the effect only of seeing that the bankrupt's estates were not burdened to a greater extent than £500, he was not entitled to rely on the amount being less.

At advising—

Lord President—I am sorry that I cannot agree with the Lord Ordinary's interlocutor in this case. His reasoning is in its general principles sound and consistent, but it is liable to objection. I think a fallacy pervades his whole argument. The state of the facts is this—Samuel M'Millan, the bankrupt, and his sister Agnes M'Millan, were originally joint-proprietors of an estate called Maidenbower in Dumfriesshire, and while owners borrowed a sum of £1000, and granted a bond and disposition in security for the £1000 over that estate, dated 18th and 25th and recorded 26th April 1853, in favour of certain persons who are now represented by Mr John Alexander Smyth. After that Agnes died, leaving her half of the estate to her two brothers Samuel and Robert in equal portions. From that date the property was held in the proportion of three-fourths by Samuel M'Millan and one-fourth by Robert. Now while the title stood vested in these proportions the brothers borrow the sum of £500 and grant a bond and disposition in security, dated 16th and recorded 19th January 1863, in favour of the trustees of Thomas Robinson Smyth, in right of whom Mr Smyth now is. That is the second bond on the estate, and it is to be observed that it is a document of the same description as the first as regards extent—it is over the entire estate. But at a subsequent period, on the 8th October 1867, a third bond was granted, by Samuel M'Millan alone, for £1000, and in security he conveyed, not the entire estate, but only that portion which belonged to himself, his brother not being a party, and his share of the estate not being impignorated.

As regards the first of these three bonds, it is needless to say anything further. The case may be regarded as if it were freed from that bond altogether. The real competition has reference to the second and third bonds.

Suppose that there were only two bonds—one for £500 in favour of Thomas Smyth over the entire estate, and the other for £1000 extending only over that portion of it which belonged to Samuel M'Millan. The trustee in bankruptcy of Samuel M'Millan has proceeded to rank the £500 debt this way, one-half upon the bankrupt estate, which has been brought to sale in the usual manner, leaving the other half to come out of the estate of Robert M'Millan, who is perfectly solvent. Now, the answer to this demand is that Robert M'Millan although he is *ex facie* a joint-obligant, and although his estate has been jointly impignorated for repayment of this sum of £500, is in truth not a joint-obligant, but only a cautioner. It is averred that the money was borrowed for the purposes of Samuel only, and in support of that averment a back letter is produced, dated 26th February 1863, which acknowledges that the whole debt is his. But this letter has never entered the record, and has never been published in any way. On the face of the record it appears that the two brothers are jointly bound, and their two estates jointly impignorated. It appears to me that the back letter and the fact that Robert M'Millan was a cautioner only—both of which as facts I fully assume—cannot be allowed any weight in this question. The creditors dealt with the estate as it appeared on the face of the record, and knew nothing of the back letter. They were therefore entitled to rely on a security not only over the estate of Samuel but of Robert also; and therefore when they came to operate payment they were entitled to draw their payment in equal portions out of the two estates impignorated. This appears to me to be the true view of the case.

The Lord Ordinary proceeds on the assumption that if no bankruptcy had taken place the party paying the £500 would have been entitled to an assignation of the entire security. That is a mistake. He would be entitled to an assignation only to the extent of one-half, on the plain doctrine that he himself is bound to pay one-half and his co-obligant to pay the other. No doubt it is said that Robert M'Millan is only a cautioner, but for the reasons I have stated that cannot be allowed to enter into the case at all. If it were otherwise it would be inconsistent with the rules of ranking of heritable securities. The back letter was never published. I think therefore that the scheme of ranking which the trustee has prepared is perfectly well calculated to carry out this principle, and Robert M'Millan must just submit to have his estate burdened to the extent of one-half. That does not arise here in form, but our judgment will rule Mr M'Millan's case. I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be altered to that effect.

Lord Deas and Lord Shand concurred.

