Tuesday, June 6.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EARL OF KINTORE AND OTHERS *v.* ALEXANDER PIRIE & SONS, LIMITED.

(*Ante*, December 18, 1902, 40 S.L.R. 210.)

Process—Abstraction of Water from River—Remedial Measures to Regulate Abstraction—Remit to Men of Skill after Proof and Judgment Deciding Rights of Parties—Scope of Remit—Competency.

After a proof and judgment, whereby it was found that the abstraction of water from a river by millowners injured the salmon fishings in the upper reaches of the river by impeding the passage of salmon in the river, and that such abstraction was supported by prescription only to a certain limited extent, the Lord Ordinary in the case remitted to men of skill to report, *inter alia*, what depth or volume of water flowing over the dam dyke would be in their opinion sufficient to secure the free passage of salmon in the part of the river affected, and what arrangements were possible to insure the observance by the millowners of the limitations attaching to their right to abstract water from the river. Objection was taken to the competency of the remit on the ground that it was a remit, after proof and judgment, of the material question at issue between the parties, viz., what amount of water was to be left in the river. *Held* that the remit was competent.

Opinion (*per* Lord M'Laren) that the remit was in order, subject to the observation that the report by the men of skill was only to be made use of to assist the Court in the matter of regulation, and that, so far as the report proceeded on matters of fact, the facts assumed must be consistent with the proof.

Fishings—Salmon Fishing—Abstraction of Water by Millowner—Regulation by Court—Regulation Providing that One-half of Whole Water of River be Sent Down Natural Course.

In an action by the proprietors of the salmon fishings in a river against millowners thereon as to the abstraction of water by the latter, the Lord Ordinary, after proof and judgment, with a view to granting specific interdict, remitted to men of skill to report what volume of water flowing over the dam-dyke would suffice to secure the free passage of salmon in the river, and what arrangements should be made to insure the observance by the millowners of the limitations on their right to abstract water from the river. The report bore, *inter alia*, that as it was the habit of salmon in ascending a river to follow the main stream, therefore whenever the millowner took more water than he had a prescriptive right to abstract, at least as much water as was being withdrawn for the use of the mill should be passed over the dam down the natural course of the river. The Lord Ordinary gave effect to the report. The Court *adhered—diss.* Lord M'Laren on the ground that the regulation proposed was based on an opinion of the reporters which might or might not be true, but which was not proved by the evidence in the case, and was not an incontrovertible fact of science which could be accepted without proof.

This was an action at the instance of the Earl of Kintore and others, the proprietors of the salmon fishings in the river Don, against Alexander Pirie & Sons, Limited, papermakers, Stoneywood Works, Aberdeenshire, which dealt with the abstraction of water from the river by the defenders at Stoneywood, where they had two dam dykes, viz., the Stoneywood dam dyke and, a little lower down the river, the Waterton dam dyke.

After a proof the Lord Ordinary (Kyllachy) on 21st December 1901 pronounced an interlocutor in the following terms:—"Finds that the defenders have since 1882, and by means of alterations made in that year, or in the years following, on their mill lade and other appliances at Stoneywood, abstracted, and do still abstract, from the river Don at the Stoneywood dam dyke a quantity of water amounting, when the river stands level or about level with the crest of the said dyke, to not less than 36,000 cubic feet per minute: Finds that the said water is to a partial and unimportant extent returned to the said river 663 yards lower down above the Waterton dam dyke, but that for the rest it is returned only at the foot of the Waterton tailrace, which measuring down the river is about 1330 yards below the Stoneywood Dyke: Finds that by means of the said exclusion from the river of the said water for the said distance the river bed is, as regards running water, practically dried except when the river is flowing in a volume exceeding 36,000 cubic feet per minute: Finds that thereby the passage of salmon up and down the river is to a substantial extent obstructed or impeded, and that by consequence the pursuers' salmon fishings in the upper reaches of the river are substantially injured: Finds that, apart from prescriptive right, the said abstraction of water by the defenders to the injury of the pursuers' salmon fishings is an actionable wrong: Finds with respect to the defenders' prescriptive rights—(1) that they have failed to prove that for forty years or upwards prior to the raising of the action, or for any period prior to 1882, they were in use to draw from the river at the Stoneywood dam dyke, or to exclude from the river between Stoneywood and Waterton, more than 7000 cubic feet per minute; (2) that the defenders have also failed to prove that for forty years or upwards prior to the raising of the

