of the young man having unexpectedly ordered him home at the time of the trial. I am therefore of opinion that this charge should be allowed. It would be a great hardship on a party winning a case if a charge for a part of procedure essential to the conduct of the case, and done in *bona fides*, was not allowed.

LORD DEAS—I concur with your Lordship.

I think the decisions quoted are not inconsistent, but that the result is that every question of this sort depends on circumstances.

Your Lordship's opinion that this witness was essential is I think conclusive in this case. I will not, however, say that in every case it is necessary before the charge can be allowed that the witness must be shown to be essential. The witness must be important, but I do not think it necessary that he should be essential.

LORD ARDMILLAN and LORD JERVISWOODE concurred.

The Court sustained the objection.

Counsel for Pursuer—M'Donald.

Counsel for Defender.—Watson.

Saturday, June 27.

SECOND DIVISION.

[Lord Shand, Ordinary.

[Lord Young, Ordinary.

DUKE OF BUCCLEUCH AND OTHERS *v.* JAMES BROWN & CO.—(ESK POLLUTION).

(*Ante*, vol. ii. 253; iii. 61 and 138; iv. 190; x. 494 and 513; xi. 36; and 2 Macph. 653; 4 Macph. 475; 5 Macph. 214, 1054; 11 Macph. 675; 1 R. 85. See *Duke of Buccleuch* v. *Cowan*, June 10, 1873; 10 Scot. Law Rep. 494 and 513; and 11 Macph. 675.)

River—Pollution—Interdict.

Interdict granted against a firm of paper-makers polluting by their manufacture the waters of a stream, it being *held* that they were *de facto* the original firm against whom a prior interdict had been obtained, and that consequently they must be placed in the same position as the other firms on the same stream who had been similarly interdicted.

This was a note of suspension and interdict presented by the Duke of Buccleuch and others, complainers, against James Brown & Company, paper-makers, Esk Mill, near Penicuik; and Edward Sambourne M'Dougal and Thomas M'Dougal, the partners of that Company.

The complainers sought interdict against the respondents discharging into the water of the North Esk from their works at Esk Mill any impure stuff whereby it might be polluted or rendered unfit for domestic use or for the use of cattle.

The complainers are proprietors of lands below Esk Mill, through which the North Esk flows; and in their statement they set forth that their residences were situated within a very short distance of the stream, their sites having been selected from the natural beauty of the water. The pleasure grounds attached to those residences were formed with reference to the same circumstances, and at great expense; and, besides its amenity and the amusement of fishing which the stream afforded, it was well suited for domestic and other primary purposes, and it yielded a constant and convenient supply of water for cattle pasturing in its vicinity, until it was polluted and rendered unfit for all such purposes by the respondents' predecessors, paper-makers at Esk Mill, and other paper-makers on its banks, as after explained. There are at present, and have been for many years, a number of paper mills situated upon the banks of the said stream, and the water of the stream has been polluted and rendered unfit for domestic and other primary purposes by the proprietors of these mills discharging therefrom into the stream the dirty and noxious refuse of the materials employed at their works. Three of these mills, called respectively Bank Mill, Valleyfield Mill, and Low Mill, all belonging to Messrs Alexander Cowan & Sons, are situated at Valleyfield, near Penicuik, higher up the stream than Esk Mill. The others are situated lower down. At the whole of these different mills the water of the North Esk is used in the process of manufacturing paper, and after being so used, the said water, or at least a portion thereof, along with other water in a polluted state, was and still is returned to the stream. The works at Esk Mill have been carried on as paper works for a great number of years; and in consequence of the water used being returned to the stream in a polluted state, the Duke of Buccleuch and certain other proprietors in September 1841 raised an action of declarator and interdict against the proprietors of the whole of the paper mills then existing upon the banks of the Esk. These paper mills were the following:—First, three mills at Valleyfield; second, Esk Mill, now belonging to the respondents, but then belonging to James Brown; third, Auchendinny Mill; fourth, Dalmore Mill; fifth, Springfield Paper Mill; sixth, Polton Paper Mill; and seventh, St Leonards Paper Mill. And the summons in the action concluded, *inter alia*, that "it should be found and declared that the pursuers have good and undoubted right to have the water of the Nork Esk, so far as it flows through or by their properties, transmitted in a state fit for the use and enjoyment of man and beast, and that the said defenders have no right to pollute or adulterate the said water, nor to use it or the channel of the stream in any way or for any purpose such as to render the said water noxious or unwholesome or unfit for all its natural primary purposes to the pursuers, or in any way to destroy the amenity of the said stream;" and for interdict. To this action defences were given in for all the parties called as defenders therein, including James Brown of Esk Mill, and thereafter an attempt was made by all the parties to mitigate the nuisance complained of; but by the continued and increasing discharges into the stream of the washings and other noxious matters used at their respective works, the water of the stream became so polluted as to be a nuisance of the most intolerable description, and the pursuers of the said action were compelled to resume judicial proceedings, and to apply to the Court for a remedy. They accordingly took the usual steps, and the process was wakened on 27th June 1863, and thereafter

