Thursday, December 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

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

Fishings—Salmon-Fishing—Obstruction—Millowner—Abstraction of Water—Title of Salmon-Fishing Proprietors to Complain—River.

In an action at the instance of the proprietors of salmon-fishings against a millowner, who was a riparian proprietor, to restrain him from obstructing the free passage of salmon by abstracting from the river so much water as frequently to dry the bed of the river for about 1300 yards, the defender maintained that the pursuers had no right to object to the obstructions complained of, in respect that the water was abstracted and returned within the millowners' own property, and that his operations were not objected to by any riparian proprietor having a title to complain. *Held* that the millowner was not entitled, apart from prescription, to abstract water in such quantities as to injure the pursuers' salmon-fishings, and that the pursuers as proprietors of salmon-fishings were entitled to object to such abstraction of water from the river.

The estate of salmon-fishing is one which will receive the protection of the law against injurious interference in the same way as any other estate created or recognised by the law.

Prescription—Long Prescription—Abstraction of Water from River by Millowner—Right of Proprietors of Salmon-Fishings to Object—Tantum prescriptum quantum possessum—Salmon-Fishing—River.

Evidence upon which *held* that a millowner had not established a right by prescription to abstract water from a river in such a manner as to obstruct the passage of salmon.

Held that for the purposes of this question the measure of the use was not the capacity of the millowner's works to take and use water but the amount of water actually taken.

Held further, that in calculating the amount of water in fact taken the millowner was not entitled to include the amount of water taken for another mill, not his property, on the opposite bank, the lade leading to which had been closed by the millowner under agreement with the proprietor of the other mill.

Held also that, as in 1882 a change had been introduced whereby the whole water abstracted was taken out of the river at the higher of two dams and only returned at the tailrace of the lower dam, and a longer space of the river was consequently dried, and the millowner had failed to prove that this change was immaterial as regards injury to salmon-fishings, his present abstraction of water was not justified by prescriptive use.

Acquiescence—Proprietors of Salmon-Fishing—Obstruction.

In an action by the proprietors of salmon-fishings against a millowner to prevent his injuring the fishing by abstracting the water from the bed of the river, the defender averred that the extensive alterations in his works causing the alleged abstraction had been carried out with the knowledge of and without objection from the pursuers, and pleaded that the pursuers were barred by acquiescence.

Held that mere knowledge of and absence of objection to the alterations made by the defenders on their own property were not sufficient to bar the pursuers from insisting in their action.

Fishing—Salmon Fishing—Obstruction—Consent of Fishery Board — Salmon Fisheries Act 1862 (25 *and* 26 *Vict. c.* 97) *—Salmon Fisheries Act* 1868 (31 *and* 32 *Vict. c.* 123).

The consent of the Salmon Fishery Board to alterations on a millowner's appliances for using the water in a river for power purposes does not bind the proprietors of salmon fishings in the river.

This was an action at the instance of the Earl of Kintore and others, proprietors of salmon-fishings on the river Don, against Alexander Pirie & Sons, Limited, paper manufacturers, at Stoneywood Works, on the same river.

The summons concluded for declarator that the defenders "have no right or title by means of dam dykes or weirs stretching across the river Don, and intakes, sluices, mill lades, tailraces, and other relative works wheresoever situated, erected, and maintained, or to be erected and maintained by them in connection with their works at Stoneywood aforesaid, or in consequence of operations executed by them or their authors or to be executed by them on the bed of the river Don, to prevent or obstruct the free passage of salmon to and from the fishings on the upper reaches of the river belonging to the several pursuers, or to one or more of them, or otherwise, and at least that they are not entitled by means of such works or operations to interpose a greater obstruction to the free passage of salmon to the prejudice of the pursuers, or one or more of them as proprietors of salmon-fishings aforesaid than was caused by their said works prior to the dates, or one or other of them, which may be determined in the course of the process to follow hereon to have been the dates when the illegal operations referred to in the third conclusion hereof were made and executed; (*second*) It ought and should be found and declared by decree foresaid that the dam dyke or weir known as the Stoneywood Dyke belonging to the defenders, and stretching across the river Don at a point about a quarter of a mile above the defenders' works at Stoneywood aforesaid, and the intake, sluices, mill-lades,

tailraces, and other works used in connection therewith, constitute, as at present constructed and in use, an illegal obstruction to the free passage of salmon to and from the fishings on the upper reaches of the said river belonging to the several pursuers or one or more of them; (*third*) It ought and should be found and declared by decree foresaid that at various dates within the prescriptive period of forty years prior to the raising of the present action the defenders or their authors have executed operations upon the said Stoneywood Dyke and upon the bed of the river immediately above and below the same, and also upon the intakes, sluices, mill-lades, tailraces, and other works used in connection therewith, which operations, or one or more of them, have the effect of illegally obstructing the salmon ascending and descending the said river Don to and from the fishings of the pursuers, or one or more of them, or otherwise and at least have the effect of illegally obstructing the salmon so ascending and descending the said river to an extent materially exceeding any obstruction which existed prior to the said operations, and that to the prejudice of the pursuers, or one or more of them."

There was a conclusion for reconstruction or alteration of the dyke, &c., so that there should be no greater obstruction to the free passage of salmon than was caused at the commencement of the prescriptive period, or such later date as aforesaid.

There were further alternative conclusions for declarator and interdict

The summons further concluded—"*Sixth*, "It ought and should be found and declared by decree foresaid that the defenders are not entitled to withdraw from the said river at the said Stoneywood Dyke a quantity of water that shall exceed at anytime a flow of 7000 cubic feet, or 43,750 gallons per minute or thereby, or such other quantity, less or more, as the defenders shall be able to instruct in the course of the process to follow hereon that they are entitled to withdraw from the said river at the said dyke in virtue of their titles or immemorial possession."

The summons contained certain other conclusions bearing upon the operations of the defenders upon the dam dyke and the withdrawal of water upon Sundays, to which it is unnecessary to refer further.

The circumstances of the case and the contentions of the parties are set out fully in the opinions of the Lord Ordinary and of the Lord President, *infra*.

The pursuers pleaded — "(1) The defenders having no right in virtue of their titles or immemorial possession to prevent or obstruct the free passage of salmon up and down the said river, or, at all events, to increase the obstruction caused by their said works prior to the dates condescended upon, decree ought to be pronounced in terms of the first conclusion of the summons. (2) The defenders or their authors having within the prescriptive period of forty years executed operations upon the said dam dyke and relative works, and upon the bed of the river, whereby the salmon ascending and descending the river are illegally obstructed to an extent exceeding any obstruction previously existing, the pursuers are entitled to decree in terms of the third, fourth, and fifth conclusions of the summons. (3) The defenders or their authors having within the prescriptive period illegally increased the quantity of water withdrawn by them from the river to the prejudice of the pursuers, the pursuers are entitled to decree in terms of the sixth conclusion of the summons."

The defenders pleaded—"(1) No title to sue (3) The pursuers are barred by acquiescence, taciturnity, and *mora*, from insisting in the present action. (6) The defenders being entitled (1st) by virtue of their titles, and (2nd) by prescription, to maintain and use the works complained of, and the said works being in all respects conform to the Salmon Fisheries Acts, they are entitled to absolvitor. (7) *Separatim*, the defenders and their predecessors and authors having been in use for more than forty years to withdraw water from the river to the full capacity of the works presently employed for that purpose, should be assoilzied. (8) The defenders and their predecessors having in the knowledge of the pursuers expended large sums on the footing that what is now complained of was in every respect legal and not challenged, the defenders should be assoilzied."

The Lord Ordinary (KYLLACHY), after a proof, on 21st December 1901 pronounced the following interlocutor:—"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 the pursuers entitled to expenses since the closing of the record, and remits to the Auditor to tax the said expenses and to report: Reserves as to other expenses, and grants leave to reclaim."

Opinion.—"The pursuers here are proprietors of salmon-fishings on the upper waters of the river Don. The defenders are paper manufacturers at Stoneywood and Waterton, on the lower part of the river, who have at least for seventy years drawn water from the river for the purposes of their manufacture. They have done so at two dam dykes—one at Stoneywood and the other at Waterton. The Stoneywood dyke is the higher. The Waterton dyke is about 660 yards lower down. The Stoneywood tailrace formerly discharged above Waterton. It now discharges into the Waterton tailrace, which tailrace discharges into the river about 1330 yards below Stoneywood.

"The pursuers' complaint is that since the year 1882 the defenders have, by means of alterations made in that year and subsequently on their intake, lade, and other appliances—(1) largely increased their abstraction of water at Stoneywood; and (2) returned the water into the river not above Waterton as formerly but lower down, at the end of the Waterton tailrace. It is said that by doing so they have depleted to a much larger extent than formerly the portion of the river between the two dykes, and also, although in a less degree, the portion of the river between Waterton dyke and the foot of the Waterton tailrace. It is also said that, as a consequence of this depletion, the passage of salmon up the river has been obstructed or impeded, with the result of causing serious injury to the pursuers' salmon-fishings.

"The defenders do not dispute that at the time alleged they made alterations on their appliances which have since enabled them to abstract at Stoneywood a greater quantity of water than formerly.

"Nor do they dispute that they now can and do dry the river between Stoneywood and Waterton when the river is low more frequently and more completely than for the period prior to 1882. But they maintain various defences both in fact and law.

"They first contend generally that the alterations being executed within their own property and for a legitimate purpose, and without objection by the riparian owners, the pursuers, as owners only of salmon-fishings, have no title to complain.

"They contend next that the alterations in question—which involved a large expenditure, and led ultimately to a still larger expenditure — were executed with the knowledge and approval of the Don Fishery Board, and separately were executed with the knowledge of the pursuers. They say therefore that the present action is barred by acquiescence.

"They further, however, contend that they have right by virtue of prescription to do all they have done, or, at all events, that the pursuers' right to object is barred by prescription. And on this head they maintain various propositions of fact, said to be established by the proof. They say—(1) that while between 1865 and 1882 they did take at Stoneywood a much smaller amount of water than they take now, they yet for forty years and upwards prior to 1865 took practically as much water as they take now. They say (2) that between 1865 and 1882 they could by their then existing appliances have taken as much water as they take now. They say further (3) that for forty years and upwards prior to 1882 they excluded, at all events from the river below Waterton, as much as they exclude now, and that the effect of that exclusion on the pursuers' salmon-fishings was practically the same as the total effect now. They also say (4) that the pursuers have not sufficiently connected the alleged injury to their salmon-fishings with the depletion or alleged depletion of the river caused by their (the defenders') operations.

"I think that in dealing with the various questions thus raised it may be best somewhat to invert the above order, and to consider — (1) What quantity of water the defenders do in fact, now and since 1882, abstract at Stoneywood? (2) What effect that abstraction has on the state of the river, and on the pursuers' salmon-fishings as affected by the state of the river? (3) Whether, apart from prescription, the defenders can justify what they do? (4) Assuming the negative, what, if any, are their prescriptive rights at Stoneywood? (5) What, if any, are their prescriptive rights at Waterton? (6) How far their prescriptive rights, particularly their rights at Waterton, affect the question at issue? (7) How far the pursuers, if entitled other-

wise to redress, are barred by acquiescence?

