Thursday, March 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

DUKE OF BUCCLEUCH *v.* GILMERTON GAS COAL COMPANY, LIMITED.

River—Pollution—Mines and Minerals.

A proprietor sought to interdict the tenants of a colliery from discharging impure water from their workings into a burn which ran through his property, whereby the burn might be rendered unfit for its natural primary purposes or its amenity diminished. It was proved that for more than forty years successive tenants of the colliery had been in the habit of discharging the water from the workings into it, and that the water thus discharged into the stream had been so impure as to be unfit for use as drinking water by man. It was also proved that since the respondents' tenancy began they had worked a pit which had not been worked for a number of years, and which was nearer the burn than the pit worked by their immediate predecessors; that if the water was allowed to accumulate in this pit, it drained naturally into the burn, but that the pumping operations of the respondents had increased the pollution of the stream, so as to render the water unfit for primary purposes, other than that of supplying drink to man, for which it had been previously used. *Held* that the respondents were not entitled to discharge into the burn water pumped from their coal workings, whereby the burn in its progress through the complainer's property might be polluted and rendered unfit for its natural primary purposes other than that of supplying drink to man.

In 1886 the Gilmerton Gas Coal Company, Limited, entered into possession of the lands of Gilmerton Colliery, situated in the parish of Liberton and county of Edinburgh. Part of these lands was bordered by a stream called the Dean Burn, which afterwards passed through the policies of Dalkeith Park, belonging to the Duke of Buccleuch.

In 1892 the Duke of Buccleuch brought an action in which he sought, *inter alia*, to have the colliery company interdicted "from discharging into the burn, known as the Dean Burn, from their coal workings at Gilmerton Colliery in the parish of Liberton and county of Edinburgh, any water, impure stuff, or matter of any kind whereby the said stream or burn in its progress through or along the property of the complainer may be polluted or rendered unfit for domestic use, or for the use of cattle or for all its natural primary purposes or the amenity of the said stream or burn in any way diminished."

The complainer averred that the water of the burn had been suited for domestic and other primary purposes until it was polluted by the respondents discharging impure water into it. The respondents averred that the minerals under the lands in their occupation had been wrought for upwards of a hundred years, and the water from the workings had always been pumped into the Dean Burn, which was actually known as the Gilmerton Day Level Rivulet or Water Run, and that they had not increased the amount of water sent into the burn or rendered it more impure.

The Lord Ordinary allowed a proof, the result of which appears from his Lordship's opinion.

Upon 5th August 1893 the Lord Ordinary found that the respondents were not entitled to discharge into the Dean Burn water pumped from their coal workings at the said colliery, whereby the said burn in its progress through or along the property of the complainer might be polluted and rendered unfit for its natural primary purposes other than of supplying drink to man.

"*Opinion.*—I hold the following facts to be proved—The colliery now occupied by the respondents has been worked from time immemorial, and has always drained into the Dean Burn by means of a day level, which enters the burn near the Melville Kennels, a short way above the lands of the noble complainer. The respondents are at present working a pit called the Square Pit, from which they pump, on an average, 260 gallons per minute into the day level. The quantity of water finding its way from the day level into the burn is about 450 gallons per minute, and the balance of 190 gallons comes by gravitation from other parts of the workings.

"The earliest tenant in the colliery mentioned in the proof was a man of the name of Marshall, whose occupation lasted for several years prior to 1838, and during his time water was pumped into the day level from a pit called the Venture Fair Pit. After his lease expired the colliery lay for sometime idle, and then was occupied successively by Proudfoot, Ramsay, and Smellie, but no pumping of any consequence took place till 1870, when the Glasgow Iron Company entered into possession. Their occupation lasted for sixteen years, during which pumping was regularly carried on from the Venture Fair Pit, the Square Pit being at that time full of water. When the present respondents took possession in 1886 they emptied the Square Pit, deepened it by 30 fathoms, and have continued to pump water from it ever since. The water so discharged into the burn percolates from the surface through the mineral strata, and thereby becomes highly impregnated with oxide of iron. This iron is originally held in solution, but by exposure to air passes into suspension and is precipitated, both in the day level and after it reaches the burn, in the form of ochre. There can be no doubt that the bed and banks of the burn are reddened by this ochre during the whole of its course below the

day level, and that the water itself is often so turbid that the channel cannot be seen. In this respect it presents a marked contrast to the water above the day level, which although not possessed of a high standard of purity, and admittedly not fitted for human consumption, is yet comparatively clear and entirely free from ferruginous matter.