Lord Mure was absent.

The Court therefore recalled the Lord Ordinary's interlocutor, repelled the objections for Robert M'Millan, approved of the scheme, and decerned.

Counsel for Petitioner—R. Johnstone. Agents—J. C. & A. Steuart, W.S.

Counsel for Smyth (Respondent and Reclaimer)—Scott—Rankine. Agent—W. S. Stuart, S.S.C.

Counsel for Robert M'Millan (Objector and Respondent)—Trayner—M'Kechnie. Agents—Carment, Wedderburn, & Watson, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

DUKE OF ROXBURGH *v.* GRIFFITH AND OTHERS (WALDIE'S TRUSTEES).

Fishings—Right to Salmon Fishings—Possession—Rod Fishing—Obstruction in River.

R held the Sprouston fishings in the river Tweed *ex adverso* of the lands of Sprouston under a barony title from the Crown *cum piscationibus.* W held the Edenmouth lands and fishings, which were opposite the fishings of Sprouston, also under Crown titles *cum piscationibus.* R had for hundreds of years exercised the full right of salmon-fishing by net and coble on the said fishings both above and below a certain part of the river about a quarter of a mile in extent, where, on account of islands and the shallowness of the stream, net and coble fishing was not

exercised. In this part of the river there was an island situated to the north of W's side of the *medium filum* of the river, and the solum of which belonged to W, from which R had for a prescriptive period fished with rod and line in the channel between the island and W's bank of the river, that being the only mode possible from the island. W had also fished the said channel both with rod and line and with cairn nets before they became illegal, it not being possible to fish with net and coble. W had also erected a cauld at the head of the channel, which was diverting water from his bank on to R's. *Held* (1) that R had a full right and title to fish in the channel in question, he having established possession by rod and line for the prescriptive period; and (2) that he was entitled to demand that W should remove the cauld he had erected whenever it was proved to have caused a diversion of water on to R's bank, and that there was no room for proof whether it was *innocuæ utilitatis* or not.

This action was raised by the Duke of Roxburgh, heir of entail in possession of the Earldom of Roxburgh and lordship and barony of Halydean, with the fishings, &c., pertaining thereto, against Sir R. J. Griffith of Pencraig and others, trustees of the late John Waldie of Hendersyde. The purpose of the action was (1) to have it declared that the pursuers had right "to fish for salmon and other fish of the salmon kind in the channel or portion of the river Tweed between the line marked by the letters A A on a sheet of the Ordnance Survey map on the west, the line marked by the letters B B on the said sheet on the east, the lands or estate of Edenmouth belonging to the defenders on the north, and an island or bank in the said river lying *ex adverso* of the farm of Banff Mill, belonging to the pursuer, on the south, and that by net and coble, rod and line, and all other lawful modes; and that the pursuer had good and undoubted right and title to practise and exercise the said right of fishing for salmon and other fish of the salmon kind in the said channel or portion of the said river Tweed from and upon the said island or bank, being the island or bank marked C on said map;" and (2) that a weir or cauld erected across the channel in question by the defenders "is an illegal encroachment upon and erection in the *alveus* of the said river, and is further an illegal obstruction to the passage of salmon therein, and that it is injurious to the pursuer, his rights and interest," and should be removed.

The pursuer held the lands of Halydean, comprehending those of Sprouston, which were *ex adverso* of the river at the channel in question, under a barony title *cum piscationibus*, and the pursuer's fishings in that neighbourhood were known as the Sprouston fishings. The pursuer's lands extended along the south bank of the river at the place in question, and opposite to them on the north bank the lands belonged to the defender. At this part of the river there were several islands, one of which, named "Banffmill Anna," situated to the north or defender's side of the *medium filum*, divided the river into two channels, the one on the north being the channel in question. The defenders claimed sole right to the island as being to the north of the *medium filum* and in the parish of Ednam, the fishings in the barony of Ednam being their property.

