convey boats or barges from one to another, that may be an exceedingly important matter for the inhabitants along the shores of the chain of lakes, that they should have a right to use that chain of lakes as a means of communication. Supposing that the lie of these two lochs was reversed, and that Loch Dubh was next the sea, with a navigable opening to the sea, I think it would be a very strong thing to hold that the proprietors on Loch Fionn, who undoubtedly had a right to sail on it, were to be kept from the sea merely because there was the narrow opening between Loch Fionn and Loch Dubh. It is quite true that the matter of communication does not very strongly arise in this case, because there seems to be no public place, and perhaps very few inhabitants, along Loch Dubh, which is said to be one of the centres of a deer forest; but it might be otherwise; and I hesitate to lay down any proposition which might lead to this—that where two natural sheets of water are united by a strait like this, passable, although it may be attended by some difficulty, that those who have a right to use the one as a means of communication are not to have a right to use the other. The question might also arise on arms of the sea, and there are many such in Scotland, into which the tide ebbs and flows; and I hesitate to affirm the right to exclude the public from a tidal or sea loch merely because there is a shallow at some particular point of it. These are the difficulties that I feel. No doubt the case is exceedingly peculiar, because the passage between the two lochs or sheets of water is not a deep passage, but a very shallow one. But I think it is in evidence that at certain states of the water, apart from the artificial bank which was made by the tenant, boats could pass from the one to the other; and it is very difficult to hold that if that had continued to be the case—and there is some evidence that it can be passed yet—the mere difficulty or occasional difficulty of passing the shore is to separate so completely the two pieces of water as to make those who have a right to the one not have a right to sail over the other. For I can easily conceive that the case might have been that Mr Bankes might have no property abutting on Loch Fionn properly so called, and it would be very hard to shut him out from Loch Fionn merely because it was difficult to push a heavy boat or any other than a flat-bottomed boat across the isthmus.

Your Lordships have come to a different conclusion from that of the Lord Ordinary. I cannot help saying that I should have assented with much more pleasure to the view of the Lord Ordinary than I can to the view of your Lordships. Still the circumstances are exceedingly singular, and there is such a marked distinction between these two lochs in natural feature that I do not dissent from the proposed judgment. I think that on this part of the case the artificial barrier is really a very material element, for it has subsisted without objection for more than forty years. The altered state of matters has become the natural state, so to speak, and the two lochs are now so completely separated that I do not dissent from a judgment which gives the Dubh Loch exclusively to the proprietor whose lands wholly surround it. I was a little moved at one time by the photograph which is in process, and which shows that a person sailing to the top of Loch Fionn would see nothing to prevent him sailing on; but I understand that photograph only shows the state of matters in a very peculiar position, and a very favourable point of view has been taken; while the evidence goes to this, that there is great difficulty in going from one loch to the other, and that persons must get out and shove or haul the boat over. Altogether, I think we are entitled to say that this is a private loch, and not one to which any party who has no ground abutting on it may come and go at pleasure.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Meyrick Bankes against Lord Craighill's interlocutor of 4th June 1877, Alter the said interlocutor: Find that the pursuer is not proprietor of any land abutting on the Dubh Loch, and has no right of common property or common interest therein: Find that the Dubh Loch is not part of the Fionn Loch, but is a distinct and separate loch: Therefore assoilzie the defender from the conclusions of the summons: Find the defender entitled to expenses, and remit to the Auditor to tax the same and to report; and decern."

Counsel for Pursuer (Respondent)—Asher—Mackintosh. Agents—Adam & Sang, W.S.

Counsel for Defender (Reclaimer)—Solicitor-General (Macdonald)—J. P. B. Robertson. Agents—Murray, Beith, & Murray, W.S.

Saturday, December 1.*

SECOND DIVISION.

[Lord Shand, Ordinary.

FRASER'S TRUSTEES *v.* CRAN.

Nuisance — Interdict — Interim Interdict against Works being carried on so as to create Nuisance.

In an action of declarator and interdict brought against a manure manufacturer by a proprietor in the neighbourhood, the Court after proof made a remit to a man of skill, who reported favourably on the mode in which improvements which he had recommended for the removal of the nuisance were carried out, and that a great diminution of it had consequently taken place. The Court made another remit that at a certain date the reporter should state "whether the nuisance complained of is then abated," and meantime *granted* interim interdict against the "carrying on the manufacture complained of so as to create a nuisance."

Nuisance — Interim Interdict — Time to Remove Nuisance.

Interim interdict was granted against the carrying on of a manufacture so as to create a nuisance. On a petition and complaint being brought averring breaches of the interdict on certain specified dates, which were de-

* Decided partly on 31st May.

nied by the respondent, who further objected to the continuance of the interdict, the Court, in respect that it was reported by a man of skill to whom a remit had been made that the nuisance could be entirely removed, gave the defender three months more in which to carry out improvements which had been suggested for the abatement of the nuisance.

