recent case of *Adair* v. *The Magistrates of Paisley*, 12 S.L.T., p. 105, about the fall of a stand at Paisley races, in which a proof was ordered, was very exceptional, because the defenders there were sought to be made liable on the double ground of certain clauses in the Burgh Police Act and of an alleged device into which they had entered to avoid responsibility. The previous case arising out of the same accident, where the race committee were the defenders—*Glass* v. *Leitch*, 5 F. 14—was tried by a jury, and the circumstances there, as shown by the bill of exceptions on which the case is reported, were less simple than here. I shall therefore approve (with a slight amendment) the issue as proposed by the pursuer."

Counsel for the Pursuer—Campbell, K.C. —Macmillan. Agent—W. Carter Rutherford, S.S.C.

Counsel for the Defenders — Graham Stewart. Agent — Cornillon, Craig, & Thomas, S.S.C.

Friday, January 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

J. & M. WHITE AND OTHERS *v.* JOHN WHITE & SONS AND OTHERS.

Water — River—Mill-Dam — Abstraction - Title to Abstract — Right to Increase Amount Taken — Res merœ facultatis— Right not Lost by Disuse—Prescriptive Possession.

The right of a millowner possessing an unqualified title to the water in a mill-dam is not restricted to the amount of water taken by him during the prescriptive period, and he is entitled to increase the extent of his use even to the prejudice of a neighbouring millowner who has no title to the water, but who has taken water from the dam for more than the prescriptive period.

A, proprietor of a mill on the river Kelvin, under a Crown grant conferring on him the mill, mill-dams, aqueducts, and all the privileges and pertinents thereof, for more than forty years drew from the dam for the use of his mill no more than 1200 cubic feet per minute. Thereafter he extended the mill and increased his supply to 6000 cubic feet per minute. B, proprietor of a mill situated on the opposite bank and drawing its water from the same dam, under a title containing no express grant of water rights, had for more than forty years drawn 2077 cubic feet per minute from the dam, but that only after the right of A's mill to the first water was satisfied. B objected to the increase of A's water supply. A raised an action for declarator that he was entitled to the first water from the dam for the use of his mill to the extent of 6000 cubic feet per minute, and that B was not entitled to withdraw water except when the dam was full, and then only to the extent of 2077 cubic feet per minute, and for interdict accordingly.

Held (*rev.* Lord Kincairney, and *diss.* Lord Young) that A was entitled to declarator and interdict as concluded for.

This was an action of declarator relative to the rights of parties in the Partick Mill Dam on the river Kelvin. The pursuers were the owners of the Old Mill of Partick, otherwise known as the Bishop Mill, and the defenders the owners of the Scotstoun Mill. These mills were on opposite sides of an old mill dam called the Partick Mill Dam, formed by a weir thrown across the river Kelvin, the Bishop Mill being on the north side of the dam and the Scotstoun Mill on the south side. They were nearly *ex adverso*, and each drew the water for its wheels from the dam by sluices on the north and south sides of the damhead respectively. There were two defenders to the action as raised—the owners of the Scotstoun Mill and the owners of the Slit Mills, also situated on the bank of the river Kelvin, but the Slit Mills had been closed for some years, and the owners withdrew from the litigation under an arrangement with the pursuers.

The rights of parties to the water in the Partick Dam had been for long in dispute, and had been the subject of several litigations. The present action arose out of the fact that in 1900 the pursuers erected an additional turbine wheel, by which they very materially increased the supply of water for the use of their mill. As a consequence the defenders were compelled, as they averred, from time to time to draw off the water for the purposes of their mill when the water in the dam was not level with the damhead or overflowing, thereby, as the pursuers averred, interfering with the supply of water necessary for the pursuers' mill. The present action was accordingly raised, the conclusions of the summons being—"That the pursuers, as proprietors of the Old Mill of Partick, now commonly known as the Bishop Mill, are entitled to the first water of the river Kelvin for the use of their said mill, *as the same now exists as regards its capacity to draw water—that is to say, to the extent of* 6000 *cubic feet per minute* (*without prejudice to the rights and pleas of parties in the event of any future extension of said mill*), and that in preference to the Scotstoun Mill belonging to the defenders, . . . and that the defenders . . . are not entitled to withdraw any water from the dam of the river Kelvin immediately above pursuers' and said defenders' said mills, and which dam is generally known as the Mill of Partick Dam, or to allow any water to pass therefrom through their sluice at any time save and except only when the said dam is full, and the water therein either standing level with the dam-head or running over, and then only to the extent of 2077 cubic feet per minute, and the defenders . . . and the partners thereof ought and should be interdicted, prohibited, and

discharged by decree foresaid from withdrawing any water from said dam, or allowing any water to pass therefrom through their said sluice at any time save and except only when the said dam is full, and the water therein either standing level with the dam-head or running over, and from at any time withdrawing water from the said dam to a greater extent than 2077 cubic feet per minute." . . . [The words in italics were added by minute of amendment for the pursuers during the debate on the reclaiming-note.]

The following narrative is quoted from the opinion of the Lord Ordinary (KINCAIRNEY):—"The Bishop Mill (the pursuers') is of very ancient date. The pursuers have produced a charter by King David I, which is said to refer to it. I understand that a large part of Glasgow is within its thirl. The Magistrates of Glasgow possessed it for a long time as kindly tenants, and it was not until 1738 that they obtained a Crown charter. That charter proceeds on the narrative that past human memory the Magistrates had possessed the dam with the mill-house and certain ground 'being parts of the barony of Glasgow,' as kindly tenants and rentallers, and on the further grounds stated the charter disponed to the Magistrates and their successors in office, heritably and irredeemably, the Mill of Partick on the water of Kelvin, with thirlage and multures and the services of the mill, all in the ordinary terms 'cum stagnis lie Dammie Inlairs et acqueductis aliisque integris previlegiis et pertinentiis ejusdem." There follows a precept of sasine in similar terms.

