dered the name of Mr Reid to be restored to the register of voters.

Agents for Appellant—T. & R. B. Ranken, W.S.

DONALDSON *v.* M'FARLANE.

Tenant and Occupant—Sub-let—Value—Objection—Proof—Onus. An objection being taken to a voter entered in the roll as tenant of a house and land, that he had sub-let and did not retain sufficient value, the Sheriff held that the *onus* lay on the objector to prove that the subjects retained were not of sufficient value, and the objector having failed to do so he retained the party on the roll. *Held* that, by proof of the sub-let, the objector had shifted the *onus* of proving value on the party objected to, but (*diss.* Lord Benholme) in the circumstances, that the party should be retained on the roll, it being evident from the statements in the special case that he could have proved value if, but for the erroneous view taken by the Sheriff, he had had an opportunity.

The Sheriff stated the following special case:—"At a Registration Court held at Helensburgh on the 23d day of September 1869, for revising the Register of Voters for the county of Dumbarton, William Donaldson, thatcher and portioner, Kirkintilloch, a registered voter for the said county, objected to the name of Peter M'Farlane, residing at Row of Luss, being retained in the register of persons entitled to vote in the election of a Member to serve in Parliament for the said county, and which Court was adjourned to the 11th day of October 1869, to Dumbarton.

"The facts are as follows:—An objection was stated to the name of Peter M'Farlane being retained on the register as tenant of house and land at Row of Luss. The objection was that by subletting he has not occupied during the statutory period, and had not a sufficient value. He is the tenant of a house and land at a cumulo rent of £29. He values the house at £9, and the land at £20; but there are not separate entries in the valuation roll. The house was let for the months of June, July, and August of the present year, and of the last. The land was not let.

"The Sheriff held that when the name of the voter is on the register, and the objection is that he had sub-let part of the subjects, and not retained enough to afford the statutory value, the objector is bound to prove that the part of the subjects reserved is below the statutory value, and that such value must appear from the valuation roll; and the objector having failed to show this, the voter is entitled to have his name retained on the register; and he accordingly repelled the objection, and retained the name.

"The validity or invalidity of the doctrine contained in the foregoing position forms the question of law."

Mr Macdonald having been heard for the appellant,

Lord Benholme said he thought there was here an obligation on the voter to prove that he had retained sufficient value. Now, he had not done that, nor offered to do it; and the Sheriff giving a bad decision in his favour, he rested satisfied with it. The voter having it in his power to insist on proving that he had retained sufficient value, did not do so, but relied on the bad decision of the Sheriff, and he must suffer for it, and ought to be struck off the roll.

Lord Ardmillan felt perfectly satisfied that there was here a good qualification. He thought he could read quite enough from the statement in the special case; but the practical question came to be, whether, in a case where there were not materials for satisfactorily disposing of it, they should or should not touch the register; at present the man was on the register. They had a case which did not give them satisfactory materials to dispose of it, and if they did not dispose of it, the man remained on the roll. He thought the true dealing with the case was that the Sheriff should have found that the objector, by instructing the sub-letting of a part of the subject, had thrown on the voter the burden of proving that he retained enough. He (Lord Ardmillan) thought it was obvious that the voter could have proved that from the statement made in the special case, and that would have been the proper mode of disposing of the case in the Court below. The absence of materials for deciding the case should lead the Court just to leave the man on the roll.

Lord Ormidale said he was very much of the same opinion. He thought there had been a miscarriage in the conduct of the case before the Sheriff, and in the statement of the case to the Court. That being so, matters should just remain as they were before proceedings were commenced.

Lord Benholme—I am glad your Lordships have mentioned the grounds on which you have given your decision. It is certainly very anomalous that, while the Sheriff states upon what his case depends—upon the validity of the doctrine contained in the case—we reverse his positions in law and adhere to his judgment.

The judgment of the Sheriff was accordingly sustained.

Agents for Appellant—T. & R. B. Ranken, W.S.

COURT OF SESSION.

Wednesday, November 17.

SECOND DIVISION.

SIR A. BUCHANAN *v.* COUBROUGH AND OTHERS, *et e contra.*

Stream—Upper and Lower Heritor—Right to Divert—Title—Possession—Illegal Operations. Circumstances in which *held* (1) that an upper heritor, upon whose land were certain collections of water made by artificial ponds, which mainly fed a stream afterwards uniting with another, was not entitled to divert the water and return it at a spot within his property, but below the works of an inferior heritor, the latter having both, in respect of his titles and of possession, a right to the undiminished use of the water; (2) that the upper heritor had failed to prove any infringement of his right to the use of the water by the operations of the inferior heritor.

The pursuer here is proprietor of the lands of Drumbrock in Stirlingshire, and through his property there flow two streams, called respectively the Milndavie Burn and the Blane, which join at a certain point within his lands; and thereafter, at a point much lower down, the united stream is in

part taken off by an intake and lade into the defenders' printworks of Blanefield, which works have been in continual operation since 1794. The defender acquired right to this water at that date by express grant, coupled with the right to execute all operations necessary at and above their intake to direct a due flow of water into that intake. The present litigation began by an attempt on the part of the pursuer to cut off the water of Blane above the defenders' intake, and restore it at a point below that intake. Hence the first action brought by the defenders in the form of a suspension and interdict. Some time later the defenders strengthened the banks of the Blane above the intake, but not otherwise, as they alleged, than they were empowered to do under their title-deeds. These operations led to the second action, being a suspension and interdict at the pursuer's instance, to prohibit the execution of such operations. While these operations were proceeding, and with the alleged view of seeking to ascertain his rights, the present pursuer brought a third action of declarator and damages, wherein he sought mainly to have it found and declared that he was entitled to use the water of the Milndavie Burn for printing and bleaching, and "for all other manufacturing purposes," or at least to regulate and control that water as he had been in use to do in and prior to 1807; that he was entitled to use the water of the Blane in a similar manner; that he was entitled to take off the Blane, and restore it within his own lands in such a way as to make it available for his lowest work at the same level, and with the same fall as existed in and prior to 1807; as also, and absolutely, to restore that water at a point below the defenders' intake, and to have it found and declared that the defenders had no right to make any embankments on the Blane or its alveus, having or fitted to have the effect of altering the level of the alveus, or gorging back the water upon the pursuer's works.

