sulted as to the granting of feus or leases, and that he shall not be bound by them unless he is so consulted and approves what is done. Subject to that condition the heir in possession is placed in the position of a fee-simple proprietor. Now one part of the prayer which the Lord Ordinary has refused is "to grant warrant and authority to the petitioner to feu the said entailed lands and estate of Durie, so far as not already feued, or such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit." That is just in terms of the 4th section of the statute, and it seems to me that the petitioner is just as much entitled to choose his time for feuing, and the portions he is to feu, and to fix the feu-duties, as if he were a fee-simple proprietor of the estate. I am therefore for granting that part of the fifth head of the prayer. But the prayer then goes on, "to approve of a form of feu-charter for said general feuing purposes as the form to be made use of therefor from time to time as the successive feus shall be granted by the petitioner; to authorise and empower the petitioner to grant said feus in the form or forms so approved of from time to time as he shall think proper, subject to any conditions or stipulations which your Lordships may think proper." Here it seems to me the petitioner imposes a burden on himself which he is not bound to bear. There is nothing like that part of the prayer in the 4th section of the statute. The petitioner is not bound to have the form of the feu-charter adjusted, and he is not bound to conform to any form of charter. Therefore I am of opinion that the proper course would be to grant that portion of the fifth head which I have specified. It will, however, be necessary that our interlocutor should bear that it is granted subject to the conditions specified in the deed of consent.

Lord Mure and Lord Adam concurred.

Lord Shand was absent on Circuit.

The fifth head of the prayer was amended at the bar, and made to run as follows:—(*Fifth*) "To grant warrant and authority to the petitioner to feu the said entailed lands and estate of Durie, so far as not already feued, or such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit, all in terms of the said Act 11 and 12 Vict. cap. 36, sec. 4, before specified, but subject always to the condition contained in the deed of consent by the said Robert Maitland Christie, namely that the petitioner shall not grant any feus, neither shall he enter into any ninety-nine years or other building leases of any part of the said entailed lands and estate, excepting as aftermentioned, nor shall he execute and deliver any feu-charter, or lease, or other deed requisite and necessary to any feuar or lessee during the lifetime of the said Robert Maitland Christie, unless he, the said Robert Maitland Christie, shall have first signified his consent to the terms of the feu or lease, which consent shall be sufficiently given and proved by a letter of consent under his hand without his executing such feu-charters, leases, or other deeds, themselves declaring that the above condition shall not apply, nor shall said consent be necessary to feus or long leases of any part of the ground bounded on the east by the road leading to the new railway station at Leven, on the north by the railway, and on the south or south-west by the old station road."

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for the petitioner Robert Christie against Lord Trayner's interlocutor, dated 23d May 1888, and having heard counsel, Allow the prayer of the petition to be amended as regards the fifth head thereof; and this having been done at the bar, Recal the said interlocutor in so far as it refuses the prayer of the petition; *quoad ultra* adhere to the same: Further, grant warrant and authority to the petitioner in terms of the fifth head of the prayer of the petition as amended, and decern."

Counsel for the Petitioner and Reclaimer—Sir C. Pearson—Cosens. Agents—Macrae, Flett, & Rennie, W.S.

Tuesday, July 3.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

ARMISTEAD *v.* BOWERMAN.

Property—Reparation—Law of Neighbourhood.

A lease was granted to a pisciculturist of a piece of ground for the sole purpose of breeding fish, with liberty to him to form ponds and to divert the water of certain burns for the purpose of supplying the ponds. The tenant thereafter formed fish ponds and a fish hatchery on the ground let. The proprietor under the lease reserved right to himself to remove through the land let timber from the adjoining lands without being liable to the tenant for damages. A quantity of timber which had been blown down in a wood belonging to the landlord was subsequently sold by him to a timber merchant, who proceeded to remove it, in terms of his contract, by dragging it over the ground. In so doing he had to cross one small burn or ditch, and the feeders of another, which led water to the hatchery and fish ponds. This stirred up the mud, fouled the water, and so caused serious damage to the fish and ova. An action of damages was then raised by the pisciculturist against the timber merchant on the ground that he had not taken proper precautions in removing the timber to avoid doing damage, and that he should have constructed log bridges across which he should have taken the timber.

