open for consideration in the present case.

On the merits of the claim I agree with your Lordship.

LORD KINNEAR — I am of the same opinion. It appears to me that the previous judgment determined the construction and legal effect of the contract between the parties. Whether the contract being so determined the pursuers had waived their right to enforce it with reference to a particular quantity of steel for rivets, was an entirely distinct and separate question. I think that is a question which was not put in issue in the previous action and not adjudicated upon. If the operative conclusions of the summons had embraced this particular quantity of steel for rivets, so as to bring the mutual rights and liabilities of the parties with reference to that specific subject within the scope of the decree of the Court, then I should have had no difficulty in holding that the judgment of the Court was a *res judicata* with reference to this as with reference to any other part of the steel which formed the subject of the contract, and in that case the defender would have been met by the plea, which I think would have been a perfectly valid plea, of competent and omitted, because it would have fallen upon him in that case to plead the waiver he is now pleading, and if he failed to do so and had a decree against him in reference to this specific subject, there could be no doubt, in my opinion, that that would have been a final and binding judgment. But then by the time the Court came to pronounce a decree of declarator in the former action, this particular quantity and all quantities of steel that were in the same position had been withdrawn from the scope of the summons, and therefore could not possibly be within the scope of the decree, because when the Lord Ordinary had allowed a proof the parties by agreement fixed the amount of damage in respect of certain quantities of steel, and then they agreed that the pursuers' claim in respect of all further quantities of steel already used or which might be used, and their whole rights, and the defenders' whole pleas and rights thereanent, should be reserved for subsequent determination, and should be settled in a separate action.

Now, this action is brought in order to enforce the pursuers' claim in respect of certain quantities of steel which were so reserved and taken out of the scope of the previous action, and therefore it appears to me quite out of the question to say that the previous judgment determines the liability of the defenders in respect of that claim which was specially reserved by the agreement of parties. It appears to me, therefore, that there can be no plea of competent and omitted in this case. The judgment would undoubtedly be binding as a precedent between the parties if the question had been raised or considered by the Court, but I agree with both of your Lordships that the judgments had no application to the special point we are now called upon to consider. My only doubt is, not whether the plea was competent and omitted in the former case, but whether it is not competent and omitted now, because I confess I am unable to find any plea upon record which relates to the point we have been asked to decide, and according to the stricter and more scientific rules of pleading which were at one time enforced in this Court, we should have been compelled, whatever our opinion of the justice of the case might have been, to refuse to give effect to this plea which is not maintained upon record. But it has been argued, and argued without opposition, and therefore I think we may fairly give effect to the opinion we have formed on the subject.

With reference to the application, I entirely agree with your Lordship that it must be limited to the 1200 tons supplied prior to July 25th 1888.

The Court left it to the parties to adjust the amount of damages payable by the pursuers in terms of the judgment, and the matter was afterwards settled by the parties out of Court without any interlocutor being pronounced.

Counsel for Pursuers — Asher, Q.C. — Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders — D.-F. Balfour, Q.C.—Guthrie. Agents — Millar, Robson, & Company, S.S.C.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff of Stirling.

BANKIER DISTILLERY COMPANY *v.* JOHN YOUNG & COMPANY.

Stream — Pollution — Primary Purposes — Special Degree of Purity — Prescription — Mine — Right to Pump Water into Water-Course.

Held that a riparian owner, although he has for more than the prescriptive period used the water of a stream for a special purpose—*e.g.*, the distillation of whisky, has no claim to have the water of the stream transmitted to him in a higher degree of purity than that of being fit for the primary purposes; but that a mine-owner is not entitled by pumping to send even unpolluted water from his colliery into a stream, which it could not have reached by gravitation, to the injury of a lower heritor.

The Bankier Distillery Company, Bankier, near Bonnybridge, Stirlingshire, was carried on by James Risk and his son John Risk as sole partners. James Risk was heritable proprietor of the mill and mill lands of Bankier occupied by the Distillery Company, which were bounded on the west by the Doups Burn. The water of this burn was used for the purposes of distillation of

whisky. John Young & Company, coal-masters, Banknock, near Bonnybridge, became tenants in 1887 of Banknock Colliery, part of the lands of which abutted upon the burn above the distillery.

The Bankier Distillery Company and the partners thereof brought an action in the Sheriff Court at Stirling against John Young & Company, to have them interdicted from discharging water from their coal workings at Banknock into the Doups Burn, "so as to pollute the water in said burn and render it unfit for primary purposes, or for the purpose of distillation of whisky" at their distillery, and to have them ordained to pay the pursuers £250 for damage sustained.

