in England this would be held conclusive. My difficulty proceeds from the fact that the whole codicil is based on the scheme for the sale of Flichity by the trustees; on the whole, however, I think the question must be decided as your Lordships propose, and that the result is at once fair and equitable. The other matters merely require adjustment.

The Court answered the questions as follows:—

"The Lords having heard counsel on the Special Case, are of opinion, and find—

"1. That the provisions contained in the trust-settlement and codicil, in so far as these relate to heritable property, are entirely evacuated by the act of the testator in selling the estate of Flichity during his life; but that in other respects it is not so—subject to the answers to the other questions.

"2. That the residuary clause contained in the trust-settlement remains effectual, and regulates the succession of the testator, and that the third party is entitled to the whole residue as therein provided, subject to the provision to the second and fourth parties.

"3. Find it unnecessary to answer this question.

"4. Find that the first parties are not bound to invest the free proceeds of the estate of Flichity in the purchase of a landed estate, and on William Congreve Mackintosh Congreve attaining the age of twenty-five years complete, to convey the said estate to him and the series of heirs mentioned in the trust-disposition and settlement, all in terms of the codicil of 10th February 1870.

"5 and 6. Find that the fourth party is entitled to the liferent of the whole sum of £10,000, provided by the codicil to the children who shall not succeed to the entailed estate, but not to the sum of £2000 in addition thereto.

"7 and 8. That the second party, in the event of her electing to claim her rights under the said trust-settlement and codicil, is entitled to an annuity of £200 in addition to the £300 per annum settled on her at her marriage, and also to the sum of £100 in name of house-rent, and to the sum of £600 in lieu of the liferent of the furniture and others mentioned in the codicil.

"Find the parties entitled to the expenses incurred by them in this case out of the trust funds, and remit to the Auditor to tax and report, and decern."

Counsel for parties of First and Third Parts—Dean of Faculty (Clark) Q.C., and Kinnear.
Counsel for parties of Second Part—Moncreiff. Agents—Hamilton, Kinnear, & Beatson, W.S.
Counsel for parties of Fourth Part—Lee. Agents—J. & F. Anderson, W.S.

[*I., Clerk.*

Saturday, June 27.

FIRST DIVISION.

COOPER *v.* CULLEN.

Expenses— Witness—Commission.

Circumstances in which the expense of examining a witness in India on commission, who, owing to events which could not be foreseen at the date of the examination, was able to attend and give evidence at the trial, was allowed as a charge against the loosing party.

Observed that it is a question of circumstances whether the expense of a commission to examine a witness resident abroad, who afterwards attends and gives evidence at the trial, is chargeable against the loosing party.

This was an action of damages for breach of promise of marriage, in which a jury returned a verdict for the pursuer, and the case now came before the Court upon the Auditor's report of the pursuer's account of expenses.

An essential witness for the pursuer was her brother, who for a considerable time previous to the action was employed in a mercantile house in India, without the least prospect of returning to this country. A commission was accordingly granted to take his deposition in India. After this commission some delay was occasioned in the case by a change of Lord Ordinary, and during that delay the pursuer's brother was suddenly called home from India by the firm which employed him. He was thus at home at the time of the trial, and was examined as a witness for the pursuer.

The Auditor disallowed the charge of £61 for the expense of the commission to examine this witness in India.

The pursuer objected to the decision of the Auditor, and argued—The expense of a commission to India was under the circumstances a necessary expense, and was certainly an expense of process, and fairly chargeable against the loosing party.

Argued for the defender—Where a party took a commission to examine a witness abroad, he took it at his own risk, and if the witness appeared at the trial, bore the loss.

Authorities—*Napier* v. *Compbell*, March 7, 1843 5 D .858; *M'Lean* v. *Cooper*, Feb. 4, 1846, 8 D. 429.

At advising—

THE LORD PRESIDENT—The question here is whether a loosing party is liable for the expense of a commission to take the evidence of a person who either is abroad or is expected to be so at the time of the trial. I think the question is one of circumstances. In the case of *M'Lean* v. *Cooper*, the Lord President, after consultation with the other Division, disallowed the charge, but at the same time said that he laid down no general rule. Therefore every question of this sort must be looked upon as one of circumstances. I observe, further, in the case of *M'Lean* v. *Cooper* that it was not maintained on the part of the pursuer that the witnesses examined on commission were essential witnesses, and it was probably on that ground that the charge was disallowed. Here the witness was undoubtedly an essential witness, so much so that if he had not been examined I doubt if the pursuer could have obtained a verdict.

At the time when the commission was granted this witness was in India, and had been there for some time in the employment of a mercantile house, and so he could not have been brought to this country for the trial, even if such a course would have been less expensive. So this commission was an absolute necessity to the conduct of the case. The appearance of the witness at the trial was the result of an unforeseen occurrence, the employers

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

LORD DEAS—I concur with your Lordship.

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

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

LORD ARDMILLAN and LORD JERVISWOODE concurred.

The Court sustained the objection.

Counsel for Pursuer—M'Donald.

Counsel for Defender.—Watson.

Saturday, June 27.

SECOND DIVISION.

[Lord Shand, Ordinary.

[Lord Young, Ordinary.

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

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

River—Pollution—Interdict.

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

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

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

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