The pursuer averred—(Cond. 6) "The channel to the south of the said island is shallow, and not adapted for the run of salmon or for salmon-fishing, while the north channel is deep, and the main flow of the river is in that channel. The said north channel is well adapted for the run of salmon, and it is in it that the salmon in fact run. It is and has for more than forty years been the only water in that portion of the river in which the right of salmon-fishing could or can be practically exercised. The salmon-fishing in the said north channel is in fact, and has been always, or at all events for a period of greatly more than forty years, let and possessed as a part of the Sprouston salmon-fishings belonging to the pursuer. The pursuer and his authors have also always, or at least for greatly more than forty years, in virtue of their titles, fished for salmon and other fish of the salmon kind in the river Tweed *ex adverso* of the lands above described both above and below the place described in the conclusions of the summons by net and coble, rod and line, and all other lawful modes." The defenders answered that salmon did run and lie in the south channel. The pursuers further averred that for more than the prescriptive period they had uninterruptedly fished in the north channel off the island in question by rod and line, "and in exercise of that right they have for greatly more than forty years used the island before referred to by fishing from and upon the same, particularly with rod and line, and for other purposes connected with the fishing. The north channel *ex adverso* of the said island is rocky, and not adapted for being fished by net and coble, and fishing by rod and line is the best and most lucrative mode of possessing the salmon-fishing in the said north channel." They did not object to the defenders continuing to fish for salmon from their own bank as they had hitherto done. The possession was denied by the defenders.

The defenders averred that they also had fished in the channel by all available methods, including cairn nets so long as that mode of fishing was lawful, and also rod and line.

The pursuer's statement in regard to the cauld was as follows:—"The defenders or their author, or those for whom they are responsible, have recently illegally erected or built a weir or cauld across the said channel from their bank to the island before referred to, which obstructs the flow of the river and the run of the fish as well as the passage of boats, and prevents the pursuer's right of salmon-fishing in said channel and the neighbouring parts of the river from being fully exercised, to the loss and damage of the pursuer. The said weir or cauld is an illegal encroachment upon the *alveus* of the said river, and might prove injurious to the pursuer and his property in other ways."

The defenders admitted the erection of the cauld, but explained that it was in point of fact beneficial to the fishing and run of salmon.

The defenders pleaded, *inter alia*—"(3) The fishings of the channel libelled are not within the pursuer's titles, because—1st, The said fishings are not within the parish of Sprouston; 2d, they are beyond the *medium filum* of the river Tweed *ex adverso* of the lands of Sprouston; and 3d, the pursuer has not had prescriptive possession of the same. (4) The defenders are entitled to absolvitor, because the fishings in question are their sole property. (5) The defenders are entitled to

absolvitor from the conclusions relating to the cauld complained of, because—1st, The construction of the same was legal and within their rights; and 2d, because it is *innocuæ utilitatis*."