action they abstracted at Waterton dam dyke, or excluded from the river between Waterton dam dyke and the foot of the Waterton tailrace, a quantity of water amounting, when the river was level with the average crest of the Waterton Dyke, to more than 28,000 cubic feet per minute: Finds that in these circumstances the defenders' said present abstraction of water at Stoneywood, and exclusion of such water from the river for the said distance, is not supported by prescriptive usage; and, *separatim*, that the defenders have failed to prove that the differences between their present and their former usage (that is to say, the differences above mentioned with respect (1) to the point of abstraction and (2) to the amount of water abstracted) are immaterial as regards injury done or calculated to be done to the pursuers' salmon fishings: Finds further that the defenders have failed to prove that the pursuers' right to complain of their said operations is barred by acquiescence: Finds therefore that the pursuers are entitled to require that the defenders' abstraction of water from the said river shall—as regards both the point of abstraction and the quantity abstracted—be restored to the position existing prior to 1882: Finds, with regard to the pursuers' complaint of the defenders' interference with the structure of the Stoneywood dam dyke and the bed of the river adjacent thereto, that the pursuers have failed to substantiate the said complaint: Finds further, as regards the abstraction of water on Sundays, that the defenders are not entitled in virtue of prescriptive usage or otherwise to abstract on Sundays more water than is necessary for the supply of their reservoir and for filling their lade after cleaning, the quantity so abstracted in no case exceeding 460 cubic feet per minute for three hours, and also in no case exceeding what may pass through one of their the (defenders') sluices kept open to the extent of 12 inches for the said space of three hours: With these findings appoints the cause to be enrolled for further procedure: Finds the pursuers entitled to expenses," &c.

On the 18th December 1902 a reclaiming note against this interlocutor was refused and the case was remitted to the Lord Ordinary to proceed (reported 40 S.L.R. 210).

On the 20th March 1903 the Lord Ordinary pronounced an interlocutor in the following terms:—"Finds and declares . . . that the defenders are not entitled between the hours of twelve o'clock midnight of Saturday of each week and twelve o'clock midnight on the Sunday following, to withdraw water from the river Don either at Stoneywood Dyke or at any other point in any quantity exceeding such quantity as will pass through one of the defenders' existing sluices at the Stoneywood intake, kept open to the extent of twelve inches for the space of three hours during the said period from twelve o'clock midnight of Saturday of each week to twelve o'clock midnight on the Sunday following, and interdicts, prohibits, and discharges the defenders from withdrawing any water from the said river during the said periods exceeding such quantity as aforesaid: Further, assoilzies the defenders: . . . *Quoad ultra* refuses the pursuers' motion, and in particular their motion for declarator in terms of the sixth conclusion of the summons, that the defenders are not entitled to withdraw from the said river at the said dam-dyke or weir of Stoneywood a quantity of water which shall exceed at any time a flow of 7000 cubic feet per minute, and for interdict in corresponding terms and decree for reconstruction of the defenders' works as expressed in said proposed interlocutor: Finds upon the just construction of the Lord Ordinary's findings as now affirmed by the preceding interlocutor of their Lordships of the First Division that the defenders are not limited to their prescriptive rights as existing prior to 1882 and as defined by the said findings, or bound, as therein expressed, to restore matters to the position prior to 1882, except when and in so far as their (the defenders') abstraction of water at Stoneywood affects or helps to affect the flow of the river between the point of abstraction and the point of return, so as to impede the free passage of salmon between the point of abstraction and the point of return: Finds, however, that when the defenders' operations at Stoneywood do by themselves, or in conjunction with similar operations or other causes, affect the flow of the river between the point of abstraction and the point of return so as to impede the free passage of salmon between the said points, the defenders are limited both with respect to the amount of abstraction and the point of return to the usage existing prior to 1882, and are only entitled to innovate upon that usage when and so long as the river flows and continues to flow over Stoneywood Dyke, and thence downwards to the actual point of return, in such volume as to ensure the free passage of salmon between the point of abstraction and the point of return: Finds therefore that any interdict to be granted against the defenders must be qualified so as to operate to the above effect; but in respect it is undesirable to grant a merely general interdict, and that it is also desirable to ascertain and denote if possible by some visible measure what shall be held to be the minimum flow of the river between the said points sufficient for the free passage of salmon, before further answer remits to David Alan Stevenson, civil engineer, Edinburgh, and Walter E. Archer, chief inspector of fisheries, Board of Trade, London, to visit and examine the river Don between Stoneywood Dyke and the foot of the Waterton tail-race, and the defenders' works and appliances connected with the abstraction of water at Stoneywood and its return to the river at the said last-mentioned point, and to report (1) what depth or volume of water, measured by inches or otherwise, flowing over the Stoneywood Dyke and thence downwards over the Waterton Dyke to the foot of the said Waterton tail-race, would be in their opinion sufficient to secure the free passage of salmon in said part of the river; and (2)

whether any, and if so what, arrangements are possible which would, automatically or otherwise, insure the observance by the defenders of the limitations attaching, as above expressed, to their right to abstract water from the river at Stoneywood Dyke: Recommends the said reporters to report *quam primum*, and continues the cause: Grants leave to reclaim."

