given to the railway company the fullest warning of the extraordinary risk to all the world which attended its transit. Once this is realised I cannot help thinking that the true relation of the railway company and its servants to the question is better understood. That duty of the consigner not being fulfilled, the railway company and their servants were entitled to treat the box as an ordinary package, and its contents as requiring no special safeguards, unless and until some cogent cause of suspicion arose. For the reasons I have stated I do not think that any such case occurred.

I am for recalling the Lord Ordinary's interlocutor and assoilzieing both defenders.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I just wish to make one observation. It is, that we are not in any way suggesting that the railway company is discharging its duty as carrier if it allows a box of sugar or flour to come in contact with leaky packages. No doubt there might be a question between the grocer and the Caledonian Railway Company as to whether they had fulfilled their contract of carriage when they delivered one of these boxes in the condition of being damaged by leakage from another package, but we have no such question here. It is of course a question whether they are responsible for the injury to life which resulted from the sale of their sugar; and for the reasons which your Lordship has given I am clearly of opinion that no such responsibility does or can exist.

LORD KINNEAR concurred.

The Court recalled the judgment of the Lord Ordinary and assoilzied both defenders with expenses.

Counsel for Pursuers and Respondents—Shaw — Dove Wilson. Agent — David Ritchie, W.S.

Counsel for Defenders and Reclaimers—D.-F. Balfour, Q.C.—Dundas. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders M'Ewen & Company—H. Johnston—Aitken. Agents—Forrester & Davidson, W.S.

Wednesday, July 20.*

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE STEEL COMPANY OF SCOTLAND *v.* TANCRED, ARROL, & COMPANY.

(*Ante*, vol. xxvi., p. 305, and vol. xxvii., p. 463.)

Res judicata.

A steel company brought an action against the contractors for the Forth Bridge for declarator that the defenders were bound by contract to take from them the whole steel required for the bridge, and for payment of damages for breach of contract. The defenders answered that on a true construction of the contract they were not bound to take from the pursuers more than 30,000 tons; that the pursuers had always acted on this view of the contract, and had for this reason acquiesced in the defenders purchasing steel rivets from another firm; and that they were therefore barred from putting any other construction upon the contract. The parties agreed that the question of damages should be reserved for a separate action, and the Court decided that the defenders were bound to take from the pursuers the whole steel required for certain parts of the bridge. *Held* that this decision did not preclude the defenders from maintaining in defence to a subsequent action of damages for breach of contract at the pursuers' instance, that the pursuers had acquiesced in the defenders purchasing rivets from another firm, and had accordingly, so far as regarded rivets, waived their rights under the contract.

Contract—Acquiescence.

A entered into a contract with B to purchase from him all the steel he required for a work on which he was engaged. A subsequently ordered a quantity of steel rivets from C, who applied to B for rivet bars, informing him that they were to be made into rivets for A. After seeing A about the matter, B agreed to supply C with the rivet bars, and he continued to make him additional supplies until he had supplied him in all with 1200 tons. He thereafter, while continuing to fulfil C's orders, intimated to A that he reserved his claim of damages against him.

In an action of damages for breach of contract by B against A, *held* that B had waived his rights under the contract only as regarded the 1200 tons.

This was an action at the instance of the Steel Company of Scotland against Tancred, Arrol, & Company for payment of £50,000 as damages for breach of contract. The action was a sequel of a former action between the same parties, reported *ante*, vol. xxvi., p. 305, and vol. xxvii., p. 463.

In the former action the pursuers (the Steel Company) sought (1) to have it declared that they were entitled to supply, and that the defenders were bound to take from them, the whole steel required in the construction of the Forth Bridge, at the prices and subject to the conditions of contract specified, and (2) to have the defenders ordained to pay them damages for having supplied themselves with steel elsewhere.

The defenders answered, *inter alia*, that under said contract they were not bound to take from the pursuers more than 30,000 tons of steel, or an amount not more than 5 per cent. in excess of that quantity, in

* *Note.*—The opinion of the Court was delivered on 19th March 1892.

