The pursuer thereupon paid the expenses, with interest, but under deduction of £5, 5s. decerned for on 20th July 1875, and the causes were subsequently conjoined.

Counsel for Mrs Wallace—Strachan. Agents—Walls & Sutherland, S.S.C.

Counsel for Mr Henderson — Henderson. Agents—Horne, Horne, & Lyell, W.S.

HOUSE OF LORDS.

Friday, November 24.

WALKER AND ANOTHER *v.* THE PRESBYTERY OF ARBROATH.

(*Ante*, vol. xiii. p. 324.)

Church— Churchyard — Presbytery — Jurisdiction— Appeal—Ecclesiastical Buildings Act 1868 (31 *and* 32 *Vict. c.* 96) *secs.* 3-14, *and* 20.

A suspension and interdict was brought against a presbytery and the heritors of a parish by a proprietor, (a portion of whose ground had been designated for an addition to the churchyard), on the grounds—(1) that he had not got sufficient notice of the meeting of presbytery at which his ground was designated, and that therefore the decree of designation then pronounced was illegal; and (2) that he had been deprived of his right to appeal to the Sheriff (in terms of the Ecclesiastical Buildings (Scotland) Act 1868, 31 and 32 Vict. c. 96) by not receiving notice of the judgment until after the time for appeal had expired.—*Held* (*aff.* judgment of Court of Session) (1) that in view of the circumstances of the case the notice was not so insufficient as to justify the setting aside of the whole proceedings as illegal; and (2) that the designation of an addition to the churchyard was a matter within the exclusive jurisdiction of the presbytery, and not subject to the review of the Court of Session.

Churchyard—Tenant—Decree of Removing.

Held that it was regular and competent for a presbytery after designating or setting apart, a piece of ground as an addition to a churchyard, to put a value upon it and appoint the tenant to remove, although they had no executorial power to enforce the decerniture to remove; and that, assuming the tenant's interest not to be taken into view in the presbytery's valuation, it was open to the tenant to maintain any claim he had.

This was an appeal against the judgment of the First Division in a suspension and interdict at the instance of James Walker of Ravensby, in the parish of Barry, Forfarshire, and James Dargie, tenant of Barry Mills and mill lands, part of the estate of Ravensby, against the Presbytery of Arbroath and the heritors of the parish of Barry, for interdict against the respondents from proceeding to carry out a designation, as an addition to the churchyard of the parish of Barry, of a portion of the lands of Ravensby belonging to the complainer James Walker, and in the occupation of the complainer James Dargie, and also for interdict against the respondents, the heritors of the parish of Barry, from inclosing the proposed addition to the churchyard with a wall, and from entering upon and levelling or otherwise interfering with the said ground and with the complainers in the peaceable enjoyment and occupation thereof, and from entering into any contract for the execution of any work thereon.

The circumstances of the case are fully narrated in the report of the case in the Court of Session, (*ante*, vol. xiii, p. 324), and in the opinion of the Lord Chancellor.

At giving judgment—

LORD CHANCELLOR—My Lords, the appellant in this case complains that a portion of his land, about three-quarters of an acre in extent, has been taken from him for the purpose of enlarging the churchyard of the parish of Barry, and that it has been taken from him irregularly, in a manner of which he is entitled to complain, and as against which he is entitled to have redress. My Lords, the appellant does not say that the churchyard of the parish should not be enlarged; on the contrary he admits that it ought to be enlarged; and he does not say that his land is not the proper land out of which the enlargement ought to be made, and that some other land belonging to some other person would be better land for that purpose. An appraisement of the value of his land has been made, by which the three-fourths of an acre has been valued at about £106 or £107. What the value which the appellant puts upon his piece of land may be, your Lordships are not informed, but of course he is quite in his right in saying that he estimates the value more highly than at the sum I have mentioned.

But I point out, in the first place, to your Lordships—and I do so with some regret—that the whole of this litigation is confined to the difference between the sum which I have mentioned and the larger sum, whatever it may be, which represents in the mind of the appellant the value of this small portion of land; and I cannot but strongly suspect that the costs incurred in the present litigation must amount to a very much larger sum than the difference between the sum which the respondents have been prepared to pay and that which the appellant would wish to have paid to him for this piece of land.

However, my Lords, be the sum which is at stake large or small, the appellant is entirely in his right in testing the regularity of the proceedings by which this portion of land is attempted to be taken from him. The complaint which he makes as to the regularity of these proceedings divides itself into two parts. In the first place, he says that under the circumstances of the case the presbytery never acquired any jurisdiction to take his land or to designate it as the land by which the churchyard was to be enlarged; and, in the second place, he says that even supposing that the circumstances were such as to give the Presbytery jurisdiction to designate a piece of ground for the enlargement of the churchyard, they did not give him that notice or intimation of the proceedings they were taking which he was entitled to, and which would have enabled him both to intervene in these proceedings and, if dissatisfied with the result, to appeal against them under a recent statute of the present reign. I

will take the second of these questions first. I will afterwards consider whether the presbytery had, under the circumstances, jurisdiction to designate land for the enlargement of the churchyard; but I will assume at this moment that they had that jurisdiction, and will proceed to point out to your Lordships the facts of the case as to the notice which the appellant received of the proceedings of the presbytery.

