appellant (pursuer) duly complied with the contract by going first to Cruden and tendering delivery there: Find that those acting for the defenders declined to take delivery at Cruden, and desired that the vessel should proceed to Aberdeen: Find that the vessel did proceed to Aberdeen, and there delivered the whole cargo: Find that the appellant was entitled to require the respondents (defenders) to take delivery at Aberdeen of the whole cargo, and that the appellant (pursuer) was not bound to send the vessel back to Cruden, or to deliver any part of the cargo there: Therefore sustain the appeal, recal the judgment appealed against, and decern in terms of the conclusions of the libel: Find the appellant (pursuer) entitled to expenses in both Courts, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer (Appellant)—Millie. Agent—W. Spink, S.S.C.

Counsel for Defenders (Respondents)—Lang. Agents—W. & J. Burness, W.S.

Saturday, March 2.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HOPE *v.* THE GOVERNORS OF HERIOT'S HOSPITAL AND METHVEN.

Property—Upper and Lower Heritors on a Stream—Obstruction—Right to Enter upon Neighbouring Lands.

Where a sediment from sewage had accumulated in the water-course of a burn, *held* that no action for removal thereof lay at the instance of an upper against a lower heritor, but that the lower heritor is not entitled to raise the bed of the stream by an *opus manufactum*, and that where the upper heritor illegally entered upon the lower heritor's lands and cleared out the burn, the presumption of fact, where there was a dispute about the level of the bank, was against him.

Process—Summons—Circumstances where a Proposed Amendment of Summons was disallowed.

A summons concluded for declarator that the defenders were bound to execute on their land at their expense certain works for the efficient drainage of the pursuer's land.—*Held* that a proposed amendment of the summons, to the effect that the expense should be borne jointly by the parties or by the pursuer alone was, incompetent, as the nature of the action would thereby be wholly changed.

This was an action raised by John Hope, W.S., against the Governors of Heriot's Hospital, and Thomas Methven, nurseryman, Edinburgh, their tenant. The summons was in the form of a declarator, on which it was subsequently proposed to make amendments (here indicated by italics). The pursuer claimed to be "entitled, *at the expense of the defenders, or otherwise of the pursuer and defenders, or otherwise of the pursuer*, to have the channel of the Broughton Burn, where the same flows through the lands and barony of Broughton, belonging to the first-named defenders, *deepened and, if necessary, widened to such an extent as to afford sufficient and proper drainage for the pursuer's lands of Broughton and Gayfield; or otherwise, to have the channel of the said burn* made and kept by the defenders free and unimpeded for the passage of the water of the Broughton Burn, and feeders thereof, according to the natural levels, to the effect of having the water of the said burn, and of Gayfield Square sewer and other feeders thereof, and the drainage of the pursuer's *said* lands of Broughton and Gayfield, carried freely down the channel of the said burn, and that the defenders are not entitled to impede or obstruct the flow of the said burn so as to dam or force back the water thereof on the said lands of the pursuer, either by neglecting to make and keep the bed of the said burn free from accumulations of silt and deposit, or by placing dams or weirs in the channel thereof, or by laying down in the said channel earth or stones or other similar materials: And the defenders ought and should be decerned and ordained, by decree of our said Lords, to remove all such dams or weirs, and earth or stones, and silt and other obstructions, as aforesaid, and to restore the channel of the said burn to its natural level, or to such levels as will afford sufficient and proper drainage for the pursuer's said lands, or otherwise to such levels as will clear the sill of the Gayfield Square sewer at the outlet of the covered part thereof; *or otherwise to restore the channel to the level at which it stood prior to May* 1876: And in the event of the defenders' failure to do this, the pursuer claimed £200, or such other sum as shall be ascertained to be the expense of the removal and restoration; *or otherwise, to allow the pursuer to remove the said dams or weirs and other obstructions, and to restore the channel as aforesaid, at the joint expense of the pursuer and defenders, or otherwise at the expense of the pursuer.*"

The nature of the case sufficiently appears from the note to the Lord Ordinary's interlocutor quoted below.