The points in fact and law chiefly maintained for the pursuer were (1) that he had not now the same fall for the wheel at his lowest mill as he once had, and that this was owing to the defenders having altered and raised the weir at their intake, and therefore that they should be ordained to lower the level of their weir; and (2) that in respect the pursuer had made certain embankments upon lochs or reservoirs, some of which were on his own lands and others on the lands of neighbouring proprietors, and of which the overflow passed into the Milndavie Burn, a natural stream, he was therefore entitled to divert that water from flowing into the Blane, and to regulate and control its flow as he pleased.

The Lord Ordinary (ORMIDALE) conjoined the actions, and after a lengthened proof on both sides pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties in these conjoined processes, and considered the argument and proceedings, including the proof, Finds that the present dispute has arisen between Sir Andrew Buchanan, who shall be called the pursuer, on the one hand, and Mrs Hannah Butler or Coubrough and her husband, as administrator-in-law for his wife, and for his own interest, and the Blanefield Printing Company, and John Coubrough and Anthony Skyes Coubrough, the partners of that Company, who shall be called the defenders, on the other hand: Finds, as matter of fact, that by disposition, dated 15th April 1794, Archibald Lyle of Drumbrock, one of the pursuer's authors and predecessors, for onerous considerations, sold and disponed to John Macleroy, one of the defenders' authors and predecessors, All and Whole that part of his, Archibald Lyle's, grounds, then already occupied by the lade of the said John Macleroy and his partners in trade, and its banks, of that corner of his lands on the north side of the water of Blane, lying betwixt the said water and their lands, lately feued from Mr Craig of Ballewn, with full liberty of a foot or wheelbarrow road six feet wide, on the side of the upper or north-east bank of said lade, with full power to repair the mouth of said lade, and to clean and deepen or fill up the mouth of the water, so as to keep the water and spring thereinafter conveyed at all times into the mouth of the lade; together with the whole water of Blane itself, including therein the spring which then ran through James Hamilton's bleachfield, the said Company and their successors being free of damages occasioned by the said lade, then and in all time thereafter; together with all heritable right, and other right and title whatever, which he, Archibald Lyle, or his authors or predecessors had, or could claim or pretend, to the said corner of land or water thereby disponed, or any part or portion thereof then and in all time thereafter: Finds, also, as matter of fact, that the defenders now stand vested in the rights conveyed by said disposition; and that for forty years, or time immemorial, before the commencement of the present litigation, the water of the Blane, as increased by the junction with it higher up, or to the east of the point where the said lade is situated, of the water of the Drumbrock or Milndavie burn, has flowed and been conducted by the said lade to the defenders' works, called the Blanefield Printwork, and there used for the purposes of these works: Finds that the pursuer has failed to prove that the defenders have within recent years, as averred by him, executed a variety of works or operations, or any works or operations, for the purpose and with the effect of altering the level or direction of the river or water of Blane, or have otherwise illegally or unwarrantably interfered with or encroached on said river or water, or the grounds of the pursuer connected therewith, so as to deprive the pursuer of his legal rights therein, or injuriously to affect the same: Finds, on the other hand, as matter of fact, that the pursuer recently, and before the commencement of the present litigation, threatened and formed the intention to divert the water of the Blane, as also the water of the Drumbrock or Milndavie burn, at a point or points above the intake of said lade, and preventing them flowing as previously into said lade, whereby the defenders would be deprived of the use of the water, to their loss and injury: Finds, in these circumstances, that there are no grounds sufficient in law to support either the suspension and interdict process, or the action of declarator, restoration, and interdict, at the instance of the pursuer against the defenders; and, on the other hand, that the defenders are entitled to the suspension and interdict prayed for by them against the pursuer: Therefore, in the suspension and interdict at the instance of the pursuer Sir Andrew Buchanan, Recals the interim interdict formerly granted, Repels the reasons of suspension, and Refuses the interdict, and decerns; in the action of declarator, restoration, and interdict, at the instance of the pursuer Sir Andrew Buchanan, Assoilzies the defenders from the conclusions of that action, and decerns: and in the suspension and interdict at the defenders' in-

stance against Sir Andrew Buchanan, Sustains the reasons of suspension: Suspends, Prohibits, Interdicts, and Discharges, in terms of the note of suspension and interdict: Declares the interdict formerly granted perpetual, and decerns: Declaring that the judgment now pronounced is subject always to the reservation in favour of the pursuer Sir Andrew Buchanan of all his legitimate rights of property in his own lands, and to the use and enjoyment of the water of the river Blane, and of the water of the Drumbrock or Milndavie burn, both and each of them, as said river and burn flow through or pass his property; and to the reservation in his favour of his right to have such operations executed on the *solum* or banks of said river called the Blane, and the Drumbrock or Milndavie burn, and on the weir, intake, or lade by which the waters thereof are taken and conducted to the defenders' works, as may be proper and necessary for his own use and enjoyment of said waters, and at the same time consistent with the defenders' right to and in the use thereof; Finds the defenders entitled to the expenses incurred by them in the foresaid processes against them at the instance of Sir Andrew Buchanan, and in the process of suspension and interdict at their instance against him, and also in all these processes after they were conjoined: Allows them to lodge an account or accounts thereof, and remits them when lodged to the auditor to tax and report.

"*Note.*—Owing to the very extensive proof which has been adduced in this case, and the variety of plans which have been founded on, as well as the numerous collateral and subordinate questions which have been raised by the parties, it presents an appearance of considerable complication, and has required on the part of the Lord Ordinary a more than ordinary length of time and amount of labour for its examination and disposal.