amended defences for some of the defenders were given in. By this time certain of the firms called as defenders in the action had been dissolved in consequence of the death of some of the partners, and the proprietors of other paper mills had been changed; and in consequence thereof, and of the continued pollution of the river, the complainers, on 20th May 1864, instituted other two actions of declarator and interdict against the then proprietors or occupants of the said paper mills, and, amongst others, against "Messrs James Brown & Company, paper-makersat Esk Mill, near Penicuik, and Thomas M'Dougal, residing at Esk Vale, near Penicuik, the only known partner of that company." These two actions contained conclusions of declarator and interdict similar to those of the action raised in 1841. Records were thereafter made up and closed in said actions, and the actions conjoined and issues adjusted to try the cause,—the seventh of these issues, that relating to Esk Mill, being in these terms:—"7. Whether, between 15th May 1856 and 20th May 1864, the defenders, James Brown & Company, did, by discharging refuse or impure matter at or near their mill called Esk Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?" The cause was tried upon said issues before the Lord Justice-Clerk and a jury in the months of July and August 1866, when a verdict was returned in favour of the pursuers on all the issues; and thereafter, on 7th March 1867, the verdict was applied by the Court. Subsequently an agreement was entered into between the pursuers and the defenders in said conjoined actions, narrating that the defenders had completed, or were in the course of completing, certain improvements and remedial measures at their respective mills, and that they were anxious that these should be fairly tried, and their effectiveness determined, and that they were willing to carry out such further improvements or alterations as might be suggested to them, all at the sight of Dr Penny of Glasgow, since deceased, and that for this purpose they had requested the pursuers not to proceed further at present in the said conjoined actions; to which the pursuers had agreed, but that only on the terms and conditions underwritten:—"Therefore the parties hereto have agreed as follows, *First*, That the whole pleas stated for the pursuers in said conjoined actions are hereby expressly reserved full and entire, and that by entering into these presents they shall not be held to have abandoned any plea competent to them, or any powers they at present possess or did possess in virtue of said verdict in said actions: *Second*, That the delay which has taken place in following up the verdict obtained by the pursuers in said conjoined actions, and the further delay granted by the pursuers under the present agreement, shall not at any time be pleaded against them by the second parties in the mills respectively occupied by them, the said delay having been granted by the pursuers solely for the benefit and at the request of the second parties." This agreement bears to be between the pursuers of said action and, amongst others, "James Brown & Company, paper-makers at Esk Mill, near Penicuik, and Thomas M'Dougal, residing at Esk Vale, near Penicuik, the only partner of that Company," and to be signed "by the said James Brown & Company and Thomas M'Dougal" on 30th November 1868. On the death of Dr Penny, a new agreement, in similar terms, substituting Mr William Arnott for Dr Penny, was entered into by the parties, and was signed "James Brown & Co.," "E. S. M'Dougal;" the testing clause bearing that it was so signed "by James Brown & Company and Edward Sambourne M'Dougal, on behalf of Thomas M'Dougal, the sole partner of that Company," on 2d February 1870. This second agreement came to an end on 1st January 1871, and was again renewed in similar terms by a third deed, which bears to be signed "by James Brown & Company and Edward Sambourne M'Dougal, partner thereof, the Company's signature being adhibited by him" on 10th May 1871. This last agreement came to an end on 1st March 1873. These conjoined actions were thereafter enrolled, and finally disposed of by the Second Division of the Court, when the following decree of declarator was pronounced:—"*Edinburgh, 3d June* 1873.—The Lords having, on the motion of the pursuers, heard counsel in the conjoined actions of declarator, find and declare, in terms of the leading declaratory conclusions in each of the three summonses at the instance of the respective pursuers, against the respective defenders thereof, that the pursuers have good and undoubted right to have the water of the North Esk, as it flows through or by their properties, transmitted in a state fit for the use and enjoyment of man and beast, and that the said defenders have no right to pollute or adulterate the said water, nor to use it or the channel of the stream in any way, or for any purpose, such as to render the said water noxious or unwholesome, or unfit for all its natural primary purposes to the pursuers, or in any way to destroy the amenity of said stream. *Quoad ultra* continue the cause."

And thereafter the following interdict was granted:—

"*Edinburgh 10th June* 1873.—The Lords having resumed consideration of the cause, allow the pursuers to amend the conclusions of their respective summonses in the conjoined actions by striking out the words 'or the rights of the pursuers therein in any way injured or affected;' and the defenders having stated that they had no proposal to make for abating the nuisance complained of, and did not move for any further inquiry, Prohibit and interdict the defenders from discharging into the water of the stream or river of North Esk, from their respective paper works, any impure stuff or matter of any kind, whereby the said water in its progress through or along the properties of the pursuers, or any of them, may be polluted or rendered unfit for domestic use, or for the use of cattle, and decern: Find the defenders liable in expenses since the 14th March 1867, and remit to the Auditor to tax the same and to report."

When the interdict was granted it was stated to the Court by the counsel for the defenders that Thomas M'Dougal had died in October 1871 and therefore that any interdict to be granted would not apply to the present proprietors of Esk Mill, Since October 1871 the respondents (sons of Thomas M'Dougal) have carried on the same works at Esk Mill foresaid, and under the same name or firm of James Brown & Company, as their father, but they did not choose to sist themselves, as they ought to have done, as defenders to the action in room and place of the said Thomas M'Dougal. Notwithstanding the terms of the agreements, the

complainers have since discovered that the respondents were partners along with their father of the firm of James Brown & Company from 1st May 1865 until their father's death in 1871. They succeeded to the mill under the directions contained in their father's trust-deed to his trustees, to hand over the mill to them at the price of £50,000, they receiving back their share of this sum as beneficiaries under said deed. It was averred that during the time they were partners they polluted, and since October 1871 they have continued to pollute, the stream, by discharging into it from their said mill, regularly every day of the week (except Sundays) nearly one and a quarter tons of solid polluting matter, whereby the water of the stream, in its progress through or along the properties of the complainers, is rendered unfit for domestic use or for the use of cattle. Besides this daily pollution, the respondents have at occasional intervals greatly exceeded the quantity of noxious and polluting matter usually discharged by them into the water. In particular, on 27th February 1872 and 6th October 1872 they discharged, an immense quantity of refuse from the boilings of esparto or Spanish grass, used by them in the manufacture of paper, which ley is of an extremely noxious and offensive nature, and the water of the stream, in its progress through the properties of the complainers, was rendered quite unfit for domestic use, or for the use of cattle, or other primary purposes. Even since the present note of suspension and interdict was presented, and interim interdict granted, the respondents have continued to pollute or materially to contribute to the pollution of the stream; and, in particular, during the months of August and October 1873, and January and February 1874, they did so by discharging into it a vast quantity of impure water, possessing a muddy appearance, frothy, and emitting a foul and putrifying odour.

On the 29th of October 1873, the Lords of the Second Division remitted to Mr John Pattinson, F.C.S., "to examine the respondent's works and the stream as affected by the manufacture carried on by them." Mr Pattinson thereafter inspected the mill, and reported to the Court; but the complainers stated that, during and immediately prior to his inspections, extra precautions were taken by the respondents to prevent as far as possible the pollution of the stream, with the view of procuring a favourable report, and that on these days the water was not polluted to nearly the extent to which it was before and has been since. Further, that they have, since the present note was presented, attempted to avoid detection by enclosing with locked covers their discharges into the river, and carrying their outlet pipe into the bed of the stream at its deepest part, so as to prevent the obtaining of samples.