respect the contract stated—"The estimated quantity of steel we understand to be 30,000 tons more or less." They further averred—"Stat. 4.— . . . The parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers they might get any extras elsewhere as not being within the contract of the parties. The pursuers have consistently read the contract between them and the defenders in the way contended for by the latter. . . . Stat 5.—In particular, the contract founded on embraced, *inter alia*, steel rivet bars. These were specified with the view to the defenders manufacturing the rivets themselves at the Forth Bridge works, but they subsequently found that it would be more convenient to buy them in a manufactured form. They accordingly, on or about 12th September 1884, ordered 700 tons of steel rivets from the Clyde Rivet Works, providing in their contract that the steel should be obtained from one of two makers, viz., the pursuers or D. Colville & Sons, Motherwell. The Clyde Rivet Company accordingly purchased steel for making said rivets from the pursuers at the market rate then current, which was much lower than the rate in said contract. This steel was tested at the pursuers' works on behalf of the defenders, and the pursuers were well aware that the rivets to be made from it were for use at the Forth Bridge. The pursuers' manager at first objected to what was being done, on the ground that this steel fell within the contract in question. The defenders, however, informed the pursuers that 30,000 tons of steel would be taken under the contract, and that being so, that the contract would be satisfied. This view was acquiesced in by the pursuers, and the steel was sold to the Clyde Rivet Company as before mentioned. Subsequently the following additional quantities of steel were purchased by the defenders from the Clyde Rivet Works Company, viz. . . . All the said steel was purchased by the Clyde Rivet Works Company from the pursuers, who were quite aware that it was intended for use in the construction of the Forth Bridge Railway."

On these averments the defenders founded this plea—"5. The pursuers are debarred by their own actings under the said contract, and by *rei interventus*, from maintaining the declaratory conclusions of the summons."

After a proof had been led of the averments above quoted, the Lord Ordinary (TRAYNER), on 2nd March 1888, found that the pursuers were entitled to supply, and that the defenders were bound to take from them, the whole of the steel required for the four main spans of the Forth Bridge.

To obviate the necessity of leading proof at that stage on the question of damages, the parties then lodged a joint-minute, in which, under reservation of all pleas and rights of appeal, they agreed that the defenders were liable to the pursuers in damages at a certain rate in respect of 5000 tons of steel (in which no rivet bars were included) ordered by them outside the contract, and that the pursuers' claim for further damages, and the defenders whole pleas and rights thereanent, should be settled in a separate action or by arbitration, as might be afterwards determined. On 13th June the Lord Ordinary interponed authority to the joint-minute, and in respect thereof decerned against the defenders for £14,850.

The defenders thereafter reclaimed, but the First Division adhered to the interlocutors reclaimed against with variations unimportant to the present question, and on appeal the judgment of the First Division was affirmed.

The pursuers now sued the defenders, as already stated, for £50,000, which they alleged to be the amount of damages still due to them for the breach of contract of which the defenders had been found guilty.

The defenders in answer averred, *inter alia*, that the pursuers' claim of damages embraced about 4600 tons of rivets. "The contract founded on by the pursuers embraced, *inter alia*, steel rivet bars. These were specified in view of the defenders manufacturing the rivets at the Forth Bridge works out of the steel rivet bars purchased by them, but they subsequently found it would be more convenient to buy them in a manufactured form. This was communicated to the pursuers, who acquiesced therein, and unconditionally agreed to waive any claim they might have had to supply the steel rivet bars above mentioned. The defenders accordingly, on or about 12th September 1884, ordered 700 tons of steel rivets from the Clyde Rivet Works, providing in their contract that the steel should be obtained from the pursuers or D. Colville & Sons, Motherwell. The Clyde Rivet Company purchased steel for making said rivets from the pursuers at the market rate then current, which was lower than the rate in said contract. This steel was tested at the pursuers' works on behalf of the defenders, and was entered in their books as rivet steel for Forth Bridge, and the pursuers were well aware that the rivets to be made from it were for use at the Forth Bridge. Subsequently the following additional quantities of steel rivets were purchased by the defenders from the Clyde Rivet Works Company, viz.—March 25, 1886, 500 tons at £6, 5s., less 5 per cent.; January 24, 1887, 250 tons at £6, 10s., less 5 per cent., and other quantities were afterwards obtained. All the steel for making the said rivets was purchased by the Clyde Rivet Works Company from the pursuers, who were quite aware that it was intended for use in the construction of the Forth Bridge."

Proof was allowed. It appeared that in August 1884 the defenders ordered about 500 tons of rivets from the Clyde Rivet Company. On receiving this order the Clyde Rivet Company asked the pursuers to give them a quotation for steel rivet bars "for the Forth Bridge contract." The pursuers replied that they were entitled under their contract with the defenders to supply them with all the rivet bars required for the Forth Bridge, and on 12th August they

wrote to the defenders in these terms—"We were surprised this morning to receive an inquiry from a firm of rivet makers for 400 to 500 tons rivet bars 'for Forth Bridge contract.' We would remind you that we are under contract with you to supply all the rivet steel for the Forth Bridge, and we shall be glad if you would kindly explain how we came to receive the inquiry referred to."