"In regard to the leading question, upon the solution of which the litigation chiefly turns, viz., what are the legal rights of the parties respectively in and to the waters of the Blane and the Drumbrock or Milndavie burn,—it is not thought that there can be much if any doubt. The pursuer Sir Andrew Buchanan is, on the one hand, entitled to all the uses of these waters pertaining to a proprietor through or past whose lands such running streams flow, subject to the rights therein of the defenders. He may, as a general rule, divert them in order to their use and enjoyment within his own property, provided he restores them before they reach the defenders as inferior heritors. So far there neither was nor could be any dispute.

"But in the present instance,—and here any difficulty that attends the question arises,—the water of the Drumbrock or Milndavie burn consists in its origin, to a large extent, though not altogether, of collections made by artificial ponds, partly though not wholly within the pursuer's property; and the pursuer, while he admits his intention so to divert it as to prevent it flowing, as hitherto, along with the Blane by the defenders' lade to their works, contends that this is within his right, provided he restores it, as he says he will do, to the Blane before that river passes entirely through his property. The Lord Ordinary cannot hold this contention on the part of the pursuer to be sound in the circumstances of this case. So far as the water of the Blane is concerned, any such contention is clearly untenable; and he thinks it also untenable as applicable to the water of the Drumbrock or Milndavie burn, in respect that for time immemorial, or for more than forty years before the commencement of the present litigation, that water has flowed, along with the water of the Blane, by the lade in question to the defenders' works and in respect also that a right to the water in this way has been constituted and secured to the defenders by their titles. The defenders having thus both written title and prescriptive possession, it is thought their right is clear even as regards the water of the Milndavie burn. See the cases of *Preston and the other Creditors of Valleyfield* v. *Erskine of Carnock*, 5th Feb. 1714, Mor. 10,919; *Blantyre* v. *Dunn*, 28th Jan. 1848, 10 D. 509; *Mackenzie* v. *Waddrop*, 24th Jan. 1854, 16 D. 381; and *Cowan and Others* v. *Lord Kinnaird*, 15th Dec. 1865, 4 Macph. 236.

"The Lord Ordinary has therefore granted suspension and interdict, as craved by the defenders, against Sir Andrew Buchanan diverting the waters of the Blane and the Drumbrock or Milndavie burn, before they reach the intake to the lade leading to the defenders' works, and not restoring them except at a point below that intake. The pursuer has not denied, but on the contrary admits, that it was his intention so to divert the water. See as to this Art. 11 of pursuer's condescendence in his action of declarator, and statements 7 and 8 for the defenders in the suspension and interdict at their instance, and the pursuer's answers thereto. And there can be no doubt that, if the pursuer were permitted to carry his object into effect, the loss and injury to the defenders would be very serious. That the defenders therefore have a sufficient interest to insist for suspension and interdict against the pursuer is undoubted; and that they have a good and sufficient right and title to do so the Lord Ordinary, for the reasons he has stated, and on the principles of the decisions in the cases he has referred to, considers to be fully established. At the same time, it is to be understood that he has determined nothing adverse to the right of Sir Andrew Buchanan to take the use of the waters of the Blane, and of the Drumbrock or Milndavie burn, as they flow through or past his own property for any works therein, provided they are restored or sent back, so far as not unavoidably consumed or wasted, at a point above the intake and lade, to the defenders' works.

"The pursuer's actions of declarator, restoration, and interdict, and of suspension and interdict, so far as they have for their object to establish his right to divert the water in question at a point or points above the defenders' intake or lade, and not restore them except at a point or points below that intake or lade, cannot of course be maintained, if the Lord Ordinary be right in having given effect, as he has done, to the defenders' suspension and interdict.

"There remains the question, whether the defenders have improperly or unwarrantably interfered with the level and direction of the Blane at or about their intake and lade, by which the waters in dispute are conducted to their works. The pursuer can only be entitled to the declarator, restoration, and interdict sought by him on the footing that he has proved such improper and unwarrantable interference. He has maintained that he has done so, by having shown, as he says, that the level and direction of the Blane have been materially changed about the place where the defenders' intake and lade are situated. But the evidence bearing on

this matter is far from being conclusive in favour of the pursuer; and, looking at the whole proof together, the Lord Ordinary has been unable to arrive at any other conclusion than that the pursuer has failed to establish his case. The level and direction of the Blane may, and probably are, not at present exactly what they were at some former time; but the Lord Ordinary can find no such consistent and reliable evidence as to entitle them to proceed against the defenders, on the assumption that the change, whatever it is, has been brought about by their unwarrantable acts or interference. He rather thinks that the fair inference to be deduced from the proof is, that the change has been the gradual result of natural causes, for which the defenders are no more answerable than the pursuer himself. Accordingly, several even of the pursuer's witnesses, and amongst others Peter M'Gregor, p. 34 A, and Robert Graham, p. 42 C, appear to be of that opinion.

