applicable to all or any kind of contravention of the fetters, and the word "contravener" to designate the party so acting. And the word "premises" has general application to the whole of what precedes it, and cannot but be held to embrace all or any part of the prohibitory clause. The hypothesis implied in the terms is of universal application, and the only ground on which it is attempted to be limited is by the use of the relative *such* on the footing that it must be referred to those facts and deeds at the close of the prohibitory clause, which by their collocation are of limited import. I do not think that this can be held the fair grammatical meaning of the terms of the irritant clause. It is not reasonable so to limit the general meaning of the words, when in the hypothesis, as to contravention, we have sufficient antecedent to satisfy the term *such* without reverting to the terms at the close of the prohibitory clause. And this, accordingly, is the view taken in the cases to which I have adverted. All the more clear does this appear to me, in this case, from the limited meaning to which I hold the words "facts and deeds" in the prohibitory clause subject, *i.e.*, as applicable only to deeds of forfeiture, not including even debts. Assuming this, it would be quite unreasonable, and I think quite ungrammatical, to hold the words "such facts and deeds" in the irritant clause to be confined to the very limited class of acts to which, in this view, it must be referred.

I am not aware of any decision, either of this Court or of the House of Lords, at variance with the views which I have stated; but two cases were referred to, as if they were of a contrary tendency—I mean the cases of *Ogilvie*, March 1855, 2 Macq., and of *Udny*, March 24, 1858. But, however valuable the opinions which were delivered by the House of Lords and in this Conrt in the case of *Ogilvie*, with regard to the general principle of construction applicable to such questions, neither of the decisions at all conflict with the case of *Craigmillar*, and the other cases to which reference has been made. The decision in the case of *Udny* was indeed all but an echo of that in *Lang* v. *Lang*, and, in giving effect to that anthoritative precedent, this Court did by no means intend to go against the principles recognised in the case of *Gilmour*, only two years before. Had I thought this entail to be on all fours with *Overton* and *Udny*, I would have arrived at a different conclusion. It is because I concur with the Lord Ordinary in holding it to be distinguished from *Overton* by the same features as *Gilmerton* was held to be, that I concur in the judgment under review.

Lord Benholme and Lord Neaves concurred.

The Lord Justice-Clerk concurred, and stated that he had difficulty in distinguishing the present case from that of *Lang*, but that the mitigation of the law of entail generally had relaxed or coloured the practical application of the canon of construction. The words "such facts and deeds" meant all acts of contravention.

Agents for the Pursuer—Dundas & Wilson, W.S.
Agents for the Defender—Mackenzie & Kermack, W.S.

Friday, February 9.

FIRST DIVISION.

CARL SEITZ *v.* JAMES BROWN & CO.

Reparation—Breach of Contract.

Where the defenders agreed to adopt the pursuer's process (which was neither a patent nor an absolutely new invention) in a certain manufacture, if satisfied with it when seen working at a place where it was already in use,—*held* that, whether they were actually bound to adopt the process on being satisfied of its efficiency or not, they are not entitled to erect an apparatus similar to the pursuer's, and copied from him, by the hands of another person, and without employing him; and damages for breach of contract given accordingly.

This was an action of damages for breach of contract at the instance of Carl Seitz, practical chemist, against James Brown & Co., papermakers at Eskmills, near Penicuik.

The agreement on which the action was founded was as follows:—

"*Eskmills, Penicuik, 13th August* 1868.

"Messrs James Brown & Co.

"Dear Sirs,—I hereby agree to communicate to you and inform you of the method by which I boil down and otherwise manufacture the strong leys resulting from the boiling of esparto grass. To supply you with all general and working drawings requisite for the efficient construction and erection of the complete working-plant for your mill; to generally superintend the work during progress, and to teach your men the complete process, until all is in thorough working order; to at once communicate and show you my method for preventing the smell nuisance about the furnaces whilst drawing the charges, and incinerating the recovered ash in the heap, as it can be applied to your present plant.