Note.—"With reference to the recent discussion on the pursuers' motion, and to the above interlocutor, the Lord Ordinary thinks it as well to make the following explanations—(1) In the first place the Lord Ordinary is fully alive to the perhaps elliptical language of the finding in his previous interlocutor, 'that the pursuers are entitled to require that the defenders' abstraction of water from the said river shall—as regards both the point of abstraction and the quantity abstracted — be restored to the condition existing prior to 1882.' But he thinks it is plain that this finding falls to be read with reference to the assumption underlying the whole previous findings, namely, that the defenders' operations are in this case being considered with reference simply to their effect on the passage of salmon between the point where the defenders abstract water from the river and the point at which they return the water abstracted. By the said previous findings the defenders' operations had been found to be illegal, simply as impeding the free passage of salmon, and their prescriptive rights had been defined only so as to fix the extent to which they had right to impede the free passage of salmon. If in any particular finding this limitation is not expressed, it is always, in the Lord Ordinary's opinion, quite plainly implied. (2) It may be true, as the defenders insist, that the present action applies only to the defenders' operations at Stoneywood, but it has to be noted that their operations at that place are impeached not only as affecting the river between Stoneywood and Waterton, but also as affecting the river between Waterton and the existing point of return at the foot of the Waterton tail-race. It is therefore, in the Lord Ordinary's opinion, both competent and necessary to make it clear that if the defenders shall in any way innovate upon their prescriptive rights they shall only do so when, with respect to the whole stretch of the river which their operations affect, those operations are, by reason of the state of the river, innocuous—that is to say, innocuous as regards the passage of salmon. (3) As regards the abstraction on Sunday, which is the subject of the eighth conclusion of the summons, the Lord Ordinary had understood that the declarator as proposed by the pursuers was not objected to by the defenders, but in case there has been any misapprehension on that point he desires to note that, as regards the abstraction of water on Sunday, the question is not, as he understands it, confined to *de facto* injury to the salmon fishings, but has reference also to the statutory enactments which forbid millowners (whatever may be their rights to withdraw water) to allow such water to run to waste on Sundays, or when their mills are not working."

The report of Messrs D. A. Stevenson and Walter E. Archer, dated 4th July 1904, was, *inter alia*, as follows:— . . . . "With regard to the question put to us under the first heading, we are of opinion that it would be impossible to denote any specific volume of water measured by inches flowing over Stoneywood Dyke which would at all times and under all conditions be sufficient for the free passage of salmon in the river. Such volume must necessarily be a varying quantity, depending on the volume abstracted for the use of the mill, and so passing out at the tail race. For it is the habit of salmon in ascending a river to follow the main stream, and if, therefore, a greater quantity of water were flowing from the tail race of the mill than down the channel of the river the free passage of salmon in the river would, in our opinion, be impeded. We consider, therefore, that the only safe rule which we can lay down for the guidance of the Court in this matter is that when free passage for salmon is desired there should always be at least as much water flowing over Stoneywood Dyke, and thence downwards over Waterton Dyke to the foot of the Waterton tail race as is abstracted for the use of the mill. We feel, however, in view of the limitations on the right of the defenders to abstract water, that it would be unsatisfactory to leave the matter there, and that we should not be complying with the term of our remit if we omitted to state what volume of water going over Stoneywood Dyke would ensure the free passage of fish in the river, so long as no more than 7000 cubic feet p. min. were being abstracted for the use of the mill. . . . It appears to us that, given as great a volume of water floating down the bed of the stream as through the mill-lade, the points which presented the greatest obstruction to ascending fish were the dykes at Stoneywood and Waterton, and that if proper passes for fish were constructed at these two dykes, the present passes being in our opinion useless, we should be able to fix a smaller quantity of water as the minimum flow, and that such smaller quantity of water would better carry out the intention of our remit than a larger volume if the dykes were to remain in their present condition. In answer therefore to the question put to us under the first heading, we are of opinion that in order to ensure the free passage of salmon the defenders should not abstract more than 7000 cubic feet of water, which we understand they are in any circumstances entitled to, until there is an average depth of 7 inches flowing over Stoneywood Dyke and thence to Waterton tail race, provided that effective fish-passes at Stoneywood and Waterton dykes respectively were constructed in accordance with the plans accompanying this report, and that whenever the volume of water coming down the river is more than sufficient to provide 7000 cubic feet to the mill-lade and keep an average depth of 7 inches in depth flowing over the crest of the Stoneywood Dyke, the

mill shall not take more than half the whole quantity coming down the river. On the other hand, should it be decided for any reason not to construct new fish-passages on these dykes, then it will be necessary, in order to ensure the free passage of salmon, that the defenders shall not abstract more than 7000 cubic feet till there is an average depth of 9 inches flowing over the crest of Stoneywood Dyke, and thence to Waterton tail race, and whenever the volume of water coming down the river is more than sufficient to give 7000 cubic feet to the mill-lade, and 9 inches average depth over the crest of the Stoneywood Dyke, the mill shall not take more than half the whole quantity coming down the river." . . .