The pursuers averred that "the Mill of Bankier was converted into a distillery more than sixty years ago, and has ever since been used as such;" that the Doups Burn "in its natural state contained pure and soft water fit for primary purposes, and on account of its softness particularly suitable for the distillation of whisky, and that the water discharged from the mine was very impure. Besides being very hard, it is charged with mineral and other impurities, including sewage, from the workings. The volume of water sent into the burn was much increased about the beginning of 1890, when the defenders sank a new shaft, and since then a very large quantity has been constantly discharged. The natural water of the stream is thus polluted to such an extent as to be rendered quite unfit for primary purposes and for use in the distillation of whisky. The defenders have no legal title to pollute the steam, and in doing so they are acting in violation of Mr Risk's proprietary rights." They further explained—"Through the illegal action of the defenders in thus contaminating the distillery water supply with the pit water, the pursuers suffered serious loss and damage. Their fermentations were interfered with, and a much smaller quantity of alcohol was obtained from the grain used than there ought to have been, and the product was inferior in quality. They further incurred considerable expense in cleansing their pipes, utensils, and other plant from impurities gathered from the contaminated water. The loss may be moderately stated at £250."

They admitted that at present their intake pipe was above the place where the defenders' water was discharged into the burn, but explained that water from the defenders' workings had got into their pipe, and might do so again.

The defenders stated that the power to work the colliery included right to discharge the water pumped by the defenders from their workings into Doups Burn, which forms the only natural outlet for carrying the water off. Mr Burns (the heritable proprietor) and his predecessors and their mineral tenants have exercised the said right of so discharging the said water for more than the prescriptive period, for long prior to the time when the mill and mill lands of Bankier were first feued out. The water discharged by the defenders from their workings into the said burn is free from sewage matter, and quite suitable for ordinary domestic and agricultural purposes as well as for cattle, and for driving mill wheels or machinery. It is in fact the natural outflow of the land. This water is much purer in quality than the natural water found in the burn immediately above and opposite the pursuers' lands.

The pursuers pleaded—"(1) The pursuer James Risk, as a riparian proprietor, is entitled to have the water of the Doups Burn sent down to the lands unimpaired in quality. (2) The water of the stream having been used by the pursuers and their predecessors for the distillation of whisky for the prescriptive period, the defenders are not entitled so to affect its quality as to interfere with that use. (3) The defenders having illegally polluted the stream by the discharge of their pit water, so as to render it unfit for primary purposes, and for the purpose of distillation, the pursuers are entitled to interdict as craved. (4) The pursuers having suffered loss and damage through the defenders' illegal pollution of their water supply, are entitled to reparation therefor, and the sum sued for is fair and reasonable."

The defenders pleaded—"(1) The pursuers' averments are irrelevant. (3) . . . Nor are the pursuers or James Risk entitled as riparian proprietors to claim right to the water of the burn as fit for the purpose of distillation. (5) The proprietor of the coal in Banknock and Bankier, and the defenders as his tenants, and their predecessors, having discharged water from their mineral workings into the burn for the prescriptive period and prior to the mill and mill lands of Bankier having been feued out by the predecessors of the proprietor of the said coal, and the said burn being the only natural outlet for such water, they are entitled to continue to do so. (6) The pursuers not having suffered any loss or damage arising from the defenders' fault, or for which they are responsible, by the discharge of water from the defenders' mineral workings into the burn, the defenders are entitled to decree of absolvitor with expenses. In any case the sum claimed is excessive."

Upon 10th November 1891 the Sheriff-Substitute (BUNTINE) repelled the first plea-in-law for the defenders and allowed a proof.

The defenders appealed to the First Division of the Court of Session, who allowed a proof to be taken by Lord M'Laren.

The proof failed (in the opinion of the Court as subsequently expressed) to establish pollution on the part of the defenders, rendering the water of the Doups Burn unfit for primary purposes, but showed that the defenders, by pumping, discharged water into the burn from their workings which would not have found its way into it by gravitation; that the water so pumped was a hard water less suitable for the distillation of whisky than the water of the burn, and that it had by incrustation to some extent injuriously affected the pursuers' appa-

ratus. It also failed to establish a prescriptive right on the part of the defenders to discharge their mine water as they were doing.