"In consideration of the above you agree to pay to me the sum of £60 as soon as I have shown you how to avoid the smell nuisance from the charges during the time of drawing and incineration in the heap, and to adopt my complete process and manufacture of soda (if you are satisfied with the process when working at Messrs Young, Trotter, & Son's mill), on the following terms:—

"1*st*, You to pay me, my heirs, administrators, or assignees, one month after starting the complete process at your mill, for travelling and other incidental expenses, the sum of £50.

"2*d*, You to pay to me, my heirs, administrators, or assignees, quarterly or half-yearly (in your option), the net profit effected by the process and suggestions for the period of twelve months (one year) from date of starting the entire process, in full discharge of my claim for ever.

"3*d*, The net profit is to consist of the difference between what the boiling of your grass has cost you during the one year whilst my process has been in operation, and what it would have cost you by boiling the grass with 60 °/₀ caustic soda, at the rate of eighteen pounds of such soda per cwt. of grass, at the price of £16 (sixteen pounds), per ton of such soda. The recovery process is to be charged with ten per cent., 10 °/₀, for the wear and tear on the capital expended on the plant required for your process, with 5 °/₀ five per cent. for interest on foresaid plant, house, and

chimney, with the cost of the coal, salt-cakes, lime, and labour, during the twelve months.

"In the event of the re-using of the soda produced by my process proving detrimental to your manufacture, you are to have it in your power to make it into soda-ash, according to my plans, I receiving one year's nett profit resulting from this method.

"You take it in hand to reduce the quantity of your ley to about 1000 gallons for every ton of esparto, more or less, that being about the quantity used at other mills.

"I guarantee you that the entire process is in my own hands, and that I will take all responsibility as regards any action or proceedings against you on account of using the recovery process at your mills. . . . .

"The £60 received by me this day is to be deducted from the first payment you make to me on account of the twelve months' net profit.

"You are to have the option of paying to me a lump sum of £1500, fifteen hundred pounds, four months after starting the complete process, which will be in full discharge of all claims, excepting the £50 for expenses.—Yours truly,

"C. SEITZ.

"We agree to the above. "JAMES BROWN & Co."

The circumstances on which conclusions for damages were founded will sufficiently appear from the opinion of the Lord President.

The Lord Ordinary (ORMIDALE) found that the parties had entered into the agreement above narrated, and that the defenders had failed to implement their part of the agreement. He accordingly estimated the damages by a calculation founded upon the terms of remuneration stated in the agreement.

Against this interlocutor the defenders reclaimed.

MACKINTOSH for them.

BALFOUR for the pursuer.

At advising—

LORD PRESIDENT—This is an action for breach of the contract contained in two missives of agreement which passed between the parties to the cause. As this contract itself is not in a very formal shape, and is of a very unusual kind, it becomes indispensable for us to ascertain the intention of the parties at the time of making, and their object in entering into the agreement.

