

is it so in point of fact? The right to it was vested in their mother, transferred to her husband *jure mariti*, and remained vested in him *stante matrimonio*. But what happened on the dissolution of the marriage? Was there not a division of the goods in communion—one-half going to the children of the deceasing wife—so that they came to their right as representatives of their mother to the extent of one-half?

But even supposing they were not beneficially interested in the defunct's estate, I am disposed to hold that their right of kinship gives them a title to be confirmed. No doubt our law has of late disregarded propinquity as against persons beneficially interested in the succession. But that has only been when there has been a competition. [His Lordship then referred to the practice in the 15th and 16th centuries, and referred to the Act 1540, cap. 120, as showing that the office of executor did not necessarily belong to the *heres in mobilibus*, and explained that it was known historically that that Act had been extended in its operation to the estates of persons of full age. Beneficial interest was not a necessary title under that Act to obtain confirmation. His Lordship thereafter referred to the further history of, and legislation with regard to, the office down to the beginning of the seventeenth century, to show that, so far as it went, it was never thought to be necessarily attached to beneficial succession, or in other words that a beneficial interest gave the *only* title to the office. His Lordship then proceeded]—This view is confirmed in a very strong way by Mr Erskine, ii. 2. 3, where he plainly distinguishes between those called *executors* because they are next of kin, and those so called because they administer the estate. And again, in iii. 9. 32, he says—"By the former practice so great attention was given to the distinction already stated between the office of executor and the right of succession, that a universal legatee, if he was not also appointed executor by the deceased, was not admitted into the office if either next of kin, widow, or creditor appeared to oppose him,' &c. Now that practice of refusing to confirm a universal donee as against the next of kin (who could not of course have been interested in the succession) lasted down till past the middle of last century. It was only then that the practice was changed by the solemn judgment of this Court in the case of Crawford (Jan. 19, 1755, F.C. 1. 125, M. 3818). But although that judgment determined that a universal donee was preferable to the next of kin, it did not determine that the next of kin, though not beneficially interested, had no title to the office of executor. I have no doubt, if the records of the Commissary Courts were examined, it would be seen that the title of kinship, though not good as against a universal donee or a creditor, has been thought perfectly good in the absence of any one showing a preferable title.

The objection with which I have been dealing is one stated by a debtor to the executory estate, not by one who could have competed with the executors for the office. Therefore, unless the defenders could make out that the pursuers could not give them a good discharge for the debt, they are not entitled to challenge their title, and I must repeat, that having *ex facie* a good title, it cannot be challenged *ope exceptionis*, whatever may be the law as to the necessity for the pursuers confirming before decree or extract. The title is also good in fact as well as *ex facie*. The pursuers are possessed of a character to entitle the Commissary to

confer the title. This objection has been stated to their insisting in the action. It may be that they must confirm before discharge, and for aught I see, the defenders may yet contend that the pursuers can't get decree as having no beneficial interest in a decree. These are questions as to the pursuers' right to prevail to a judgment upon which I give no opinion at present. But with regard to the title to insist in this action, I think the two pleas sustained by the Lord Ordinary ill-founded, and that we ought now to repel them in so far as they contain an objection to the pursuers proceeding with this action.

The other Judges concurred in opinions of considerable length.

The Court therefore recalled the Lord Ordinary's interlocutor, and repelled the defenders' two pleas, with expenses since the date of the Lord Ordinary's interlocutor.

Agent for Pursuers—L. M. Macara, W.S.

Agents for Defenders—J. & A. Peddie, W.S.

DUKE OF BUCCLEUCH *v.* COWAN AND OTHERS (*ante*, vol. ii. p. 253).

*Property—Private Stream—Pollution—Upper and Lower Heritors—Bill of Exceptions.* In advising a bill of exceptions to the charge of a Judge, Held, affirming the charge—1. That an upper proprietor is not entitled to discharge anything into the stream so as to render it unfit for its primary purposes. 2. That a use of the river for secondary purposes may be prescribed. 3. That a lower proprietor complaining of the pollution of the river as it passes through his land is entitled to a verdict against every upper proprietor who can be proved to have materially contributed to the pollution. Exceptions against the refusal to give special directions disallowed.

The bill of exceptions in this case, in which a discussion took place sometime previously, was advised to-day.

The LORD JUSTICE-CLERK at the trial had given the following directions to the jury:—His Lordship said that, in point of law, there was a marked and important distinction between the rights of proprietors on the banks of a public river and those of proprietors on the banks of a private stream; that the public rivers of this country are vested in the Crown for public purposes, and the uses which the proprietors or inhabitants on their banks may have of the water are entirely subordinate to these public purposes; but in a private stream the bed of the stream is the property of the owner of the lands on the banks; that he is entitled to the full and uncontrolled use of the water as it passes through his property, subject only to the conditions that he shall suffer it to pass undiminished in quantity, and unimpaired in quality, to his neighbours below; that these conditions, however, are necessarily subject to some modifications, because even in ordinary uses of water there is a certain unavoidable consumption of the body of the water, and that it is impossible to prevent running streams from receiving impurities to some extent from natural causes, and from causes incidental to the presence of inhabitants on their banks; but that an upper proprietor is not entitled to throw impurities, and especially artificial impurities, into the stream so as to pollute the water as it passes through the estate of a lower proprietor; that the lower proprietor is entitled to complain of such

