

Friday, November 25.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

MILTON v. GLEN-MORAY GLENLIVET DISTILLERY COMPANY, LIMITED.

River—Diversion of Water—Right to Percolating Water—Material Injury.

An action was raised by a riparian proprietor against a firm of distillers possessing ground further up the stream to prevent the latter diverting, for the purposes of their distillery, the water of the stream by means of a well dug at a distance of twelve feet from the river, and into which the pursuer averred the water of the stream percolated.

A proof was led, which showed, *inter alia*, (1) that the amount of the water pumped by the defenders from their well was 24,000 gallons per week, in two instalments on different days, and (2) that the flow of the river when gauged in November after six weeks of dry weather was 10,270 gallons per minute, and when the river was fairly full 181,680 gallons per minute.

Held (1) that the pursuer had failed to prove that the water in the well came from the river, and (2) that even if they had done so the water taken was immaterial in comparison with the river's flow, and was not calculated to prejudice the pursuer's use of the river.

Opinion (by the Lord Ordinary, following *Chasemore v. Richards*, 7 H.L. Cas. 349) that as matter of natural right percolating water is the property of the landowner in whose lands it is found, and that his right to use it is not affected by the fact that it helps to feed a running stream, or comes by percolation from the stream.

John Milton, dairyman, Norriston, near Elgin, raised an action against the Glen-Moray Glenlivet Distillery Company, Limited, in which he sought to have it declared "that the constructing by the defenders of the well or reservoir in or about the year 1897 or thereby, in or on the lands of Gallowcrook, belonging to the defenders, whereby a large portion of the water of the stream of water known as the river Lossie, which flows past the said lands of Norriston, belonging to the pursuer, was diverted from its natural channel, and prevented from forming part of the waters of the said river Lossie, and thereby from flowing past the pursuer's said lands of Norriston, and also that the constructing by the defenders of the dams, embankments, or other obstructions, and the drains, water-courses, or water-pipes or other works, in or about the year 1897, in or on the said lands of Gallowcrook, belonging to the defenders, whereby a large portion of the water of the said river Lossie was diverted from its natural channel, and was thereby conveyed away from the said lands of Norriston, belonging to the pursuer, to the Glen-Moray Glenlivet Distillery, belong-

ing to the defenders, were illegal and unwarrantable and to the prejudice of the pursuer, and in violation of his right and interest in the said water." He concluded further to have the defenders ordained to remove the well, water-pipes, &c., and to have the defenders interdicted from thenceforth interrupting or diverting the water of the Lossie towards or through their lands.

The defenders pleaded, *inter alia*—"(3) The defenders not having diverted or interfered with the natural flow of water in the said river, to the prejudice of the pursuer's rights therein, should be assoilzied."

A proof was taken. The facts brought out were fully set forth in the Lord Ordinary's opinion.

On 5th May 1898 the Lord Ordinary (KYLACHY) pronounced the following interlocutor—"Finds that the pursuer has failed to prove that the defenders' operations have exceeded their legal rights, and are to his injury: Therefore dismisses the action, and decerns."

Note.—"The defenders in this case are the owners of a distillery in the neighbourhood of Elgin. The distillery (which was formerly a brewery) is situated on a kind of peninsula, formed by a somewhat extensive bend of the river Lossie, and lying wholly or for the most part below the level of the river. Like the previous brewery, the distillery derives its supply of water from a well sunk near to the buildings, but the water of this well, although suitable for washing and cooling, and perhaps also for domestic use, is not, it appears, suitable for mashing and steeping. Accordingly, a new well has been lately sunk in close proximity to the river, at a point about 200 yards from the buildings and immediately opposite to certain fields belonging to the pursuer on the other side of the river bend. The question now is, whether the defenders have acted legally in sinking this second well, and in pumping its water to a reservoir within the distillery, whence it is taken to the malt-steeps and mash-tuns.

"I do not know that there is much controversy, or at all events much room for controversy, as to the facts—that is to say, the facts which do not depend on inference and opinion. The position of the well, its distance from the river bank, its size, its depth and mode of construction, are all sufficiently indicated on the plan and section Nos. 17 and 18 of process. It may be well, however, to note certain points which, if not admitted, I hold to be proved.

