lands, unfit for the use of man and beast, and for the primary uses already referred to.

The defenders pleaded—1st, That they did not pollute the water-course in question; and 2d, That the said water-course had been for the prescriptive period unfit for primary uses, and had been dedicated to the reception of the the defenders' sewage.

On the 17th June the following issue was adjusted between the parties:—"Whether between the 5th May 1872 and 5th May 1875 the Commissioners of Police for the burgh of Dunse did by discharging sewage or other impure matter, or permitting sewage or other impure matter to be discharged, from the sewers or drains under their charge, at or near the burgh of Dunse, pollute the water of the stream . . . . which flows through and *ex adverso* of certain parts of the lands and barony of Wedderburn, belonging to the pursuers—to the nuisance of the pursuers?"

The case was tried before the Lord President and a jury, and the following special verdict was returned:—"(3) That for more than forty years continuously, prior to the 5th May 1875, the water of the said stream was, as it flowed through the estate of Wedderburn, polluted by the sewage of the town of Dunse to such an extent as to render it unfit for some of its primary uses; and (4) That within the said period of forty years, and particularly within the period embraced in the issue, the water of the said stream has, from the same causes, become polluted to a materially greater extent than it was previously."

It appeared that the primary uses for which the water still continued to be fit, and which had not for the prescriptive period been destroyed by the defenders' use of the stream, were the coarser kinds of primary uses, such as are enumerated in the interlocutor *infra*, viz., washing, bleaching, and watering cattle. The jury were held to have negatived the contention of the pursuers that the water had within that period been fit for cooking or drinking, or other primary purposes of the highest rank.

Following upon this verdict a remit was made to Mr Thomas Stevenson, C.E., Edinburgh, and at a later stage also to Professor Dewar of Cambridge, in the first place to visit the ground and to report what could be done to remove the nuisance, and subsequently to report whether the works erected upon their recommendations were effectual. Objections as to the unsatisfactory character of the works were at various times taken by the pursuers, and especially on the 3d February 1879, when it was maintained by them that owing to the flocculent nature of the organic matter held in suspension in the sewage a great part of it passed through the concrete tank and could not be retained without having recourse to chemical means for causing precipitation.

On the 7th June the defenders stated that the works erected on the recommendation of the reporters were completed, and that it was unnecessary to resort to chemical agency to assist the mechanical arrangements.

Messrs Stevenson and Dewar reported on 30th June 1880, *inter alia*—That chemical treatment of the sewage was not required, and would do no good, and suggested various ways in which the water might be purified; their methods would require to be properly attended to and skilfully worked.

These opinions were substantially adhered to in their various subsequent reports, and especially in that of 22d May 1882, the last, in which it was pointed out as essential that there should be a systematic inspection of the management of the works, "a distribution of the sewage, and a proper cropping and removal of the crop at regular intervals." If these recommendations were given effect to, the reporters believed that the purification works at Dunse would be permanently efficient.

The defenders put in a minute undertaking to comply with the recommendations of the reporters.

The Court pronounced the following special interlocutor:—

> "Find and declare that the pursuers have good and undoubted right to have the water of the stream, which after the confluence of its several sources or upper tributaries near to the town of Dunse flows eastwards through the lands and farm of Crumstane, and other lands belonging to William Hay, Esq., of Drummelzier, and thereafter enters and flows through and *ex adverso* of certain parts of the lands and barony of Wedderburn, lying in the county of Berwick, transmitted to and allowed to flow through and *ex adverso* of the said lands and barony of Wedderburn in a state fit for the primary uses and purposes of washing, bleaching, and watering of cattle; and that the defenders have no right to pollute the said water or to use it or the bed of the said stream, or of its sources or tributaries, in any way or for any purpose so as to render the said water unfit for any of the primary uses or purposes foresaid, when and so far as it flows through or *ex adverso* of the said lands or barony of Wedderburn: And in respect of the said report and minute for the defender, find it unnecessary to dispose further of the conclusions of the summons, and dismiss the same, and decern," &c.

Counsel for Pursuers—Robertson—Jameson. Agents—Waddell & M'Intosh, S.S.C.

Counsel for Defenders—Mackintosh—Rankine. Agents—J. & J. Turnbull, W.S.

Saturday, June 10.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Lord M'Laren, Ordinary.

BUCHANAN *v.* BLACK.

Process—Recal of Arrestments on Dependence—Petition Presented before Defences Lodged—Personal Diligence Act 1838 (1 *& 2 Vic. c.* 114, § 20).

A person having raised an action of reduction arrested certain funds on the dependence. Before defences had been lodged the defender presented a petition for recal of these arrestments, and a record was made up upon this petition, with condescendence and answers thereto.

Question as to the competency or expediency of such procedure.