After some further correspondence between the pursuers and defenders, a meeting took place between Mr Riley, the manager of the pursuers' company, and Mr Arrol, about the beginning of September 1884.

With reference to this meeting Mr Arrol deponed—"I accordingly saw Mr Riley, and asked why he would not supply the Clyde Rivet Works with this steel. He said he could not afford that to be taken off his contract. I said I did not want to take it off his contract; that I would bind myself to take up the full 30,000 tons irrespective of whatever he supplied to the Clyde Rivet Works, and if he did not supply it I would require to buy the steel somewhere else. He said in that case he was quite agreeable, and we had no more communication about it. From that time onwards the steel was got from the pursuers by the Clyde Rivet Company in the knowledge on the part of the pursuers that it was going to the Forth Bridge. Mr Riley at that meeting did not mention any number of tons of rivets at all, either 1200 or any other figure."

Mr Riley's evidence on this point was as follows—"The meeting was about rivets, and it arose on a proposal by the Clyde Rivet Works Company to buy bars from us for the manufacture of rivets for the Forth Bridge. That proposal was discussed, and the end of it was that we agreed to quote to the Clyde Rivets Company, in response to their inquiry, for 400 to 500 tons of rivet bars, and we did so. In the first place I consulted my directors, who considered the matter, and, as I have stated, we agreed to quote. We had objected to quote to the Clyde Rivets Company because we were under our contract entitled to deliver all the rivet bars. (Q) At that meeting with Sir William Arrol did you agree to waive that contention?—(A) That is the practical result—that we agreed to quote to the Clyde Rivets Company in response to their inquiry. (Q) Did your directors agree to waive that contention?—(A) They agreed that we might quote to them. *By the Court*—(Q) Which implied a waiver of that contention?—(A) I suppose so. *Examination continued.*—(Q) You adhere to what you said before, that you consulted your directors and they agreed to waive the point? (A) Clearly . . . *Cross.*— . . . I conducted the preliminary negotiations between the company and Sir William Arrol about the contract to supply steel. I had general information from him as to the probable quantities that would be required. I had a strong impression at the time of our meeting that 1200 tons of rivets would be required. In communicating with my directors about this matter I told them my strong impression was that 1100 or 1200 tons would be required."

Between September 1884 and July 1888 the pursuers supplied the Clyde Rivet Company with 1200 tons of steel to be made into rivets for the Forth Bridge. In July 1888 the pursuers were asked by the Clyde Rivet Company to give them a quotation for 1000 tons of rivet bars for the Forth Bridge. The pursuers thereupon wrote to the defenders mentioning the application made to them by the Clyde Rivet Company, and intimating that they had supplied the desired quotation under reservation of their right to claim damages against the defenders in respect of said rivet bars.

On 26th January 1892 the Lord Ordinary (KYLLACHY) found, *inter alia*, that the pursuers had sustained damage by the breach of contract libelled to the amount of £24,447, 4s. 1d., of which sum £13,659, 8s. 5d. was applicable to rivets, and decerned the defenders to make payment to the pursuers of said sum of £13,659, 8s. 5d.

"*Opinion.* . . . With respect to rivets, I have included them in the above figures. I do so for this reason. I think that the rivet steel fell within the contract. Indeed, I did not gather that this was seriously disputed. The only question therefore is, whether the contract was modified to the effect of discharging this part of the defenders' obligation? On this question, if it were open, I should, I confess, have had difficulty in deciding against the defenders. My impression is, that there was on this matter a concluded verbal agreement, followed by *rei interventus*, to the effect that the defenders might get their rivets where they pleased. But I do not think that the question is open. The question was fairly raised by the conclusions of the summons in the former action. It would have been, so far as I can see, a good defence to the action that, at least as regards rivet steel, the defenders were not bound to take the whole steel required for the bridge from the pursuers. In other words, it would, so far as I see, have been a competent and relevant plea in the former action that, at least *quoad* rivet steel, the contract had been discharged. But no such plea was taken, and accordingly the judgment of the Court, affirmed by the House of Lords, was expressed in unqualified terms, affirming that the defenders were bound to take from the pursuers the whole steel required for the superstructure of the four main spans. It is not, I am afraid, possible to read that judgment as declaring merely the construction of the original contract without reference to modifications of the contract subsequently made. But that is the only answer which on this point the defenders were able to make." . . .