Observations per Lord Shand (Ordinary) on the question how far the existence of such manufactories as are injurious to health and interfere with the proper use and enjoyment of a neighbouring property is to be tolerated.

This was an action at the instance of John Fraser of Bunchrew, Inverness-shire (whose trustees were after his death sisted in his stead), against John Cran, tenant under a long lease of certain subjects near Bunchrew Station, on which he carried on an artificial manure manufactory.

The summons concluded "that the said defender is not entitled to carry on the manufacture of artificial manures at present carried on by him at the works or other premises presently occupied by him near the railway station of Bunchrew, in the said county, on the Highland Railway; at least that he is not entitled to carry on the said manufacture in such way and manner as to cause injury to the pursuer, his property, his tenants, and others residing in the vicinity of the said manure work or other premises, in their health, comfort, or otherwise, or so as to create a nuisance" and to have the defender interdicted "from carrying on the said manufacture of artificial manure at the said work or other premises—at least from carrying it on in such way and manner as to cause injury to the pursuer, his property, tenants, and others, as aforesaid, in their health, comfort, or otherwise, or as to create a nuisance."

The pursuer averred that the defender's work was carried on so as to be a nuisance, and injurious to the comfort and health of persons residing at Bunchrew.

The defender denied that any nuisance had been caused or existed. He also pleaded that the pursuer was barred from objecting to the existence of his works or their use for the manufacture of manure, in respect that he had made no objection to the erection of the works, though he well knew the purpose of them.

After a proof the Lord Ordinary, on 24th March 1876, pronounced this interlocutor:—"Finds that at and for a considerable time prior to the date of the institution of the present action the manufacture of manure at the defender's works near Bunchrew Station was carried on to the nuisance of the proprietor and occupants of the mansion-house, garden, and grounds of Bunchrew: Finds that although the remedial measures adopted by the defender, and put in operation for the first time on or about the 16th of last month, are calculated, with the exercise of due care, to remedy the evil complained of to a certain extent, and have in point of fact done so, yet the manufacture as still carried on is to the nuisance of the pursuers: Remits to Professor Crum Brown, Edinburgh, whom failing Professor Dewar, Cambridge, to visit the premises, and to report what changes, if any, in the buildings and other works are necessary in order to secure the absorption or destruction within the manufactory of the fumes and gases evolved in the course of the manufacture, so as to prevent the nuisance complained of," &c.

Opinion delivered at advising— . . . . .

"The works, which were originally put up in 1870, have been considerably extended as the manufacture increased. The defence is a complete denial that any nuisance has been caused or now exists.

"The property of Bunchrew extends to about 1000 acres. The mansion-house and grounds have for many years been occupied by the late Mr Fraser and his family for several months in the year, and are at a distance from the defender's works of about 660 yards, and on a considerably lower level. The action was originally instituted on 30th November 1875 by the late Mr Fraser, who died so recently as the 24th of last month; and it is a remarkable and painful feature of the case that he and his family attribute the origin of the four days' illness of which he died to nausea produced by inhaling polluted air coming from the works, and which caused severe and continued sickness. His trustees, immediately after his death, took up the litigation, which has now to be disposed of after a proof which has lasted over four days.

"At the close of the pursuer's evidence I intimated a clear opinion that so strong a case of nuisance had been made out as to render it extremely difficult for the defender to resist a finding to the effect that a nuisance did exist, and suggested that advantage might be taken by the defender of the suggestions of some of the scientific witnesses as to possible modes of remedying the evil. The defender's counsel, however, stated that they anticipated they would be able to adduce evidence to disprove entirely the case made by the pursuer. I am, however, of opinion, after careful attention to the defender's evidence of the two succeeding days, that it falls far short of meeting the pursuer's case.

"There is no question as to the law which is applicable to the case. Apart from any limited rights which may have been acquired by prescriptive possession, no one is entitled so to use his property as to cause injury to the health of his neighbour, or to render the occupation of his neighbour's property positively uncomfortable. In particular, and with special reference to the question raised in this case, no one is entitled, in the use of his property for the purpose of any manufacture or otherwise, to emit gases, fumes, or vapours, either noxious in their nature or causing nauseous or offensive smells, which sensibly diminish the comfort of others in the use and enjoyment of their adjoining property. It may be shown beyond question that the smells complained of are not in any direct sense injurious to health; but even in that case, if they be such as cause sensible discomfort, and so destroy, or in a practical sense restrict and diminish, the use and enjoyment of a neighbouring property—as, for example, by compelling the proprietors or occupants to close their windows and doors against the admission of fresh air, on account of the disagreeable odour which accompanies it—the law will put a stop to the use complained of, as a nuisance. It is no answer to the party injured, and no justification of the nuisance, that the work or manufacture is in what is called a

convenient and suitable place either for the manufacture or for such members of the public as may purchase and use the subject of manufacture. The convenience and benefit of the manufacturer and his customers cannot be gained by requiring others, for the profit or convenience of their neighbours, to submit to such injury or discomfort as results in a sensible diminution or restriction of their enjoyment of their property, as distinguished from a mere trifling or temporary passing inconvenience."

