Now, my Lords, if a party has any right to oppose such an act, he is at perfect liberty to go before the House and be heard, upon the ground of his interest, if he have any; but is it possible that an interdict can be granted in that respect? Then it is said, you may qualify the interdict—that is to say, you may cut off three-fourths of that which is asked, and grant something, simply for the purpose of this appeal. But I am sure that your Lordships will not allow parties to withdraw a part of that which they ask, and which is the material part of it, and then to fall back upon something which is comparatively unimportant, simply for the purpose of maintaining an appeal before your Lordships' House.

My Lords, I think it is perfectly clear that, upon the first point laid, your Lordships would never be advised to decide that point, it being a point in doubt, upon a pleading like that before your Lordships. Upon the point of a decree against the act of parliament, I think that is out of the question. Then comes what has been much insisted upon at the bar, namely, the prayer that the company may be restrained from paying back to the shareholders the money they have paid them. What possible right, my Lords, can this landowner have to interfere with the money of the shareholders as between themselves? If the money is wrongfully paid back to them, they will, if they are liable, still be liable to every action of right which exists now in the appellant.

But he has no right to these specific funds. They could be paid without his interference in either one way or the other; and I think, my Lords, that a more mischievous thing could not be imagined, than that any mere landholder should be able to come to your Lordships' House seeking to interfere with the manner in which the money of the shareholders must be appropriated (for it amounts to that if the money is to be paid back). If this large prayer were granted, it would be sufficient to interfere with the actual arrangements of the company with regard to their own money.

My Lords, no such interdict ever was granted, and I believe no such interdict ever will be granted. The action of declarator has failed—the appellant has failed in that action, and I hope he will not be advised to bring it to your Lordships' House. If he should do such a thing, it will be considered then in a shape to enable your Lordships to give a clear opinion upon the point of law; but as the matter stands, I think, my Lords, that it is quite impossible to maintain this appeal, and therefore I propose to your Lordships that it be dismissed with costs.

Interlocutors affirmed with costs.

First Division.—Surr and Gribble, *Appellant's Solicitors.*—Connell and Hope, *Respondents' Solicitors.*

MAY 7, 1852.

HENRY ARNOT and ROBERT CHISHOLME, *Appellants*, *v.* JOHN BROWN and WILLIAM COMMON, *Respondents.*

Process—Personal Bar—Acquiescence—Suspension and Interdict—Nuisance—Closing Record—Withdrawing Case from Jury—Judicature and Jury Court Statutes—*A. obtained interim-interdict against B's using a building for a candle manufactory. B. asked and obtained leave of the Court to make two experiments, to shew that, by his mode of working, there was no nuisance. The record was then prepared, but never closed or authenticated by the Lord Ordinary. A remit was also made to the Issue-Clerks, but the Court, instead of sending the proposed issues to trial, appointed a scientific person to report upon a third experiment; and then, on a report favourable to the work, "of consent recalled the interim interdict," allowed the manufactory to be carried on in the mode observed at the third experiment, and repelled the reasons of suspension and interdict.*

HELD *that after the interlocutor "of consent recalling the interdict," A. was barred from objecting, that as the record had never been closed, and the case withdrawn from jury trial, the judgments of the Court of Session were incompetently pronounced.* Opinions.—1. *Procedure by way of suspension and interdict to prevent a nuisance from being established, is not one of the enumerated cases exclusively appropriated for jury trial by* 6 *Geo.* IV. *c.* 120, § 28. 2. *Though an issue has been adjusted for trial in a case not among the enumerated cases of the statute, the Court may nevertheless recall their order, and dispose of the case otherwise than by sending it to a jury.* 3. *The objection, that the record has not been signed and closed by the Lord Ordinary is fatal if the case is sent to jury trial; otherwise, the irregularity may be waived.*[1]

The respondent Brown was proprietor of premises situated on the Abbey-Hill, Edinburgh, which he let to the other respondent, Common, for a candle manufactory. Before Common had

[1] See previous reports 9 D. 497: 10 D. 95: 19 Sc. Jur. 193: 20 Sc. Jur. 17. S. C. 1 Macq. Ap. 229: 24 Sc. Jur. 421.

entered into occupation, Arnot, and other parties, proprietors of adjoining subjects, presented a note of suspension and interdict against Common using the premises as a candle manufactory, on the ground that such manufactory would form a nuisance. On this note being presented, the interdict was granted till the facts were ascertained. The Lord Ordinary afterwards, without prejudice and before answer, allowed the defender an experiment to be made of his manufacture, and relaxed the interdict to allow this. The First Division recalled the interlocutor, and ordered the record to be made up, and after the record was made up, but not closed, the Lord Ordinary allowed a specification to be given in as to the proposed mode of carrying on the manufactory, and made avizandum to the Court. The Court allowed further experiments. Ultimately an issue was prepared—whether the proposed manufactory would be a nuisance. Another remit to scientific men being next made, at length the First Division recalled the interim-interdict, and allowed the manufacture to be carried on under the specification. The record still being unclosed, the Court finally, on 22d Jan. 1850, refused the interdict.