The respondents in answer stated that they purchased the works there from their late father's trustees in November 1872, with entry as at the previous Whitsunday. Their father died on 12th October 1871. Since 1866 the respondents' predecessors at Esk Mill, and the respondents themselves, under the directions and with the approval of the late Dr Penny and Mr Arnott, have made numerous experiments, and from time to time have erected and constructed a large number of costly works, apparatus, and appliances, with a view to prevent the pollution of the river, which were described in detail. These remedial measures are all so arranged and perfected that no polluting matter can or does reach the river, except in case of an accident, such as the leakage or bursting of a pipe. And in order to keep all their remedial measures in the highest state of efficiency, the respondents have a special manager, whose primary duty is to attend to these matters, with a foreman under him constantly cleaning and examining hourly every possible point of danger. In the course of the last summer (1873) a new process was discovered for cleansing the esparto fibre of the ley retained in it, by means of a machine called the esparto squeezing machine, whereby the quantity of water polluted in the process of manufacturing paper from esparto is greatly reduced both in volume and intensity. The ley retained in the esparto fibre, after the boilings and coolings were drained from it, was formerly washed out of the fibre in the washing engine. By the esparto squeezing machines, two of which are now in operation, it is squeezed out before it is put into the engine, so that the process of washing is now simply reduced to that of "rinsing," which is amply sufficient to cleanse the esparto fibre for the qualities of paper principally manufactured by the respondents, and for the finest quality of their manufacture one-fifth of the time formerly required for washing is all that is requisite. Further improvements are in the course of being made in connection with this part of the process. The reduction of time in washing necessarily saves fibre which formerly passed away with the water as organic impurities, and reduces to the extent of four-fifths the quantity of water used in washing the ley out of the esparto fibre. By the introduction of this process, about 70,000 gallons of washings are daily kept out of the settling-ponds at the respondents' mills, and by this reduction in the quantity of washings to be operated on the process of purifying is greatly facilitated. The liquid resulting from the squeezing is evaporated in the incinerators. The process of manufacture has further been recently much improved by the introduction of a system of intermittent filtration. The improvements and alterations introduced have entirely obviated the pollution of the River Esk, which was found by the verdict of the jury to have existed prior to 20th May 1864. Finally, in general terms, they denied the pollution as alleged against them.

The complainers pleaded—(1) Under and in terms of the decree of declarator foresaid, the complainers are entitled to have interdict against the respondents, as craved. (2) The water of the said stream being, by and through the operations of the respondents, polluted and rendered unfit for domestic use, the watering of cattle, or any of the primary purposes of a stream, the complainers are entitled to the interdict craved. (3) The water of the said stream being polluted to the nuisance of the complainers, and the respondents having materially contributed to the production of that nuisance, the complainers are entitled to interdict against them as craved."

The respondents pleaded—(1) The statements of the complainers are not relevant or sufficient to support the prayer of the note. (2) The decree of declarator founded on cannot form any ground for granting the interdict craved, in respect the respondents were not parties to any of the proceedings under which the said decree was obtained, and do not represent any of the parties thereto. (3)

The statements of the complainers being unfounded in fact, the suspension ought to be refused, with expenses. (4) The complainers' averments in regard to pollution by the respondents prior to October 1871 cannot be founded on in support of the interdict craved—1st. In respect they apply to a period too remote to be the basis of an application for interdict: 2d. In respect the system of manufacture has been entirely changed since the period referred to: 3d. In respect the application for interdict when presented was not based on the alleged pollution during the said period.

The following interlocutors were pronounced by Lord Shand in the cause:—

"1*st August* 1873.—Having heard parties' procurators, passes the note of suspension, and grants interim interdict as craved.

"*Note.*—The only ground on which it has been maintained that interim interdict should be refused is, that the respondents, as proprietors and occupants of Esk Mill, are singular successors, who have derived their title by purchase and arrangement with their late father's trustees, and that they are consequently not bound by the legal proceedings referred to in the note. It appears from the interlocutor of the Second Division of the Court, of 10th June 1873, that the defenders in the action at the instance of the present complainers against the various paper-makers on the Esk, when interdict was granted against them, stated that they had no proposal to 'make for abating the nuisance complained of, and did not move for any farther inquiry.' So far as the respondents are concerned their position is the same.

"But it was maintained that the respondents are in no way affected by what has taken place in the former litigation. The Lord Ordinary cannot adopt this view. The operations carried on at the respondents' mill were the subject of a special inquiry and verdict in that litigation. The same manufacture has been taken up by the respondents, and is now carried on by them in the same premises. It is not said that they have adopted an entirely new system, or that they have any proposal to make for abating the nuisance, which it has been found was caused by the operations at the mill; and, in these circumstances, notwithstanding the general denial by the respondents of any pollution of the stream by them, which is just a repetition of the defence of their predecessor in the mill, the Lord Ordinary is of opinion that the complainers are entitled to the interim interdict which they ask."

"*Edinburgh, 7th August* 1873.—The Lord Ordinary having considered the incidental note and answers, Nos. 6 and 7 of process, Refuses the desire of the note, and allows the certificate to be issued in the usual form.

"*Note.*—The Lord Ordinary cannot doubt that the respondents were quite aware of the position taken up by the various defenders in the former action when the Second Division of the Court granted interdict against them, and, indeed, the interlocutor containing a record of the statements made on their behalf is quoted in the note. In these circumstances, it appears to the Lord Ordinary that, in order to warrant him in taking the course of refusing the interim interdict asked in this case, it was necessary that the present respondents should distinguish their case from that of the other manufacturers, and state definitely what they had done and yet proposed to do in order to abate the nuisance; for, as already stated, the Lord Ordinary cannot regard a mere change in the occupancy of the mills as giving the respondents right to be treated as entire strangers to all that has occurred. In the absence of any such statement, which is not even made in the note for the respondents, the complainers are, in the circumstances, in the opinion of the Lord Ordinary, entitled to interim interdict."

Against these interlocutors the respondents reclaimed, and the Second Division pronounced this interlocutor:—

"*Edinburgh, 29th October* 1873.—The Lords having heard counsel on the reclaiming note for James Brown & Company against Lord Shand's interlocutor, of date 1st August 1873, with the minute, No. 9 of process, Before answer, remit to Mr John Pattinson, F.C.S., analytical and consulting chemist, Newcastle, with power to him to take the assistance of Mr George Robertson, civil-engineer, Edinburgh, to examine the respondents' works, and the stream as affected by the manufacture carried on by them, and the statement in this record and minute; and to report whether the injury complained of is now removed, in whole, or to any and what extent: Meanwhile continue the interdict."

