

they must put it into a safe condition if that is possible, and if it is not possible, then they must stop the traffic, which cannot be carried on without danger. That failure of duty is the ground of my judgment.

There was a question raised whether there was not a statutory duty upon the railway company as the original makers of the road to erect this bridge at a height of fifteen feet above the level of the public road, but when it appeared, as it did during the course of the discussion, that in its beginning this was not a public road at all, but merely a path made by the railway company for the convenience of its feuars, that argument disappeared. I think, therefore, that the Police Commissioners have no defence to this action.

LORD RUTHERFURD CLARK—I also am of opinion that the Police Commissioners are liable in damages to the pursuer of the action, but I wish to say that like Lord Young I abstain from giving any opinion or from saying anything as to the duty of the railway company in the matter.

LORD LEE concurred.

The Court pronounced this judgment:—

“The Lords having heard counsel for the parties on the appeal, Find in fact (1) that Peter Myles M'Fee, husband of the pursuer, when driving a cab along Brook Street, Broughty Ferry, on the night of 8th December 1888, came in contact with bridge crossing that street and was killed; (2) that the said street is within the burgh of Broughty Ferry, and is maintained by the defenders the Commissioners of Police of that burgh constituted and acting under the General Police and Improvement (Scotland) Act 1862; (3) that said bridge is of inadequate height, and was known by the said defenders to be so and dangerous to the public; and the death of the said Peter Myles M'Fee was caused by their failure to have it put into proper condition, or to take precautions to prevent the use of it for purposes for which it was not safe: Find in law that they are primarily liable in damages to the pursuer, his widow: Therefore dismiss the appeal and affirm the judgment of the Sheriff appealed against: Find the said defenders liable to the pursuer and to the other defenders in the expenses incurred in this Court: Remit to the Auditor to tax the same and to report, and decern: *Quoad ultra* remit the case to the Sheriff with instructions to proceed therein as accords, and decern.”

Counsel for the Commissioners—H. Johnston—Law. Agents—Henderson & Clark, W.S.

Counsel for the Pursuer—Low. Agent—Alex. Nicholson, S.S.C.

Counsel for the Railway Companies—C. S. Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Friday, May 30.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

M'GAVIN AND OTHERS v. M'INTYRE BROTHERS.

River—Opus Manufactum in Alveo—Pollution—Interference with Natural Flow of Stream—Prejudice of Lower Heritors—Interdict.

The proprietors of bleachfields bounded by the *medium filum* of the Dighty, a sluggish polluted stream, used from time immemorial for manufacturing purposes, sunk a tank into the bed of that stream at its junction with the Fithie, a quickly flowing stream of pure water, in order to obtain for their works some of the pure water of the Fithie. After being impounded and used in the works the water was returned to the Dighty undiminished in quantity. Before the water was abstracted in this way the riparian proprietors below the junction of the two rivers were able to use the water for agricultural and bleaching purposes, but the result of the operations was that the flow became more irregular, and the water was sometimes so polluted as to be unfit for these uses.

On the application of the lower heritors the Court ordained the proprietors of the bleachfields to remove the tank, pipes, &c., and to restore the *alveus* to its former condition, and *interdicted* them from entering on any similar operations in the future.

River—Medium Filum.

Observations by Lord Trayner as to the proper mode of ascertaining the *medium filum* of a river where it is joined by a tributary.

The Dighty water rises in the Lochs of Lundie, to the north-west of Dundee, and flows in an easterly direction till it falls into the sea a little west of Monifieth. The Fithie burn, rising in the Sidlaw Hills, pursues a southerly course and falls into the Dighty at an angle of about 60 degs., a few feet west of the Brechin or Pitkerro Road Bridge. Messrs M'Intyre Brothers were proprietors of lands to the south of the Dighty and to the west of the Brechin Road called the lands of Ballunie, and used by them as bleaching fields, the northern boundary of these lands being the *medium filum* of the Dighty. The Dighty above the junction had for more than 40 years prior to 1889 been used for manufacturing purposes, especially for bleaching, there being several works above that point, and had been much polluted. The Fithie, which is a much more rapidly flowing stream than the Dighty, and whose volume at the junction is equal to from one-third to one-half the volume of the Dighty, had remained comparatively pure and did much towards purifying the Dighty below that point. For some yards below the bridge the two

streams can be distinguished by their different colours.