On an appeal it was maintained that the judgment of the Court of Session ought to be reversed —1. Because the interlocutor of 22d January 1850, and whole interlocutors following on it, (decerniture for expenses,) were null, in respect the Court below delivered judgment upon the merits, and finally disposed of the cause, without any adjusted and authenticated record, contrary to the provisions and enactments of the Judicature Act 6 Geo. IV. c. 120, § 10. 2. Because the Court withdrew the case from trial by jury, again disregarding the provisions and enactments of the Judicature Act—the case, as an action for nuisance, being by that act specially appropriated for, and directed to be tried by jury: 6 Geo. IV. c. 120, § 18. 3. Because the judgment of the Court below, whereby the appellants' reasons of suspension and interdict are *simpliciter* repelled, is wholly erroneous and incompatible with the prior interlocutors, inasmuch as that judgment authorizes the respondents to carry on their candle-work according to the mode in which it was conducted at the time when the appellants first applied for interdict; whereas the Court could, at most, upon the footing of their own interlocutors, only authorize the respondents to carry on the work according to the specification supposed to be sanctioned by Professor Thomson's report.

The respondents supported the judgment on the following grounds:—1. Because the experiments, allowed by the interlocutors of 17th November 1847, and 22d January and 12th February 1848, were in conformity with the course sanctioned by the practice of the Court of Session and the decisions of the House of Lords, and were in themselves essential to the justice of the case, in whatever way it might be ultimately disposed of, more especially taking into view the nature of the case, and the pleas of the appellants therein.—*Trotter* v. *Farnie*, 9 S. 144; 5 W. & S. 649-56. *Dowie* v. *Oliphant*, 11th Dec. 1813, F. C. *Swinton* v. *Pedie*, M'L. & Rob. 1018; 15 S. 775. 2. Because the course followed by the Court in the subsequent interlocutors, whereby their Lordships remitted to scientific chemists to conduct the manufacture under their inspection, and report the result, was the only course calculated to enable them to decide the cause—was agreeable to the course followed and approved of by the Court in the case of *Trotter* v. *Farnie*,—and was not objected to by the appellants at the time—and is not in any respect objectionable, on any ground, in law or otherwise.—[The ground on which this *second* reason was supported, was, that the statements of the appellants in the Court below, as to the nature of the respondents' manufactory, did not raise any proper question of fact. They were merely problematical or hypothetical statements of what would be the result, in their apprehension, of the manufactory, if established; and therefore the case did not fall under the scope of the Jury Court statutes and practice.] 3. Because the appellants are barred by their conduct in the cause, and by the course of pleading which they adopted, from now objecting to the said interlocutors.—*Dickson* v. *Monkland Canal Co.* 1 Sh. 145—1 W. S. 636. *Macintosh* v. *Lady Ashburton*, 12 Sh. 518. *Wilson & Son*, 15 Sh. 523. *Brown* v. *Love*, 4 D. 386. *Jolly* v. *Graham*, 6 Sh. 236. *Halkett* v. *Earl of Elgin*, 9 Sh. 412. *Grant* v. *Dunbar*, 12 Sh. 717.

Rolt Q.C., and *Anderson* Q.C., for appellants.—Our objections are—1. That the record was not closed, and therefore no final interlocutor could be pronounced on the merits. The Judicature Act (6 Geo. IV. c. 120, §§ 4, 10), is peremptory in ordering, that before the final disposal of the cause, the Lord Ordinary must sign the record. This view is confirmed by the statute 13 and 14 Vict. c. 36, § 5, which dispenses with the consent of counsel, but still saves the signature of the Judge. The provision of the statute must be strictly obeyed, and there is no discretion in the Court to dispense with it. Many cases shew that it is a fatal objection that the record has not been duly closed.—*Pattison* v. *Campbell*, 5 S. 208; *Nicholson* v. *Hay*, 2 D. 995; *Sproat* v. *Mure*, 5 S. 66; *Doig* v. *Fenton*, 5 S. 553; *Falconer* v. *Shiells*, 4 S. 829; *Wemyss* v. *Wilson*, 6 Bell's App. 394. 2. The case was not sent to jury trial, as it ought to have been. This is one of the cases enumerated in the statute as exclusively adapted for a jury.—6 Geo. IV. c. 120, § 28. Section 28 expressly includes "all actions brought for nuisance;" it does not say actions "of damages," though the word "damages" is used in other cases in the same clauses, and therefore the present case is within the clause. If so, the Court had no discretion but to send it to a jury, and had no jurisdiction to dispose of it otherwise—*Marshall's Trustees* v. *Kerr*, 3 Sh. & M'L. 1; *Montgomerie* v. *Boswell*, 1 M'L. & Rob. 136.

