conclusion of the summons as to the first and third branches thereof. As regards the other conclusions—the conclusions for removal and interdict—there is no foundation for them whatever.

The condescendence sets out that there are three roads, with reference to each of which it is distinctly averred, in the 5th, 6th, and 9th articles, that from time immemorial, or at least for forty years and upwards prior to the date of instituting this action, such public right of way has existed. It is therefore the fact, according to the pursuers themselves, that there has been no obstruction to these roads prior to this action. And, to make this still clearer, the reason for this action is also stated. In the 13th article it is said that the defenders have recently attempted to interfere with the pursuers and others of the public in the use and enjoyment of said roads, whereby the present action has become necessary. Now, this interference has been explained to be a suspension and interdict in the Bill Chamber. But that is not an obstruction removeable by any conclusion of the summons. There is therefore no foundation for the conclusion for removal of obstructions. Nor is there any more foundation for the conclusion for interdict; for interdict, whether in the form of a summons or of a suspension and interdict, is only competent in the case of active or threatened interference with rights. While therefore the pursuers obtain decree under their first conclusion, as regards the first and third heads, the defenders should be assoilzied as to the second head; and *quoad ultra* the action should be dismissed.

As to expenses, the pursuers have substantially gained their case. They have got a cart-road to Pettico-Wick, and also a footpath. They have lost on the second issue; and if they had subjected the defenders to any distinct expenses applicable to their defences under that branch of the case, which could have been the subject of a distinct account, the defenders might have succeeded in their contention; but there is plainly nothing of that kind here. The justice of the case requires that the pursuers should get their expenses, subject to modification.

The other judges concurred.

Agent for Pursuers—T. White, S.S.C.

Agents for Defenders—Jardine, Stodart, & Fraser, W.S.

Friday, May 24.

TAYLOR & CO. *v.* MACFARLANE & CO.

(*Ante*, vol. iii., p. 151.)

Jury Trial—Bill of Exceptions—Record—Issue—Construction. 1. Refusal by presiding Judge to allow pursuers to put in (1) articles of condescendence, and (2) whole record, at trial, sustained. Observations on the legitimate use of the record at trial. 2. Exception by defenders to refusal of Judge to construe a term in the issue disallowed.

The pursuers in this action were William Taylor & Co., merchants, Leith, and the defenders were M. Macfarlane & Co., distillers, Glasgow. The case was tried in January last on the following issue:—

"Whether in or about September 1862 the defenders, on the order of the pursuers, agreed to supply to them a quantity of whisky, coloured with burnt sugar or other innocent material, similar to a sample of Mackenzie & Co.'s whisky then shown to the defenders? Whether the defenders delivered to the pursuers a quantity of coloured whisky, amounting to 20,554 proof gallons or thereby, for which the pursuers duly paid the stipulated price? And whether the coloured whisky so delivered by the defenders to the pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter not being burnt sugar, or other innocent material similar to said sample, to the loss, injury, and damage of the pursuers?"

Damages were laid at £6000.

The pursuers' statements were to the effect that they ordered from the defenders a quantity of spirits, coloured according to a sample which had been coloured by Messrs Mackenzie & Co. with burnt sugar; that the whisky supplied by the defenders on this order was sent to the West Coast of Africa, but was then found to be so bad that the natives, after trial of it, refused to purchase. The pursuers afterwards found that the whisky had been coloured with logwood, which was noxious and injurious. Experiments suggested by the defenders were made to purify the whisky, but without success, and the pursuers now sought damages for loss of trade and otherwise.

The defenders denied that burnt sugar was the usual or only substance used for colouring whisky, and maintained that the whisky sent by them was conform to sample. They denied that the preparation of logwood used by them was deleterious. They contended that the pursuers were barred from claiming damages by their failure to return the whisky.