Held (*rev.* Lord M'Laren) that the defender had exercised no more than his right under the contract in carrying out an ordinary

agricultural operation in the usual way, and that there was no duty on him so to clear away the timber as to cause the pursuer's hatchery and fish ponds no injury. Defender *assoilzied.*

J. J. Armistead, a pisciculturist, obtained in 1881 a lease for fifteen years from Lord Herries of about five acres of ground at Kinharvie, in the Stewartry of Kirkcudbright, for the purposes of his business. The lease provided—"(*First*) The said ground is let to the said Joseph John Armistead for the sole purpose of breeding fish, . . . and for this purpose he shall be at liberty to excavate the ground for the formation of ponds to the satisfaction of and under the superintendence of the proprietor's factor, or a person to be appointed by him. (*Second*) The tenant shall have right, so far as the proprietor can give him such right, to divert water from the Newabbey and Tannox Burns where they pass through or adjoin the ground hereby let, for the purpose of supplying the ponds to be constructed as aforesaid; and he shall construct to the satisfaction of the proprietor an outlet for the water so diverted after passing through the said ponds. . . . . (*Ninth*) The proprietor reserves the right to remove through the land hereby let the timber cut on the lands adjoining without being liable to the said Joseph John Armistead in any damage caused by the removal of such timber." After obtaining this lease Armistead excavated the ground, formed ponds for the rearing of fish, and led a supply of fresh water into them. He also erected a large hatchery, built of stone and lime, for the purpose of hatching eggs or ova in boxes, and fixed all the necessary machinery and filters for breeding fish.

The storm of 1883 caused a great deal of damage to the trees on Lord Herries' property, and the timber which was blown down was sold to Messrs Moxham & Company, who in turn sold it to James Bowerman, a timber merchant. The contract of sale contained the following conditions—"1. The wood to be removed by 31st of December 1886, and if any is left it shall be in Lord Herries' option to remove the same at the buyer's expense, or to dispose of it as he may think fit, without payment or compensation. . . . 4. The buyer shall remove the wood by such roads or tracks as may be pointed out by the forester across the lands occupied by Lord Herries or his tenants, without liability for surface damage, but shall be bound to repair all gaps made in the fences in removing the wood. . . . 6. The buyer may erect a sawmill at such convenient place as may be pointed out by the factor, Mr W. J. Maxwell."

Bowerman proceeded to remove the trees by the drag roads, and in doing so required to cross a small burn or ditch known as the "Hatchery Burn," and also the feeders of another known as the "Tannock Burn," both of which supplied Armistead's batching establishment with water. When the timber was dragged across these burns or ditches the mud was stirred up, the water became fouled, and the result was serious damage to Armistead's hatchery and fish ponds.

This was an action of damages at the instance of Armistead against Bowerman in respect of these operations.

The averments of the pursuer were to the effect that the defender had wrongfully and in disregard of the pursuer's interests dragged the timber by means of horses and otherwise through the streams, and so fouled them to a serious extent, which would not have occurred if the defender had adopted the simple precaution suggested by the pursuer of laying across them temporary log bridges. The pursuer further averred that the defender had conducted his operations recklessly and maliciously, but it was held in the Inner House that there was no evidence to support this averment.

The defender, besides maintaining that the pursuer was not a party to the contract between Messrs Moxham & Company, pleaded—"(3) The defender having acted within his rights in the removal of the said timber through the streams in question, is entitled to be assoilzied, with expenses."

The Lord Ordinary (M'Laren), after a proof, pronounced this interlocutor on 6th March 1888:—"Finds that the pursuer had right as tenant to a supply of pure water for his fish hatchery from the streams flowing through Lord Herries' plantation: Finds that the defender had right to remove the fallen timber in said plantation, and that it was his duty in doing so to take reasonable precautions against fouling the streams supplying said hatchery: Finds that the defender was negligent in the performance of this duty, and that through such negligence the pursuer has lost the greater part of the fry or young fish hatched in the season of 1887, and has sustained damage to the extent of £300: Decerns in favour of the pursuer for this sum, and *quoad ultra* assoilzies the defender from the conclusions of the action: Finds the pursuer entitled to expenses.