"So far the facts do not admit of much dispute. But the point on which the evidence is most conflicting is whether and how far this state of things has become aggravated since the respondents began their operations in 1886. I own that I have found this conflict very perplexing, but I have come to the conclusion that the evidence of witnesses like Inglis, Speedie, and Dobbie, who have had daily opportunities of observing the state of the water, is to be preferred to that of the numerous witnesses for the respondents, whose observation was of a much more casual sort. The latter say, in effect, that they have noticed little or no difference in the burn ever since they knew it. The evidence of the former, on the other hand, comes to this, that prior to 1886 the water of the burn was clear and tolerably pure, so as to hold fish, to be fit for watering plants, and even to be drinkable by cattle, except for a few days twice or thrice in the year, when it was as bad as it now is continuously. Their evidence is corroborated by that of Dunn, and other servants of the complainer, who say that prior to 1880 (when the Moorfoot water was introduced into the Dalkeith Gardens), the water of the burn was regularly used for watering plants, that trout were caught in it, and that it was occasionally drunk by the gardeners. At the same time, it is fair to notice that all of them admit the channel of the burn to have been red ever since they knew it, and one of them even declares that it was known long ago as the 'Ochrey Burn.' It is unfortunate for the complainer's case that there is no evidence of the burn water having been regularly used for watering cattle, but I am disposed to think that this is due to its not having been required rather than to its being unfit for that purpose. It is not very easy to account for there being a marked increase of pollution since 1886 as compared with the period of the Glasgow Iron Company's occupation during the sixteen years prior to that date. Pumping took place during both periods, but the Glasgow Company pumped from the Venture Fair Pit, and the present respondents pump from the Square Pit, which is considerably nearer the burn. This leads me to the conclusion that during the earlier period either the water must have parted with a greater proportion of its iron before reaching the burn, or that the water standing in the Square Pit must have acted as a kind of settling-pond and have intercepted a considerable quantity of the polluting matter.

"Such being the facts I hold to be proved, it is clear in law that the day level must be treated exactly as if it were a natural water-course, and that the complainer cannot object to any water, however highly charged with iron, which finds its way through that level into the burn by means of gravitation. But I think it is equally clear, on the authority of the case of *Bankier Distillery Company* v. *Young*, 19 R. 1083 (in which the judgment of the First Division was recently affirmed by the House of Lords), that the respondents are not entitled, apart from contract or prescriptive right, to interfere with the law of gravitation and to pump water into the burn if the effect of the operation is to injure the inferior heritor. There is here no contract entitling them to do so, and they have no prescriptive right because during the forty years prior to the raising of this action there was no pumping for the first eighteen years. It is, I think, impossible for the respondents to rely on the pumping which took place in Marshall's time, because that had been discontinued between the period from 1838 to 1870—*Rigby & Beardmore* v. *Downie*, 10 Macph. 568. It is quite true that the water pumped in the *Bankier Company's* case was water which would not have found its way into the stream if let alone, while here the evidence undoubtedly is that if pumping were discontinued the water would accumulate in the Square Pit, and would overflow into the burn by way of the day level. Here, again, there is a perplexing conflict of evidence as to what the effect would be of leaving the water to find its own way into the burn, but if it be the true result of the evidence that there has been a material increase of the pollution since 1886, I think that that is *prima facie* attributable to the pumping operations of the respondents, and that they have not succeeded in displacing the presumption against them which arises from their interference with the law of gravitation.

"It is impossible for me to grant interdict in the terms asked, as these would include the discharge of water by natural drainage and would exact a higher standard of purity than is possessed by the water above the junction of the day level with the burn. But I shall pronounce findings establishing the complainer's right to prevent the pumping of water which shall make the water of the burn unfit for the primary purposes other than that of supplying drink to man."

The respondent reclaimed, and argued—In the first place, the respondents had only acted as the previous tenants of the colliery had done without challenge for more than forty years in pumping the water into the burn, and it was not proved that they had increased the amount of polluted water which they sent into the burn. For all that time the burn had not been more fit for any uses than it was now. In the second place, it was conclusively proved that even if the respondents did not pump the water, the natural effects of gravitation would cause as much water to flow into the burn as was now sent in by the pumping, so the complainer could not say that it was the pumping which did the harm. This case was not ruled by the case

of *Young & Company* v. *Bankier Distillery Company*, July 27, 1893, 20 R. (H. of L.) 76, because here the respondents had a prescriptive right to pump, and no more water was sent into the burn than would go there by natural gravitation—*Duke of Buccleuch, &c.*, v. *Cowan, &c.*, December 21, 1866, 5 Macph. 214.