"Prior to that date it does not clearly appear that anyone except the Magistrates made use of the dam. But about that time a company called the Smithfield Company built what is called a slit mill, and they applied to the Magistrates for leave to carry an aqueduct from the Partick Mill Dam to a dam to be erected on their own ground for their slit mill. This petition was granted by the Magistrates, and the aqueduct and dam were constructed, but the minute bears that the operation was to be conducted 'in such manner that the said Mill of Partick shall receive no detriment or prejudice, and shall be kept in the same order and condition as it is now'—that is, that the Magistrates' mill should not suffer prejudice. This minute bears date 30th May 1738, before the Crown charter, but it was confirmed by another minute dated 3rd January 1740.

"It is to be observed that the owners of the Scotstoun Mills are not mentioned in these proceedings, and do not seem to have been consulted, and it does not clearly appear whether at that precise time the Scotstoun millers drew water from the dam."

[The first writ of importance in the defenders' progress of title was a charter of resignation by Queen Anne in favour of William Walkinshaw, their predecessor, dated 25th July 1711. The grant was in the following terms:—"Totum et integrum illud molendinum vocatum molendinum Fullonis de Partick cum libertate post hac eodem utendi quasi molendino frumentario una cum duabus ulnis Terræ circa idem," &c. The defenders also produced an excerpt from a sasine recorded in 1727 on disposition by William Walkinshaw to John Walkinshaw in the following terms:—"All and whole that his miln called the Wakemiln of Partick, now ane corn miln," &c.]

"A deed has been produced, of great importance in this case, which was granted in 1780. It is by the Smithfield Company, and it bears to sell and dispone to one John Craig, Scotstoun Mill, with certain other subjects mentioned. How the Slit Mill Company acquired the Scotstoun Mill does not appear. But it appears that at first the Scotstoun Mill was a waulk mill or fuller's mill, for which it was said a mill dam was not essential. But that does not signify much, because this deed bears that 'it was now' (that is in 1780) 'made use of as a corn mill.'

"This disposition by the Smithfield Company (slit mills) to Craig bears the following clause:—'But alwise with and under this condition and provision, as it is hereby expressly conditioned and provided, that the said John Craig and his foresaids, and the miln before disponed, shall have no right to the water of Kelvin until the old Miln of Partick is first served, she having the first water, and until our works at our slit miln on the water of Kelvin for rolling and slitting of iron and grinding of tools is next served, they being declared to have the second water, the same being hereby limited to three wheels, the foresaid waulk miln of Partick hereby disponed being only to have the third water, and for one wheel only. But in case at any future period we or our foresaids shall find it convenient or necessary to discontinue the manufactory of rolling and slitting of iron and grinding of tools, and shall instead thereof erect any other milns or machinery which may require a greater quantity of water than is now used by us, then and in that case the second water so now reserved for our present works shall in all times thereafter, during the scarcity of water, be applied for driving the new machinery so to be erected in the proportions stated, viz., three-fourths of said water shall be applied for the use of the machinery so to be erected by us and our foresaids, and one-fourth thereof shall be applied for the use of the Scotstoun Miln aforesaid, or our said works so to be erected shall go eighteen hours of the twenty-four and Scotstoun Miln shall go the remaining six hours. But in case that we or our foresaids shall have occasion in future to erect upon our works any water wheels besides the foresaid three, all such wheels above three shall have no privilege of water (until the Scotstoun Mill is fully served), whether used as a corn miln or any other purpose, and shall only be used at such times when there is a superplus quantity of water in the River Kelvin running over the damhead after serving the Miln of Scotstoun as aforesaid.'

"The owners of the Bishop Mill were not parties to this deed, although their right to the first water is affirmed or acknowledged in it. Then it is also said that the slit mills

are to have the second water limited to three wheels, and the waulk mill of Partick (*i.e.* Scotstoun) is to have the third water, and for one wheel only. This is the first time when the enigmatical phrase first, second, and third waters occurs in the titles. Presumably the parties knew what they meant. But I think no one at the debate knew precisely, and I don't think the term has been successfully explained.

"It is possible that the respective rights of the Slit and Scotstoun mills might be arranged by this deed, but it could not prejudice any right of the Bishop Mill, whose owners were no parties to it.

"I do not think it necessary to trace the history of these mills in more detail. It seems enough to say that the Slit Mills were closed a considerable number of years ago, and no water has since been drawn from the dam on their account, and that the Bishop Mill, after passing through intermediate owners, was sold and disponed to the pursuers in 1897.

"Scotstoun Mill appears to have remained in the possession of John Craig and his successors until 1839, when it was sold to John Blackwood, and by him in 1854 to John White, father of the defenders, from whom it passed in 1897 to the present defenders.

"With regard to the possession and use of the dam by the Bishop Mill and Scotstoun Mill, it appears that parties are agreed (1) that Bishop Mill was entitled to draw and did draw the first water, although I do not think they are agreed as to the precise import and effect of that right and privilege; (2) that from 1780 to 1865 the owners of Bishop Mill drew no more than 1200 cubic feet per minute; I am not able to point to any document in which this measure of their use is stated. But I understand that parties are agreed about it. Further, I understand that parties are agreed that about that time the Scotstoun Mill was in use to draw 2077 cubic feet per minute, but that only after the Bishop Mill's right to the first water was satisfied."