On 23th January 1874, Mr Pattinson reported as follows:—

"In accordance with the instructions given in the above-quoted interlocutor, the undersigned has examined the respondents' works, and the water of the river North Esk as affected by the manufacture carried on by them, and now has the honour of presenting to your Lordships the following report:—

"The respondents' works and the river North Esk were visited and inspected by your reporter on the 25th and 26th of November and on the 6th of December last, and he was accompanied on each occasion by the representatives of the complainers and respondents.

"From 40 to 50 tons of paper are manufactured weekly at these works. The chief raw materials used are Esparto grass, rags, and china clay, and it is in the chemical and mechanical treatment of these, in the various stages of the manufacture, that the polluting liquids are produced which endanger the purity of the stream.

"The following is a brief outline of the processes carried on at the respondents' works:—The Esparto grass and rags are boiled with a solution of caustic soda. In this process the caustic soda solution extracts much of the organic matters of the grass and rags, forming a dark brown coloured liquid, technically known as 'boilings.' This liquid is highly polluting, and has the property of causing water to froth even when added to the latter in very small quantities. After the 'boilings' are drained off, water is added to the fibrous materials in the boiler, partly to cool and partly to wash them. A liquid is thus formed, known as 'coolings,' containing impurities of the same kind as the 'boilings,' but much diluted. After this is drained away, the Esparto grass is removed and taken to the 'squeezing machine.' This machine contains a couple of rollers covered by cocoa-nut matting, through which the Esparto grass is gradually passed under considerable pressure. The liquid matters which were held in the fibre, as a sponge holds water, are thus squeezed out. The effect of the use of this machine in preventing the

pollution of the stream will be shown afterwards. The next process consists of the washing and 'breaking-in' of the fibrous materials. The 'breaking-in' engine consists of revolving knives, mounted on rollers working in water, by means of which the fibrous materials are reduced to the condition of pulp. When the water used in this machine (technically called 'washings') is drawn off, it carries with it a considerable quantity of fibrous matter in suspension, and also a small quantity of the soda and soluble organic matter still adhering to the Esparto grass when it leaves the squeezing machine. The next process is that of bleaching, which is accomplished in machines similar to the last, into which has been run water containing a solution of chloride of lime (bleaching powder). After the spent bleach liquor is removed, the pulp is then placed in the 'beating engines,' where it is mixed with water, china clay, colouring matters, and 'size,' and made ready for the 'making machine,' at which the last operation producing polluted water is performed.

"During these processes many polluting liquids are formed, and in such quantities that if they were allowed to enter the stream direct very serious pollution would be caused. But this is not the case, and it is evident to your reporter that very great care has been bestowed and much expense incurred by the respondents to prevent polluting matters reaching the river. The works are so arranged that the 'boilings,' 'coolings,' and the liquid separated by the squeezing machine, can all be evaporated to dryness, and altogether kept out of the stream, and the best guarantee that this will be done as completely as practicable is the fact that the soda recovered by the process amply repays the cost of recovery. The 'washings,' the waste bleach liquor after re-use, and some portions of the water separated at the making machine, all containing more or less fibrous matter in suspension, and various organic and mineral matters in solution, together with nearly the whole of the waste liquids formed in the works, are conveyed through a trough and pipes to a series of six settling ponds, situate by the side of the river, about half-a-mile below the works. Some of these liquids, before entering the trough, are passed through an apparatus called a 'save-all,' whereby some portion of fibre is separated. A considerable portion of the fibrous and other suspended matters is deposited at the bottom of the settling ponds as the water passes from one to the other. The water coming from the last pond is run on to a large filter-bed, made chiefly of ashes, having an area of about 1000 square yards, and 4 feet deep, through which it passes, and from whence it is conveyed into the bed of the river North Esk.

"The respondents' works are built closely adjoining the river. The mill-lade, where it passes the works, is arched over with masonry, and a considerable part of the works is built immediately over the lade. An inspection was made of the arched tunnel of the lade on the 26th of November. There were a great number of openings, and provisions for openings, in the roof and sides, many of which had been built up; others appeared to be out of use, and some few were discharging water of an inoffensive character. Impure liquids were oozing out from between the crevices of the stones in two or three places, but the quantity was not large, and would not appreciably affect the purity of the stream.

"Other sources of possible pollution of the stream are the deposits of waste lime arising from the preparation of the caustic soda and bleaching powder solutions. These deposits are at some distance from the lade, but in all probability the liquids draining from them will percolate through the soil, and ultimately mix with the water of the lade. The effect of these drainings on the stream is, however, probably inappreciable, owing to the small quantity which will enter at once.

"Nearly the whole, then, of the waste and impure liquids formed in the respondents' works, which enter the river North Esk, are carried from the works to the ponds, through which they slowly pass, and then through the filter-bed of ashes, into the stream. Much of the fibrous and other matters in suspension, and probably some portions of the organic matters in solution, are thus removed from the water.

"The water as it issued was very frothy and turbid. It had a fetid and very offensive odour.

"Before entering the river the effluent water of the filter is joined by a quanity of pure water flowing from the borehole made in the neighbourhood. A sample of the mixed waters, taken on the 25th of November, had the following composition per gallon:—

Inorganic matters in solution,	46·00	grs.
Organic do.	13·65	,,
Inorganic matters in suspension,	2·00	,,
Organic do.	0·92	,,
	62·57	,,

This water, though improved by the admixture of bore-water, was still very frothy and turbid, and had an offensive odour.

"The filtering bed has only been recently formed, having been first used in the middle of August last. Since then it has been occasionally out of use, during which time the water flowed into the river direct from the last settling pond. Another large filter is in process of construction, and will shortly be in use, by means of which it is hoped the quality of the effluent water will be improved.

'The Esparto grass squeezing machine mentioned above, and referred to in the minute for the respondents, dated October 25, 1873, has undoubtedly the effect of reducing the quantity of polluting matters passing through the ponds and filter into the river.

"As about 174 cwts. of Esparto grass are treated per day in the respondents' works, it follows that, reckoning the matters in solution only of the liquid squeezed out, about 971 lbs. of solid polluting matters are prevented from entering the river per day by the use of this machine. Moreover, as much less washing water is used in 'breaking-in,' less fibre is carried away to be mixed with the waste water.

