indeed, appears not to be the same in the two countries. "In England," Professor Bell says (Principles, par. 1356), "it is on the ground of property alone; in Scotland, on the ground chiefly of just and expedient interference for the protection of reputation." Lord Chancellor Eldon, it may be observed, in deciding the case of *Gee* v. *Pritchard*, 2 Swans. 402, while recognising the fact that such is the ground upon which the English doctrine was founded, did not speak of that ground as one which to his mind was satisfactory; but as the interests of those concerned had been, and might continue to be, protected upon that basis, he was not disposed to part with it, seeing difficulties might arise in adopting a new foundation for rules requiring to be maintained. What is more important is, that he looked upon cases in which an injunction against the publication of private letters was sought as cases of circumstances. In other words, there is in England no hard or fast line to which decisions in this department must be squared, and the results in *Percival* v. *Phipps*, in which the injunction was refused, and in the earlier case of *Gee* v. *Pritchard*, in which it was granted, may be cited in illustration. The views of our law upon this question, as well as the reasons on which it rests, as expressed by Professor Bell in his Commentaries, i., 111, 112, 7th ed., are entitled to great consideration. Mr Bell says with regard to the publication of private letters—"In Scotland the Court of Session is held to have jurisdiction by interdict to protect not property merely, but reputation and even private feelings, from outrage and invasion. In one respect the publication of private letters may outrage both; and the question has been, whether where private letters have been written and sent to a correspondent, the author by sending them to his friend authorises him to disseminate them or publish them for gain? Now the purpose of the communication is quite different. It rather implies a veto on publication. Compositions for the public and for the eye of a friend are in a different spirit. It is one of the great charms of epistolary correspondence that one writes not under the awe of a misjudging world, but throws out unscrupulously his genuine and undisguised sentiments, utters his most secret thoughts and with as little reserve as in the secrecy of his own chamber, expresses his feelings of affection, or his murmurs of disapprobation and of censure, in full reliance that they are confided to a friendly ear. By the publication of such effusions—confidential, careless, unthinking of consequences—a man may be wounded in his tenderest part, his literary reputation hurt, his character traduced. It is accordingly the understood or implied condition of the communication—the implied limitation of the right conferred—that such communications are not to be published. With these natural feelings on the breach of epistolary confidence the determinations of the Court of Session have accorded."

Where, however, none of these results can reasonably be contemplated from publication, and where, besides, there is a legitimate interest in the receiver to publish, the Court ought not and will not interfere to prevent publication. All questions of literary property are of course outside the present controversy. These when they arise will be dealt with on their merits, and must probably be decided upon other considerations.

These being my views of the law, which, I may add, are not in any way inconsistent with the cases reported in Morrison's Appendix, 1 and 4, *voce* "Literary Property," to which the Sheriff has referred, I concur in thinking that the interdict prayed for ought not to be granted, and that having been granted by the Sheriff, it ought now to be recalled. The respondents will not be injured, and the appellants may be, and think they will be, benefited by the publication. I regret that the appellants insist upon their right. Much better would it be for them and for all who are concerned in the family *embroglio* to forbear, but, as I think, there is no ground in law on which they can be prevented.

Lord Justice-Clerk—I concur entirely, and the result is in accordance with what was my impression from the first. A question of interdict, especially against doing a thing of the kind sought to be interdicted here, is always a question for the discretion of this Court. It depends on the injury done and on the clearness of the evidence with which the probability of future injury is shown. This is not a question of property but of entirely equitable right, and the holder is in the first instance master of the letter. If he use it to the prejudice of the writer he may be responsible.

Lord Eldon in one of the cases cited laid it down to be a question of circumstances whether such publication as is here intended can be restrained; and I think with your Lordships that the circumstances here are not such as to render it necessary that publication be restrained. The appellant, however, will have to consider that if he does by the publication cause injury to others the fact that interdict is now refused will not shield him from the consequences.

The Court recalled the interlocutor appealed against and dismissed the petition.

Counsel for Appellants—Party. Agent—C. S. Taylor, S.S.C.

Counsel for Respondents—Gillespie. Agents—J. & J. Ross, W.S.

Tuesday, July 5.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

INGLIS *v.* SHOTTS IRON COMPANY.