[LORD CHANCELLOR.—Did you ever require it to be sent to a jury?]

It does not clearly appear from our case that we did, yet we always stood upon our rights; and even though we had not demanded a jury, we are not to be prejudiced by this omission. At least we did not consent to have the case disposed of without a jury trial. Cases of acquiescence and consent have no bearing except where the Court has a discretion.

[LORD CHANCELLOR.—Do you say both parties could not have dispensed with a jury?]

They certainly could have gone off into an arbitration, but nothing short of that. No consent of parties can give a legal jurisdiction to the Court where it has none independently. 3. The remit to the issue clerks is a final and irrevocable order. Even though this case were not within the enumerated cases of the statute, still, when the Court granted an issue for trial, its jurisdiction was thereby exhausted.—55 Geo. III. c. 42, § 4; 6 Geo. IV. c. 120, § 15; *Montgomerie* v. *Boswell*, 1 M'L. & Rob. 136; *Craig* v. *Duffus*, 6 Bell's App. 308. 4. We did not consent to the case being disposed of as it was disposed of. Our consent to the interlocutor (17th July 1849) was merely to this effect, that the manufactory should be carried on according to Professor Thomson's specification in the mean time, until the merits should be disposed of. We merely consented to mitigate the rigour of the interdict to a limited extent. Yet the Court, instead of allowing the case to go to jury trial, adopted Professor Thomson's evidence, and disposed of the case upon that evidence. We could neither check nor control Professor Thomson's evidence; it was an *ex parte* experiment that was substituted for a trial, whereas we had a clear right to go into evidence before some person or other.

[LORD CHANCELLOR.—How can you say that, after consenting to an order to go into an experiment, you were not to be bound by the result of that experiment? Besides, what question do you say ought to have gone to the jury, after you consented to an experiment?]

We say, *first*, it should have been the old issue. *Secondly*, If we could not have had the old issue, then it should have been this—Whether the manufactory, if carried on in any other mode than that specified in Professor Thomson's report, would not have been a nuisance? The interlocutor of 17th July 1849 operated only as the interim interdict, and had the same limitation as that interdict. The final interlocutor, however, repelled absolutely the reasons of suspension and interdict, thus virtually finding that we never had any cause of complaint, notwithstanding we had succeeded so far in modifying the operation of the manufactory. Thus, the very next day, the respondents might, under that interlocutor, have carried on their operations according to the old plan first proposed.

Bethell Q.C., and *G. H. Pattison*, for respondents.—These technical objections are taken here for the first time; and though we hold that consent has barred the appellants from making them available, yet—1. As to the record not being closed:—There is no particular form specified of closing the record, and it is not even agreed whether the Lord Ordinary ought not to sign every page of the record. All that is required is, that the papers intended to form the record be indicated and identified, which was substantially done here. Now, both parties treated the record as adjusted. Thus the Lord Ordinary ordered the record to be printed, and the appellants printed it accordingly. The statute does not say that there is to be a nullity if the Lord Ordinary has not signed; but, at all events, the appellants are barred by having treated it as an adjusted record.—*Reid* v. *M'Cormick*, 8 S. 300; *Bain* v. *Whitehaven Co.*, 7 Bell's App. 79. 2. This is not one of the enumerated cases of the statute. "Actions for nuisance" mean actions of damages brought for an existing nuisance, and not an action brought to prevent a possible nuisance being created. The cases cited do not apply; whereas there are cases to shew this is not an enumerated case.—*Trotter* v. *Farnie*, 9 S. 144; 5 W. & S. 649; 10 S. 423. In *Pedie* v. *Swinton*, 1 M'L. & Rob. 1024, this very point arose, and was decided for us. 3. As to the granting of an issue being irrevocable:—It was competent for the Jury Court, when a separate Court, to deal with a case sent to it. That Court was not obliged to take the case to trial, but might have disposed of the case otherwise, if it was thought fit.—55 Geo. III. c. 42, §§ 2, 4; 59 Geo. III. c. 35, §§ 3, 12. What the Jury Court, when separate, could do, the Court of Session can now do.—1 Will. IV. c. 69, §§ 1, 16. In *Montgomery* v. *Boswell*, the Court said it was a fit case for a jury, and the Inner House held that the interlocutor granting the issues could not be reviewed. But here the issues had never been adjusted. Besides, there are many cases to shew, that after a party has acquiesced, there can be no trial.—*Dixon* v. *Monkland Canal Co.* 1 W. & S. 636; *Mackintosh* v. *Ashburton*, 12 S. 518; *Wilson* v. *Struthers*, 15 S. 523; *Brown* v. *Love*, 4 D. 386. 4. As to consent:—The technical objections are all swept away by the consent of the appellants. The interlocutor (17th July 1849) was an admission that there was a mode of carrying on the manufactory without creating a nuisance; and after that, it was clear there was nothing to go to a jury. There was no actual fact to be tried. All was mere hypothesis. In England, such hypothetical questions of nuisance are held to lead to so vague and uncertain inquiries, that courts of equity refuse applications of this kind.—*Haines* v. *Taylor*, 2 Phillip's Ch. C. 209. In Scotland, it is different; yet here it was plainly a mistake on both sides to take a remit to the issue clerks. The jury could only have found an issue on paper. Accordingly, it was a wise and proper course for the Court to appoint a man of science to report on the matter. To that course the appellants