The defenders are papermakers on the North Esk, and they, in common with all the other papermakers on that river, had been disturbed in their manufacture by complaints of proprietors against the polution of the river. The case of the North Esk has been more prominently before the public and the Court than that of any other river, and we are therefore tolerably familiar with the circumstances connected with its polution. The polution of the river occurred mainly through the escape into it of the refuse from certain processes employed in the manufacture. Amongst these were the leys of the esparto. The esparto is boiled in a strong solution of soda, termed oxide of sodium. After the boiling is finished, and that part of it which is to be converted into paper taken out, the refuse consists of this solution of soda, combined with a large quantity of organic matter, coming from the esparto. This combination is of a very offensive and poluting character—and when escaped into the river it affected the amenity of the district to a considerable extent. The consequence was the raising of an interdict by the riparian proprietors, in which the papermakers went to trial upon an issue, and were unsuccessful, and lost a verdict after a long and very serious trial. They thereafter applied themselves to the problem of getting rid of their leys in some other manner than by discharging them into the stream. The process of incineration had been tried before, and their attention was now still more directed to it, for the makers were honestly striving to get rid of the leys without nuisance. The manner in which this process of incineration works is very simple. The liquid portion is first evaporated, and then the rest is consumed, and escapes by combustion through the chimney. The small residuum after this combustion ought to be carbonate of soda in a perfectly pure state. If the combustion is perfect, the carbonate of soda will be pure, or so pure as to be available as an article of commerce, and will be so good that it can be converted into caustic soda, and used again in boiling down esparto. The soda ash or product of this process of combustion was sold by the defenders before this agreement was entered into, and they realised a price for it, but not such as they would have had it been good enough to be re-used in their own operations; for the purchase of caustic soda is a large item in the working of a paper-mill, and if the same can be used again a great saving of expense is effected, independently of the great saving in carriage. It was therefore a great object to all paper makers to succeed in incinerating their leys in such a way that the result would be the production of soda in such a form that it could be re-used in their works. Now, the defenders, at the time they entered into this agreement, were not succeeding in the operation of incineration to this extent. It was indeed said that at one time, when using the process known as Richardson and Irving's, they were re-using the soda. But it is a fair inference, from the fact of their having abandoned it, that it was not satisfactory in its result. However this may be, they were not at the time re-using their soda, and did not see their way to doing so at a profit. For this reason, they were willing to listen to the proposals of the pursuer, who told them that he had been very successful in the erection of incinerators elsewhere, the result of which was that papermakers using his method were succeeding in what the defenders had in view. Everybody knew that the great desideration was to make as great a combustion as possible in the incineration. Everybody knew that the effect of this process was to throw off the organic and leave the inorganic particles. Therefore complete and perfect combustion was the thing to be aimed at.

Now, it has been represented that the pursuer claimed a new principle at the bottom of his process, and represented himself as in possession of a new invention; and that he told the defenders that what he proposed to use was a new invention, known only to himself. This is a mistake on their part. No doubt a great deal of loose and inaccurate language was used by the parties, and the defenders may very reasonably have been misled. But when we come to the agreement itself, it is not at all clear that the pursuer guaranteed or intended to guarantee the communication of a new invention. I rather think all he undertook was to put up a new incinerator of better construction, the practical result of which would be the effecting of the defenders' object.

The agreement itself requires to be considered. The pursuer undertakes to communicate to the defenders his method of boiling down the leys. He undertakes farther to supply them with working

drawings requisite for the erection of the plant necessary for the process, to superintend generally the erection, and to teach the defenders' men the use of the process. And then there follows another matter. He undertakes at once to communicate to the defenders his method for preventing the smell nuisance about the furnaces when drawing the charges. Now, that is the undertaking on the part of the pursuer, and there is no allusion there to a new process or invention. All that he undertakes is, when read in the light of the previous correspondence, &c., the communication of a process which shall ensure certain practical results.