Nuisance—Smoke—Calcining Bings of Ironstone—Interdict.

Held that a proprietor who had proved that the operations of a mining company in calcining the ironstone obtained by them under a lease from an adjoining proprietor were injurious to plantations upon his estate, was entitled to interdict against a continuance of these operations within a reasonable distance of his lands, and interdict granted accordingly to apply within a

distance of a mile—*dub.* Lord Young, who was of opinion that to prove such damage was not sufficient to entitle the complainer to the remedy asked, and that the evidence did not establish whether the operations were or were not carried on in a convenient and reasonable manner and in a convenient and reasonable place, regard being had to the interests both of the proprietor and the mining company.

In this case the pursuer the Right Honourable John Inglis of Glencorse, Midlothian, raised action against the Shotts Iron Company, incorporated by Act of Parliament 1871, to have it found and declared that the defenders as tenants of the minerals in the lands of Penicuik, belonging to Sir George Clerk, Bart., in the parishes of Penicuik and Glencorse, in the county of Midlothian, had during the years 1877, 1878, 1879, and 1880 wrongfully and illegally calcined ironstone or iron ore at certain places mentioned in his condescendence, or one or more of them, on the said lands of Penicuik, adjacent to the pursuer's lands of Glencorse, House of Muir, and Belwood, whereby noxious gases or vapours had been generated and discharged to the nuisance of the pursuer; and further, to have them interdicted and prohibited in all time coming from calcining ironstone or iron ore or burning blaes on any part of the said lands of Penicuik within two miles of the pursuer's said lands, or within such other distance as might be fixed by the Court. The pursuer was proprietor of the lands and estates of Glencorse, House of Muir, and Belwood, in the parish of Glencorse, Edinburgh. The defenders' company had been established in Scotland since the beginning of the present century, and was incorporated in 1871 by Act of Parliament "for the purpose of carrying on the iron trade in its various branches at such places as may be found expedient and advisable." They obtained in 1865 from Sir George Clerk, Bart., leases of his minerals in his Loanhead property, and in 1874 of the minerals in his estate of Penicuik. They also at different periods obtained leases of the minerals in other estates in the neighbourhood. The minerals consisted principally of blackband and clayband ironstone, and gas coal and common coal, and the defenders had made great expenditure of money and labour in developing them. The circumstances which gave rise to the action were as follows:—In March and April 1877 the defenders burned or calcined a heap of minerals or ironstone at a pit which they constructed on the farm of Greenlaw Mains, part of the estate of Penicuik, close to the march of the pursuer's lands of Glencorse, being about 200 yards to the north of them, and close to the turnpike road leading from House of Muir past the mansion-house of Belwood to Greenlaw or Glencorse Barracks. This pit was called No. 1 Incline, and was in the immediate vicinity of plantations on the pursuer's lands of Glencorse and Belwood, and also in the immediate vicinity of the mansion-house of Belwood and of the mansion-house of Loganbank, where the pursuer resided. In the operations of calcining ironstone large quantities of sulphurous acid are given off, much of which is converted into sulphuric acid. The fumes of this, the pursuer averred, were found to injure his woods and plantations. In the summer of 1877 the defenders constructed another bing on this site, and a second near Mauricewood, which was called Incline No. 2. The pursuer fearing a repetition of the injury which he had already suffered, presented a note of suspension and interdict against the defenders, craving to have them interdicted from calcining in the place first mentioned, and on 18th October interim interdict was granted. In this note the defenders lodged answers denying that any damage had been caused to the pursuer. On the 27th November the note was passed for the trial of the question and the interim interdict continued. A record was then made up between the parties for the trial of the petition. The case came to depend before the Lord Ordinary (Young), and after the usual steps of procedure proof was led before his Lordship on 28th Feb. 1878. Additional proof having been taken on commission, and counsel being prepared to be heard on the import of the evidence, the defenders lodged a minute in which they stated that they undertook to confine their calcining operations at the place mentioned in the prayer of the note of suspension and interdict to the months of November, December, and January in each year. Upon this the pursuer lodged a minute in which he stated that in respect of the above minute of the defenders he did not now press for interdict, although he reserved all claims of damages competent to him against the defenders on account of injury, if any, already occasioned, or which might yet be occasioned, to his property through the calcining operations of the defenders, and also his right to apply for interdict against the defenders calcining ironstone or other minerals at any place, including No. 1 Incline, or at any time, including the months of November, December, and January, where such calcining might be injurious to his property or might prove a nuisance to him. On 12th March 1878 the Lord Ordinary pronounced an interlocutor, in which, in respect of the above minute of the defenders, he recalled the interim interdict and found it unnecessary to make any other order or pronounce any other decree in the action.