The complainer argued—It was amply proved that the amount of water sent down by the respondents had injured the amenity of the Duke of Buccleuch's policies and that was a sufficient ground for interdict; it also had injured the water for other primary purposes than drinking, the cause of which was the pumping and the careless working of the pit. The case was ruled by that of *Young, &c.* v *Bankier Distillery Company* (cited *supra*).

At advising—

LORD JUSTICE-CLERK—The pursuer complains of pollution of a stream which runs through his property, caused by mining operations carried on by the defenders.

The case is complicated by the fact which is beyond dispute that at no time during the prescriptive period has the water of the stream when flowing through the pursuer's grounds been in a strict sense pure. It has always carried a certain amount of foreign matter either in suspension or solution, in consequence of the water flowing from strata containing iron. The iron in the water in the course of the stream is precipitated, the precipitate formed being in a flocculent form, and adhering to the channel until it is scoured by flood, thus giving the channel an appearance which has led to the stream being spoken of as the Ochrey Burn. That this has been so in degree for a very long period of time cannot be disputed. The dispute arises upon the extent of the pollution. The defenders maintain that for more than the prescriptive period the effect of the operations in mining carried on higher up the stream has been that the water when it passes through the pursuer's lands has never been fit to be used for primary purposes. The pursuer maintains that up to the year 1886 the stream was not so polluted as to be unfit for primary uses, that it was potable, that fish lived in it, and that except upon an odd occasion now and then cattle could have used it without harm, although as a matter of fact the pursuer's cattle did not require to use it, having a better drinking supply available. The evidence in the case is very conflicting. Witnesses for the complainer prove that prior to 1886 they drank the water when convenient to do so, and that fish have been caught in the stream from time to time. Witnesses for the defence give evidence to the effect that the water was not potable, and would not, so far as they could judge, support life in fish. In this conflict of evidence the Lord Ordinary has found that the evidence for the complainer led before him commends itself to him as more satisfactory than that for the defence, not going the length of holding that the water was suitable for drink for man, but holding that it was fit for the other primary purposes. I have read the whole of the proof, and have come to the same conclusion as the Lord Ordinary. I am unable to get over the positive evidence of the complainer's witnesses, which if true, is I think sufficient, and I see nothing in it to make its truthfulness doubtful. Being positive evidence of fact, it, if accepted as true, will necessarily outweigh an even larger body of negative testimony. I have therefore come to the same conclusion as the Lord Ordinary.

It appears that for a long period there has been a process of pumping carried on above the complainer's property. But it is the fact that in earlier years the pumping took place from a pit called the Venture Fair Pit, which is some distance further up the stream than the Square Pit from which the water is now pumped. This may account for the greater pollution, as the iron in the water takes some time to precipitate, requiring to be ærated in order to its being thrown down. The distance between the point of the discharge into the open stream and the complainer's lands being diminished, may account for the fact that within the bounds of the complainer's lands there is more pollution than formerly, although the actual water comes from the same district.

As regards this part of the Lord Ordinary's interlocutor, he has not pronounced any interdict, but has found only that the Gilmerton Coal Company are not entitled to discharge water into the burn so as to pollute the burn and render it unfit for its natural primary purposes, other than that of supplying "drink to man," and has continued the cause to give the company the opportunity of proposing means to prevent the pollution. I would propose that as regards that part of his interlocutor we should adhere, thus extending the opportunity.

LORD YOUNG—I think our decision in this case is attended with considerable doubt, but I am not prepared to dissent or to suggest that we should alter the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD TRAYNER—I am satisfied on the proof before us that the pollution of the water in the burn in question has been increased by the workings of the respondents, and that the complainer will be entitled to interdict against such increased pollution being continued if it becomes necessary hereafter to deal with the prayer for interdict. I have felt some difficulty, however, in regard to the question whether prior to the respondents' operations the water in the burn was fit for all the primary purposes, except, as the Lord Ordinary expresses it, "that of supplying drink to men." There is some proof, no doubt, tending to support that view—proof sufficient in the opinion of the Lord Ordinary to support the conclusion at which he has arrived. On that point all I can say is,

that I have not been satisfied by the respondent that the Lord Ordinary is wrong. It is a finding in fact by the Judge who took the evidence, and I am not prepared to differ from it.