Now, in order that your Lordships may have that matter properly placed before you, I must remind you, in the first instance, of the origin and inception of these proceedings. The churchyard was supposed by the heritors and inhabitants of the parish to be too small for the increasing population of the principal town or place in the parish, namely the town of Dalhousie; and on the 18th of February 1874 your Lordships find that a meeting of heritors took place upon the subject; your Lordships find that Mr Walker (the appellant) was present at that meeting, and that he was chairman. At that meeting, of which Mr Walker was president, "after due deliberation on the present and prospective circumstances of the churchyard, and hearing the sexton's statement," "on the suggestion of Mr Walker" (the present appellant) "Mr Stevenson moved, and Mr Borrie seconded, that the meeting he adjourned to the 4th of March ensuing, at one o'clock afternoon, in order to obtain a fuller meeting of members of the committee."

What was done at the committee meeting of the 4th of March we are not told, but afterwards, on the 19th of March, a meeting of the heritors took place, at which again Mr Walker was present; and your Lordships have this information as to the opinion of that meeting of the heritors—"The meeting having had under consideration the state of the present burial-ground of this parish, is unanimously of opinion that some steps must immediately be taken either for the purpose of enlarging the present burying-ground or for acquiring ground in some other part of the parish for the purpose of burial." Therefore your Lordships have the opinion of the appellant that the churchyard should be enlarged, and of course he must have been aware that one, and not the most unlikely, mode of enlarging it would be by means of his own land, which was in actual contact with the churchyard.

On the 1st October, after an interval of some months, there was another meeting of the heritors. At that meeting Mr Walker was not present. "The meeting having had under consideration the necessity of providing additional burying-ground for the parish," we find that they say they are "unanimously of opinion that the most suitable ground for this purpose is the small field immediately adjoining the present burying-ground—to the north of the existing churchyard—belonging to James Walker, Esquire." Then they came to a resolution as to the offer which should be made to Mr Walker for a portion of his ground, and the clerk was "instructed to transmit to Mr Walker an extract of this minute, and the following committee was chosen with power to carry into effect the resolutions aforesaid and report to another meeting."

Then your Lordships find by the minutes of the 19th November 1874, that upon the day after this formal meeting, namely on the 2d of October, the clerk immediately communicates with Mr Walker, and then Mr Walker is then made aware, not merely that the churchyard was to be enlarged (to that he had assented), but that the opinion of the heritors was that the enlargement ought to be made out of his ground, and that they were willing to pay him a certain price for the ground. It further appears from the minute of this same meeting of the 19th of November that an answer had been given by Mr Walker stating the price at which he would sell, but the meeting thought that price unreasonable, and declined to entertain it. Then it appears that a suggestion was made that some person else might be willing to sell a piece of land in the neighbourhood of another part of Mr Walker's property, and that might be exchanged by the heritors for the piece of ground of Mr Walker's which they wanted for the enlargement of the churchyard; and the meeting appointed some members of the committee as a deputation to wait upon Mr Walker and ascertain whether he would fall into this alternative plan. Your Lordships find that in the minute of the 1st December 1874 there is a report of the interview which the committee had with Mr Walker, from which it appears that Mr Walker declined the exchange and adhered to his former offer as to price.

That brings your Lordship to the end of the year 1874 and up to the year 1875. In the year 1875 it appears that there was a meeting of heritors on the 18th of March. Counsel's opinion had been taken as to the difficulty the heritors were in, and I infer that counsel had advised that it would be better if the heritors were to hand over the further conduct of this matter—the enlargement of the burying-ground—to the presbytery, inasmuch as they themselves did not appear to have the power of getting the ground which they desired. The memorial and counsel's opinion "having been read and carefully considered by the meeting, it was unanimously resolved to act upon" counsel's "opinion and make application to the presbytery of Arbroath to design the ground necessary for the extension of the churchyard. The clerk was accordingly instructed to prepare the necessary petition." The petition was prepared and signed by a number of heritors in the parish, and was presented to the presbytery.