The Lord Ordinary (CURRIEHILL) allowed a proof, and found as follows in fact and law—[*After stating the facts* ut supra]—"That the said island, viz., Banffmill Anna, which is about an acre in extent, is situated to the north of the *medium filum* of the river, and that the solum thereof belongs to the defenders: (*Sixth*) That from time immemorial the river below the cauld has been divided into two main channels, called respectively the north channel and the south channel, and that the north channel flows between the north side of the said island and the north bank of the Tweed, belonging to the defenders, and that the south channel flows between the south side of said island and the south bank of the Tweed, belonging to the pursuer: (*Seventh*) That from time immemorial and in ordinary states of the river by far the greater proportion of the water in the river which flows past the said cauld has flowed in the said north channel, and only a small portion in the south channel: (*Eighth*) That from time immemorial salmon and fish of the salmon kind ascending the Tweed have been in use to ascend by the north channel and to lie therein, and have not been in use to lie in the south channel, or, except in time of high floods, to ascend by that channel: (*Ninth*) That the bed of the north channel is so rocky that it never has been and cannot be fished by means of net and coble, and that the only practicable legal modes of fishing were by rod and line and by cairn nets, but that such nets could be attached only to the north bank of the river, and that the use of such nets on the island was impracticable, and if practicable would have been illegal: (*Tenth*) That in virtue of their titles the defenders and their predecessors have for time immemorial fished for salmon in said north channel by rod and line, and also until 1857, when cairn nets were abolished on the Tweed, by means of cairn nets attached to their own north bank of the river, and that the whole of their said fishing was carried on from or upon the said north bank of the river, and never from or upon the said island: (*Eleventh*) That the pursuer and his predecessors, in virtue of their titles, have from time immemorial, by themselves, their tenants and servants, been in use to fish for salmon for profit in the Tweed from Kelso, which is some miles above Sprouston, to Carham Burn, which is some miles below it, and that by means of net and coble in all practicable places, as well as by rod and line, and also to take their boats by the said north channel between their net fishings above the said cauld or weir and those below Banffmill: (*Twelfth*) That for upwards of forty years, and from time immemorial, the pursuer and his predecessors, by themselves, their tenants and servants, have in virtue of their said titles been continuously, peaceably, and uninterruptedly, in the practice of fishing for salmon for profit and amusement in the said north channel, and that by means of rod and line: (*Thirteenth*) That in these circumstances the pursuer and his predecessors have had full legal possession of salmon fishing in said north channel from the north side of said island, and that the pursuer has full right and title to continue said possession, and also to take boats up and down said channel for the purposes of his salmon fishings in the upper and lower water of the Tweed: *Secundo*, Finds (*first*) that the defenders have recently, and without the consent of the pursuer, constructed in the bed of the said north channel a cauld across the upper or west end thereof, and that in ordinary states of the river the said cauld is covered by the stream; (*second*) that the said cauld does not form any obstruction to the passage of salmon, but that it has the effect of diverting, to a certain extent, the flow of the river from the north channel into the south channel, and is therefore an illegal encroachment on the right of the pursuer; and (*third*), and separately, that the said cauld illegally obstructs the passage of the pursuer's boats up and down the north channel; therefore finds, decerns, and declares in terms of the declaratory conclusions of the summons: Decerns and ordains the defenders to remove the said cauld, and to restore the said channel to the same condition in which it was prior to the erection of said cauld, and that within two months from this date, &c.

"*Note.*—There are two questions involved in this action—(1) The right of the pursuer to fish for salmon in the north channel of the Tweed opposite the 'Banffmill Anna;' and (2) the right of the defenders to erect and maintain a cauld in that channel. The facts of the case as disclosed by the proof are so fully detailed in the findings of the foregoing interlocutor as to require no further explanation. I shall therefore confine the following observations to the questions of law which are raised by these facts, and in doing so I shall first consider the right of the defenders to erect the cauld complained of. That cauld is clearly proved to have caused a diversion (though not as yet to any material extent) of the flow of the Tweed from the north bank, which belongs to the defenders, towards the south bank, which belongs to the pursuer, and to have begun to wash away the island. The case therefore falls under the rule applied by this Court and by the House of Lords in *Bicket* v. *Morris*, July 13, 1866, 4 Macph. (H. of L.) 44. It is unnecessary for the pursuer to prove present damage or to state how he expects future damage to be caused. It is enough to say that the diversion of the stream may in future have serious consequences, which it is impossible at present to foresee. The pursuer is also proved to have from time immemorial used the north channel as a navigable stream for the transport of his boats from his net fishings in Sprouston Dub and the upper waters of the Tweed to those belonging to him below Banffmill. The defenders' new cauld illegally obstructs that use, as the pursuer has in my opinion established a right-of-way over that part of the Tweed for the purposes of his fishings even although he had failed in establishing a right to fish in that channel. The defenders are therefore not entitled to retain their cauld without the consent of the pursuer, who desires and is entitled to have it removed.

