nied. He also denied that he had ever entered by the pursuer's window, or had connection with her.

The Court, after hearing counsel for the pursuer repelled the reasons of advocation. They could place no faith in Jardine's evidence, and without it the pursuer had no case.

SECOND DIVISION.

MAGISTRATES OF ROTHESAY *v.* M'KECHNIE.

Property — Boundary. Interdict against a person building a wall to enclose his property, on the ground that the *solum* of the proposed wall did not belong to him, refused.

Counsel for the Suspenders—The Lord Advocate and Mr Muirhead. Agents—Messrs J. & R. Macandrew, W.S.

Counsel for the Respondent—The Solicitor-General and Mr Orr Paterson. Agents—Messrs J. & A. Peddie, W.S.

In this suspension and interdict the magistrates seek to interdict the respondent from erecting a wall for the enclosure of his property, which wall, they aver, encroaches on the *solum* of the public road between Rothesay and Port Bannatyne, of which they are custodiers. Issues were ordered and lodged. Thereupon the Lord Ordinary (Barcaple) intimated an opinion that the proper and expedient course was to try the case by a proof on commission, and parties having consented, that course was followed. A proof was accordingly led; and the Lord Ordinary, after hearing parties on the proof, refused the suspension and interdict. The suspender reclaimed. On the case being called, the Lord Justice-Clerk stated that he had doubts as to the competency of the course that had been followed, and appointed parties to be heard on the question, whether this was an action on account of injury to land, where the title is not in question, and as such one of the causes enumerated in the Judicature Act, and appropriated to trial by jury. After hearing counsel upon this point the Court took time to consider. On the case being called to-day, parties were directed to speak to the merits, without reference to the objection to the procedure, which was not insisted on. The case raises a pure question of fact. The averments of parties and the proof have reference to the history of the ground in question, and extend back for a period of about fifty years, the contention being whether it is to be treated as part of the road under the custody of the suspenders, or as part of the respondent's property held by him as tenant under a long lease from the proprietor of Ardbeg. The main points relied upon are (1) the planting of a hedge and the forming of a ditch along the road at the part in question, between 1815 and 1850; but the Lord Ordinary has found that the proof clearly instructs both these operations to have been performed by the agricultural tenant of Ardbeg; (2) a call made by the magistrates in 1849 upon the proprietor of Ardbeg to fill up the ditch, as being dangerous and offensive, which not being responded to, the magistrates undertook themselves. The suspenders maintain that the ditch is the watercourse of the road; but the Lord Ordinary has found that it is impossible so to regard it, looking to its nature and origin, and to the position taken in regard to it by the suspenders in 1849. On the whole, the Lord Ordinary was of opinion that the history of the ground in question implies that it has all along belonged to the proprietor of Ardbeg and his tenants, and was never either acquired or possessed by the magistrates as trustees of the road. His Lordship accordingly repelled the reasons of suspension, and refused the interdict; and to-day the Court, on the same ground, adhered.

Friday, Dec. 15.

FIRST DIVISION.

HUNTER AND OTHERS *v.* CARRON CO.

Title to Sue—Title to Exclude. Circumstances in which (*aff.* Lord Mure, *diss.* Lord Curriehill,) these defences repelled in an action founded upon the fraud of the defenders.

Counsel for Pursuers—Mr Horn, Mr Adam, and Mr Deas. Agents — Messrs Duncan & Dewar, W.S.

Counsel for Defenders—The Solicitor-General, Mr Clark, and Mr Balfour. Agents — Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This action is raised by the sole surviving trustee and beneficiaries under the marriage-contract of the late John Lothian, S.S.C., and his wife, and under certain deeds of settlement executed by Mrs Lothian. The object of the action is to compel the defenders, the Carron Company, to account for a large amount of profits said to have been realised by them between the years 1824 and 1846, during which period the pursuers' predecessor, Mrs Lothian, was a shareholder in the company, but which profits are alleged to have been fraudulently concealed and misapplied by the defenders for the purpose and with the effect of keeping down the rate of dividend during said period, and thus of withholding from Mrs Lothian and the other shareholders profits which legally belonged to them. The sum sued for is £30,000. The defenders pleaded (1) that the pursuers had no title to sue; and (2) that they were in possession of a title to exclude the action.