"(1) *Present Abstraction at Stoneywood.*—The question here, it must be noted, is not what the defenders have abstracted since the raising of the present action, or how much or how little they may abstract when on particular occasions they more or less use their steam-power in lieu of their water-power. It is common ground that it is their interest as well as their practice to utilise their water-power to the utmost. And accordingly the question is, what amount of water they withdraw from the river under normal conditions—that is to say, when their turbines and water-wheels are working at full power.

"It has also to be noted that it is common ground that for the purposes of this case the best measure of the extent of the defenders' abstraction is the quantity withdrawn and passed down through their sluices and lade, turbines and wheels, when the river stands about level with the crest of the dyke, and when therefore they take about just sufficient to dry the river below the dyke. Of course when the river is low there will be less 'head' and therefore less abstraction. On the other hand, when the river is high there will be more 'head' and therefore (up to the capacity of the lade, &c.) greater abstraction. But for practical purposes, and particularly for the purpose of comparison, parties were, I think, agreed that the best measure of the abstraction is what is withdrawn and passed down the lade when the river is level with the crest of the dyke.

"This being so, the pursuers say generally that, so measured, the quantity which the defenders now can, and normally do, abstract at Stoneywood is about 40,000 cubic feet per minute. In other words, they say that the defenders dry the river up to that figure. They found upon certain observations by their engineer Mr Ironside, and also upon a number of instances to which they point in the defenders' Table of Observations.

"The defenders' figure, on the other hand, seems to be about 33,000 cubic feet per minute. And that figure is reached by taking as a basis certain observations made by Mr Carter and Mr Bennett on 6th May 1901, when the river was 9 inches above the dyke, and deducting from the result some 3000 cubic feet per minute for the assumed excess of 'head' on that day.

"I am not sure that this difference—between 33,000 and 40,000 cubic feet—although it has involved a great deal of evidence, is after all very material. But in certain views it may be important, and I have accordingly examined, to the best of my ability, the materials which exist for reaching, not an accurate result (for that is impossible), but a fairly approximate estimate of the defenders' present abstraction. The result is, that I am on the whole satisfied that I do full justice to the defenders, and no great injustice to the pursuers, in holding that, under the assumed conditions, the defenders abstract at Stoneywood about 36,000 cubic feet per minute, and so dry the river up to that limit. . . . .

"(2) *Effect below Stoneywood of the Withdrawal of 36,000 Cubic Feet per Minute.*—The next question is, what effect has the defenders' present abstraction on the state of the river, and particularly on the state of the river between Stoneywood dyke and the foot of the Waterton tailrace. And I think the answer to this question is so far clear. The river is, as regards flowing water, dried—absolutely dried—up to a flow of 36,000 cubic feet per minute. It can only have water flowing in it when after providing that quantity for the defenders there is still water flowing over the dyke. That is clear. It is also, I think, clear that it can only have water flowing in it sufficient for the passage of salmon when (after providing as above) there is still about four inches flowing over the dyke. So far, I think, there is no controversy. Nor, again, does it seem disputable that the result, speaking generally, is that during the summer months (May, June, July, and August) the river is almost always dry, and at anyrate almost always so dry as to be impassable for salmon. What may perhaps be disputable is the extent to which the same thing holds during the spring and autumn and winter months. But as to this I think it is at least clear that on many occasions, and for many periods in the spring and autumn and winter, the bed of the river below Stoneywood is so dried and depleted by the defenders' works as to be impassable for salmon. In the months particularly of September and October I think the defenders' state shows this very clearly, and Mr Ironside's observations, made at casual intervals in the autumn and winter of 1898, and in the months from May to December 1899, are to the same effect. I cannot therefore doubt that the effect of (what I may call for shortness) the defenders' waterworks, as they now exist and are used, is (1) to bar generally the passage of salmon in summer; (2) to bar, often although not always, the passage of salmon at other times; and (3) to injure thereby, and to a substantial extent, the pursuers' fishing rights. The degree of injury doubtless varies at different seasons. In summer, apart from grilse, which are said not to be numerous, there is not perhaps much of a run of salmon up the Don, at anyrate under present conditions. But in spring and autumn, particularly in the later autumn, the run is constant, and the injury therefore severe, The fact that it has been found necessary to net the pools and cart or carry the fish past the Stoneywood dyke is sufficiently significant of the reality—I say nothing at present as to the legality—of the injury. It is hardly necessary to appeal to the general evidence on that point. But if referred to it will, I think, be found to be in entire accordance with the observations of the professional witnesses.

"(3) *The Defenders' Rights—apart from Prescription.* — The next question is, whether, apart from prescription, the defenders can justify what they do—that is to say, justify it in a question with the pursuers? To test this, let it be supposed

that the Stoneywood dam intake and mill lade formed a *novum opus*, constructed, or proposed to be constructed, say in the present year, with the consent, let it be assumed, of the whole riparian owners above and below—Could the pursuers have challenged the structures or stopped their use on the ground of injury to their salmon-fishings? This at once raises a point of law which the defenders have anxiously argued both now and at the former discussion, the point, viz., whether a riparian owner can at common law, and apart from statutory enactments, be controlled in the uses, whether primary or secondary, which he makes of the water of the river, except by other riparian owners above or below. The defenders maintain the negative, arguing, as I understood, (1) that injury to salmon-fishings by industrial operations otherwise lawful has never yet been held to be at common law actionable; (2) that the salmon-fishery statutes, ancient and modern, assume the lawfulness at all events of such structures as dam dykes and mill lades, and content themselves with attempting to regulate those structures so as to prevent as far as possible unnecessary injury to salmon-fishings.

"I have endeavoured to give this argument respectful consideration, urged as it was with much earnestness and ability. But I am obliged to say that I have not been able to accept it.

"In the first place, I do not know that in this matter it is possible to draw any sharp line of distinction between common law and statute law. The scope of the old salmon statutes has been so extended by common consent and judicial construction that to a large extent they operate really by force of custom. Accordingly, if it be true, as the pursuers contend and as I think have proved, that the defenders at Stoneywood dry the river, and thus obstruct or impede the passage of salmon, it is not of much consequence whether at all times and at all stages of the law such proceedings were illegal. Neither is it of much consequence whether, as matters now stand, they are illegal by statute or by common law. For it is quite certain that one way or another any *opus manufactum* not supported by prescription which is erected in or about a river, and creates a barrier or material impediment to the passage of salmon, is now, at all events, an illegal structure. Nor can it, I think, matter whether the obstruction is constituted, say, by the *opus* itself, or whether the *opus*, being itself passable, it is used so as to dry up, say, a long stretch of river below its site. In either case there is an obstruction *de facto*, which, if not illegal at common law, is at all events illegal under the salmon-fishery statutes. This is, I think, clear by reference to Lord Corehouse's note in *Grant* v. *M'William*, reported in note 10 D. 666, and Lord Westbury's judgment in the case of *Hay* v. *The Magistrates of Perth*, 4 Macq. 535. It may be that in these and similar cases the object of the obstruction was to retard the fish and give facilities for their capture. But the fact is of more importance than the motive. Here, if the fact be what I have held proved, it seems hardly material whether the defenders' object was to catch the fish in the mill-pool or to drive the machinery of their mill.

"But, in the next place, I cannot accept the defenders' view of the common law. In principle it is not obvious why the owner of an estate of salmon-fishing, localised in a particular river, should not participate with the riparian owners in a common interest in the uninterrupted flow of the river—that is to say, its flow in its accustomed course and its accustomed volume and quantity. It may perhaps be that in the case of the owner of a salmon-fishing the common interest is less favoured by presumptions of injury. But still it is, in my opinion, a common interest giving a cause of action where injury is proved. And although the decided cases may not be numerous, there are, I think, at least some in which the principle is recognised. The case of *Forbes* v. *Leys, Masson, & Company*, 2 S. 603, 9 S. 933, 5 W. & S. 384, which related to operations not dissimilar to the present in this very river, and which went ultimately to the House of Lords, is an example in point—an example not, I think, affected by some specialities as to the defenders' titles founded upon as it appears in argument, but not, I think, affecting the judgment. Equally in point, also, although less expressly, is the case of *Baillie* v. *Lady Saltoun*, 1 S. 227, and the more recent case of *West* v. *Aberdeen Harbour Commissioners*, 4 R. 207. And perhaps not less applicable are the pollution cases—*Moncreiffe* v. *Magistrates of Perth*, 13 R. 921, and *Seafield* v. *Kemp*, 1 F. 402. All these cases recognise, in my opinion, the principle that owners of salmon-fishings have the same title to complain of obstructions or of pollutions interfering substantially with their fishing rights, as a riparian owner has to complain of interference with his riparian rights.

"(4) *The Defenders' Prescriptive Rights at Stoneywood.*—The next question is, what rights have the defenders acquired by prescription? whether by positive or negative prescription is here immaterial. And that question may first be considered with respect to the part of the river between Stoneywood and Waterton. It may first also be considered apart from the defenders' alleged right to count as part of their possession the possession had by the proprietors of the Grandhome Barley Mill on the other side of the river.

"In this view one thing at least is sufficiently clear—that the defenders did not during the forty years *immediately* prior to the raising of this action withdraw from the river at Stoneywood anything like their present quantity. They have withdrawn this present quantity since 1882; and they may have withdrawn it for forty years prior to 1865. I shall consider that presently. But between 1865 and 1882 it is common ground that they withdrew not more than about 7000 cubic feet per minute—that being all that was required or used at the upper mill wheel—the only wheel

which up to 1882 was supplied by the Stoneywood lade. This was the figure furnished by the defenders to Mr Willet in 1878; and it is admitted by Mr A. G. Pirie in his evidence to be substantially correct.

"The defenders are therefore thrown back upon this position—that they require to prove (or to prove enough to presume) an abstraction for forty years prior to 1865 on a much larger scale than from 1865 to 1882. And this they accordingly seek to do, maintaining at the same time alternatively that their old lade and appliances were always capable of abstracting on such larger scale; and that capacity to abstract, and not actual abstraction, is the important element.

"Now, as to the first point—actual abstraction prior to 1865—the defenders' case seems to be this. They do not suggest that as far back as the evidence goes there was more than about 7000 cubic feet per minute *required or used* in connection with the wheels and machinery fed prior to 1882 from the Stoneywood lade. But they say that until 1865, when the Salmon Fishery Acts made it for the first time imperative that mill lades should be sluiced, they kept their sluices at Stoneywood always or almost always open, taking off all the water the sluices and mill lade could pass, and discharging what was not used into the river by spills or bye-passes. What I have first therefore to consider is how far all this is proved.

"Now here it must be admitted there are several difficulties in the defenders' way. To begin with, a continuous period of forty years goes back to 1825; and there is no evidence of the existence of the Stoneywood lade prior to 1829, when it first appears on the old plans. This difficulty might perhaps be overcome by presumption if the evidence otherwise was quite satisfactory. But, in the next place, the actual evidence goes back only to about 1856; and shortly before that there had been considerable changes. In 1849 the present sluices had been erected, taking the place of the old sluices, as to the working of which there is no evidence. Again, about 1841 the snuff mill, which had been acquired by the defenders in 1837, and which was one of the mills worked from the Stoneywood intake, fell, it appears, into disrepair, and probably into disuse, and was finally removed about 1858. These are all, it seems to me, rather disturbing circumstances, when it is sought to carry back to 1825 the conditions and usages said to exist in 1865.