"As to the pursuer's claim to fish for salmon in the north channel, I have, after much consideration, come to be of opinion that it ought to be sustained. Whatever may have been the effect of the original erection of the mill cauld by the pursuer's predecessors in diverting the flow of the river from the south to the north channel, the state of the river from time immemorial has been that the main flow of water passing that cauld is by the north channel and between the defenders'

north bank of the river and the island or 'Banffmill Anna.' I think it not improbable that the cauld when erected had, as the defenders allege, the effect of diverting the flow from the south into the north channel, if indeed it was not the cause of the formation of the island. But from whatever cause, the main flow has been between the island and the north bank of the river. The island is undoubtedly on the north side of the *medium filum* of the river, reckoning from the north to the south bank, and although the evidence of the possession of the island by the defenders as their exclusive property is slender, I think it must be held to belong to them in property. But the *medium filum*, though important as defining the extent of the solum of the *alveus* which belongs to each of the opposite riparian proprietors, is not conclusive, or in many cases material, in questions of salmon fishings; it is by possession that the extent of grants of salmon fishings attached to lands is to be defined, whether the grant is of 'salmon fishings' or of the lands '*cum piscationibus*,' and the right to fish for salmon in a river may by possession be extended beyond the lands expressly named in the grant to the effect of entitling the grantee to fish even *ex adverso* of the lands of an adjoining proprietor whether on the opposite or on the same side of the river—*The Duke of Roxburgh* v. *Ramsay*, 10 D. 665; *Duke of Richmond* v. *Earl of Seafield*, 8 Macph. 530. Now, the facts as to the possession are very fully and clearly disclosed in the proof. The pursuer has express grants of salmon fishings in various parts of the Tweed between Kelso and Carham Burn. Neither he nor the defenders, however, have an express grant of salmon fishings in the part of the Tweed now in question, but each has a grant of lands '*cum piscationibus*' which, if proper possession is proved, establishes the right to fish salmon in connection with his lands washed by the Tweed. Both parties have from time immemorial fished for salmon by means of net and coble *ex adverso* of their respective properties both above and below the north channel, and there is no dispute as to the general right of both to the salmon fishings in the Tweed *ex adverso* of their respective properties. The dispute between the parties relates solely to the north channel from a little below the end of pursuer's old cauld to about opposite the mouth of the tail race of the pursuer's mill.

"Now, it is a fact, and a most important one, that in consequence of the rocky nature of the bed of the north channel it cannot be fished by means of net and coble, or otherwise than by rod and line, or by cairn nets. The defenders and their authors have fished in it regularly with rod and line, sometimes from a boat, sometimes from their own bank, but never from the island; and they were also regularly in use to fish by means of cairn nets until these were abolished by the Tweed Act of 1857.

"The pursuer and his predecessors have also regularly fished for salmon in the said channel by rod and line, and always from the north bank of the island. This they have done openly, continuously, peaceably, and uninterruptedly, the fishing having been almost invariably let to tenants, chiefly professional salmon fishers, though sometimes merely sportsmen. But it is undoubted that the rod fishing in the north channel has from time immemorial, at all events for about seventy years, been systematically carried on by the pursuer and his predecessors and their tenants as part of a considerable commercial undertaking. From the formation of the island cairn nets could not be there used, and even if their use had been possible it would have been illegal, as such nets were only lawful when attached to the bank of the river, and not when attached to an island.

"The defenders maintain (1) that no amount of fishing merely by rod and line can establish a right to salmon fishing; and (2) that at all events it cannot establish such a right in competition with the higher right which they have established by their cairn net fishing. On the general question I think the current of recent decisions has been tending strongly to this—that where the ordinary mode of fishing by net and coble is impracticable, rod fishing, if proved to have been carried on systematically, openly, continuously, and uninterruptedly for forty years upon a habile title, will suffice to establish a right, and specially ought to do so if, as in the present case, the part of the river in dispute is merely a small portion of a long stretch of water over the whole of which the pursuer has established or possesses an unquestionable general right and title to fish for salmon. I think it would be absurd to maintain that prescriptive possession by net and coble of every pool in a river capable of being fished by that method, exercised in virtue of a grant of lands *cum piscationibus*, which would undoubtedly give a general right to salmon fishing in such river, should yet be insufficient to support the proprietor's claim to fish for salmon with the rod in intervening streams and pools which do not admit of being fished by net and coble. But that is just the case of the pursuer—this north channel is merely a stream which cannot be fished by net and coble, but which is interposed between the upper and lower fishings, which undoubtedly belong to him.