"*Opinion.*—The pursuer Mr Armistead is lessee of a house and land, with certain water rights, which he rents from Lord Herries, for the purpose of carrying on the business of fish hatching and fish culture. According to the evidence this comparatively new branch of industry has already attained a considerable development in Great Britain. One of the essentials of its successful prosecution is the supply of a constant flow of perfectly pure water, and the right to such a supply was the subject of special stipulation in the lease which Mr Armistead obtained. At the same time Lord Herries stipulated for the right to remove fallen timber through the land which was given in lease to Mr Armistead. Since the commencement of the lease a large number of trees on Lord Herries' property were blown down by a gale of wind, and as Mr Armistead's enclosure is situated at the foot of the slope of the plantation, and was the most convenient access to the plantation, it became necessary that Lord Herries should exercise his reserved right under the lease. Instead of employing his own foresters or workmen to remove the fallen timber, Lord Herries sold the timber in 1884 to an English firm, who re-sold it to the defender Mr Bowerman with the right of removing it, which Lord Herries had reserved. In removing the timber the defender on various occasions fouled the water which supplies the pursuer's fish hatchery and breeding ponds. The young fry in the hatchery were completely destroyed as the natural and inevitable result of the pollution of the water, and there was also a considerable destruction of the fish in the breeding ponds,

which the pursuer attributes to the same cause. For this loss the pursuer claims compensation from the defender.

I may here observe that the removal of the timber on the occasions complained of was subsequent in point of time to the period within which the defender was bound by his contract to complete the clearance of the fallen timber. On this circumstance the pursuer has founded a separate argument, to the effect that the defender must be regarded as a trespasser, or as a person interfering without a title. In considering the case I have not felt at liberty to give any weight to this contention, because I conceive that the circumstance of the defender having exceeded the limits in time within which he was to complete the removal of the timber only raised a question between him and Lord Herries. Lord Herries might have granted an extension of time without consulting the pursuer, or he might, without granting an express extension, acquiesce in the defender removing the timber after the expiration of the agreed-on time. It appears to me that as the defender had undoubtedly acquired the timber by purchase he must be taken to be in the lawful exercise of his rights in removing it, so long as he was allowed to do so without objection on the part of Lord Herries.

The next and only other general question is one which is raised in the interest of the defender. It is contended on his behalf that the acts of pollution averred and proved do not constitute an infringement of the law of neighbourhood. If the defender is not a trespasser, he is only responsible, as it seems, for the observance of the law of neighbourhood; hence it is urged that the acts complained of do not give rise to an action unless they amount to a nuisance. It must be admitted that the fouling of a stream by dragging fallen timber across it would not amount to a nuisance; but I cannot accept the defender's view that an injury done to a neighbour is not actionable unless it amounts to a nuisance. The obligation of neighbourhood is expressed in the maxim *sic utere tuo ut alienum non lædas*. A supply of pure water is essential to the pursuer's business; the pollution of the streams which feed his hatcheries was calculated to destroy the whole produce of his undertaking for the year. Assuming (but only for the purpose of testing the argument) that this was known to the defender, I conceive that the obligation of neighbourhood required the defender to use a reasonable degree of care and trouble to avoid injurious pollution.

"There are then three points for consideration with reference to the alleged injuries:—

"(1) Was the defender made aware of the injury which the temporary fouling of the water would cause to the hatcheries?

"(2) Was it possible by the use of reasonable and inexpensive expedients to avoid the fouling of the water?

"(3) Was the defender negligent in the performance of the duty of taking reasonable care to avoid fouling the water?

"These questions will be considered with reference to the facts as proved.

"I may here observe that I do not hold it proved that the defender had been made aware, before 30th December 1886 of the necessity of using means to avoid the pollution of the streams which fed the pursuer's establisment.