"The two points on which the pursuer chiefly relies, as the Lord Ordinary understood his argument, in support of his allegation of illegal interference by the defenders, and his right to restoration, are,—1st, the heightening of the weir and south bank of the Blane at or about the intake to their works, by means of planking and otherwise; and 2d, the fact, as he represents it, that in consequence of the change in the level and direction of the Blane, a wheel such as that which was in operation in that part of his works, called the lower bleach-work or starching-house, in and prior to 1837, could not now be worked unless the water were sent by a new cut, as proposed by him, into the Blane at a point below, in place of at a point above, the defenders' intake and lade. But the Lord Ordinary does not think that the proof is sufficient to establish either that there has been any such heightening of the bank of the Blane or of the weir as averred by the pursuer; nor does he think that the proof is at all satisfactory in regard to the wheel. No doubt the defenders appear to have occasionally cleared out the Blane in and about their intake, and strengthened their weir; but the Lord Ordinary thinks that the proof fails to show that in executing these operations anything illegal was done by the defenders, anything which they were not warranted in doing in virtue of the right vested in them by their titles, whereby they have full power and liberty to clean and deepen, or fill up the mouth of the lade, so as to keep the water at all times into the same. This is all they have done, according to the pursuer's own witnesses, Peter M'Gregor, p. 34, and Robert Graham, p. 42. From the testimony of Robert Graham, as well as others, it also appears that the putting up of the planking on the top of the weir, and along part of the south bank of the Blane above it, was absolutely necessary, not only to keep the water into the mouth of the lade, but to prevent the river from entirely flowing over into the adjacent haughs or fields With regard, again, to the working of non-working of a wheel at the pursuer's lower bleach-work or starching-house, the proof is far from being so satisfactory as to admit of this matter being taken as a certain or conclusive test in favour of the pursuer's contention. Not only is it not clear that there ever was a wheel of the description and size averred by the pursuer in the place in question, but it is more than doubtful whether the wheel, such as it was, worked better when it existed than it would do still. Nor is it the least surprising that there should be such an uncertainty about this matter, considering that there has been no wheel of any description working in the place since 1838, and that previously there appears to have been not one, but various wheels of different sizes. There is also abundant evidence in the pursuer's, as well as the defenders' proof, to the effect that at all times when there was a wheel at the place referred to its working was varied and uncertain, dependent upon the state of the water and other contingencies. Finally, in regard to this point, as well as the alleged heightening of the weir and south bank of the Blane at the defenders' intake, the Lord Ordinary has to refer to the evidence of Mr James Leslie, the engineer, which he considers to be of much importance, as well from what he states, as from the well known skill of that gentleman in such matters as those now in dispute, and the candour and fairness with which his opinions and testimony were given. From Mr Leslie's evidence it would appear,—(1) that the probability is that there was never any larger than a 15 feet 5-inch wheel in the place in question; (2) that there is nothing to prevent such a wheel still working there, just as well as, according to the evidence, it ever could have worked; and (3) that the planking of which the pursuer complains so much, while it has the effect of preventing the water of the Blane from flowing over into the haugh below, has not 'the effect of making the river alter its course up above it.'

"In this state of matters, and having regard to the whole evidence on both sides, the Lord Ordinary has been unable to satisfy himself that the pursuer has established sufficient grounds for an interdict against the defenders in the terms prayed for by him. No such interdict could be granted unless it had been made out that the defenders had executed, or threatened to execute, illegal operations of the nature of those complained of. But, for the reasons stated, the Lord Ordinary does not think that this has been established; and he further thinks that such an interdict as that asked would, if granted, have the effect of preventing the defenders exercising what appears to him to be their undoubted rights. And in regard to the pursuer's action of declarator, restoration, and interdict, the Lord Ordinary, for the same reasons, does not think that its conclusions can be given effect to. Its first conclusion, or part of it, may be unobjectionable in itself, and the defenders may have no interest to oppose it; but by itself it is unnecessary, and introductory merely to other conclusions, and was evidently not intended to be the foundation of a decree or judgment, except in connection with the other conclusions. But as the Lord Ordinary cannot, consistently with the views he entertains and has explained, sustain these other conclusions in the terms they are expressed, the result is that the defenders are entitled to absolvitor from the whole action, it being understood that the pursuer's rights of property in his own lands, and his rights in and to the use of the water of the streams and ponds in question, whatever these may be, are not thereby affected or prejudiced. These rights have accordingly been expressly reserved by the interlocutor, which also reserves to the defenders the right to get the *solum* and banks of the Blane, as also the weir at and about the defenders' intake and lade, put into such a state as may be best calculated to secure and serve the legitimate rights and uses of all concerned."

The pursuer reclaimed.

SOLICITOR-GENERAL and BALFOUR for them.
LORD ADVOCATE and BRAND in answer.
At advising—