In August 1888 Messrs M'Intyre Brothers placed a box or tank in the bed of the stream a few feet to the west of the bridge. This box was covered with an iron grating and was sunk 4 or 5 inches below the gravel which formed the bed of the stream. By means of it the combined water of the Fithie and Dighty in an almost pure condition was obtained by the Messrs M'Intyre Brothers for their works. The water was led by a trough from the box into a tank, and thence by a pipe running westwards or up stream for 1150 feet, where it was discharged into a sunk well from which it was pumped up into reservoirs for use in the works. The difficulty of the gradient, which was not steep, was thus overcome. After being used in the works the water was returned to the Dighty by outlets situated about two-thirds of a mile above the point from which it had been drawn undiminished in quantity but considerably polluted.

In the beginning of 1889 Robert M'Gavin of Ballumbie, whose lands of Baldovie were bounded on the south by the Dighty and on the east by the Fithie, and Douglas Drummond Dick of Pitkerro, and others, riparian proprietors on the Dighty below its junction with the Fithie, brought a note of suspension and interdict against the Messrs M'Intyre Brothers to have them interdicted and prohibited "(1) from altering or otherwise interfering in any way with the bed or *alveus* of the Dighty water and of the Fithie burn, or either of them, either above or below their junction: and (2) in particular from removing stones, shingle, or gravel from the bed or *alveus* of said stream or streams, and also from removing stones, shingle, or gravel from any one part of the bed or *alveus* of said stream or streams to any other part of said bed or *alveus*; and (3) from placing in or upon the bed or *alveus* of the said stream or streams any tank, box, pipe, drain, or other *opus manufactum*; or at least (4) from placing in or upon the bed or *alveus* of the said stream or streams any such tank, box, pipe, drain, or other *opus manufactum* except at such part or parts of said bed or *alveus* as shall be entirely within their own property, as bounded by their titles, or by the *medium filum* of the said Dighty water; and (5) from abstracting the water of said streams, or either of them; and (6) from detaining and arresting the water of said streams, or either of them, and preventing the same running uninterruptedly and continuously in its natural course through or past the complainers' lands; and (7) from using any conduit, aqueduct, or other *opus manufactum*, whereby the water of the said stream or streams may be made to regeorge into tanks or reservoirs at the respondents' works at Ballunie bleachfield, and there be detained or arrested for use in their processes of bleaching, or otherwise, and may be prevented from continually running in the said bed or *alveus*, through or past the complainers' lands; and (8) from discharging any refuse from their bleach works,

or other deleterious and noxious or impure stuff of any kind into said stream or streams, whereby the said stream or streams may be polluted or rendered unfit for agricultural and manufacturing uses and purposes, or its amenity diminished, or the property of the complainers in any way injured; and further, to ordain the respondents to remove all tanks, boxes, pipes, drains, or other *opera manufacta*, erected or placed by them in or upon the *alveus* or bed of said stream or streams, and to fill up all excavations made by them in the said *alveus* or bed, and to restore the said *alveus* or bed to the state in which it was prior to the operations of the respondents thereon."

The complainers averred (Stat. 15) that the respondents, by the operations explained above, "have most injuriously affected the property of the complainers. They have caused erections to be made *in alveo* of the said Dighty water and Fithie burn, and have disturbed the *alveus* of the said streams *ex adverso* of the property of the said Robert M'Gavin and Douglas Drummond Dick, and have altered the course of the said streams. They have by their said operations encroached upon the property of the said Robert M'Gavin and Douglas Drummond Dick. They have, by abstracting and storing the water of the Fithie before it has joined the Dighty, interrupted the accustomed and continuous flow of said stream or streams. By returning to the Dighty said abstracted water, polluted by the refuse of their bleachwork, they have materially increased the pollution of the Dighty below its confluence with the Fithie to such an extent that whereas prior to the year 1887 the combined water of the Dighty and Fithie was, below the junction of the said streams, available for the secondary purposes of agriculture and manufactures as it passed through the complainers' lands, it is now rendered deleterious to animal life, and noxious and offensive to sight and smell, and unsuitable for manufacturing purposes. The amenity of the complainers' properties, and particularly the policies of Linlathen House, through which it passes within a short distance of the mansion-house, has been thereby injuriously affected, and the value of the complainers' properties has been thereby deteriorated."

The respondents answered—"Denied. Explained that the operations complained of were conducted entirely to the south of the *medium filum* of the Dighty. They could not possibly alter the bed of the river or affect the flow of the water. The water drawn by the respondents was insignificant in amount, and was all returned to the river before it left the respondents' property. The said operations did not and could not produce any greater pollution in the water flowing past the complainers' properties or works than had previously existed."