Argued for the pursuers—(1) The primary purposes of the burn water were affected by the matter contained in suspension in the water from the mine. (2) Even if the ordinary primary uses were not affected, the pursuers had acquired a prescriptive right to have the water sent down to them fit for the distillation of whisky, but this had been seriously affected both by the quality of the water introduced and by the increase in its quantity—*Dunn* v. *Hamilton*, March 11, 1837, 15 Sh. 853; *Collins* v. *Hamilton*, April 19, 1837, 15 Sh. 895; *Clowes* v. *Staffordshire Potteries Waterworks Company*, November 1872, L.R., 8 Chan. 125; *M'Gavin* v. *M'Intyre Brothers*, May 30, 1890, 17 R. 818, *per* Lord Justice-Clerk, p. 828. (3) A lower heritor, although bound to receive water which would naturally have found its way to his lands by gravitation was not bound to receive water artificially introduced, nor to allow the volume to be artificially increased to his prejudice. Further, mines must be worked in the ordinary way, so as not to force the water by machinery upon lower heritors — *Magor* v. *Chadwick*, 1840, 11 Adolph. & Ellis, 571; *Irving* v. *Leadhills Mining Company*, March 11, 1856, 18 D. 833; *Baird* v. *Williamson*, November 1863, Scott's Rep., 15 C.B. (new series) 376; *Campbell* v. *Bryson*, December 16, 1864, 3 Macph. 254, giving effect to the doctrine laid down in Ersk. ii. 9, 2; *Duke of Buccleuch* v. *Cowan* (Esk Pollution), December 21, 1866, 5 Macph. 214; *Blair* v. *Hunter, Finlay, & Company*, November 29, 1870, 9 Macph. 205; *Durham* v. *Hood*, February 3, 1871, 9 Macph. 474; *Wilsons* v. *Waddell*, January 8, 1876, 3 R. 288, *affd.* December 1, 1876, 4 R. (H.L.) 29; *Pennington* v. *Brinsop Hall Coal Company*, 1877, L.R., 5 C. D. 769; *West Cumberland Iron and Steel Company* v. *Kenyon*, August 1877, L.R., 6 C.D. 773; *Heggie* v. *Nairns*, March 8, 1882, 9 R. 704.

Argued for defenders—(1) The proof of sewage pollution was quite insufficient. The primary purposes were not affected, and that was the only degree of purity the law recognised. (2) The pursuers had no right to insist that the water sent down to them should be fit for some special purpose, *e.g.*, the distillation of whisky. No length of time could establish such a right against an upper heritor by prescription. The element of adverse possession was completely absent. (3) They had only worked the mine in the ordinary way, and were not to be interdicted in the use of their property. The water removed was natural water, not water brought artificially into the mine—*Downie* v. *Earl of Moray*, November 12, 1825, 4 Sh. 167; *Rylands* v. *Fletcher*, 1868, L.R., 3 (H.L) 330; *Robertson* v. *Stewarts & Livingston*, December 6, 1872, 11 Macph. 189; *Pennsylvania Coal Company* v. *Sanderson*, Pennsylvania Supreme Court, October 4, 1886, 56 American Rep., note to p. 89 (very much in point); *Armistead* v. *Bowerman*, July 3, 1888, 15 R. 814. (4) They had acquired a prescriptive right to discharge this water. No doubt they had only continuous evidence back to 1863, but from that the law would presume immemorial use — *Magistrates of Elgin* v. *Robertson*, 1862, 24 D. 301. A mine had undoubtedly been there in 1809, and this right to discharge was incidental to the use of the mine. Upon prescription—*Nicolson* v. *Lairds of Bightie and Babirnie*, 1662, Mor. 11,291; *Rodgers* v. *Harvie*, 1827, 5 Sh. 917, and 1828, 3 W. & S. 251; Rankine on Landownership (3rd ed.), 350, with cases there cited, *i.e.*, *Magistrates* v. *Skinners of Inverness*, 1804, M. 13,191; *Duncan* v. *Earl of Moray*, June 9, 1809, Fac. Coll.; and *Rigby & Beardmore* v. *Downie*, March 8, 1872, 10 Macph. 568.

At advising—

LORD PRESIDENT—The pursuers of this action are proprietors of lands in Stirlingshire, along the western side of which there flows a stream called the Doups Burn. It is not disputed that they have the rights of riparian owners in this stream. They are distillers, and use their lands and the water mainly for the purposes of their distillery.

The defenders are tenants of the minerals of lands also abutting on the burn above the lands of the pursuers. From their coal workings they are discharging into the burn water which is pumped from the mine. The pursuers seek to interdict the continuance of this discharge, and they claim damages for injury already done them.