The counterpart of this agreement on the defenders' side is the immediate payment of £60 for the prevention of the smell nuisance. And they bind themselves farther to adopt "my complete process and manufacture of soda (if you are satisfied with the process when working at Messrs Young, Trotter, & Son's mill)." It is right, in the meantime, to observe, that if they approve the process and adopt it in their works, it is implied that they are bound to employ him in terms of the preceding clauses to erect the necessary apparatus, &c., or at least to superintend the erection. Now, the terms on which this is to be done are—that they pay him £50 down one month after the complete process is started at their works; and that they pay him also one year's net profit or saving effected by the use of the process. Then follows a statement of the way in which the net profit is to be ascertained. Then there is a provision that if they find the re-using of the soda produced by the process detrimental to their manufacture, they are to have it in their power to make it into soda ash according to his plans, he receiving one year's net profit as before. The defenders then undertake to reduce the quantity of their leys to 1000 gallons to each ton of esparto. There is then a provision for arbitration in case of disputes, which seems to have turned out ineffectual. And, finally, there is an arrangement whereby the defenders may pay down, if they prefer it, £1500 in lieu of the first year's profits in the working of the process. Now, one cannot help seeing that this agreement was drawn upon very fair and reasonable terms, as regards the interests of both parties. The defenders were very well protected against the erection of a useless apparatus, for until it proved successful the pursuer was to get nothing. On its succeeding in its object depended his hopes of remuneration. Nor was that to extend beyond one year's profit. On the other hand, if the incineration turned out a greater success than was expected, then the defenders had the option of buying him off with £1500. Now, as I said before, what the pursuer undertook to do was, not to communicate a new invention, but a process which would have the practical result of effecting the object at which the defenders were aiming. The defenders, on the other hand, I think, undertook, not that they would act upon his suggestions in any event, but only that if satisfied they would adopt them and employ him. Whether they had it in their power, however satisfied they were with the process, to refuse to go on, it is not necessary here to decide; but I am disposed to think that they might be entitled to say—Well, we have seen this process, and are satisfied with its working, but on the whole are not disposed to go into it. If they had taken this position, I am not prepared to say they could have been compelled. But that is not the position they took. They went to Chirnside as agreed; they saw an incinerator at work there. There is no evidence that they expressed satisfaction or the reverse, for the evidence is not conclusive on that point. But what they saw there was undoubtedly the process which the pursuer had represented to them. It was an incinerator that produced complete combustion, and the difference between it and the one at Eskmills was, that the latter produced a pasty substance, which afterwards hardened so as to require to be broken with a hammer, and was accompanied with a very offensive smell when drawn off the furnaces. It could indeed be sold, but not re-used for boiling esparto. What they saw produced at Chirnside, on the other hand, was a powdery ash, quite different in substance from that at Eskmills, easily dissolved, and available for sale or re-use. They saw the whole of this process, and saw also that there was no nuisance by way of smell.

Now, I think that, whatever the opinion of the defenders might be, it is impossible to dispute that there was at Chirnside, and in practical use, an incinerator which produced the effects aimed at by all in the trade. It is to be regretted that after this some communications did not take place between the parties, as to whether or not the defenders were to employ the pursuer in terms of the agreement. It is a pity also that the defenders did not give the pursuer an opportunity of going to Chirnside with them. There is no great blame in this, but still it is to be regretted. After their return from Chirnside, I am inclined to think that the defenders might have made no change in their works at all; they might have abandoned altogether the idea of purifying what remained after this process of incineration. They were, I think, entitled to do this; but what they were not entitled to do was, to adopt the method of the pursuer, which they saw at Chirnside, and employ some one else to put up the apparatus. The question is, whether that is what they did. Now, there is a good deal of contradictory evidence as to what the defenders really did. They seem inclined to represent that there was no difference between their furnaces and those they saw at Chirnside, except the balling furnace, of which they did not approve. This matter of the balling furnace bulks most unnecessarily largely in the proof. Besides this, they say they saw nothing at Chirnside which they had not got already. Possibly that may be the case. But it was never at any time held out to them that the pursuer's incinerator was different from the one they had got, but only that it was a very good one and fitted for its purpose. The defenders, however, came back from Chirnside, and began making alterations upon their works, and all they did was intended to produce more perfect combustion in order to effect the purpose they originally had in view. It is, moreover, very clearly shown that all their alterations were in the direction of what they had seen at Chirnside. But for a time, and while they were employing Law and Dunn, there was no very great change in the incinerator or in its results. In 1870, however, they began to re-use their soda, and they did so in consequence of having got it in a purer state, owing to a change in their apparatus, which undoubtedly made it much more like those at Chirnside. If the evidence had stopped there the result would not have been very satisfactory; but one piece of evidence remains to be noticed, and that is, that they put up a new incinerator in the year 1870, and employed a Mr Arnott to build it. Now, he

