does not arise from the mode of fishing or the way in which the appliance is used, but from the fact that the stream is in this case somewhat different in strength and action from the stream in *Allan's* case It seems to me, however, that if we take the opinion delivered by Lord Westbury in *Hay* v. *Magistrates of Perth* and apply it to this case, we shall find that what was done here was in no way in contradiction to what was laid down by his Lordship as being the essential elements of fair river fishing, of which the symbols are net and coble. His Lordship says (4 Macq. App. 546)—"The proper conclusion is that the 'net and coble' is merely symbolical of the proper legal form of fishing, that legal form of fishing being by a net which is not to be fixed or stented, or in any manner settled or made permanent in the river, but is to be used by the hand, and is not to quit the hand, but is to be kept in motion during the operation of fishing."

Now, in *Allan's* case it is certain that the way in which the net was kept in motion was by the action of the tide, or of the stream on the net. In this case, also, there is no doubt that the motion imparted to the net is imparted by water, and by water alone. I suppose that a net of this kind stretched in absolutely still water would be ineffectual, and though the stream and tide may cause the net not to swing round in exactly the same way as it did in *Allan's* case, still the effect of the tide and stream is to keep the net moving always, and to prevent its remaining in one fixed place across the river.

These then being the facts, I am unable to see any distinction between this case and *Allan's* case. If the question were still open it might be a difficult one to decide, and I cannot say that my opinion would not lean in the direction of the decision in that case, because I think it was consistent with the deliverance of Lord Westbury which I have quoted. But I think it is sufficient for us in the decision of this case to find that there is no substantial difference of any kind between the facts of the two cases, and on that ground to hold that we must adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I concur in adhering to the Lord Ordinary's interlocutor. I only wish to say this, that I do so solely because of the judgment in the case of *Allan's Mortification*. I am not prepared to say with the Lord Ordinary that I agree with the opinion delivered by Lord Shand in that case. I think the decision is not free from doubt, and I should have been very glad if your Lordships had seen fit to reconsider the subject of it in this case very carefully. I only therefore wish to guard myself against our decision being thought —should this or any other case go elsewhere — against it being thought that we are adding by our present judgment to the authority and weight of the case of *Allan*. I think we proceed—at least I do—on it entirely because it would not seem to your Lordships on the whole to be fitting for us to review that decision in the present case. I should like to say that I do not approve of any judgment of any Division as conclusive of Scottish law. If it should happen to be thought wrong on further consideration either by the same Division or another Division, I am not of opinion that it is necessary to summon the whole Court, or that nothing but an Act of Parliament will correct an error that has been fallen into. The series *rerum judicatorum* would cease to be valuable if as soon as a judgment was pronounced the matter was to be considered as conclusively settled; and it is a matter of discretion in the circumstances whether, in considering a point which has been a subject of decision either by ourselves or by the other Court, we should call in a larger number of Judges to consider it or not. But here, clearly guarding against being supposed to add anything to the weight of that decision by our formal adherence, or that we are doing more than simply adhering, I concur in the Lord Ordinary's judgment being affirmed.

LORD RUTHERFURD CLARK—I am of the same opinion, and think that we should adhere to the Lord Ordinary's interlocutor. I only wish to say further that I proceed solely upon the case of *Allan's Mortification*, and that like Lord Young I do not think that case is entirely free from doubt.

The Court adhered.

Counsel for the Reclaimers—Sir C. Pearson—Ure. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Respondents—Jameson—Guthrie. Agents—H. G. & S. Dickson, W.S.

Tuesday, November 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

STURROCK *v.* WELSH & FORBES.

Reparation—Wrongous Use of Diligence.

A party who had been charged to make payment of the sums contained in a decree for expenses obtained against him in an action of maills and duties, brought an action of damages against the chargers, averring that before they moved for said decree against him they had entered into an agreement under which, in consideration of certain trust-deeds granted by him for behoof of his creditors, they discharged all "personal claims" against him, and, *inter alia*, the claim for expenses in the action of maills and duties. The defenders founded upon the fact, that although they had given the pursuer due notice of their intention to move for said decree, he had not appeared to oppose their application, and pleaded that the action was irrelevant. It appeared

from certain correspondence produced in the case that the pursuer had acted on the view, that in consequence of the agreement libelled he had no interest entitling him to oppose the decree being granted, as it could only be the foundation of a claim for a ranking on his estate.

Held that the view upon which the pursuer had acted was reasonable in the circumstances, and that he was entitled to an issue on the question whether the charge executed by the defenders was wrongful and in breach of their agreement with him.