Various questions of law and fact have been discussed, but in the view which I take the case of the pursuers is divided into two entirely separate heads.

The pursuers have, in the first place, treated the case as if it were an ordinary one of pollution—that is to say, they have complained of the quality of the water sent down to them, just as they would have done if the water of the burn were simply used for some manufacture and then sent on. In this aspect of the case two questions are raised by the pursuers—(1) They allege that the water is unfit for primary purposes; and (2) they say that even if it is fit for primary purposes, it is now unfit or less fit than formerly for distilling whisky, and that having for forty years used the burn for distilling on the lands in question, they are entitled to prevent every use by the defenders which unfits or deteriorates the water for this special purpose. I am against the pursuers on both these points—on the former in fact, and on the latter in law.

I do not think that the pursuers have established that the infusion of this colliery water has rendered the burn unfit for primary purposes. The specific case on the fact of sewage pollution from the mine seems egregiously to fail, and the evidence, both scientific and general, as to the quality of the water is quite insufficient.

The claim based on prescriptive use to a higher degree of purity than that required for primary purposes is in my opinion en-

tirely untenable in law. The fact that for any number of years the inferior heritor has used the water for special purposes cannot possibly affect the rights or add to the obligations of a superior heritor. The use of the water by the pursuers for their distillery was no invasion of the rights of the defenders, and the superior heritor cannot have additional burdens imposed on him by acts which he cannot check or interfere with. Prescription implies acquiescence, and a man cannot be held to acquiesce when he has not the option to dissent.

If, therefore, the case had to be decided on the ordinary footing of pollution cases—that is to say, if the defenders had been merely exercising the ordinary right of a riparian proprietor to use the water of the stream and then return it—I do not think that the resulting quality of the water is such as to prove an abuse of the right.

But when we turn to consider the acts of the defenders another and quite different chapter of legal discussion is opened. What the defenders have done is, not to use the water of the Doups burn, but to introduce into that stream, by artificial means, water which would not reach it by natural means. The water is pumped up the mine from a seam many fathoms underground, and is then conducted into the burn; its quantity, relative to that of the burn, is very great, and it is the water so introduced which is complained of as prejudicial to the distillery. That this water is prejudicial, by comparison with the water of the burn, hardly admits of dispute; it is very hard water, whereas the burn water is soft, and hard water is much less suitable for distilling than soft. The question then arises, have the defenders right to introduce this water into the burn to the prejudice of the pursuers?

That an inferior heritor is bound to receive such water from the superior property as descends by gravitation is certain, and this rule applies alike to surface water and to subterranean water. It is also true that the owners of a mine have right to work it, in the usual and proper manner for the purpose of getting minerals, and they are not liable for any water which flows by gravitation from works so conducted. But it is another and different question whether the occupier of the mine on the superior property may interfere with the gravitation of the water and be an active agent in sending it upon the inferior property. That is the case here. The water in question, with its peculiar hardness, if it ever reached the pursuers' property, would, if left to the operation of gravitation, only enter it in these subterranean parts in which its hardness would be innocuous, and would never reach the burn, where it is injurious. Are the defenders, then, entitled by their active agency to make this addition to the natural burden which is admittedly recognised by law?

The case of *Baird* v. *Williamson*, 15 C.B. (N.S.) 376, decides this question in the negative, where the water raised by pumping is discharged into a mine in the inferior estate. The judgment does not seem to depend on the circumstance that it was on a subterranean part of the inferior estate, and not on the surface, that the discharge took place. The principle I take to be that the superior heritor has not the right to interfere with the gravitation of the water so as by that interference to inflict injury on the lower proprietor. In the present case the discharge of this mine water into the burn inflicts on the lower proprietor sensible injury, for it gives him water substantially less effective for the lawful manufacture which he conducts on his lands. I hold that the pursuers are not bound to submit to this merely because it is necessary for the working of the mine that the defenders should get rid of the water.

The defenders endeavoured to make out a case of prescriptive use, but in this I think they have failed. Even as regards the existence of the mine the dates do not support them, and the existence of the mine is all that there is to prove the pumping into the burn during the earlier period.

My opinion on the rights of the parties being thus far favourable to the pursuers, I turn to the prayer of their petition. At present the discharge of the mine water is at a point below the existing inlet to the distillery. On the other hand, the defenders have asserted right to discharge this water, and I think they have no such right; the pursuers might find it convenient to have another inlet lower down, and it appears to me that they would ultimately, and failing the removal of their grievance, be entitled to interdict.