LORD JUSTICE-CLERK—The terms of the judgment which your Lordships may pronounce will perhaps require some consideration; but upon the general merits of the questions which have been argued before your Lordships, I, for my own part do not feel much difficulty, and I should propose in substance to adhere to the Lord Ordinary's interlocutor. There are two questions, which are entirely separate, and have been the subject of discussion. The first is the alleged heightening of the weir; and the second the right of Sir Andrew Buchanan to deal with the Dumbrock or Milndavie Burn as if it were wholly an artificial stream produced by operations within his own property and by his erections on these reservoirs. Now, with regard to the first of these questions, the pursuer comes into Court, I think, in a very disadvantageous position. It seems that his interest in regard to that matter of the weir depends upon his right to put a wheel at the wall which is marked A upon the plan; and he says in substance, I had formerly, before 1837, a sufficient fall to make a 16-feet wheel, or a wheel of about that size, work efficiently at the work A, but now the levels are so altered that I cannot work a wheel there, and they have been altered in consequence of the raising of the weir, and he refers to the clauses in the feu-right granted by his predecessor to the defenders' authors, to show that such a raising of the weir was an illegal proceeding. It is not disputed that if the weir has been raised that is contrary to the terms of the clause in the feu-right; but the fact is that no wheel has been placed at the work A for thirty years, and although there is a great conflict of evidence upon the question whether it worked to advantage or not before that time, I have a very strong impression that the balance of testimony is that it was not, even at that time, an available wheel; that there was not water power sufficient to work it to profit; and, in point of fact, that that was the reason why it was discontinued in 1837. Now, I say that Sir Andrew Buchanan has a very large weight thrown upon him of proof upon such a matter. He undertakes to prove that the weir has been heightened; and he founds his allegation, and relies for his evidence, upon these facts. He first says, It is plain my wheel at A worked well before 1837, and therefore, as the levels now will not enable a wheel to work there, the weir must have been raised. Then he says, in the second place, because the levels as we have them calculated from the Ordnance datum are levels which will not enable my wheel to work, therefore the weir must have been raised; and then he refers us also to the remains of an old weir, the highest stone of which he calculates to be something like 7 inches below the level of the present weir; and he also refers to the evidence of the sluice-keeper in former times, who gives us the elevation to which the water came on the sluice when it went over the old weir—that is, the weir as it formerly existed. In addition to that, there is the parole testimony of persons who recollect the height of the weir, and the course of the stream. Now, with regard to the last, there is a very great conflict—one set of witnesses saying that the weir had been removed, and had been heightened; and the others stating with as much confidence that the weir always was in the place where it is now, and that it never had been heightened. Now, I do not attach the slightest importance to parole testimony of that kind on either side. The witnesses are speaking to their recollection of thirty years ago. It lay upon Sir Andrew Buchanan to prove the fact; and in the state of the testimony I think he has not proved the fact, as far as that portion of the evidence is concerned. As regards the other fact—that the wheel at one time worked well that could not work now—I am inclined to think that he has not made that out in the manner in which it would have been necessary in order to entitle your Lordships to give him a decree. I alluded yesterday to the evidence of one of the witnesses—I think a very important witness — adduced for Sir Andrew Buchanan—Robert Graham, who states distinctly that even in the old time the wheel would not work well when the sluice was done. He says:—"The backwater was caused by floods, and also, in ordinary states of the burn, by the Blanefield sluice being down." It just comes to this—the wheel would work when the sluice was running, but it would not work when the sluice was down; and your Lordships have the evidence of Mr Leslie to the effect that, even with the levels as we have them now, a 15-feet wheel would work if the sluice was running, so that the mere inferential evidence adduced from the fact that the levels now would not admit of the constant working of a wheel of that kind does not support the presumption that the weir has been heightened. But I think there is evidence in the case which demonstrates how entirely fallacious this kind of testimony is as the ground for a declaration upon matter of fact. For instance, the sluice-keeper says that the water stood at 16 inches on the sluice when it was running over the old weir. Now, we have the height of the sluice, which I think is 183 8-10th feet; 16 inches added to that would bring it up to something like 185 feet; but then we have it in evidence from Sir Andrew Buchanan himself that the highest stone of what he calls the old weir, which he takes as a test, is 185 9-10th feet, or as near as may be 186 feet; so that either the sluice-keeper is wrong in his recollection—which is very probable, for he is wrong by a foot—or else this stone, which is said to be one of the stones of the old weir, is not a stone of an old weir at all. Again, the stone of the so-called old weir is 185 9-10th feet; but even supposing it were part of the remains of an old weir, there is no evidence that that was the ultimate height of the weir. We may assume that it was at least as high as that; but there being a difference of only 7 inches between the existing weir and this alleged ruin of the old weir, I think your Lordships could not come to the conclusion, on evidence of that kind, that the present weir was in point of fact higher than the old weir. In short, the result to which I have come, and without much hesitation, is simply this:—There is a somewhat turbulent hill stream, which alters its course from time to time when it comes down in great spates. There is a water right given to a lower heritor or feuar by a feu-right from the proprietor above. There is a grant of the water in the Blane, and there is a right to a weir and a sluice and a lade. From time to time that weir is washed away or injured by the stream, and of course it is repaired; and the proprietor who gives the grant lies by for thirty years until he cannot prove, and no one can prove, at what time or in what way the alterations or repairs upon this weir have been made, and

then at last he turns round and says—The levels are altered, and your weir must be higher than it ought to have been. I am of opinion that Sir Andrew Buchanan has not proved that, and that he has himself to blame if he has not taken the precautions which he ought to have done, and objected if alterations were made which were contrary to the feu-right. My opinion is that they were not contrary to the feu-right, and therefore the defender ought to prevail on that point. With regard to the second point—the question as to the artificial embankment of the water — the case would have been difficult enough if this had been really a case of the artificial embankment of storage water, by which a stream was allowed to flow down to a lower heritor to his advantage; but that is not the nature of it. Although it is assumed that Sir Andrew Buchanan and his predecessors have made certain operations on these sources of water, there is not the slightest proof that the Milndavie Burn has not run, and run under that name, from time immemorial, although Sir Andrew Buchanan's operations may have increased the flow of it at one time, and perhaps diminished it at another. But what he now says is, that he is entitled to cut it off altogether, at least so far as the right of the lower proprietor is concerned. Now, in the first place, I doubt greatly whether under the terms of the feu-right he is entitled to do anything of the kind, independently altogether of the other argument. He gave a right to the water of the Blane, and I think that his vassal, the person who took it from him, was entitled to assume that he was to have all the advantage from the water which at the time of the grant he would have enjoyed, or did enjoy. But, independently of that, I do not think we are in a case of the artificial erection of reservoirs of water, for here was a natural stream, and I do not think the heritor can divert that natural stream so as to make it join the Blane at a lower point than it does now, to the injury of his own feuar. How far we are to protect the possible rights of Sir Andrew Buchanan in the interlocutor to be pronounced is a matter which perhaps your Lordships will have to consider; but upon the whole matter, and without going into the authorities that have been quoted—for I do not think the facts raise the question of law which has been so ingeniously argued—I am of opinion that upon both points the defenders are entitled to prevail. I think the case of *Cowan* v. *Lord Kinnaird* raised very much the kind of question which Mr Balfour was pointing at, for Lord Kinnaird proposed a kind of compensatory operation. He said—in respect of the large flow of water that my artificial operations have thrown into the stream, I am entitled to withdraw the same or about the same amount from another point on the river; but he was found not to be entitled to it. On the whole case, therefore, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD COWAN—I concur in the opinion that the Lord Ordinary's interlocutor is well founded. How far we may change its expression, so as to reserve any right which Sir Andrew Buchanan may have at common law, subject to the answers of the defenders, is a matter for consideration.

On the first branch of the case, to which your Lordship has referred as rather a question of fact than of law, I entirely concur with the view your Lordship has stated on the evidence. After a careful consideration of the whole of that evidence, and of the argument so fully and able stated to us by Mr Balfour, I am satisfied that the Lord Ordinary has taken the correct view. After the epitome which your Lordship has given, I do not feel it necessary that I should go into the grounds on which I have formed that opinion; and therefore I do not say a word on this part of the case.