The Lord Ordinary (MURE) repelled both pleas and ordered issues to be lodged. The defenders reclaimed.

The title to exclude depended on the effect of a compromise of an action which had been raised by Mrs Macfie, the second wife and executrix of Mr Lothian, against the defenders for restitution of the shares held by Mrs Lothian, which she had made over to her husband, and which after her death, had been sold to the defenders in virtue of a right of pre-emption possessed by the company under the contract. The Lord Ordinary held that the compromise of that action must be viewed in reference to its conclusions, and that, as these were restricted to the profits from 1846 downwards, this action, which had reference only to profits accruing before 1846, was not excluded by it.

The objection to the title to sue was rested mainly on a codicil executed by Mrs Lothian in 1843, by which she directed her trustees to allow her husband the option of taking her ten shares of Carron stock at an estimate of £6000 as part of the specific sum settled upon him in their marriage-contract. This codicil was acted on after Mrs Lothian's death, and it was contended that in this way Mr Lothian acquired right not only to the capital stock mentioned in the codicil, and to the profits which might afterwards accrue thereon, but also to all claim to any undivided profits effeiring to the shares, including those of which it is alleged that Mrs Lothian and her marriage-contract trustees were during her life fraudulently deprived of by the defenders. It appeared to the Lord Ordinary that the codicil had reference only to the capital stock, and not to the profits accruing during her life, which by her marriage-contract the trustees were directed to pay over to herself exclusive of her husband's *jus mariti*.

It was also urged by the defenders that as the pursuers were not now holders of stock they were not in a position to insist on a claim for bygone profits, but this difficulty the Lord Ordinary thought was removed by the fact that the action contained conclusions of reduction of the defenders' title to the stock, in so far as it is interposed as an obstacle to the pursuers' demand, and also by the

terms of the contract of copartnery of the Carron Company.

The case was advised to-day. The Court—Lord Curriehill dissenting—adhered to the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—It appears that the late Mrs Lothian had ten shares of the Carron Company, which had belonged to her first husband, Mr Caldwell. These she held by herself and her trustees till her death in 1846. She was all that time the registered owner in the books of the company. In 1828 she married Mr Lothian, when a contract of marriage was executed by which the shares were conveyed to trustees. Mr Lothian's *jus mariti* and right of administration were excluded, and the dividends were to be paid over to Mrs Lothian herself. The trustees had power to give Mr Lothian such part of these dividends, not exceeding one-fifth, as they should think proper. There was a clause of pre-emption in the contract of the company in its favour, and in 1847 the company agreed to purchase Mr Lothian's shares for £6800. Mr Lothian afterwards married a Mrs M'Fie, and she, as his executrix, raised an action against the company to have the sale reduced, on the ground of the company's fraud, and this action the company compromised by a payment to Mrs M'Fie or Lothian of £11,000, she granting an assignation of all her rights. The pursuers in this action say that the first Mrs Lothian was cheated during her life, and that no discharge has been granted for what she was defrauded of betwixt 1824 and 1846. It is maintained, on the other hand, that what was transferred to Mr Lothian by his wife's codicil was ten shares of what the company had to divide, and that the defenders have satisfied his executrix by the payment made to her. The question is whether the pursuers have still a title and interest to sue this action. I think there is an interest to make out that certain sums were not paid to Mrs Lothian, which, if the contract had been honestly acted on, would have been paid to her. I think it would be premature to dismiss the action without inquiry. There must be some inquiry as to how the profits were laid aside instead of being divided. If this was honestly done in order to increase their stock or otherwise, I don't see how the pursuers can complain; but the contrary is averred, and I am not for excluding light from the transactions.