The pursuer pleaded—"(1) The pursuer, as an upper heritor, is entitled to have the free and unimpeded use of the levels of the burn for the drainage of his lands, and the defenders are bound to receive the said drainage. (2) The water of the Broughton Burn being charged with sewage and other solid matter, the defenders are bound from time to time to clear out the channel thereof, to the effect of preserving the natural fall, or at least of preventing the stoppage of the pursuer's drainage. (3) The defenders are not entitled to impede or obstruct the course of the burn, or to alter the levels thereof to the disadvantage of the pursuer, either by neglecting to clear out the channel and allowing accumulations of deposit therein, or by constructing dams or weirs, or forming ponds, or by placing earth or stones or other similar materials in the bed of the burn; and the pursuer is entitled to have decree to that effect, and to have the existing obstructions removed, as concluded for. (4) The pursuer, as an upper heritor, is entitled to have the burn so deepened, and the water or sewage made to run in such an incline as will effectually carry it away. (5) The defenders having illegally and unwarrantably dammed back the water of the burn upon the pursuer's lands, he is entitled to

decree of declarator as craved, and to have the channel restored to the natural level, or as near thereto as is practicable."

The defenders pleaded *inter alia*—"(1)There being no obligation on the defenders to clear or keep the channel of the Broughton Burn for the purpose of having the sewage thrown therein by the pursuer more effectually carried away, there are no grounds in law to support the conclusions of the summons. (2) The operations of the defenders on the Broughton Burn having been rendered necessary by the illegal acts of the pursuer, and having been such only as were necessary to remedy the damage thereby done, the pursuer is not entitled to object thereto. (3) In respect the pursuer was not entitled to deepen or widen or otherwise alter the channel of the Broughton Burn at the part thereof situated within the defenders' lands, the defenders were entitled to restore the bed of the burn to its former level.

The Lord Ordinary (RUTHERFURD CLARK), on 3d November 1877 pronounced an interlocutor refusing to allow the amendment on the summons above narrated, and assoilzied the defenders, appending the following note:—

"*Note.*—The pursuer has proposed to amend the summons to a material extent, and the defenders resist the amendment on the ground that it will entirely change the nature of the action, and necessitate a new defence. The Lord Ordinary has come to be of opinion that the defenders are right, and has therefore refused to allow the proposed amendment.

"The purpose of the action is to have the defenders ordained to remove obstructions to the flow of Broughton Burn which they have either created or allowed to come into existence. The theory of the pursuer's case is, that the defenders are responsible for the present condition of the burn, and that in consequence they are bound to alter it. But the proposed amendments would introduce a total change, in so far at least as they propose that the works necessary for the efficient drainage of the pursuer's lands should be executed either at the joint expense of the pursuer and defenders or at the sole expense of the pursuer. In other respects they are not necessary, for the conclusions of the action are sufficient to enable the Court to give the pursuer all the relief to which he is entitled on the theory on which he asks it.

"In the opinion of the Lord Ordinary, the defenders are not bound to enter on a new defence and a new inquiry. They are, he thinks, entitled to judgment as the case stands, which raises one question only—Whether the defenders are bound, at their expense, to remove the evils of which the pursuer complains.

"The case of the pursuer is, that in 1852 the levels of the burn were sufficient to give him the fall necessary for draining his lands; that about that time the defenders made or permitted on their own lands operations which retarded the flow of the burn, and led to such an accumulation of silt as to raise the level of the burn, and that at a later period—viz., in September 1876—they raised the level of the burn, both in their own lands and in the pursuer's, to a height of 18 or 19 inches.

"It is to these last operations, and to the effect which they have produced, that the proof has been mainly directed. Indeed, the pursuer has brought very little evidence to show that his position was worse in 1876 than it was in 1852.

"That there were material alterations in the burn in 1876 is certain. They arose in this way —The pursuer entered into an agreement with Mr Methven, at the same time his own tenant and the tenant of the defenders, to deepen the burn in his own lands and in the lands of the defenders. Without any notice to the defenders, Mr Methven proceeded to execute the operations which he had undertaken to perform. As soon as the defenders came to know what Mr Methven was doing, they objected, and took measures to restore things to the condition in which they were before Mr Methven's operations began.

"It is here that the most important question of fact arises. The pursuer alleges that Mr Methven's work was not completed when he was stopped, and that the defenders, assuming that the bed of the burn had been lowered to the depth specified in the contract, raised it by as much as they believed it to be lowered, and thus in effect raised it higher by 18 inches or 2 feet than it had been before. The defenders, on the other hand, say that Mr Methven had completed his contract with the pursuer, and that they did nothing more than replace what he had taken out, adding merely to the bed and sides of the burn such works as would ensure the stability of both.