"There is evidence that the defender and his son (who was in charge of the timber) had separately visited the pursuer and seen the fish hatchery. But these were visits of a friendly character, and the hatchery was most probably shown to the defender and his son, just as it might have been shown to any member of the public attracted by curiosity or scientific interest. If the attention of the defender and his son had been drawn to the subject, they might no doubt have inferred that pure water was necessary. But they were not naturalists, nor were they persons conversant with fishing or fish culture. Therefore it is not to be assumed that they ever thought of the quality of the water. They probably saw the filters, but these might only suggest that the pursuer had the means of protecting his hatchery from the effects of pollution. In point of fact the filters are only efficacious against such pollution as results from natural causes—a heavy shower, for example, washing a certain amount of turbid water into the stream. But if the water is mixed with any considerable amount of soil or mud, the filters become choked, and the water flows over the frames instead of passing through them. The pursuer states that when he showed the defender the hatchery he spoke of the necessity of having pure water, and requested the defender to use means of avoiding pollution. The defender denies that such communications were made to him. As the evidence on this point is conflicting I think it is best to assume it as unproved that the defender and his son were originally made aware of the requirements of the hatchery, or of the injurious effects which would follow from the temporary pollution of the water.

"On the morning of the 30th December 1886 the pursuer on proceeding to inspect his hatchery found that the water flowing into it was fouled with mud, that the filters were choked and the muddy water flowing over the frames into the hatchery, forming a muddy deposit on the fish ova. The pursuer did what was possible to clean the ova; but notwithstanding his endeavours they were to a large extent lost, their vitality being destroyed by the muddy deposit which prevented the access of fresh ærated water which is necessary to their development. The pursuer immediately saw the defender's son, and informed him of the mischief that had been done. The pursuer says that it was eventually arranged that during the ensuing week, the weather being frosty, the defender should proceed with the removal of the timber, as it was considered that when the ground was hard there would be little disturbance of the soil by dragging the timber across or in the neighbourhood of the stream. Assuming that this was so, the defender did not keep to the arrangement, but on the 3rd January 1887, during a heavy fall of rain, he continued the work at the same place, with the result that the filters were again choked, and what remained of the ova and the young fry were completely destroyed. The pursuer purchased a fresh supply of ova, for which he paid £58, 10s. I am of opinion that the defender is excusable for the injury done on the 30th December, but not for

what was done on 3rd January. He ought either to have suspended the work during the thaw, or have laid down a bridge of logs over the watercourse, for which materials lay ready to hand, or at the least he ought to have consulted the pursuer, and given him the opportunity of making a log bridge, or doing what was necessary to preserve the water from contamination.

"On the occurrence of this second injury the pursuer again remonstrated, and this time he indicated that he would apply to Lord Herries or his factor to have the removal of the timber stopped unless some arrangement was made. Lord Herries had the means of putting pressure on the defender, because the latter had exceeded the time allowed by his contract. But it was not necessary to refer to Lord Herries or the factor, because the defender's son agreed to defer the removal of the timber from this part of the plantation until the middle of March, when it was understood that the fish would be fully hatched, and the risk of injury much lessened.

"I may here explain that the pursuer makes use of two small streams coming from the plantation. The stream already referred to flows direct into the hatchery, and thence into one of the fish ponds. It is referred to in the evidence and argument by the name of the 'hatchery' stream. The remaining fish ponds are supplied by the other small stream known as Tannock's Burn. The arrangement of the ponds and their feeders is shown in a plan which the pursuer gave in at the proof.

"Before the next pollution complained of the pursuer had made a change in his arrangements, and his whole establishment, including the hatchery, was then supplied from the second stream. What was the reason for this change does not clearly appear, but I understand it was done to enable the defender to remove what remained of the timber without taking precautions against polluting the hatchery stream. All the timber had to be taken across the hatchery stream, and it would have been difficult, even if bridges had been constructed, to avoid causing some pollution. It was necessary, however, that part of the timber should be taken across the small rills which flow into the Tannock's Burn, and it was supposed that by forming log bridges across these the amount of pollution would be so small that when mixed with the larger volume of water in the Tannock's Burn it would be rendered insensible. I think that counsel on both sides are agreed that this would be so.

"I now come to the 7th of March, when, according to what I hold was the arrangement between the parties, the removal of the timber was to be recommenced. On the 8th March the pursuer observed that the water coming into the hatchery and pond was discoloured. This was found to be caused by the dragging of timber across one of the rills that flow into the Tannock's Burn. At the pursuer's request the defender, who happened to be on the spot, at once agreed to place planks or logs across the rill; and over such an extemporised bridge the rest of the timber in that part of the plantation was drawn, and damage avoided. No serious damage resulted from the slight disturbance to the water in the morning; partly because the disturbance was stopped before it had time to take effect upon the inhabitants of the hatchery and pond, and also because the fry were so far advanced that they could be cleaned by washing in pure water.