was a skilful man, and it was very natural for them to employ him, as he was the inspector appointed by the river proprietors after the interdict case at their instance, and one of their chief objects was to satisfy him. But then, unfortunately, Mr Arnott was thoroughly acquainted with the pursuer's incineration, and highly approved of it. He has recorded that fact in his journal. Mr Arnott accordingly, having full information from the pursuer about his process, very naturally availed himself of the knowledge he had acquired, and it would have been very extraordinary under the circumstances if he had not. We must further keep in mind that there was no doubt as to the success of the pursuer's incinerator. He had been successful at Chirnside, and at the works of several other leading papermakers both in Scotland and England, who all come here to testify to the success of Mr Seitz's process. And it is clear that if anybody were employed to put up an incinerator, the first thing he would do would be to make himself acquainted with Mr Seitz's process. Now, Mr Arnott had got the information required, and the consequence was, that he put up at Eskmills an incinerator identical with that put up a short time before by the pursuer at another mill well known to Mr Arnott. We have this from the evidence and from the drawings. The result of that undoubtedly is, that the defenders had by this course of action got in August 1870 at their works at Eskmills just such an incinerator as the pursuer would have erected for them had he been employed in terms of the agreement. The question is, whether they were entitled to employ Mr Arnott, and not the pursuer, and there I think the defenders are entirely in the wrong. If they wanted such an incinerator they were bound to employ Mr Seitz, and pay him the stipulated remuneration according to the agreement. They have not done so, and therefore they must be held liable for breach of contract.

A good deal has been said of the conduct of the defenders in this matter, and it was represented to us by their counsel that charges were made against them which involved their character for fair dealing and honesty. I do not know if this was intended by the pursuer. But I see no foundation for it at all. They merely misunderstood the agreement, and did not see that if they put up an incinerator after Mr Seitz's method they were bound to employ him. I am very glad to be able to say that I think this is the foundation of the whole case, nor do I think that there is any reason to hold that there is any ground for imputing improper motives to the defenders. I therefore concur in the Lord Ordinary's judgment. In the assessment of damages, however, he has made a slight mistake, which will have to be corrected before a final judgment is pronounced.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I have found considerable difficulty in making up my mind in this case, which is a very peculiar one. But I have come to rest in the conclusion arrived at by your Lordships.

There is no question here as to a patent right. The agreement between the pursuer and defenders is not of the nature of a license to use a patented invention. It is, nevertheless, quite a competent agreement. The pursuer, a man of scientific skill, had devoted much time and attention to an endeavour to discover how paper makers might, after using the caustic ley employed in the preparation of esparto grass, recover and re-use the soda which lost its causticity in the process, in place of carrying this away, either as useless rubbish, or for such sale as it might command. He considered himself to have hit upon a process better adapted for this end than any previously employed. He does not pretend that all the details of this process were inventions of his own. It is not necessary to his case that any one of them should be so. What he says is, that by a combination, previously unpractised, he secured the desired result better and more economically than was previously accomplished. It is altogether impossible, in the face of the evidence before us, to deny merit to the pursuer's process. For he brought before us partners or managers of no less than six or seven paper-making houses who had adopted his process, paying him a consideration for the use of it, and who testify to its being used effectually and profitably. The proposition by the pursuer to the defenders was that they should, in like manner, use his process in their works, and take the benefit of his services in setting it a-going, giving him for remuneration the first year's saving effected by the process, estimated by the amount actually expended in boiling the grass compared with a fixed sum of £16 per ton of soda, reckoned on an expenditure of 18 lbs. of soda to each cwt. of grass, which was taken to represent the previous cost. In the option of the defenders, they might pay a lump sum of £1500 within four months after starting the process, in full of all claims by the pursuer. Nothing could be more fair and reasonable, as nothing can be more clearly competent, than such an agreement.