The pursuer averred in this action that when he lodged the above minute in the former process he was not of opinion that calcining in the months of November, December, and January would prove innocuous to his property; on the contrary, he was advised by scientific men that the sulphurous fumes must be injurious to vegetable life at all seasons of the year, and that the injurious effects would be specially seen in all plants or trees of the evergreen description. Inasmuch as this was a matter of opinion, he was willing to allow the matter to be put to a practical test. During the winter of 1878–79 and 79–80 the defenders carried on their calcining operations at Inclines Nos. 1 and 2, and also at a third station in close proximity to the pursuer's lands, called the New Hearths, the results of which were, as the pursuer alleged, that those trees died and the whole plantations suffered greatly. In these circumstances, and in order to save his plantations from destruction, as well as to preserve the amenity of his estate as a residential property, he raised the present action. He pleaded that he was entitled to decree of declarator and interdict

in respect that the operations complained of were wrongful, illegal, and a nuisance.

The defenders, on the other hand, averred that their operations at Incline No. 1 were necessary for the working of the minerals and that the pursuer's plantations at one time consisted of strips of ordinary forest trees. They had, however, been of late years altered by the pursuer, who had introduced large quantities of conifers. The ground for these had not been properly prepared for their reception, and had not been properly tended. Further, they averred that in consequence of several unfavourable seasons prior to 1880 all plantations throughout the country were for a time less thriving than they would otherwise have been, but that these, like other plantations, had improved by the better season of 1880. Further, they averred that they had followed the ordinary and customary course taken by other iron manufacturers in other parts of the United Kingdom; and if such operations were put a stop to in circumstances similar to those which had here occurred, the iron industry of the country would suffer serious injury and its development would be practically averted. They pleaded—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) The operations complained of being lawful, the defenders should be assoilzied. (4) The operations complained of not being to the nuisance of the pursuer, the defenders should be assoilzied. (5) The pursuer has not sustained damage entitling him to any of the decrees concluded for. (6) *Separatim*, No ground is alleged or exists for the delineation of two miles libelled, and the prohibition thus concluded for is uncalled for and unnecessary. (7) The material averments of the pursuer being unfounded in fact, the defenders should be assoilzied with expenses."

The Lord Ordinary (Rutherfurd Clark) found and declared and decerned in terms of the declaratory conclusions of the libel; further, interdicted and prohibited the defenders in all time coming from calcining ironstone or iron ore or burning blaes on any part of the said lands of Penicuik within one mile of the pursuer's said lands, and decerned; and found the pursuer entitled to expenses. In the note appended to his interlocutor his Lordship said—"It remains to consider how far the prohibition by the Court against calcining is to extend. This must necessarily be fixed in a somewhat arbitrary manner. But if the view which the Lord Ordinary has taken of the evidence be correct, he thinks that it would not be safe to put the limit at less than a mile."