At the trial, various exceptions were taken by the defenders' counsel to the ruling of the presiding judge (KINLOCH). The first two exceptions related to certain questions put to witnesses in the course of examination. These exceptions, however, were not insisted on. (3) The defenders also proposed to put in the ninth article of the condescendence to prove what the pursuers stated therein as to the character of the substance of which they now complained as not being innocent. The pursuers objected to the admissibility of this evidence, and the objection was sustained by the judge. (4) The defenders then proposed to put in the whole record, for the purpose of its being used in construing the words "innocent material" occurring in the issue. This was also objected to by the pursuers, and the objection sustained by the judge. To these two rulings the defenders excepted. (5) Counsel for the defenders also excepted to the charge, in so far as the judge had directed the jury that the term "innocent" in the issue was not a legal term requiring construction from the judge, and that it was for the jury to say, upon the evidence, whether the thing was innocent or not, in the fair and reasonable sense of the word, as employed in ordinary language. (6) They also asked the judge to direct the jury (1) that, in order to entitle the pursuers to a verdict, it was not sufficient for them to prove that the material with which the whisky was coloured was injurious to the marketable quality of the whisky; (2) that in order to entitle the pursuers to a verdict, it was necessary for them to prove that the colouring matter was injurious to the health of the consumer; (3) that the words in the issue, "similar to the said sample," related to the colour of the whisky

only, and not to the colouring material; (4) that if the jury were satisfied that the defenders from the first repudiated liability, the pursuers could not recover damages on the ground of the vessel having been detained beyond the usual period for obtaining a return cargo, if such detention took place without notice to the defenders.

The Judge declined to give these directions, and the defenders excepted.

The jury returned a verdict for the pursuers, assessing the damages at £3000.

JOHN M'LAREN, for the defenders, supported the bill of exceptions, and also contended that there ought to be a new trial, on the ground that the verdict was contrary to evidence.

GIFFORD and ASHER were heard for the pursuers in reply.

The LORD PRESIDENT—In this case there was a rule granted to show cause why the verdict should not be set aside on the ground that it was against evidence; but there was also a bill of exceptions for the defenders in the same case, and we are now to dispose of the bill of exceptions. The nature of the action is seen at once from the issue. It is an action upon a contract by which the pursuers allege that the defenders agreed to supply them with a quantity of whisky, coloured with burnt sugar, or some such material; and they further allege that there was a breach of that contract, inasmuch as the whisky that was furnished was not coloured in the manner that they expected and stipulated for, but was coloured in such a way as to destroy its value to them as a mercantile commodity. That seems to me to be the nature of the pursuers' case, and that is undoubtedly the case which he made in evidence.

In the course of the trial six exceptions were taken; but the first and second of these exceptions, which were taken by the defenders in the course of leading the pursuers' evidence, were abandoned, and we heard nothing of them at all in argument. And in like manner, the fourth head of the 6th exception was abandoned by the defenders, and no argument was offered to us in support of it. But there remain for consideration the 3d, 4th, and 5th exceptions, and the first three heads of the 6th exception; and I shall endeavour to state shortly the opinion which I have formed with regard to each of these exceptions separately. The first exception arises in this way:—In the course of leading the defenders' evidence, the defenders' counsel proposed to put in the ninth article of the condescendence, in order to prove what the pursuers state therein as to the character of the substance of which they now complain as not being innocent. Now it appears to me that that exception condemns itself by its own terms, and that it is quite impossible to entertain it. The condescendence contains the statement of facts for the pursuer, and the record generally may be used in two different ways at a trial, but in two ways only. In the first place, it is in the hands of the Judge ready for constant reference by him, for the purpose of preventing either party from endeavouring to make a case at the trial which they had not stated on record. That is one great function of the record, as settled by the Judicature Act of 6 Geo. IV., cap. 120, although that has often been misunderstood. But as regards that matter I need only refer to the observations of Lord Colonsay, while he presided in this Division, in the case of *Mackintosh* v. *Smith & Low*, 2 Macph., 1261, in which he explains this very fully, and in every word of which explanation I entirely concur. But there is another purpose undoubtedly for which parts of the record may be used at the trial. If a party makes a statement or admission of a matter of fact in the record, that statement or admission may be used against him by his opponent, and his opponent may put in that statement or admission as evidence to prove the fact stated or admitted. That is another great object of our records as provided by the same Judicature Act to which I have already referred, the purpose being to bring parties as near as possible to one another upon matters of fact, and to give every opportunity for eliciting and giving admissions of matters of fact. And it certainly would be quite inconsistent with that object of the statute if a party were not allowed at the trial of the cause to use the statement or admission which he has thus obtained as evidence of the fact there stated or admitted. Therefore, if the defenders' counsel had proposed to put in the ninth article of the condescendence for the purpose of proving the fact there stated, that would have been a legitimate use of that article of the condescendence. But that is not what he proposes to do at all. What he proposes to do is to put it in for the purpose of proving what the pursuers state therein as to the matter in dispute. Now that is an illegitimate purpose altogether, for which the record never was intended, and I have no hesitation therefore in saying that this exception ought to be disallowed.