Now, I will ask your Lordships to observe the resolution at which the presbytery arrived, because when I come to look at the intimation given in the kirk, it will connect itself with this resolution, and the resolution therefore should be borne in mind. The minute of the meeting of the presbytery is of the 6th of April 1875; it is in these words—the "petition was read, and the presbytery having considered the same, resolved to visit and inspect the churchyard of Barry on Thursday the 6th day of May next, at one o'clock p.m., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and directed, and hereby direct, the minister to intimate this petition and the time fixed for the visit from the pulpit and on the church door, and also by advertisement," and so on. Therefore your Lordships, I think, can have no doubt in arriving at this, that whatever may be the effect of the intimation when it was given (that I will consider afterwards), the object and intention of the presbytery was that there should be an intimation

given in the kirk that they were going on the 6th of May to the churchyard, not alone to consider the question of the enlargement of the churchyard, but, feeling confident that the enlargement must take place—for the heritors were agreed upon it—to designate a piece of ground which would be suitable for the purpose of the enlargement. And in that respect they were acting upon the petition, because the petition had stated to them, not merely that the churchyard ought to be increased, but "that at a meeting of the heritors, held on the 1st of October 1874, it was unanimously agreed that a piece of ground immediately adjoining the churchyard on the north side is the most suitable and convenient for appropriating as an addition to it;" that was Mr Walker's piece of ground.

Your Lordships, therefore, before you come to the intimation in the kirk, approach it with this knowledge, that this matter had been a subject of general consideration throughout the parish and among the heritors, that it was perfectly well known to Mr Walker, and that Mr Walker was himself of opinion that the churchyard ought to be enlarged; that he knew that the heritors desired to enlarge it by means of a piece of ground belonging to him, and that he was, or had been, in controversy with the heritors as to the price to be paid to him for that piece of ground; and therefore if he heard, as I shall afterwards shew he did hear, the intimation as to what the presbytery were going to do, he heard that with a knowledge of all that had gone before, and of what was the desire of the heritors as to the mode and form of the enlargement of the churchyard.

My Lords, the intimation which the presbytery had ordered was given in the kirk on the 18th of April, and your Lordships have it admitted that Mr Walker was present at the kirk and heard that intimation. The intimation, therefore, must be read, not as it might have struck your Lordships if you had been at the kirk without any knowledge of what had taken place, but as it would appear to the mind of Mr Walker, who knew everything which had taken place up to that time, and who knew the piece of ground which was referred to in the intimation as the source from which the enlargement was to take place. With that knowledge on his part, this intimation is made in the kirk:—"Intimation is hereby given to the heritors of this parish, and all concerned, that a petition has been presented to the reverend the Presbytery of Arbroath, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the presbytery are to visit and inspect the churchyard on Thursday the 6th day of May next, at one o'clock afternoon, at which time the heritors, and all others concerned, or persons duly authorised to act for them, are requested to attend."

Now, my Lords, as regards Mr Walker, this to his mind of course would read just as if his own name had been mentioned in it—as if it had been an intimation that a petition had been presented to the presbytery craving them to set apart Mr Walker's piece of ground for an addition to the churchyard, and that the presbytery would visit and inspect the churchyard at one o'clock on Thursday the 6th May, at which time Mr Walker—for he was one of the heritors—was required to attend.

Now, I ask your Lordships to observe, with respect to the objection which has been made to this notice, that it consists both of an introduction and also of a part which conveys the actual affirmative intimation. The introductory part does not say that the petition presented to the presbytery had asked the presbytery first to consider whether there should be an enlargement or not and then to designate the piece of ground, but it states that the presbytery had been asked to do one thing, and one thing only, namely, assuming that there should be an enlargement, to designate and set apart the particular piece of ground mentioned in the notice, or another suitable piece, for the purpose of the enlargement. My Lords, I attach some importance to that, for this reason. If the introductory part of the notice had stated that the presbytery had been asked to consider the expediency of enlarging the churchyard and then the mode of enlarging it, and thereupon an intimation had been given that the presbytery were to meet in the churchyard on a particular day, it might have been said—I, hearing this notice, am in doubt whether it means that the presbytery at their meeting are going to do anything more than consider the first question, namely, whether the churchyard ought to be enlarged at all? But, my Lords, when that is not the form of the notice—when the introductory part speaks of designating a particular piece of land, and the notice then states that the presbytery will upon a particular day visit and inspect the churchyard—I must say that the inference which I should draw from that intimation, and I think the inference which any person who reads it or hears it ought to draw from the intimation, is this, that the presbytery upon the day named is coming to the churchyard for the purpose of considering that step—that proposal—which is mentioned in the introductory part of the intimation, namely, the designation of the particular piece of land, or other suitable piece of land, mentioned in the introduction. Your Lordships cannot of course tell what passed through the mind of Mr Walker, but I am bound to say that any person of ordinary understanding ought to have concluded that this was the meaning of the intimation, and that in any court Mr Walker must be held to have received an intimation which has that natural and fair construction.

My Lords, I should be extremely unwilling under any circumstances to hold as inept or irregular merely upon a matter of form the proceedings of a presbytery, which is not a court of law, and which does not proceed upon fixed and settled formula with regard to notices or other documents; but in this case it appears to me that both in form and in substance, upon a fair construction of the notice, the presbytery had given a notice such as fairness required them to give before they were proceeding to designate the land under their powers.

My Lords, it does not stop there, because a subsequent notice was given on the 11th of May, following that which was given on the 18th of April. The notice of the 11th of May was not a notice in the kirk; it was a notice in a letter addressed to the appellant personally, and it states to him that "The reverend the Presbytery of Arbroath will meet at Barry on Monday the 17th instant, within the parish church at Barry, at 1·30 p.m., to take further steps towards making an addition to the churchyard at Barry, which meeting you are requested to attend."