consented deliberately and judicially. And after such consent, the case was exhausted when the report of Professor Thomson was made, and nothing remained but to treat of expenses. It would therefore be a violation of all justice to allow a party, after dispensing with certain forms of procedure, and consenting to this remit, to turn round and fall back on technical objections, on finding the result of the proceedings he had acquiesced in to be unfavourable.

Rolt replied.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, the merits certainly are not to be decided. The question is, what is the weight of the different technical objections which have been taken at your Lordships' bar. The law of Scotland differs from the law of England in this respect, that the law of England does not permit a man to maintain a bill for an injunction for a probable nuisance; but the law of Scotland does, and that jurisdiction was called into exercise in the present case.

Now, my Lords, that very distinction leads to a great deal which will enable your Lordships to come to a satisfactory conclusion, I think, upon this point; for where it is problematical whether that which does not exist will be a nuisance or not, it may be difficult to meet the exact case; but where an actual fact has taken place,—where, for example, as in this case, there was an intention to build a candle manufactory,—till that intention was carried into effect, it would be difficult to say whether it would be a nuisance or not; because at least it seems to be admitted —and the learned counsel was bound to give way upon that point—that a candle manufactory is not in itself absolutely a nuisance. It may be a nuisance, and the probability certainly is in favour of that; but it may not be a nuisance. Science has certainly gone so far as to produce so many modes of working in these cases, as to prevent that which was formerly decidedly a nuisance, from now being so. When a manufactory is actually established, then it becomes an object of sense. If it be smoke, for example, which may lead to great damage, that is an object of one sense. If it be, as in this case, the stench arising from the manufacture, which may be exceedingly hurtful, it is the object of another sense. But as an object of sense, it is, if I may use the expression, a tangible matter. You can tell whether or not you have evidence that it is a nuisance in the proper sense of the term. It is not quite so easy to decide in these days whether any given manufactory to be established will prove a nuisance or not. In this state of uncertainty, the present appellants proceeded in the Court of Session, and they asked for that which they obtained—and it is exceedingly important to see what they did ask for, and what they did obtain. They asked for an interdict and suspension of the proceedings of the respondents, an absolute interdict, "to interdict, prohibit, and discharge the respondents from introducing into the buildings after mentioned," to be erected, "the property of the respondent Mr. Brown, machinery fitted for the purpose of candle-making, or commencing the manufacture of candles within the said premises, or otherwise create a nuisance within the same." Now, my Lords, I suppose nobody will contend that you can have in Scotland an interdict to prevent a man, who is erecting a building, generally from committing any nuisance within the same, because you might lay a ground of course that the building is intended to be used for a nuisance, or you might obtain an injunction against every man who might convert a dwelling-house into a very perfect nuisance—he might burn coals in his back-yard if he thought fit, and create other nuisances of a very odious description. You must therefore allege, and prove what you allege, that a use is intended to be made of particular buildings or places, which will operate as a nuisance. Taking, therefore, that as a part which you could not maintain ultimately, then what the appellants asked for was this—that Mr. Brown, who was then erecting these buildings, should be prohibited from erecting "machinery fitted for the purpose of candle-making, or commencing the manufacture of candles within the said premises." Now, my Lords, he obtained an interdict (the answers were to be put in within fourteen days) according to the prayer. It was no doubt an interim-interdict; and, upon a subsequent proceeding, the Lord Ordinary having made a certain order with regard to a proposition which had been submitted for an experiment, he continued the interdict. The interdict was therefore then enlarged to the period when there should be something like a final end of this matter. There is no doubt that the interdict was enlarged in point of duration of time by the second order.