"Matters went smoothly with one exception, which I do not stop to narrate, until 1st April, when a further pollution of the Tannock's Burn took place, alleged by the pursuer to be the most serious of all, and according to his evidence it destroyed the whole of the fish of that year's hatchery. On 1st April the defender's workpeople had cleared the timber so far up the bank that it now became necessary to cross two other rills feeding the Tannock's Burn. They formed no log bridges, took no precautions of any kind, and gave no notice to the pursuer to protect himself. They commenced at an early hour in the morning to drag the timber across the two tributary rills, the banks of which were trodden into mud by the men and horses engaged in the work. The mud of course went down the Tannock's Burn into the hatchery. The pollution was not discovered by the pursuer until its effects were irremediable. All the young fry died, with the exception of about 2000, which were chiefly from the lot of ova which had been bought in January to replace those that were first destroyed. According to the pursuer's evidence, which on this point is not open to criticism, he and his men spent weeks in tending and cleaning the ova and young fry in the hope of removing the effects of the flooding of 8th March and 1st April, but their efforts were unavailing. The pursuer evidently thinks the flooding which took place on the 1st April was the more injurious of the two, and has no doubt that the destruction of the ova is attributable to the inflow of muddy water. I think that his conclusion is in entire accordance with the facts of the case.

"Besides the destruction of the young fry the pursuer also claims damages for the destruction of fish in certain of the ponds into which water runs from the hatchery. The fish in these ponds were attacked by fungus disease, which the pursuer attributes to organic impurities coming from the hatchery, which of course contained a certain amount of putrescent matter coming from the dead fry or ova. The fish in ponds which are not supplied with water through the hatchery were not affected by the disease. It is therefore probable that the mortality amongst the grown fish is in some way attributable to the water connection between the hatchery and the ponds in which these fish were contained. But assuming the correctness of the pursuer's explanation, and the soundness of the corroborative evidence given by Mr Chambers on this subject, it only proves to my mind that it was a bad arrangement ever to allow the ponds to be supplied with water passing through the hatchery. It is agreed that the mortality among the young fry is always considerable, and therefore the risk of disease spreading to the fish exists independently of the exceptional mortality among the fry which occurred in the 1887 season. I suppose that the pursuer's men would remove the dead fry from time to time as they were observed, and if this was done regularly it would not follow that there was more organic contamination of the ponds in this than in other seasons. Therefore, while accepting the evidence that the fish were attacked by disease consequent on impurity in the water, I am disposed to hold that the dam-

age is not proved to be the result of the defender's pollution, but is rather attributable to defective arrangement for which the pursuer is himself responsible.

"Another head of damage is for injury done to the pursuer's garden by flooding, which is attributed to the acts of the defender in having broken down the bank of one of the small streams, whence the water escaped during the night and washed away the pursuer's vegetable beds and manure heap.

"There is some evidence that the defender's men took pains to keep this bank in repair as the work was going on, and it is quite possible that notwithstanding their having taken care of the bank a heavy fall of rain may have washed it away. There being no direct evidence of negligence, I hold that this head of damage is not proved. As to the minor matters referred to in the record, I shall only say that in my opinion they are excluded by known rules of law.

"I have now to estimate the damage done to the pursuer's business through the destruction of what is virtually the whole produce of the year. It would not be fair to the pursuer to limit the damage to the sum for which the fry could be replaced in April 1887. The pursuer had already made an endeavour to replace his stock, and in this endeavour he was foiled by the continued carelessness of the defender's work-people. In April he found that the hatchery and adjacent ponds were thoroughly contaminated by decaying matter, and that the place must be cleaned out and allowed to rest to eliminate the organic impurities. In this view I think he was well founded, and I cannot accept the suggestion that in a question with the defender the pursuer was bound immediately to re-stock his ponds, and risk the chance of further loss from the cause referred to. I consider that in April he was in the position of one who has lost the profits of the season through the defender's fault. I am speaking of course of the young fry, which were the chief subject of sale from his establishment. At the same time it is to be observed that the pursuer's statements in regard to the profits of his business are somewhat vague, and he has not produced a balance-sheet. In such cases, where injury is not the result of personal negligence or misconduct, it is usual to estimate damages on a moderate scale. Without entering minutely into the values of the young fish, or professing to base my estimate on numerical calculation, I shall award as damages for the injuries I have held proved the sum of £300."