Now, my Lords, supposing for a moment that on hearing the first intimation in the kirk the appellant had conceived that the presbytery were going to divide their proceedings in two, and were going at their first meeting to consider whether the churchyard should be enlarged at all, and were going to leave over for a separate meeting whether it should be enlarged by the taking of the ground of the appellant—supposing, I say, that that had been his idea when he heard the first intimation, then it seems to me that this second intimation, given to him personally by letter, ought to have told him that the first step had been taken, and had resulted in the opinion that the churchyard should be enlarged, and that the presbytery were now going to take the second step which had been referred to in the former intimation, namely, to designate his piece of ground as the ground by the addition of which the enlargement ought to be made.

My Lords, I have no hesitation in adopting the conclusion arrived at by the Lord President and the majority of the Court below, that there was in this case, supposing the presbytery to have had the jurisdiction, a sufficient intimation to the appellant of their intention of exercising that jurisdiction for the purpose of designating his land.

I now turn to the other point which I reserved for subsequent consideration, namely, Had the presbytery the jurisdiction in this case to proceed to designate land for the enlargement of the churchyard? My Lords, the only objection made to their jurisdiction is this—and it is an objection which did not meet with favour from any of the Judges in the Court in Scotland—it is said the jurisdiction of the presbytery to designate land for the enlargement of a churchyard is not a primary or original jurisdiction as it were; it arises only upon the failure or the refusal of the heritors to enlarge the churchyard and to procure ground for the purpose. The duty, argues the appellant, lies in the first instance upon the heritors to enlarge the churchyard. If they neglect it, or if they refuse to perform it, the presbytery may step in and exercise their jurisdiction; but their jurisdiction does not arise until there is a failure on the part of the heritors, and, says the appellant, there was no such failure on the part of the heritors here. You are not able to predicate, he says, of the heritors that they did fail or refuse to enlarge the churchyard. On the contrary, he says, they were endeavouring to do it.

My Lords, I will assume—though I should desire not to be understood as myself affirming it—that the view taken by the appellant of the law is correct. The old statute upon the subject is very obscure, and I should be sorry myself to appear to be defining what is the jurisdiction of the presbytery, or how it arises; but I will assume that the appellant is right in his statement of the law. If the law be as he states it, of course it is obvious to your Lordships that the reason of the law must be this—until there has been some neglect by those who ought to be the best judges of the manner of the enlargement of the churchyard, and who will have to pay for that enlargement, the law does not desire to take the matter out of their hands, and to place it in the hands of what I may term an external body, who are not the body to pay for the enlargement. On the other hand, the law says that that which is necessary must be done, and if those who ought to do it fail to do it, then the presbytery are to be allowed to exercise their rights. What, my Lords, I ask, does that mean? Does that state of the law require that the heritors must contumaciously and violently refuse to exercise their power, or to discharge their duty, of providing an enlargement of the churchyard? Supposing the heritors admit openly and candidly that it ought to be enlarged, but suppose that in point of fact they do not enlarge it; suppose that they say—We cannot make a bargain of a satisfactory kind with any owner of land for the purpose of procuring an enlargement which we all admit to be required—are the presbytery to be paralysed by the mere fact that the heritors have made no refusal, but have simply done nothing?

But I carry it further—Suppose the heritors come to the presbytery and say, We do not desire to stand in your way; we do not desire to be supposed to be persons who are going to enlarge the churchyard, or to take any steps towards acquiring land for that purpose; we find the difficulties to be such that we abandon it in despair, and now you must look upon us as asking you to step in and to exercise the right which we might have exercised. It would appear to me to be the most monstrous and violent and the most inconvenient proposition possible, and one for which I know of no authority, to contend that in that state of things the jurisdiction of the presbytery is not to arise, just as much as if the heritors had been contumacious—had denied that there ought to be an arrangement at all, or, admitting that there ought to be an enlargement, had refused to take any steps for the purpose of procuring that enlargement.

My Lords, I have in the former part of the case laid before you the facts as to the meetings which were held, and your Lordships remember what took place before the petition was presented to the presbytery. If the heritors had been able to do so they would have made a bargain with the appellant, and have bought his land, and enlarged the churchyard; but they found they could not do that, and they took counsel's opinion, and the difficulties of their position being pointed out to them they gave up any idea of acting. They presented that petition to the presbytery, in which they abandoned any intention of acting, and asked the presbytery to proceed upon the footing that they, the heritors, were not going to act. My Lords, if the law be such that the presbytery cannot act unless there be a failure by the heritors to act, then I say that in this case there was that failure by the heritors to act, and the jurisdiction therefore of the presbytery arose. Therefore, I entirely concur in the unanimous opinion of the learned Judges in the Court of Scotland.