Andrew Buchanan, wine merchant in Glasgow, raised an action of reduction, declarator, and payment against A. H. Black & Co., brewers at Kingston, concluding for reduction of a minute of agreement and contract of copartnery dated 10th May 1880, entered into between him and Andrew Heggie Black, of the above firm of brewers, and for declarator that he was entitled to receive payment out of the assets of the said firm of three sums—£2000, £250, and £950—amounting to £3200. On the dependence of that action the pursuer used arrestments on funds of the firm in hands of the Clydesdale Bank, and against Black in the hands of his mother's trustees, who held between £4000 and £5000 for him.

The defenders petitioned the Lord Ordinary (M'Laren), before whom the action was pending, for recal of the arrestments. The petition was presented before defences were lodged in the action of reduction, and was in the form of condescendence and answers thereto.

The Lord Ordinary having heard counsel for the parties on the petition and answers, recalled the arrestments used by the pursuer on the dependence of the action in the hands of the Clydesdale Bank, and on caution being found by the defender to the extent of £1200 recalled the arrestments also used by the pursuer on the dependence of the action in the hands of the trustees of the defender's mother.

Black reclaimed, and, after counsel had been heard for him, the pursuer stated at the bar his willingness to restrict his arrestments to the amount of £1200.

At advising—

Lord Young—I am not generally in favour of arrestments on the dependence of an action, because they give a great advantage to one of the parties without a corresponding advantage to the other, and we know that not unfrequently they are used oppressively. The threat of an action with diligence to follow on the dependence is sometimes used as a means of concussing an opponent. Nevertheless, the law allows a pursuer, without making out even a *prima facie* case, to make use of this diligence, resort being allowed to the Court to prevent oppression or hardship.

This application was made to the Lord Ordinary when only the summons was before him, the defences not having yet been lodged, and on the statement of the case in this petition and answers his Lordship thought proper to loose the arrestments on the funds in bank, and to order the arrestments on the trust-funds to be loosed on caution for £1200 being found.

The pursuer of the action has stated at the bar that he is prepared to acquiesce in the arrestment on the trust-funds being restricted to £1200. I think that a reasonable proceeding, and propose that we should restrict them accordingly.

As the case developes itself in the Outer House, the Lord Ordinary may be applied to by incidental motion in the cause to recal even this restricted arrestment, or to restrict it still further. What will then be done depends on the merits of the case as disclosed at a later stage. I think, in the present position of matters, that a restriction to £1200 is reasonable.

Lord Craighill concurred.

Lord Rutherfurd Clark—I am of the same opinion. There is a matter here, however, with respect to the Personal Diligence Act 1838, which, with deference, I consider of importance, although it has not been raised at the bar. That is in regard to the form of the present application. I was always under the idea that an application to recal arrestments under the Personal Diligence Act was only competently presented after defences were lodged, so that the Lord Ordinary might have an opportunity of judging of the merits of the cause. The power to recal is given by the 20th section of the Act 1 and 2 Vict. cap. 114, which provides that "it shall be competent to the Lord Ordinary in the Court of Session before whom any summons containing warrant of arrestment shall be enrolled as Judge therein, or before whom any action on the dependence whereof letters of arrestment have been executed has been or shall be enrolled as Judge therein . . . to recal or to restrict such arrestments on caution or without caution." Now, what is the meaning of "enrolling" a summons or action before a Lord Ordinary? I do not think that a case can be "enrolled" in the meaning of this statute before defences are lodged. At the time that this Act was passed the first enrolment was in the printed roll, and no case could be in the printed roll until defences were lodged. This section contemplates that before the Lord Ordinary shall proceed to consider such an application the defences as well as the summons must be before him so as to avoid the necessity of making up a record in condescendence and answers in the application. I make this remark because I am surprised to see such a record made up, and I must say I do not admire the form of process.

Lord Craighill—I can only say that since 1874, when I became a Judge, this is a form of process to which I have been accustomed, and I am not prepared to cast any doubt upon its competency.

Lord Young—I must say I do not like this condescendence and answers, and I do not recollect seeing anything of the kind before.

Whether in a summons of reduction, before defences are lodged, an application for recal of arrestments is not competent I would not like to say. I should think that in a case like this, where there is no great urgency, the Lord Ordinary might say, "Renew your application at a later stage when I know something of the case." Or in a case of urgency, he might, on a statement made at the bar, act as seemed just. This, however, is certainly a most ponderous proceeding, and I desire to express the opinion which I understand is shared by both your Lordships that it is not a proceeding to be encouraged. Such an application should be incidental to the cause, and not a separate process. Our judgment, then, here will be, that we vary the Lord Ordinary's interlocutor to the extent of restricting the arrestments in the hands of the trustee to £1200 in place of recalling them, and *quoad ultra* refuse the reclaiming note.

Lord Rutherfurd Clark—I rather think, after what has fallen from your Lordship in the chair, and on reconsideration, that as an action of reduction must be enrolled before defences are lodged, such an application as the present at that stage is competent in such an action, but still I think it should stand over until the defences are lodged

unless the circumstances are very urgent. The remarks I have made previously I think apply to all other cases, because I do not think these cases can be "enrolled" until the defences are lodged.