pollution as renders the water unfit for primary purposes; but that it will be a good defence against such a complaint that the stream has been from time immemorial devoted to secondary purposes, such as manufactories, so as to supersede and abrogate the primary purposes. That it is not indispensable for each of the pursuers to prove that any one of the mills would of itself, if all the other mills were stopped, be sufficient to pollute the river to the effect of creating a nuisance to him; that it is sufficient to entitle a pursuer to a verdict on any one of the issues to prove that the river is polluted by the mills belonging to the defenders generally, to the effect of producing a nuisance to him, and that the defenders in that issue materially contribute to the production of the nuisance to him; but it is indispensable for each pursuer to prove that the river is polluted by the mills of the defenders so as to produce a nuisance to him independently of the production of any nuisance to the other pursuers, or either of them, and that each of the defenders, against whom he asks a verdict, materially contributes to the production of such nuisance to him.

The following directions were asked by the defenders, and having been refused, exception was taken against said refusal:—

1. That the law does not regard trifling inconvenience; that, in determining the question raised in the issues, time, locality, and all the circumstances should be taken into consideration by the jury; and that in districts where great works have been erected, which are the means of developing the national wealth, persons are not entitled to stand on extreme rights, or complain of every matter of annoyance.

2. That under the terms of the tack of the carpet manufactory, granted by Lord Melville to Henderson & Widnell in 1847, Lord Melville is responsible in this question with the defenders for the use which has been made of the water by his tenants.

3. That under the terms of the tack of the carpet manufactory, granted by Lord Melville to Whytock & Company in 1834, Lord Melville is responsible in this question with the defenders for the use which has been made of the water by his tenants.

4. That none of the pursuers is entitled to a verdict against any one defender unless the jury shall be of opinion, in point of fact, that the matter discharged by such defender into the river pollutes the river within the property of such pursuer to his nuisance.

5. That if the jury are satisfied that the primary uses of the water are destroyed at Melville and at Dalkeith with the consent, or with the acquiescence of the pursuers, by causes arising below St Leonard's Mill, for which none of the defenders are responsible, they must find for the defenders on all the issues as far as regards the Duke of Buccleuch and Lord Melville.

D. F. MONCRIEFF and A. MONCRIEFF in support of the bill of exceptions.

LORD ADVOCATE, SHAND, and JOHNSTON for the pursuers.

At advising,

Lord COWAN was of opinion that the direction of the presiding Judge to the jury were sound in law, and further, that he had done rightly in refusing to give all or any of the specific directions asked by the defenders. The distinction drawn between public and private streams, and the statement of law as to the use which riparian proprietors were entitled to make of the water, were

unexceptionable in themselves, and had received the sanction of many decisions since they were first defined in the Lochrin case, as decided in this Court in 1791, and in the House of Lords in 1792. The exception to the second part of the charge rested upon this fallacy, that, because a certain act did not of itself amount to a nuisance, though it materially contributed to its production, the act was therefore a matter of legal right. This proposition was opposed both to law and common sense, and would be most dangerous in its consequences. With regard to the first direction asked, so far as it was not ille and unnecessary, it was unsound in itself and inapplicable to the circumstances of the case. It was not true that a nuisance became legal if such nuisance was a public benefit; and further, the manufactures in question were not carried on for the public benefit, but for private profit. There was no definition given as to what was meant by "extreme rights," and the only effect of making such a vague statement as this part of the direction would have been to distract the mind of the jury from the main question. As to the second and third directions, they were not such as to meet the case, which it was the avowed intention of the defenders to lay before the jury; it could only proceed on the assumption that the carpet manufactories were of themselves a nuisance apart from and irrespective of the paper-works; and, secondly, that the use made by the tenants of the water was authorised by Lord Melville, so as to make him responsible. There was no evidence that these manufactories were such a nuisance. On the contrary, the whole evidence went to show that the esparto grass was the principal if not the sole cause of nuisance; and it was a monstrous thing to say that one nuisance could not be got rid of because of the existence of another. The fourth direction had already been disposed of in the Judge's charge. The fifth direction was objectionable—(1) because no time was specified as to when the primary purpose of the water was destroyed; (2) because the jury had been already told that, if there had been a prescriptive usage of the water for secondary purposes, this would be sufficient to entitle them to find for the defenders—if it meant any more than this, it ought to have been the subject of a special issue; and (3) because the pursuers were entitled to proceed against all the sources of nuisance. The case would have been different if, as in the case of the Lochrin burn, the river had been allowed to become a common sewer, so that the removal of another nuisance would have been useless and unprofitable. That was not the case here.

The other Judges concurred.

The LORD JUSTICE-CLERK, in so doing, stated that he wished to explain that the directions in law now before them were not all the directions which he had given to the jury, but only such as had been excepted to; that the two portions of his charge had not been delivered in immediate juxtaposition; that the only reason why he had thought it necessary to define the difference between a public and a private stream was that the defenders' counsel had stated to the jury that there was no such distinction. With regard to the directions which he had been asked, and had refused, to give, he was not at liberty to modify or alter them; and as they stood, they appeared to him to be all either unsound or misleading, or both.

Exceptions disallowed.

Agents for Pursuers—J. & H. G. Gibson, W.S.

Agents for Defenders—White-Millar & Robson, S.S.C.; Menzies & Coventry, W.S.