"The well is 7 feet wide and 14 feet deep. It is 12 feet from the river, and its bottom is 9 feet below the level of the river bed. Between it and the river the ground is, for a depth of about 6 feet from the surface, hard and impervious to water, but lower down, and below the level of the river bed, it is composed of sand and gravel, which are of a porous character. This description, it may be taken, applies also to the ground on the other side of the well and round about it, and indeed more or less to the whole ground within the peninsula. The well is lined below with an iron cylinder, and above with brick and cement, and its

sides, from the top downwards, are thus practically impervious to water. Its bottom, however, consists of a stratum of very fine sand, and through this sand the water rises by which it is fed. When full it contains about 2600 gallons, and the water then stands in it at a level about 6 inches below the level of the stream. The pump used by the defenders is said to be capable of pumping about 42 gallons per minute, but I incline to think that its capacity is rather more. The quantity at present pumped, and under present arrangements required, is about 24,000 gallons per week, which is brought up weekly in four instalments by pumping continued for about two hours on two days of each week. The flow into the well during the process of pumping is, speaking roundly, about 25 gallons per minute. While the well is filling, between the spells of pumping, the flow will be somewhat less. The flow of the Lossie has not, as it happens, been gauged in summer, but on 1st November of last year, after six weeks of dry weather, the flow close to the well was 10,270 gallons per minute, and on the 17th November, when the river was fairly full, it was 181,680 per minute. A good deal was said about a catch-water drain running parallel to the river, by which it was at one time intended to feed the well, but this drain, it is sufficiently proved, was closed up almost as soon as made; and, as I have already said, it may, I think, be taken that, as constructed, the well in question is fed entirely by water rising through the sand at its bottom.

“Now, *prima facie*, it appears to be a strong proposition that a landowner may not, by himself or others to whom he may grant right, sink and use for such purposes as he pleases a well on his own ground fed by percolating water making its way underground in no known or definite channel. There may be limitations upon the right—I shall consider that presently—but undoubtedly the general rule is as expressed in the leading case of *Chasemore v. Richards* (1859), 7 H.L. Cases 349, the rubric of which is—‘The principles which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.’ In that case a well, or rather reservoir, had been constructed for the supply of the township of Croydon. It was fed, as here, by percolating water, which, until intercepted, found its way into a stream which had for the prescriptive period turned a mill. The decision, which was by the House of Lords, following the opinion of seven Judges called in, was to the effect that prescription in this matter is inapplicable, that as matter of natural right percolating water is the property of the landowner in whose land it is found, and that his right to use it is not affected either by the fact that it helps to feed a running stream, or by the other fact that the benefit of wells or reservoirs which he (the landowner) constructs are communicated by him under arrangement to the whole inhabitants of a district.

“The pursuer, however, seeks to distinguish the present case (which he says is special) on two grounds.

“In the first place, he says that the defenders’ well is so close to the river, and is otherwise so arranged, as to be really a mere device for drawing water from the river itself. He says, in short, that the 12 feet barrier between the well and the river is merely colourable, and that the case is really the same as if the well was a reservoir into which a pipe was led direct from the stream. And the case being thus assimilated to the withdrawal of water from a running stream, he goes on to contend that by the law of Scotland such withdrawal—at least for manufacturing purposes—is entirely illegal, or at all events is so when the water appropriated bears an appreciable proportion to the total flow of the stream.