Upon the whole, I submit to your Lordships that this appeal is one which does not rest upon any solid foundation, and that it ought to be dismissed, with costs.

Lord O'Hagan—My Lords, I have had some difficulty, during the argument of this case, in reaching a conclusion satisfactory to myself. But, on the whole, I do not feel warranted in refusing my assent to the resolution proposed by my noble and learned friend. My difficulty was of a two-fold character. The conflict of opinion between the eminent Judges of the Courts below

created a reasonable hesitation in my mind. They had to consider a question of local procedure, to be determined very much by local usage, on which their knowledge of the ordinary course of action in the Church Courts of Scotland with reference to the extension of graveyards must necessarily have been greater than is possessed by the majority of your Lordships, and the marked difference in their mode of applying that knowledge suggested the propriety of caution and diffidence to persons less informed. But, further, the views of the Lord Ordinary and Lord Ardmillan as to the insufficiency of the notice given to the appellant have manifestly much to commend them to respectful attention.

Undoubtedly no man's property should be taken from him for any purpose, private or public, in the absence of such notice as may enable him to assert his right and offer such reasons in respect both to the taking and the terms of the taking as may secure him justice and adequate compensation. Now, in this case neither the statement to the congregation, of which the appellant appears to have been a member, nor the letter addressed to him personally, made any express reference to the designation or the value of his land. The statement only announced that on a given day the presbytery would "visit and inspect," and did not declare that they would "designate," the ground; and the letter merely made the intimation that they would meet within the parish church "to take further steps towards making an addition to the churchyard." It is further to be observed that in neither case was the appellant addressed as the owner of the land in controversy, but only as one of the heritors of the parish.

Now, I think it very unfortunate that a more full and unequivocal indication of the intentions of the presbytery was not given, for if it had been, this wretched litigation, at such heavy cost, about an interest so trival, could not have been maintained. But when we are asked to set aside the entire proceedings and declare them of no effect, we must consider the position of the appellant and the means substantially afforded him for self-protection. The notice published from the pulpit, affixed to the church door, and inserted in the newspapers, had more in it than the announcement of intention to "visit and inspect." It recited the petition craving the presbytery "to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground." The piece of ground "on the north" was the ground of the appellant, as to which there had been much negotiation, and which everybody knew the presbytery wished to acquire; and taking the whole notice together, I incline to agree with the Lord Chancellor that, the "visit and inspection" being undertaken in pursuance of a petition "to design and set apart," the appellant might reasonably have expected to see for himself that nothing be done to prejudice his rights. He knew what was desired and what was contemplated. He had had interviews about the ground; he had had offers for it; and it would have been easy for him to have guarded himself from injury by his presence, or that of a representative, at the inspection to which he was invited.

Then, as a matter of fact, can we reasonably doubt that he had knowledge of the doings of the presbytery on the occasion of their visit—quite time enough to appeal if he had been disposed to do so. The churchyard is in the immediate vicinity of the appellant's residence. His complaint rests very much on the allegation that the "amenity" of the property will be injured by its extension, so that the addition will become visible from the windows of his mansion-house. Is it conceivable in such circumstances that he should not have inquired about the proceedings of the presbytery, almost at his very door, upon the 6th of May, or that he should not have heard of their designation of the ground? If he did know of it, the lapse of the time for appealing occurred through his own default.

Next, we have the letter of the 11th of May, inviting him to meet the presbytery on the 17th of May, with a view to the taking of further steps "towards making an addition to the churchyard." He may not have been bound to attend that meeting, but he was free to do so, and he must have understood it to have been designed to complete a proceeding already taken, and if he had attended he would still have had full time and opportunity to make his appeal.

This being the history of the matter, I think it important to note that there is no impeachment of the *bona fides* of the presbytery. They did not seek to deceive or over-reach the appellant. They took the best advice they could get in Scotland, and acted honestly upon it for the general interest. And their proceedings are not lightly to be set aside if your Lordships are of opinion that, although technically the notices might have been better framed, the appellant did not suffer wrong, but had substantially such information given to him as should have been sufficient for the protection of his rights.

Then, we must not forget that there was no hard and fast line of procedure imposed upon the presbytery. They acted, as was said in the Court of Session, under a jurisdiction regulated by the common law; the regulation of it depended on established usage, and that usage is authoritatively described by the Lord President when he says—"We have been referred to the forms and styles in Church Courts, which are well known and published and acted on every day, and in analogous cases, when styles are provided, we certainly find a great deal of authority for holding that an intimation of this kind, conveyed in general terms and making reference to the prayer of the application which is before the presbytery, is quite sufficient notice to everybody concerned." And Lord Mure speaks of the practice to the same effect—"All this is done in the usual mode of giving notice by the presbyteries of proceedings before them, as I understand the Style Book." It is very hard for strangers to Scotland to resist the force of such testimony as to a local practice, coming from those whose position and experience must make them especially conversant with it.