LORD CURRIEHILL said—The pursuers are not here claiming damages, but an accounting on the footing that they are the parties to whom the profits in question still belong. In considering the pleas before us, we must, of course, assume the pursuers' statements to be true. On the other hand, we must keep in view the nature and extent of their allegations. Now, it is not alleged that the profits were purloined by those conducting the business. On the contrary, it is said that the profits have been accumulated. Nor is it alleged that any of the conditions of the contract of copartnery have been contravened. It is only said that there was concealment. In order to ascertain whether the pursuers have a title to sue we must attend to the history of these shares. This his Lordship proceeded to narrate; and then put the question—Suppose a multiplepoinding were raised as to the right to the profits in question, whether would Mr Lothian's executrix or Mrs Lothian's representatives be preferred? Undoubtedly the former. The trustees had divested themselves in favour of Mr Lothian. They say that they only transferred the stock. I think that is not only erroneous in law, but inconsistent with what I gather to have been the intentions of the parties. If the other party were preferred such a result would be very startling on all the stock exchanges of the country, where it has always been understood that a transference of stock includes a transference of all accumulated profits which have not been set apart as dividends. These accumulations are always dealt with as accessories to the capital. This was illustrated by considering the respective rights of fiars and liferenters. A fiar has right, as accretions to the capital, of all profits not made during the liferenter's life. This was ruled by the House of Lords in the case of Irving *v.* Rollo, 27th July 1803 (4 Paton 521 and M. 8283); and where a dividend is declared during a liferenter's life, but is not payable till after his death, it belongs to the fiar. This was decided in the case of Thomson *v.* Lyell, 18th November 1836 (15 S. 32). Mrs Lothian's trustees were bound to know, and plainly did know, that the profits were, under the contract, to be appropriated in part to increasing and extending the company's business: and the benefits of this they were to reap not by increased yearly dividends, but by the gradual increase of the value of the shares. Accordingly, Mr Lothian sold his shares to the company for £680 a share. I think therefore that, had matters remained as they were, the pursuers would have had no title. But the state of matters is not now the same. Mr Lothian's executrix has raised her action for the remedy which she was advised to ask. This action she has compromised, and, in addition to the £6800 paid to Mr Lothian, she received from the company £11,000 for stock, the original value of which was only £2500. She granted a discharge to the company in the most comprehensive terms. I think, therefore, that if any claim ever existed it has been extinguished and discharged. I am therefore of opinion that the Lord Ordinary's interlocutor should be altered and the defenders assoilzied.

Lord DEAS concurred with the Lord President. In reference to the cases cited by Lord Curriehill, he said they were cases where everything had been fairly and honestly done. But if there is fraud, the cases don't apply. Here it is alleged, and must admittedly be assumed. The fraud alleged is the fraud of the managers of the company, who are said to have committed it for their own personal benefit, and these parties are all made parties to this action. They took advantage of the clause of pre-emption in the contract in order that they might acquire the shares, and so reap the benefit of their own fraud. The dividends prior to 1846 were not made over to the Carron Company by Mr Lothian, and it was not the intention to do so. His executrix in the former action did not assert any right to these dividends, and she did not by the compromise discharge any claim to them. Then Mr Lothian's representatives are made parties to this action, and they do not even yet make any claim to them. It would therefore be extremely hazardous to dismiss the action at this stage.

Lord ARDMILLAN concurred with the majority.

SECOND DIVISION.

COWANS *v.* LORD KINNAIRD.

Property—Running Water—Stagnum—Compensatory Supply — Acquiescence. In a declarator that operations on a running stream by an upper heritor whereby the rights of a lower heritor were injured, were illegal—held (1) that it was not a relevant defence that the upper heritor had provided a sufficient compensatory supply by draining a stagnum into the stream, it not being alleged that all the lower heritors had agreed to accept this as sufficient; and (2) that the defender had not relevantly averred acquiescence. Counter issues founded on these defences disallowed.

Counsel for the Pursuers — Mr Patton & Mr Gloag. Agents—Messrs Wilson, Burn, & Gloag, W.S.

Counsel for the Defender—The Lord Advocate and Mr Fraser. Agents—Messrs Leburn, Henderson, & Wilson, S.S.C.

This is an action at the instance of Charles and John Cowan, surviving partners of the company carrying on business at Valleyfield as papermakers, under the firm of Alexander Cowan & Son, and