“I am of opinion that this argument fails in its first premiss. It is not, I think, possible to represent this case as one of direct interference with the water of a running stream. The defenders’ well is, in my opinion, a *bona fide* well; and although only 12 feet from the river, the water of the river, if it finds its way into it, does so, not by reason of the closeness of its proximity, but by reason mainly of the porous nature of the river bed and the surrounding ground. The 12 feet barrier is, as I have already said, composed, down to a level below that of the river bed, of impervious material. The well also is so lined as to be substantially impervious from top to bottom; and altogether—although the percolation into it may possibly be more rapid than if it had been, say, 100 feet from the stream—I see no reason to doubt that, so far as *quantity* is concerned, the defenders might with equal advantage have placed it at that or even a greater distance. In short, I do not consider that the question in its legal aspect is different from what it would have been if the defenders had sunk their well, say, 100 feet from the river bank; and in that connection I may add (in case the fact may be thought of importance) that I do not hold it proved, but rather the contrary, that the ridge of sand and gravel which runs across the peninsula between the bend of the river and the distillery is, except towards the surface, less porous and pervious to water than the surrounding ground.

“The pursuer’s second point, however, is this. He takes the case simply as one of a well sunk in the neighbourhood of a stream, and fed by percolating water from the surrounding ground; and so taking it, he admits that, according to the doctrine of the case of *Chasemore*, such well may lawfully *intercept* water which has hitherto passed into the stream and helped to feed it. But he contends that if it be proved that the well is fed in whole or in part by water which has once flowed in the stream, the withdrawal of that water (even by percolation through the bed of the stream, and thence through the intervening strata) is outside the principle of the case of *Chasemore*, and falls under the general rules

which regulate the rights of riparian owners in rivers and streams. In short, he contends that the defenders, in so far as their well is fed even indirectly from the Lossie, are as much disabled from using the water for manufacturing purposes as if they had pumped it direct from the river. He relies for this proposition upon an English case reported in 6 Chancery Appeals, p. 483, viz., the case of the *Grand Junction Canal Company v. Shugar*, in which case Lord Chancellor Hatherley, overruling a contrary decision by the Master of the Rolls, is said to have held that if drainage operations, however proper in themselves, affect the level of a neighbouring watercourse, and do so not by interception of water percolating into it, but by the withdrawal through the neighbouring strata of water percolating out of it, such drainage constitutes an illegal encroachment on the rights of those interested in the stream.

“Now, I am not of course bound by the judgment in question, the more especially as it was pronounced by a single judge, reversing an opposite judgment by another judge of perhaps equal eminence. At the same time one must always be diffident in questioning any judgment by Lord Hatherley. It does, however, appear to me that if his Lordship’s decision went the length suggested (as from the report I would infer it did), it is extremely difficult to support its doctrine, or to reconcile it with the principles laid down so authoritatively in the case of *Chasemore v. Richards, &c.*”

“In the first place, the doctrine is not, in my judgment, a workable doctrine. Not to mention extreme cases (as for instance the artesian well mentioned by Lord Brougham in *Chasemore’s* case, which drew its supplies from a distance of forty miles), there is hardly, I should think, a coal or iron pit in this country which does not to some extent drain from the neighbouring strata and pump to the surface water which has at some time flowed in some neighbouring stream. Indeed, I should think that the instances must be numerous in which mining operations quite sensibly affect the level of neighbouring watercourses. Similarly there are, I should think, few systems of agricultural drainage, especially in low ground and in gravelly soil, which do not, more or less, have a like result. In point of fact the doctrine in question, if sound, would, as far as I can see, render unlawful the drainage (according to the natural fall of the strata) of the whole or most of the ground within the peninsula with which we are here concerned. It would even, I apprehend, render unlawful the pumping of water from the original distillery well. The proof might of course be more difficult, but that would depend on circumstances; and a principle cannot, it appears to me, depend for its soundness on its application being limited by the mere difficulty of proof. In truth, I am not myself able to accept as substantial the distinction suggested between the interception of underground water percolating into a stream, and the abstraction from the strata of

similar water which has passed through the stream. The effect on the stream is of course the same; and altogether it would seem to be a better and sounder principle that a river or other watercourse must take its chance, on the one hand, of what it may gain by percolation into it through its banks or bed, and, on the other hand, of what it may lose by percolation out of it in the same way. If it flows over and through rock or clay, it will of course gain less and also lose less. If, on the other hand, it flows over and through sand and gravel, it will gain more and also lose more; and, putting aside extreme cases, justice will thus be done.