"It is certainly to be regretted that the pursuer went so far wrong as to execute operations on the burn without the intimation to the defenders. For though the work was done by Mr Methven, the pursuer is responsible for it. To this great mistake on his part much of the confusion which exists has arisen. But the defenders do not contend that they are entitled to maintain the burn at a higher level than it formerly was, and admit their obligation to lower the level if it shall be found that they have raised it.

"The pursuer mainly relies on the evidence of Mr Esdon, who acted as the engineer in the work which Mr Methven was to perform. He says that the work was not completed, and gives his evidence by reference to levels which he took personally. On the other hand, the persons whom Mr Methven appointed to superintend the work depone that the excavations were carried down to the depth which Mr Esdon had fixed, and that they ascertained this fact by the means which Mr Esdon had himself provided. They are certainly not persons of the same knowledge and education as Mr Esdon, but, in the opinion of the Lord Ordinary, they were quite capable of carrying out his instructions, and of determining whether the work was completed or not. They were intelligent men, and the Lord Ordinary sees no reason to doubt their honesty.

"Some collateral evidence has been adduced on both sides to aid in the solution of the question which has arisen. It had reference chiefly to the condition of the Gayfield Square sewer, and of the adjoining grounds. But even here there is a great variety of statement, and the Lord Ordinary has not been able to find much assistance from it.

"The Lord Ordinary has come to be of opinion that it has not been proved that the defenders have raised the bed of the burn. There is a

direct conflict of evidence, and the Lord Ordinary is unable to hold that the evidence of the pursuer is more trustworthy than that of the defenders. On the contrary, he inclines to the opposite opinion. He is more induced to take this view because the controversy has been created by the inconsiderate act of the pursuer, which throws on him the burden of making it very clear that the defenders have exceeded their just rights in what they did for the purpose of restoring matters to their original condition.

"But if this be so, the pursuer fails in showing that the defenders have acted wrongfully. Indeed, the charge against the defenders was ultimately confined to the operations of 1876. It was, no doubt, urged that the particular method which they took to restore the bed of the burn led to an accumulation of silt. But even this point has not been made out to the satisfaction of the Lord Ordinary; and, at any rate, he thinks that it has not been proved that the defenders have raised the level of the burn.

"The result, in the opinion of the Lord Ordinary, is, that the defenders are entitled to absolvitor. The object of the action, as he has already said, is to have them ordained to keep the burn free and unimpeded according to its natural levels. But if they have done no wrong, they are not, he thinks, under any obligation either to deepen or clear out the burn. As to the remedies the pursuer may have if his drainage has become insufficient by reason of accumulation of silt, but for which the defenders are not responsible, it is not for the Lord Ordinary to express any opinion. But he is very much impressed with the idea that if the matter were approached in a spirit of mutual conciliation the existing order of things might be greatly improved, to the benefit of the defenders as well as the pursuer."

The pursuer reclaimed, and argued—(1) On the question of the right to stop the increase of the sewage. The cases of *The Tunbridge Wells Commissioners* and *The Corporation of Birmingham* showed the right to interdict, which amounted to this, that even with a prescriptive right to pollute, increase in the pollution might be checked. At least, if he was not empowered to compel the defenders to take away the nuisance, he could take steps to do it himself at his own cost. [Lord Justice-Clerk—Assuming that Mr Hope's operations were undoubtedly illegal, would the Hospital be entitled to replace the nuisance?] He thought not. [Solicitor-General—We are quite prepared to prove that his operations would have increased the nuisance.] The amendment of the summons was competent, and was not so material as the Lord Ordinary thought. If a convulsion of nature were to cause a change, damming back the water, he would in that case surely be entitled to go and put things right on his neighbour's property, even though he could not force him to do so himself. [Lord Ormidale—If you are entitled to go on to his ground and remove an obstruction, surely that is tantamount to having a right to compel him to remove it.] That was not so always, for the illustration of a salmon-fishing might be taken, where a person might land his nets on ground not his own. Again, it was not a trespass for shipwrecked mariners to cross another man's land. He needed no fresh averments, as all his facts were proved.

The defenders argued that their objection to the proposed amendment was, that it really was initiating a new system of drainage for the district, and that could not be done in the course of such an action as the present.