"That, however, is not all. The alleged wastage of water prior to 1865 depends mainly, if not entirely, upon the evidence of Mr A. G. Pirie; and although I am bound to say that, for a party to a cause, I have seldom seen a more fair and candid witness, I cannot overlook that he is speaking to recollections going back to an early period, and relating to matters which he had only slight occasion to observe. The defenders' other witnesses do not really come to much. I refer to G. Rae, 335 B, M'Dermont, 355 F G and 356 F, and Groundwater, 328 C F and G. And on the other hand, the pursuers' witnesses, who on this point were not cross-examined, negative I think quite sufficiently any distinction between the period after 1865 and the period before it. Indeed, Noble, 62 B, makes without challenge a very distinct statement on the subject. The pursuers, moreover, complain, and I think with justice, that there was no suggestion of this particular point until after they had closed their proof. And altogether—taking everything into account—while I think it is quite probable that in the old days, before 1865, there was considerable laxity in the regulation of the sluices, I am quite unable to hold it proved that the sluices were normally left open to their full extent. I think it difficult so to believe, for this reason amongst others, that the sluices of 1849 (the present sluices) were always of a capacity largely in excess of the capacity of the lade, and that if left open they must, I should think, have sent down a great deal more water than the lade could carry. Besides, it has to be observed (and this is not unimportant on other parts of the case) that if water was sent down otherwise than through the tailrace of the upper mill wheel, it must have been returned to the river at a point near the old snuff mill—only about halfway down to the Watertondyke.

"As to the actual abstraction therefore by the Stoneywood lade, I am of opinion that it is not proved that at any period prior to 1882 the abstraction amounted to more than about 7000 cubic feet per minute. Prior to 1865 something may possibly have to be added for greater laxity, but I cannot hold it proved that such an addition was really material.

"But then comes the question of the *capacity* of the lade prior to its enlargement in 1882; and here the parties are at issue both as to the law and the fact.

"I may take the legal question first, because in the view I take of it, it supersedes the other. It appears to me that in cases of this kind the measure of the prescriptive right is not the capacity of the appliances which a party possesses for the abstraction of water, but the use which he makes of these appliances. The appliances are his own, and his neighbours have no concern with them except in so far as used, and used to their injury. On principle therefore it seems to me that the use must be the measure, not the capacity of the appliances. But I am further of opinion that this point, if it required decision, must be held decided by the case of *Aitken* v. *Hunter & Aikenhead*, 7 R. 510. I refer particularly to the opinion of Lord Adam, the Lord Ordinary in that case.

"This being so, the question of capacity, to which the proof has been so much directed, becomes of little consequence. But, in case a different view should ultimately be taken, it may perhaps be proper that I should state my conclusion as to what quantity prior to 1865 the sluice, lade, &c., at Stoneywood were in their then state able to pass."

[*His Lordship then reviewed the evidence on this point.*]

"The result then, so far, is (1) that the defenders have not proved actual abstraction at any time prior to 1882 exceeding 7000 cubic feet per minute; and (2) that they have not proved the possibility of abstraction beyond about 9000 cubic feet per minute. As to the possible abstraction between 1865 and 1882, it may, after the removal of the old sluices in 1865, have somewhat increased. Mr Bennett makes the increase about 3000 cubic feet; but any increase of that kind going back only to 1865 cannot, I conceive, affect the question.

"It remains to consider as to the Grandhome lade. That lade, in connection with which the Stoneywood dam dyke was built, is on the opposite side of the river, and dates back to 1790. It provided water-power to an old barley mill which had two wheels—a larger and a smaller—and was more or less regularly at work until 1856. In that year it was leased by the defenders, and was worked by or under them somewhat irregularly until 1878, when it ceased to work altogether. Up to 1865 the lade was not sluiced, but a sluice was introduced in that year. In 1891 the lade was closed under an arrangement between the defenders and the owner of Grandhome. While the Grandhome mill worked, the lade excluded undoubtedly a certain amount of water from the stretch of the river between Stoneywood and Waterton. It did so, however, not like the Stoneywood lade all the way down to Waterton, but only for a maximum distance of 250 yards. The defenders' case is that in a question of prescriptive right they are entitled to combine the abstraction of the two lades (Stoneywood and Grandhome) in the same manner as if they (the defenders) had been proprietors of both lades and both sets of mills. They found upon two agreements—one dated 1797, and the other in 1891, both printed in the Joint Print; and assuming the question of law thus raised to be decided in their favour, they maintain that they have proved in point of fact that for forty years prior to 1891 the Grandhome lade, with the mill working, and the river standing about level with the crest of the dyke, drew from the river about 10,000 cubic feet per minute—the exact quantity being, as calculated by Mr Bennett, 9677 cubic feet; of which 5420 cubic feet passed through the wheels, and the remainder (4257) escaped through the spills and bye-passes.

"If all this were so, the result would of course be to bring up the total abstraction at Stoneywood dyke during the prescriptive period to 17,000 cubic feet per minute. But I have not been able to see my way to take the Grandhome lade into account as enlarging the defenders' rights.

"In the first place, I am not satisfied that they have proved anything like the abstraction at Grandhome which they allege. Their skilled evidence, able and ingenious as it was, seemed to me to be of a somewhat speculative character—involving at every point matter of estimate and matter of controversy. It did so perhaps inevitably, because among other difficulties the Grandhome Mills are, it appears, now in ruins. The wheels have been removed, and even their size can only be inferred from the size of the pits. Moreover, the lade has been, as I have said, entirely closed at its intake since 1891. Points of controversy were therefore, as I have said, inevitable. But whether inevitable or not, the evidence seemed to me to involve, if I may say so, too many assumptions. For example, I cannot assume that because the lade was unsluiced it necessarily withdrew as much water as according to its dimensions it could possibly pass—I mean possibly, irrespective altogether of the discharge at the mills. Neither can I assume that the defenders' engineers' method of measuring the capacity of the lade is correct. What they do is to take first the capacity of the broad part of the lade, and then the capacity of the narrow part and summing up these two figures they halve the total. This method of measuring the capacity of a lade of varying breadth has been strongly impeached, and I must say I thought with justice. Neither can I overlook that at Grandhome—at all events when the water was lipping the crest of the dyke—a considerable overflow must have occurred at the first spill—a spill which is only 90 feet below the dyke, and which, at all events now, is lower by some inches that the crest of the dyke. Altogether, if I required to determine how much water Grandhome lade withdrew from the river—I mean for any substantial distance—I should (assuming always, as formerly, the river to be just lipping the crest of the dyke) take 5000 cubic feet as an outside figure. Mr Carter gives 4045 cubic feet as the quantity which the wheels would pass, working full power. Mr Bennett's corresponding figure is 5420. I do not think it proved that the Grandhome lade did or could pass more at best than the larger of those quantities.

"All this is, however, only by the way unless the defenders are entitled to the benefits of the Grandhome water rights. What they found upon are two agreements—one dated 13th November 1797 made between the then proprietors of Grandhome and Stoneywood, and another dated 5th March 1891 made between themselves and the present proprietor of Grandhome. By the first of these agreements the parties consented and agreed, '(*Primo*) That either party shall have the full and unlimited use, privilege, and benefit of the river Don for the accommodation and establishment of mills or machinery to be worked by water, and to be erected upon any part of their said lands along the banks of the river, and that without any let, hindrance, or obstruction whatsoever competent by law or practice to either party against the other: they being resolved to accommodate one another and their respective lands as much as possible in regard to the use and benefit of the said river in the fullest sense of good will and good neighbourhood in all time coming.' By the second agreement, which related

to a variety of other matters, the proprietor of Grandhome, in consideration of a sum of £300 paid to him by the defenders, agreed to the then intake to the Grandhome meal mill from the river Don, on his estate of Grandhome, being closed by the defenders, and remaining closed in all time coming, and renounced and discharged for himself and his successors any right which he or they might have or claim to withdraw water from the river Don for other than domestic purposes at any point on his property of Grandhome above the dam dyke known as the lower intake of Stoneywood. The question is, whether in respect of those agreements the defenders can, for the purposes of the present case, claim the benefit of the Grandhome water rights.

"I am not, I confess, able to construe the documents. It does not appear to me that the defenders have by these agreements obtained the command of the Grandhome water rights, or are in a position to exercise the rights attaching to the Grandhome mill lade. They have, no doubt, obtained right to close the lade and to keep it closed, but they cannot use it, nor have they obtained anything of the nature of a transfer or assignation of the right to use it. Perhaps such transfer would be impossible, the right to withdraw water being incident to the right of property in the lands, and not capable (except by way of personal contract) of being severed from the lands. But at anyrate no right of the kind has been in fact obtained. By the one agreement the then proprietor of Grandhome merely waived in the defenders' favour the right of veto which he possessed as an opposite heritor upon their drawing of water for other than primary uses. By the other agreement the proprietor of Grandhome merely confers upon the defenders a right of veto against similar operations on the Grandhome side. But I fail to see how by either deed the defenders' right can have been enlarged, in a question with the pursuers or others interested in the river. There is only at best a renouncement of certain rights, a renouncement in the first case operating in the defenders' favour, but in the other case operating necessarily in favour of all concerned. It is not, I suppose, doubtful that if the proprietor of Grandhome had in 1891 closed his lade on his own motion and for his own purposes, that would have operated to the benefit of all concerned. And although the closure in that year was in fact purchased by the defenders, who had perhaps the primary interest, that cannot, I think, alter the true character and legal effect of the transaction. Mr Paton of Grandhome may have been quite willing to renounce generally any right he had to interfere with the flow of the river. But it by no means follows that he would have been, or was or is now, willing to transfer such right to the defenders. If that had been the intention, it would have been easy to have expressed it, but it is not, in my opinion, either expressed or implied.

"(5) *Defenders' Prescriptive Rights at Waterton.*—The next inquiry is, what are the defenders' rights, I will not say as to the abstraction of water at Waterton, but as to the exclusion of water from the river below the Waterton dam dyke? What, in other words, has been the quantity of water proved to have been excluded below Waterton during the forty years preceding the present action? There is not here, it will be observed, any question as to the period of prescription. It is not suggested that there was at Waterton (as alleged at Stoneywood) any interregnum or interruption between 1865 and 1882. Nor, so far as I see, is there any reason why the defenders' possession since 1882 should not—here at Waterton—count in their favour. It may be that the abstraction since 1882 has taken place not at Waterton but further up the river at Stoneywood. But still below Waterton the effect is the same.

"So taking the question, the defenders, on whom of course the onus lies, contend —(1) that their sluices and lades at Waterton were capable so far back as 1860 with a free discharge (*i.e.*, with all their wheels going full power) of taking and passing about 34,000 cubic feet per minute. They say further (2) that their manufacture of paper in 1860 (which did not subsequently diminish) required (on a certain calculation of horse-power) not less than 31,850 cubic feet per minute; and they say (3) that as to the actual quantity passed and used, they were informed by their experts when the subject came up in 1879 that that quantity was about 29,000 cubic feet per minute, the water lipping the crest of the dyke.