The defenders reclaimed, and argued—(1) In point of fact it was clearly proved by the evidence in the proof that the damage and injury complained of was not due to calcination. The true cause of decay was the naturally unhealthy and languishing condition of the woods prior to 1877, accelerated doubtless by the severe winter of 1876-1877. But even assuming that the pursuer had succeeded in proving a certain amount of damage, (2) in point of law he was not entitled to interdict against the defenders. They were legitimately using up the mineral products of the lands in the only way possible. The district was already a manufacturing and mining district, and the defenders were not in the position of persons setting up a new chemical work, but were only doing with their own property what they were entitled to do. Now, it was in accordance with legal principle (*a*) that the pursuer in order to succeed in putting a stop to a great work of this kind must show substantial or visible damage clearly due to the cause alleged, and this he had failed to do.—*Salvin* v. *North Brancepeth Coal Company*, June 1874, 9 Ch. App. L.R. 705; *Dewar* v. *Fraser*, Jan. 20, 1767, M. 12,803. (*b*) If the party complained against in a great work of this kind would suffer more damage by being interdicted than the complainer did as matters stood interdict was not to be granted. It was necessary to make a comparison between the relative interests of parties and then to determine according to the value of their respective interests. To aid this an inquiry must be made as to whether the place where calcining was carried on was a suitable or convenient spot, and whether such a use of the land was a reasonable one. On this test the defenders were entitled to carry on their present operations on paying damages, and on the whole matter to be assoilzied.—*Hole* v. *Barlow*, May 5, 1858, 4 C.B. N.S. 1858, and 27 L.J. (C.P.) 207; Comyn's Digest, Title "Action on case for a Nuisance," C. p. 420, vol. i.; *Baines* v. *Baker*, Dec. 18, 1752, Ambler's Reps. 158; *D'Eresby's Trustees* v. *Strathearn Hydropathic Establishment*, Oct. 21, 1873, 1 R. 35.

In reply the pursuer argued—(1) In point of fact it was incontestably proved on the evidence that prior to 1877 the woods were in a healthy and flourishing condition, and their decay was due to the operations of the defenders. (2) In point of law he was entitled to have interdict in order to preserve his estate from ultimate total destruction. This was not a case which involved merely his personal discomfort, but a case in which he had suffered a material, substantial, or visible injury to his property. The defenders were violating the maxim *Sic utere tuo ut alienum non lædas.*—The *Caledonian Railway Company* v. *Baird & Company*, June 14, 1876, 3 R. 839; *Fraser* v. *Cran*, June 1, 1877, 4 R. 794; *Ralston* v. *Pettigrew*, July 29, 1768, M. 12,808; *Duke of Buccleuch* v. *Cowan*, Dec. 21, 1866, 5 Macph. 214; *Chalmers* v. *Dixon*, Feb. 18, 1876, 3 R. 461; *Rylands* v. *Fletcher*, July 6, 1868, 3 L.R., Eng. and Ir. App. 330. The terms reasonable, suitable, and convenient, which the defenders contended were to be entertained in considering this branch of the case, had been repudiated by the English authorities. — *Bamford* v. *Turnley*, July 12, 1862, 31 L.J. (Q.B.) 286; *Tipping* v. *St Helens Smelting Company*, June 30, 1865, 11 H. of L. Rep. 642; *Watter* v. *Jelfe*, 20 L.J. Chan. 433; Rankine on Land Ownership, 313.

At advising—

Lord Justice-Clerk—After stating the facts of the case and examining the evidence, expressed the opinion that the injury which the pursuer said he had suffered and had reason to anticipate had been sufficiently established by the evidence. He then said:—No question of law was raised before the Lord Ordinary; but we have had from the bar, on the reclaiming-note, a long and able argument to show that, assuming the facts to be as the Lord Ordinary has found them, the defenders have only done with their own pro-

perty what they were entitled to do, whatever injury they may have caused to the pursuer; and that these operations, undertaken entirely for their own profit and for that of the proprietor, possess a *quasi* exceptional character which ought to protect them from being stopped, whatever obligation of damage their results might infer.

This is, of course, a well-worn theme; but the law on the subject is not doubtful, nor do I think the present by any means a difficult example.

The general rule is, that everyone is bound so to use his property as not to injure his neighbour. It is equally certain that this rule may suffer modifications according to the varied considerations of social life. Things which are forbidden in a crowded urban community may be permitted in the country. What is prohibited in enclosed land may be tolerated in the open. Vicinity — close proximity—may make that a nuisance which may cease to be so at a distance; and the habit and practice of the neighbourhood has also some weight in cases of this kind. Nor in extreme cases do I doubt that the comparative interests at stake may be taken into view.