“I prefer therefore, if I must choose between them, the view of the Master of the Rolls to that of Lord Hatherley, but I must say further, that even assuming Lord Hatherley’s principle, I am not satisfied that the proof in the present case has been brought up to the point required for its application.

“In the first place, looking to the fact that the water which passes into the defenders’ well does so at a level of 9 feet below the river bed, and to the further fact that, so far as appears, the whole ground on both sides of the Lossie is of the same porous character, it seems to me impossible to affirm with certainty that the water in question ever formed part of the flowing stream. There is here, it has to be noted, no evidence—at all events no reliable evidence—of any difference of level induced in the stream itself; and although no one can speak with confidence as to the source or course of water percolating underground, it appears to be as likely as not that, so far as water percolates into this well from the side next the Lossie, it percolates (perhaps from some distance) at a level well under the river bed.

“In the next place, there is another element of uncertainty. The fall of the ground within the peninsula (so far as there is a fall) appears to be downwards from the river bend towards the distillery and the lower reaches of the river. Assuming therefore that water does percolate from the Lossie into the well, it is quite possibly, and indeed not improbably, water which but for the well would have percolated across the peninsula and found its way into the river below the pursuer’s ground. In this view the well might be described as in a sense fed from the Lossie, but it would be so by water which had already left for good the part of the Lossie in which the pursuer is interested.

“Lastly, what I have just said suggests a further difficulty. In the case of *The Grand Junction Canal Co. v. Shugar* there had been a material and indeed serious diminution of the flow of the stream which was there in question—a diminution which involved a direct pecuniary loss to the Canal Company. To bring himself therefore within the decision in that case the pursuer would, it would seem, require to show that a similar effect has been or is likely to be produced on the flow of the Lossie. Now, on the evidence I cannot

hold that that is proved. Looking to the result of the gauges (which, whether or not conclusive as to the flow of the river in the driest weather, are the best evidence which we have), it is not, I think, possible to say that an abstraction from the river of 24,000 gallons per week materially affects its flow, or causes appreciable prejudice to the pursuer. It is said, no doubt, that the defenders will, when they make the whole of their own malt, require for steeping and mashing at least 40,000 gallons per week. That may perhaps be so, but I cannot affirm that even that quantity, if distributed over the week, would necessarily constitute a material abstraction. And in any case it seems to me that if the distillery is enlarged and its output greatly increased, it will be time enough to deal with that state of matters when it exists. All I at present observe is, that in so far as the pursuer relies on the case of *The Grand Junction Canal Co. v. Shugar*, he has not, in my opinion, shown that the facts of the two cases are similar.

“On the whole, therefore, I am of opinion that the operations of the defenders, so far as they have yet gone, are within their rights. I think that the case is within the principle of the case of *Chasemore*, and that it is so, even on the assumption that the whole or a material part of the water which feeds this well comes by percolation from the Lossie. I do not, however, hold it proved that under present conditions such is the fact.

“Taking this view of the case I do not think it necessary to decide, but reserve my opinion on several points of interest which were the subject of argument.

“I do not, for example, decide whether it would be lawful for the defenders to take direct (say by a pipe or conduit) from the Lossie water to be used for manufacturing purposes. It is said to be the law of Scotland that no water can be taken from a running stream except for primary purposes. It is said, on the other hand, that the law of Scotland, while not perhaps going so far as the law of America, permits, like the law of England, abstraction for manufacturing uses to a reasonable extent, the question of reasonableness being one of degree, and the test being whether the domestic or other primary uses are materially abridged. I reserve my opinion on that question until it arises, as is some day must.

“Neither do I decide that the principle of the case of *Chasemore* is subject to no limitations. Extreme cases may be figured, which must be dealt with as they arise. The defenders will be well advised if they are careful to avoid such questions, and to confine their operations substantially within their present limits. As yet it seems enough that no extreme case is, as I think, presented.

“Finally, I do not decide anything as to the effect of the defenders’ offer to pump back into the Lossie from their distillery well a quantity of water fitted for primary uses equal to that which they are alleged to abstract. All I need say is that I am not

satisfied that that question is, irrespective of circumstances, foreclosed by the authorities.”