The defenders reclaimed, and argued—The question whether or not the pursuers had waived their right to supply rivet bars was not *res judicata*. The averments made by the defenders on that subject in the previous action had been made *alio intuitu*, and all that the Court had decided was that

the pursuers were not barred by their actings from construing the contract in a wider sense than that contended for by the defenders. It had never been decided that the defenders had not a competent defence to the pursuers' claim in respect of rivets, on the ground that they waived their right to supply the rivet bars, nor could it be said that the defence, though competent, had been omitted, inasmuch as the question of damages had been withdrawn from the cognisance of the Court by the joint-minute. The defence was, therefore, still open to the defenders, and the evidence established that the pursuers in September 1884 had waived their right to supply rivet bars in terms of the contract. The waiver applied to all the rivets required for the Forth Bridge, and it was not in the power of the pursuers afterwards to withdraw it.

The pursuers argued—The Court in the former action had decided without qualification that the pursuers had a right to supply the defenders with the whole steel required for certain parts of the bridge. It was competent for the defenders to have pleaded in defence to that action that the pursuers had discharged their claim under the contract in regard to rivets. The defenders had either maintained that plea, and it had been rejected, or they had omitted to maintain it. In either case they were precluded from putting it forward now. Further, on the evidence, the plea of waiver could only be maintained, if at all, as to the rivets purchased by the defenders prior to July 1888.

At advising—

LORD PRESIDENT—The Lord Ordinary has decided the only question raised under this reclaiming-note, viz., the claim of damages for rivets, on the ground that the defenders' liability in damages on that head has already been affirmed by the judgment of this Court and the House of Lords in the previous action, and that the present dispute is *res judicata*. It is argued by the defenders that all that the previous judgments did was to decide that the terms of the contract dated in February and March 1883 covered all the steel, including rivets, but that these judgments did not negative, and do not preclude the plea now stated, viz., that in September 1884 the pursuers waived their right to supply rivets under the contract.

I have come to be of opinion that the latter view is right. The scope and effect of the decree of 2nd March 1888 (which was subsequently modified only in a matter unimportant in the present question) is to be ascertained by its own terms, and by the summons and the record on which it was pronounced. Taking these writings together, I think that the question submitted for decision and decided was the construction of the contract of February and March 1883, and that the decree did not declare the rights of parties as affected by fulfilment or release so as to state the net results of those rights at the date of the decree. The opposite theory would have this result—that it would make us read the word "required," as necessary, "now required;" and the declarator, pronounced as it was when much of the bridge was already constructed, would limit the pursuers' claim of damages to such steel as was required at and after 2nd March 1883.

An examination of the record confirms the view that the decree only construes the contract. The pursuers make much of the fact that the arrangement of September 1884 now founded on was made matter of averment, and proof was led upon it. That is quite true, but it is clear that those averments were made in support of the plea that the pursuers were barred by their actings from insisting in the declaratory conclusions of the summons. The argument was that the fact that the pursuers agreed that the rivets might be taken from the manufacturers was irreconcileable with the view of the contract taken in the summons, and could be accounted for only by the defenders' theory of a limit of 30,000 tons. The matter of the rivets was thus germane to the question which construction had been adopted by the parties, and a perusal of statements 4 and 5 in the record in the former action, as well as the matters alongside of which the topic is brought in, makes its relation to the controversy sufficiently clear. It is of course true, that if in the dispute submitted for decision those facts gave rise to a separate plea which was not stated, the plea of competent and omitted would not be met by showing that the subject was introduced *alio intuitu*. But at present I am concerned to see how far the presence of the averments about the rivets affects the question what was truly the matter of debate and decision, and their presence does not conflict with the view that the dispute was solely as to the construction of the contract of 1883, as that should be ascertained from its terms, or as affixed by the conduct of parties. I think that, assuming the rivets were within the contract, the Court had no occasion to consider whether the pursuers had waived their right to claim fulfilment of that part of the contract, that not being *hujus loci*. In truth, the latter question had no bearing except either as binding the parties to one construction of the contract, or as stopping a claim of damages on that head. But the question of damage was admittedly held over till the construction of the contract was determined, and thus the judgment of 2nd March 1888 had no relation to the present controversy.

Unless the defenders' right to their present plea was taken away by that judgment, it certainly is before us now; for the joint-minute of 12th May 1888 most amply saves for the new action all possible pleas, new and old, which were competent to them. I am therefore of opinion that we are not precluded from considering the case on its merits.