Then we come to the 4th exception, which again, I think, shows a very great misunderstanding of the proper purpose for which a record can be used at a trial. The counsel for the defenders proposed to put in the whole record for the purpose of its being used in construing the words "innocent material" occurring in the issue. Now it naturally occurs to inquire, in the first place, if the record is to be used for the purpose of construing these words occurring in the issue, by whom it is to be so used? It cannot be put in for the purpose of enabling the Court to use it, because the Court has it without its being put in. It is always in the hands of the Court for every legitimate purpose; and to enable the Court to use the record nothing of this kind is necessary. Therefore the proposal to put in the whole record, for the purpose of being used, must mean, of course, that it is for the purpose of being used by the jury. And for the purpose of being used by the jury, how?—in construing the words "innocent material" occurring in the issue. Now this leads one to consider the rules applicable to the construction of words occurring in an issue; and here there is a great distinction between words of different kinds. Some words have a technical legal meaning, and these words unquestionably must be explained by the Court to the jury in so far as that is necessary. I daresay, even some technical legal words are sufficiently familiar to a jury not to require any explanation; but if they do require any explanation or any construction, that construction must be given by the Court to the jury. But there are other words, again, frequently occurring in issues which are not used in an ordinary colloquial sense, and indeed many of which are incapable of such use. I mean either words that have a particular meaning impressed upon them by the use and practice of merchants, or words of a technical meaning in science or in art. And with regard to all these—words of mercantile signification, that is to say, words with a special meaning impressed upon them by the understanding or usage of merchants, or words of science and

art—the meaning of these must be made the subject of evidence where necessary. They are not for the construction of the Court, because the Court knows nothing of itself of mercantile understanding, or of science, or of art, and must trust to the evidence of experts to enable them to know what is the meaning of such terms. And therefore the meaning of words of this class is to be fixed by evidence. But what kind of words are those that the jury are to connstrue for themselves without either the aid of expert witnesses or the aid of construction from the Court? They are words of ordinary signification, with no technical meaning of any sort, with no secondary meaning impressed upon them by the usage or understanding of particular classes of persons. These words are naturally and properly left to the jury themselves to construe, because the issues which we send to juries are, as far as possible, expressed in ordinary popular language which the jury can understand. But to propose that the jury in discharging their ordinary function of construing themselves words of ordinary meaning—words used in the course of every-day conversation and writing—that in discharging that duty they are to be aided by having the record put into their hands, is the most extravagant proposal I ever heard of. What is the use of framing an issue? Just to prevent the record from being sent to the jury. That is the whole object of it. It is to substitute for the record that which shall be more clear and intelligible to the jury, and lay before them more shortly and more precisely the question which they have to answer. Upon these grounds, therefore, I need hardly say that I can give no countenance whatever to this 4th exception.