John Sturrock was the proprietor of certain heritable properties in Edinburgh and Leith, and over certain of these properties the North British Investment Company held a bond and disposition in security for £1500. Sturrock having failed to pay regularly the interest due on this bond, the investment company in November 1886 raised an action of mailis and duties in the Sheriff Court of the Lothians against him and the the tenants of the properties conveyed in security under the bond, and on 3d February 1887 the Sheriff-Substitute decerned against the pursuer, and found him liable in expenses. Sturrock thereupon appealed to the Sheriff. In these proceedings against Sturrock Messrs Welsh & Forbes, S.S.C., who themselves were heritable creditors of Sturrock, acted for the investment company, and during the course of the proceedings negotiations were being carried on between Sturrock and Welsh & Forbes, in which the latter acted both for themselves and for the investment company.

Pending the result of these negotiations, the hearing of the appeal was delayed on the application of Sturrock's agents, with consent of Welsh & Forbes. The negotiations resulted in Sturrock granting two trust-deeds for behoof of his creditors. In one of these deeds he conveyed certain of his properties to Richard Brown, C.A., for behoof of the creditors holding securities thereover, and in the other he conveyed certain other of his properties to A. Davidson Smith, C.A., for behoof of the creditors holding securities over them. Thereafter on 14th April 1887 Welsh & Forbes wrote to Sturrock as follows:— "We hereby undertake, with reference to the trust conveyances executed by you to-day in favour of Mr Richard Brown and Mr Davidson Smith—1. That they shall not be binding upon you until they are formally acceded to by Messrs Burness, the British Linen Company Bank, the North British Property Investment Company, and ourselves. 2. That when the deeds are so acceded to we shall deliver to you discharges by the North British Property Investment Company and us, of their and our securities over—(1) your dwelling-house at Wardie; (2) the portion of the Marjoribanks superiority sold by you to Mr Byers; (3) discharge of the poinding and of the charge of payment upon our bond; and (4) discharge of arrestments in the action at our instance. Upon exchange of these documents all personal claims against you at the instance of the investment company or ourselves shall be held as discharged, and all claims at your instance against said company or against us shall be held as discharged. The balance due to the investment company and to us has been left blank in the schedules attached to the trust-deeds in the meantime."

On 29th November 1887 Welsh & Forbes intimated to Sturrock by letter that the action of mailis and duties had been put to the roll, and that in the event of no appearance being made for the defender they would move to have the appeal dismissed and the interlocutor of the Sheriff-Substitute affirmed. On 7th December the Sheriff, on their motion, dismissed the appeal with additional expenses. The pursuer's account of expenses was taxed, notice of the diet fixed by the Auditor having been duly sent to the defender, and thereafter Welsh & Forbes intimated to Sturrock their intention to move for approval of the Auditor's report, and for decree in name of the agent-disburser, and on 16th December 1887 the Sheriff granted decree against Sturrock in terms of said motion. In none of these proceedings was any appearance made for Sturrock.

On 27th October 1888 Welsh & Forbes served upon Sturrock a charge upon said decree for expenses. Sturrock then brought a suspension of the charge in the Court of Session, and, after certain procedure, the Lord Ordinary (WELLWOOD) on 12th June 1889 suspended the charge with expenses, on the ground that the claim for expenses in the action of mailis and duties was "a personal claim" within the meaning of the agreement of 14th April, and was thereby discharged. That judgment became final.

On 14th May 1890 Sturrock raised the present action against Welsh & Forbes for payment of £500 as damages, on the ground that the charge executed upon the decree pronounced in the action of mailis and duties was wrongous and illegal.

The pursuer founded upon Welsh & Forbes' letter of 14th April, above quoted, and averred—"The said letter expressed the terms of the arrangement upon which the pursuer consented to grant the deeds in question, and, *inter alia*, that all personal claims *hinc inde* between the pursuer and the investment company and the defenders should be discharged. The conditions mentioned in said letter were all thereafter purified, and on 7th November 1887 the deeds, &c., in question were finally delivered, and the trust-deeds became operative. The foresaid agreement to discharge all personal claims against the pursuer then became absolute. . . . The defenders were duly warned that the pursuer relied upon the letter of 14th April 1887 as discharging their claim for said expenses (*i.e.*, in the action of mailis and duties), and that any proceedings in respect of same would be at their own risk. A copy of the correspondence passing between the parties is produced and referred to. No claim was made on the pursuer by the defenders in respect of said decree, and no intimation was made that he was liable for

payment of the sum therein contained until on or about 27th October 1888, when the pursuer was, without any preliminary warning, most illegally and unjustly served with a charge upon said decree."