The pursuers pleaded, *inter alia*—"(1) Under and by virtue of their titles, the pursuers being entitled to the first water of the river Kelvin for the use of their mill in preference to the defenders' mill, they are entitled to declarator and interdict as concluded for. (2) The defenders . . . having no right to the water of the Kelvin, except to the third water, and that at the time and to the extent mentioned in the summons, the pursuers are entitled to declarator and interdict, as craved. (3) The pursuers' right being a right of property in the dam and water, they are entitled to increase the extent of their use thereof as occasion requires. . . . (6) In respect of their title and the use and possession had by them and their authors, the pursuers are entitled to decree as concluded for."

The defenders pleaded, *inter alia*—"(3) The pursuers not being entitled to any preferable right to the use of the water of the dam to a greater extent than is in accordance with prescriptive usage, are not entitled to maintain their present claims."

On 27th October 1903 the Lord Ordinary (KINCAIRNEY) allowed a proof, in which the facts above stated were ascertained or admitted.

On 6th July 1904 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that the Bishop Mill, belonging to the pursuers, and the Scotstoun Mill, belonging to the defenders, are situated on the mill dam of Partick, on the Kelvin, and are *ex adverso* of one another; (2) that by Crown charter, dated 22nd September 1738, there was disponed to the Magistrates of Glasgow the said Bishop Mill with various pertinents, including 'dams'; (3) that in 1809 the said subjects were sold by the said Magistrates to John Gibson and others, and thereafter, by subsequent transmissions, they came in 1897 to be vested in the pursuers, and that the pursuers are now in right of the subjects conveyed by the said Crown charter; (4) that from the date of said Crown charter in 1738 the said Bishop Mill has been served with water from the said mill dam; (5) that from 1780 or thereby, and for more than forty years thereafter, the Scotstoun Mills belonging to the defenders have been served with water from the said mill dam; (6) that the defenders have acquired by prescriptive use and possession, founded on a sufficient title, a right to draw water from the said mill dam for the use of the said Scotstoun Mill; (7) that by the first part of the conclusion of the summons, viz., 'that the pursuers are entitled to the first water of the river Kelvin for the use of their said mill, and that in preference to the Scotstoun Mill,' the pursuers seek for a declarator which, if granted, would enable the pursuers to draw the whole water in the dam and exclude the defenders from all use thereof: Therefore assoilzies the defenders from the first part of the conclusion: *Quoad ultra* finds it unnecessary to dispose of the conclusions of the summons, and decerns."

Opinion.—[*After the narrative quoted above his Lordship proceeded*]—"A long proof has been led and many titles and other documents have been produced. There have been various litigations already between the owners of these mills, the processes in which have been produced, so that this process has become very bulky and cumbrous." [The litigations referred to are sufficiently noticed in the opinion of Lord Moncreiff *infra*.] "Yet when the precise meaning of the conclusions is attended to it does not seem necessary to enter into much detail in advising the case. The first part of the conclusion seems to claim an unrestricted use of the water in the dam so long as it can be utilised for the Bishop Mill. The second part of the conclusion, with the corresponding interdict, seems to deny the defenders' right to draw water from the dam except when it is full, but apparently to concede that right when it is full. . . .

"The first question is, whether decree should be pronounced in terms of the first conclusion, or whether there should be absolvitor from that conclusion.

"That first conclusion is that it should be declared that the owners of the Bishop Mill are entitled to the first water of the river Kelvin for the use of their mill.

"Now, the meaning of this conclusion depends on the meaning of the phrase 'first water.' What is meant by first water? Does it include all the water in the dam or some definite part of it? I understand that the Scotstoun owners admit, and have all along admitted, that the Bishop Mill owners are entitled to a certain preference which they call first water. But they maintain that the amount of first water must be determined by previous usage. They say that the Bishop Mill owners are entitled to the first water, but only to the extent of 1200 cubic feet. The Bishop owners claim the right absolutely without any restriction, unless it be only that they are bound to use the water for the mill, and that is certainly the nature and extent of the pursuers' claim. They think they will settle all the questions which have arisen between them on the footing of joint-ownership of the dam by denying the defenders' right altogether, because they claim it was a piece of heritable property under their Crown charter of 1738. They maintain that that deed gives them an absolute right, just as if the dam was a rood of agricultural land, and that no one could use the mill afterwards without their permission, because it is covered by their heritable title and sasine. Thus the pursuers' case rests on title, and the defenders' on prescription.

"I hesitate to accept the pursuers' argument on the title. I think, no doubt, that it puts a meaning on the charter which it will bear, but that it is not its necessary meaning.

"There is no question here about the property of the *alveus*. It has not been suggested that anyone is proprietor of the *alveus* except the pursuers under their Crown grant. But this is a question about the water, not the *alveus*. A dam is a portion of the flowing water of the river which has been temporarily arrested, and it does not appear to me that a disposition of a dam necessarily gives an exclusive right to all the water in it. I rather think it means a right to use the dam as a dam, but not necessarily an exclusive right. I do not remember that any authority on this point was quoted.