Authorities—*Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L.R. 1 Eq. 161; L.R. 1 Ch. App., 349; *Attorney-General* v. *Corporation of Birmingham*, 4 Kay and Johnston 538; *Montgomery and Fleming* v. *Findlay*, July 9, 1853, 15 D. 853; Bell's Principles, secs. 984, 985.

At advising—

Lord Ormidale—This case, besides being one of much interest to the parties between whom it has arisen, is of some general importance in respect of the principles it involves touching the rights of upper and lower proprietors on a running stream or burn.

The defenders, the Governors of Heriot's Hospital, are, in relation to the pursuer Mr Hope, both upper and lower proprietors on the Broughton Burn; but, what is here chiefly to be remarked, Mr Hope is an upper proprietor on the burn in regard to that portion of it which passes through the defenders' property, where the operations more immediately in question have been executed.

In his summons Mr Hope, the pursuer, concludes against the defenders for decree of declarator to the effect that he is entitled "to have the channel of the Broughton Burn, where the same flows through the lands and barony of Broughton belonging to the first-named defenders (the Governors of Heriot's Hospital), made and kept by the defenders free and unimpeded for the passage of the water of the Broughton Burn and feeders thereof, according to the natural levels, to the effect of having the water of said burn and of Gayfield Square sewers and other feeders thereof, and the drainage of the pursuer's lands of Broughton and Gayfield" (all of which are situated higher up than the lands in question belonging to the defenders), "carried freely down the channel of said burn." In reference to this portion of the conclusions of the pursuer's summons the question at once occurs—Upon what ground or principle can it be supported? It is nowhere said that the defenders are under any special obligation or agreement to keep the Broughton Burn as it flows through their lands "free and unimpeded" for the passage of the sewerage of the upper grounds belonging to the pursuer. Nor did I understand the pursuer to contend at the debate that, independently of special contract, they are under any such obligation. They may as lower proprietors be subject to the servitude of receiving the natural drainage of the upper grounds, and to this extent there is no dispute. The defenders may also, in consequence of immemorial usage, be obliged to submit to the sewerage of the upper grounds coming down by the Broughton Burn through their property; and, at anyrate, no question in regard to this has been raised. But the defenders deny and dispute that they are under any obligation to make and keep the Broughton Burn as it passes through their property "free and unimpeded" for the conveyance of the pursuer's sewerage, however large in quantity and injurious in its effects that sewerage may be.

At first, and before the Broughton Burn may

be said to have been by uninterrupted usage virtually converted into a common sewer, it cannot be doubted that the lower proprietors, situated as the defenders are, might have successfully prevented any such pollution and conversion of the burn from its natural condition, as is well illustrated by the cases of *Montgomerie and Fleming* v. *Findlay*, July 9, 1853, 15 D. 853, and *The Caledonian Railway Company* v. *Baird and Company*, June 14, 1876, 3 Rettie 839. And although it may be too late now to get the burn restored to its original condition, the defenders might also be well entitled to object to any material increase of the pollution, as appears to have been done in *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners*, Law Reps., 1 Chan. Apps. 349.

But, as already remarked, it is unnecessary to consider how far the defenders must submit to receive the sewerage from the higher grounds belonging to the pursuer and others as heretofore, or even to receive it in an increased quantity, for they have as yet raised no question or complaint on the subject. It is the pursuer alone who is *in petitorio*; it is he who, not content with sending down his sewage as in time past, now insists for a declarator to the effect that the defenders must not only submit to its being sent down through their property, but also that they must, irrespective of trouble and cost, make and keep the channel of the Broughton Burn free and unimpeded for its passage, and this although they are under no specific obligation—and the pursuer does not say they are—to do so. The pursuer does not even say that the defenders have been in the practice of keeping the burn clear and unimpeded, or indeed that they have ever at all done so. Nor has the pursuer been able to refer to any authority in support of his contention in this respect. On the contrary, it was acknowledged at the debate that no such authority could be found. To hold that the servient tenement is under any further or larger obligation than merely passively to suffer and bear the burden cast upon it by the dominant would be contrary to the essential principles and nature of a servitude in the constitution of which no such element is said to have assisted.

So far, therefore, as the first part of the conclusions of the pursuer's summons is concerned, I have no difficulty in holding that it cannot be sustained, and I may, in addition to the observations I have already made, remark that in any view that can well be taken of this matter I do not see how it could be entertained or dealt with in the absence of the proprietors of the grounds situated below the defenders' property, for it is obvious that the defenders could not make and keep clear the channel of the Broughton Burn as it passes through their grounds to the extent and effect concluded for by the pursuer without affecting the lower heritors, it might be very seriously.