On the 19th August 1904 the Lord Ordinary (KYLLACHY), giving effect to this report, pronounced an interlocutor in these terms—"The Lord Ordinary having considered the report by Messrs Stevenson and Archer and heard counsel, Approves of said report, and with reference thereto and to the record and proof, and to the Lord Ordinary's previous interlocutors, Finds and declares that the defenders are not entitled to abstract water at the Stoneywood Dyke in excess of 7000 cubic feet per minute, except when 9 inches of water are flowing over the crest of the Stoneywood Dyke, and thence downwards over the Waterton Dyke to the Green Burn: Finds and declares further, that even on said excepted occasions the defenders are not entitled to withdraw a larger quantity of water from the river at the said dyke than 31,850 cubic feet per minute, except when and so long as there shall be left to flow over the said dyke and thence downwards over the Waterton Dyke to the Green Burn at least one-half of the whole water flowing down the river at the time: Finds and declares further, that even when the defenders' abstraction at Stoneywood Dyke does not exceed 7000 cubic feet per minute, they (the defenders) are, except as after mentioned, bound to return to the river the whole water there abstracted at a point not lower than the point where the existing tail race of the Stoneywood Upper Mill joins the river, providing, however, and declaring that they may continue as at present to carry the said water down to the foot of the tail race at Green Burn, while and so long as and upon the condition that they refrain from exercising their prescriptive rights at Waterton as previously defined, or curtail the exercise of the said rights to an extent at least equal to the extent of the water abstracted by them at Stoneywood, and not returned as aforesaid at the foot of the said Upper Mill tail race: Finds and declares further that it is a condition of the exercise by the defenders of the rights of abstraction and return above expressed that they (the defenders) shall permit the pursuers or the Don Fishery Board (1) to erect and maintain at the sight if necessary of the reporter Mr Stevenson, or failing him of a person to be named by the Judge Ordinary from time to time the gauges mentioned in the report; and (2) to mark their (the defenders') sluices at the sight of said reporter or other person in the manner mentioned in the report, and that they shall also give to the pursuers or the said reporter or other person all necessary facilities for preparing the table mentioned in said report. To said extent and no further declares and decerns in terms of the sixth conclusion of the summons: And with respect to the interdict therein concluded for, interdicts, prohibits, and discharges the defenders (1) from abstracting from the said river at Stoneywood more than 7000 cubic feet of water per minute, except on the occasions and under the conditions and restrictions above expressed; and (2) from carrying any water abstracted by them at Stoneywood to any point of return below the said point where the tail race of the Stoneywood Upper Mill joins the river, except in the circumstances and under the further condition and restriction above expressed: *Quoad ultra* finds it unnecessary to dispose of the conclusions of the summons otherwise than as already disposed of: Therefore dismisses the same, and decerns," &c.

The defenders reclaimed, and argued — The remit by the Lord Ordinary was incompetent. It was not made for the purpose of defining an interdict. It was a remit of the whole question at issue between the parties, viz., what water was to be left in the river by the defenders after a proof had been taken and judgment pronounced. Such procedure was not competent — *Provost, Magistrates, &c. of Kilmarnock* v. *Reid*, January 22, 1897, 24 R. 388; *Clark and Shotts Iron Co.* v. *Lindsay*, Weekly Notes, 1888, p. 52. No interlocutor should therefore proceed upon it. But even if the remit were competent, the report upon it was incompetent, inasmuch as it brought in a new question into the case, whether more than half the flow of the river might be abstracted. That was a very substantial question, and should have been advanced at the proof. A new standard was set up, viz., damage, and that standard was not followed throughout, for it would have allowed the defenders' abstraction on Sundays, which had not been proved to do damage, and it would have allowed the drying up of the river between Stoneywood and Waterton whenever it was dried up below Waterton, for no further damage was done thereby. This question was also made to depend on the salmon ladders which were to be as required by the Fishery Board, and so beyond the defenders' control. Such a report could in no sense be said to be merely executorial, and the interlocutor so far as proceeding on it should be set aside. The regulation providing for one-half of the whole flow of the river being passed down the natural course whenever the amount prescribed was exceeded should therefore be disallowed.

Argued for the pursuers and respondents —The interlocutor as it stood would be accepted, but if it were to be altered, then

the pursuers maintained that they were entitled, in terms of the interlocutor of 21st December 1901, to a restoration of matters to the position prior to 1882, and that the findings in that interlocutor were not to be read subject to the limitation now suggested by the Lord Ordinary. The defenders had never suggested such a limitation, and it was for them to have done so. But if the Lord Ordinary were to be held right in putting this construction on that interlocutor, the pursuers then maintained that he was also right in the subsequent procedure of the remit and its terms. Parties had never met on the question of what the remedial measures were to be, and a remit was the proper mode to settle that question. The position of the defenders was that they must either accept the position prior to 1882, or they must show that any change would not be to the injury of the pursuers—*M'Intyre Brothers* v. *M'Gavin*, June 16, 1893, 20 R. (H.L.) 49, 30 S.L.R. 941.

At advising—

LORD ADAM—On 21st December 1901 the Lord Ordinary pronounced an interlocutor by which he found that the defenders abstracted from the river at Stoneywood Dam Dyke, when the river was about level with the crest of the dyke, a quantity of water amounting to not less than 36,000 cubic feet a minute; that thereby the passage of salmon up and down the river was to a substantial extent obstructed; that in consequence the pursuers' salmon-fishings were substantially injured, and that, apart from prescriptive right, the said abstraction of water to the injury of pursuers' salmon fishings was an actionable wrong. The Lord Ordinary then proceeded to deal with the defenders' alleged prescriptive rights. He found that the defenders had failed to prove that they were in use to draw from the river at the Stoneywood Dam Dyke more than 7000 cubic feet a minute, or that they had abstracted from Waterton Dam Dyke more than 28,000 cubic feet per minute. He further found that the pursuers were entitled to require that the defenders' abstraction of water from the said river should, as regards the point of abstraction and the quantity abstracted, be restored to the position existing prior to 1882. The interlocutor contained various other findings which need not be here mentioned.