"The pursuers, on the other hand, contend that making the necessary allowances even the actual figure (the 29,000 cubic feet per minute) requires considerable modification. They reject as irrelevant and also exaggerated the calculation as to the capacity of the sluices and lades. They also reject as entirely speculative the calculation of horse-power and water-power required to manufacture so many tons of paper per annum. And then with regard to the information said to have been furnished by the defenders' experts in 1879, they point to the circumstance that Mr Jenkins of Messrs Jenkins & Marr, who was the defenders' expert at that time, is alive, and was not examined. They further refer to their (the pursuers') counter evidence, and particularly to the evidence of their witnesses Mr Ironside and Mr Carter. And it is certain that these witnesses bring out figures substantially lower. According to Mr Ironside the maximum capacity of the Waterton sluice and lade was 27,921 cubic feet per minute with the water lipping the higher part of the dyke, or 25,320 with the water lipping the lower part. According, again, to Mr Carter (who, I should explain, proceeded upon certain measurements made in 1878 by the late Mr George Cunningham, C.E.), the quantity abstracted in 1878 was only 23,220 cubic feet per minute, and although that figure was, it appears, subject to some addition in respect that

one turbine was at the time off work, it was also, it appears, subject to some deduction in respect that the water was lipping not the lower but the higher part of the dyke.

"It is hardly possible for a Judge who is not an expert to arrive at more than a very general conclusion in such circumstances. But applying my best judgment to the matter, I doubt whether I can hold it proved that the quantity excluded below Waterton before 1882 much exceeded 25,000 cubic feet. In any case, I am satisfied that I shall do full justice to the defenders if I assume a withdrawal of, say, 28,000 cubic feet per minute when the river was about level with the average crest of the dyke.

"With regard to prescriptive rights, the net result therefore is that, comparing what the defenders abstract now with what they have right to abtract by prescription, they exclude from the river below Stoneywood 29,000 cubic feet per minute more than they excluded before 1882, and that, on the other hand, they exclude below Waterton 8000 cubic feet per minute more than they excluded before 1882.

"To put it otherwise, the defenders formerly (that is, before 1882) withdrew 7000 cubic feet at Stoneywood and an additional 21,000 cubic feet at Waterton. They now draw off 36,000 cubic feet at Stoneywood, and (for the present at least) they draw nothing additional at Waterton. I should explain that I take no account of the quantity at present withdrawn at the Waterton intake. That quantity is said to be inconsiderable, and I hold it balanced (as it probably is) by the part (also inconsiderable) of the 36,000 cubic feet which still finds its way back to the river above the Waterton Dyke. I should also explain that in speaking of 1882 I should perhaps more accurately say 1884, that being the date of the completion by the defenders of the alterations at Stoneywood.

(6) "*How far the Defenders' Prescriptive Rights, and particularly their Prescriptive Rights at Waterton, affect the Question.*—I have next to consider the bearing upon the question at issue of the prescriptive rights thus existing at Stoneywood and Waterton, and particularly at Waterton. I have already found that the present exclusion from the river for 1329 yards below Stoneywood of 36,000 cubic feet per minute causes (as compared with the natural flow of the stream) serious injury to the pursuers' salmon fishings, and that being so, it *prima facie* seems difficult to justify that injury by proof of prescriptive right (1) to exclude 7000 cubic feet per minute from the 663 yards between Stoneywood and Waterton, and (2) to exclude 28,000 cubic feet per minute from the 666 yards between Waterton and the foot of the Waterton tailrace. *Prima facie* the difference, at least as affecting the passage of salmon between Stoneywood and Waterton, seems not only material but very great. But what the defenders say is this, that, given the exclusion of 28,000 cubic feet below Waterton, that exclusion is *per se* enough to bar effectually the passage of salmon, and so to render the state of the river farther up (between Waterton and Stoneywood) as regards the passage of salmon of no moment. In other words, the defenders say that, supposing the pursuers to succeed in this action, and matters to be restored to the *status quo* as in 1882, they, the pursuers, would be really in no better position than they are now, the stoppage or retardation for 666 yards below Waterton being practically just as injurious as the prolongation of that stoppage for 663 yards farther up. That being so, they conclude that the pursuers have no interest and therefore no title to sue this action. This is, I think, stating it broadly, the contention of the defenders founded on their prescriptive rights at Waterton.

"Now, if it could be held as proved that under the old conditions—the conditions prior to 1882—the state of the river below Waterton formed always or generally an impassable barrier to the passage of salmon, I could quite understand the argument that the prolongation under the new conditions of that impassable barrier for 663 yards further up was presumably immaterial. I could understand that argument just as I could also understand that if there were always or generally plenty of water flowing over both dykes, that is to say, plenty of water to secure the passage of salmon, a prolongation up the river of merely a certain shallowness would probably be of no consequence. But it has to be kept in mind that the flow or volume of this river ranges, to take Mr Carter's figures, from 13,000 cubic feet to 100,000 cubic feet per minute, and that between those limits the flow is constantly varying according to the state of the weather, varying sometimes from day to day, or even from hour to hour. Doing so, I should think it certain that there must be many states of the river, lasting for longer or shorter periods, in which, under the old regime, a block at Waterton must have been hardly serious, while under the new regime, that now existing, it is, or may be, not only serious but insuperable. The physical conditions at and below Waterton are, it seems certain, by no means identical with those at and below Stoneywood. The Waterton dyke is shorter than the Stoneywood dyke. The flow over it is therefore more concentrated. The Waterton dyke is also lower than the Stoneywood dyke, and is therefore less of a barrier. Further, the river bed below Waterton is, it appears, rocky, and has more pools and refuges than the bed below Stoneywood. Altogether it may, I think, be taken that the approach to Waterton is better and easier, and accordingly that less water will suffice to secure the passage of salmon below Waterton than below Stoneywood. A night's rain, for example, may often, if I understand the matter, make all the difference below Waterton, while yet it may make little or no difference on the long stretch of shallows below Stoneywood, I mean the shallows between

Stoneywood dyke and the top of the mill-pool.

"Even, therefore, if there had been no increase in the depletion below Waterton—if, that is to say, the only change made in 1882 had been the transfer of the point of off-take from Waterton to Stoneywood—it would require very clear and conclusive evidence to establish the harmlessness of the change. But in point of fact—as, I think, follows from what I have already said—there has been a very material increase or depletion below Waterton—an increase of depletion of at least 8000 cubic feet per minute. I need not repeat the figures. That is the result, and being so it does not, I think, require skilled evidence to establish that such an increased depletion does, and must, make a very substantial difference to the passage of salmon—a difference which, combined with the much greater difference above Waterton, cannot possibly be described as immaterial.

"The defenders have therefore, in my opinion, failed to prove by reference to their prescriptive rights either—(1) that those rights cover and so justify their present proceedings; or (2) that without doing so they displace, for want of interest, the pursuers' title to sue. In such circumstances I do not know that the pursuers are bound to show affirmatively, by reference to the somewhat voluminous evidence which they have led on the subject, that their salmon-fishings have in fact suffered in the manner and to the extent which they allege. The evidence does, however, I think, go at least to this, that there has been of late years a great falling off in the upper fishings of the Don—a falling off which synchronises roughly with the defenders' alterations. I do not say that it is proved that there have been no other causes operating, or possibly operating, and capable of accounting for the result. Several such have been suggested, and I think it probable that some of them may at least have contributed. But the fact remains that the defenders' operations, being calculated to injure the fishings, the fishings have in fact suffered, and in these circumstances it appears to me that the onus is on the defenders to negative the presumptions which thus arise, and that taking their (the defenders') evidence at its best, they have not discharged themselves of that onus.

"(7) *Acquiescence.*—It only remains (apart from some minor matters) to deal with the defenders' plea of acquiescence. And here I must own that with respect to that plea I have felt from the outset a certain difficulty. The plea in some respects arises favourably. The defenders have in making the alterations which have increased their water-power beyond doubt expended large sums of money, and they have also beyond doubt expended further large sums in extensions and alterations of their works for the purpose of utilising their increased water-power. And I do not doubt that they did all this in reliance upon the continuance of their increased water-power. But, on the other hand, their whole extensions and alterations have been made within and upon their own property; and apart from the use which they make of them, the same cannot be and are not now challenged, The extensions and alterations were and are in themselves, I should think, quite lawful. The pursuers' complaint is a complaint simply of the abstraction by the defenders from the river of a certain excess quantity of water, and in principle it would have been the same if the abstraction had been by means of a pump or pipe, or any other machinery or appliances—moveable or fixed—ordinary or extraordinary. The acquiescence therefore which is pleaded is acquiescence not in the defenders' extensions and alterations but in the defenders' increased abstraction of water from the river. And the right sought to be established by acquiescence is not merely a right of immunity for the past, but a right of continuance for the future.

"Now I am not aware that the doctrine of acquiescence—taking it at its widest—has ever been applied to a case of this kind. Acquiescence may bar objection to what is past—to what has been done—but it can never, so far as I know, establish directly or indirectly a continuing and perpetual right. I may have allowed my neighbour, it may be for years, to draw and to use say my share as well as his own of a certain stream or other water supply, but I may resume my own share at pleasure. Nor will it, I suppose, be a bar to my doing so that my neighbour has, relying on my continued consent, spent money say in enlarging his mill or in taking water into his house. And similar illustrations may be readily figured. The truth is, that to serve the defenders' purpose what they call acquiescence would require to be something of the nature of an agreement. It may, perhaps, be true that if the defenders could show that their operations in 1882 were entered upon and executed under some agreement with the pursuers, such agreement if acted on could be enforced not only if constituted or proved by writing but perhaps also if constituted and proved by facts and circumstances. But all this, I am afraid, is as against the present pursuers beside the question, for there is not only no proof but no suggestion of anything of the nature of an agreement between the defenders and them. As against them, the case presented is one of acquiescence pure and simple, and that has in my opinion no relevancy. I had occasion lately, in the case of *Carron Company* v. *Mercer Henderson's Trustees*, 23 R. 1042, to consider this kind of question, and I may refer for shortness to my opinion in that case.

"Supposing, therefore, that the pursuers had been in full knowledge in 1882 of the defenders' alterations, and had known their purpose, and had known later on that they were being used to withdraw more water from the river, and also that such increased withdrawal was to the injury of the salmon-fishing—supposing all that, I do not see how the pursuers' right to challenge could be held thereby barred. It is perhaps,

however, proper to say that in point of fact there is no proof of knowledge on the part of the pursuers. On the contrary, all of them, I think, disclaim such knowledge, and I see no reason to doubt their statements.

"The defenders, however, put their case alternatively in this way. They say that the Don Fishery Board were informed of what was proposed, and intimated that they had no objection, and this, the defenders say, is established by the correspondence.

"Now, I am far from doubting that if (1) the Don Fishery Board had in this matter power to bind the pursuers, and if (2) they had full knowledge of what was proposed, and had full knowledge of the defenders' prescriptive rights and of the whole facts, and if (3) they having that knowledge passed the minute and wrote (through their clerk) the letters dated respectively 15th and 16th September 1879—I say I am far from doubting that in these circumstances the defenders would have had at least a very formidable case—a case not turning on acquiescence but on express agreement—an agreement proved *scripto* and validated *rei interventu*.

"But, in the first place, I do not see how the Don Fishery Board could in this matter bind the pursuers—that is to say, bind them by way of agreement. The Board's powers are defined by statute, and they have no power except what the statutes confer. And I do not find in any of the statutes the power to make agreements or grant concessions on behalf of the proprietors. On this point I may refer to the case of the *Tay Fishery Board* v. *Robertson and Others*, 15 R. 40.