It is only fair, however, to the pursuer to say that his chief reliance did not seem to be so much upon that part of the conclusions of his summons which has now been referred to as upon the conclusion, which is also in his summons, to the effect that the defenders are not entitled to obstruct the flow of the Broughton Burn as it passes through their grounds "so as to dam or force back the water thereof on the lands of the pursuer, either by neglecting to make and keep the bed of the burn free from accumulations of silt and deposit, or by placing dams and weirs in the channel thereof, or by laying down in said channel earth or stones or other similar materials;" and his further conclusion, to the effect that the defenders should be ordained "to remove all such dams or weirs, and earth or stones, and silt and other obstructions, as aforesaid, and to restore the channel of the said burn to its natural level, or to such levels as will afford sufficient and proper drainage for the pursuer's said lands, or otherwise to such levels as will clear the silt of Gayfield Square sewer at the outlet of the covered part thereof."

So far as the defenders are in these conclusions required not merely to submit passively to the burden of a servitude—that is to say, to submit to the sewerage of the higher ground coming down to them by the Broughton Burn and passing onward—nothing need be added to what I have already stated. And as to the question whether the defenders are entitled by placing dams or weirs or stones and earth in the channel of the burn, whereby the water thereof is forced back upon the pursuer's lands, the defenders have raised no dispute further than denying that anything of the kind has been done by them. The parties having joined issue and gone to proof on this as matter of fact, the question on the proof is, Whether the Lord Ordinary is right in holding, as he has done, that the pursuer, on whom the *onus* lay, has failed to substantiate his averments?

[*His Lordship then examined at some length the evidence given at the proof, and concluded*]—Enough has been shown to satisfy anyone that, in the most favourable view for the pursuer that can be taken of it, there is a conflict of evidence, and that I think is sufficient in the circumstances to entitle me, especially having regard to the heavy *onus* there was on the pursuer, to hold that he has failed to establish that the defenders in their operations in 1876 did more than restore the burn, so far as that could be done, to the condition in which it was before the pursuer's own unwarrantable interference with it.

The only other point on which the pursuer seemed to rely was the placing in the burn what he has called, in somewhat exaggerated terms I think, "weirs or dams." But if I am right in holding, on a full consideration of the whole evidence, that the pursuer has failed to prove that the defenders' operations have been the cause of injury to him by the regorging of the water, or throwing it back upon his property, he is not entitled to complain of anything they have done or may do in reference to the burn as it passes through and within the limits of their own property. It is true that Mr Cunningham, Dr Littlejohn, and others of the pursuer's witnesses, say the weirs or dams have had the effect of silting back the water or sewage, and in that way doing injury to the pursuer's upper grounds, but on a close examination of the evidence of these witnesses it does not appear to me to be entitled to much weight, at least not to be sufficient to outweigh the counter evidence on the point for the defenders. Mr Cunningham evidently knows little of the Broughton Burn, and speaks of it in a very general way. He no doubt condemns what he calls the "weirs or dams,"

but he is obliged ultimately to confess that he "cannot exactly say whether it" (the water in the burn) "is dammed back or not," and accordingly he does not say that the mere removal of the weirs would effect any good, but he adds "that the lands of the pursuer can never be properly drained until the weirs are taken out and the bed is deepened." In the same way Dr Littlejohn, forgetting or not being aware that the question is simply whether the defenders did more than restore the burn, and not how the greatest good could be done to the pursuer's lands, says—"The lands of the pursuer can never be properly drained until the weirs are taken out and the bed deepened." On the other hand, there is a good deal of evidence as to the weirs or dams—on the part of the defenders—to show that they had become necessary in consequence of the pursuer's own unauthorised interference with the burn, and that they have had the contrary effect to that ascribed to them by the pursuer.

Giving all due effect, therefore, to the proof touching what the pursuer calls the "weirs or dams," I cannot think that he has succeeded on this particular point better than in any other. And in the whole case, as it now stands, I can come to no other conclusion than that the Lord Ordinary has rightly assoilzied the defenders.