But then we come to consider an exception—the 5th—which is taken to a direction given by the presiding judge to the jury in the course of his charge. Lord Kinloch directed them that the word innocent, as contained in the issue, was not a legal term, nor one on which it was necessary that he should put a legal construction, and that it was for the jury to say, upon the evidence, whether the thing was innocent or not in the fair and reasonable sense of the word as employed in ordinary language. Now, in order to judge of the merits of this exception, it is necessary to attend precisely to the terms of the issue in which this word innocent occurs. It consists, as such issues very often do, of three questions. The first is, Whether, in September 1862, the defenders, on the order of the pursuers, agreed to supply them a quantity of whisky, coloured with burnt sugar or other innocent material similar to the sample of Mackenzie & Co.'s whisky, then shown to the defenders? Now that is the portion of the issue in which the word innocent first occurs. The whisky ordered was to be coloured with burnt sugar or other innocent material. The second question is, Whether the defenders delivered a quantity of whisky?—and that part of the issue is immaterial to the present consideration? The third part is, Whether the coloured whisky so delivered by the defenders to the pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter, not being burnt sugar or other innocent material similar to said sample, to the loss, injury, and damage of the pursuer? Now here again the word innocent occurs. It occurs in both the first and third parts of the issue as an adjective, expressing the quality of the colouring material. It is to be an innocent colouring material. Now the question comes to be, in the first place, whether the presiding judge was wrong in saying that that word was not a legal term, nor one on which it was necessary that he should put a legal construction? Now I am humbly of opinion that the word innocent, as used in that issue, is not a legal term, and that it is one on which it was not necessary for him therefore to put a legal construction. So far, I think, there can really be no serious question as to the propriety and soundness of the direction which his Lordship gave to the jury. But there is a little more difficulty about the second part of this direction, for a reason that I shall immediately explain; for his Lordship went on to say that it was for the jury to say, upon the evidence, whether the thing was innocent or not in the fair and reasonable sense of the word, as employed in ordinary language. Now, if I could read that as meaning plainly and distinctly, on the part of the Judge, an abdication of his proper function in construing the issue, I should then be disposed to come to the conclusion that that was not a good direction, or at least that there was a certain miscarriage on the part of his Lordship in not construing the issue to the jury in so far as it needed construction. But I think it would be rather an unnecessary strict view of the direction which we have here, to read it as having that effect. We must take these words which I have just read in connection with those which precede them. It was plain that he had been asked by the defenders to put a legal construction upon this word "innocent," or at least to put a fixed construction upon it, which was not its natural or necessary meaning. And, with a view to illustrate what I am going to say, as regards this second part of his Lordship's direction, I think it necessary here to advert to the first and second heads of the 6th exception, in which the defenders express very clearly and distinctly the construction which they desired his Lordship to put upon the word innocent in the issue. They asked him to tell the jury that, in order to entitle the pursuers to a verdict on their issue, it is not sufficient for them to prove that the material with which the whisky was coloured was injurious to the marketable quality of the whisky; and second, that in order to entitle the pursuers to a verdict on their issue, it is necessary for them to prove that the material with which the whisky was coloured was injurious to the health of the consumer. Now, before I can quite dispose of the portion of the direction of Lord Kinloch to which I have been adverting, I find it necessary to make up my mind upon what is the true construction of this word innocent as occurring in the issue, and whether it is the construction contended for by the defenders. Upon that question I confess I have formed a very clear opinion. They say that innocent means not injurious to the health of the consumer, and that it does not mean not injurious to the marketable value of the commodity. Now, in order to judge of these competing meanings given to this word innocent, I think we must look naturally to the subject matter with reference to which the word was used. What is this issue about? It is about a mercantile contract — a contract for the sale and delivery of whisky to be shipped to and sold at the coast of Africa to the negroes there; and, of course, the object of this, as of every other mercantile contract, is to make money. The great object is to buy this coloured whisky in this country at as low a rate as possible, and to sell it at as