"In the next place, the Board, it appears, acted on the report of their engineer Mr Willet, and he acted on information supplied by the defenders, to whom his report was in fact submitted. And without going into particulars or imputing blame to anyone, it is, I think, quite clear that Mr Willet did not know the full extent of the defenders' proposed alterations, nor did he know the true measure of their prescriptive rights, nor did he know, as we know now, the whole facts bearing on those rights and their true measure. He was not, for example, informed that the defenders' existing sluices were only thirty years old, or that up to 1865 their capacity had been limited by the orifices of the old sluices, or that it was proposed to widen and deepen the lade, or to widen and deepen the intake, or that turbines were contemplated requiring or probably requiring 33,557 cubic feet per minute. As to all these matters the Board were in error, and an error for which they were not responsible; and it may perhaps be added that when, having ascertained in July 1882 that the lade was being widened and deepened, and again in 1884 that the intake was being widened and deepened, they complained to the defenders, they were met in the first place by an excuse, and in the next place by a reference to legal rights.

"I am, on the whole, therefore of opinion that the plea of acquiescence fails; and I think that exhausts the questions at issue, with the exception of two minor matters, namely (1) the abstraction of water on Sundays contrary, it is said, to prescriptive use, and (2) the operations of 1894 in or at the foot of the dam dyke." [*His Lordship then proceeded to deal with these questions.*]

The defenders reclaimed.

Argued for the reclaimers—It might be assumed for the purposes of the case that they were proprietors of both banks. Their right to take water was one of their rights as riparian proprietors, an inherent part of their right of property. It was not a servitude exercised by a dominant owner over the river as servient property—*Magistrates of Linlithgow* v. *Elphingstone*, Kames' Select Decisions, p. 331; *Cunningham* v. *Kennedy*, 1713, M. 8903, 12,778; *Orr Ewing* v. *Colquhoun's Trustee*, July 30, 1877, 4 R. (H.L.) 116, at 127-8. This was not a case of opposite proprietors, where the rule was "*melior est conditio prohibentis*"—*Bicket* v. *Morris*, July 13, 1866, 4 Macph. (H.L.) 44; *Robertson* v. *Foote & Co.*, July 16, 1874, 6 R. 1290, 16 S.L.R. 794. The case of *Baillie* v. *Lord Saltoun*, December 21, 1821, 1 S. 227, referred to by the Lord Ordinary was one of damage to the opposite proprietors by regurgitation. This was also the case in *Fairly* v. *Earl of Eglinton*, 1744, M. 12,780; *Burgess* v. *Brown*, 1790, Hume 504. By the law of England also there was an absolute right in a proprietor to use water in this way provided there was no regurgitation or injury to the flow of water below—*Miner* v. *Gilmour*, 1858, 12 Moore, P.C. 156. The reclaimers did not question that each proprietor of salmon-fishing had a certain interest in the water from mouth to source. The question was, what was the nature of that interest? It was to be observed that this was not a water case but a fishing case, and accordingly the point at issue was whether there was an illegal obstruction to fish. The proprietor of salmon-fishings was no doubt entitled to interfere with such illegal obstruction, but he must first show that it was illegal. For example, he could prohibit pollution as injuring his fishing, even though the pollution was effected below his property — *Seafield* v. *Kemp*, January 20, 1899, 1 F. 402, 30 S.L.R. 363; *Moncreiffe* v. *Perth Police Commissioners*, June 4, 1886, 13 R. 921. Or he could prevent an obstruction by one not having a title to obstruct—*Paton* v. *Brebner*, 1819, 1 Bligh 42; *Forbes* v. *Leys, Masson, & Co.*, September 7, 1831, 5 W. & S. 384. But there was no law apart from fishing statutes to the effect that all obstructions, such as cruives and salmon-weirs, were illegal. Had there been a common law right to object to all obstructions there would have been no necessity for the restrictions imposed by fishing statutes. Accordingly apart from statute there was no restriction on the reclaimers' exercise of their legal right to use the water for mill purposes—Rankine on Landownership, 286; *Duke of Sutherland* v. *Ross*, April 15, 1878, 5 R. (H.L.) 137, 14 S.L.R. 552; *Munro* v. *Munro*, 1845, 7 D. 358, and 1846, 8 D. 1029. The statutes were based

on the assumption that a millowner had this common law right, but that it was to be subject to regulation—Salmon Fisheries Act 1862 (25 and 26 Vict. c. 97), sec. 6 (6); Salmon Fisheries Act 1868 (31 and 32 Vict. c. 123), sec. 9 (44) and 11. Accordingly, the Court had power to regulate but not to prevent this use — *Grant* v. *Duke of Gordon*, M. 12,820, 2 Pat. 582; *Carnegy* v. *Magistrates of Brechin*, 1704, M. 14,288. On any view of regulation the pursuers must submit to what had been in existence for forty years, and on that point the state or alteration of the works was not in point, the question being the actual effect of the obstruction on the river, and the damage, if any, caused thereby, not whether there had been any alteration which did not increase the obstruction—*Arbuthnott* v. *Scott*, May 25, 1802, 4 Pat. 337. Accordingly, the onus was on the pursuers to prove damage. The cases founded on by the Lord Ordinary and the pursuers only affected the question of title, and did not determine that the things complained of were *per se* illegal. On the facts it was shown that the defenders had acquired a right by prescription to interfere with the flow of the river to the present extent, even if it interfered injuriously with the pursuers' rights. (2) *Acquiescence.* There had been acquiescence with *rei interventus.* The defenders had in 1887 expended large sums of money in extensions and alterations of their works in reliance on a continuance of their water-power. These were public, and the effect was noticed at once. This must accordingly have been known by the pursuers or their authors, and it was acquiesced in by them. But further, the Don Fishery Board had power to decide the legality of these operations. They were informed of what was proposed and made no objection. They gave their consent, and even if there was some mistake on the facts, which was not admitted, the agreement must stand and be binding on all parties, at anyrate to the extent authorised by the Board. If the Board had not the power to acquiesce or object, could one salmon proprietor raise objections—*Earl of Kinnoul* v. *Keir*, January 18, 1814, F.C.; *Marquis of Abercorn* v. *Langmuir*, May 20, 1820, F.C.; *Aytoun* v. *Douglas*, 1800, M. App. Property, No. 5.

Argued for the respondents—(1) The defenders had by their operations in the last twenty years made it possible to withdraw the whole river except when in flood. This of course amounted to an absolute prohibition of the passage of salmon up and down the river. The legal proposition of the pursuers was that every salmon proprietor had a right to object to any recent obstruction to the passage of the fish which was such as to damage his property. The right to protect salmon fishing was necessarily inferred in the title to it. It was clear that if the water was removed so as to prohibit the passage of fish there must be injury to the fishing, and the salmon proprietor was not bound to show more than this. The right of such proprietor was analogous to that of any other riparian proprietor. He had an interest in the water, and was entitled to the advantage of the flow of the river in its natural state. If a millowner could not exercise his right of abstracting water without interfering with the right of fishing, and thus invading another legal right, he was liable under an action at common law as well as by statute—*Forbes* v. *Leys, Masson, & Co., supra*; *Baillie* v. *Lady Saltoun, supra*; *West* v. *Aberdeen Harbour Commissioners*, December 8, 1876, 4 R. 207, 14 S.L.R. 147; *Hay* v. *Magistrates of Perth*, May 12, 1863, 4 Macq. 535. All obstructions were in themselves illegal and it was not necessary to prove any special illegality—*Duke of Sutherland* v. *Ross*, May 26, 1877, 4 R. 765, 14 S.L.R. 552, April 15, 1878, 5 R. (H.L.) 137; *Wedderburn* v. *Duke of Atholl*, May 28, 1900, 2 F. (H.L.) 57, 37 S.L.R. 686; *Earl of Seafield* v. *Kemp, supra*; *Robertson* v. *Foote & Co.*, July 16, 1879, 6 R. 1290 at 1298, 16 S.L.R. 794; Stair, ii. 7, 12; *Arbuthnott* v. *Scott, supra*; Bell's Principles, sec. 1100; Erskine, ii. 9, 13. The pollution cases were clearly in point. There had been an attempt to differentiate them on the ground that pollution was always illegal. But it was only so when someone had an interest to oppose it. In the case of *Lyon* v. *Fishmongers Co.*, 1876, 1 App. Ca. 662, pollution and diversion were treated by Lord Cairns as being in the same category. There was nothing in the fishing statutes to indicate that they were intended as a code setting out all the law applicable to the rights of salmon proprietors. The functions of the Fishery Boards thereby created were limited, and existing rights were reserved. Accordingly if the defenders were to use their own rights to injure those of their neighbours they must bar their challenge by prescription —*Young & Co.* v. *Bankier Distillery Co.*, July 27, 1893, 20 R. (H.L.) 76, 30 S.L.R. 964. On the facts, it was clear that they had not prescribed this right. It was clear that what they had done at Stoneywood would not justify the present works. The right alleged to have been prescribed must be exercised only as it had been possessed — *M'Intyre Brothers* v. *M'Gavin*, June 16, 1893, 20 R. (H.L.) 49, 30 S.L.R. 941. (2) *Acquiescence*—The plea was not relevant. There were no facts to support it. The respondents were not the Don Fishery Board, which could not have raised the present action — *Tay District Fishery Board* v. *Robertson*, November 16, 1887, 15 R. 40, 25 S.L.R. 54. The proposals as to intended alterations, &c., had very properly been submitted to the Board to show that no bye-laws were being violated, but the acquiescence of the Board could not bar proprietors whose rights were impaired. Besides, there was no full disclosure of the facts, as was pointed out by the Lord Ordinary. To bar the pursuers' action the defenders would have required to show that their works in 1882 had been executed under some agreement with the pursuers.

At advising—

LORD PRESIDENT—The question in this case is whether the pursuers, who are proprietors of salmon-fishings in the upper waters of the river Don, are entitled to have the defenders, who are the owners and occupiers of extensive paper mills at Stoneywood and Waterton, on the right bank of that river, restrained from abstracting from it for the purposes of their business the quantity of water which they now are and have for nearly twenty years been in use to take from it for these purposes.

It is not disputed that the defenders and their predecessors in the mills now belonging to them have been, for a period greatly in excess of the years of prescription, in use to withdraw some water from the river for the purposes of their mills. Until about the year 1882 they did so chiefly by means of two dam dykes, one at Stoneywood and the other at Waterton, which is between six and seven hundred yards lower down the river than Stoneywood. Formerly the Stoneywood tailrace discharged into the river above Waterton, but it now discharges only to a small extent above Waterton, and as to the rest it discharges into the Waterton tailrace, which discharges into the river about 1330 yards below the Stoneywood dam dyke. The fall from Stoneywood to Waterton is about 12 feet, and the fall from Waterton to site of the lower mill which formerly existed is about 11 feet, making the total fall between the points in question about 23 feet. The flow of water in the Don varies from about 13,000 to about 100,000 cubic feet per minute, and to enable salmon to ascend it is necessary that about 4 inches of water shall be flowing over the crest of the dam dyke.