On 7th January 1902 we adhered to this interlocutor, and remitted to the Lord Ordinary to proceed with the cause.

When the case came again before the Lord Ordinary, he on 20th March 1903 found, *inter alia*, that on the just construction of the Lord Ordinary's findings, as affirmed by their Lordships of the First Division, "the defenders are not limited to their prescriptive rights as existing prior to 1882, and as defined by the said findings, or bound as therein expressed to restore matters to the position prior to 1882, except when and in so far as their (the defenders') abstraction of water at Stoneywood affects or helps to affect the flow of the river between the point of abstraction and the point of return so as to impede the free passage of salmon between the point of abstraction and the point of return," but were only entitled to innovate upon that usage when and so long as the river flows and continues to flow over Stoneywood Dyke and thence downwards to the actual point of return in such volume as to insure the free passage of salmon between the point of abstraction and the point of return. He finds therefore that any interdict to be granted against the defenders must be qualified so as to operate to the above effect, but in respect it was undesirable to grant a purely general interdict, but that it was desirable to ascertain and denote if possible by some visible measure what should be held to be the minimum flow of the river between the said points sufficient for the free passage of salmon, before further answer he remitted to David A. Stevenson, C.E., Edinburgh, and Walter E. Archer, Chief Inspector of Fisheries, Board of Trade, London, to visit and examine the river Don between Stoneywood Dyke and the foot of the Waterton tail race, and the defenders' works and appliances connected with the abstraction of water at Stoneywood and its return to the river at the last-mentioned point, and to report (1) what depth or volume of water measured by inches or otherwise flowing over the Stoneywood Dyke and thence downwards over the Waterton Dyke to the foot of the Waterton tail race would be in their opinion sufficient to secure the free passage of salmon in said part of the river; and (2) whether any and what arrangements are possible which would automatically or otherwise ensure the observance by the defenders of the limitations attaching as above expressed to their right to abstract water from the river at Stoneywood Dyke.

Messrs Stevenson and Archer on 19th July 1904 duly reported to the Lord Ordinary, and his Lordship, on considering their report, by the interlocutor now submitted to review approved of their report and gave effect to the recommendations therein contained.

As I understood, the pursuers stated that they were content to accept the interlocutor as it stood, but that if the interlocutor were to be altered and further inquiry gone into as to the minimum depth of water necessary for the free passage of salmon, then they maintained that such inquiry was altogether incompetent.

It was said to be incompetent because of the finding in the interlocutor of 21st December 1901, that the pursuers are entitled to require that the defenders' abstraction of water from the river shall, both as regards the point of abstraction and the quantity abstracted, be restored to the position existing prior to 1882, which they said was final and conclusive of the matter.

It appears to me, however, that as the only title of the pursuers to complain of the defenders' operations is, in so far as they impede the free passage of salmon to

their fishings, if such free passage be fully secured to them, they have no right to object to the defenders' operations *in suo*. I further agree with the Lord Ordinary that the defenders' operations had been found to be illegal simply as impeding the free passage of salmon, and that their prescriptive rights had been defined only so far as to fix the extent to which they had a right to impede the passage of salmon.

I further agree with the Lord Ordinary that it was not desirable that a general interdict should be granted in this case, but that, with a view to granting specific interdict, it should be ascertained in this process what volume of water passing over Stoneywood Dyke would be sufficient at all times to afford salmon a free passage upwards and the conditions necessary or desirable to prevent the abstraction of water from the river from obstructing such free passage.

In order to inform himself as to these matters I think the Lord Ordinary was quite entitled to remit the matter to two gentlemen in whose opinion he had confidence and whose capacity and skill is not questioned. I see no incompetency in that course.

The reporters reported that in order to ensure the free passage of salmon the defenders should not abstract more than 7000 cubic feet, till there was an average depth of nine inches flowing over the crest of Stoneywood Dyke, and thence to Waterton tail-race, and that whenever the volume of water coming down the river was more than sufficient to give 7000 cubic feet to the mill-lade and nine inches average depth over the crest of Stoneywood Dyke, the mill should not take more than half the whole quantity coming down the river.

The defenders have lodged no objections to the report, but I understood them to maintain that a minimum depth of nine inches of water flowing over the crest of the dyke was not necessary for the free passage of salmon, but that a depth of six inches was quite sufficient for the purpose; and in support of that proposition they referred to various passages of the proof. I have read these passages, but they have not satisfied me that the reporters have overestimated the minimum depth of water necessary for the free passage of salmon.

The defenders further objected to the report in so far as it found that the defenders should be entitled to take only one-half of the water passing over the Stoneywood dyke when the volume of water passing over the dyke exceeds nine inches in depth. The reason given by the reporters for this restriction on the defenders' right to take water is that it is the habit of salmon in ascending a river to follow the main stream, and if therefore a greater quantity of water were flowing from the tail-race of the mill than down the channel of the river the free passage of salmon in the river would in their opinion be impeded.

Opinions may perhaps differ as to whether this opionion of the reporters is well founded or not, but, however that may be, it is the opinion of the men of skill to whom the Lord Ordinary has remitted, and I think that for the purposes of this case he was right in giving effect to it.

On the whole matter I think the interlocutor should be adhered to.