The complainers pleaded—"(1) The respondents not being entitled to erect or place any *opus manufactum* in or upon the *alveus* of the Dighty *ex adverso* of their

lands, interdict should be pronounced as craved. (2) *Separatim*—The respondents not being entitled to erect or place any *opus manufactum* in or upon the *alveus* of the Dighty or Fithie beyond the boundary of their own property, whether that be an artificial line or the *medium flum* of the stream of the Dighty, or of the conjoined stream of the Dighty and Fithie, as it passes their property, interdict should be pronounced as craved. (3) The respondents not being entitled to abstract the water of the Fithie, or of the combined stream of the Dighty and Fithie, or to retain and store the same, and interfere with the accustomed and continuous flow of the said stream or streams, interdict should be pronounced as craved. (4) The respondents having, by their operations complained of, materially increased the pollution of the combined stream of the Dighty and Fithie, to the loss and injury of the complainers, interdict should be pronounced as craved."

The respondents pleaded—“(5) The respondents' operations *in alveo* having been confined to their own side of the *medium flum*, and having been of such a nature as could not by possibility affect either the bed of the river or the flow of the water, the complainers are not entitled to complain of the same. (6) The whole water drawn by the respondents being returned by them to the stream at a point higher up than where it is drawn, and before the river leaves the respondents' property, the respondents are entitled to continue the use of the water as presently possessed by them. (7) The respondents' operations having no effect whatever in increasing the pollution of the water passing the complainers' properties or works, the Note of Suspension ought to be refused. (8) The complainers are not entitled to complain of the polluted state of the Dighty, in respect that it has been polluted by public works for more than forty years, and it is now polluted by complainers and others along its entire course from below the Lochs of Lundie to the sea.”

Upon 19th March 1889 a remit was made to Mr William Allan Carter, C.E., to examine the works complained of, to prepare plans of the *locus*, and to report, and upon 21st May 1889 the Lord Ordinary pronounced the following interlocutor:—“On caution, passes the note, and meantime interdicts, prohibits, and discharges the respondents, and all others acting with their authority, from using the conduits, aqueducts, or *opera manufacta* mentioned in Mr Carter's report, or any of them, for the purpose of withdrawing water from the stream or streams mentioned in the note of suspension, and conducting the same into the tanks or reservoirs at the respondents' works, or from erecting or using any similar conduit, aqueduct, or *opus manufactum* for the said purpose.

Upon 14th June 1889 the record in the note of suspension and interdict was closed and a proof allowed.

The import of the evidence as to the quantity of water withdrawn, the additional pollution, and the effect of the

respondents' operations upon the flow and quality of the Dighty, sufficiently appears from the Lord Ordinary's note, and from the opinion of the Lord Justice-Clerk.

The evidence as to whether the box was an encroachment upon the lands of the complainers, Robert M'Gavin and Douglas Drummond Dick, or either of them, as being beyond the *medium flum* of the Dighty, was conflicting, the skilled witnesses differing as to the method to be employed in determining the line of the *medium flum* at that point.

For the complainers Mr George G. M'Laren, surveyor, Dundee, deponed—“In judging of the *medium flum* of the stream, I find that it passes through the existing box, in my opinion. In ascertaining the *medium flum*, I would take the average centre between the two banks for a considerable distance up-stream and down-stream, drawing a line through those points until they joined. In the present case you have an artificial interference with the natural condition of the stream—in the shape of the pier of the bridge. . . . In taking the *medium flum* where there is such an obstruction as that, you may either eliminate the artificial obstruction and take what the course of the stream would have been but for it, or you may take it as it is there. I have shown the *medium flum* here on the assumption that the pier was not there, which in my opinion is the fair way to take it. . . . In order to ascertain the point where the *media fla* of the two streams join, assuming the pier of the bridge is to be entirely eliminated, I should think the *medium flum* of the Fithie would pass through and join the Dighty at a point to the eastward of the bridge altogether. . . . Again, supposing the bridge is there, I should take the *medium flum* of the Fithie through the north arch entirely, it is the natural flow of the Fithie. In the same way I adhere to the *medium flum* of the Dighty as I have shown it on the plan. They would not join till the two streams were quite united below the bridge, and then I would start a new *medium flum* for the combined streams.”

Mr James M'Laren, surveyor, Dundee, deponed—“In point of fact I ascertain the *medium flum* above and below, and unite them as if there had been no such thing as the pier of the bridge there. I would consider that to be the correct way of ascertaining the *medium flum*. That being so, the proper *medium flum* passes through the existing box. . . . The line representing the *medium flum* of the Fithie goes quite straight. If you straighten the *medium flum* of the Dighty it will meet that of the Fithie very near the centre of the box. I can conceive no reason for making the *medium flum* of the Dighty trend northwards except some idea of the cut-water of the bridge being somehow to be taken as the centre of the stream, which I think is erroneous, because practically the Dighty flows all through the one arch.”