"The objection of the defenders, that their prescriptive use of cairn nets has given them as full a right to the whole fishings in the channel as if they had used net and coble, and has thereby excluded the pursuer's rod fishing from having the effect which it might otherwise have had, is not, in my opinion, well founded. The cairn nets (the construction of which is fully explained in the report of the case of *Duke of Roxburgh* v. *Ramsay*) did not command the whole river; they were fixed to the north bank, and only projected a short distance from it, and they were only used at night and in time of flood. They were no doubt in the case cited held to be possession of such a nature as to exclude the proprietor of the ground on which they had been fixed by the party possessing the fixing from interfering with that fishing even by rod and line, but it has never been held, and I can see no reason for holding, that their use is complete possession of the whole river in the sense in which net and coble fishing has been held to be complete possession, to the effect of excluding the proprietor of the opposite bank from using the rod and line—*Duke of Richmond* v. *Earl of Seafield*, 8 Macph. 530.

"If, then, fishing with rod and line for the prescriptive period in a channel or river like that now in question by one holding a habile title is, in the absence of proof of exclusive possession by a third party, sufficient to establish a right to fish for salmon, I am of opinion that the pursuer

must prevail in his claim. I think that, although the island may all be locally on the defenders' side of the *medium filum* of the river, it has nevertheless become the law of this river that the opposite riparian owners should not, as regards their respective rights of fishing, be controlled by the *medium filum*, but should fish from opposite sides of the north channel as if it had been the entire river, and as if its banks had been the banks of the respective parties. The principle on which I have formed this opinion is to be found running through many cases, and among others the cases of *Earl of Zetland*, 6 Macph. 292, and 8 Macph. (H. of L.) 144, and *Wedderburn*, 2 Macph. 902.

"The result of the whole case is that the pursuer is entitled to decree of declarator as concluded for, and that the defenders must remove their cauld within a reasonable time, which I have fixed at two months from the date of the interlocutor. The pursuer will ultimately be found entitled to expenses—at all events to those hitherto incurred—but these are reserved in the meantime, and until the final issue of the cause. Leave is granted to the defenders to reclaim, as the present is obviously the most convenient stage for having my judgment reviewed, if the defenders should desire to take that course."

The defenders having got leave, reclaimed, and argued—(1) The amount of possession proved by the pursuer was inadequate with reference to the kind of case which was required to be proved to establish a right beyond the *medium filum*. (2) Where in the endeavour to establish a prescriptive right to fishing a more energetic right was encountered, as in the present case the cairn nets of the defenders, the exercise of a less important right will not establish a prescriptive right to fishings, being merely the exercise of a privilege. In regard to the cauld, it was submitted (1) that it was not proved that there had been any throwing of the water on to the pursuer's lands; (2) that even if there had been an essential change in the current caused by the weir, it was not enough; it was necessary for the pursuer to show a reasonable apprehension of injury.

Authorities — The cases quoted in the Lord Ordinary's note, and the following—*Orr Ewing & Company* v. *Colquhoun's Trustees*, July 30, 1877, 4 R. (H. of L.) 116; *Duke of Sutherland* v. *Ross*, May 26, 1877, 4 R. 765.