LORD M'LAREN—This case was formerly before us on a reclaiming note from the Lord Ordinary's interlocutor of 21st December 1901, on the question of fact of the interference on the part of Messrs Pirie with the water of the Don, to the effect of obstructing the passage of salmon, and also on the question as to the extent of Messrs Pirie's prescriptive right to withdraw water from the Don for use as motor-power in their paper-mills. The interlocutor then under review consisted of a series of findings in fact and law on the various points which had been argued. The Lord Ordinary did not decern in terms of any of the declaratory conclusions of the summons, and did not grant interdict. No decree was pronounced, but, after the findings referred to, the Lord Ordinary appointed the case to be enrolled for further procedure.

On 18th December 1902 this Division adhered to the Lord Ordinary's interlocutor and remitted the case to his Lordship to proceed.

The case having been thus remitted, the Lord Ordinary on 20th March 1903 pronounced an interlocutor, which deals first with the abstraction of water on Sundays, and, secondly, with the abstraction of water on working days. As to the first head, his Lordship interdicted the defenders from withdrawing water from the Don on Sundays in excess of such quantity as will pass through one of the defenders existing sluices at the Stoneywood intake, kept open to the extent of twelve inches for the space of three hours. Now, this is a mere echo of the finding on the same subject in the interlocutor of 21st December 1901, or, rather, it is an interdict in terms of that finding; and as we adhered to the interlocutor of 21st December 1901, it is self-evident that we must adhere to the interdict granted in terms of it.

With regard to abstraction of water on working days, the interlocutor of 20th March 1903 begins with certain findings, and then proceeds—"But in respect it is undesirable to grant a merely general interdict, and that it is also desirable to ascertain and denote, if possible, by some visible measure, what shall be held to be the minimum flow of the river between the said points sufficient for the free passage of salmon," therefore the Lord Ordinary before further answer remitted to David Alan Stevenson, C.E., Edinburgh, and Walter E. Archer, Chief Inspector of Fisheries, Board of Trade, London, to inquire and report on the case under two heads, which I shall presently consider. These gentlemen made a report on the questions remitted to them, and the Lord Ordinary's interlocutor of 19th August 1904, reclaimed against, is substantially in accordance with their report. At the hearing before this Division of the Court no objection was stated to the selection of the gentlemen

named as referees. Each is eminent in his own department, Mr Stevenson as a water engineer, and Mr Archer as an expert in the regulation of salmon fisheries. But if I am not mistaken the defenders' counsel expressed dissatisfaction with the action of the Lord Ordinary in making a remit, from an apprehension, which I hope is not well-founded, that the Lord Ordinary might be disposed to give undue weight to the opinions of the referees where these were in conflict with the weight of the expert evidence contained in the proof.

This is a prejudicial question which it may be convenient to deal with first in order.

It consists with my experience, and I think with that of all your Lordships, that actions relating to water-rights not infrequently resolve into questions of regulation, and that in such cases, after the main question of fact has been disposed of by a proof or jury trial, the Court has been in use to remit to persons of skill to assist it in devising remedial measures or framing regulations which will prevent encroachment by the one party on the rights of the other. In such cases a general interdict is of very little use, because it only leads to a prosecution for breach of interdict, in which we should have to try the question which can be more conveniently settled by way of regulation in the original action.

At the advising of this case under the previous reclaiming note Lord Kinross delivered the leading opinion, and examined the evidence and arguments with great care. My own opinion was only intended to be supplementary to that of the Lord President, in which I concurred, but in it I said that "I should have preferred to decide the case by a finding that the defenders have infringed the pursuer's rights, and by remitting to an engineer or person of skill to report what works were necessary to secure a passage for the salmon if the parties could not agree as to what should be done." None of the Judges say anything to the contrary; and I think it was understood that, as the Lord Ordinary had only made findings with a view to further procedure, all questions of regulation were left open. I am therefore of opinion that the remit to Messrs Stevenson and Archer was quite in order, subject to this observation, that the report of these gentlemen was only to be made use of to assist the Lord Ordinary and the Court in the matter of regulation, and that, so far as their report proceeded on matters of fact, the facts assumed must be consistent with the proof.

I pass now from the interlocutor making the remit (20th March 1903) and come to the consideration of the interlocutor of 19th August 1904, which proceeds on a review of the report of Messrs Stevenson and Archer, and of the record and proof, and disposes of the cause, first by certain declaratory findings which are in the nature of regulation of the use of the water, and, secondly, by interdict against the abstraction of water from the Don in a manner or measure inconsistent with the prescribed regulations.