As regards the second branch of the case, which involves a very nice and somewhat subtle question of law, I think we certainly would have required some time to have considered the principles upon which our judgment should have been based, had it not been for this—that in this Division of the Court, under the presidency of the now Lord President, we had these questions before us in 1864, in the case of *Cowan* v. *Lord Kinnaird*. I remember the long and elaborate discussions which took place then with reference to questions of this class; and the grounds of the judgment pronounced in that case are, I may be permitted to say, fully explained in the opinions which were then delivered by the Lord Justice-Clerk, who then presided here, and by myself, and concurred in by Lord Benholme and Lord Neaves. The principle that we held as clear and undoubted, arising out of the principles which we found to be stated in the authorities with reference to the rights to water—the principle that we fixed was this — that if a stagnum has, within the years of prescription, been conducted into a running stream above a mill so as to increase the water-power, and so as to mingle with the rest of the water, any attempt thereafter to destroy the interests of the lower heritors, who had got a common interest in the whole stream as thus augmented, by taking away at a convenient point upon the proprietor's own ground as much water as he said he had added from his own grounds by draining the stagnum, was an illegal act, because when water once gets mixed into a stream, you cannot attempt by some extraordinary hydrostatical operation to take off from it again as much as you had put into it. You cannot pretend to take away the same stream as you have put in, because the two streams do not run parallel with one another; and then when you are taking away a portion of the common stream, you are taking away a portion of that which the upper heritor has no right to touch, and to the removal of which the lower heritor is entitled to object. Having said that much upon the second branch of the case to which your Lordship has referred, I have only this further to say, that I do not enter at all into the plea that was pressed upon us on the assumption that there was here no natural stream. I put the question to Mr Balfour whether the natural drainage of the lands, where these artificial ponds were formed, was not just into the channel which forms the natural stream of the Dumbrock burn? and he answered very candidly that that was the natural drainage of the lands. Now, that being the case, there being a natural stream by which these stagnums, which had been made in the course of other streams further up, would ultimately come to run into the stream of the Dumbrock burn,—this being the natural fountain of a stream of water naturally flowing in a particular direction, augmented by some artificial operations, but not caused altogether by artificial operations, such as pumping water from a mine, or anything of that kind would have been,—I think the principles we applied to the case of *Cowan* v. *Lord Kinnaird* apply to this case, and that we ought to follow that judgment.

Lord Benholme—Upon the first branch of this case the question between the parties seems to me to be really a matter of evidence; and I must say that I do not think the engineering abilities that have been brought to bear upon the question are either very satisfactory or very conclusive. It appears to me that, if the evidence of a great body of witnesses is to be credited, the weir has always been in the same place where it is at present, and that what has been termed the old weir never had any existence as a weir at all. It is called the old weir, and it has been made great use of by the pursuer in this way—at least in the argument. They have found the level of some of the stones of this so called old weir, and finding that they were lower—or supposed to be lower — than the level of the present weir, they conclude that the present weir has been raised; or rather, they seem disposed to contend that the old weir has been gradually shoved to the westward, and by each shove it has got it has gradually increased in height, producing such an effect upon the stream that it has at last become intolerable, in consequence of the present weir being higher than the old weir was. In my view of the evidence, that is an entire mistake. The weir has always been in the place where it is now. It may be higher or it may be lower than it formerly was, but I do not think it ever was in any other place than where it is now. Therefore, all the deductions from a comparison of the height of the supposed old weir and of the present weir appears to me to be mere groundless suppositions. I look upon that so called old weir, and the planking or stobs that used to be placed upon it, as the result of an attempt on the part of both sets of proprietors to keep the river within its bounds. I think these obstructions on its left bank were the work not only of the Messrs Coubrough, but of Sir Andrew Buchanan's people, or his predecessor's people also. They found the river would intrude upon the low ground, which it is very plain would have been prejudicial to both, and this erection appears to have been put up for the protection of both, not at all as constituting a weir, but a mere strengthening of the bank. In its present condition there are stones below, and there is planting or twigs above; but to suppose that there ever was a weir there, and that this erection ever served the purpose of a weir, is I think contrary to the evidence. In that way, I must relieve my mind of all comparisons between the height of these old stones and the height of the present weir.

Now, it appears from the evidence that this lower mill formerly had three wheels erected upon it at different times; and a question arises as to the manner in which these wheels worked, and whether they worked better than a wheel would work there now. It is said by the pursuers that a wheel would not work there at all; but I think the engineering evidence does not make that at all plain, and indeed Mr Leslie, whose opinion seems to me to be worth as much as that of any of the other engineers, gives evidence of a totally different kind. It appears to me that it has not been made out that these former wheels, especially the large iron wheel, worked worse than it would work now, if they ever have the enterprise to put it up again.