high a rate at its port of destination, and with as little obstruction or difficulty of commanding a market, as possible. Now if I desired a man who furnished me with this whisky to colour the whisky with burnt sugar or some other innocent material, what would he naturally understand by that? Would he not understand that it was to be something that was innocent in this sense, that it should not be hurtful to the commodity which I was purchasing, or to my object in purchasing it, which in other words is, that it shall not be hurtful to the marketable quality of the commodity,—that it shall not depreciate or deteriorate from the marketable value of the commodity. And therefore I can have no hesitation whatever in saying that men dealing in the ordinary course of business with a commodity of this kind, and making use of such language as we are now considering, would have in view the marketable quality of the commodity, and the command of an easy and profitable market more than anything else. Of course if it was injurious to the health of the consumer, that would make it also unmarketable,—probably more highly unmarketable than anything else that could happen to it. But there are many other things that would make it unmarketable besides being injurious to the health of the consumer, and we have an excellent illustration of that in the present case, because I don't think the pursuer's case, as made on the evidence, at all comes up to this, that it was injurious to the health of the consumer, and the jury could never imagine that the pursuer had made out a case of that kind; but he proved very clearly that this colouring matter in the whisky produced such alarming symptoms in the consumer as to cause very great terror, and to deter persons from either consuming or buying the whisky, and so to destroy the market. Now in these circumstances I cannot help thinking that it is very clear that the proper construction of the word innocent here is, that the colouring matter is not to be injurious to the marketable quality or value of the whisky. Therefore I am very clear that the construction which the defenders asked the presiding judge to put upon that word innocent was not a construction which he was bound or would have been entitled to put upon it. But while he refused to do that, he said, at the same time, that it was for the jury to say upon the evidence whether the thing was innocent or not in the fair and reasonable sense of the word as employed in ordinary language. Now if I had been counsel for the pursuer, I think I should have asked him to tell the jury that the word innocent meant that it was not to be hurtful to the marketable value or quality of the commodity, and I think that probably that would have been a prudent and a right course to take. Nay, I am not sure but that if I had been the presiding judge, I would have taken that course whether the pursuer's counsel asked me or no. But the question comes to be whether the presiding judge has committed a miscarriage here by reason of not having said in so many words to the jury, "I not only refuse to tell you that this must be injurious to the health of the consumer, but I tell you it is enough if the marketable value is destroyed." Well, he said this, that the word innocent was employed in its ordinary meaning in the issue, and that they were to consider upon the evidence whether, taking that word in its ordinary meaning, it was innocent or no. Now I confess I don't think the jury could be in any difficulty, because they heard the evidence, which showed very clearly that this colouring matter was very hurtful to the marketable value of the commodity, and having been told that it was not necessary that it should be injurious to the health of the consumer—Lord Kinloch having refused to tell them that—I don't think they could have any difficulty themselves in arriving at the conclusion that the word innocent in its ordinary meaning in such a case as this just meant what I have now said, that it must not be a colouring matter injurious to the marketable value of the commodity coloured. And accordingly they found a verdict for the pursuers. If they had found a verdict for the defenders, there might have been more strength in a complaint by the pursuers that the presiding judge had failed to give the necessary direction to the jury. But then he might have been met again with this very strong answer, that it was his duty to ask for a direction as to the construction of this word. But as regards the defenders, if he be wrong in saying that it was necessary to prove that the colouring matter was injurious to the health of the consumer, and if the true construction was that it only required to be injurious to the marketable quality of the whisky, then I don't see what the defenders have to complain of; because that was the pursuers' case, and upon that it cannot be disputed that the evidence was all one way, and that the jury taking that view of the meaning of the word, were justified in the conclusion they arrived at in finding a verdict for the pursuers.

Now that disposes of the whole of the exceptions except a trifling fragment. I mean the third head of the 6th exception, in which the defenders' counsel asked the presiding judge to tell the jury that the words "similar to the said sample, as used in the first issue, relate to the colour of the whisky only, and do not relate to the colouring material." Now these words, "similar to the said sample," occur in the last part of the issue, and equivalent words occur also in the first part, and I need hardly say that the words must be taken in the same meaning in that part of the issue which relates to the making of the contract, and in that part of the issue which relates to the breach of the contract. Now the contract is made according to the issue in this way,—the whisky is to be supplied coloured with burnt sugar or other innocent material similar to the sample of Mackenzie's whisky then shown to the defenders. Now if the only meaning of the words, similar to the sample of Mackenzie & Co.'s whisky, had been that the colour of the one and the other was to be exactly the same, it certainly would have been a very curious contract, because then I don't know very well what would have been meant by the words immediately preceding the word similar—"coloured with burnt sugar or other innocent material;" and although the expression of the issue may not be in every respect what one could have wished it to be, I cannot but think that the fair and reasonable interpretation of these words is, that the similarity to Mackenzie & Co.'s whisky required by the contract was a similarity in the mode of colouring and the material with which the colouring was to be made, fully as much as in the colour produced. And then when we come to the last part of the issue which relates to the breach of contract, the breach is said to consist in this, that the whisky was coloured with some colouring matter, not being burnt sugar or other innocent material similar to the said sample. Now here it must be observed that the word similar occurs again,

exactly in the same company as before. It is preceded by the words burnt sugar or other innocent material, and therefore it demands there, I think, exactly the same construction as it does in the first part of the issue, and the appeal made to the sample and the similarity of the sample and the goods furnished, is not merely in regard to the colour of the one and the other as compared, but in the mode of producing that colour, and the material used to produce it. And therefore upon this last point also I think the direction asked by the defenders' counsel was erroneous. That disposes, I think, of the whole of the exceptions which have been taken; and I am therefore for disallowing these exceptions entirely.