But I do not think the facts of the present case make it necessary to apply any of these modifying rules. The simple ground of complaint in this case relates, not to any use which the defenders make of their own property, but to the use which they make of the atmosphere as it passes over them, by injecting into it noxious vapours, which prevents it reaching the pursuer in purity, and causes damage to his property. The law on this subject was fully discussed and settled in the case of a running stream in the action against the papermakers on the Esk. The analogy of the atmosphere may not be in all respects complete, inasmuch as the rights of riparian proprietors in water-runs are more capable of definition and appropriation than those in the purity of the atmosphere. But in the case of injury to health by polluting the air, the regulating principles are precisely the same, and we so applied them in the recent case of *Fraser* v. *Cran;* and injury to property, although admitting, as I have said, of some qualifications, substantially follows the same rule. The cases relating to brickburning in urban or suburban districts, several of which have been decided by the Courts in England, were instances mainly of annoyance and discomfort; but the judgment in the case of *Bamford* v. *Turnley* has substantially set the law on that subject on an explicit footing, and the opinion of Baron Bramwell in that case proceeds on principles which are conclusive of the present.

It is true, that if we continue the interdict which the Lord Ordinary has granted, these mineral lessees may be exposed to inconvenience, and even to loss. But I cannot hold in the present case that this consideration can justify the continuance of the wrong. It was very truly said by Lord Justice James in a recent case that when large interests are at stake persons should not stand on their extreme rights. I am quite of that opinion, but the sentiment seems to tell against the defenders. There is no attempt to show on the proof that the operations of the defenders might not be carried on at other points of the estate of Penicuik without doing any injury to the pursuer's property or other conterminous proprietors. The evidence is left a blank upon that subject, and there are no facts upon which we can come to a conclusion on it. But it is manifest that any difficulty on this head is entirely the voluntary act of the proprietor of the minerals, and the defender, his lessees. Their lease covers an area upwards of three miles in extent, measuring from the pursuer's boundary, besides the minerals in the adjoining property of Loganbank. I have looked into these leases, and their provisions afford a very instructive commentary on what the parties to them believed to be the character and effect of calcining. As regards Loganbank, the defenders are prohibited by their lease from calcining on any part of the lands. By their lease from the proprietor of Penicuik they are prohibited from calcining on more than one-half of the area I have mentioned—that is to say, from an area of two miles in length, measuring from the pursuer's boundary; and although the portion on which they are not debarred from calcining extends to more than a mile from the pursuer's boundary, they have chosen to set down these calcining heaps within a couple of hundred yards of the pursuer's property, at points at which the width of the ground narrows to about 300 yards. But these are voluntary acts. It is certain, at least for anything that appears, that the proprietor of Penicuik could not justify the works complained of on the pretext that he could not carry on the operations elsewhere. Nor do I think he could, by interposing a tenant, and introducing these restrictions into his lease, obtain the full value of his minerals and save his own woods at the expense of his neighbour. It is not, in my opinion, a reasonable arrangement between landlord and tenant in a mineral lease to exempt practically nine-tenths of the surface of the mineral field, and all positions where such operations might injure the landlord, and to select for these deleterious operations a mere corner, close to their neighbour's land, to the prejudice of one to whom they can yield no profit.

Lord Young was of opinion that with respect to Incline No. 2 and New Hearths there was upon the evidence no damage done to the pursuer's plantations by the calcining operations, but that at Incline No. 1 they had been prejudicial to a number of the pursuer's trees. His Lordship proceeded:—So taking it, the question of law is, Whether there is here such nuisance and injury to the pursuer's property as to entitle him to the remedy he asks? I do not regard this as a simple question in the sense of being easily answered. The defenders are certainly not at liberty to cause avoidable damage to the pursuer or any other adjoining proprietor—that is to say, avoidable consistently with the reasonable exercise of their own legal rights at suitable or convenient places within their own bounds. It follows from what I have already said that with respect to Incline No. 2 and New Hearths the action fails on the facts—no damage being done by them to the pursuer's property. With respect to Incline No. 1, by which I think damage is done, my doubt is about the reasonableness of calcining at that place even in the winter months