Now, my Lords, the pleadings were of this nature:—The respondents, from the beginning, answered, that the candle-making, which had not commenced regularly, was not an object of sense—was simply an assertion on the one side, and a denial on the other—not a denial that candle-making was intended, but a denial of that which constituted the offence, namely, that candle-making upon those premises would be a nuisance. It could not be, unless, as it was at first argued, that candle-making was, as it is not, by the law of Scotland, such a nuisance, that there could be no means of obviating it. The one side insisted that it was a nuisance, and would be so. The respondent answered that by asserting, that in the way in which he intended to conduct his manufacture upon those premises, there would not be a nuisance. That was the issue to be tried: Would it be a nuisance or not? In the first place, when the first experiment was tried, I agree with the learned counsel for the appellants at your Lordships' bar, that that experiment was ordered with a view to assist the jury—and at that time the matter was

intended to go to a jury—and the evidence of the experiment would have been properly laid before the jury. The Court was driven to the extremity of ordering this experiment, by the very circumstance to which I have alluded, namely, that it was called upon to grant this interdict before the nuisance existed.

Now, my Lords, after various proceedings, which it is unnecessary for me to go through, I would merely make the observation with regard to the appellants, that there were several orders, one after the other, directing these experiments, from which, though they had no absolute right to appeal, yet they have a right to appeal with the leave of the Court. They never applied for that leave—though they come afterwards here, and appeal from these orders, as they had a right to do. It must be considered, not as taking away the right, but as having a considerable operation in the matter, that the parties allow matters to go on, step by step, not objecting to them, and which led to the final issue which they then dislike, and then appeal from, when they might have stopped the whole mischief at an earlier period. But that they did not do. However, in the result, they at last asked for an issue, after certain experiments, or such order as the Court shall think proper to make. So that they do not confine themselves actually as to asking for an issue, but they put it in the alternative, and the result is, that there are issues ultimately directed. Those issues go to the clerk to report upon, and those issues are such, that, except in the particular specification there referred to, they would have tried no question which would have decided this matter. They would only have tried the question of what that issue was with regard to that particular specification—would this candle-making, carried on according to that particular specification, be a nuisance or not.

Now, my Lords, the result was, that instead of attempting to re-form the issue, or to send the matter to a jury,—I do not say with the consent, but, I must state to your Lordships, without any opposition ultimately as regards either party,—this matter was sent for another experiment to be made before a most scientific person, and full liberty was given to the appellants to attend that experiment with two scientific persons. It has been treated at your Lordships' bar as if that experiment was to be a question of evidence on both sides. It was no such thing. It was a simple question of science and of the senses combined,—the operation of the senses and of science upon the person who was to test and examine, and try the experiment. The experiment, of course, was performed by persons who understood the nature of the trade, and they asserted that it would not be a nuisance. A scientific person, Dr. Thomson, witnessed that experiment; and, to see that the experiment was fairly conducted, scientific persons on the part of the appellants were allowed to be introduced, and the result arrived at was the most conclusive which it is possible to conceive. The learned Professor, going through the matter, does state in the strongest possible way, not only that it was no nuisance, but that it was entirely free from all objection. It is not necessary to go into particulars, because it led to that to which I will presently call your Lordships' attention; but it is impossible that any report from a scientific person could be more satisfactory than the report of Dr. Thomson. He says, speaking of two experiments made with different materials, "Both experiments were made in the same way, and the results of both were identical. I may therefore state with perfect confidence, that the process of candle-making, as conducted by Mr. Common, cannot in the least incommode the neighbourhood—that it is not injurious to the health—and does not give out any offensive smell." Then it is stated, "The report was most unexpected to the appellants, but as it was a judicial report, affording a *primâ facie* case in favour of the respondents' new mode of manufacture, as explained in their last specification, the appellants were humbly advised that they ought to consent to a recall of the interim interdict which they had obtained in the Bill-Chamber." Then they say that that was with a certain understanding. That understanding never was expressed,—it does not find its way into the top of the interlocutor which followed that consent, and embodies it,—and therefore your Lordships, I apprehend, are bound to disregard that, which I consider was introduced by way of parenthesis, and was not justified by anything that appears before your Lordships in this case.