The pursuers also seek damages, and on two grounds, the first being that the water has been injurious to his apparatus, and the second that the difference in quality has diminished the production of whisky. I must own that *ab ante* I should have expected a more substantial case to be presented, but as the evidence stands the second branch of the claim is very poorly supported. Indeed, I am unable to get over the point made by the defenders, that the table framed and proved by the pursuers themselves shows that in one of the years presented by way of contrast, the yield was almost identical with that of the period complained of. On the first head, viz., injury to apparatus, I think something has been proved, although not much. On the whole, I think we shall act safely in assessing the damages at £25.

I should propose that we decern for £25, and find that the defenders are not entitled to discharge water from their coal workings into the burn to the injury of the pursuers, and continue the cause in order to allow the defenders, if so advised, to make arrangements for obviating injury to the pursuers: Further, I propose that we find the pursuers entitled to two-thirds of their expenses.

LORD M'LAREN—I concur in the opinion delivered by your Lordship in the chair, and it is only because of the novelty and importance of the question that I add

some observations regarding the obligation of a mine-owner who claims the use of the natural stream flowing on the surface for the discharge of the water which is pumped out of his mines. There is a well-settled rule regarding the use which may be taken of natural water-courses and their contents by riparian proprietors, but, for reasons which have been stated, that rule in my view has no application to the case we are considering. In the case of riparian proprietors all have a common interest in the running water, and it was stated by the late Lord President that the theoretical right of a riparian proprietor is to direct or take away as much of the water as he requires on condition of returning it undiminished in quantity and unimpaired in quality. But in order that each of the owners might get as much benefit as shall be consistent with the substantial interests of the other, this rule was qualified in its practical application and was held to be sufficiently complied with if the water was returned in a condition fitted for the primary uses of a running stream. Now, in the present case we are not engaged in determining or adjusting the relative rights of riparian owners, nor is there any relation of common interest in the water that I can discover between the mine-owner and the proprietors of the bed of the stream. A nearer but, as I think, imperfect analogy is the right of a proprietor whose lands naturally drain into a stream to require the riparian proprietors to receive the drainage of his lands, and that right has been held to be qualified by the condition that this natural servitude must be exercised in the way which is least burdensome to the servient tenements. The water must be discharged at the most convenient point, regard being had to existing arrangements. But I am not able to put the right of the mine-owner so high as that of the superior heritor, and, indeed, if one were to inquire very curiously into the matter, it is difficult to see what natural right, or right other than such as may result from prescription or positive grant, can be asserted by a mine-owner to use the nearest or most convenient stream as an aqueduct for the removal of mine water which he cannot prove to be water which would have found its way into the stream if the surface had been unbroken. But the defenders have not maintained the extreme proposition, that irrespective of quantity, quality, and situation they are not bound to receive the water. Their case is rested on the allegation of substantial injury, and we are considering whether they are obliged to submit to such injury. I agree with your Lordship that the water from the mine is not shown to be contaminated by natural or artificial impurities in such a degree as to render it unfit for the primary uses. But the water of the Doups Burn before receiving the drainage of the appellants' mine is soft water, and there is sufficient evidence that the admixture of the large quantity of hard water which comes from the mine would render the water of the stream less suited for the preparatory processes connected with distillation in which it seems only pure water can be used.

Now, let me suppose it granted in argument that the water which the appellants pump from their workings would under other circumstances have found its way into the Doups Burn, and this is quite possible, because we know that the operations of mining have a tendency to dry up the natural springs and streams of the surface by providing a more ready outlet for the water at a low level. Such an admission might bar the respondents from complaining of the discharge of pure water into the stream in the mere assertion of a theoretical right. But it does not seem to me that the position of the appellants is tenable when they say—Because the water would have found its way into the stream in a state of purity you are bound to receive it in its altered condition, because this is the result of the exercise of our right to work the minerals. This argument seems to prove too much, because the mine-owner would then be within his rights, even if the water were so contaminated as to be deleterious.