Lord Curriehill—I have gone over this case very carefully, and I have arrived at the same conclusion as your Lordship. I have done so quite clearly upon all the points, with perhaps one exception, on which I have felt difficulty, and that is with regard to the 5th exception, for in my opinion it was the duty of the Judge, when called upon, to explain the meaning of the word innocent as used in the issue, so that the jury might be under no mistake as to the question they were answering. But I am also quite satisfied that the declinature of his Lordship to give the explanation has not led to any bad consequences. I think the jury themselves have come to a right conclusion, and that the verdict is a right verdict upon the evidence; and on that ground I think that the mistake of the judge—as I hold it to be—in not giving the explanation that was asked of him is of no consequence in this case.

Lord Deas concurred substantially with the Lord President.

Lord Ardmillan thought that Lord Kinloch would have been right if he had given a judicial construction of the word "innocent." He did not think there had been a miscarriage of justice because the Judge did not give that construction, but looking to the fact that the word "innocent" was not used by the parties on record, but was inserted by parties in the issue with the sanction of the Court, he thought it would have been quite correct and appropriate if the Judge had construed the word at the trial. But then the right construction, and the one which the Judge ought to have delivered, was the construction contended for by the pursuers, and that being so, the defenders could not be allowed to set aside the verdict because a direction adverse to them was not given. On the other points of the case his Lordship concurred with the Lord President.

On the motion for a new trial,

Lord President—There was a rule granted upon the pursuers to show cause why the verdict in this case should not be set aside as being against evidence. Now, in disposing of that rule I confess I don't think it necessary to say anything beyond merely announcing the conclusion at which I have arrived upon a full consideration of the evidence. I am satisfied that the evidence supports the verdict, and that the verdict is perfectly justified by the evidence, and therefore I am for discharging the rule which was previously granted.

The other judges concurred.

Exceptions disallowed and rule discharged.

Agents for Pursuers—Henry & Shiress, S.S.C.

Agents for Defenders—White-Millar & Robson, S.S.C.

Friday, May 24.

SECOND DIVISION.

M'INTYRE'S TRUSTEES *v.* MAGISTRATES OF CUPAR.

Property—Running Stream—Riparian Proprietors—Feu—Medium filum—*Burgh.* Circumstances in which held that a feuar who had a running stream as a boundary under his titles, had a right to interdict proceedings at the instance of the Magistrates of a burgh that would have the effect of debarring him from the use of the stream. Question, How far a proprietor who has a running stream as his boundary has an absolute right of property *usque ad medium filum aquæ?*

The question in this case was, whether the Magistrates of Cupar-Fife were entitled to perform certain operations in the way of arching over and otherwise, on the Lady-Burn, without the consent, and in opposition to the wish of the suspenders.

The suspenders, trustees of the late Duncan M'Intyre, manufacturer in Cupar-Fife are proprietors of some house property and garden ground on the banks of the Lady-Burn. The subjects were acquired by two several dispositions from the Magistrates of Cupar, and are described as bounded by the Lady-Burn on the south. Some time ago the Magistrates of Cupar proposed to arch over the burn for the whole portion of it opposite to the property of the suspenders. The effect of this would be, in substance, that the burn would no longer be the south boundary of the suspenders' property; and the public street would be widened on the other side of the burn so as to bring it up close to the suspenders' south wall. In other words, the property would be bounded on the south by a street instead of by the burn. The suspenders objected to these alterations as illegal and unwarrantable, and brought a suspension and interdict against the Magistrates. By the arching of this burn they said the privacy of their property and the protection it derives from the burn would be interfered with, the course of the burn would be altered and narrowed, and the rights of the suspenders to the water of the burn would be injuriously affected. There would be danger of the property being injured by back-flow of confined water. Farther, the *solum* of the burn, to the extent of one-half, was their property, and the contemplated operations would narrow the *solum ex adverso* of their property. The Magistrates contended that they were entitled to execute the operations complained of, on the grounds—(1) that the suspenders had no right to the burn proposed to be arched over; (2) that the suspenders' property would not be in any way injured; and (3) that the operations were upon burgh property, and necessary for the health of the inhabitants of the burgh.

After a proof the Lord Ordinary (Kinloch) found that the suspenders had a right under their titles to prevent the contemplated operations, and granted interdict as craved. His Lordship was of opinion that the suspenders were in the ordinary position of riparian proprietors. The burn was declared to be their south boundary, and the right thereby given was not affected by measurement or otherwise. It was quite true that their title did not give them any express right to the burn, but the same was the case with almost every riparian pro-