Mr G. Miller Cunningham, C.E., deponed —“I understand the *medium flum* is to be determined by taking the average width of

the waterway for some distance up and down the stream in its ordinary flow. In doing so I do not take artificial encroachments into consideration, such as watering-places for cattle, or jetties projecting out into the stream. In fact, it is just an average taken in sections of the stream, and the longer stretch you can get the better. I should not consider a bridge as interfering with the *medium filum*, but would take the flow of the water on the assumption that the bridge was not there. In my opinion the red line upon plan No. 67 correctly indicates the *medium filum* of the Dighty. It strikes through the existing box at A. Where there is a junction of two streams as here, each stream has a *medium filum*. (Q) How would you deal with the part of the water after you have passed the angle of land between the two streams?—(A) I would lay down a *medium filum* for the Fithie in the same way as that for the Dighty until it meets the *medium filum* of the Dighty. Until the two have met I consider there could not be a single *medium filum* for the stream. I think the only way when you have two streams joining is to take their *media fila*, and prolong them till the one meets the other."

For the respondents Mr W. Allan Carter, C.E., deponed—"I prepared a plan on which I laid down what in my opinion is the correct line of the *medium filum*. I show the box, marked A, with its connections, to the south of the *medium filum*. I arrived at the *medium filum* in this way—Going a certain distance up the Dighty westward, I divided what appeared to me to be the natural and normal bed of the stream, putting the *medium filum* in the centre of it. I took a central point a short distance before I came to the spit of land at the south-east corner of Mr M'Gavin's property, and took a central point there again, running right across to the southern bank, and I drew in my line between those two points. Then, going further east, having no bank to measure from opposite the mouth of the Fithie, the next fixed point I was able to obtain was the centre of the pier of the bridge—that is, the centre of the available waterway between the abutments of the bridge. I carried my line through the centre of that pier, dividing the bridge into two equal parts. I have carried my *medium filum* no further eastwards. It would have made no difference if the bridge had had a single span. It is a mere accident that my line happens to come to the point there."

The Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Declares the interdict formerly granted perpetual: Ordains the respondents forthwith to remove the tanks, boxes, pipes, drains, or other *opera manufacta* specified in the eighth head of the prayer of the note, and to restore the *alveus* of the stream to the condition in which it was prior to the respondents' operations, and that at the sight and to the satisfaction of Mr William Allan Carter, C.E., Edinburgh: *Quoad ultra* refuses the note, and decerns: Finds the complainer entitled to expenses, subject to modification, &c.

"*Opinion*.—It is necessary in disposing of this case to distinguish between the complainers; their legal rights in the water in question are different, as also to some extent are their grounds of complaint.

"The complainer Mr M'Gavin is the proprietor of land on the Dighty and Fithie waters *ex adverso* of the respondents' land. He complains of the respondents' operations, on the ground that they are (1) operations *in alveo*, and therefore illegal; but at all events (2) that they are operations on his side of the *medium filum*, and amount to a trespass on his property.

"The first of these grounds appears to me to be too broadly stated. I cannot hold that every operation *in alveo* is illegal simply because it is an operation *in alveo*. The authority chiefly relied on by the complainers—*Morris v. Bicket*, 2 Macph. 1082, *appd.* H.L. 4 Macph. 44—does not support the complainers' contention as put. It was decided in that case that no riparian proprietor is entitled to make any erection *in alveo* which affects prejudicially the common interest in the flowing water, or from which such a result might reasonably be apprehended. But it was distinctly recognised both in the Court of Session and in the House of Lords that there might be operations *in alveo* to which a riparian proprietor could not successfully object. Thus the Lord Justice-Clerk said (2 Macph, 1089)—'If it could be shown that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—in *emulationem vicini*—not under any apprehension of danger to himself or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line, . . . I am not prepared to say that I could hold such a work to be illegal;' and in this view Lord Neaves concurred. The Lord Chancellor observed (4 Macph. (H.L.) 49)—'It seems to me to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course, but anything done *in alveo* which produces no sensible effect upon the stream is allowable.' These several opinions, which were quoted and approved of by the House of Lords in the case of *Colquhoun's Trustees v. Orr Ewing & Company*, 4 R. (H.L.) 116, are quite applicable to the present case so far as I am now dealing with it. The respondents' operations do no injury and threaten no injury to Mr M'Gavin's rights. The flow of the water *ex adverso* of his lands is not interfered with to his detriment, the *alveus* is to all practical effects the same as if the respondents' operations had never been performed, and nothing is taken from the river which (in a question with Mr M'Gavin) the respondents may not legally take.