Counsel for Pursuer—J. G. Smith—Shaw. Agent—J. Knox Crawford, S.S.C.
Counsel for Defender—Guthrie. Agents—J. & J. Ross, W.S.

Saturday, June 10.

OUTER HOUSE.

[Lord M'Laren.

MYLNE (CAMPBELL'S FACTOR) *v.* CAMPBELL AND OTHERS.

Succession—Destination—Fee and Liferent—Accrescing Share.

A truster directed his trustees to realise his whole estate, and "divide" it amongst his children, the daughters' shares being limited to a liferent, with a gift of fee to their children. With reference to the daughters' shares, it was further provided, "if no children, then in that case her share shall revert and be divided, share and share alike, among my other children." A daughter having died unmarried—*held* that the share liferented by her was to be conveyed absolutely to her brothers and sisters without any restriction of the latter to a liferent as in the case of the shares falling to them directly.

The late John Campbell, bleacher, Bowfield, Renfrewshire, died on the 14th January 1845, leaving ten children—four daughters, named Janet, Mary, Catherine, and Jane; and six sons, John, Thomas, Allan, Richard, Archibald, and James. By a trust-disposition and settlement he ordered that the residue of his estate should at his death be equally divided among his surviving children when they attained majority or marriage, but by a codicil he provided that none of his children should have power over their share till the youngest was twenty-five years of age, and that then his whole estate and effects should be divided, share and share alike, among his whole family, the sons then getting the management of their own shares, "but my daughters' shares to be lent on good security, and the interest of which to be their allowance all the days of their lives; if married and have children lawfully begotten, their children to succeed to their mother's share at her death; but if no children, then in that case her share shall revert and be divided, share and share alike, among my other children."

Under the management of the trustees appointed by the truster the estate became seriously reduced, and the present pursuer, W. R. Mylne, C.A., was appointed judicial factor on the estate on 4th December 1880.

On 28th March 1881 Miss Mary Campbell died without issue, and her share of her father's estate became divisible according to the terms of his trust-deed. The only parties at this date having an interest in Miss Mary Campbell's share were Archibald Campbell, a brother, and Mrs Connell and Mrs Gebbie, sisters, and Mrs Swan and others, the children of the two latter; Archibald's claim was not disputed, but a competition arose upon the question whether Mrs Connell's and Mrs Gebbie's shares of their sister's estate should be paid absolutely to them, or if they had merely the liferent, while the fee was in their children.

Argued for Mrs Connell and Mrs Gebbie—The presumption is in favour of an unlimited gift, and unless the words of the deed very plainly imply a restriction, no restriction will be imposed—*Hutton's Trustees* v. *Hutton*, February 11, 1847, 9 D. 639. Nor does the creation and existence of a trust under the deed, unless it was created and exists for the purpose of holding the fund in question, imply any restriction—*Ferguson's Trustees* v. *Hamilton*, July 13, 1860, 22 D. 1442—see Lord Wood's opinion, pp. 1454–5. In the case of *Cullen and Another* v. *Downie's Trustees*, March 16, 1882, *supra*, p. 509, limitations imposed by a father upon sums which were to be enjoyed by his daughters were held inapplicable to shares of these sums accrescing to surviving daughters. There was no reason to hold that a limitation to a liferent was necessary here to give effect to the truster's wishes.

Argued for Mrs Swan and others—The general presumption that the words "shall be paid and divided" was in this case contradicted by the word "revert" occurring in the trust-deed, which was intended to make the share of any deceasing daughter subject to the same qualifications as were in the original deed, and the words "and divided," were not in opposition to this view, as they merely meant to settle the share thus qualified.

The Lord Ordinary (M'Laren) held that Mrs Connell and Mrs Gebbie were entitled to the full fee of the shares claimed by them, and sustained their claim accordingly. His Lordship delivered the following judgment:—"In this case there is a good deal to be said on the question of intention for the purpose of giving to the accrescing shares the same destination as is given to the daughters' own shares. But the Court has never been in use to give the same scope or effect to the intention of a truster in cases of destinations as in cases of bequests which are to take effect immediately. No specially favourable construction will be resorted to for the purpose of controlling the absolute terms of the gift, but the tendency rather is to construe a destination in favour of an immediate and absolute gift. The most obvious illustration of that tendency is the establishment of the old rule, in the case of a destination to a parent in liferent and his children unborn in fee, that the person to whom the liferent is provided shall take the full fee. That is the rule established by a well-known series of cases.

"Now, it is clear enough in this case that if the trustees, in pursuance of the truster's directions, had made a special investment of Miss Mary Campbell's share, they would have had no authority to make any provision that in the event which has happened that share should accresce to the other daughters in liferent. It was laid down authoritatively by Seven Judges in the case of *Ross* v. *Gibson's Trustees*, July 12, 1877, 4 R. 1038, that in such cases the trustees must use the exact words of the will, and not any words that will extend, amplify, or give greater force to the words which the testator has used. If they had used in making such an investment the words