

of the process, Finds that the pursuers and defenders have each a calico printing-work on the banks of the river Kelvin, at a place where the stream forms the march-line between the counties of Lanark and Dumbarton, the pursuer's works being in Lanarkshire, and the defenders' in Dumbartonshire: Finds that, about two years ago, an ironstone pit was sunk by the firm of M'Nair, Stokes, and Dixon in the neighbourhood of the defenders' works, and it was arranged between that firm and the pursuers that the water pumped from the pit should be carried across the Kelvin to the pursuers' works for the purposes of their trade: Finds that the pursuers agreed to pay a rent of £20 a-year for the water thus assigned to them, and they obtained from the North British Railway Company permission to make use of their viaduct, which crosses the Kelvin near the spot, for laying pipes for the conveyance of the water across the river: Finds that, these matters having been thus arranged, the pursuers proceeded to lay their pipes, but were interrupted by the defenders, who broke or disconnected the pipes, so as to prevent the water from passing along them, and the present action of interdict has been resorted to by the pursuers with the view of preventing such interference in future: Finds that the plea maintained by the defenders is to the effect that the water pumped from the pit has been drained from sources from which they formerly obtained their water supply, and that they have thus a preferable claim to it, and that it is *ultra vires* of M'Nair & Co., as tenants and possessors of the pit, to dispose of the water to the pursuers: Finds it not denied by the defenders that it was competent for M'Nair & Co. to sink the said pit, and to remove and appropriate the minerals found therein; and this being conceded, it appears to follow that the water accumulating in the excavations thus made, and forming a *surrogatum* for the abstracted minerals, became the property of M'Nair & Co., and has therefore been competently disposed of by them to the pursuers: Therefore, and for the reasons stated in the annexed note, repels the defences, and declares the interdict perpetual.

“*Note.*—It is no doubt true that a proprietor is not entitled to deal with the water on his ground so as, unnecessarily or capriciously, to subject his neighbour to loss and inconvenience. He cannot, for instance, alter the course of a stream so as to deprive the inferior proprietor of the use of it, or collect the surface water and discharge it upon his neighbour's ground at a point to which it does not naturally flow. At the same time, he is entitled to do every ordinary act for the improvement and management of his property, such as the drainage of his fields, conducted in the usual and approved manner. In this way, the proprietor of minerals is not to be prevented from sinking pits, and working coal or ironstone seams, though the result may be to drain injuriously the surface of the ground belonging to a different party. The defenders plead that this has taken place in the present instance, and that a spring from which they derived a portion of their water supply for the purposes of their trade has been interfered with and dried up. The defenders do not maintain that this was an illegal act on the part of the occupiers of the pit, but they maintain that when these parties, by means of machinery, and in order to restore their pit to an available condition, have again brought the water to the surface, they must either hand it over to the defenders, or place it in a position

in which it may be available to them. There is no authority for this doctrine. The water as soon as it quits the surface, and seeks a lower level occupied by a different party, ceases to be of any value to the surface proprietor, and he loses his interest in it, and the proprietor of the lower level becomes the owner of the water, for the reason, — apparently satisfactory, — that he alone has access to it; and the result of this is, that if, by machinery or otherwise, and at his own expense, he again raises the water to the surface, he may dispose of it to any party he chooses. This view is supported by the authority of the case of *Irvine v. The Leadhills Mining Company*, 11 March 1856, in which it was found that a mining company was entitled, for their own advantage and convenience, to alter the drainage of their mine so as to send away the water by a different burn or stream from that which they had been in the practice of using; and that a neighbouring proprietor was not entitled to interfere with their operations, though he was thereby deprived of the use of water which he had formerly enjoyed. See also the cases of *Campbell v. Bryson*, 16 December 1864; *M'Kenzie v. Woodrop*, 24 January 1854; and *Lord Blantyre v. Dunn*, 28 January 1828.”

The respondents appealed to the Court of Session.

FRASER and MACLEAN, for them, contended that the general proposition that springs may be interfered with by subterranean operations, only holds when there has been no lengthened use and possession of the spring for a specific purpose. Here the spring had been used as a part and pertinent for the purposes of the print works for forty years; and quoted *Major and Chadwick*, 9 L. J. (Q.B.) 159; *Dickens v. Great Junction Canal Co.*, 21 L. J. (Ex.) 242; *Popperwell*, 4 L. J. (Ex.) 248; and *Whitehead*, 27 L. J. (Ex.) 248.

R. V. CAMPBELL, in answer, quoted *Broom's Com.* 796; and *Fletcher v. Rylands*, 3 Law Rep. (Ex.) 330.

At advising—

THE LORD JUSTICE-CLERK said that the law of the case was plain. On the authority of *Fletcher v. Rylands* (quoted *supra*) a lessee of minerals was entitled to work them in any way he pleased, without reference to the injury he might inflict on a neighbouring proprietor, so long as he works them in a fair and ordinary way. He was not responsible for pumping dry springs which had formerly been advantageous to a neighbouring tenant, although it might be, that if the landlord had guaranteed the water of these springs to the tenant under the lease, he would be liable in damages for the withdrawal of it. In the present case the respondents had purchased the water from its proper owner, and had conveyed it by pipes through land which did not belong to the appellants, and consequently the appellants must be interdicted from injuring or lifting these pipes.

The other Judges concurred.

Appeal dismissed.

Agent for Appellants—John Galletly, S.S.C.