Argued for respondent—There was no question as to the title of the parties, the only question was—Was their possession sufficient in amount and quality? It was submitted (1) that cairn nets were not an effective mode of fishing the channel; (2) that the cairn nets had not really fished the whole channel right across; (3) that for a prescriptive period there had been no challenge of the pursuer's rod fishing, which was the most advantageous, and indeed the only practicable method of fishing the channel from the pursuer's side. In regard to the cauld—It was not an improvement to the pursuer's fishing, and it was enough for its removal that the defenders had no right to put it there—*Bicket* v. *Morris*, quoted *supra*.

At advising—

LORD JUSTICE-CLERK—If I had any difficulty in this case, assuming the state of facts as stated to us for the defenders, I would have been inclined to have taken time to consider the evidence. But the case seems to me to be not one of fact, but of law.

The first question is, Whether the fourth plea-in-law for the defenders is sound? It is in these terms—"The defenders are entitled to absolvitor because the fishings in question are their sole property." That is what the defenders were bound to make out, and I am very clearly of opinion that they have failed in doing so. What they want is to prevent the Duke of Roxburgh and his tenants from fishing from this island, which lies in the channel of the river. They state that they have prescribed a right to those fishings by the use of fixed engines, and that the fishing by the Duke of Roxburgh and his tenants by rod and line only from the island is not habile to acquire a right to fishings by prescription or to interrupt the running of prescription. The Duke of Roxburgh has admittedly a right of salmon-fishing in the river both above and below the part in dispute. It seems that there, for a distance of about a quarter of a mile, the shallowness of the river and there being islands in it prevent fishing by net and coble. But will that take away an admitted right to salmon fishings?

I imagine that if the titles of the Duke of Roxburgh embrace the whole stretch of water *ex adverso* of his lands, he is entitled to fish in any way he can. Having the right, he may exercise it as best he can, and it so happens that at this place rod and line is the best mode.

It would be very awkward if we were to hold that whenever there is an interruption of the possibility of fishing by net and coble the admitted proprietor of salmon fishings should lose his right to them. I think therefore that the defenders are not sole proprietors of the fishing in dispute, and that the proprietors on either bank may use it as best they can. That settles the first question.

The second question is as to the construction of the cauld in the bed of the stream. The mere property of the solum of the *alveus* is not in question at all. *Prima facie*, no proprietor of one side of a stream is entitled to alter the flow of the stream without the consent of the proprietor of the other side, or even of those below.

This case is moreover distinguished from the case of *Bicket* v. *Morris* (quoted *supra*). In that case the operation had no reference to the stream itself; it was the gable of a house which accidentally projected into the stream; and in the more recent case of *Orr Ewing* (quoted *supra*), the piers or supports of a bridge were said to obstruct the river.

But this operation was carried out for the purpose of obstructing the stream, and for nothing else; to be sure it is said to be for the benefit of the salmon fishing.

It is plain therefore that there is in this case no room for inquiry as to whether the operation is *innocuæ utilitatis*. The object is to deepen the stream at one place and to send a larger flow of water down the south side of the channel. I think no riparian proprietor is bound to submit to such an alteration being made on the bed and in the flow of a stream. His right is to have the flow of water to which he has become accustomed by use and wont. With these remarks, I am of opinion that we should adhere to the Lord Ordinary's interlocutor.

LORD ORMIDALE—I think that the Lord Ordinary's interlocutor is well founded.

The only question which occasioned me difficulty was with regard to the island, but as to that there is now no dispute. The Lord Ordinary has found that the solum of the island belongs to the defenders, and that has now been conceded in argument. I take it that that is rather in favour of the pursuer on the second point.

Undoubtedly the Duke of Roxburgh has a full right of salmon-fishing in the Tweed *ex adverso* of his lands, and it would be anomalous if his right should be of a different nature for this small distance to what it is over the rest. He has fished here with rod and line from time immemorial. It is true the island was used for this purpose, but that can make no difference. All that could be said against his right at this spot was that he did not there exercise his right to the same extent as the other riparian proprietor, who made use of cairn nets.