Now, my Lords, upon that consent, in my opinion, the whole case turns. I shall presently refer to the different objections which have been raised; but I think one of these objections, at all events, must be considered as the only objection, and therefore, if the consent has not a double operation,—*first* of all, as far as the case went up to that point of concluding the appellants upon the merits, and *secondly*, of concluding him or excluding him from objecting to previous defects in the proceedings,—then the appellants would be entitled to a remit at your Lordships' hands.

Now, my Lords, the case has been very elaborately argued upon this point, and exceedingly well argued; but the point that has been most laboured has been this,—that this consent was simply to modify to a certain extent the interim interdict,—that that interdict was of course asked for, for a certain portion of time, and certainly not beyond the final hearing of the cause,—and that the consent was not to be more extended, but was to be limited by the duration of the interim interdict.

My Lords, in the *first* place, the only point, as I apprehend, which was to be decided in this

case, was the simple question,—whether candle-making, as carried on by the respondents, was a nuisance or not,—and whether the appellants were entitled to another order. I shall presently address a few observations to your Lordships upon that matter, but they came at last to the simple question, Were the appellants right in asserting that the candle-making, as it would be carried on, (for they could speak only problematically,) would be a nuisance, or did they turn out, in point of fact, to be wrong? When the candle manufactory came into existence, and became an object of sense, and the subject of investigation by science, the result was, that it was no nuisance at all.

Now, my Lords, that, I apprehend, was the only question to be tried. The parties themselves by acquiescence, and by this consent, adopted all that had been done up to that time; and I apprehend, my Lords, that the parties bound themselves to abide by that which had been the mode of trial; for, instead of issues going on, an experiment was substituted for the issues. Now, the experiment being substituted for the issues, how could you have the issues? I asked the learned counsel for the appellants during the argument, what there was to try; and if he looks at his own summons, it will be seen, that besides the question of nuisance to be decided,—and he should assent to the conclusion of a scientific person like Dr. Thomson,—any other question was simply this, whether Mr. Brown should be prohibited "from introducing into the buildings after mentioned, the property of the respondent Mr. Brown, machinery fitted for the purpose of candle-making, or commencing the manufacture of candles." He had already commenced, and fixed machinery. That was not a question to submit to a jury. The Court, then, exercised its equitable power by granting an interim interdict, and there remained nothing, therefore, to go to a jury. I am utterly at a loss to conceive, and I have not heard an attempt made at the bar to offer any suggestion as to what would be the terms of an issue to go to a jury. Then, my Lords, the only question is,—if that be so, is the consent, as we here find it, such as to be a waiver of the objections? Now, my Lords, I apprehend that every party may waive that which the law has introduced for his own benefit; and if these parties have done so,—and supposing that to be a fatal objection in itself, standing by itself, or supposing that, under the jury act, this was a trial that ought to have gone to a jury,—or supposing it were not, and that, having gone to the issue-clerk, then they were not at liberty to recall it :—take any of those cases,—they might have been fatal in themselves, but all these were left imperfect to the knowledge of the appellants, who never objected to their being left in that state,—who never called upon the Court to put them in a different state,—and then are they to be allowed, when the merits are decided against them, to come here and for the first time to raise these questions upon these technical points, and call upon your Lordships to decide? Your Lordships, in my opinion, are entirely relieved from deciding any of these points, because I think that they were concluded by the consent.

Now, my Lords, in regard to the objections themselves, I will say a word or two upon them. I am of opinion, that under the Jury Act, this is not within the description which will be found there, of an action for nuisance. I am not at all impressed with the argument, that the word "damages" is omitted, because I find it sometimes inserted and sometimes omitted, where it would be just as properly inserted in the one case, and omitted in the other, as we find it the contrary. But this is not an action for a nuisance. This, as it has been properly said, is an action to prevent a nuisance, — to prevent the possibility of a nuisance arising. This is to prevent a nuisance ever existing,—not an action for a nuisance. I am clearly of opinion that this case does not fall within that exception. Then, upon the other question,—whether it is competent to stop the case, now that it has gone to the clerk of the issues, — taking this argument, that this is a case which is not within the enumeration, there may be some difficulty in it, but your Lordships are not called upon to decide it. I am strongly disposed to think that there is no real difficulty, and that the Court of Session has, as I hope it has, with a due construction of the power which formerly belonged to the Jury Court, and which was transferred to them by the late act, so considered. If so, there can be no question; but I still think that the record was not properly closed; and if the matter had gone out to trial upon a question to be submitted to a jury, then, undoubtedly, it would have been a fatal objection, because there must be a closed record, and the parties are not to be sent to trial upon anything else. But with an imperfect record, and the appellants choosing to adopt proceedings which are not founded upon a closed record, I submit to your Lordships that they are not at liberty to fall back upon the objection, and say that this arrangement was made upon the record. I do not feel it necessary to go further into these objections, which I think your Lordships are not called upon to decide. I apprehend, if they were examined, they would not be found to be of great weight.