Agents for Respondents—Maitland & Lyon, W.S.

Wednesday, November 30.

FIRST DIVISION.

MACLEOD v. INGLIS.

Process—Reclaiming Note—Withdrawal—Expenses.

The Court having been moved by the reclaimer to refuse a reclaiming note, of consent of both parties, and limit the finding of expenses in favour of the respondent to £1. 1s., that being now held as a fixed rule, where timeous notice has been given to the respondents.—*Observed*, by the Lord President, that notice of withdrawal should have been sent to the Keeper of the Rolls.

Shortly after the reclaiming note in this case had been boxed the reclaimer intimated to the respondents that he intended to withdraw it.

When the case was called, MACKAY, for the respondents, moved that the reclaiming note be refused of consent of both parties.

KINNEAR, for the respondents, moved for expenses.

The amount of expenses was limited to £1. 1s., in accordance with the case of *Kirkwood v. Knox*, 4th June 1868, 6 Macph. 898. It was observed by the Lord President that notice of the withdrawal of a reclaiming note should have been formally given to the Keeper of the Rolls by a note from both parties before it appeared in the Short Roll, in order to guide the Court in putting out cases for hearing.

Agents for Reclaimer—Mackenzie & Black, W.S.

Agents for Respondents—Mackenzies & Frasers, W.S.

## COURT OF JUSTICIARY.

Monday, October 31.

NEILSON *v.* STIRLING.

(Before a full Bench.)

*Indictment—Relevancy—Alternative Charge in the Minor of the Libel—Summary Procedure Act.*

Where under the Summary Procedure Act a charge had been made against the travelling collector of a deaf and dumb benevolent society, the major of which libelled "falsehood, fraud, and wilful imposition," while the minor contained two alternative descriptions of the manner in which the crime charged was alleged to have been committed, which were proper alternatives, the one excluding the other, and a general conviction had been obtained—*Held (diss. Lord Justice-Clerk and Lord Deas)* that though under the Summary Procedure Act a suspension on the ground of relevancy was not to be lightly entertained, or even on the same grounds as would sustain the objection in a higher Court, still, the second alternative in the minor being irrelevant from want of proper statement as to wherein the alleged falsehood lay, and being at the same time a substantially different charge from the first, while the conviction was general, the objection of irrelevancy must be sustained, and the conviction quashed.

*Per* the Lord Justice-General—The rule, that a general conviction upon an alternative charge is incompetent, applies properly only to the major of an indictment, and does not apply where the alternative occurs in the minor. But where the alternatives occurring in the minor are proper alternatives, and one of them is irrelevant, the same reason exists for hold-

ing the conviction incompetent, viz., that it is uncertain whether it proceeds on a relevant or an irrelevant charge.

*Opinion* by Lord Justice-Clerk and Lord Deas, that the objection raised only amounted to want of sufficient specification, which was not enough to warrant a suspension of a conviction under the Summary Procedure Act, though it might have been a good objection in a higher Court.

This was a suspension of a sentence pronounced by the burgh magistrate of Nairn at the instance of James Stirling, the Procurator-Fiscal of Court, against James Neilson, on 26th July last.

The suspension and complaint set forth, "That the complainer has to complain to your Lordships of a sentence pronounced against him on or about the 26th day of July 1870 by Alexander Jeans, magistrate of the burgh of Nairn, on a complaint, under the Summary Procedure Act 1864, presented to the magistrates of the burgh of Nairn at the instance of James Stirling, residing in Nairn, Procurator-Fiscal of Court, whereby the complainer was found guilty of falsehood, fraud, and wilful imposition, and fined and amerced in the sum of £2 sterling, and was sentenced to be imprisoned in the prison of Nairn till payment thereof, but for a period not exceeding fourteen days from the date of said sentence, when he was to be set at liberty, notwithstanding the said fine should not have been paid, and for these purposes warrant was granted to all concerned—most wrongously and unjustly, as will appear to your Lordships from the annexed statement of facts and note of pleas in law."

The statement of facts, so far as material to the case, was as follows:—"In or about the year 1835 a society was instituted in Edinburgh under the name of the Edinburgh Deaf and Dumb Benevolent Society. . . . The Society has existed ever since. Its affairs have for some years been managed by two trustees and a committee, including a treasurer and secretary. Dissatisfaction having arisen within the last year or two among the members as to the way in which the affairs of the Society were managed by those who then had the management, the Society, at an adjourned general annual meeting held on 5th April 1869, did not elect the old members of committee to be the committee of management, but unanimously elected certain other members of the society in their place. Shortly thereafter the rules of the Society were amended, revised, and approved of by the Society, and were submitted to Alexander Carnegie Ritchie, Esq., advocate, Registrar of Friendly Societies in Scotland; and he, on 30th May 1870, certified the rules to be in conformity with law, and that the Society was duly established from said date, and was subject to the provisions, and entitled to the privileges, of the Acts relating to friendly societies. . . . After the rules were certified, an election, in terms thereof, took place on 24th June 1870, of a president, two trustees, a treasurer, a secretary, and a committee of management of seven members. The secretary so elected is William Dickson, 9 Tolbooth Wynd, Canongate, Edinburgh, being the individual of that name referred to in the complaint against the complainer, afterwards narrated, and under which the conviction complained of was obtained. Two or three of the individuals who had formed the governing body of the Society prior to said election on 5th April 1869, did not acquiesce in such elec-