The defender reclaimed, and argued—Lord Herries had the right to sell the wood to the defender, and the defender had conducted his operations in the ordinary way used for taking away fallen timber. The defender had to take it the way he did, as under his contract he was obliged to take it over the drag roads shown to him. The removal of the timber was an operation incidental to the property of the upper heritor, and if carried on in a proper manner could not be held to be a nuisance to the lower heritor even if some damage was done to him. The fact of the pursuer's hatchery having been placed where it was did not impose upon the defender any extra duty to see that he did not do damage. The defender had shown his desire to do all he could to avoid doing damage, as he had put up a log bridge upon the only occasion that he was asked to do so. As a matter of fact, if the pursuer had taken proper precautions to save his hatchery, and had seen that the filters were kept in good working order during the time that the trees were being removed, no damage would have resulted. He failed, however, to do this, and consequently he sustained this loss.

Argued for the respondent—The pollution might have been avoided if the defender had taken ordinary and simple means of prevention. The pursuer had established his fish hatchery, and got it into full working order long before the defender came upon the scene at all. The defender ought to have put a log bridge across the burns at each of the drag roads, and that would have prevented any fouling of the water such as undoubtedly caused the damage here. The question of whether there was a nuisance depended largely upon the circumstances of the case, but where work was conducted in such a careless and negligent manner as to cause damage to the neighbours, then that was a nuisance entitling the person damaged to legal redress—*M'Intosh* v. *M'Intosh*, July 15, 1864, 2 Macph. 1357; *Cameron* v. *Fraser*, October 21, 1881, 9 R. 26; *Laurent* v. *The Lord Advocate*, March 6, 1869, 7 Macph. 607; *Hislop* v. *Fleming*, December 22, 1882, 10 R. 427; *Dumfries Waterworks Commissioners* v. *M'Culloch*, June 4, 1874, 1 R. 975; *Chalmers* v. *Dixon*, February 18, 1876, 3 R. 461.

At advising—

Lord Justice-Clerk—This is a case of some interest. The Lord Ordinary has decided in favour of the pursuer, who is a cultivator of fish near Dumfries, and has established a hatchery on the lands of Lord Herries in the neighbourhood of a wood which has given rise to the dispute here. His complaint is that in the course of taking away the timber from the adjoining lands the defender, who is a wood contractor, and who was under contract with Lord Herries to clear the wood, fouled the rivulets which feed the hatchery, and that the result of that, continued over a considerable period of time, has been to cause great damage to the article of commerce in which the pursuer is engaged. I own to feeling great regret for the loss, which, as far as the pursuer is concerned, has been considerable. The operations in which he was engaged were scientific, and were not only interesting, but exceedingly valuable to him and profitable; and certainly one must regret that by an incident of this kind so much loss should have been sustained. But I must fairly own that I am unable to follow the Lord Ordinary in his reasoning. It appears to me that the whole ground of action is false. I think that the defender incurred no liability in consequence of anything which he did. I think that he acted simply as he was entitled to do in the exercise of his ordinary rights, and that there was no ground of complaint whatever in any part of his proceedings. On the other hand, I think—although the proof, voluminous as it is, is very slender on this point—that if the pursuer had taken reasonable precautions this injury would have been avoided. If instead of insisting on the defender taking measures which only impeded the operations in which he was engaged, the pursuer had simply applied himself to see how the injury might be avoided, I think that he would

have succeeded, and that with no great exertion, and at a moderate expense.

That is the general nature of the action and of the views I have come to form upon it. It is necessary to consider the questions which have been raised a little more in detail.