"One of these machines has been in use since the 27th of September last, and two since the 30th of October.

"Both the samples of the North Esk water taken in the grounds of Penicuik House, and that of the Black Burn, taken above all paper mills, have a brownish tint of colour, arising from peaty matters, but they are tolerably bright and clear. The samples taken from below the filter outflow were in both cases of a somewhat darker yellow-brown colour, and more turbid than the samples taken immediately above Esk Mill outflow. Those taken

below the outflow had, moreover, a peculiar fusty organic taste, less perceptible in the samples taken from above the filter outflow.

"It will be seen on reference to the above analyses that the amounts of impurity both in solution and in suspension are increased after passing the filter outflow. The sample taken at Auchendinny station is reduced in organic matter. This may probably be partly owing to the natural purifying power of running water, but it may also be partly due to the admixture of the water of the Loan Burn, a considerable stream of water, containing less colouring matter in solution than the Esk, which enters the North Esk a little way below the filter discharge.

"On no occasion on which your reporter has seen the river has there been any tendency to froth in any part of the river, even so far down as Dalkeith Palace. In fact, on the 6th of December there was more froth seen on the water above all the paper mills than there was seen below them. The polluting effect on the stream of the effluent water of the filter was on no occasion, when your reporter visited the works and stream, very perceptible to the eye, nor probably was it such as to destroy fish; but on examination it was found that the water of the stream was darkened in colour to a slight extent, made slightly more turbid, and somewhat injured in taste, by the admixture of the discharge from the respondents' filter-bed. In all probability these effects will be intensified in summer, when the water in the river is relatively smaller than the filter outflow, and when the higher temperature favours decomposition.

"The quantity of effluent water from the filter has been carefully gauged by Mr Robertson. He finds that about 277,536 gallons are discharged per 24 hours. The accuracy of this measurement is confirmed by the measurements of the respondents themselves. There are thus, after making allowance for the solid matters already in the water before entering Esk Mill, by deducting 10·77 grains per gallon, 3344 lbs. of solid matter discharged into the North Esk from the respondents' works per day, 795 lbs. of which (the organic matters in solution and suspension, and the inorganic matters in suspension) are of a highly polluting nature.

"Besides this amount of polluting matter entering daily under what may probably be considered the most favourable circumstances, there is the liability to further pollution arising from the carelessness of workmen and the accidental derangement of the machinery and other plant, whereby increased quantities of polluting matters are allowed to get into the ponds, or directly into the stream. It is proper to state that this danger is guarded against in the respondents' works by having two men appointed whose duty it is to see the remedial measures carefully carried out, and by having printed instructions to the work-people posted throughout the works, directing what is to be done in case of accident.

"The settling ponds are in communication with the river by means of valves and pipes, so that there is the power to empty the whole contents of these into the river and thereby cause serious pollution. The valves for opening a communication between the ponds and the river are, however, secured with padlocks, the key of which is in the possession of an official in the employ of the papermakers of the Esk jointly. Your reporter was informed that the ponds had not been emptied into the river during the years 1872 and 1873."

On 29th January 1874 the question was taken up on the report; and after hearing counsel was advised as follows:—

Lord Justice-Clerk—This application for a suspension and interdict was presented on the ground that "in February and October 1872 the respondents allowed to be discharged into the stream an immense quantity of esparto ley or refuse from the boilings of esparto."—[Reads from complaint.] An application was made to the Lord Ordinary for interim interdict, and that was granted, the note of suspension being passed. It was stated by the respondents here that there was no *prima facie* cause for that, because in point of fact they had used precautions that prevented the pollution of the stream to any appreciable effect, and that as against an application for interim interdict was beyond all doubt relevant. I am exceedingly glad to find from the report of Mr Pattinson that those proceedings have not been without their advantage to the public and to the manufacturers also; because it does appear that to a very considerable extent at least the evil originally complained of can be cured, and that with profit to the manufacturers themselves. Probably a little more exertion and a little ingenuity may produce the very great advantage to the public of solving the conflict between the interests of trade and the rights of the lower proprietors upon the stream. But the question now is how we are to deal with this report? It is impossible for us to come to an absolute conclusion upon the truth or want of foundation of the statements in the note of suspension. Whether what is now done does or does not interfere with the ordinary uses of the stream we cannot judge. The question is, is there a *prima facie* case on which an interim interdict should be granted? Now I am not inclined to grant an interdict here without some restriction or reservation. The case is ready for trial. In any event, it can be tried at the end of this session, and I am not desirous of granting an interdict which would remove from the suspenders the obligation to proceed and bring their case to issue in the proper way. What I would suggest is that we should continue this interim interdict until the 20th of May next, and by that time there ought to be the verdict of a jury on the questions of fact involved, if the parties cannot come to an adjustment or settlement in the meantime. I don't see that the respondents can complain of that, because they admit that what they have been doing is a novelty, and it remains to be seen whether it will or will not have a sufficient effect to entitle them to a verdict at the hands of a jury. In the meantime I do not see that much evil can be done by continuing this interdict, and, on the other hand, if the interdict were not granted one can see very well that the relaxation of these precautions might produce all the old effects.

Lord Benholme—I have no objection that the restriction in point of time which your Lordship proposes should be adopted. But upon the question whether this interim interdict is to be continued or not, I have no donbt at all. It seems to me that upon the respondents' own showing the only clear and substantial interest they have is, that by this interdict they are prevented from doing something that they wish to do. If they do not wish to

do it, then they have suffered no injury by the continuance of this interdict. Their tone ought rather to be—we have no objection to the interdict being continued, because we are not doing, and have no intention of doing anything inconsistent with that interdict or to the injury of the other party. However, what your Lordship proposes is very reasonable, and it will have the effect of bringing the trial to a point. I do not object to the limitation in point of time, but it will always be competent to have a prorogation, if without any fault on the part of the suspenders the matter is not finally decided by that time.