The pursuer pleaded—"(1) The said charge being wrongous and illegal, the pursuer is entitled to damages as concluded for."

The defenders pleaded—"(1) The pursuer's averments are neither relevant nor sufficient to support the conclusions of the summons."

It appeared from certain correspondence produced in the case that when the pursuer received the intimation that the action of mails and duties had been enrolled in order to have the appeal dismissed, he enclosed it to Mr Brown, the trustee under one of the trust-deeds granted by him, as the party interested therein, and thereafter on 9th December the pursuer wrote to Mr Forbes, of Welsh & Forbes, in these terms—"I duly received your firm's notice of enrolment in this case, which I forwarded to Mr Richard Brown, the trustee. He returned it, but I did not get the notice back until after the case had been disposed of. I have also received your letter of this date, and relative account, which I am at a loss to understand. All personal claims at the instance of the investment company and your firm were held as discharged, and that was one of the conditions of granting the deed. I shall be glad, therefore, if you will let me know, at your earliest possible convenience, what is the meaning of your letter, and what position you take up in the matter." To this letter it appeared that no reply was sent.

The Lord Ordinary (KINNEAR) allowed the pursuer an issue in these terms—"Whether the defenders, having on or about 16th December 1887 obtained a decree against the pursuer for the sum of £28, 10s. 7d., on or about 27th October 1888 wrongfully charged the pursuer to make payment of the sums contained in said decree, to his loss, injury, and damage? Damages laid at £500."

The defenders reclaimed, and argued—The issue should be disallowed, and the action dismissed as irrelevant. Where a decree was competently obtained against a defender, after due notice to him that it would be moved for, such defender could not bring an action of damages on the ground that he had been illegally charged on said decree. It was the duty of the pursuer in this case to have appeared in the Sheriff Court, produced the discharge on which he relied, and opposed the motion that decree should be granted against him. He was responsible for the consequences of not having done so—*Aitken* v. *Finlay*, February 25, 1837, 15 S. 683; *Bell* v. *Gunn*, June 21, 1859, 21 D. 1008; *Ormiston* v. *Redpath, Brown, & Company*, February 24, 1866, 4 Macph. 488.

Argued for the pursuer and respondent—The pursuer having surrendered his estate to his creditors, could not object to decree being granted in the action of mails and duties, as such decree was a good decree of constitution against his estate. The intimation sent to him did not indicate that decree was to be taken against him personally. There was therefore no reason why he should attend the Sheriff Court in order to oppose the granting of the decree. The defenders had no right to put the decree in force against him personally. The pursuer was therefore entitled to the issue allowed by the Lord Ordinary—*Gibbs* v. *Edinburgh Brewery Company*, June 19, 1873, 11 Macph. 705; *Henderson* v. *Rollo, &c.*, November 18, 1871, 10 Macph. 104; *Smith* v. *Taylor*, December 8, 1882, 10 R. 291.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in holding that the pursuer is entitled to an issue substantially in the terms proposed by him in the issue which is before us. But that issue, I think, will be made much more specific and much more intelligible to the jury, if the wrong which is alleged against the defenders be specified more particularly. Therefore I took leave to suggest during the debate, that after the words "wrongfully charged" should be inserted the words, "in breach of the agreement contained in the letter of 14th April 1887." And further, I agree with the suggestion made by Mr Johnston in his reply, that the issue will be still further improved, if the letter itself is set out in a schedule appended thereto, as the Judge and the jury will then have before them the ground upon which the charge is said to have been wrongfully made.

Under the issue as so adjusted there will arise at the trial a question of law as well as a question of fact. The question of law of course relates to the construction of the alleged agreement, and that is a matter upon which at present I express no opinion, and I suppose none of your Lordships intend to either. It will be for the presiding Judge to direct the jury in that respect. The question of fact raised upon the issue as so adjusted will turn mainly, I should think, upon whether the pursuer has in any way debarred himself from making his claim now, in consequence of his not appearing in the Sheriff Court to oppose the decree being pronounced against him in the terms of which he had notice.