"The second question of complaint by Mr M'Gavin is of a different kind. He alleges that the respondents have in their operations crossed the *medium filum* which is his boundary, and trespassed upon his property. If this is established, then it does not matter whether the respondents' operations are *innocue utilitatis* or not;

the complainer is entitled to have them removed. I have experienced considerable difficulty in dealing with this question of fact. The witnesses differ as to what is the *medium filum* at the place where the operations in question have been executed, and I refer to their evidence and the plans in process as showing their different views, which I could not hope to make clearer by any resumé of my own. The result, however, is this—If the complainers' witnesses are right, the respondents have trespassed beyond the *medium filum* to the extent of about nine inches; but if the respondents' witnesses are right, the respondents' operations are just about the same number of inches within their own line. The difference between them seems to arise in this way—Mr M'Laren takes the *medium filum* of the Dighty at a certain point above the inflow of the Fithie, and he produces that line in the course of the Dighty's flow without regarding the fact that the Dighty becomes wider just as it approaches the Fithie. Mr Carter, on the other hand, starting from the same point and with the same line as Mr M'Laren, makes his line trend somewhat northward just before or at the inflow of the Fithie, thus giving effect to the increased width which the Dighty has attained at that point.

"After a good deal of hesitation, and contrary to my first impression, I have come to be of opinion that Mr Carter's line of the *medium filum* of the Dighty west of the bridge is the right one. I think he errs to some extent in carrying his line straight through the pier of the bridge instead of making it trend somewhat south from that point. But it is of no importance to this case what is the *medium filum* when the bridge is reached, the site of the respondents' operations being west of that point.

"I am of opinion, therefore, that the complainer Mr M'Gavin has failed to establish either of the grounds on which he complains of the respondents' operations.

"The other complainers are riparian proprietors on the Dighty below the respondents. So far as the proof goes, they are not all equally interested to complain of the respondents' proceedings. The tenants and proprietor of the Panmure Bleachfield seem to have most interest, and in fact their complaint really constitutes the case I have to try so far as the lower proprietors are concerned. To appreciate the complaint made by the lower proprietors it is necessary to advert to some facts not yet noticed. The Dighty, which forms the northern boundary of the respondents' land, has been used from time immemorial, and is now used, for the purposes of public works, chiefly bleachfields, of which there are several above the respondents'. The water of the Dighty consequently, as it reaches and passes the respondents' works, is very impure. On the north side of the Dighty, and opposite the eastern extremity of the respondents' land, the Fithie, a pure natural stream, joins the Dighty, the volume of the Fithie being equal to from one-third to one-half the volume of the Dighty. With

the view of obtaining some of the pure water of the Fithie for the purposes of their works the respondents executed the works now complained of, and which are described in the complainers' fourteenth statement. By means of these operations the respondents carry back to their works (about quarter of a mile distant) the pure water of the Fithie, or perhaps it would be more accurate to say the combined water of the Dighty and the Fithie in an almost pure condition. This water is used by the respondents in the several processes of their bleachfield, and is ultimately returned to the Dighty at a point considerably higher than that at which it is abstracted from the stream. In these circumstances the complainers aver (1) that the respondents intercept the natural flow of the Fithie, and impound its waters in their storage ponds; (2) that but for the respondents' operations the whole water of the Fithie would in its natural flow, and at a point far below the respondents' works, mingle with the Dighty, and thus reduce by dilution and oxygenation its impurity; and (3) that these operations are injurious to the works at Panmurefield.

"The respondents' answers to these complaints are (1) that they take the water in question at a point *ex adverso* of their lands, and restore it to the stream at a point also within their lands; (2) that the quantity so taken is not a material part of the volume of the Fithie; (3) that although the water is not restored in as pure a condition as that in which it is taken, yet, as restored, it does not add to the pollution of the Dighty; and (4) that its oxygenating influence as restored is not decreased.

"On a careful consideration of the proof, I am satisfied that the respondents do by their operations interfere with and divert the natural flow of the Fithie water, and that what would in natural course pass down the stream is intercepted, and carried back to the respondents' works and there impounded, although the impounding is not maintained for any lengthened period. The second and third of the complainers' averments, as I have stated them above, are, I think, clearly established.