LORD NEAVES—There are two questions here, viz., whether we should continue this interim interdict, and upon what footing we should do so? With reference to continuing the interdict, I agree with your Lordship. I don't at all say that a man is entitled to interdict against another in all circumstances for doing what would be wrong. The Court would not grant an interdict against a man who was under no suspicion. At the same time, it is quite competent to grant interdict which will add the authority of the Court when there is room to suspect that injury would be done, which would be more readily averted in that way than in any other. In this case the respondents are carrying on what may be called a dangerous trade. They have got a most unmanageable and dangerous article in their hands, which may lead to pollution, and which has been proved to have been the source of pollution formerly. Now that is a *prima facie* ground for putting these parties upon their guard with reference to their occupation of the same mill which was polluting, and as this report plainly proves they are carrying on a trade which consists in the manipulation of the most dangerous and polluting materials. They are very laudably, and prudently for their own sakes, endeavouring to disarm that agent of its powers, and to remedy the evil complained of. But a relaxation of their efforts might be accompanied by very serious consequences, and therefore I think we are entitled to continue this interim interdict. I would be very sorry to grant any interdict which entitled the suspenders to rest upon their oars and leave their case to remain upon the interim interdict, and therefore I am quite content in the meantime to have it limited as your Lordship proposes. I don't know what shape the case is in. This is a bill of suspension in the Bill Chamber, and therefore is not in Court yet, and it has been hung up by the reclaiming note of the respondents. While we continue the interim interdict in the meantime till the Court meets in May, it will be open to the parties then to bring before us any change in the state of matters.

The Court passed the note and continued the interdict till the 20th of May.

Thereafter, on 14th May, the Lord Ordinary (YOUNG), pronounced the interlocutor reclaimed against:—"The Lord Ordinary having heard counsel, and considered the record, the report by Mr John Pattinson, and whole process—Interdicts and prohibits the respondents from discharging into the water of the stream or river North Esk, from their paper-works at Esk Mill, near Penicuik, any impure stuff or matter of any kind, whereby the said water in it progress through or along the properties of the complainers, or any of them, may be polluted or rendered unfit for domestic use, or for the use of cattle: Finds the respondents liable in expenses, and remits, &c.

"*Note.*—The respondents do not dispute that it is the right of the complainers to have the water of the Esk, as it flows through or by their properties, in a state fit for the use and enjoyment of man and beast, and that they (the respondents) have no right to pollute the water so as to render it unfit for its primary purposes to the complainers. After the verdict and judgments in the action at the complainers' instance against the several mill-owners on the river, it would have been unreasonable, and probably hopeless, for the respondents again to bring the matter of right into controversy, and they accordingly repudiate any such intention. Although, therefore, the judgment of declarator, of 3d June 1873, does not constitute *res judicata* against the respondents, their father, who was a party to the litigation as proprietor of the Esk Mill now belonging to them, having died in 1871, the present case must be considered on the footing that the legal rights of the parties are exactly as thereby declared. The interdict with which that decree of declarator was followed on 10th June is of course inoperative against the respondents, and would probably have been so although their father had been alive when it was granted, and it had applied to him as well as the other, for an interdict is *in personam*. The present application has been made for that reason. The purpose of the complainers is to put the respondents under an interdict in the same terms as that which was granted on 10th June, and now subsists against the other mill-owners on the river.

"It is hardly necessary to observe that it is no sufficient reason for granting interdict against a party that he disclaims any right to do what is sought to be prohibited. An application for interdict may be nimious and unwarrantable, although the right sought to be protected is admitted, and any right to infringe it disclaimed, and it is perhaps generally true that interdict ought only to be granted on evidence of some infringement of the right to be protected, or serious threat or manifestation of intention to infringe it by the party against whom it is directed. Another, and possibly safer, expression of the general rule is, that the applicant must show to the satisfaction of the Court that his right requires the exceptional protection of an interdict, and that it may be granted without injustice to the party against whom he applies.

"Although rejecting the judgments pronounced in the former proceedings as constituting *res judicata* against the respondents (and, indeed, they have not been so pleaded) I cannot disregard these proceedings themselves as bearing on the questions whether the complainers require the protection of the interdict now asked, and whether it may be granted without injustice to the respondents; and the right being admitted, and any right to infringe it disclaimed (which indeed follows from admitting the right) these are truly the only questions in the case. They are questions to be determined with reference to all circumstances reasonably bearing upon them, and are not affected by the rules which govern the doctrine of *res judicata*, or so far as I know by any technical rules. Now, as matter of plain fact, the respondents not only knew of these proceedings, but actively took part in them as the sons of their father, who was formerly a party, and as engaged along with him (whether as partners or not is immaterial) in the business of the mill, as proprietor of which, and carrying on business then, he was a party. The most important part of the whole proceedings, in their bearing on

the present subject, occurred in the interval between the application of the verdict in March 1867 and the final judgments in 1873. This interval was devoted by arrangement to attempts at the several mills to abate or mitigate the nuisance which the verdict had found. During the whole of this time the respondents were engaged in the business of their father's mill, and necessarily cognizant of everything done then. They were not parties to the record, and their father was dead at the date of the interlocutors of 1873, which were pronounced because of the failure of the attempts made during the six preceding years. But the connection of the respondents with the Esk Mill never ceased, and on their father's death they became proprietors, formally as purchasers, but really taking the property at a certain value as their shares of his succession. The character in which they took is, I think, of no consequence, the material fact being that since their father's death they have continued the manufacture at the mill in which they had previously assisted him as his partners or otherwise.

"The complainers now aver that the attempts to abate the nuisance were unsuccessful at the Esk Mill, as they certainly were at the other mills on the river. They admit that it is incumbent upon them to exhibit *prima facie* evidence that the pollution found by the verdict of 1866 to have been committed at this mill still exists, but they dispute the respondents' contention, that the question ought to be tried just as if the former proceedings had never occurred. For the reasons which I have stated, I adopt the view of the complainers; their right to have the river unpolluted is admitted, and the respondents, disclaiming all right to pollute it, only say that the complainers have no such reason to apprehend pollution by them, that interdict can be granted without injustice, and demand a trial or proof. The complainers, on their part, say that the previous proceedings, joined to the report of Mr Pattinson upon the remit from the Court in October last, sufficiently shew that their apprehensions are not unfounded or unreasonable; that the existing pollution at this mill, though less than formerly, is still considerable, and the means available to increase it secretly at any time very alarming, and that no injustice will be done to the respondents by interdicting them in the same terms as the other manufacturers on the river. I agree with the complainers. I think they have established a sufficient case to warrant their application, and that it is unnecessary to send the case to trial or proof."