Under the second branch of the case there is a good deal of law—and of rather delicate law—but which, along with your Lordship and the Lord Ordinary, I think is rather misplaced in the present instance. We had a distinguished instance of the difference between a perennial rill coming by a fountain to the surface, and the mere result of draining lands, in a case from Berwickshire, where there was a certain stream that was called Maggie's Well—a pretty considerable rill which bubbled up upon the mountain side. In that case it was the opinion of the Court that, to the extent of Maggie's Well, the proprietor through whose grounds it came had no right to divert it. He had a right to drain his fields in the neighbourhood, and to convey the result of the drainage by any channel which he could find for it convenient to himself. He had that control over the drainage; and we acted on the supposition that that which did not come to the surface in the shape of a bubbling well or fountain was under his own control. He might drain his fields, and dispose of the water in any way he pleased, so long as that did not attain the character of a running rill; but I take it that whenever water comes to the surface, and appears on the surface as a continuous stream, the right of the proprietor to breast that up, and so make it artificial, is a mere delusion. He has no right in law to alter the course of that stream, being a running river; and however high he may build an embankment, and however big a pond he may make below it, that does not alter the rights of the inferior heritor, which remain as they were before. He may use the water in any way he pleases within his own grounds; he may erect breastworks, and keep it in large quantities for the purpose of driving mills; he may make every use of it within his own grounds, but he cannot divert it, so as to prevent the perennial rill from finding its way down to the lower heritors. Now, in the present case I do not think it is said that it is by mere drainage that these ponds have been gathered. Some of them seem to be natural pieces of water, increased, no doubt, to a certain extent by the artificial breastworks put up by Sir Andrew Buchanan's predecessors. But that does not to my mind alter the character of the water which had gathered in these ponds before. If the water now collected in these ponds found its way down to the Dumbrock burn, and formed the stream of that burn, what would it signify though he had built them round with breastworks, and made every sort of use of the water within his own grounds? That will not make the water artificial. His works are artificial, but the water is not—in this respect, that it does not require to be aided by any effort of his. It is merely collected, and taken advantage of, and controlled within the limits of his own grounds. It does not appear to me that even Mr Balfour says that the whole of this water was artificial. He is obliged to admit that some of it was in every respect a natural rill of water. But what I principally consider is this—when this right to the Blane was granted by feudal grant, I take it that whatever then ran in the Blane, whether derived from its own separate sources or from this tributary of the Milndavie burn—everything that then constituted the Blane—was passed by that grant. And I do not care to consider whether the Milndavie burn had originally been what Mr Balfour calls an artificial stream or not. It appears to me that at the date of that conveyance all that ran into the Blane, either the Blane itself or the Milndavie burn, was granted to this party. In that way the important point, and the only decisive point for Mr Balfour's client, was to show that there was no Milndavie burn at all at

the date of this grant. It is said that this Milndavie burn appears to have been altered; but where on earth did the sources of this burn run before? Did they not exist? They surely must have run down some channel of the same kind, and found their way into the Milndavie burn immediately, or into the Blane itself. But whichever was the correct position of the fact, it appears to me that this grant embraced the whole of that water; and it is mainly upon that ground that I am inclined to be decidedly of opinion that Messrs Coubrough have a right to this Milndavie burn just as clearly as they have to the Blane.

The other conclusions of the summons I need not speak to. They seem to be quite unnecessary. They go to vindicate the right of this gentleman, within his own grounds, to make use of this water, both of the Blane and of the Milndavie Burn, for the ordinary purposes and uses that a proprietor is entitled to make. It is quite unnecessary to do that. If, indeed, he meant to impeach or impinge upon the rights of Messrs Coubrough, these would not be impinged upon by any such declarator; but if he wished to go further, and to say "I shall take more than the ordinary uses of this water—I shall do more with it than is innocent and innocuous to you—I shall pollute it, or I shall use it in such a way as to be an injury to you, and implying a higher right on my part, and one inconsistent with the integrity of your rights," he ought to put that distinctly in the process; and if he had done so, I think we would have been obliged to consider the evidence on which he maintained a prescriptive right to do that. But I do not think he has distinctly affirmed anything of the kind. Therefore I think these conclusions of the summons ought to have been abandoned by the pursuer.

Lord Neaves—I concur in all respects in the opinions that have been delivered.

With regard to the first point, I should be inclined to say that, upon the evidence as it stands, even looking at it apart from any specialty, the pursuer has not made out his case. I am very well satisfied with the patient care which the Lord Ordinary has taken in considering this case, and I am quite prepared to go along with him in all the conclusions at which he has arrived; but certainly that view is greatly confirmed when I take into consideration what your Lordship pointed out as so important a feature in the case, namely, that we are called upon here to deal with matters of such a remote date as these, and that the remoteness of that date arises from the passive position which the pursuer has for nearly forty years—certainly for thirty years—occupied. In the year 1837 he gave up using this mill that he now wants to resume. Why he did that may be matter of conjecture. Either he meant at that time to relinquish the place altogether, in which case a very strong presumption would arise against him, or he meant to reserve the power to resume it under more favourable circumstances, at some future period, in which case one would certainly have expected this of him, at least, that he would keep a vigilant lookout upon any operations that were going on after that which would have interfered with his rights and with his practical power of resuscitating that mill when he pleased. But we have nothing of that kind. It has been said, and very strong allegations were made that should have been supported by very strong proof, that there was a sort of unfair encroachment from time to time by these defenders, gradually creeping on and stealing a march on Sir Andrew by shifting the weir from here to there, and raising it a little by degrees, until they had accomplished the great change which is said to have been made. Now that is a thing that requires to be proved by conclusive evidence, because it is a very strong allegation, an implication of a want of fairness in dealing with the rights they have. But there is no proof of that whatever. There is not the smallest evidence of a specific kind as to what was done,—no workman engaged at it, nobody that could tell us specifically either the time, place, or circumstances of this alleged fraudulent substitution of one weir for another. It is all conjecture, and conjecture at this distance of time of old witnesses, for they cannot be very young who speak to the position of matters so far back as 1837 and prior to it, and that is the foundation on which the comparison between the olden time and the present is set up. I think that very unsatisfactory. But what after all does it all come to? The old mill is now tried to be made a model mill—a most successful mill; but was it that before? The evidence on that point just seems to me to come to this, that sometimes the mill worked, and sometimes it did not work; and that if it was again set agoing it would still work if the flow through the sluice brought the level of the water down by a sufficient number of inches below the sole of the arc at the upper mill. It is not the height of the weir that does that. The height of the weir may be one thing, but the sluice is another; and if the Messrs Coubrough carry on their works —and they do not seem so unenergetic as not to do that—and keep their sluice open, so that the water may get down to them, then that would bring the water down to a certain extent, and enable the pursuer still to work the upper mill, and I do not see there is any proof that it was able to work at other times. When the sluice was closed it did not work, or at least did not work well, because the water from it was not then carried away. Upon such evidence as that to found the claim that is now made seems to me to be wholly preposterous.