Lord Herries is the proprietor of the whole subjects, which consist of the large pine wood which the defender was engaged in clearing, and also of the subjects which had been let for the purpose of these piscicultural operations. The defender was under contract with Lord Herries, and he was under contract to clear the forest within a particular time. It was a time bargain which he had made with Lord Herries, and therefore it was a matter of very considerable consequence to him not to be impeded in carrying out the clearance. The operation began in the winter time, when of course the hours of daylight were short, and when it was therefore of importance to proceed as rapidly as circumstances would permit. The ground has been indicated by a plan, and it appears that this fish hatchery was fed by a few small rivulets, some of them, the witnesses say, having no water in them at all during summer, some of them more or less. The mode in which the defender cleared the forest of the wood was by horse-power and dragging the trees along the ground, using certain drag roads which had been made on previous occasions by the forester—a very simple, and, as far as the evidence goes, a perfectly legitimate mode. The question is, was the "lower proprietor," as I may call him, engaged in these fish culture operations, entitled to object to the defender clearing the ground according to the ordinary way?

The Lord Ordinary has put three questions, which, he says, ought to be answered—(1) Was the defender made aware of the injury which the temporary fouling of the water would cause to the hatcheries? (2) Was it possible, by the use of reasonable and inexpensive expedients, to avoid the fouling of the water? (3) Was the defender negligent in the performance of the duty of taking reasonable care to avoid fouling the water? I think there are two questions omitted there. The first is—Did the defender use more than his own legal rights in carrying out the operation which he performed, and did he perform it in the ordinary and well-defined way? and secondly, did the defender observe the precautions which he might have observed for avoiding the fouling of the water? I am of opinion that both of these questions must be answered in favour of the defender. It was nothing more than an ordinary agricultural operation in which the defender was engaged, and if a man chooses to set up a scientific laboratory at the foot of a stream he must take his chance of the effect of ordinary agricultural operations which may go on higher up. I put the case of drainage. This is a moss, according to the evidence, with a forest on it. Now, if the proprietor of this plantation had chosen to clear the forest and to drain the moss, that would have fouled the streams which fed the hatchery beyond all doubt. But could it be said that any lower proprietor was entitled to object to those operations on the part of the upper proprietor? It is impossible to put in the balance against those operations any such damage as is founded on here. I am afraid the defender exercised no more than his right in carrying out his contract in the ordinary and usual method.

But there is another matter. The pursuer complains that the defender did not put bridges across the stream and haul the timber across these bridges. But would that have been an execution of his contract? I see that the defender's son is asked why he did not put bridges over the tributaries further up at drag road No. 5, and he answers to that not unreasonably. He says—"If we had done that we should have had to do it at a hundred and fifty places, because there were trees lying across these burns 'allwheres.'" Was the contractor bound to delay his execution of the contract to do all that? He had the greatest interest in this matter, for I see it is actually pleaded against him that he was too late in the fulfilment of his contract. The pursuer in this action actually puts himself into the place of Lord Herries, and pleads that he can claim damages because the defender was a trespasser, and had no right to be there at all. That is the very best possible reason why the defender should not have wasted time in making log bridges across the stream. I do not desire to carry that further than is reasonably necessary. If it could have been done reasonably and simply, then the defender had no desire to put the pursuer to expense; but when that is pleaded as a matter of right against the defender that is a different question. I think, further, that there are clear indications that the pursuer might if he had chosen—it might have cost him something, but there is no reason why it should not have cost him something—have well avoided the fouling of the water.

On the whole matter, I think that the action is unfounded, and that the contractor was only exercising his right in clearing the ground in the way he did. I am for assoilzieing the defender.

Lord Young—I am of the same opinion. I think that the only question which we can decide is, whether the defender did or did not commit a legal wrong against the pursuer, and if he did, what was the damage consequent on that legal wrong? I agree with your Lordship in thinking he committed no such legal wrong, and consequently that no question of damages arises.

I do not dissent from the general proposition, as a general proposition, that anyone executing lawful operations—of course I am only dealing with such—upon his own property is bound to have a reasonable regard to the interests of his neighbour. He is not entitled to perform the operations in a particular way when he has ascertained that that will be hurtful to his neighbour, if there be another way equally available for his purposes which would not be injurious to his neighbour. He is not entitled to do his neighbour harm, and then defend himself from liability by saying that his purpose was effected by carrying on his business in a particular way, when that particular way was not necessary for carrying on his business. As to what is required by considerations of right feeling and good neighbourhood, we cannot enter on that except in a very rough way, and it is sufficient for me to say here—though it is somewhat out of the case—that I do not,

upon the evidence, think there is any ground for imputing to the defender any want of right feeling or due consideration of his neighbour's interests. But, I repeat, the question for us is whether he committed a legal wrong? If the averment is true that what he did was done wilfully, maliciously, quite unnecessarily, as far as his own interest was concerned, and maliciously in order to inflict damage on the defender, then I am prepared to say that what he did would be actionable. But that view of the case, though presented on record, is utterly untenable on the evidence, and was not maintained to us in argument.