Again, I am unable to accept the proposed extension of the criterion of fitness for primary uses to a case like the present case, because here the foundation for this relaxation of the strict rule is wanting. I mean we have not here the element of a common interest the enjoyment of which is to be regulated in a manner most convenient to the body of proprietors. I have not been able to satisfy myself that the mine-owner has any right of the nature of a natural servitude, and in the absence of express grant or prescriptive title or the lower right flowing from acquiescence, I think the mine-owner could only defend himself from an action of interdict on the principle that the Court will not grant an interdict which would be prejudicial to the defender where no real injury is proved, but will leave the pursuer to recover damages for the trespass by satisfying a jury (if he can) that he has sustained injury entitling him to pecuniary compensation.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the appeal, together with the proof, productions, and whole process, and heard counsel for the parties, Decern in favour of the pursuers for the sum of £25 sterling in name of damages: Find the defenders were not and are not entitled to discharge into the Doups Burn, water pumped from their coal workings to the injury of the pursuers, and decern: Continue the cause in order to allow the defenders, if so advised, to make arrangements for obviating injury to the pursuers: Find the pursuers entitled to two-thirds of their expenses," &c.

Counsel for Pursuers and Respondents—Ure—Wilson. Agent—G. Monro Thomson, W.S.

Counsel for Defenders and Appellants—Asher, Q.C. — Dickson—N. J. Kennedy. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, July 20.

FIRST DIVISION.

BAIRD & STEVENSON *v* MALLOCH.

Expenses — Taxation — Counsel's Fees — Hearing Continued over More than One Day.

For an Inner House debate, which lasted half-an-hour one afternoon and about an hour the following day, the fees sent to senior counsel were five guineas for the first day and four guineas for the second day, and to junior counsel four guineas and three guineas. The Auditor taxed off one guinea from each of the first day's fees and disallowed the second day's fees altogether.

Held that as the debate had been continued into a second day the two guineas taxed off the first day's fees fell to be restored.

Messrs Baird & Stevenson, quarrymasters, 21 Clyde Place Glasgow, brought an action in the Court of Session against James Macgregor Malloch, joint agent, British Linen Company Bank, Govan, for payment of £50. The Lord Ordinary (KINCAIRNEY) assoilzied the defender and found him entitled to expenses, and the First Division upon a reclaiming-note adhered and found the defender entitled to his expenses in the Inner House. The hearing on the reclaiming-note occupied about half-an-hour one afternoon and somewhere over an hour on the following day. For the first day the agents for the defender sent five guineas and four guineas to senior and junior counsel respectively, and for the second day four guineas and three guineas respectively. The Auditor taxed off one guinea from each of the counsel's fees for the first day, and disallowed any fees for the second day.

When the motion for approval of the Auditor's report was made in the Single Bills, counsel for the defender objected to the fees being interfered with, and argued that the agents had acted reasonably and within their discretionary rights.

At advising—

LORD PRESIDENT—The facts here I understand to be these. The case was taken up late on the afternoon of one day, and after having been heard for about an hour, it was continued till the next day, when it was further heard for about an hour and a half I think—the precise figures are immaterial. I think the sound practice as recognised by the Court has been this. At one time counsel got refreshers as if a day which was partially occupied had been a whole day irrespective of the proportion which the particular part might bear to the whole day. But the proper view which now prevails is that the whole time occupied is to be taken into account; at the same time, it is evident that if a case is heard, for example, during a solid three hours on a single day, it may give counsel much less trouble than it would have done had that time been split up between two days. I think that there is an appreciable difference depending on that consideration. I should suggest, therefore, that we should allow the guinea which the Auditor has taxed off from the fee of each counsel for the first day, and this more by way of emphasising the principle to which I have alluded than because of the importance of the matter in this case. As regards the second day's fees I think the Auditor has rightly exercised his discretion, and I am not for interfering with what he has done.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court allowed each of the defender's counsel one guinea in addition to the fees allowed by the Auditor.

Counsel for the Pursuers and Reclaimers—C. K. Mackenzie. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defender and Respondent—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Thursday, July 14.

FIRST DIVISION.

[Lord Low, Ordinary.

PATMORE & COMPANY *v.* B. CANNON & COMPANY, LIMITED.

Agent and Principal—Agent for a Business for a Specified Time — Principal Ceasing to Carry on Business before Expiration of Time —Damages—Recompense.

In an action of damages the pursuers averred that they had agreed to act as agents in Scotland for the sale of goods manufactured by the defenders (an English firm) consisting of leather goods, dips, and glues, at a certain rate of commission and other allowances, for a period of five years unless broken by mutual consent, and with a reconsideration of terms for leather at the end of the first year; that before the end of the first year the defenders intimated to the pursuers that they intended to give up their fancy leather trade, and advised the pursuers to become agents for another firm in the same line of business to whom they offered the pursuers an introduction; that the defenders intimated that in other respects they were willing to adhere to the agreement; that the pursuers declined