"Now, had the pursuers been able to point to such a use following the charter as indicated, a claim to or an assertion of an exclusive use the case would have been different. But that was not the character of the use which followed the charter. For more than forty years the pursuers drew a comparatively small part of the water from the dam and left the rest to others. I do not affirm that the pursuers were thereby ever after restricted to 1200 cubic feet per minute—I am not trying that question—only that their practice was not such as would support a claim to an exclusive right. The defenders maintained that as riparian proprietors, though they were nothing else, they could object to the pursuers' summons. I understand the argument to be something like this. Conceding your right of property in the dam, still you cannot abstract more water from it than your prescriptive use warrants, because it is flowing water, and you cannot detract from it without the consent of the riparian proprietors. I doubt whether the law as to riparian proprietors, whose right does not include the *alveus*, can be extended to the case of a dam, and in the absence of authority I am not prepared to affirm it. This dam has existed for above 800 years, and I hesitate to say that it is to be treated as flowing water all along.

"The defenders maintained that no property could be acquired in water without appropriation. I do not see how to affirm that proposition as applicable to a mill-dam. Surely this mill-dam was the property of somebody during the 800 years of its existence—a right of property which involves the right to put the arrested water to the uses subserved by the water in a dam. I suppose that until 1738 it was the property of the Crown.

"The pursuers maintained that their case was not affected by the negative prescription, because although they did not make full use of their property their abstention was *res meræ facultatis* and could not affect their right. This argument, of course, assumes the pursuer's original right, and if that be assumed I incline to think that the argument that the right was not lost by mere non-use is well founded. But the defenders' best answer to the pursuers' claim to an exclusive right to the dam seems to be in their plea of positive prescription. I understand that for much more than forty years (perhaps a hundred) the proprietors of Scotstoun supplied their mill with water from this dam. They and the pursuers were using the dam together, and this, *prima facie*, would entitle the defenders to claim the right to continue to use it. But now it is objected that they have no title on which their plea of prescription can be vested. But when possession has lasted for a hundred years, and no misunderstanding is alleged, it seems late in the day to plead no title. I need not discuss the question whether a prescriptive title is necessary. See *Kintore* v. *Pirie*, May 30, 1903, 5 F, 813, *per* Lord M'Laren. But I think the defenders have a sufficient title for prescription in the deeds which were produced late in the debate, in particular in the Crown charter by Queen Anne in 1711, the application of which to the Scotstoun Mill was admitted. The plea that the possession of the Scotstoun owners was mere matter of favour seems inconsistent with the whole history of the case and the continual litigations. The origin of the Scotstoun admission to the benefit of the dam does not seem to be known.

"On the whole, on this matter it appears to me that the owners of the Scotstoun Mill have acquired by prescription a right to draw water from the Partick dam. I do not say how much water or under what conditions. No questions of that character are raised by the first conclusion of the summons—nothing, I think, but a claim to exclusive right, and it seems to me that the defenders have adduced a sufficient title to enable them to plead their possession against this claim.

"If the pursuers have not an exclusive right to the whole water in the dam, and a right to prevent everyone else from using the dam, the only possible result is absolvitor from that conclusion.

"The following cases were referred to on this branch of the case—*Lyons & Gray* v. *Bakers of Glasgow*, 1749, M. 12,789; *Dick* v. *Abercorn*, M. 12,813; *Mackenzie* v. *Waddrop*, 1854, 16 D. 381; *Hunter* v. *Aitkenhead*, 1880, 7 R. 510. But the whole law is to be found fully discussed in *Kintore* v. *Pirie, supra.*"

The pursuers reclaimed, and argued that under the charter of 1738 the Bishop Mill acquired an unqualified and exclusive right to use the water in the dam so long as the use was confined to the legitimate needs of the mill. This right was recognised in all subsequent deeds in which the Bishop Mill was mentioned. The Scotstoun Mill had no express title to any water-rights till 1780, and then only under a deed to which the proprietor of the Bishop Mill was not a party and in which the rights of the Bishop Mill were reserved. The defenders' contention that right to use the water was conferred on them by their charter of 1711 was not borne out by the evidence as to use or by the deed itself. Even admitting that the defenders were riparian owners, this did not help them in a question with the pursuers, whose rights depended on express grant, the common law of riparian ownership not being applicable to the present case—*James* v. *Montgomerie & Company*, December 18, 1903, [1904] A.C. 73, 41 S.L.R. 137. The pursuers were entitled, even to the prejudice of the defenders, to increase their use of water beyond what they had hitherto taken—*Lyon & Gray* v. *Bakers of Glasgow*, January 7, 1749, M. 12,789—and their right under their charter to take an unlimited supply was *res meræ facultatis*, which could not be lost by disuse—*Smith* v. *Stewart*, June 13, 1884, 11 R. 921, 21 S.L.R. 623. The defenders had no competing title of property, and had not, at least in a question with the pursuers, prescribed any competing right which could limit the pursuers' right under their titles. As heritable proprietors under their charter of 1738 of the dam and the *alveus* of the stream, the pursuers were entitled to use the water as they required—*Dick* v. *Abercorn*, November 16, 1769, M. 12,813; *Baird* v. *Robertson*, February 2, 1836, 14 S. 396; *Scottish Highland Distillery Company* v. *Reid*, July 17, 1877, 4 R. 1118. In any event, the defenders' rights, if any, were limited to 2077 cubic feet per minute, the quantity taken by them from 1780 onwards.