The written agreement, which is signed by both parties, and bears date 13th August 1868, contains no specification of the pursuer's process, and no reference to any other document for such specification. The pursuer simply refers to "the method by which I boil down and otherwise manufacture the strong leys resulting from the boiling of esparto grass." But in order to fix what was the process agreed about, it is represented to be that in operation at the mill of Messrs Young, Trotter & Son, at Chirnside, one of the firms which had already bargained with the pursuer on the subject. It was agreed that the defenders should inspect the process as there in operation, and, if satisfied on such inspection, should adopt it at their own mills. The bargain was "to adopt my complete process and manufacture of soda, if you are satisfied with the process when working at Messrs Young, Trotter & Son's mill, on the following terms."

I entertain a strong opinion that if, on seeing the process in operation at Chirnside, the defenders expressed dissatisfaction with it, and intimated that, in respect of such dissatisfaction, they declined proceeding with the contract, they were entitled to break it off, without incurring pecuniary liability. On the other hand, if satisfied with the process, they were bound to adopt it, or pay the stipulated sum. It is scarcely necessary to say that if they were in reality satisfied with the process, and in reality adopted it, they were bound to the pursuer, and could not escape liability by withholding expressions of satisfaction, or using depreciatory language, or by any other way, ostensibly but not really, repudiating the process.

The defenders went to Chirnside on the 8th or 9th January 1869, and had the fullest opportunity of inspecting the pursuer's process as there in

operation. Unquestionably, they never gave utterance to any formal expression of satisfaction. They have adduced themselves as witnesses to prove that when they saw the pursuer they rather expressed themselves dissatisfied,—at least, to the effect of saying that they saw nothing new except in one point; and that this novelty they were not disposed to adopt. There is contradictory evidence as to what passed. I cannot hold it proved that the defenders intimated to the pursuer, in clear and unambiguous terms, that they were dissatisfied with the process, and declined going on with the agreement, which I think it was incumbent on them to do if they meant to avoid responsibility. On the other hand, the pursuer has not established any distinct and formal expression of satisfaction, so as, on that account, to hold them bound by the contract.

The case of the pursuer is rested on the alleged fact that the defenders really adopted the process, and so became responsible to him for the stipulated consideration. And here it is that I find the pinch of the case to arise. There can be no doubt, as I think, that if the defenders adopted the process in its substance and material details, this will be equivalent to the satisfaction contemplated by the contract. On the other hand, if the process was not in substance adopted, it would not raise a case of pecuniary responsibility if in one or other of the subordinate details the defenders acted on a hint derived from their visit to Chirnside. For the pursuer, who had not patented his process, laid himself open to his views being taken advantage of by others, without his having against them any pecuniary demand. His case lies on agreement only; and he cannot bring himself within the scope of the agreement unless he prove that in all the substance of the thing his process was adopted by the defenders.

I have had considerable difficulty in coming to a satisfactory conclusion on this matter of fact. It does not appear that, following on their visit to Chirnside, the defenders executed any general process of renovation of their works. But I think it clearly proved that very soon after that visit they made considerable alterations on their apparatus, and all in the direction of bringing into practical operation the process of the pursuer as exhibited at Chirnside. Such alterations are proved to have been made in March to May 1869, and again in August 1870, down to early in the year 1871. By these alterations I think they brought into operation the substantial parts of the process practised at Chirnside, more particularly the coal-pockets, the lowering of the roof of the furnace and of the firebridge, and the mode in which the heat was made to operate, with other details. One thing is extremely clear, that by dint of these alterations they accomplished the great result aimed at of recovering and re-using the soda, and re-using it to profit. It is established by the proof that although originally they had attempted to recover and re-use the soda, yet that they had for years discontinued doing so. They could accomplish this result satisfactorily neither under one process nor another; and were not recovering and re-using the soda when they made their agreement with the pursuer in August 1868. They were enabled to do so not sooner than March 1870, after they had made considerable alterations on their works, all in the line of the pursuer's process. The final result of the alterations I think fairly expressed by one of the scientific witnesses (Mr Wallace), when he says—"The apparatus in the new house at Eskbank and that at Chirnside were similar, in fact practically identical. They seemed to be identical in all essential respects."