"I am quite satisfied that the water abstracted by the respondents and carried back to their works is a large and material portion of the volume of the Fithie, and on this matter, both as to the quantity actually taken and the quantity which might be taken by means of additional pumping, I have had no difficulty in accepting the evidence of the complainers' witnesses in preference to that of the respondents' witnesses. Indeed, the respondents' principal witness on this subject—Mr Blackadder—appears to me to have gone quite wrong in his mode of estimating the flow and volume of the Fithie. Then as to the question of additional pollution, it may be—and appears to be—the case that the aggregate quantity or weight of chemicals now used by the respondents and discharged into the river does not exceed what they have been in the habit of so using and discharging for several years. But it is the fact nevertheless

that water which they take into their works in a comparatively pure state is discharged in an impure state, and of this the lower proprietors are entitled to complain, seeing that it is their right to have the water of the stream sent down to them not diminished in quantity or deteriorated in quality. I think the pollution is increased by the respondents' operations in two ways—(1) They take from the stream water that is almost in its natural purity, and return it in a dirty and polluted condition; and (2) the more pure water they take from the Fithie and use in their bleaching processes, the more do they destroy or weaken the purifying influences of that water on the lower part of the stream. On this matter there is the real evidence that on many occasions, while the defenders' operations were at work abstracting the water of the Fithie, the tenants of Panmure Bleachfield had to stop their work on account of the bad quality of the water coming down to them. They had never had to do so before the defenders' operations were executed, and they have not had to do so since the defenders' operations were stopped by the interim interdict granted in this case.

"I cannot grant interdict in terms of the first and second heads of the prayer of the note, because that might be interdicting the respondents from performing acts competent to them either in respect of common law right or prescriptive right, such as the restoring of the *alveus* altered by an extraordinary flood to its previous condition, or by removing banks silted up which had the effect of making the water regorge on their wheel. The respondents do not maintain any right to put down a tank or drain to the north of the *medium filum* of the Dighty, and therefore interdict under the third head of the prayer is not called for. Interdict under the fifth head I cannot give as craved, because the respondents are entitled to take the water of the Dighty as it passes their works for the purposes thereof, although they are under obligation to restore it; and interdict under the eighth head is plainly what the complainers have no right to, looking to the admitted use of the Dighty for more than the prescriptive period. *Quoad ultra* I shall grant the prayer of the note.

"The complainers will be found entitled to expenses, but subject to some modification on account of the expense incurred relative to the question with Mr M'Gavin on which the respondents have been found to be right."

The respondents reclaimed, and argued—A man was entitled to do anything he liked with a stream passing his property provided he did not alter the flow or the quantity or the quality of the water to the detriment of the lower heritors. It was virtually admitted here that the same quantity of water was returned as was withdrawn, but it was said the flow was interfered with by the *opera manufacta* and by the system of impounding. The former were below the bed of the stream, and could have no effect; the latter merely regulated the return of

the water. The cases of *Morris v. Bicket*, *Colquhoun's Trustees*, and the *Duke of Roxburghe*, relied on by the other side, were all cases of erections in the *alveus*, which was not the case here. The flow always had been intermittent, because the practice of impounding had been practised in the Dighty for more than the prescriptive period by all the bleachers. They had made no change. As to pollution, the Dighty was given up to bleaching, and was so thoroughly polluted that their small additional pollution could make no appreciable difference on its quality. Besides, they had not discharged more polluting matter since the box was put in than they had done previously. The line of the *medium filum* was correctly laid down by Mr Carter, and they had drawn Dighty water from their side of that line.

Argued for the complainers—The box was an illegal *opus manufactum*. It was also an encroachment, because it was beyond the *medium filum* as correctly laid down by their witnesses. The water was only nominally drawn from the Dighty; it was really drawn from the Fithie, which had hitherto been a pure stream. It was not therefore returned undeteriorated in quality. Further, the flow was affected both by the *opera manufacta* and by the system of impounding. Although the same quantity might be returned within twenty-four hours as was withdrawn during that time; the withdrawing, owing to the system of pumping, might be confined to less than half that time, the discharging spread over the whole time—*Lord Blantyre v. Dunn*, January 28, 1848, 10 D. 509; *Morris v. Bicket*, May 20, 1864, 2 Macph. 1082, and July 13, 1866, 4 Macph. (H. of L.) 44; *Earl of Zetland v. Glover Incorporation of Perth*, January 31, 1868, 6 Macph. 292; *Laird v. Reid*, March 14, 1877, 9 Macph. 699; *Colquhoun's Trustees v. Orr Ewing & Company*, January 26, 1877, 4 R. 344, and July 30, 1877, 4 R. (H. of L.) 116; *Duke of Roxburghe v. Waldie's Trustees*, February 18, 1879, 6 R. 663 (Lord Justice-Clerk's opinion); *Robertson v. Foote & Company*, July 16, 1879, 6 R. 1290 (Lord Justice-Clerk's opinion).

