—I think the course proposed by your Lordship is the right one. I think the parties on both sides have pleaded their case too high. They attempt to show that nobody can be harmed by the granting of this interdict. Now if a man breaks an interdict he is not only liable in reparation, but he can be severely punished. He can be sent to prison for an unlimited period. Such an interdict therefore is not to be granted merely because it can do the person no harm. Every subject is under inderdict to a certain extent. If he does wrong, he is liable in reparation; but I think there must be a foundation for such a course of procedure, not only because it is against a wrong, but because a wrong is apprehended. On the other hand, the attempt on the other side to disconnect themselves altogether with the former proceedings appears to me just as unfounded. The true nature of the case is that this mill is under suspicion. It did carry on a trade which was interdicted, and still it carries on the same manufacture, though in a different way. The respondents in this case are most willing to make an experiment; and they have confidence that if that experiment is carefully carried out there will not be a breach even of interim interdict; but they do not wish that this interim interdict should be granted in such a way that, behind their backs, or by the negligence of their workmen, they shall be found liable. I think they are repentant, and ought to be encouraged. If the parties are going to mend their ways and cease to do evil and learn to do well, I think they ought to be received with open arms. I trust that they are doing so. I can imagine that many people from very general impressions and custom are doing injurious things, and never think that they are doing any harm. They make a mistake, and all the time the pollution is going on. If they now, by the declarator which has been pronounced, are doing their best, and hope to succeed in not having any more pollution, I think we are not to discourage them, but rather to encourage them. I can see no harm in this, and it would be a great blessing indeed, if it can be found that this manufacture, a most important one for the country, and one which it is most desirable not to suppress, can be carried on. I would be sorry to see the making of paper discontinued in this country; but at the same time it is most desirable that it should be carried on without doing injury to the parties interested in the streams. The reason why a difference may be made between this party and the others is that they declare not only that they are willing to turn over a new leaf, but that they have done so, while the others do not say that they wish to do so, or ask an apportunity of doing so. I think the course proposed is a reasonable one. The report ought to do made at once. It is one of great interest to the community, and the sooner it is done the better.

The Court unanimously, before further answer on the reclaiming note, remitted to a professional man to inquire and report, and meanwhile continued the interim interdict.

Counsel for the Duke of Buccleuch and others—Watson and Johnstone. Agents—Gibson & Strathearn, W.S.

Counsel for Brown & Company—The Solicitor-General and Asher. Agents—J. & R. Macandrew, W.S.

Wednesday, October 29.

SECOND DIVISION.

[Lord Mackenzie, Ordinary

HAMILTON *v.* DIXON.

Mandate—Unilateral Obligation—Breach of Contract—Reparation—Iron Warrant—Master and Servant—Summons—Relevancy.

A raised an action against B, an iron-master, to compel him to fulfil a written obligation bearing to be signed by C, a salesman, as follows—"I hold at the credit of A, and will deliver to his order on demand, 750 tons of pig-iron, (Signed) for B, C." There were also conclusions for damages. The pursuer averred that this obligation to deliver had not been fulfilled, and that C was the defender's manager, and had an authority and was in the practice of granting such obligations. Action *dismissed* as irrelevant, in respect that C's authority could not extend to an obligation of this kind *ex facie* gratuitous, unless there were (1) special assent by B, and (2) specific explanation as to how the obligation was entered into.

This was an action at the instance of James Borland Hamilton, iron merchant, Glasgow, against the firm carrying on business at Calder and Govan under the name of "William Dixon," and the pursuer concluded for delivery of 750 tons of pig-iron, together with £500 in name of damages, caused by failure to deliver the same in May 1866; or otherwise for £2500. From 1849 to 1866 Mr Dixon's business was carried on