Now, upon a review of the correspondence, which is in print, between the defenders and the agents for the pursuer and the pursuer himself, I think the position taken by the pursuer was a perfectly reasonable one in the circumstances. The pursuer came to the conclusion that he could not very well oppose a decree going out against him in the action of mails and duties, because the action of mails and duties, as is usual in such cases, concluded against him as debtor for payment of the expenses of the process. The position the pursuer seems to have taken was this—that as he was very much in the same position as a sequestrated bankrupt, having surrendered all his estate to his creditors, and put himself under trust, a decree taken out against him after the occurrence of that surrender in bankruptcy could be

nothing more than a ground of claim for an item in the process of distribution which was to follow. I think that was quite a reasonable position for him to take in the circumstances, and it is not necessary to give any opinion at present as to whether it is absolutely correct in point of law. I cannot hold therefore that the pursuer neglected any proceeding that he ought to have taken before the Sheriff in that action of mailis and duties. He might perhaps, if he had appeared, either have got the decree modified or reduced to a decree of constitution merely by inserting the words *cognitionis causa tantum*. That would have been substantially what he thought this decree would be, viz., a foundation for a ranking in the bankruptcy. But I do not think he did any injury to anyone by failing to appear, and I do not think he can be blamed in the circumstances for not going into Court and disputing the matter, which he must have done at his own cost, seeing that he was of opinion—and probably rightly of opinion—that the decree as it was actually issued was nothing more than a decree of constitution.

The defenders themselves also seem to have taken the same view of the subject originally, because, after they obtained this decree, they did not proceed to put it into execution as a decree against the pursuer personally. They delayed proceedings for about a year before taking any action under this decree. And at last when they did take action upon it the matter was raised—and I think quite competently raised—in a process of suspension before Lord Wellwood, in which the pursuer maintained that this decree could not be enforced against him personally, and that plea was sustained by the Lord Ordinary by an interlocutor which has now become final. His Lordship proceeded upon a construction of the agreement as is set forth in the note appended to his interlocutor. But whatever was the view of the Lord Ordinary upon that agreement—whether it turns out in the end to be sound or not—it at least put him in the position consistently with his own opinion of the law and the circumstances of the case, of granting relief to the pursuer from anything in the nature of personal diligence upon this decree.

Now, that being so, it appears to me that the pursuer has a perfectly relevant case. What may become of it in the end is another affair, because that will depend upon what is the construction ultimately adopted of the agreement in question. But his case as stated upon record appears to me to be entirely relevant. He says that this decree and the charge given upon it were in breach of that agreement. If he can satisfy the jury upon that question he will be entitled to a verdict.

LORD ADAM—In this case the defenders obtained a decree in the Sheriff Court against the pursuer, ordaining him to pay a sum of £28, 10s. 7d., being the amount of taxed expenses incurred in a process of mailis and duties in that Court. About a year after the date on which this decree was obtained, the defenders charged the pursuer to make payment of that sum. A suspension of that charge was then brought in this Court, which Lord Wellwood disposed of by granting suspension, and the present action is an action of damages brought against the pursuers in the Sheriff Court action for having executed the charge which has been suspended. The question accordingly is, whether or not the present pursuer is entitled to the issue he craves? and I agree with your Lordship that he is entitled to that issue.

I think, upon the authority of the case of *Aitken* v. *Finlay*, and the other cases that were quoted to us, that where a person has obtained a decree from a competent Court, and puts that decree into force by diligence and execution, he is not liable for damages thence arising, although it may afterwards turn out that there are grounds, or reasons, or objections, which might have been urged against the decree being granted at all. I think a person having a good ground of objection to a decree going out against him is bound to appear at the proper time and place and state that ground, and if he fails to do so the party putting the decree in force is not responsible. If I thought that this was a case of the kind to which these principles applied, I should be in favour of refusing the issue. But I do not think that is really the nature of this case.

The question which arises here is, whether the objections which are now stated to the enforcing of this decree are objections which the pursuer ought to have appeared and stated in the Sheriff Court before decree was granted? If he ought to have appeared and stated them, then perhaps an issue ought to be refused, That he might have appeared and stated them is one thing; that he ought to have appeared and stated them is another thing. If he had appeared and stated them his objection would have been that in accordance with an arrangement between him and his creditors the defenders in this action had discharged or agreed to discharge all personal claims against him, and that this was one of them, and that therefore decree should not go out against him. But he might probably have been met with the answer that though that was so, the defenders were entitled to have this claim constituted in order that they might rank upon it on his estate; and that being so, I have great difficulty in seeing why this decree should not have been granted in the terms in which it has been granted. I do not know whether such a form prevails in the Sheriff Court or not, but the Sheriff might, if he wished to be very careful, have granted the decree *cognitionis causa tantum*. But I hardly think that the pursuer ought necessarily to have gone forward and obtained this. I think that after what had passed he was entitled to think that that decree would be treated as a decree of constitution, and I am not at all clear, the pursuer having made over all his estate

for the benefit of his creditors, whether at this present moment it is anything more than a decree of constitution.