I shall briefly state the conclusion to which I have come on the facts. In or about August 1884 the pursuers became aware that the defenders were getting rivets from the Clyde Rivets Company,

and they complained to the defenders, claiming that this was a breach of contract. In September 1884 Sir W. Arrol and Mr Riley, the pursuers' manager, had a meeting to consider the question which had thus arisen. The precise form in which the question arose requires to be noted. The Clyde Rivets Company when they got the order for rivets from the defenders asked the pursuers to sell them bars for the manufacture of these rivets to the extent of some 500 tons. It was thus that the pursuers became aware of the breach of contract, and they felt that they would compromise themselves if in that knowledge they supplied their supplanters with the material for the rivets. The practical question therefore was, whether the pursuers should quote for the bars, the alternative being that they should intimate a claim of damages. Now, I hold it to be proved that at this meeting in September 1884 Mr Riley agreed to waive the objection taken by his company to the defenders taking the rivets from the Clyde Rivets Company instead of from the pursuers, and to quote for the bars. Mr Riley's evidence on this point is quite explicit. Nor do I think that the evidence of Sir W. Arrol varies the result. It is true Sir William thought Mr Riley's consent to waive was due to trust in the theory of the 30,000 tons limit. But I do not think that this affects the fact that Mr Riley, for good reasons or bad, waived his company's objection to the Clyde Rivets Company supplying the rivets.

If the facts stand as I have stated them, then the position of the parties is this—The pursuers are claiming damages, *inter alia*, for the defenders having got those 500 tons from the Clyde Rivets Company. But then they cannot get damages for what they themselves have agreed to, and this in my opinion is the fact. Mr Riley, as I have said, did so agree, and his directors approved of what he had done, and left the matter in his hands. No further communication was made to Sir W. Arrol by Mr Riley, and none was necessary.

The next question is, whether the parties are in the same position as regards the rest of the rivets as they are in regard to the 500 tons. Now, I do not adopt the defenders' view that what was done in September 1884 was a contract which tied the hands of the pursuers as regarded all rivets. I think that it was a mere waiver of objection implying consent to what was objected to, and that the pursuers were quite free, if the defenders went back to the Clyde Rivets Company for more rivets, to give notice to the defenders that they were going to stand to their rights. It appears, indeed, that no figure was mentioned to Sir William Arrol as the measure of the concession made by Mr Riley. It may fairly be held, therefore, that the pursuers could not claim damages until they had told the defenders that they withdrew their consent, and that the claim of damages would not lie for goods ordered prior to such intimation. This, I think, is the sound view. In that view, the question is, what quantity of rivets had been ordered from the Clyde Rivets Company prior to 25th July 1888, when distinct intimation was made that the pursuers withdrew their consent. On the evidence not more than 1200 tons has been proved to have been so ordered; and therefore, in my opinion, the sum found due and decerned for by the Lord Ordinary must be reduced by a sum representing that quantity. The figures can be adjusted by the parties.

LORD M'LAREN—When a question arises whether a particular claim is *res judicata*, the ordinary mode of determining that question would be by a comparison of the conclusions of the first action and the *media concludendi* with those of the action in which the question arises, and if it is found that the subject-matter of the two actions is the same, that the rights asserted with reference to that subject are the same, and if the defender was a party to the original action, then the matter is *res judicata*, and the party can neither be allowed by way of defence nor by instituting a reduction of the original decree to raise a point which might competently have been pleaded in defence to the original action, but which was omitted to be stated in that action. But then that absolute criterion evidently only holds good where the first action is contested upon all the points submitted by the summons and record to the adjudication of the Court, because if in the course of the proceedings in the first case part of the subject is withdrawn from the cognisance of the Court, the comparison evidently lies between the new claim and the original claim as restricted. It appears to me, accordingly, that in the technical sense of the expression this claim cannot possibly be a *res judicata*, because the only subject as to which a decree was given in the first action was the 5000 tons of steel as to which it was agreed that a test opinion should be obtained, and as regards all the remainder of the steel which was reserved for consideration by arbitration or a subsequent action it is plain that special defences might arise, and might be very proper for consideration, which could not have been taken to any part of the 5000 tons which constituted the subject of the original decree. Now, although there is, as your Lordship has pointed out, a reference to those letters which are said to constitute the waiver in the original record, I do not understand that that waiver applied to any part of the 5000 tons on which this Court and eventually the House of Lords were asked to give a decision, and it was therefore impossible after the first action had been thus restricted that a decision could have been given upon the question which the Lord Ordinary has been called to decide in the present case. No doubt if an opinion had been given upon the point incidentally—especially in the House of Lords—that might have been binding upon us as a precedent, but the fact is that the matter was never considered at all, and it appears to me to be entirely

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