And, finally, my Lords, it is plain that according to the law of Scotland the Court of Session had no power, and your Lordships have no power, to supervise or review or correct the action of the presbytery. We can only interfere if there has been some flagrant violation of the fundamental principles of justice, resulting in substantial wrong to an individual, which it would be contrary to the universal course of legal

tribunals to allow. We are not asked to amend a statuteable or other irregularity, but to declare the proceedings absolutely null and void, on the ground that they have been essentially inequitable; and can we do this, having regard to the good faith of the presbytery, the substantial intimations of its purpose given to the defendant, and the opportunities afforded to him of resisting any wrong?

As to the question of jurisdiction, I shall add nothing to the observations already made. The Scottish Judges were unanimous upon it, and I see no reasons to doubt that they were right.

I therefore give my concurrence to the proposition of the Lord Chancellor.

LORD BLACKBURN—My Lords, I also am of opinion that the resolution which has been proposed to your Lordships should be adopted.

I take it that the facts are to a certain extent undisputed here. The churchyard of the parish of Barry was in fact too small, and required to be enlarged, and the heritors agreed that a particular portion of land on the north side of the churchyard, which belonged in part (the greater part of it) to Mr Walker, the appellant, was the best piece of ground to be added to the churchyard. They wished to get it, and some negotiations between them and Mr Walker went on for that purpose for some time, in which they were endeavouring amicably by some arrangement to get this piece of land added to the churchyard. He objected to the proposed conditions. I should conjecture not solely to the conditions as to the price, but also to the mode in which the piece of ground was to be laid out and occupied, which might affect the amenity of his property. But whatever the reason might be, the parties could not agree, and it is an admitted and agreed fact on all sides that the churchyard required enlargement and the heritors thought that a piece of ground which ought to be added to it in order to make the enlargement was that which belonged to Mr Walker. Under these circumstances, having taken advice, they petitioned the Presbytery of Arbroath, in which the parish of Barry is, saying, what seems to be agreed on all hands, "that the providing and maintaining of a churchyard sufficient in extent for the wants of the parish is a burden incumbent on the heritors of each parish, and the duty of enforcing the obligation belongs to the presbytery of the bounds." Then they proceed to narrate in their petition (truly) that the churchyard was too small; they narrate (truly) that the heritors had, at a meeting duly constituted, unanimously resolved that a portion of land on the north side was most suitable to be added, and they request the reverend presbytery to take the proper steps to get that piece of land, or some other suitable piece, to be the addition.

Now, the first objection urged, as I understand, to the jurisdiction of the presbytery, is this, that the duty of enforcing the obligation upon the heritors does not arise until the heritors have made default, and that consequently all that the presbytery could or should have done here was to declare the undisputed fact (nobody ever disputed it; it was a matter of common sense), that the churchyard did require increase, to agree with what seems to be the fact as stated by the heritors, that this piece of land on the north was the most convenient, and to send it back to the heritors and say, Get that piece of land somehow—it is not explained by the learned counsel who have argued the case at your Lordships' bar, how, but get it somehow—and it could only be (says the appellant) when the heritors had made default in getting it in some unexplained manner that the presbytery would have jurisdiction.

My Lords, I am very unwilling upon such a subject as this, with which I am not familiar, to say anything that is unnecessary; but supposing it was so, and supposing that the heritors had failed in doing what they were required to do—supposing that they had the power, and consequently the duty, to take this piece of land, and supposing that that duty had remained unfulfilled for a year and more, I cannot conceive how it could be said that the presbytery, who had the jurisdiction of enforcing that duty, ought not to have intervened to enforce it when the heritors, fully a year after it was recognised that facts existed which would have placed the duty upon them, had done nothing towards fulfilling it. It seems to me, therefore, my Lords, that the presbytery were duly seised of the cause, and should have proceeded to enforce upon the heritors the fulfilment of their obligation in the way in which the law required them to do it.

Now, my Lords, it appears that by the 31st and 32d Vict. chap. 96, the presbytery having this jurisdiction are finally subject to a particular appeal, which must be brought within twenty-two days. The presbytery here having proceeded, and the appeal not having been brought within the twenty-two days, what the presbytery have done cannot be looked into. It was urged, and I think correctly, by the appellant below, that although it is true that you cannot inquire into what the presbytery has done in the interim, yet the presbytery must pursue their jurisdiction properly; and it is the very essence of justice, and runs through the law of every country, that where proceedings are to be taken which may have the result of taking away a man's land, you must intimate to him sufficiently what you are going to do, that he may come and be heard, and shew, if possible, that you ought not to take away his land, or if you do take away his land, you ought to do it upon better terms than those which would otherwise have been offered to him. That lies at the very foundation of the administration of justice.