The pursuers do not dispute that in so far as the defenders and their predecessors in the mills now owned by them have withdrawn the water and used it for the purposes of these mills, continuously throughout the prescriptive period, they (the pursuers) are not now entitled to complain of the like withdrawal and use of the water being continued, but they allege that in and since the year 1882 the defenders have, by alterations on their intake, lade, and other equipments, made between 1879 and 1882 and subsequently, largely increased their abstraction of water at Stoneywood, and also that they return the water to the river, not, as formerly, above Waterton, except to the small extent already mentioned, but at the lower end of the Waterton tailrace. It appears that what the defenders did to the lade at and below Stoneywood in or about 1882 was greatly to increase its depth and width, to straighten it, and largely to augment its capacity for carrying water. The main complaint of the pursuers is, that by what the defenders have done and are still doing with respect to the Stoneywood dam dyke and the lade at and below Stoneywood, they have left, and still leave, the portion of the river bed between Stoneywood and the lower end of the Waterton tailrace for long periods either without water or with so little water that salmon cannot run in it. The pursuers maintain that they have proved that the result of these changes has been and is, at some times and places, to prevent, and at others materially to impede, the passage of salmon up the river, and thereby seriously to injure the salmon-fishings belonging to the pursuers.

It is not disputed by the defenders that between 1879 and 1882 they made alterations and executed works upon the bed and banks of the river by which they have been enabled to withdraw at Stoneywood a much larger quantity of water than was formerly withdrawn there, and indeed to withdraw and pass through their works the whole, or nearly the whole, water of the river unless it is running very full, nor do they, as I understand, dispute that they can and do withdraw the water from the bed of the river between Stoneywood and the lower end of the Waterton tailrace to such an extent that it is not infrequently left dry, or nearly dry, so that salmon cannot run in it. It appears that from 1866 to 1878 the total withdrawal of water from the river, both for the purposes of the defenders' upper mill and of the Grandhome meal mill on the opposite side of the river, was about 12,000 cubic feet per minute, and that between 1878 and 1882, after the Grandhome mill stopped, the abstraction by the defenders was about 7000 cubic feet per minute. The defenders allege that the actual abstraction since 1882 has been 25,000 cubic feet per minute when the water has been lipping at the Stoneywood dyke, and 33,000 when the water has been 9 inches over that dyke, but I think that the true result of the evidence is to establish that the defenders can and do abstract not less than 33,000 cubic feet per minute when the turbines are working and the water is lipping the crest of the dyke, and not less than 36,500 when it is 9 inches over. It is not immaterial in this connection to observe that the defenders' turbines are constructed to pass 33,500, and their upper wheel, &c., 4500, making together 38,000 cubic feet per minute. This seems to raise a probability that in normal working their abstraction of water will not be greatly below the capacity of the mechanism which it serves.

In answer to the complaints made by the pursuers, the defenders maintain, in the first place, that the pursuers not being riparian proprietors, but merely owners of salmon-fishings in the river, have no right or title to complain of what the defenders have done and are doing in the matter of the abstraction of the water, in respect that it is done with the assent of, or at all events without objection by, any riparian proprietors who would have a title to interfere.

The defenders also maintain that the pursuers have no right to complain, because the alterations in question were carried out with the knowledge and approval of the Fishery Board of the river Don, and without any timeous objection on the part of the pursuers; and they further submit

that the pursuers have no title or interest to complain, because they (the defenders), prior to 1882, abstracted (as they allege) at Waterton as much water as they now do at Stoneywood, and dried the river bed as much between Waterton and the Green Burn as they now do between Stoneywood and Waterton, or the lower end of the Waterton tailrace.

The defenders further contend that the mode in which they have been and are dealing with the water and the bed of the river has been fortified by the positive prescription, and that any right which the pursuers might otherwise have had to object to it is excluded by the negative prescription. They also maintain that although the quantity of water abstracted is greater now than it was prior to 1882 they could, by the appliances they then had, have withdrawn as large a quantity of water as they withdraw now. They further submit that the pursuers are not entitled now to complain because they (the defenders) formerly took and temporarily retained from the river below Waterton as much water as they now take and temporarily retain from the river between Stoneywood and Waterton, and that although the main retention of water, and the drying or partial drying of the river bed, is now between Stoneywood and Waterton instead of below Waterton, the result is not substantially to increase the interference with the salmon-fishings. They say that although the bed of the river between Stoneywood and Waterton is now drier than it was prior to 1882, it is not drier between Waterton and the Green Burn than it was then.

I do not think that the questions in the case can be considered in a more clear or better order than that adopted by the Lord Ordinary, and he first deals with the question — What quantity of water do the defenders now withdraw from the river when their turbines and water-wheels are working at full power? It appears to be common ground that for the purposes of the present inquiry the best measure of the defenders' abstraction is the quantity of water withdrawn from the river and sent down through their sluices and lades, turbines and wheels, when the river stands level or nearly level with the crest of the Stoneywood dam dyke, or, as it has been termed, when the water is "lipping" that dyke. This seems to be a convenient standard, because if practically no water is allowed to pass over the crest of the dyke, the bed of the river below the dyke will be dry or nearly so, and an interference would, in my judgment, be established which would found a complaint at the instance of the pursuers, unless what the defenders are doing is justified by prescription or some other bar.

The pursuers allege that the defenders can with their present appliances and arrangements abstract, and do abstract, at Stoneywood about 40,000 cubic feet of water per minute, while the defenders allege that they abstract less than 33,000 cubic feet per minute. The Lord Ordinary has carefully examined the evidence bearing upon this point, and has arrived at the conclusion that it may safely be held that the defenders normally abstract at Stoneywood about 36,000 cubic feet per minute, and so diminish the flow of the river below to that extent, and practically dry its bed when no larger quantity comes over the dam dyke. Upon a careful consideration of the evidence I see no reason to differ from the conclusion at which his Lordship has arrived on this point.

The next question is, What is the effect of the defenders' normal abstraction of water upon the river between Stoneywood Dyke and the foot of the Waterton tailrace, and I consider it to be established that the river is, as regards running water, absolutely dried throughout the greater part of that reach unless a flow in excess of 36,000 cubic feet per minute reaches the Stoneywood dam dyke. In other words, no water can enter the bed of the river below the dyke until the defenders' abstraction of 36,000 cubic feet per minute has been provided for, and it is also, I understand (as I have already stated) not in controversy that there is not sufficient water to enable salmon to ascend the river unless a depth of at least 4 inches of water is flowing over the dyke. The result of the whole evidence is in my judgment to establish that the withdrawal of water by the defenders is carried to such an extent as generally in summer, and frequently at other times, to bar the progress of salmon to the upper waters, and thereby materially to injure the fishing rights of the pursuers.

In this state of the facts it may be convenient to consider, first, what the rights of the defenders in dealing with the water of the river would be apart from prescription, and, in the second place, what rights, if any, have they acquired by prescription to interpose obstructions to the passage of the salmon to the upper waters which would, unless supported by prescription, be illegal. Upon this question the defenders maintain the large proposition that, apart from statutory enactment, the right to challenge any such interferences with the water of the river as they have admittedly made rests only with the riparian proprietors, and to no extent with the owners of salmon-fishings in the river as such. If this contention was well founded the result would be that a feudal estate, viz., the estate of salmon-fishing, whether in the hands of the Crown or of a subject who has derived it immediately or mediately from the Crown, would receive no protection from the common law, and I understand the defenders also to maintain that there is nothing in the statutes to warrant the pursuers in complaining of what the defenders have done and are doing in this matter. These are large propositions, and I am not aware that they have previously been maintained in so broad a form. The general rule is that rights lawfully created or acquired are protected by the law, and that if different lawful rights come into collision each must be enjoyed in such a way as to leave a reasonable measure of enjoyment of the

other, or, in other words, that if the parties cannot agree, a case for regulation is established so as to prevent the destruction or supersession of either right by the other. I could have understood the defenders' contention if a right to salmon-fishings had been merely, like trout-fishing, an incident of the ownership of the banks or bed of the stream, but as the right to salmon-fishings is a feudal estate held by the Crown, or under titles flowing from the Crown, just as much as the land on the banks and in the bed of the river is, I am unable to see any ground in reason or principle for holding that the one feudal estate should not receive the protection of the common law as well as the other.

From a very early period statutes have been passed both by the Scots and by the British Parliament for the protection of salmon fishings in Scotland, and I agree with the Lord Ordinary in thinking that it is not now possible to draw a sharp line of demarcation between the common and the statute law on the subject, because the old Scots Statutes were in most cases very brief, and as interpreted by usage and decisions they have now in some cases a larger comprehension than would appear to arise from their terms. Further, it seems probable that these statutes not infrequently embodied an expression of the common law and practice existing at the time when they were enacted.

In the case of *Hay* v. *Magistrates of Perth*, 4 Macq. 535, the Lord Chancellor (Lord Westbury) said that it was a just remark of Lord Eldon sixty years previously that the decisions of the Courts of Justice in Scotland on the subject of salmon had gone far beyond any principles embodied in the statute law, and that he was unable to find any rule or principle of common law that is not embodied in the statutes themselves upon the subject, which in truth, especially the earlier ones, may be considered as declaratory of the common law, and then he stated the three principles which these Acts embody, and the objects which the Legislature sought by them to attain, the first "to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning grounds of the fish; the second to secure the unimpeded return to the sea of the smolt or the young fry of the salmon; the third was to prohibit the killing of unclean fish during the fence months, as we call them in England—that is, when the fish are out of season." I concur with the Lord Ordinary in thinking that whether structures *in alveo* are illegal by statute alone or also by common law, it is now well established that any *opus manufactum* not protected by prescription which is erected in or about a river so as to create a barrier or material impediment to the passage of the salmon in it is by the law of Scotland illegal, This in my judgment holds good whether the structure itself bars the passage of the fish by presenting to them an obstacle which they cannot surmount, or whether it makes access to the upper waters impossible or difficult by wholly or partially drying up a portion of the bed of the river, of greater or less length below it, and that, whether the object of the construction is to enable the fish to be caught in a pool below a dam or to withdraw water for the purposes of driving machinery, is immaterial if the effect is to prevent the run of the fish up the river.