The Court adhered.

Counsel for the Reclaimer—Ure—J. Wilson. Agents—F. T. Weir & Robertson, S.S.C.

Counsel for Complainer—H. Johnston—Dundas. Agents—Strathern & Blair, W.S.

Friday, March 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

M'MURRAY *v.* M'FARLANE.

Agreement—Guarantee—Relief—Guarantee for Advance to Newspaper Proprietor—Renunciation of Right to Relief in Event of Newspaper being a Failure—Whether Newspaper had Fair Trial.

On 22nd December 1887 the proprietor of the *Scottish Leader* newspaper, who had applied to a friend for pecuniary assistance, received from him a letter whereby he agreed to lend for the purposes of the newspaper a sum of £5000 sterling at "2½ per cent. in the meantime, and till such time as the *Scottish Leader* becomes a paying property, after which you will pay me at the rate of 5 per cent. per annum so long as you have the use of the money, and should the *Scottish Leader* unfortunately turn out a failure I agree to renounce all claim for the repayment of both principal and interest." In August 1888 a sum of £1250 was advanced, the receipt for which bore express reference to the letter which was in subsequent correspondence brought before the lender's view as containing a promise on which the borrower relied. As the lender could not conveniently pay the balance he granted an acceptance for the amount, until upon his own suggestion the transaction ultimately took the form of a guarantee by the lender to a bank for advances to the extent of £5000. Out of this sum the borrower repaid the sum of £1250 formerly advanced, and used the balance of £3750 for the purposes of the newspaper. In 1891, the lender withdrew his guarantee, paid the debt to the bank, obtaining an assignation of the debt to himself, and sued the borrower for the sum advanced, maintaining that the guarantee had superseded the original loan. After the action was raised the nephew sold the paper to a third party for about £8000, and the pursuer further maintained that even if the defender was only liable for repayment on the success of the paper, he was barred from founding on that condition by his sale of it. It was proved that the defender's losses approached the sum of £40,000, while the total losses of the newspaper, including interest, approached £60,000 in the six years of its existence.

Held that the conditions of the letter of 22nd December 1877 applied to the transaction in its ultimate form, and that the guarantee was only a substituted mode for carrying out the original arrangement; and that, as there had been an honest but unsuccessful attempt to make the newspaper a commercial success, the circumstances contemplated by the agreement had occurred and the defender was not liable to repay either principal or interest—*dub.* Lord Rutherfurd Clark as to whether the paper had received a sufficient trial to justify the conclusion that it had proved a failure.

In the beginning of 1887 John M'Farlane, Edinburgh, started a daily newspaper called the *Scottish Leader*. Upon 13th December he wrote to his uncle James M'Murray, of the Royal Paper Mills, Wandsworth, Surrey, asking him to join a company under the Limited Liability Acts with a capital of £25,000, the object of the company being to lend money to the *Leader*, and the inducement held out to intending shareholders being that they should receive one-third of all the profits made, and should incur no responsibility beyond their subscription. M'Murray declined to join the company, but upon 22nd December 1887 he wrote him this letter—"My dear John,—In further reply to your letter of the 13th inst., I shall be very pleased to lend you £5000 — say, five thousand pounds at a moderate rate of interest —say, 2½ per cent. in the meantime, and till such time as the *Scottish Leader* becomes a paying property, after which you will pay me at the rate of 5 per cent. per annum, so long as you have the use of the money, and should the *Scottish Leader* unfortunately turn out a failure, I agree to renounce all claim for the repayment of both principal and interest, and in the event of my decease, this letter will be sufficient to protect you against any claim being made." After repeated requests by M'Farlane, his uncle paid him £1250 sterling. M'Farlane granted this receipt —"14th August, 1888. Received from James M'Murray, Esq., the sum of twelve hundred and fifty pounds, being the first instalment of a loan of five thousand pounds, terms of interest and repayment as per your letter to me of 22nd December 1887." M'Farlane continued to press for the rest of the money and by a letter dated 23rd November 1888, while stating he could send no more money, M'Murray wrote—"However, in order to assist you out of your present difficulty, I am willing to accept for the amount—viz., £3750 at 6 m/d, and I have no doubt Mr Aikman will be quite willing to take my bill for this sum." This offer having been accepted the bill was sent, and it was twice renewed afterwards, the last bill falling due in May or June 1890,