The Duke, however, could not have fished by means of cairn nets, because that could only be done on his side from the island, and they could not be erected there, both because it was apt to be overflowed, and because the solum of that island did not belong to him. We have it in evidence that he made use of the island for rod and line fishing, and that, I think, was the only manner in which that piece of water could be fished from his side.

We now come to the cauld, which, according to the second conclusion of the summons, the pursuer holds that the defenders had no right to erect. I concur in that view. Whatever may be the rights of the defenders in the solum up to the *medium filum* on their side, they have certainly no right to alter the flow of the water in the channel.

It is not necessary for a riparian proprietor in the position of the pursuer to show that such an erection or operation as this had done damage to him, or even that damage was imminent; all that is necessary is, that there is a reasonable apprehension of risk of injury. That is certainly the case here. The result of the erection of this cauld will be to cause a change in the state of the river, to which the pursuer is not bound to submit. We are therefore entitled to hold that the erection is illegal, and must be removed.

LORD GIFFORD—I am of the same opinion. I have come to substantially the same conclusion as the Lord Ordinary, and on the same grounds, so I do not consider it necessary to go into the details of the evidence.

There are two questions raised. The first is, whether the pursuer is entitled to fish in the channel between the south bank and the island? Both parties to the case have express grants of salmon-fishing, and their rights extend over a long stretch of water *ex adverso* of their respective properties. It is said, however, that the *Duke of Roxburgh's* right for a distance of about one-eighth of a mile is not full. I agree with the Lord Ordinary that in a question as to salmon-fishings in a river we must not look to every part of the river. It may be that the general use is by net and coble; but if we find that for a short distance the fishing was not conducted by net and coble, but by rod and line, still I hold that to be sufficient possession. The least possession would, in my opinion, retain the right of salmon-fishing in such a state of the title. Here, I think, we have possession by rod and line of such an open description as so to preserve it; moreover, it seems clear that it was impossible to fish from the south side of this channel except by rod and line.

The second point is—Have the defenders the exclusive right of using the solum of the channel in the way they have done by erecting this cauld?

I think it is of great importance that the cauld is constructed in the *alveus* of the stream for the purpose of affecting the fishing, and not with a view to any other operation. Whenever we find that such an operation is carried out for the purpose of actually interfering with a common subject so as to affect the common interest, the case is very different from such cases as *Bicket* v. *Morris* and *Colquhoun's Trs.* v *Orr Ewing*. Even if such an operation did the pursuer good instead of hurting him, I think he would be entitled to object. Here I think it does injure him—at least it will most benefit the defenders; and any such operation, before it can be looked upon favourably, must at least conduce equally to the benefit of both the parties interested.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Pearson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders (Reclaimers)—Kinnear—J. P. B. Robertson. Agents—C. & A. S. Douglas, W.S.

Thursday, February 20.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(ROBERT WEIR'S CASE)—WEIR (DODDS' TRUSTEE) v. THE LIQUIDATORS.

Public Company—Winding-up—Trustee—Presumed Acceptance of Office without Previous Consent.

By antenuptial contract of marriage, dated 1st June 1874, between John Dodds and Miss Margaret Bordue, Robert Weir was, along with four others, nominated a trustee, and amongst other funds thereby specially assigned to the trustees was £200 of City of Glasgow Bank stock then standing in the name of Margaret Stenhouse Bordue in the books of the bank. She executed a transfer, which bore that she thereby transferred the same to and in favour of the five trustees "and to their assigns and successors whomsoever;" and further, that the five trustees (naming them) accepted of the transfer on the terms and conditions therein mentioned. The transfer was not signed by Weir, only by the other four trustees; and a letter or mandate which was handed to the bank requesting them to issue the dividend warrants in name of, and to transmit them to, Mrs Dodds, was also signed by the same four only. At the time when the marriage-contract and the transfer were executed, Weir was in Spain, having gone there early in 1874, and not having returned till the end of June of the same year. Up to the date of the