I think there is no better way of reviewing an interlocutor of this nature than by examining the findings separately in their order. But before doing so it may be well to note what are the rights of the defender. in relation to the use of the water at common law and in virtue of prescriptive uses I begin by stating that according to the evidence and documents in process the defenders have acquired the water-rights on both sides of the Don over the tract of river on which these paper-works are situated. It follows, in my opinion, for reasons which are stated in my speech at the advising of 18th December 1902, (1) that in a question with proprietors of salmon fishing the defenders are entitled to withdraw for use in their turbines so much of the water of the Don as may be withdrawn consistently with the right of the owners of the salmon fishing to have a free passage left for the salmon with a sufficiency of water therein to enable the fish to pass. The right is of course subject to the condition that the water must be returned into the natural bed of the river substantially in the same condition as to quality, quantity, and direction. As the parties are at issue as to the quantity of water which may be withdrawn consistently with the rights of the proprietors of the salmon fishings, it is for the Court to make such regulations as to the quantity of water which may be withdrawn as will safeguard the rights of the proprietors of salmon fishings. (2) It has been already found that the defenders have acquired by prescriptive use the right to withdraw water to the extent of 7000 cubic feet per minute at Stoneywood Dyke, and that irrespective of the pursuers' rights. (3) It has also been found that the defenders and their authors have, for the prescriptive period withdrawn from the river a quantity of water estimated at 28,000 cubic feet per minute, and that irrespective of the pursuers' rights, at the Waterton Dyke, which is situated below the Stoneywood Dyke, *i.e.*, at a point between the present intake and the present point of discharge. But it must be kept in view that since 1882, when the defenders' existing waterworks were constructed, the whole of the water used in their turbines has been intaken at Stoneywood. For this variation the defenders are not in a position to plead prescriptive use, and the effect of it, as very clearly established by the evidence, is greatly to increase the injury done to the rights of the proprietors of fishings.

Reverting now to the interlocutor under review, the first finding is in these terms: — "Finds and declares that the defenders are not entitled to abstract water at the Stoneywood Dyke in excess of 7000 cubic feet per minute, except when nine inches of water are flowing over the crest of the Stoneywood Dyke, and thence downwards over the Waterton Dyke to the Green Burn." Now, it was found by our previous judgment, affirming that of the Lord Ordinary, that the defenders, for forty years prior to 1882 (the year when their waterworks were remodelled), had been in use to withdraw 7000 cubic feet per

minute at all states of the flow of the river, and the question now is, how much more may they take consistently with the right of unobstructed passage for the salmon? It was argued to us that nine inches of water at the crest of the dyke or dam is more than is reasonably necessary for the passage of salmon, and that the weight of opinion among the skilled witnesses examined at the proof was in favour of a minimum depth of six inches. I have already given my adhesion to the principle that the facts of the case must be found in the proof, but I think this is too critical an application of that principle. In the first place, the witnesses examined at the proof were not considering the question of regulation, and again, this is not a matter of fact, but of opinion, and the Lord Ordinary's finding is in accordance with the recommendation of Messrs Stevenson and Archer. But, further, I am not sure that the witnesses referred to, and Messrs Stevenson and Archer, are speaking of the same thing. It may be quite true that if the salmon could be brought up the dam to a point near the crest of the dyke, or if an effectual salmon ladder was provided, whereby they might ascend the slope of the bank, six inches at the crest would be sufficient to enable them to float over into the stream. But the reporters say that the existing salmon pass is perfectly useless, and we have to consider that the water which flows over the crest will spread, and six inches at the crest does not imply six inches or anything like it over the slope of the dam. Now, I understand that the reporters in recommending nine inches at the crest of the dam give this as a measure of the amount of water which when spread over the surface of the dam and the present inadequate salmon pass would be sufficient to enable the salmon to ascend the dam as well as to surmount the crest. I am unable to see that the Lord Ordinary was in error in acting on that recommendation, and I am of opinion that this finding ought to remain unaltered.

The next finding is, "that even on said excepted occasions the defenders are not entitled to withdraw a larger quantity from the river at the said dyke than 31,850 cubic feet per minute, except when and so long as that shall be left to flow over the said dyke, and thence downwards over the Waterton Dyke to the Green Burn, at least one-half of the whole water flowing down the river at the time." I understand that the figure 31,850 cubic feet represents the quantity of water flowing over the dyke when the surface of the water is nine inches above the crest of the dyke, and the principle of this finding is that of equal division of the surplus water between the mill-owners and the proprietors of salmon-fishings. But to understand the bearing of this finding it must be kept in view, as already pointed out, that prior to 1882 a great part of this volume of water was withdrawn, not at Stoneywood but at Waterton Dyke, a point considerably below the present intake at Stoneywood, and the defenders have not a prescriptive right to take this volume of water at Stoneywood. On the one hand, it would be very detrimental to the defenders' industry if they were compelled to alter their works and to take the water at the lower point, Waterton, because they would not have the necessary fall for their turbines. On the other hand, the unqualified withdrawal of so large an amount of water at Stoneywood would be injurious to the salmon fishings, because it would leave a longer tract of river bed dry, or nearly dry, in the summer season when the water is low. Now, if I thought the Lord Ordinary's requirement, that one-half of the water in excess of 31,850 feet should be sent down the natural bed of the stream, was intended as an additional safeguard to the proprietors of fishings against the chance of the bed of the river being left dry, or insufficiently filled, I should certainly not propose to interfere with the finding on such a question of the judge who heard the evidence, and who is in a better position to judge of such a question than we can be. But this is not the motive of the finding. The motive is found in the report of Messrs Stevenson and Archer, who give their opinion that "it is the habit of salmon in ascending a river to follow the main stream," and who therefore recommend that "there should always be at least as much water flowing over Stoneywood Dyke, thence downwards over Waterton Dyke to and the foot of the Waterton tail-race, as is abstracted for the use of the mill." This may or may not be true as a fact of natural history, but it is not proved by the evidence in this case, and I am not prepared to accept it as one of the incontrovertible facts of science which have passed into the domain of general knowledge and may be accepted without proof. This finding, if affirmed, might be quoted as a precedent, and we should in effect be making a new law for all the water-rights in Scotland to the effect that, prescription apart, no millowner on a salmon river can ever withdraw more than half of the water of the stream at one time. I think this is going beyond what I understand by regulation, which must, as I think, take account of the facts of the case as fixed by the proof.