The respondents reclaimed, and argued—The present action was raised in August 1873, interim interdict was granted in August 1873, and the case came before the Second Division by reclaiming note in October 1873. Before further answer the Court remitted to Mr Pattinson, and the case came back upon his report in January 1874. The interim interdict was continued to May 20, 1874, so that parties might proceed to the trial of the case on the disputed averments at the end of the winter session. On 5th March the record was closed, and the case sent to the procedure roll when his Lordship, without any further enquiry or proof, granted the interdict as craved. We submit we should have been afforded an opportunity of establishing our denial of the complaint, and our statements that we have not polluted the Esk so as to render the stream unfit for the use of cattle and for domestic purposes. In the former jury trial the Lord President seemed to suggest that some kind of improvements might be made by the paper-makers which would obviate the necessity for an interdict. The paper-makers who appeared declined or were unable to make such arrangements, and the Court apparently then took the view that they must be interdicted. It is important that neither M'Dougal nor any one representing either him or us had this opportunity which the other paper-makers did not avail themselves of. [Lord Neaves—Did not you sist yourselves?] No, we did not. [Lord Ormidale—Some of the mills which have all along been parties to the actions are higher up the stream?] That is so. The nearest point of the complainers' property to Esk mill is 5 miles, and after interdict had been given against the other paper-makers the Duke of Buccleuch and the other complainers in June 1873 raised this action, not upon the alleged pollution as between 1856 and 1864, the period referred to in the verdict, but in the period subsequent to the death of the respondents' father in October 1871. We did not become partners till 1865, and the averments as to partnership was put in afterwards, it was not part of the basis of the original complaint. The period to which the verdict applied is not embraced within this note of suspension. The averments by us as to means taken to obviate pollution are almost entirely supported by Mr Pattinson's report. The averments in stats. 2, 4, and 9, are such as the respondents should have an opportunity of proving. (*The remit is made, and reported* R. i, 85.) The report does not notice the fact that whereas 18 millions of gallons of water pass the works with polluting substances, amounting to 795 lbs. distributed over them, there is immediately below the mill the Loan Burn flowing into the Esk which would greatly increase the body of water with which the polluting matter came to be mixed before entering the complainer's property. [Lord Justice-Clerk—If every mill-owner put in that porportion per gallon what would the result be?] A quarter of a grain per gallon is a very minute quantity, and is so inconsiderable as a contribution to the general pollution. —(*see report*). A great deal of the solid matter discharged into the water is perfectly harmless. [Lord Neaves—When do you say the ameliorating process was first successful?] We do not say there has been no pollution since 1871, but it has been steadily improving, and we do all we possibly can. The report generally is in our favour. On being called on as the original defenders were we come forward and say that we have done all these important things, and that we are willing to continue; and seeing that this is a *bona fide* and successful effort, it would be a very strong measure to grant a perpetual interdict. The view which the Court appears to have held in January 1874 was that while it was reasonable to continue the interim interdict, the questions of fact would require to be determined by proof—trial by jury being almost necessarily the mode. The Lord Ordinary's views appear to be that there is no injustice in granting the perpetual interdict, and that the complainers require it for their safety: we maintain the contrary of both these propositions.

Argued for complainers—We have now for the first time an admission by the respondents that since July 1, 1865 they were partners in the mill, and the verdict was given in August 1866, and

applied in 1867.—[Lord Neaves—How were the proprietors of Esk Mill called in the action?] By the firm of James Brown & Co. and Thomas M'Dougal, the only known partner. He was the father of the respondents, and in 1865, without any notice or intimation to the complainers, he assumed his two sons as partners, without the slightest change or interruption in the working of the mill. In the Outer House the respondents pleaded not known and not admitted to all the previous proceedings. They really were parties to the agreement to abate the nuisance along with the others, and they have done nothing save what the others have done. The second agreement is signed E. S. M'Dougal, who is one of the respondents, and the testing clause bears that it was signed by E. S. M'Dougal on behalf of Thomas M'Dougal, the sole partner, because he was then so understood by the complainers to be, though in point of fact he was not so. This second agreement ended in 1871, and was renewed in similar terms, being signed by "James Brown & Co. and E. S. M'Dougal, partner thereof." The object of this interdict is to put Brown & Co. in precisely the same position as the other mill-owners. [*Counsel proceeded to refer particularly to the report of Mr Pattinson.*] Certainly the pollution is less, but it is still material and considerable.

At advising—

Lord Justice-Clerk—When this case was last before us in the Bill Chamber your Lordships granted an interim interdict for a limited period, in the firm belief that the case as stated in the note of suspension would be tried upon its merits. But it appears that that is not so; and the Lord Ordinary, after hearing the parties has granted the interdict without any further inquiry, excepting that which may be held as constituted by Mr Pattinson's report. I have come to be of the same opinion with the Lord Ordinary, and that very clearly. When the case was before us on the former occasion we were led to understand,—and proceeded upon that understanding,—that the tenants of the mill, Messrs Brown, were truly in no degree participant in the former pollution of the stream, and were no parties to the action at the date when the case was tried or the verdict applied. I can only say for myself that if I had known what now turns out to be the fact, that they were partners of the concern at the date of the trial and at the date when the verdict was applied, I should not have hesitated for a moment in making the interdict which passed against the others directly applicable to the individual partners, whether they had been partners at the date of the pollution or not. It is quite true that this is an application made upon subsequent actings, and if it had been made against any of the other parties in the former suit, which it might have been, for there might have been some reason for applying for a second interdict,—I do not know that it would have been necessary to have gone into any farther investigation, and I don't think that it is so here. But in truth there has been investigation, and the result is simply this, that the respondents, who were partners of the concern at the date of the last trial, are still sending into the stream polluting matter of a nature which has a tendency to pollute the water, and that Mr Pattinson has now reported that that is so; and although there may be a diminished quantity, the pollution still continues. In these circumstances, although at one time I was of opinion that we might put the *onus* on the other party and in the meantime qualify the interdict, I have come to be very clearly of opinion that justice is done, and complete justice, to the tenants by making the interdict perpetual against them, they taking their chance of a consciousness of innocence if they choose, by going on with their works in their own way, if they think that thereby there will be no risk of breaking the interdict. That interdict, no doubt, prevents them from discharging polluting matter into the stream. I think it is right that they should be so prevented; and of course it lies with them so to regulate their works as not to incur the penalty of breach of interdict. But as this matter of interdict is a matter of possession only, I must fairly say that the concealment of the true state of the facts in the former part of this proceeding, weighs very much with me in thinking that we shall only do justice by making the interdict perpetual against these parties.