The real question here seems to me to be, Whether the intimation given to Mr Walker of what the presbytery were going to do was a sufficient intimation to fulfil the requirements of justice? I do not understand that any of the Judges in the Court below doubt that it was necessary to show that Mr Walker had such notice given to him as to enable him to come and defend his rights. The question was, Whether or not the notice actually given to him was sufficient? Now, let us see what was done in order to see whether that was so or not. The presbytery having taken into account the petition, which clearly asked them to designate this particular piece of land, determine that they will meet on "the 6th day of May next, at one o'clock p.m., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same." Then they proceed to direct that the minister shall intimate that from the pulpit and

elsewhere. Clearly the presbytery there intended to express in the clearest words possible that they intended to meet at the churchyard for the purpose, amongst other things, of designating the piece of land; and it is pretty obvious, when you consider the nature of things, that the very purpose for which the presbytery met upon the ground must have been the purpose of designating the ground. It is very true that upon the undisputed question of whether the churchyard was too small or not a personal inspection by the presbytery might have afforded them evidence of that, and have shown them that the churchyard was overcrowded; but it is quite plain that upon the question of which was the most convenient piece of land to be added to the churchyard the personal inspection which they actually performed was of the greatest importance. The presbytery themselves had made the most clear statement that they were going there for that very purpose, but unfortunately the intimation which has caused this litigation is in more general words. It is this—"Intimation is hereby given to the heritors of this parish, and all concerned, that a petition has been presented to the reverend the Presbytery of Arbroath, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north" (I may observe that that included Mr Walker's ground, part belonging to Lord Dalhousie as well, but he has not made any complaint), "or other suitable piece of ground, for an addition to the same, and that the presbytery are to visit and inspect the churchyard on Thursday the 6th day of May next, at one o'clock afternoon, at which time the heritors, and all others concerned, or persons duly authorised to act for them, are requested to attend."

Now, my Lords, the Lord Ordinary and Lord Ardmillan thought, as a matter of fact, that this notice did intimate to those who were present—and Mr Walker was present and heard it—that the presbytery were going to meet at the churchyard, but that although the presbytery, in point of fact, were going to meet at the churchyard for the purpose of viewing and designating the land if they thought proper, with power to adjourn any matter for decision afterwards, Mr Walker had a right to suppose, and would naturally suppose, that they were merely going to look at the land and do nothing more. I think, for the reasons I have stated, that the natural and *prima facie* impression of any one who read or heard that notice, and knew what the nature of the thing was, would be that the meeting of the presbytery upon the ground in order to view it must have been principally for the purpose of ascertaining the suitability of the ground on the north for the addition, and of designating that piece of ground. But when we find what the Lord President states as to the styles and forms of the Court of Presbytery, and the manner in which they conduct their business—when we find that, according to his statement, an intimation of this general sort, concurring generally in the terms of the petition, has always been held sufficient, and when we consider that Mr Walker, or at all events his advisers, knew what were the styles and forms of the Court of Presbytery, I cannot bring myself to doubt that upon hearing this intimation he ought to have known that the presbytery were to meet at the churchyard for the purpose of taking steps, then and there to fix upon this land as the land which was to be added to the churchyard; and if he did not choose to go, and consequences followed, and things passed behind his back, it was his own fault.

I think, my Lords, that that is greatly confirmed by the fact that the presbytery, not having ascertained the value of this piece of land, adjourned that matter to a future occasion, and there were further steps taken on that day; and although formal notice was given through the clerk to the heritors, and among others to Mr Walker, of that adjourned meeting, still Mr Walker did not attend. I quite agree with what has been said, that that further shows that Mr Walker was to blame, for had he attended then he would have known what they were doing, and he would have had an opportunity of appealing if he had wished to do so. Even if the 22 days ran, not from the time when the notice was given to him of the meeting of the 17th of May, but from the 6th of May, they would not have run then. It seems to me, my Lords, that he had complete and sufficient intimation of what the presbytery were going to do, and consequently he cannot establish the want of such notice as I quite agree with all the Judges below in thinking was necessary. He cannot set up the ground of a want of such sufficient notice given to him as would authorise him to come and defend his own interests. I think that such notice was amply given, and consequently that what the presbytery did was with full jurisdiction, and if Mr Walker lost his opportunity of appealing it was owing to his own fault, which we cannot now help.

Consequently, my Lords, I agree that the judgment of the Court below ought to be affirmed, with costs.

Lord Gordon—My Lords, I desire to express my own individual concurrence in the views which have been stated in support of the resolution proposed by my noble and learned friend on the Woolsack. I regret that there has been so much litigation in this case, but as the parties thought proper to raise a somewhat narrow point, it is quite right that it should have received the very careful consideration both of the Court below and of your Lordships. I think they must be satisfied that the case has been fully and very minutely considered both in the Court below and by your Lordships.