The next finding of the Lord Ordinary is that in which certain limitations are attached to the rights to abstract—1st, 7000 cubic feet of water per minute; and 2nd, 31,850 cubic feet per minute. The finding is rather long for quotation here, and, in the absence of any explanatory note of the Lord Ordinary's opinion, I am not sure that I am completely in possession of the Lord Ordinary's view on this question. But, as I understand it, the risk to be guarded against is that the defenders, in the professed exercise of their prescriptive rights, might make a further withdrawal of water from the stream at Waterton Dyke or some other point below Stoneywood. By the first finding 7000 cubic feet per minute is to be the maximum withdrawal at Stoneywood in the pure exercise of prescriptive right. No more water is to be taken until the stream rises to the height of nine inches above the crest of the dyke at Stoneywood;

and this is right, because a prescriptive right to withdraw a larger quantity at a lower point, viz., Waterton Dyke, will not justify the taking this larger quantity at Stoneywood. So long as all the water taken by the defenders is taken at Stoneywood the limit of nine inches is sufficient to secure a free passage for the salmon. But, obviously, that limit would not be efficacious for the purpose if the defenders were permitted to make a further withdrawal at a lower point, thus using up the water which was intended to secure a passage for the salmon.

If I had been sitting alone I should have preferred to express the qualification differently. I should have said that the regulation was only to be binding so long as the defenders withdrew the water only at Stoneywood, but that in the event of their desiring to alter their works and to withdraw water at a lower point the pursuers should be at liberty, either in this or in another action, to apply to the Court for a new regulation. I have difficulty in forecasting the effect of future alterations, and I incline to think that the condition, as expressed by the Lord Ordinary, is too complicated for the purposes of a working condition. But as my opinion on this point is not shared by other members of the Court I may add that if the condition only means that the defenders are not to withdraw at a lower point any part of the nine inches of water which they are required to send over the Stoneywood Dyke, then I approve of it; if it means anything more than this, I should prefer not to make a hypothetical declaration as to a condition of things that has not arisen and which may never arise.

With respect to the conditions numbered (1) and (2) as to the erection of gauges, the marking of the sluices, and the preparation of the table recommended in the report of the referees, I think that these conditions are sound, and that they are within the legitimate limits of regulation.

With respect to the interdict to be granted, this will be in accordance with the declaratory findings as these may be adjusted by the Court.

LORD KINNEAR concurred in the opinion of LORD ADAM.

The LORD PRESIDENT was not present at the hearing and gave no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents — Campbell, K.C. — Lord Kinross. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders and Reclaimers —The Solicitor-General (Salvesen, K.C.)—Clyde, K.C.—Nicolson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, June 7.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

GRAHAM *v.* LAMBIE AND OTHERS.

Local Government — Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 50), *secs.* 70 (5), 75 (1)—*Audit of County Council Accounts—Illegal Payments—Disallowance by Secretary for Scotland—Surcharge on Persons "Making" Payments —Secretary's Decision as to Legality is Final — Persons "Making" Payments are those who Signed Cheques under sec.* 75 (1).

The Local Government (Scotland) Act 1889, with respect to the audit of county council accounts, provides, sec. 70 (sub-sec. 5), that if a county auditor thinks that any payment is contrary to law and should be disallowed, he is to report it to the Secretary for Scotland, who after due inquiry shall decide all questions raised by the report and shall "disallow all illegal payments, and surcharge the same on the person or persons making them."

By section 75 (sub-section 1) it is provided that all payments out of the county funds, with certain exceptions not applicable to this case, "shall be made in pursuance of an order of the council signed by three members of the finance committee, and countersigned by the county clerk. . . . Moreover, all cheques for payment of moneys shall be signed by two members of the finance committee, and be countersigned by the county clerk or by a deputy approved by the council."

The Secretary for Scotland, on a report from a county auditor, under section 70 (5) of the Act, disallowed certain payments made out of county funds, and surcharged them upon the individuals who signed and countersigned the cheques under section 75 (1) of the Act.

Held (1) that upon the question of the legality or illegality of the payments the decision of the Secretary for Scotland was final; (2) that the individuals who signed and countersigned the cheques were the persons "making" the payments in the meaning of section 70 (5), and were accordingly rightly surcharged.

The Local Government (Scotland) Act 1889, section 70, provides—"The following regulations with respect to audit shall be observed," that is to say, . . . sub-sec. (5)—"If it shall appear to any county auditor acting in pursuance of this section that any payment is in his opinion contrary to law and should be disallowed, or that any sum which in his opinion ought to have been is not brought into account by any person, whether such payment or failure to account has been made matter of objection or not, he shall by an interim report under his