After an examination of the evidence his Lordship proceeded:—"The defender has examined a number of witnesses from a distance—generally speaking, persons engaged in the same or similar trades—who say that at their works and in their neighbourhood similar manufactories cause no injury to health, or discomfort, or inconvenience; and, as generally occurs in cases of this class, it is represented that the decision in this case involves the settlement of a much larger question, viz., whether the existence of such works is to be tolerated at all in the neighbourhood of human habitations? I do not think the case involves any such general question, nor do I think that much benefit is to be gained by the evidence of the nature now referred to which has been adduced. Whether the operations at a particular work constitute a nuisance to an adjoining property or a neighbouring district must always be a question of circumstances. Everything depends on the nature of the situation—the position of the houses which may be affected in relation to the works. The situation may be very open, as on or near the seaside, or confined by the contour of the neighbouring ground, or open at one side and shut in at another; the work may be in the midst of a locality filled with other manufactories, the smoke or fumes of which have to a great extent pervaded and affected the atmosphere, and where the surrounding inhabitants are mainly, if not exclusively, engaged as operatives in the manufactories, which to them, from habit, are little if any annoyance. Much may depend on the prevailing direction of the wind as affecting a particular house or district; and very much on the nature of the buildings of which the manufactory consists, and the system on which the work is conducted. In order to judge properly of most of the other works referred to by the witnesses, it would be necessary to know about as much in regard to each of them, by the evidence of people from the locality besides that of the owner or occupant, as is now before the Court on the proof in regard to the work in question. Taking the partial evidence adduced, I can only say that the impression on my mind in reference to the other works now referred to is, that some of them are in such a situation and carried on in such a manner as not to constitute a nuisance to the particular neighbourhood in which they are placed; while, in regard to others, if they were made the subject of legal proceedings, it would probably be found that they do constitute a nuisance, and could not be permitted to be continued, unless under such an entire change of system as would prevent the escape of fumes and disagreeable odours.

"On the grounds now stated I am of opinion that it is the clear result of the evidence that the defender's manufactory at the date of the action, and for a considerable time prior to that date, did constitute a nuisance to the owners and occupiers of Bunchrew House. . . . .

"It appears to me, however, to be the result of the evidence as a whole—and I may particularly refer to the evidence of Dr Stevenson Macadam—that the work may be put into such a condition, and may be carried on, as to obviate the nuisance, although, undoubtedly, with the best appliances it will require great care on the defender's part. It was stated for the defender that while he denied that any nuisance existed, yet if the Court should decide otherwise, he desired an opportunity of adopting such remedial measures as might remove all cause of complaint. In the circumstances I think such an opportunity should be allowed; and with that view I propose to remit to a person of skill, who, after perusing the evidence, particularly with reference to the suggestions of means for removing the existing evil, will visit the manufactory, and report as to the works which are necessary for that purpose."

Professor Dewar having made a report in accordance with the remit contained in the preceding interlocutor, the Lord Ordinary, on 27th June 1876, made another remit to him to see the works reported on by him for obviating the evils complained of executed forthwith.

The defender reclaimed against the interlocutor of 24th March 1876, and after hearing counsel for the defender, the Court, upon the grounds stated by the Lord Ordinary, on 30th November 1876 pronounced this interlocutor:—"Adhere to the first finding in the said interlocutor, and appoint parties to be further heard on the cause, reserving in the meantime the question of expenses."

Professor Dewar made a second report, in which, *inter alia*, he observed—"I have to express generally my great satisfaction with the mode in which the above alterations have been executed, and also with the willingness and desire of the defender to carry out all my recommendations.

"The above improvements have produced a great amelioration of the nuisance that formerly arose from the Bunchrew Works, and I regard the principle of the method on its first trial as so satisfactory that it only requires judgment and a little scientific knowledge to reduce almost indefinitely annoyances arising from this manufacture."

The case was again debated, the pursuers arguing that they were entitled to interdict as craved, as the nuisance had not been entirely removed. Interdict was the only mode of securing constant attention on the defender's part—cf. *M'Neill* v. *Scott*, March 17, 1866, 4 Macph. 608.

The defender argued that time should be given him to perfect his apparatus.