Now, my Lords, the consent goes to questions of form; because, after all, they are questions here of form, and not of substance. They may be in themselves questions of substance, but, as brought forward here, they are, simply and technically, questions of form, raised to obstruct the decision of your Lordships upon the merits of the case. Then, are the merits proved? It is said that this was a simple consent to that which had been decided. The

appellants themselves call it a judicial report—the judicial report of Dr. Thomson. I have already shewn that that interim interdict had been extended; and as the point of time to which it was extended never arrived in law—namely, the trial of this question in the way in which the appellants suggested that it ought to be tried—this would be in effect a perpetual interdict in that sense. But without insisting upon that, what else was there in the way? What obstacle was to be removed except this interim interdict removed it? What is to prevent the respondents carrying on their trade *modo et formâ*—which, it is admitted, would not be a nuisance—which is proved and consented to? What else would be to be removed? There was but the interim interdict, and that was removed. The interdict so far gives them leave to carry on the business in the way in which it was then conducted. I think no words could be more expressive than those which I find here, quoting their own statement, that they were advised to submit to this, though they say it was an interim interdict. The interlocutor is in these pregnant words :—"The Lords having considered the report, of consent, recall the interim interdict granted in the Bill-Chamber, to the effect of allowing the respondents to carry on the proposed manufactory under the specification, and supersede further advising *in hoc statu*." There was an end of any further advising. They were to carry it on, but your Lordships will observe the uncertainty that there is. This manufactory was to be carried on according to the mode that was shewn to be satisfactory by the experiment. When were they to be stopped? Would the Court do such a thing, in this stage, after all the experiments, as to allow this trade to be carried on in this way, and afterwards stop it? Could any man believe that any Court, any judicial authority, worthy or fit to decide upon the rights of mankind, could make an order that such a trade should be carried on without stating the particular period—and meaning, that without any change of circumstances, without any new evidence, without anything to call upon the Court to pronounce a different opinion upon the merits, that at some future time that manufactory should be stopped? There is ruin upon the face of it. To the respondents, it would have been injurious enough to be stopped in the beginning of their manufacture; but if they are to be allowed to get into full work in their manufacture, and to be stopped at some future and indefinite time, what ruin would await manufacturers! How would the business of the country be carried on? Who would embark in trade if an order of this sort were made? This order must be read in an open, liberal, and fair sense; and it means, that which I think it sufficiently expresses, that, as the matter then stood, the point was concluded. As to the question of nuisance or no nuisance, the respondents would be at liberty, notwithstanding the interdict, to carry on the trade. In that sense, then, there was no other obstacle or further question to decide as regarded the merits.

But, my Lords, there was still to be decided a question, which, though not affecting the manufacturing, does have a very powerful operation in these cases ;—there was the question of costs, and that question of costs could not be decided without again bringing the case before the Court. Both parties were anxious, and the appellants, I think, took the first step. They asked the Court to put the case again upon the roll, and to advise upon it. By that term, I understand a reference to the Court itself to advise, and not simply a question as to whether they were to take it back to the jury. What was to go back to a jury? Let us go back to that point. What was there here that any man can represent to your Lordships was to go back to a jury? Nothing. Was there anything but a question to be decided by the Court? Nothing. It never could by any possibility, in the view that I take of this case, be a question to be again submitted to a jury.

Well, then, my Lords, both parties, as I submit to your Lordships—it being a case for ultimate decision as it then stood—taking it as it then stood—brought it before the Court; and both parties agreeing to that, the Court made this order :—"The Lords having considered the notes, repel the reasons of suspension and interdict, and decern : Find the suspenders liable in expenses, subject to modification ; and before answer as to amount of modification, appoint an account of expenses to be lodged, and remit to the auditor," &c. This was, of course, a great surprise to the appellants, and they denied the jurisdiction, upon which I have not said a word. There cannot be a question upon the point of jurisdiction. Those who grant an interdict can recall it. The matter was properly before the Court. There never was a want of jurisdiction ; there might be a want of form—an irregularity of procedure ;—and then, as I have already shewn your Lordships, there being a jurisdiction, it can be waived by the conduct of the parties. But it is said, "Observe the anomalous position in which we are placed. We complain of candle-making generally as a nuisance. An experiment has been made, and, after various experiments, the respondents established to the satisfaction of a scientific person named by the Court, and indeed to our own conviction, that the mode in which the respondents proposed to carry on their candle manufacture would not be a nuisance. Very well," they say, "so far we have yielded;" but they say, "We have not given up the candle-making; we object to candle-making there in any other way than that pointed out, because the other way might be a nuisance. We were first of all entitled to an injunction restraining candle-making upon those premises in any way other than that pointed out by Dr. Thomson, and therefore we are entitled to our expenses."