Lord Benholme—I entirely concur with the views that your Lordship has expressed. I think Mr Watson's observations, on the part of the heritors, completely justify the conclusion at which we have arrived, and they certainly did alter my view as to how this question of interdict should be disposed of. A temporary interdict was granted by us in the view that these parties, truly being the singular successors, were entitled to have the case tried, and were not bound or affected by the verdict that had been formerly returned, apparently against their father. But we know now the real situation of the parties, and the connection which they had with their father at the period when they pretended they had no such connection; and we know that their relations to the mill were of a totally different kind from what we at first supposed. I am therefore clearly of opinion that we should affirm the decision of the Lord Ordinary in this case.

Lord Neaves—I am of the same opinion. I quite recognise this, that a party who is wholly free from suspicion, who has never himself done anything or homologated or adopted anything that is wrong, is not to be put under any other interdict than that which the law imposes on everybody not to do what is wrong, not under pain of breach of interdict and contempt of Court, but as provided by the law. But when a party has once been proved to be connected with a positive and actual pollution of the stream, as these parties have been here, because it now turns out that they were connected with all this matter, not at the time involved in the issue, but at the time of the trial, when the state of the river was in question, and subsequently to that, and it turns out also that they for years, disingenuously as I cannot help thinking, concealed their connection with it, it is much worse than if they had candidly acknowledged it; and having in this way been parties to the pollution, they must take the consequences. The investigation which has taken place here at their own instance shows that they do pollute the stream. They are entitled to the merit of trying to diminish it as much as possible; but still they are in the situation in which the pursuers are entitled to put them, in peril of conducting their business in the way in which parties must do who have once done wrong. I therefore concur with your Lordships,

and I think it is quite useless to have any further investigation.

Lord Ormidale—I have come to the same conclusion, although I must own that I was at one time under some little difficulty, of the nature of that suggested by your Lordship. But upon further consideration, and keeping in view the true position of Messrs M'Dougal, who now object to an interdict being kept up against them, I think it is impossible in ordinary fairness, and on legal principle, to hold that there has not been quite enough of injury here actually done or threatened to entitle the Court to sustain the interdict which the Lord Ordinary has granted. It may be that Messrs M'Dougal have only become partners in the paper mill in question subsequent to the period of investigation under the recent trial, but they have now for a considerable time been such, and I think it is important also to notice that Brown & Co. has been the descriptive name of the concern all along, and is so now. The two Messrs M'Dougal have been for a considerable time latent partners of that firm. The original interdict and all the proceedings from the beginning till now have been directed against Brown & Co., under that descriptive name. An interdict is a peculiar matter altogether, and the interdict here sought for is specially so. It is an interdict against the respondents discharging into the North Esk, from their works, impure stuff or matter of any kind, whereby the water may be injured to the damage of the inferior heritors. The respondents say that they have not done so. If so, let them go on as they have hitherto been doing. Then it will lie between them and the parties who hold themselves to be injured by their acts to raise the question whether or not there has been a breach of interdict. But in continuing the interdict,—and that is all the Lord Ordinary has done, and all that the Court now proposes to do,—we do not require positively to ascertain at present beyond all manner of doubt that the water has been polluted. It is enough that things have been done, and sanctioned by the respondents, whereby the complainers are entitled to say that there is reasonable apprehension that they are polluting the river. Now, can it be doubted that there is reasonable apprehension of that,—that if matters are allowed to continue as they are, and no interdict is granted, there is serious ground for believing that the water will be polluted? The respondents no doubt say that they have not polluted the water, but a man of skill, Mr Pattinson, has reported to the contrary, and I understand that no objections have been taken to his report. It seems to be a fact that there are deleterious substances used by Brown & Co. at their mill, and that these go into the river. Now, I think that is quite sufficient to entitle the Court to sustain the interdict which has been imposed by the Lord Ordinary. On these grounds, I concur with your Lordships in coming to the conclusion that the Lord Ordinary's interlocutor should be adhered to.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the reclaiming note for James Brown & Company against Lord Young's interlocutor of 14th May 1874, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report."

Counsel for Respondents (Reclaimers)—Dean of Faculty (Clark), Q.C., and Keir. Agents—Menzies & Coventry, W.S.

Counsel for Complainers—Watson and Johnstone Agents—Gibson & Strathearn, W.S.

[*R.*, Clerk.

Wednesday, July 1.

FIRST DIVISION.

[Dean of Guild, Glasgow

JAMES MORRISON *v.* JOHN M'LAY AND OTHERS.

Dean of Guild—Street—Feuing Plan.

Where the owners of building stances in a street were bound by their titles to erect houses of "a style not inferior" to certain four story houses already erected in the street,—*held* that a row of shops one story high on the street line, with a building on the back green sixty feet high in the roof, did not comply with this restriction.

The appellant in this case presented a petition to the Dean of Guild in Glasgow, in which he asked, *inter alia*, for authority to erect certain buildings in St George's Road according to a plan annexed. The respondent M'Lay resisted the application, on the ground that the proposed buildings were in contravention of the restrictions and conditions contained in the petitioner's titles and his own, which provided that no buildings should be erected inferior in style to certain other houses already erected by Messrs Galloway & Lumsden, and that no buildings should be erected on the back ground having a greater height in the side walls than 20 feet. The proposed buildings were a line of shops one story high along the street, and on the back ground a public hall with side walls of 20 feet and a roof of 60 feet high. The buildings already erected were four stories high, the ground floors in some of them being occupied as shops. The Dean of Guild refused the application. The petitioner appealed.

At advising—

Lord President — The petitioner here is under certain restrictions which are contained in the contract of ground annual of his author James Foster with the trustees of the late Thomas Ferguson. They are in the following terms:—"Declaring always, as it is hereby expressly provided and declared, that the said second party or his foresaids shall be bound and obliged, within five years from and after the the term of entry aftermentioned, to erect, and thereafter to uphold and maintain in all time coming, upon the steading of ground hereby disponed, a house or houses of sufficient value to yield a yearly rent at least equal to double of the foresaid ground-annual or yearly ground rent, and the feu-duty after specified payable from the same, and which house or houses to front St Georges Road shall not be of a class inferior to the houses sometime ago built by James Galloway and Thomas Lumsden, masons and builders in Glasgow, on part of the plot of ground above described. . . . Declaring that the said second