I also concur with the Lord Ordinary in thinking that the pursuer's proposed amendment of his summons is inadmissible, in respect that it would amount to a charge and enlargement of the grounds of action, and that too at the conclusion of the ligitation, after proof has been adduced and concluded by both parties. If the pursuer is entitled to some remedy or redress different from that concluded for in his present action, he will not be cut out from it in a new and more appropriate action. I rather think, however, that the pursuer cannot succeed in accomplishing his object—the drainage of his property—except by some general well-devised scheme embracing all parties having property in the districts, whether upper or lower heritors on the Broughton Burn, and there are both besides himself and the present defenders. And possibly legislative authority rather than an action may be necessary for carrying any such scheme into effect. Be that, however, as it may, I am quite satisfied that under his present summons, or as he proposes to amend it, the requisite object cannot be satisfactorily accomplished.

Lord Gifford—I concur, and would only add two observations—First, the pursuer has failed to show that the defenders did more here than simply restore matters to their former position. He acted at his own hand, and against the remonstrances made to him; he entered on the defenders' property, and acted altogether in a masterful way. Second, this small burn running through the lands of various proprietors becomes the entire property of those who own the lands through which it is at the time passing. They may do what they like with the water so long as they do not throw it back upon the higher heritors by damming it. It has not been shown that this has been done in the present instance; there is no obstacle to the flow; and when I visited the ground myself I was unable to perceive anything to indicate that water had been thrown back in the manner alleged.

Lord Justice-Clerk—I concur with your Lordships, although with more difficulty than has been expressed. I do not think that the proceedings on either side appear in a favourable light, but I am quite unable to give effect, in present circumstances, to the conclusions of this summons.

Mr Hope concludes in his summons for decree to have the bed of the stream in question restored to its natural level. The stream is one which carries down its channel continually a large amount of sewage from the adjoining quarter of the city, and of course an amount of sedimentary matter is deposited on the bed of the stream from time to time. If the conclusion to have the bed of the stream, as it passes through the lands of the heritor immediately below, restored to its natural level, means its natural level without these impurities, I greatly doubt if the demand is well founded in law in any sense, and certainly not in the absence of any of the inferior heritors. An action to prevent the stream from being polluted I can understand, but if the foreign matters are lawfully in the stream, there is no obligation on any individual heritor, at the suit of another, to perform any operation on the bed of the stream within his own ground in order to clear out sediment for which he is not responsible. Cases may no doubt arise, at common law or under sanitary legislation, where a nuisance to an upper proprietor or to the neighbourhood might give rise to such a demand. I do not think any such case is presented here.

As far therefore as this action relates to the accumulated sediment carried down by the stream and deposited on its bed within the Hospital grounds, I am of opinion that no action lies at the instance of an upper heritor against an inferior heritor to remove this gradual deposit. In a question with an upper heritor who transmits the impure stream through his own ground, it is merely the result of the natural operation of the stream itself as it reaches the lower heritor.

Apart, therefore, from the specialties founded on, I think no relevant action is laid in this summons. But then the pursuer alleges further that the defenders have raised the level of the burn about 18 inches higher than it ever was, and that by operations conducted on their own ground. Your Lordships have gone over the history of the singular facts on which this plea rests, and I need not resume them.

The question raised is one simply of fact. The Hospital were not entitled by an *opus manufactum* to raise the bed of the burn even within their own ground, for that would necessarily affect the flow above. But they join issue on the fact, and say they have not raised it.

Had it been shown by conclusive evidence that they had raised the level from what it was when the pursuer began his operations, it would have been nothing to the purpose to have alleged that the pursuer's operations were illegal. Beyond doubt they were, and went so far beyond the line of ordinary excess of power as to place the pursuer in a very disadvantageous position here. There was no excuse for the line adopted, and none was made for it. Still, in their operations to restore the bed of the burn, especially if they chose to do that—as they should not have done it at their own hand—they were bound not to exceed the former level. But in the question whether they

have or have not exceeded that level, all the presumptions are against the pursuer, the wrong-doer originally, who was at least bound to have preserved clear evidence of the state of things, first, when he commenced his operations, and secondly, when he completed them.