Reference may be made to the cases of *Forbes* v. *Leys, Masson, & Co.*, 2 S. 603, 9 S. 933, and 5 W. & S. 384—which related to a dyke still on the river Don near Grandholme—*Baillie* v, *Lady Saltoun*, 1 S. 227, and to *West* v. *Aberdeen Harbour Commissioners*, 4 R. 207, as well as to the cases in which the owners of salmon-fishings have been held to have a title to challenge pollution of the water of the river as being injurious to their fishing rights—*Moncrieffe* v. *Magistrates of Perth*, 13 R. 921; and *Seafield* v. *Kemp*, 1 F. 402. From these and other cases the general doctrine is in my judgment to be derived that the estate of salmon-fishing is entitled to receive the protection of the law against injurious interference with it, just as any other legal estate or right is. The counsel for the defenders did not, as I understood, dispute the authority of these cases, but they said that they only affected the question of title, and did not determine that the things complained of were illegal. It appears to me, however, that the cases do establish that salmon fishing is an estate of such a character that it will receive the protection of the law against injurious interference just as any other estate created or recognised by the law will. In expressing this view I do not dissent from what the defenders say as to the right of a riparian proprietor to draw water from a river by a lade or otherwise, being a right incidental to his property in both banks or in one bank as the case may be, but taking this to be so, it does not in my view lead to the conclusion that this right can (apart from prescription) be so exercised as to destroy or materially injure the right to salmon-fishings in the same river. The Act of 1696, cap. 33, provided that there shall be a constant slop in the mid-stream of each mill dam dyke, and that the said slop "be as big as conveniently can be allowed," providing "always the said slop prejudice not the going of the mills." This enactment is expressed in very general terms, and it seems to apply to all dam dykes, whether new or old. But I do not think that it would be reasonable to assume from the terms of the Act that prior to and apart from it an owner of salmon-fishings could not have insisted that a dam dyke (unless supported by prescription) should not be of such a size and construction, and should not be so used as totally to bar the access of the salmon to the waters above it. The mills referred to in the Act were no doubt, primarily at all events, the small old meal mills used for grinding the then somewhat meagre produce of the country, not works of the magnitude and character of those now belonging to the defenders. It does not seem

likely that these old mills could often require the whole water of a river sufficiently large to hold salmon, to drive them. The serious nature of the defenders' contention may be illustrated by supposing that the Crown still retained or had made an express grant to a subject of the salmon-fishings in the 1330 yards of the river between Stoneywood and the Waterton tailrace. By the drying of the river-bed by the defenders and the operation of the annual and weekly close times the estate of salmon fishing in that stretch of water would be practically extinguished. For these reasons I am of opinion that the withdrawal and diversion of what is on many, if not on most occasions, practically the whole water of the river between Stoneywood and Waterton and down to the end of the Waterton tailrace for long periods is *prima facie*, and apart from prescription, illegal.

It is, however, true, that according to the law of Scotland an interference with the feudal estate (in this case the estate of salmon fishing), or other proprietary right, which was in its inception illegal, and could have been stopped at any time within the period of prescription, may become legal if it has been submitted to or acquiesced in, continuously and without interruption, during that period. For the purposes of the present question it is not, in my judgment, material whether, what is in effect the acquisition of a right injuriously to interfere with a feudal estate is to be attributed to the positive or to the negative prescription, or to the concurrent operation of both. The present action was raised in January 1900, and consequently (if the views above expressed are correct) the defenders require to prove that the interference with the flow of the river complained of had continued without challenge throughout the prescriptive period prior to January 1900, and they have not, in my judgment, established this. They have withdrawn about the same quantity of water as is now taken since the completion of their new works in 1882, but I understand that it is not disputed that between 1865 and 1882 they did not abstract more than about 7000 cubic feet of water per minute at Stoneywood, and it therefore (if the views above expressed are correct) becomes necessary for them to make good the proposition that they had acquired by prescription the rights which they now claim forty years prior to 1865 or 1866, so that the prescriptive period must have begun to run about 1825 or 1826. The defenders' point, as I understand, is that although, as far back as the evidence goes, not more than 7000 cubic feet per minute of water required to be, or were, withdrawn at the Stoneywood dyke for use in connection with the wheels or machinery in their works prior to 1882, they were before 1865, when it was made imperative that mill lades should be sluiced, in use to keep their sluice at Stoneywood nearly always open to withdraw all the water which it and the mill lade could pass, and that they discharged all the water which was not required in the mills into the river by spills or bye-passes. It may be a question how far a prescription founded not upon the use but upon the waste of water would avail to acquire an active right, even assuming that it would be sufficient to cut off a right of challenge, but it appears to me unnecessary to consider this question here. The first answer made by the pursuers to this contention is that it is not proved that the Stoneywood lade existed prior to 1829, and it is difficult to assume in the absence of evidence that a similar state of things in connection with that lade existed *retro* before 1829. These and other reasons are, in my judgment, adverse to the view that the structures which existed in 1865 can be held to have existed and been used for withdrawing water for forty years prior to that year.

There is, however, a question between the parties as to the capacity of the lade prior to 1882, and it appears to me that in such a case the measure of the prescriptive right claimed is not the capacity of the channel or channels for conveying water, but the use which has been made of that channel or these channels for the actual conveyance of water. A person can make on his own property as large a channel as he pleases without his neighbour having any right to interfere, so long as that channel is not used for the abstraction of water from a river or other watercourse in which his neighbour has an interest, and I understood that the counsel for the defenders did not dispute that the measure or extent of the actual use, and not of the capacity, of the channel is the material point in such a case. I agree with the Lord Ordinary in thinking, for the reasons which he has given, that neither the capacity of the lade at Stoneywood, nor the use which was made of that lade prior to 1865, at all approached the capacity and use of the defenders' arrangements for withdrawing water since 1882.

The defenders further contend that in this question they are entitled to take into account the abstraction of water by the lade of the Grandhome mill on the opposite side of the river. I understand that the Grandhome mill (originally a meal or barley mill), was worked by the defenders or their predecessors in business as tenants from 1856 to 1878 or 1879; that, in terms of an order made in 1865, it was sluiced in 1866; that further sluicing was done in 1878 under the Salmon Fishery Act of 1868; and that the intake was built up and closed in 1891. It appears that the Grandhome mill only required and used about 4000 or 5000 cubic feet of water per minute till it stopped working in 1878 or 1879, and at that time the upper mill at Stoneywood took only 7000 feet per minute, making altogether 11,000 or 12,000 feet per minute. It appears to me that the defenders have failed to prove that the Grandhome mill abstracted nearly so much water as they allege, and in any view it only withdrew water or excluded it from the river for a distance of about 250 yards. The evidence seems to

me to support the Lord Ordinary's conclusion that 5000 cubic feet per minute when the water was lipping the crest of the dyke would be an outside figure for the Grandhome lade.

But apart from the question as to the capacity and use of the Grandhome lade, a question of law arises as to whether the defenders are, in the present question, *in titulo* to plead that use, and I am of opinion that they are not. The Lord Ordinary examines the agreement of 13th November 1797 between the proprietors of Grandhome and Stoneywood, and another agreement, dated 5th March 1891, between themselves and the present proprietor of Grandhome, and I agree with his Lordship, for the reasons he assigns, in thinking the defenders have not by these agreements obtained the command of the Grandhome water rights, as also that they are not in a position to exercise the rights which formerly pertained to the Grandhome mill, and that consequently the capacity of the Grandhome mill lade cannot be taken into account in considering whether the defenders are or are not exceeding their legal rights in withdrawing what is, throughout a large part of the year, practically the whole water of the river, into their mills at the Stoneywood intake. There is no transfer of any right of property, or other feudal or active right, in Grandhome to the defenders, but merely a payment to a competitor for the water as a consideration for his ceasing to withdraw it. I may add that, even if Stoneywood, Waterton, and Grandhome had all been held under the same titles, and water had been taken from the river at Grandhome by the owner of the three properties, as it was by the proprietor of Grandhome, or persons deriving right from him, I do not think that the owner of the three properties could have begun to exercise at Stoneywood, or elsewhere on the combined estates, the right to abstract at Stoneywood the quantity of water which he had formerly abstracted at Grandhome, in addition to the quantity which he had formerly abstracted at Stoneywood. The right prescribed is the right possessed — *tantum prescriptum quantum possessum*,—and although a proprietor of salmon-fishings may have acquiesced in water being taken at one place throughout the prescriptive period, it does not follow that he would have acquiesced in this being done at another place during that period. The right alleged to have been acquired by prescriptive possession must be exercised *modo et forma* as it has been possessed. I may refer to the case of *M'Gavin* v. *M'Intyres*, 17 R. 818, 20 R. (H.L.) 49, in which it was held that a riparian proprietor who had acquired a prescriptive right to take, in a particular way and in a particular place, pure water from a river, and to restore it to the river in a polluted state, was not entitled to take it in any other way or at any other place with the effect of increasing the pullution of the river.

The next question is, Have the defenders, by prescription or otherwise, acquired a right so to deal with the water of the river at Waterton as to entitle them to leave the bed of the river practically dry for a large part of the year below the dam dyke there? Such a right could not, in my judgment, be acquired as against anyone having an interest in the natural flow of the river without either an express grant or renunciation, or evidence that the whole, or nearly the whole, water had been abstracted or prevented from passing down to the lower reaches of the river and its bed left dry, or so nearly dry as not to be passable by salmon, for the prescriptive period prior to the raising of the action. The case of the defenders on this point I understand to be—(1) that their sluices and lades at Waterton were, back to 1860, capable of receiving and passing about 34,000 cubic feet of water per minute; (2) that their make of paper in 1860 required 31,850 cubic feet per minute; and (3) that in 1879 the quantity taken was about 29,000 cubic feet per minute when the water was lipping the crest of the dyke. The pursuers reply that the figure of 29,000 cubic feet per minute is not sustained by the evidence; that the inferences drawn from the capacity of the sluices and lades cannot be relied upon, as the capacity might exist without its being used nearly to the full; and further, that the calculations of horse-power and water-power required for the manufacture of certain quantities of paper are exaggerated. There is opposing evidence of experts, especially of Mr Ironside and Mr Carter, on these points, the former putting the maximum capacity of the sluice and lade to pass water at 27,921 cubic feet per minute when the water was lipping the upper part of the dyke, and 25,320 when the water was lipping the lower part, while according to Mr Carter, proceeding upon measurements taken in 1878, the quantity then withdrawn amounted to only 23,230 cubic feet per minute. The Lord Ordinary, while feeling the difficulty of deciding between the opinions of experts, expresses himself as satisfied that he will do full justice to the defenders if he assumes a withdrawal of 28,000 cubic feet per minute when the water of the river was nearly level with the average crest of the dyke, and this appears to me to be a reasonable assumption. But if this be so, it follows that there is no good ground for the contention that the Lord Ordinary has erred in holding that the defenders now exclude from the river below Stoneywood 29,000 cubic feet more than they excluded prior to 1882, and that they exclude below Waterton 8000 cubic feet per minute more than they excluded prior to that year. I concur with his Lordship in thinking that the defenders have failed by reference to any rights which they have acquired by prescription, to prove either (1) that these rights justify what they are doing now or (2) that they displace, for want of interest, the pursuers' title to sue. But if this view is correct, it does not appear to me that the pursuers are bound to prove affirmatively that their salmon-fishings have in fact suffered from the alterations made by the

defenders as the natural consequence, or at all events the natural tendency, of these alterations is and must be to injure the fishing. I may add that it appears to me that the serious falling off in the yield of the upper fishings of the Don in recent years may well, to some extent at all events, be attributed to the operations of the defenders, although it may also be due in part to other causes. It seems to be a natural result of the things done by the defenders in and about 1882 in presenting to the salmon the obstacle of one large dam dyke instead of two smaller ones, and leaving an additional stretch of the river-bed dry, or at least containing so little water that salmon cannot run in it.