At advising—

Lord Justice-Clerk—I am quite satisfied that the pursuers are entitled to interdict. It is proved that a very serious nuisance has been perpetrated by this manufactory. The defender says that he has done everything in his power to abate the nuisance, and that the manufactory is a new one. I think that the novelty of the manufacture rather strengthens the pursuers' right to interdict. It is true that Professor Dewar reports "his great satisfaction with the mode in which the alterations suggested by him

have been executed," and also with the willingness and desire of the defender to carry out all his recommendations. I think that we should remit back to Professor Dewar to report, not whether his recommendations have been carried out, but whether the nuisance has been abated, and that we should in the meantime grant interim interdict.

Lord Ormidale—I think this is a clamant case for interim interdict. On 24th March 1876 the Lord Ordinary found that there was a nuisance. The Court unanimously adhered to that judgment. At first sight, and independently of specialties, I should have thought that, if the Lord Ordinary had not previously granted interim interdict, he could not have gone wrong in granting interim interdict in his interlocutor of 24th March 1876. His Lordship, however, so far gave an indulgence to the defender, and merely made a remit to Professor Dewar.

If Professor Dewar had reported that the nuisance had been completely removed, even then I am not sure that, nuisance having once been established, we ought not to have granted interdict so as to prevent its recurrence. But on reading the Professor's report I find that he does not say that the nuisance has been entirely removed, but only that it has been greatly abated.

The work on which the defender is engaged is a new work, perhaps a laudable work; still he is carrying it on for his own pecuniary benefit, which he has a right to do, but not at imminent risk to the health and comfort of the pursuers.

Lord Gifford concurred.

The Court again remitted to Professor Dewar to visit the place at intervals, and report on October 15, granting interim interdict "against the defender carrying on the manufacture complained of so as to create a nuisance."

The case again came up for discussion on December 1, 1877, upon a petition and complaint for breach of interdict at the instance of the pursuers. It was averred that on several specified dates during the six months following June 1877 the effluvia discharged from the work had penetrated the mansion-house and policies of Bunchrew, and that the family had been prevented from residing there.

Cran denied that on any of the occasions specified a nuisance had been created, and further stated that he had offered to cease his manufacture during June, July, and August of each year, which offer was rejected.

Professor Dewar in the meantime issued another report, the nature of which is explained in the opinions of the Court.

It was maintained for the defender that the case should be sent to a jury, and reference was made to *Mackenzie* v. *The Magistrates of Dingwall*, July 11, 1829, 7 S. 899, 1 D. 487.

The pursuers maintained that it was clear that the question of nuisance or no nuisance depended entirely upon the mode of conducting the works.

[Lord Justice-Clerk—What I want to see is whether the manufacture is carried on with care, and that can only be ascertained by allowing a little time to elapse.]

At advising—

Lord Justice-Clerk—I think that when manufactures of this kind are so conducted as to be a nuisance they can be put down altogether. Where the defender undertakes to remove the nuisance, it is enough to give interdict to that effect against his doing what will produce it. The manufacture here is one which is capable of being carried on without creating a nuisance, provided the improvements suggested by Professor Dewar be adopted. But it is said that since that gentleman's report there has been a breach of interdict. I would suggest that more time should be given to the defender to enable him to have all opportunity of showing that he can and will carry on his works under the regulations of Professor Dewar's suggestions. If he does so, then it might not be worth while to inquire further as to the breaches which are alleged to have been committed during the summer months. If he does not, then it comes to be a serious question, whether we should not interdict the works altogether.

Lord Ormidale—I concur. I look upon the mode of granting the interdict as an indulgent one to the manufacturer. This appears to be the only way in which the Court can deal with the matter. It is rather a strong thing that the person who is indulged should complain of interdict being granted on such terms. In the circumstances the course which it is proposed to follow appears to be correct, for if the works are not properly carried on for the three months which it is now, I understand, proposed to grant, then a supplementary petition can be presented during that time; and again, if Mr Cran carries on his works without nuisance during all the probationary period, that will not protect him against an interdict at any time afterwards.

Lord Gifford—I am of the same opinion, and I think that the proposed method is a very reasonable mode of dealing with the case. Professor Dewar says that the manufacture is not one which necessarily creates a nuisance, and indeed if there be any nuisance it must be because the Professor's scheme is not properly carried out.

After the expiry of the probationary three months there will be time for the pursuers to consider whether they are to further press the question of the breach of interdict. Were it shown that nothing really could be done to stop the nuisance, the position of the interdictors would be very much stronger; but that is not so here. The warning we give the defender is a good one, and he will be in a very different situation if we are told in March that the nuisance has not been stopped.

The Court superseded consideration of the cause until March 1, 1878.

Counsel for Pursuers (Respondents)—Lord Advocate (Watson)—Trayner—Asher. Agents—Irons & Roberts, S.S.C.

Counsel for Defender (Reclaimer)—Fraser—Mackintosh. Agent—Thomas Carmichael, S.S.C.