Then what is the case? The pursuer has quite lawfully established a sort of fish nursery—a hatchery—on the banks of a river or burn called the Tannock's Burn, and that burn—the Tannock's Burn—receives into it two or three little tributaries. These tributaries are in reality mere ditches running through the woods of Kinharvie with some water in them—rain water chiefly—in winter running dry when the weather is fair, and quite dry generally in summer. The largest of them is that which is marked on the plan "Hatchery Supply." That is the name which the pursuer has given to it, because he has run a pipe into it—quite lawfully, though it is outside the subject of the lease to him. That is the largest of the tributaries, and it is described by a surveyor very much in the language I have used—a ditch running through the wood. The others are smaller ditches running through the wood of Kinharvie.

Now, we know from the evidence in this case, and also from that in another case which was before us, that the wood through which these ditches pass suffered very severely from the storm of 1883-84, I think; that the trees were blown down all through it to an enormous extent, so that the right to take them away was purchased for many hundred pounds—I think a good deal over £1000. Well, they fell into these ditches, as they fell everywhere else, and the purchaser contracted to remove them. It was his right to remove them, but there were special stipulations between him and the landlord as to the removal. In removing them he dragged them over these ditches, because the ditches presented no impediment to dragging them over. If they had, he would have had to overcome the obstacle as he best might, but there being no impediment, what legal wrong did he commit in taking his horses and dragging over the ditches in the wood the blown-down timber which he had purchased and had contracted to carry away? The pursuer says—"Oh, but a duty to me arose, for I had some very delicate ova in cradles in the hatchery, and if the mud is stirred up in the ditches it would get in among them into my premises through my pipe, and would do the ova an injury." I am of opinion that the defender was under no legal duty whatever in regard to this. It is nothing to the purpose to say that the defender could have prevented the injury at little expense. I rather think he could have done it at no great expense, and when it was brought prominently under his notice he did do something, I think, merely from good feeling and good neighbourliness, and not because he thought he was under any obligation. I refer to this only to illustrate what I meant when I said I thought there was no ground for imputing a want of right neighbourly consideration to the defender. But why did not this gentleman who was hatching these young fish attend to his own filtering operations? It would be extravagant on the statement of it to suggest that he could not have made his filters so as to prevent the mud stirred up by the operations of the defender from passing in among those fishes. I must assume that he could have done it at a very trifling expense. But if he could not—if the expense of doing it made it not worth his while to do it—then that is just one of the results of putting his hatchery where he did, and the purchaser of the timber blown down in the forest had no concern with it at all. I think that what one right-minded man might be expected to do towards another the defender was willing to do, and did do, at some inconvenience to himself, and even cost. But to say that the duty was put upon him in this matter of so clearing the forest of the blown-down timber as to cause the pursuer's hatchery no injury is, I think, a proposition for which there is no ground in reason, and certainly no authority.

I only wish to add, that as at present advised I should not have allowed evidence here on the record as it stands. On the question of wilfully and maliciously, I should have required some statement of facts indicating the nature of the wilfulness and the malice, and the grounds for inferring their existence. When I put the question to the pursuer's counsel, and asked him what he founded on as indicating wilfulness and malice on the part of the defender, his answer was, merely the fact that the defender did not put bridges at the places where they took timber across, or give the defender notice so that he might do so. I do not think I should have received that as any statement of wilful and malicious proceeding, and apart from that I should not have thought that there was on record any relevant statement to be remitted to probation. But taking the case as it is presented now, the concluded case, I think that the pleas for the pursuer ought to be repelled, the defences sustained, and the defender assoilzied.

Lord Rutherfurd Clark concurred.

Lord Craighill was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

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