Now, my Lords, where is there the least ground for such a claim? Before any manufacture was established, they took upon themselves to assert to the Court that the manufacture to be carried on was to be a nuisance. The result has proved that it is not so. Then they are at liberty to say, "To be sure it is not a nuisance, we see now; but it may become a nuisance." If so, why may we not upon that ground, now that it is an object of sense, and the manufacture exists, apply that same doctrine in this country? Any man who carried on a manufacture which was not a nuisance at the time, might have an interdict applied for to prevent his thereafter carrying it on in a way in which it would become a nuisance. That is the only complaint. The appellants have no present ground of complaint—no present ground of action—none whatever. It was problematical; and the reality now stands in the place of the problem; it is now known what the fact is against them. But they say, "Hereafter the trade may be carried on in a different way, and then it will become a nuisance." When it does become a nuisance, and I hope not till then, in the Court of Session or in any other Court, the appellants will be at liberty to apply for and obtain a fit and proper remedy for the mischief that may occur. No law of any country does or ought to restrain any man from the full enjoyment of his own property where it injures no one; and no man has a right upon a point of law, upon any supposed injury that hereafter may result, to put restriction upon the liberty of another man to use his own property in the way he may think best for his own purposes.

My Lords, in every possible view of this case, after having given every possible attention to it, I submit to your Lordships, that, in point of principle, the appellants have not made out a case which calls for your Lordships' interposition, and therefore this appeal should be dismissed with costs.

Interlocutors affirmed with costs.

First Division.—Richardson, Loch, and Maclaurin, *Appellants' Solicitors.*—William Rogers, *Respondents' Solicitor.*

MAY 10, 1852.

ALICIA FRANCES SUTTON, Administratrix of Henry Stephen Sutton, *Appellant*, *v.* ROBERT AINSLIE, W.S., *Respondent.*

Evidence—Proof—Competency—Foreign Witness—Gambling Debt—Acts of Sederunt, 29th Nov. 1825; 16th December 1841—Jury Court Act, 55 Geo. III. c. 42—Bill of Exceptions—*A suspension having been presented of a charge for payment of the interest of a bond, on the ground that the consideration was a gambling debt, the Court, after the preparation of a record, allowed witnesses residing in London to be examined for the suspender on commission, on adjusted interrogatories. The case went to trial on an issue, and, in the course of it, the suspender proposed to put in evidence the report of the commission, but it was objected that such was an incompetent course, unless the suspender proved that the witnesses could not attend the trial on account of absence abroad, or that the suspender could not bring them to the trial. The presiding Judge repelled the objection; and, on a bill of exceptions, the Court confirmed the ruling. The bill also contained an exception, that the presiding Judge ought to have told the jury that the charger was not bound to prove consideration, and that the presumption was, that value was given unless the contrary was proved by the suspender. The Court also repelled this exception.*

HELD (affirming judgment) *both exceptions were properly disallowed.*[1]

The charger appealed to the House of Lords against the disallowance of the bill of exceptions.

Rolt Q.C., and *Moncreiff*, for appellant.—1. The *first* exception is, that the deposition of the London gamblers ought not to have been admitted without proof of their inability to attend the trial in person. The Jury Court Act (55 Geo. III. c. 42) gave the Court power to frame rules; and the act of sederunt, § 22, provided for the case of foreigners whose depositions were to be taken by commission; but, by § 23, these were not to be received by the Court if the deponent could attend. Those provisions were often put in practice from 1815 to 1825, and received our construction.—*Haddaway* v. *Goddard*, 1 Mur. 150; *Setton* v. *Setton's Trustees*, 1 Mur. 9. The act of sederunt 1825, § 28, puts all the enumerated cases, of which the present is one, on the same footing; and proof of inability to attend was necessary before witnesses' depositions could be received, as is confirmed by § 59.—*Wight* v. *Liddell*, 4 Mur. 328, 5 Mur. 47; *Armstrong* v. *Leith Bank Co.*, 12 S. 440. In *Mackay* v. *M'Leod*, 4 Mur. 278, the report is vague, but the fair

[1] See previous reports 14 D. 184; 24 Sc. Jur. 79. S. C. 1 Macq. Ap. 299; 24 Sc. Jur. 428.