At advising—

LORD JUSTICE-CLERK—The respondents in this case carry on a bleaching-work upon a stream called the Dighty, somewhere in the neighbourhood of Dundee, and there is no doubt that in carrying on that business from time immemorial they have been in the practice of polluting the stream of the Dighty. But it appears that some little time ago they proceeded to make certain alterations in their mode of conducting their works, and that these alterations were made in order to improve the supply of clean water for the purposes of their manufacture. In short, they made a real change upon the state of matters which had existed before. It was done in this way—At some distance below their works a stream called the Fithie runs into and joins the Dighty, and from that point the stream has the name of the Dighty only. Near the point

of the junction, and at such a place as would enable them to catch the water from the Fithie before it had mingled completely with the water of the Dighty, the respondents put down a box with some apparatus in it by which they drew off the water, getting thus the clean water which had come down the Fithie. The levels from the works down to this point give a very slight fall towards the junction of the Dighty and the Fithie, from the respondents' works; and they were enabled by gravitation and by using a sunk well at their works to bring that water up stream towards their works, and to put it into this sunk well. They then, as they required it, pumped it into their works, put it through their works to perform the processes required, and returned it to the stream. Now the complainers, who are lower heritors upon the stream, say that the result of the respondents' operations has been that the Dighty, as it comes down to them—the complainers—is rendered more foul, at least at certain times, than it was before.

Now, upon a full consideration of the proof, I have come to the conclusion that the respondents were not entitled to place that box and apparatus in the stream and to intercept the clear water and to deal with it as they have done. In coming to that opinion I do not allow anything to turn upon the question of where the exact *medium filum* of the Dighty at the junction between it and the Fithie really is. I think that is a very delicate and a very difficult question. I think that though we had the evidence of fifty skilled engineers upon each side it might still be very difficult indeed to decide where that *medium filum* was. But the opinion which I have formed upon the case does not depend at all upon the question whether the box is placed on the side of the *medium filum* to which the respondents have right, or beyond that *medium filum*; because the view I take of the case is this—While it is quite true as matter of law that the respondents cannot be interfered with in carrying on their works, as long as nothing is done by them to the stream, except what has been borne without complaint and without any process of law by the lower proprietors in time past, it does not at all follow that that entitles them to start a new mode of dealing with the stream, nor does it follow that even if that mode does not add to the pollution of the river in quantity, therefore it is legal. It is quite clear that, in the first place, this new mode of dealing with the stream amounts to the setting up of a regular work—an *opus manufactum*—in the bed of the stream, by which the respondents succeed in abstracting the water from the stream at a considerable distance below their works, and therefore interfere with the flow of the stream at that point as it had not been interfered with before. I think it is also quite plain that to do that, so as to give themselves any beneficial result, it is absolutely necessary that they should more or less impound the water that they have so checked and abstracted. And it is the fact

that they keep the impounded water for a certain time and discharge it into the stream when they please, but in a polluted state. Now they had no right to do that at the time at which they began these operations; and even if it were a fact that by doing it they did not at the time pollute the stream more than it had been polluted before, I should hold that they were not within any right they had in performing that operation.

But although that, in my judgment, would be quite sufficient for the disposal of the case, I think there is another point in the case which is conclusive against the respondents in the interdict. I think it is quite clear upon the proof, whether it be the fact or not that no more work is done at the respondent's bleaching works than used to be done, that the effect of their operations upon the bed of the stream is that at certain times the Dighty where it passes the respondents' works is rendered more filthy than it was before, and one can perfectly understand that that should be the case. There may not be more work done in the respondents' works than used to be done, and therefore it may be a reasonable assumption that the quantity of polluting matter which in a given time will pass down the stream may not be one whit greater than it used to be. But it may also be true, and in my opinion it is the effect of the evidence, that the change of mode which they have adopted in dealing with the water and abstracting the water which they require for their works has resulted in this, that the quantity of polluting matter which passes down that stream is at times much larger than it used to be, and at times renders the flow of water past the complainers' works so filthy that they are unable to use it for the purposes of their manufacture as in past times they had always been able to use it.

Therefore both upon the general question as to whether the works which the respondents executed here some time ago are works which they are legally entitled to execute, and upon the question of the actual effect of these works upon their neighbours further down the stream, I am of opinion that the Lord Ordinary's conclusion is right, and that his interlocutor ought to be adhered to.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I think the respondents in the interdict acted illegally in taking pure water from the river, and in returning it in a foul condition so as, I think, to increase the pollution to the inferior heritors. I concur that the interlocutor of the Lord Ordinary should be adhered to.

LORD LEE—I agree. I may add with reference to what the Lord Ordinary has said, that I wish to reserve my opinion upon the question whether this was not an operation *in alveo* affecting the flow of the water and therefore illegal.