Argued for the respondents—The pursuers had not under their titles an exclusive right to the water. Under their charter of 1711 the defenders acquired right to use the mill as a corn mill, and the evidence showed that it was used as such before 1727. This implied a grant of some water rights 27 years before the date of the deed founded on by the pursuers, and it was not to be assumed that the Crown in 1738 intended to derogate from its grant to the defenders in 1711. The rights of parties accordingly fell to be determined by the evidence as to possession for the prescriptive periods. The right of the pursuers was limited to 1200 cubic feet per minute, the amount *de facto* used by them since 1780—*Hunter & Aitkenhead* v. *Aitken*, January 23, 1880, 7 R. 510, 17 S.L.R. 319; *Earl of Kintore* v. *Pirie & Sons, Limited*, May 30, 1903, 5 F. 818, 40 S.L.R. 210. By prescriptive possession the defenders had acquired a right to draw 2077 cubic feet per minute, and the pursuers were not entitled to increase their use in any way which might prejudice this right. Apart from the question of title the defenders, as riparian owners, were entitled to have the pursuers restrained from increasing their use of the water—*Mason* v. *Hill and Others*, January 27, 1832, 1 L.J. (N.S.) K.B. 107; *Bealey* v. *Shaw and Others*, February 7, 1805, 6 East 208; *Embrey and Another* v. *Owen*, April 30, 1851, 20 L.J. (N.S.) Ex. 212; *Bicket* v. *Morris*, July 13, 1866, 4 Macph. (H.L.) 44, 2 S.L.R. 222; *Orr Ewing & Company* v. *Colquhoun's Trustees*, July 30, 1877, 4 R. (H.L.) 116, *per* Lord Blackburn, at p. 126, 14 S.L.R. 741. The defenders' rights depended on their position as riparian owners, and it was not necessary that they should own any part of the *alveus*—*Lyon* v. *Fishmongers Company*, July 27, 1876, 1 App. Cas. 662.

In the course of the debate on the reclaiming note a minute was lodged for the pursuers, in which they stated that, "with the view of making the declaratory conclusion of the summons more plain," they desired to amend it by the addition of the words in italics above quoted.

At advising—

Lord Justice-Clerk—This case was debated on both sides with great ability, and presents an important question for decision. It is necessary in the first place to ascertain what was the position of the mill of the pursuers in early times. It appears very clearly from the documents that the Mill of Partick was in existence at a very remote period and had an extensive thirl. In the early part of the 17th century the Corporation of Glasgow were the kindly tenants of the mill, and they appear to have continued to be so for a long period. In 1738 a Crown charter was granted in favour of the Corporation of Glasgow, by which they obtained right as proprietors, the charter proceeding on the narrative that "past memory the magistrates possessed the dam, with the mill-house and certain grounds, being part of the barony of Glasgow, as kindly tenants and rentallers, and it disponed the subject to them and their successors in office," and there was added, "cum stagnis lie Dammie Inlairs et acqueductis aliisque integris previlegiis et pertinentiis ejusdem." On this charter sasine followed.

There is nothing tending to indicate that before this time anyone used the dam except the magistrates. It was a natural dam, formed by rocks, which only required to be straightened at the top by artificial erections to bring it all to a level line for holding back the water, and was obviously the most convenient and economical place for the establishment of a mill. There is, I think, no room to doubt that it had the

unrestricted use of the dam and the water held back by it at that time. It appears that at about that period a mill, called a slit mill, for mechanical purposes, was established further down the river on the same side, the company which formed it applying to the magistrates for "leave to carry an aqueduct from the Partick mill-dam to a dam to be erected on their own ground for their slit mill." The leave was granted, but it was on the express condition that it should not in any way prejudice the mill belonging to the magistrates. There was a confirmation of this minute granted after the date of the charter of 1738.

It is a very important fact in the case that from first to last in none of the titles produced is there to be found anything tending to establish or even to suggest that any limit was laid down as regards the use of the water of the dam by the Old Mill of Partick. On the contrary, where by any of the deeds any privilege is given to others, it is invariably fenced with the condition that the first right of the water belongs to the Old Mill, and that that mill must be first served. And in the earlier documents there is no mention of Scotstoun at all; indeed, it does not appear that when the waulk-mills of Scotstoun were in operation there was any use made of the water of the river for power purposes. But it is very worthy of note that when in 1777 the magistrates gave out a tack to the Smithfield Company for the slit mill, it was expressly provided that as the Old Mill had in the past enjoyed without dispute the right to the first water preferably to the Scotstoun Mill, the Smithfield Company were prohibited from giving to the Scotstoun or other mills, including their own mills, any right to use the water "except when the said Old Mill has no use for the said water for grinding malt or other grain." In contrast to this, when the Scotstoun Mill obtained a Crown charter to their ground, with right to use it as a corn mill, nothing was conveyedto them of the dam or *alveus*, and nothing said as to how they were to obtain power for driving their wheels—a condition of matters quite consistent with their having to rely on water which would flow over the weir if not impounded, it being the fact that the average quantity was always greatly in excess of what could be held by the dam, even when the Old Mill was in full operation.

So clearly were the rights of the Old Mill recognised that when the proprietors of the slit mill granted a disposition to Scotstoun in 1780 it was expressly under condition and provision that there was to be "no right to the water of the Kelvin until the Old Mill of Partick is first served, she having the first water." Thus Scotstoun was prohibited from drawing any water of the Kelvin from the dam unless the Old Mill did not require it, and an interdict to this effect was granted against Scotstoun in 1827, and the same right was reserved in a later litigation in 1864, the pursuer, viz., Scotstoun, having asked declarator only "after the Old Mill of Partick is served with its first water."