I am of opinion that this is sufficient to satisfy the condition of the agreement between the pursuer and defenders. I do not think it material that the defenders did not immediately proceed to embody the Chirnside process in one general renovation of their works, but attained the result by a series of successive alterations. I consider it to be enough if they ended in bringing that process into practical operation in its essence and substance. Nor do I think it enough to say, as the defenders said very urgently, of this or the other detail, that it had nothing new in it, but could be seen elsewhere, and had even been aimed at by the defenders themselves. The case is not one of a patent right; and it is not the least necessary to the success of the pursuer that he stamps his process with the character of an original invention. It was the combination of a variety of details, more or less known before, to a beneficial practical effect, which constituted the pursuer's process. If after their agreement with the pursuer the defenders made alterations on their works which ended in a process "practically identical" with that at Chirnside, I am of opinion that they are bound to pay to the pursuer the stipulated consideration. Their satisfaction with that process is testified in the most conclusive manner; and as, under the agreement, they were bound, if satisfied, to adopt the process, under the direction and superintendence of the pursuer, paying to him the stipulated remuneration, I think they cannot, by not employing him, and doing the same thing at their own hand, get rid of their obligation to pay to him the agreed on sum.

One great difficulty raised by the defenders lay in the assumption that the main feature of the pursuer's process consisted in having two hearths or furnaces, side by side, with an opening from the one into the other, through which the stuff was thrust, to sustain in the second furnace a process of incineration additional to that sustained in the first. I think it clearly appears that this double hearth was a part of the pursuer's process, as exhibited at Chirnside, and in the pursuer's apprehension a not unimportant part. I think it also clear that the defenders did not adopt this part of the process; for the proceeding spoken to by Dennis was not the construction of a double furnace, with an opening between, but of a wholly separate incinerator, 80 to 100 yards off, to which the stuff was carried under exposure to the atmosphere, and so without the main benefit of the double furnace. But I am satisfied on the evidence that this double furnace did not form so essential a feature of the pursuer's process that its omission prevented its being said that the process was adopted. The primary object of the second furnace was to make ball-soda, either to be sold in the market or used in the after processes; and it was whilst not so occupied that it was to serve the purpose of an additional incinerator, which might be a convenience, but was not essential to the process, which could be sufficiently carried through with only one incinerator. This part of the pursuer's scheme went rather to the diminution of the cost than the efficacy of the process. So far as concerned the recovery and re-use of the soda, it was just as effectually accomplished without this double furnace as with it, and the double furnace

has been in fact generally discontinued. It cannot, I think, be said that the omission to adopt this double furnace amounted to a non-adoption of the pursuer's process, the process being truly adopted in all its substance and materiality.

I am therefore of opinion that on the question of liability the Lord Ordinary's interlocutor should be affirmed. On the point of damages, I think it should be only altered to the effect of correcting the *error calculi* made in taking £14, 10s. per ton as the price of soda, in place of the £16 of the contract, and of deducting the £60 paid to account.

I think it only fair to the defenders to say, in conclusion, that I see no evidence to warrant the inference that they consciously and intentionally broke their agreement with the pursuer. I am satisfied that they believed, in good faith, that the contract was no longer binding. They simply acted, as I believe, under a misapprehension. Their misapprehension probably arose either from supposing that the double furnace was an essential part of the pursuer's process, or from supposing that unless the process was a new and original invention, the contract did not hold good. In these respects, I conceive them to have been mistaken, and in consequence to have incurred pecuniary responsibility. But I consider the question to involve mere legal obligation, and in no wise moral character.

Agents for Pursuer—G. & H. Cairns, W.S.
Agents for Defenders—J. & R. Macandrew, W.S.

Friday, February 9.

CAMERON *v.* MORTIMER.

Reparation — Wrongful Apprehension — Diligence — Agent and Client—Jury—New Trial.