In these circumstances I am of opinion that the pursuer is not to blame for not having gone forward and objected to decree being granted in the terms in which it was granted. The ground accordingly upon which I think that this issue ought to be granted is that the objections now stated are truly objections to the decree being put in force, and not objections which ought to have been stated before the Sheriff.

LORD M'LAREN—I agree with your Lordship and Lord Adam. I consider that where a pursuer or a creditor has obtained decree for a sum to which he is not entitled, or for a larger sum than the debt to which he is entitled, he may notwithstanding proceed to enforce that decree, and no action of damages will lie at the instance of the defender if the defender was in a position to enter appearance in the original action, and successfully maintain the defence on which he has succeeded in having the decree suspended. Now the question in this case is, whether the grounds of suspension on which Lord Wellwood set aside the Sheriff's decision are such as might have been lawfully maintained by Mr Sturrock before the Sheriff when he received notice that the case would be enrolled for decree? That is a question of construction of the correspondence. It appears to me, on the whole, that both parties must have understood that the decree which the Sheriff was to be asked to pronounce was one in which Mr Sturrock had no personal interest. He says so himself plainly, and Messrs Welsh & Forbes say nothing to the contrary. I hold therefore that Mr Sturrock was not bound to appear before the Sheriff, and that he might reasonably assume that the decree to be taken was one which was not to be put in force against him, but was only for the purpose of constituting a claim for expenses against his estate, which he had made over for voluntary distribution. In these circumstances the question arises whether that decree has been wrongfully put into execution against the pursuer. The question whether it was wrongfully done is a matter for a jury. It is not to be assumed as clear that Mr Sturrock might and ought not to have appeared before the Sheriff and objected to this decree being pronounced. However, that is a matter on which either party may justify his action to the jury.

LORD KINNEAR concurred.

The Court approved of an issue in these terms—"Whether the defenders having, on or about 16th December 1887 obtained a decree against the pursuer for the sum of £28, 10s. 7d., on or about 27th October 1888 wrongfully, and in breach of the agreement contained in the letter printed in the schedule hereunto annexed, charged the pursuer to make payment of the sums contained in said decree, to his loss, injury, and damage?"

[The letter written on 14th April by Welsh & Forbes to Sturrock was printed in the schedule.]

Counsel for the Pursuer—H. Johnston—Salvesen. Agents—Sturrock & Graham, W.S.

Counsel for the Defenders — Sol.-Gen. Pearson — Craigie. Agents — Welsh & Forbes, S.S.C.

Wednesday, November 19.

SECOND DIVISION.

OVENS & SONS *v.* BO'NESS COAL GAS LIGHT COMPANY.

Reparation—Gaspipes Laid without Packing—Explosion—Fault.

In 1886 the Bo'ness Gas Company laid turned and bored pipes which admitted of packing with rope and lead at the joints, in forced earth and round a curve, without said packing. No accident took place for four years, when an escape of gas, followed by an explosion attended with serious consequences, occurred at one of the joints, probably through subsidence. *Held* that the company were in fault in not having packed the joints, and were liable in damages for the loss sustained by the explosion.

Question discussed — Whether they could have been liable although fault had not been established?

The Borrowstouness Coal Gas Light Company introduced in 1886 half-turned and bored pipes instead of spigot and faucet pipes. They chose pipes in which the joints were united by means of a wedge arrangement, which made caulking unnecessary. At the same time, the joints were so arranged as to allow of packing with rope and molten lead if desired. In their specification for the pipe-track the Bo'ness Coal Gas Light Company stipulated — "The pipe-track will be on an average two and one-half feet in depth, and wide enough to allow the pipes to be properly laid, and make all joint holes of sufficient size to allow joints of pipes to be well caulked home." The pipes were laid, but the joints were not packed.

On the morning of 29th November 1889 a serious explosion of gas occurred in or near the premises of Messrs Thomas Ovens & Company, chemical manufacturers and seed merchants, Bo'ness, whereby great damage was done to the same. The explosion was due to an escape of gas from one of the joints of the main pipe of the Bo'ness Coal Gas Light Company, which passes said premises. Thomas Ovens & Company brought an action against the Bo'ness Coal Gas Light Company for £258, 9s. 5d. in name of damages.

They averred that "having regard to the nature of the ground, and that there is a curve on the main at this point, great care