Therefore the matter thus stands historically:—The pursuers from the earliest times used the dam and its water to such extent as was required by them. No right was given to the dam or its impounded water to anyone else, and in all transactions relating to the water the right of the Partick or Bishop's Mill to first water was distinctly recognised and reserved.

The next question is whether the right of the pursuers falls to be held to have suffered restriction in respect of the limited extent to which that right was exercised—in other words, if for the prescriptive period only a certain quantity was passed through their mill, has the right to take more been lost, and is their right to the first water, which undoubtedly would have included more if they had used it, been lost to them? I have no hesitation in answering that question in the negative. The right of the pursuers to take water from the dam being *res meræ facultatis*, I hold that the measure of that right cannot be affected by the extent of the user. It cannot be made in any way to depend upon or to be affected by prescription. And if this be so, then it is equally clear to my mind that the defenders cannot by any use they may have had of water to which the pursuers have first right, deprive the pursuers of that right if they see fit at any time to exercise it. It may be quite true that at a certain time the pursuers did not draw any more than 1200 cubic feet per minute for their mill, but that this should be held to exclude them from the exercise of any right they may have had to draw more is a proposition to which I cannot assent. I would say here, in passing, that I attach no importance to the disputes which took place between the tenants of the Old Mill and Scotstoun in regard to the opening or shutting of sluices in certain states of the water supply. Whatever agreement they might come to in the arrangements they made between themselves could not in any way deprive the proprietors of their rights under their charter. If the proprietors' rights are to be restricted below what they were under their charter originally, it must be by something binding on them by which their right has been given away or lost. And, as I said before, I cannot hold that it was given away or lost merely by non-user. The fact that at one time they used only 1200 cubic feet, being all that they then required, could never have the effect of shutting them out from taking a larger supply if it was necessary for the proper working of their mills. It is quite plain that in the early days of their working a much smaller quantity of water might be necessary to do the milling work of the shire than might be necessary fifty years later, and I do not see that if for any number of years they used only a certain quantity of the water that could deprive them of the right to what they required of the first water at a later date. It appears to me that the contention of the defenders that the pursuers have no right to more than 1200 cubic feet, while they draw 3000, being 923 cubic feet more than they were restricted to by the interdict in the former

action, involves an absolute reversal of the rights of parties. It practically would take away the right of the Old Mill to be first served. Scotstoun would then be first and the Old Mill second. The primary right would be taken away, and those having the secondary right only would be in the better position of the two. The preference would lie with those to whom no rights had been given in the dam, for after 1200 cubic feet had been allowed to the Old Mill that mill could get no more water till Scotstoun had taken more than double the quantity.

I am therefore of opinion that the pursuers are entitled to succeed. They are willing to restrict their demand to 6000 cubic feet, being satisfied that that is ample for their purpose, and I am unable to see what disadvantage the defenders can suffer, seeing that the flow even in the dry months is equal to more than 9000 cubic feet per minute. But whether they would suffer disadvantage or not, they have, in my opinion, no claim to restrict the pursuers as they have maintained they are entitled to demand shall be done, and therefore I would propose that the judgment of the Lord Ordinary be recalled and decree given on the conclusions as restricted.

LORD YOUNG—Your Lordship and Lord Moncreiff are of opinion, and I think upon exactly the same grounds, that the judgment of the Lord Ordinary is erroneous and ought to be reversed. I, on the contrary, am of opinion that the judgment of the Lord Ordinary is right in fact and law, and ought to be affirmed. I cannot usefully add anything to what the Lord Ordinary has said in explaining the grounds of his judgment, and I think it would be a waste of time to go into the details of the case as your Lordship has done.

LORD MONCREIFF—This regrettable litigation, which I think could have been avoided with a little conciliation and management, arises from the simple fact that the pursuers, who are the proprietors of the Old Mill of Partick or Bishop's Mill, introduced for the purposes of their business in 1900 a new turbine wheel into their works, and consequently required to withdraw from the dam a larger quantity of water than they had previously used.

When the case first came into Court both parties stood upon their extreme rights, but in the course of the discussion in the Inner House the pursuers for the purposes of this action restricted their demand to 6000 cubic feet per minute, which is the amount of water required to drive the mill as it at present exists. The defenders, however, still maintain their original contention that the pursuers are not entitled to draw more than 1200 cubic feet per minute, that being the amount used before the new turbine wheel was introduced.

We had the advantage of a full and very able argument on both sides, but notwithstanding Mr Cullen's excellent argument for the respondents I have come to a different conclusion from the Lord Ordinary, and I am of opinion that the pursuers are entitled to declarator and interdict as now restricted.

The Lord Ordinary has in his opinion, as usual, stated the facts of the case and the arguments of the parties with such fulness and fairness that I propose to adopt most of his statements, and indeed (except on one point) I differ from him in little but the conclusion at which he has arrived—a conclusion which, it is fair to observe, was arrived at before the pursuers restricted their claim.

In forming my opinion on the case I have been influenced mainly by four broad considerations.

1. The Old Mill of Partick is the only mill whose titles show an express Crown grant of the mill and dam. Although it may not be necessary for the decision of the case, my opinion is that the owners of the mill were and are proprietors of the *alveus* of the Kelvin *ex adverso* of their property and of the dam. But in any view the mill from a very ancient date was the mill of the district on both sides of the river; and that being so, the proprietors or tenants of the Old Mill were, on the one hand, bound to keep the dam in repair and provide sufficient machinery and water-power for the farmers who were thirled to the mill; and, on the other hand, were entitled to use as much of the water impounded by the dam as they required from time to time.