Neither of those things he did. I may say that I attach no importance to the evidence of the contractors on this question of levels. In such a matter it is, in my view, entirely worthless, and no man in the practical affairs of life would for a moment place it against the levels of the engineer. While the restoration of the burn was as yet not commenced, Mr Hope wrote to Methven that the burn had not been deepened to the required depth, and requesting Methven to say whether he questioned the accuracy of the statement. But there was no reason why this matter should have been left to rest on these levels. The old landmarks had been totally obliterated by the unwarranted acts of the pursuer himself. There was no difficulty in preserving certain conclusive evidence of what they were; but the pursuer having failed to do so, must abide the result. If this were a matter of ancient date, or if there were a necessary *penuria testium*, I might have accepted these calculations as conclusive. But, as it is, I am compelled to come to the result at which your Lordships have arrived. The matter is left in doubt, and the doubt is fatal to the proof of the affirmative.

It is impossible, however, not to see that the defenders are also not without fault here. If Mr Chesser had asked for and seen the letter which Mr Hope wrote to the tenant after the work had been completed, which he admits he was aware of, and which I think he should have seen, and had checked Mr Esdon's calculations as regarded the depth to which the burn had been excavated, all these doubts would have been removed. I am left with an impression that here the fact is with Mr Hope; but he has put himself so far in the wrong that even this element will not overcome the presumptions against him.

I observe, with regret, persons in the position of both of these parties surrounding their disputes with unnecessary difficulties by asserting and acting on their supposed rights at their own hand. But I see no other result to this lawsuit than that at which your Lordships have arrived.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Fraser)—Balfour—Pearson. Agent—Party.

Counsel for Defenders — Solicitor-General (Macdonald) — Gloag. Agents — M'Ritchie, Bayley, & Henderson, W.S.

Friday, March 1.

FIRST DIVISION.

BROATCH, PETITIONER.

Administration of Justice—Procurator—Suspension of Procurator by a Sheriff.

Circumstances in which the Court, on a petition by a procurator in a Sheriff Court for recall of an order by the Sheriff suspending him from his office, refused to interfere, but *superseded* consideration of the petition till the petitioner should, if so advised, apply to the Sheriff for recall of the order.

This was a petition presented by Robert Broatch, law agent in Dalbeattie, a procurator in the Sheriff Court of the stewartry of Kirkcudbright, for recall of an order by the Sheriff (NAPIER) suspending him from his office. The petitioner was agent for the defenders in an action that depended before the Sheriff-Substitute (NICOLSON) at Kirkcudbright, in which the Sheriff had pronounced an interlocutor repelling certain preliminary defences and ordering a proof. Against this the defenders had reclaimed, the reclaiming petition being prepared and signed by the petitioner. When the petition came before the Sheriff on 30th November 1877, his Lordship pronounced this interlocutor, from which it will appear what his grounds for pronouncing it were:—

"*Edinburgh, 30th November* 1877.—On looking at the prayer of the reclaiming petition in this case, before proceeding to study its contents the attention of the Sheriff was at once attracted by the following statement, which immediately precedes the prayer for reversal. It bears to be written, not as for the party litigant, but expressly in the name and for behalf of 'the writer,' viz., Robert Broatch, procurator and agent for defenders. 'The writer cannot resist, too, stating the following facts. His Lordship, the Sheriff-Substitute, decides nearly every case against his clients, the cause of which is only conjectural; but it cannot be because of their cases being bad, for your Lordship, although apparently disinclined to alter unless on very strong grounds, has reversed three decisions in favour of the writer's clients; and out of six appeals to the Court of Session in only two of them were the Sheriff-Substitute's adverse judgments adhered to, and these two might also have been reversed had they been well handled, but were not so well managed as clients with plenty of money would have secured. The writer has every respect for the learned Sheriff-Substitute, but these facts tend to sap his confidence in the soundness of his judgments; but the writer could not resist adverting to these facts, because it so happens that at the present moment two or three other cases have been decided against his clients.'

"This agent's 'facts,' as he calls them, are by no means intelligibly stated as regards the details; but the Sheriff will not condescend to endeavour to understand them. This much, however, he has no difficulty in perceiving through a very transparent gloss of respect, that the purport of the passages above quoted is to accuse the Sheriff-Substitute of the Stewartry of systematically and unrighteously giving judgments against parties, not according to the merits of their cases, but because they happen to be clients of Mr Robert Broatch. That the Sheriff-Substitute does so is asserted as a fact. The cause of his doing so, as Mr Broatch is pleased to inform the Sheriff, 'is only conjectural.'

"As regards the Sheriff-Substitute, the Sheriff has no hesitation in coming to the conclusion that this accusation amounts to the criminal offence of maligning a Judge, *omni suspicione major.*