The defenders also plead acquiescence by the pursuers in their increased abstraction of water from the river. Two things are necessary to support this plea—(1) that the person who is alleged to have acquiesced shall have had power to stop the things complained of; and (2) that he shall have had full knowledge of what was being done. The pursuers could not object to the defenders making any excavations or erections they pleased on their own ground so long as they did not use them to the prejudice of the pursuers, and if a case of acquiescence is established at all, it must, in my judgment, be in the use of the works and equipments of the defenders for withdrawing water from the river, not in the excavation or erection of these works, which they had no power to stop. If the pursuers had been maintaining a claim of damages, or other claim founded upon what had been done in time past, I could better have understood the argument of the defenders, but I do not see how (apart from prescription) it would confer upon them any permanent right for the future. The defenders, no doubt, in and about 1882 executed important enlargements and improvements upon their works, which cost large sums, the turbines and their equipments alone having apparently cost about £15,000, but the pursuers had no power to stop or interfere with what the defenders were thus doing within their own property, and the pursuers were not bound or indeed entitled to assume that the defenders would put their property and works to any unlawful use, as, for example, by withdrawing from the river more water than they were legally entitled to withdraw. The plea of acquiescence to avail the defenders would, as already stated, require to be, not in the erection or construction, but in the use of the works, and it is not in my judgment established that they ever acquiesced in that use. Further, in order to sustain the plea of acquiescence, knowledge on the part of the pursuers of what the defenders were doing or intended to do would require to be proved. The pursuers deny such knowledge, and I see no reason to doubt the truth of their denial.

An important point was, however, raised by the defenders in regard to the Don Fishery Board. I understood them to contend that the Don Fishery Board had power to decide and to decide finally the legality and the propriety of such works as those executed by the defenders at and below Stoneywood, and that as what they (the defenders) did was sanctioned by the Board, it cannot be challenged in this Court. It appears to me that in order to make this point good as a defence to the present action the defenders would require to establish (1) that the Don Fishery Board had power to bind the pursuers by their assent or absence of objection in regard to the matters in question; (2) that the Board had full and accurate knowledge of what the defenders proposed to do as well as of its effects upon the salmon-fishings belonging to the pursuers and other proprietors of salmon-fishings in the river, and of all other material facts, and that in such full and accurate knowledge they passed the minute of 16th September 1879, and caused the letter of the same day to be written by their clerk.

In considering this view it is material to keep in view that the Don Fishery Board is the creature of the Salmon Fisheries Acts of 1862 (25 and 26 Vict. c. 97) and 1868 (31 and 32 Vic. c. 123), that its powers are conferred and defined by these Acts, and that it has no powers except such as are so conferred and defined. If the communications between the Board and the defenders were to bind the pursuers to what was in effect a concession, or to make an agreement obligatory on the pursuers, the power to make and enforce such a concession or agreement must be found in the statutes, and I am unable to discover anything of the kind in them. This view receives support from the decision in the case of *Tay Fishery Board* v. *Robertson and Others*, 15 R. 40, in which, while it was held that such Boards have power under the Acts to sue for statutory penalties and offences, it was also decided that they being merely statutory boards with statutory powers and remedies have no title at common law to sue for interdict against persons fishing in a manner alleged to be illegal, or doing something else forbidden by statute or common law. It is also to be kept in view that in what they did the Board proceeded upon the statements of their clerk, and that he acted upon information furnished to him by the defenders. The clerk's letter to the defenders' law-agents dated 18th August 1879 bears that the Board received favourably the proposal to make alterations in the water supply of the works, and will agree to it "on the assumption that the Board is satisfied by the report of a qualified engineer that by the intended operations the withdrawal of water from the river shall not be greater than Messrs Pirie are now entitled to use, and that no damage is likely to arise to the fishings." And the minute of the Board of 16th September 1879 assenting to the proposed works of the defenders bears "as from that report" (Mr Willet's) "it appeared that the intended operations would not in any way detrimentally affect the fishings, the Board assented to the works being carried through by Messrs Pirie."

So far as I see from the papers no question was submitted to the Board which they were asked to decide as between disputant parties, nor does it appear that the pursuers were apprised of what was passing between the defenders and the Board. The defenders communicated only with the Board, not so far as appears with the pursuers or any other proprietor of salmon-fishings interested, and I think that the patrimonial rights of the pursuers could not be prejudiced or affected by such an *ex parte* proceeding in the absence of any statutory declaration that it should be binding upon them. The assent given by the Board could only be for any interest which they had or with which they were charged, and such assent as they gave seems to have been in effect conditional upon the proposed works not being constructed or used so as to prejudice the salmon-fishing interests in the river. The Board seems to have assented (for such power as it had) to the withdrawal of 28,000 cubic feet per minute, while the capacity of the old lade was only to take 14,000 cubic feet per minute; in other words, to the quantity of water withdrawn, or, at all events, to the capacity of the lade and other works for withdrawing water being doubled. If they gave such an assent it seems to be plain from the letter and minute above quoted, as well as from the other documents produced, that they did so under essential error.

[*His Lordship then proceeded to dispose of the minor points dealt with by the Lord Ordinary.*]

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I concur with the Lord President and the Lord Ordinary in their review of the facts of the case, and also as to the questions of law as to which the parties are at issue. I shall only state in a few sentences the points which I hold to be established.

1. I understand it to be settled law in a question with riparian proprietors that the owner of an estate through which a stream naturally flows, or the two owners concurrently where the banks belong to different owners, may withdraw the water from its natural bed on condition of returning it substantially in the same condition as to quality, quantity, and direction.

2. In a question with the owners of heritable rights of salmon-fishing this proposition suffers some limitation. The proprietor of the *alveus* of the stream has not an unqualified right to divert the stream within his estate. He is only entitled to withdraw so much of the water 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 rights of the owners of the fishings, as we now understand these rights, are derived mainly from the Scottish Statutes and the judicial decisions following on the statutes. Theoretically there is, of course, a common law right, because the grantee of the Crown is entitled to the protection of the law in the exercise of his right, but we do not know what was the measure of this protection antecedent to and independent of the rights given by statute. The earliest of these statutes belongs to the reign of William the Lion, *i.e.*, to a period antecedent to any record of the common law. This as well as the later statutes, notably that of 1696, presuppose a right in the riparian proprietor to withdraw the water by a mill-lade for water-power, and their object is to regulate the competing rights of the millowner and the salmon fisher by providing that sufficient waterways shall be left for the passage of the fish. The Scottish Fishery Statutes, although directed to the regulation and enforcement of existing rights rather than to the constitution of new rights, are evidence that under the ancient law of Scotland the rights of the owners of salmon-fishings and the rights of the millowners were capable of living together under suitable restrictions. I reject altogether the extreme proposition of the pursuers in this case that a millowner has no right apart from prescription. We know that from very early times the owner of a barony was entitled to set up a corn mill, and astrict his tenants and feuars to grind their corn at his mill. This is only an illustration. The broad fact is that throughout Scotland, as in other countries, the owners of estates have made use of running streams as a source of power, and until the question was raised in the present case I am not aware that their right to do so has been challenged. I have already stated what I conceive to be the limitations of that right in a question with riparian owners, and also in a question with owners of salmon-fishings.

3. I do not doubt that by immemorial use the owner of a mill may acquire a right to withdraw a quantity of water in excess of what he would be permitted to take if the owners of the salmon-fisheries were standing on their rights. This would not, in my apprehension, be a case of positive prescription under the statute, because the statute presupposes a right constituted by charter and sasine followed by possession. Now, this is not a case of acquiring a new estate, or an extension of an estate, by possession on a written title, but is rather a case of extending the use that may be taken out of the estate to the prejudice of the owner of another estate who has neglected to assert his right. In any view, the owner of the salmon-fishery would not lose his right to an unobstructed passage for the salmon unless he had neglected to assert it for the full period of forty years, or for time immemorial, and this implies that during the period in question there must be continuous adverse use.

4. As a matter of fact, it is clearly established that Messrs Pirie & Company are withdrawing water for use in their turbines to an extent which is prejudicial to the common law rights of the owners of the salmon-fishings. It is no answer to say

that the water is returned to the natural bed of the stream within Messrs Pirie's property. That answer might meet objections on the part of riparian owners, but it is no answer at all to the complaint of the owners of fishings that the bed of the stream is left nearly dry for three-quarters of a mile and the passage of the salmon completely barred except when the river is in flood.

5. I also hold that the pursuers have not lost their rights by submitting to an adverse use during forty years or for time immemorial. It is, I think, clearly proved that for many years prior to 1882 the quantity of water taken was very much less than it has been subsequent to 1882. Then going back to the prescriptive period antecedent to 1858 or thereby, it is, in my judgment, not proved that water was withdrawn by the joint action of the three mills to such an extent as to call for the intervention of the fishery proprietors. Such evidence as we have applicable to that now distant period (1825 to 1865) points to a use of a much more limited character than the use which Messrs Pirie & Company have had since 1882.

6. I do not think it possible to arrive at anything more than a very approximate estimate of the amount of water taken by the defenders in excess of their rights. For this reason I should have preferred to decide the case by finding that the defenders have infringed the pursuers' rights, and 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. But I do not understand the Lord Ordinary's interlocutor as precluding joint action if the parties desire it, and no question of variation of the form of the interlocutor was raised at the hearing of the case, and as I agree with the Lord President and the Lord Ordinary as to the questions of law and fact which are in issue, I concur in the proposed affirmance of the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Dean of Faculty (Asher, K.C.)—W. Campbell, K.C. —Balfour. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders — Salvesen, K.C.—Clyde, K.C.—Nicolson. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, December 17.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CLARK *v.* HUME.

Lease — Insurance — Stipulation in Lease that Landlord shall Insure, Tenant Paying Half of Premium — Rights of Parties in Sum Recovered—Landlord not Bound to Rebuild.

In the lease of a corn-mill it was stipulated that the landlord "shall insure against loss by fire the whole mills, kiln, machinery, houses, and offices . . . for such amount as he may consider necessary, the tenant paying one-half of the annual premium."

The mill and machinery having been destroyed by fire during the currency of the lease, *held* that the insurance was solely for the benefit of the landlord, and that he was not bound to expend the money recovered under the policy of insurance in rebuilding the mill.

In December 1901 Robert Mossman Clark, miller, Ninewells Corn Mill, Berwickshire, raised an action against John Alexander Ross Hume, of Ninewells, in which he concluded (1) for declarator that in implement of the provisions of a lease dated 23rd July and 10th August 1896, whereby the defender let to the pursuer for ten years from Martinmas 1896 the corn-mill of Ninewells, with the kiln, dwelling-house, and offices attached, the defender was bound to expend the sum of £680 recovered by him from the Caledonian Insurance Company, or such part of it as might be necessary, in rebuilding the mill, &c., so as to restore the subjects leased to the condition in which they were prior to the occurrence of a fire on 12th July 1901; (2) for decree ordaining him to expend the £680 as above stated; (3) in the event of the defender failing to rebuild within a fixed time, for payment to the pursuer of £680 in order that the pursuer might himself reinstate the subjects damaged by the fire; (4) for payment to the pursuer of £200 as loss occasioned to him by the interruption of his business; or otherwise (5) as alternative to conclusions (2), (3), and (4), for payment to the pursuer of £2000 as damages.

The circumstances leading up to the action were as follows:—By the lease above referred to the defender let to the pursuer for ten years from Martinmas 1896 the corn-mill of Ninewells, with the kiln, dwelling-house, and other houses and offices belonging to the said mill, and also the lands attached thereto, the pursuer binding and obliging himself to maintain the whole mill and machinery, &c., in good tenantable condition during the lease, and leave them so at his removal, all at his own expense. The lease contained the following clause:—"And it is further stipulated that the landlord shall insure against loss by fire the whole mills, kiln, machinery, houses, and offices, in some respectable insurance office for such amount as he may consider neces-