2. There is no trace of any other title or obligatory document which imposes any restriction whatever on the quantity of water which the proprietors or tenants of the Old Mill are entitled to draw preferably.

3. On the contrary, in every document to which we have been referred it is expressly provided "that the Old Mill shall be first served, having right to the first water." And this recognition of the right of the Old Mill is to be found so late as the pleadings in litigations which took place in 1864.

And 4. The pursuers' right to withdraw water from the dam being *res meræ facultatis* is not to be measured by the use which the pursuers' predecessors have made of it; it does not depend upon prescription. And it follows as a corollary to this that the defenders cannot by positive prescription acquire any right to abstract water from the dam which will prejudicially affect the pursuers' use of the water for the legitimate purposes of the mill.

The history of the mill is thus stated by the Lord Ordinary with precision and conciseness in his note. [*His Lordship quoted the narrative, which is quoted supra, from the opinion of Lord Kincairney.*]

I cannot within a moderate compass examine the various deeds as fully as I could wish; but I should like to add one or two observations to the Lord Ordinary's short history of the mills.

(1) We find early in the seventeenth century the corporation of Glasgow, who were then kindly tenants of the Old Mill, reprimanding their miller for failing to keep the dam in repair and furnish sufficient water-power to serve the mill and the farmers who were thirled to it.

(2) The Crown charter of 1738 in favour of the Corporation of Glasgow proceeds on the narrative—"Et quod pro Incitamento dicto Concilio Burgensi et Communitati prædictæ Civitatis sustinere tuere *et amplificare* dict Molendinium et Commodum seu utilitatem prædictæ Civitatis necessarium est ut Carta earundem in terminis postea mentionat, sit concessa."

(3) In all the leases granted by the City of Glasgow the right of the Old Mill to "the first water" and to be "first served" is saved in express terms. To take one instance, in the tack for nineteen years in favour of the Smithfield Company, dated 29th May 1777, it is expressly provided that as the Old Mill had all along enjoyed the unquestionable right of using the first water preferably to the Scotstoun Mill and all other mills below the dam, the Smithfield Company should on no account give the Scotstoun Mill or other mills, including their own, any right to use the water "except when the said Old Miln has no use for the said water for grinding malt or other grain."

(4) It is true that in 1711 the owners of the Scotstoun Waulk Mill obtained a Crown charter of the ground on which the mill stood, with power to use it as a corn mill. But there is no mention in the charter of the dam or the source from which the water-power for the corn mill was to be derived, and it is not even clear whether the land upon which the waulk mill stood immediately adjoined the river. One thing, however, I think is clear, that there is no trace of the Scotstoun Mill being used as a corn mill until after 1738.

His Lordship next proceeds to deal with the disposition of Scotstoun Mill granted in 1780 by the Smithfield Company to John Craig. The owners of the Old Mill were not parties to that deed, and consequently were not bound by it. It simply regulated the use of the water, by the slit mill and the Scotstoun Mill respectively. But it is of importance as showing that the full rights of the Old Mill were specially reserved in these terms:—"But alwise with and under this condition and provision, as it is hereby expressly conditioned and provided, that the said John Craig and his foresaids and the miln before disponed shall have no right to the water of Kelvin until the Old Miln of Partick is first served, she having the first water."

To follow up this reservation of the Old Mill's rights I may pass on to a decreet obtained against Robert Craig and others proprietors of the Scotstoun Mill in 1827, in which they are interdicted, *inter alia*, "from using any of the water of Kelvin for Scotstoun Mill till the Old Mill of Partick shall have been first served."

Again, in a subsequent litigation, initiated this time by the proprietor of Scotstoun Mill, which lasted from 1856 to 1864, and which was really directed against the proprietor of the slit mill, the pursuer asked declarator against the latter only after "the Old Mill of Partick is served with its first water," and the Old Mill's preferable right was accordingly reserved to it in the final interlocutor of 19th July 1864.

To return now to the Lord Ordinary's interlocutor. His judgment, as I read his opinion, proceeds upon the ground that the conclusions of the summons as originally framed were too wide, and would enable the pursuers, if they were so disposed, to deprive the defenders of what the Lord Ordinary considers their prescriptive right to 2077 cubic feet per minute of the water in the dam. I have already explained that the conclusions have been restricted, and apart from the strict rights of parties it can be shown from the evidence that in the present state of matters there is, with an average rainfall, more than sufficient water to supply the defenders with what they claim—indeed, to supply them with nearly double of what they were in the habit of drawing when the disused slit mill was working. I shall revert to that matter presently.

In the meantime I desire to point out that while the Lord Ordinary has decided against the pursuers, he was by no means prepared to affirm the extreme views stated for the defenders. For instance, he says—"For more than forty years the pursuers drew a comparatively small part of the water from the dam and left the rest to others. I do not affirm that the pursuers were thereby ever after restricted to 1200 cubic feet per minute; I am not trying that question, only that their practice was not such as would support a claim to an exclusive right. The defenders maintained that as riparian proprietors, though they were nothing else, they could object to the pursuers' summons. I understand the argument to be something like this. Conceding your right of property in the dam, still you cannot abstract more water from it than your prescriptive use warrants, because it is flowing water, and you cannot detract from it without the consent of riparian proprietors. I doubt whether the law as to riparian proprietors whose right does not include the *alveus* can be extended to the case of a dam, and in the absence of authority I am not prepared to affirm it. This dam has existed for above eight hundred years, and I hesitate to say that it is to be treated as flowing water all along."