The Court adhered.

Counsel for the Complainers and Respondents—H. Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondents and Reclaimers—D.-F. Balfour, Q.C.—Guthrie. Agents—Henderson & Clark, W.S.

Saturday, May 31.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

KENNEDY AND CURRIE v. WISE.

Process—Reclaiming Note—Allowance of Proof—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 27 and 28—Act of Sederunt 1870, sec. 2.

Held that an interlocutor disposing of the pursuers' title to sue, and of the competency of the action, but not disposing of the relevancy of the action, and "appointing the pursuers to lodge the issues proposed for the trial of the cause" on a day fixed, was not an interlocutor importing an allowance of proof, and therefore could not be reclaimed against within six days without the leave of the Lord Ordinary.

Upon 13th September 1889 Malcolm Kennedy and Lachlan Currie, fishermen at Bowmore, in the island of Islay, raised this action against Major Lovat Ayshford Wise, tenant of and residing in Islay House, Islay, for recovery of certain nets alleged to have been wrongfully seized on 22nd July 1889 by the defender's gamekeeper, or alternatively for £25 sterling, the value of the nets.

The defender averred that the nets had been used for poaching salmon within his boundaries, that he had instituted a prosecution against the pursuers in the Sheriff Court, Inverary, that warrant had been granted to serve the complaint on 26th September, and on 22nd October the pursuers were found guilty of salmon poaching and fined, their nets being declared forfeited.

The defender averred that under the Acts 9 George IV. cap. 39, and 7 and 8 Vict. cap. 95, he was entitled to seize and detain the nets when he found them used for poaching.

The defender pleaded—“(1) The action is irrelevant, and ought to be dismissed. (2) No title to sue. (3) The nets having been forfeited by order of the Sheriff-Substitute, the conclusions for their delivery, or alternatively for their value, are incompetent. (4) The defender being entitled to seize the said nets and detain them till the result of the prosecution was known, and the nets having now been forfeited by order of the Sheriff, should be assolvized from the conclusions of the summons.”

Upon 14th March 1890 the Lord Ordinary pronounced this interlocutor—“Repels the second, third, and fourth pleas-in-law for the defender as pleas to exclude the action, reserving their effect on the merits, and decerns; appoints the pursuers to lodge the

issue proposed for the trial of the cause, &c.

“*Opinion.*—In this action, the summons in which was signed on 13th September 1889, for delivery, or failing delivery for the value of nets wrongfully taken possession of, and for damages in consequence of their illegal seizure, it appears to me that the pursuers have stated a relevant case, and apparently when the action was raised there was no ground for contesting their right to have their action tried. The defender may have been able to establish a complete defence, but I do not see that he had any plea by which he could have avoided a trial of the cause. But it appears that after the action was raised, the defender lodged a complaint against the pursuers in the Sheriff Court of Argyllshire at Inverary, charging them with an offence under the Salmon Fisheries Act, 7 and 8 Vict. cap. 95, on the occasion in question, and praying for infliction of the penalties provided by the Act, and for forfeiture of their nets; and on 11th October the Sheriff-Substitute, over-ruling an objection founded on the subsistence of this action, and after a proof, convicted the pursuers of the offences charged, imposed a penalty, and declared the nets to be forfeited.

“I understand that the nets so forfeited are the same nets for delivery of which, and failing delivery for the value of which, this action concludes.

“The defender now pleads this conviction as a conclusive answer to the present action, which entitles him to absolvitor without inquiry.

“Had the prosecution been instituted and the conviction obtained before this action was raised, I should have felt much difficulty in sustaining the action, and should have considered the cases of *M'Lellan v. Miller*, December 7, 1832, 11 S. and D. 187, and *Gilchrist v. Anderson*, December 17, 1838, 1 D. 37, quoted for the defender, especially the former, as weighty authorities against it. But it appears to me that the fact that this action was brought before the prosecution was instituted makes an important difference. The institution of this action may not be a bar to criminal prosecution, but I cannot hold that after a question has been duly submitted to the Civil Court the defender can institute a summary prosecution, and present a conviction which he has obtained in it as a conclusive solution of the questions raised in the civil action. If that could be done at this stage of the action it would be equally competent at any future stage, at least before judgment. But I do not know of any authority for pressing a summary conviction to that extent. Besides, I cannot ascertain from the procedure following on the complaint or from the conviction, assuming it to be correct, whether or not the defender was justified in seizing the pursuers' nets *brevi manu*, and in withholding them. It appears to me, therefore, that the pleas put forward to exclude the action must be repelled. The defender may have a complete defence, and the fact that the pursuers have been convicted may favour the conjecture that he has, and