My Lords, the first question which arises is whether the presbytery had jurisdiction to do the act which is the subject of complaint here, namely, to designate the land which belonged to the appellant. As to that, there appears to be no doubt whatever expressed in the Court below. I do not see any suggestion on the part of the Lord Ordinary that there was any doubt as to that, and I find also on looking at Lord Ardmillan's judgment that he expressed a very clear opinion that he had no doubt whatever as to the jurisdiction. We have had an able argument from my learned friend Mr Duncan, whose skill in these matters is well known, but I think he has not established to your Lordships' satisfaction that the presbytery were not entitled to act in the manner in which they did act under the circumstances of this case, for although he pushed his argument as far as to say that it was necessary that there should be contumacious opposition on the part of the heri-

tors, I venture to think that that is not correct, and if there has been default and failure to perform a duty incumbent upon them by law, then the duty of the presbytery to compel them to do so does come into operation. I apprehend, therefore, in the first place, that there is no question whatever as to the jurisdiction of the presbytery to pronounce the judgment which is the subject of complaint.

But, in the next place, the ground upon which objection was taken to the judgment was that no notice had been given to the appellant of the proceedings intended to be taken by the presbytery. Now, after what has been stated by your Lordships so very clearly, and with reference to the documents, particularly the intimation of the meeting of the 8th of May, which must have been known to Mr Walker, who was present in the church when the intimation was given, I think it is plain that he did receive due notice that the presbytery intended to exercise their jurisdiction, and having received such notice it was his duty, if he intended to combat any resolution which they might adopt in the way of taking possession of his property for adding it to the churchyard, to have attended the meeting of the presbytery; but he failed to do so. And even after the notice of the 11th of May was given to him, intimating that they were about to take further steps in the matter, he failed to appear before the presbytery on the 17th. He did not avail himself of the opportunity which the law afforded to him of stating his views to the presbytery, and, if they refused to adopt his views, of taking an appeal to the Sheriff. In having thus neglected to avail himself of the opportunity given to him by the presbytery of stating his objections to any designation of his land, I think he has put himself out of Court. He is not in a position to say that the land has been taken without due notice, and therefore I venture to think that upon that ground the judgment which was adopted by the Lord Ordinary, and adopted also by the late Lord Ardmillan, is not well founded, but that the opinions of the other learned Judges below are entitled to the greater weight.

I do not think it necessary to trouble your Lordships by going over the details of the documents, because those have been sufficiently brought before your Lordships; but it is of importance to keep in view what has been stated by my noble and learned friend who has last spoken, that there is no allegation of a breach of a statutory form on the part of the presbytery; neither is there any allegation of there being any deviation from any customary procedure on the part of the presbytery. That, I think, has been clearly brought out in the opinion of the Lord President, and has not been challenged by anything which has been stated at the bar.

That being so, my Lords, I think there was jurisdiction on the part of the presbytery, and there was due notice given of the intention to exercise that jurisdiction in the way of dealing with this particular piece of land which is the subject of dispute. I do not go into the question as to whether there is not a strong reason for presuming that all the facts were substantially known to Mr Walker. I venture, however, to think that the impression which must be left on the mind of everybody is that it is very difficult to conceive that he was in ignorance of the meetings of the presbytery with reference to this piece of ground, in which he held so great an interest. Therefore I think, under the whole circumstances of the case, your Lordships will be of opinion that the interlocutor appealed against ought to be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Mr Cotton and Mr J. M. Duncan. Agents—Drummond & Reid, W.S., Edinburgh, and Mr Robertson, Westminster.

Counsel for Respondents—Mr and Mr Gloag. Agents—Mackenzie & Kermack, W.S., Edinburgh, and W. A. Loch, Westminster.

Thursday, November 30.

THE DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS.

Process—Competency—Instance—River—Pollution.

In an action by several riparian proprietors against the proprietors of several paper-mills situated on the banks of the stream, to have them prevented from polluting the water, the defenders pleaded that the action was incompetent, in respect (1) that it was raised by several pursuers, each with a separate interest and cause of action; and (2) that it was directed against several unconnected defenders.—*Held* (*aff.* judgment of Court of Session) that the action was competent, there being community of interest among the pursuers, and a common ground of action against the defenders.

Process—Conjunction—River.

Three actions were raised by riparian proprietors against the proprietors of paper-mills on the stream to have them prevented from polluting the water.—*Held* (*aff.* judgment of Court of Session) that it was competent and advisable to conjoin the actions, although one of the pursuers of two of the actions was not a party to the third, and although the defenders in the actions were different.

This was an appeal in conjoined actions at the instance of riparian proprietors on the river North Esk, against certain paper-makers whose works were upon that river.

The original action was brought in 1841, and was ultimately insisted in by the Duke of Buccleuch, Viscount Melville, Sir James William Drummond of Hawthornden, and Robert Brown, Esq. of Firth, against Messrs Alexander Cowan & Sons, paper-makers, Valleyfield, William Somerville & Sons, paper-makers, Dalmore Mills, and Alexander Annandale & Son, paper-makers, Polton Paper Mills. Valleyfield and Dalmore were further up the stream than the properties of any of the pursuers, and Polton Paper Mills were below the properties of Firth and Hawthornden, but above the properties of the other pursuers.

The pursuers averred that the defenders by their paper-works greatly polluted the river, so as to make it unfit for domestic purposes or for the use of cattle, destroyed the trout in it, and deprived the stream of its ornamental character