An issue was sent to a jury—"Whether, on or about the 27th July 1871, the defender wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July, to the loss, injury, and damage of the pursuer?" The pursuer's case was that the agreement to give delay had been made by an agent, who, being resident at the seat of the Sheriff-court, was employed by the defender's agent to take the usual steps of diligence to enforce payment of a bill. The jury found for the pursuer. *Held*, by the majority of the Court (*diss.* Lords Deas and Ardmillan), that there was no evidence to show that, in the circumstances, the agent had authority, express or implied, to bind the defender to delay diligence; and further, that although he had taken upon himself to grant delay, he had intimated to the pursuer his doubt of his power to do so,—and the verdict set aside as contrary to evidence.

Opinions that the question, whether an agent, employed to recover payment of a debt, has or has not an implied discretionary power to grant delay, is one of circumstances.

This was an action of damages for wrongful apprehension and detention at the instance of Captain Colin Cameron, a retired Indian officer, now resident in Forres, against John Mortimer, Forres, a traveller for Messrs Usher & Co., brewers in Edinburgh.

On the 29th December 1870 Captain Cameron accepted a bill at six months for £10, 15s. 4d. Shortly before the bill became due it was bought by Mortimer for £10. From the evidence in the case it appears that Mortimer was offended with Cameron in consequence of a letter which the latter had written to Messrs Usher complaining of him, and that he avowedly acquired the bill for the purpose of doing diligence upon it against Cameron, who was understood to be not in very good circumstances.

The bill became due on 2d July 1871. Mortimer had instructed his agent Mr Alexander Mackenzie, solicitor in Forres, to enforce diligence without delay if the bill was unpaid when due. The bill was not retired when due, and Mr A. Mackenzie, not being resident at the seat of the Sheriff-court, employed Mr Alexander Morrison, solicitor in Elgin, to take the necessary steps to enforce diligence. The bill was protested on the 2d July, and the instrument of protest recorded in the Sheriff-court Books of Elgin on the 22d, and the usual decree interponed, in virtue of which, on the same day, Cameron was charged to pay within six days.

During the currency of the charge, on Thursday the 27th July, Cameron, by his agent Mr Robert Peat, solicitor, Forres, applied to Morrison to delay a settlement of the bill till Monday the 31st, when Cameron would be in funds to settle the same.

A conversation took place between Morrison and Peat, which is thus related by the latter:—"I called on Mr Morrison, or rather I saw him in court, and so did not need to call for him. I said I understood he was Mortimer's agent. He said he was. He said the bill had been sent to him to do diligence on it. I said to Mr Morrison that I had seen Captain Cameron at the station, and he wished a few days' delay to get the bill settled. Mr Morrison said he had been instructed by the agent in Forres to carry out the diligence. I understood him to say by Mr Alexander Mackenzie, Forres; and he did not know whether he could grant the delay or not. I said I thought the bill would be paid in a few days, as they were doing well in the hotel where Captain Cameron resided. Mr Morrison hesitated to grant delay. I said he had better consider and let me know. We had some talk. He said Captain Cameron might go out of the way. I said this was not likely. We parted on the footing that he was to consider and let me know, and he was to send me a state of the debt. He said nothing about granting the delay conditionally if the Forres agent consented. I asked for a state of the debt, and he said he would send it. All this was on Thursday, 27th July, at twelve o'clock. Next day I received the letter of 27th July. Before that, and on 27th July, I saw the Captain, and told him that Morrison was to consider and let me know as to granting delay. I received the letter on Friday morning—(*letter read*). I sent the pursuer a copy of this letter immediately."

The letter referred to was as follows:—

"*Elgin, 27th July* 1871.

"*Mortimer* v. *Cameron.*

"Dear, Sir—I enclose state of debt as requested,—amount, £11, 14s. 9d. I must have a remittance by Monday morning's post.—Yours truly.

Amount of bill, dated 29th December 1870, ...	£10	15	4
Interest, ...	0	1	0
	£10	16	4
Expenses, ...	0	18	5
	£11	14	9"