Again he says—"The defenders maintained that no property could be acquired in water without appropriation. I do not see how to affirm that proposition as applicable to a mill dam. Surely this mill dam was the property of somebody during the eight hundred years of its existence—a right of property which involves the right to put the arrested water to the uses subserved by the water in a dam. I suppose that until 1738 it was the property of the Crown.

"The pursuers maintained that their case was not affected by the negative prescription, because although they did not make full use of their property their abstention was *res meræ facultatis* and could not affect their right. This argument, of course, assumes the pursuers' original right, and if that be assumed I incline to think that the

argument that the right was not lost by mere non-use is well founded."

But then his Lordship adds—"But the defenders' best answer to the pursuers' claim to an exclusive right to the dam seems to be in their plea of positive prescription." Now, whether there might have been any force in that plea in a question with the owners of the slit mill I do not need to inquire; but I do not see how it can avail the defenders in a question with the pursuers, who, in my opinion, have a right which they have not lost *non utendo* of drawing as much water as is required for the legitimate uses of the mill.

The defenders' argument is rested upon this singular assumption, that because in 1780, when John Craig obtained a title to the Scotstoun Mill from the owners of the slit mill, a title to which the owners of the Old Mill were not parties, the owners of the Old Mill only found it necessary to draw 1200 cubic feet per minute, they were (at least if they did not increase their use for forty years) for ever thereafter precluded from drawing a larger quantity. The truth is that the disposition of 1780 simply regulated the rights of the owners of the slit mill and the Scotstoun Mill respectively. That being so, I entirely assent to the following passage in the letter of Messrs Mackenzie, Robertson, & Company, 12th February 1901, in which they say—"It will be noted that while the slit and Scotstoun mills are restricted to a certain number of wheels, no attempt is made to restrict the Bishop Mill to any number or size of wheels. Nor, if we are right, could any such attempt have been successfully made, because the town were the then owners of the Bishop Mill under a Crown charter with an unlimited right. The same phraseology about the Bishop Mill having 'the first water' was used in the sale in 1780 of the Scotstoun Mill, and it has been adopted in all the titles and decreets since then, and in none of them can we find a single word restricting its meaning."

As to the amount of water available for the two mills, I may point out that in the proof, William Clark, civil engineer, says—"For the ordinary years the available rainfall is 36½ inches, equal to 18,900 cubic feet per minute, which would give 9450 for the four dry months and 23,625 for the other eight. (Q) Taking the ordinary seasons and the dry seasons together, what would be the average flow of the Kelvin according to your calculation?—(A) Taking the mean all over it would be 18,120 cubic feet per minute."

And, indeed, even when the slit mill was going there was sufficient water for all three mills except in extremely dry seasons, when during a part of the year Scotstoun Mill, having only right to the third water and one wheel, necessarily suffered to a certain extent.

The Lord Ordinary states that he is unable to say what is meant by 'the first water'; but I think that an amply sufficient explanation of that term is provided by the words which almost invariably accompany it, that the Old Mill of Partick "shall be first served"; that is, that it shall be entitled preferably to draw from the dam all water that may be required for the legitimate purposes of the mill. It is not necessary to say how matters would have stood if the pursuers had proposed to add so materially to the machinery of the mill as really to alter its character and deprive the defenders of any water for their mill. It is sufficient for the decision of the case to say that in my opinion the introduction of one additional wheel is consistent with the legitimate use of the Old Mill of which the defenders have no right to complain.

The truth is that what the defenders contend for is that the position of themselves and the pursuers should be inverted, and that they who have only right to the third water should have right to the first, to the effect at least of drawing nearly double the quantity of water which they say the pursuers are entitled to draw.

Various decisions were cited, but I do not think it would serve any good purpose to examine them in detail, as they in great part depended on special circumstances. The case that comes nearest to the present is the case of *Lyon & Gray* v. *Bakers of Glasgow*, 7th January 1749, M. 12,789, in which it was decided that a person having a mill-dam on a river may use more water than he has formerly used though to the prejudice of the heritor of an inferior mill. This case is cited as an authority by Mr Bell in his Principles, sec. 1107. The learned editor of the last edition states in note *e* to that section that the case was a special one—but so is the present. I agree with the Lord Ordinary in thinking that the general rules which regulate the rights of riparian proprietors in regard to running water cannot be precisely applied to water which has been impounded in terms of the titles of one riparian proprietor. The only other remark which occurs to me is that the arrangements of late years as to the use of the water of the Kelvin by the Bishop's Mill and Scotstoun Mill seem from the evidence to have been "extremely loose and unsatisfactory," to quote the words used by Sir James Leslie in his report. I therefore attach little or no weight to the evidence on this point, and we are practically driven to decide the case upon the titles of the parties.

I am therefore on the whole matter of opinion that after the summons has been amended as proposed the Lord Ordinary's interlocutor should be recalled, and decree of declarator and interdict pronounced in terms of conclusions as restricted, the pursuers being found entitled to their expenses as taxed subject to a modification.

LORD TRAYNER was present at the hearing but absent at the advising.

The Court recalled the interlocutor reclaimed against, found in terms of the declaratory conclusions of the summons as restricted by the minute for the pursuers, and granted interdict as craved.

Counsel for the Pursuers and Reclaimers—Lord Advocate (Scott Dickson, K.C.)—Younger. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents—Salvesen, K.C.—Cullen. Agents—Alex. Morison & Co., W.S.