—for to the extent of confining the operations to that season the defenders have yielded to the injunction *Sic utere tuo ut alienum non lædas.* It was explained at the bar that the minerals of Loganbank and Penicuik crop out there, and that the consequence of interdicting the working and calcining them there would be to sacrifice a considerable part of the mineral field. But although there is some evidence on this subject, it is slight, and I cannot say satisfactory. On the other hand, the pursuer does not, as I understand, suggest that No. 1 as a place of working and calcining was not properly selected with reference to the legitimate interests of the mineral field, and could be abandoned without a great sacrifice to the defenders and their landlords, or that it is an inconvenient place otherwise than with reference to the wellbeing of the fir trees in the neighbourhood. In the circumstances, and considering the decision that is about to be pronounced, it is probably an idle thing for me to pursue this topic. I should, however, wish to say for myself that I think the legality of an act, and the reasonableness of doing it at the particular place, are to be taken account of, and may be sufficient to defend it notwithstanding that it causes damage to a neighbouring property. The nature and extent of the damage are of course to be considered on the one hand, as well as the nature and extent of the proprietary interests sought to be sacrificed in order to avoid it on the other. It is according to the evidence that iron ore, such as that here in question, must be calcined at the pit-head where it is brought to the surface, and that a field of such ore cannot in fact be worked on other terms. I cannot assent to the contention that it is necessarily sufficient for the pursuer's case that he has proved damage to his fir trees such as would entitle him to protection and remedy against a wrongdoer. I think magnitudes and proportions are to be considered, and also whether or not the defenders have acted with a reasonable regard to their neighbours' interests in selecting the places for operations, which are in themselves quite legitimate. I am not prepared to hold that the case is made out with respect to Incline No. 1, although had my views on the case generally prevailed I should have been prepared to allow further evidence regarding it, not as to whether damage had been caused or not, but as to whether it was a convenient and reasonably chosen place for working and calcining, having regard to the defenders' legitimate interests as well as those of the pursuer.

Lord Craighill concurred with the reasons and conclusions arrived at by the Lord Justice-Clerk.

The Court therefore adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimers—Asher—Mackintosh—J. P. B. Robertson. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondent — D.-F. Kinnear, Q.C.—Balfour, S.-G.—Trayner—Murray. Agents—Inglis & Allan, W.S.

Tuesday, July 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* CARRICK AND OTHERS.

Arrestment—Building Society—Right in Security.

Held that instalments paid by the borrowing members of a building society formed under the provisions of the Act 6 and 7 Will. IV. c. 32, the rules of which provided that the borrower should take shares to the full amount of his loan, and that the instalments as they were paid should be carried to the credit of the borrower's account in name of payments for these shares, are not liable to arrestment if at the date of the arrestment the amount of the loan made to the member is in excess of the sum at his credit in name of instalments on shares.

This was an action of multiplepoinding raised in the Sheriff Court of Lanarkshire at Glasgow by John Carrick and others, as trustees of the North British Building Society, Glasgow, for the purpose of determining the right to a sum of £243, 18s., being the amount of instalments paid into the funds of the society towards the full sum payable for 160 shares therein standing in name of a person named William M'Kay. Two competing claimants entered appearance and lodged claims, viz., David Martin and Hugh Wilson. Martin claimed to be preferred to the fund *in medio* in respect that he himself had paid the instalments standing in the company's books at M'Kay's credit. Wilson claimed the fund in respect of arrestments used by him on the dependence of a Court of Session action against M'Kay in which decree was subsequently obtained. The facts as they appeared from the averments of the parties and the proof led were as follows:—On 22d February 1878 M'Kay, who was then proprietor of certain property in Hillhead, obtained from the North British Building Society a loan for £4000, and in security for repayment granted in favour of the building society a bond and disposition in security in ordinary form over his property. Martin and another person named M'Neill granted jointly and severally with M'Kay their personal obligation to repay the sum in the bond. On the same day (22d February 1878) M'Kay conveyed the property to Martin by an *ex facie* absolute disposition unqualified by any back bond or other obligation. By the rules of the society only members holding shares on which six months subscriptions had been paid were entitled to borrow, and the directors of the society invariably required that the number of shares taken by the borrowing member should be equal in value to the amount of his loan. M'Kay was thus compelled to take shares in the society of the nominal value of £4000, and to pay up six months' subscription thereon as a condition precedent of his right to borrow. He accordingly made application for 160 £25 shares of the society, six months' instalments on which amounted to £138. That latter sum was placed to his credit in the books of the society on 22d February 1878, but he did not actually pay it in. It was simply deducted from the amount of his