With regard to the second question, I think it is a very clear matter too. I don't think there is any occasion for disputing what Mr Erskine has said in general terms, provided the very circumstances which that author desiderates shall occur. They may occur, and in that view I think the major proposition is proved, but in this case the minor proposition fails. With regard to the matter of underground operation, I shall take leave to say,—and in that I believe I shall have the concurrence of your Lordships,—that there is no analogy between operations underground and operations which may affect streams on the surface, and for an obvious reason. If a water-course or channel or current exists above ground, in which various parties are interested, every man with his eyes open sees the connection of one part with another; and if he is going to injure the stream at any place, he must know how it will tell, and that he must abstain from doing that so as to respect the rights of parties. But when once you come underground, can any human being living on the surface, or anybody but a gnome, know what is the connection between a hole deep down here and a well or a stream there? It is impossible. You have no indications of it at all; and nobody could work except in the dark, in every possible respect, in endeavouring to find out whether penetrating this

or that bed of sand would have this effect. The sinking of a pit down here may do injury to a stream issuing there; but if you were to put parties under this restraint, that they were not to do anything which, whether they foresee it or not, shall affect at a little distance some of your neighbours, you would entirely put an end to the use of subterranean property, by making mining a thing that could not be carried on except at the greatest possible risk and disadvantage. That is the distinction between the two cases, and I think it was well pointed out by Lord Campbell in one of the English cases, which is well known. Now, that has nothing to do with the present case. There are two grounds on which I think the pursuer must here fail. He is proposing to tamper with, to interfere with, and to carry away a natural and existing current in a well-defined channel. That is the first reason. That comes under the principle of the case of *Cowan*, with this difference, that there Lord Kinnaird said, "I contributed a certain amount of water, and I am entitled to make a duct down below the point where I did so, if I do not carry away more than the amount I put in." That was his idea. It was no doubt according to some opinions of debit and credit, but it was not sustained. But in the present case Sir Andrew Buchanan, after putting something into this water, proposes to draw out more than he put in. That is the difference between the cases. The proposition here is—If a man can add to a natural stream more than the natural stream, then he can afterwards draw out both his own contribution amd the natural stream into the bargain. As to its being *de minimis*, I cannot admit that. All streams at their sources are small, except perhaps the Nile, for of that it was said of old "*Nec licuit populis parvum te Nile videre.*" The source of it has now been discovered, and it is not a small thing; but almost all other rivers are small at first, and if you can in such cases say *de minimis* you will get into consequences which you cannot foresee. What is contended for is a power to withdraw at the fountain, not his own contribution, but the whole stream; but he cannot first give a conveyance of the water, and then take it away again, and divert the whole stream, as this proposition would imply. There is another question which Lord Benholme has alluded to, and that is the disposition given in 1794 of the river Blane and such parts of the banks as are necessary for its use. There is in that disposition a clause of warrandice, into which I shall not go further than to say that, whatever may be its effect otherwise, it appears to me at least clear that the author of the disposition would be bound by it, and that the disponee of that author cannot withdraw from the river as it then stood, at his own hand and by his own operation, what was part of the thing stipulated to be got, and which was actually given and possessed for so many years.

On these grounds I am quite of opinion that we should adhere to the Lord Ordinary's interlocutor; and with regard to the declaratory conclusions which are unnecessary, it should appear in the interlocutor or from our opinions, that we do not wish to interfere in the slightest degree with the rights of Sir Andrew Buchanan as a proprietor interested in this water, but that we refuse tc give effect to the conclusions merely because they are unnecessary. It is not our business to sit here pronouncing truisms or things which are not contested.

Lord Cowan—Allow me to say that I agree entirely with Lord Neaves as to the distinction in the principles which are applicable to surface streams and to subterranean waters. We had that deliberately considered in one of our Scotch mine cases; and it will be found that in this Division of the Court we stated expressly that the same principles that were applicable to surface streams could not be applied to streams underground, which were regulated by principles of an entirely different nature, and arising from necessary causes in the operation of working these subterranean grounds. I intended to express that in the opinion I delivered; but I am quite satisfied with the way in which it has been expressed by Lord Neaves.

Lord Justice-Clerk—We substantially adhere to the interlocutor of the Lord Ordinary, and we shall intimate the terms of our judgment.

Agents for Pursuer—Ronald & Ritchie, S.S.C.
Agent for Defenders—William Mitchell, S.S.C.

Thursday, November 18.

MITCHELLS *v.* STRACHAN AND OTHERS.

Multiplepoinding—Arrestment—Competency. Held that a single arrestment used against a fund did not entitle the holder thereof to raise an action of multiplepoinding.

This was an advocation from the Sheriff-Court of Aberdeenshire of a multiplepoinding in which the pursuers and real raisers were Charles and James Mitchell, fish-curers, Fraserburgh. Andrew Strachan had previously obtained decree against them for £23, 15s. 3d. as the price of herring supplied in pursuance of contract between him and the Messrs Mitchell, and for £20, 16s. 5d., as expenses of process. These two sums were brought into Court by the Messrs Mitchell as the fund *in medio*. Objections to the competency of the multiplepoinding were lodged as defences by several of the parties called as defenders, and a record was made up thereon.

The Sheriff-Substitute (Skelton) pronounced the following interlocutor:—"Having heard parties' procurators on the record closed upon the objections and answers, and considered the same, with the productions and whole process, Finds that there was no double distress or competing interests when this action was brought and the summons executed, and therefore no grounds for the action, which dismisses as incompetent: Finds the objectors entitled to expenses of process, allows an account thereof to be given in, and when lodged, remits to the auditor of Court to tax and report, and decerns.

"*Note.—In limine*, it must be observed, that an action regards every fact and interest as at the date of bringing it, so that if a multiplepoinding is brought, the question whether or not there has been double distress or competing interests must be determined as at the date of citation; no subsequent arrestment, for example, will validate the action. To establish double distress by arrestment there must be two or more creditors of the debtor's creditors using arrestments. Multiplepoinding means *double* poinding, because anciently the term 'poinding' was applied to any diligence which was called distress. Where there is but one creditor using arrestment, that was called distress, but not double distress, and in such case the pro-