The pursuer reclaimed, and argued—It was proved that the water in the well was the water of the Lossie. If that was proved, the Lord Ordinary’s judgment was wrong. The Lord Ordinary based his judgment on the case of *Chasemore v. Richards*, 1859, 7 H.L. Cas. 349. But here the pursuer did not dispute the general legal proposition laid down in that case that a proprietor was entitled by sinking a well to stop water flowing in no defined channel before it reaches a river. But that was not the case here. The present case was governed by the decision in *The Grand Junction Canal Co. v. Shugar*, 1871, L.R., 6 Ch. App. 483, where it was held that operations which drew off water flowing in a definite surface channel were illegal. The case of *Dickinson v. Grand Junction Canal Co.*, 1852, 7 Ex. 282, also supported this view. This case, as far as it dealt with water before it reached a river, was overruled by *Chasemore*, but as regards water which had formed part of the stream the case was still a good authority. Where water was drawn off from a stream, not for primary purposes, but to supply a manufactory or a distillery, the operations were illegal, unless the consents of the lower heritors on the stream were obtained. Such operations were calculated to form a claim which might deepen into an adverse right. They constituted an infringement of the pursuers’ right to have the river uninterrupted in flow and undiminished in quantity—*Ogilvie v. Kincaid*, Nov. 24, 1791, M. 12,824, Hume’s Cases, 508; *Stirling v. Haldane*, Nov. 26, 1829, 8 S. 131; *Morris v. Becket*, May 20, 1861, 2 Macph., opinion of Lord Neaves 1092; *Marquis of Breadalbane v. West Highland Railway Company*, January 25, 1895, 22 R. 307, opinion of Lord President Robertson 312; *Commissioners of Peterhead v. Forbes*, July 4, 1875, 22 R. 852; *Young & Co. v. Bankier Distillery Co.*, July 27, 1893, 20 R. (H.L.), opinion of Lord Macnaghten, 78. The quantum of injury did not matter. The pursuer was not under the necessity of proving that he suffered material injury by reason of the defenders’ operations—*Lord Melville v. Dennistoun*, May 21, 1842, 4 D. 1231, opinion of Lord Justice-Clerk Boyle, 1240; *Stevenson v. Hogganfield Bleaching Company*, Nov. 18, 1892, 30 S.L.R. 86; *Medway Co. v. Earl of Romney*, 1861, 9 C.B. (N.S.) 595; *Wilts and Berks Canal Navigation Co. v. Swindon Waterworks Company*, 1874, L.R., 9 Ch. 451. Even if it was held that material injury to the pursuer must be proved in judging of the prejudicial effect, the capacity of the pipe must be taken into account, and its capacity was such as to enable the defender at his pleasure to materially diminish the flow of the river.

Argued for defender—The pursuer had failed to show that the water in the well was Lossie water. Even if it had been shown to come from the Lossie, it was percolating under the ground when it was abstracted, and the case of *Chasemore* had

decided that a man was entitled to abstract water percolating through his property. This point was also settled in *Acton v. Blundell*, 1843, 12 M. & W. 324; and the *Mayor of Bradford v. Pickles* [1895], App. Cas. 587. Even if the cases of the *Grand Junction Canal Co.* and *Dickinson* were held to decide that water which had flowed in a defined surface channel could not be abstracted by the operations of one to the prejudice of another, these cases did not apply, as no prejudice of any kind to the pursuer had been proved. There had been no material abstraction of water from the river. It was not relevant to say that it was possible for the defender to abstract so much water by means of his pipe; the Court must deal with facts and not with possibilities.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether interdict is to be granted against the defenders taking water out of a well sunk near the Lossie river for use in their works. The ground is that the well draws water out of the river and so diminishes its flow to the lower heritors. The well and the works are situated inside an area surrounded on three sides by the winding course of the river. The ground is to a great extent at a lower level than the bed of the stream, which is held in by banks which rise above the level of the neighbouring ground. The respondents, finding that the quality of the water in a well close to their distillery was not suitable for their purposes, sunk the well in question. It is 12 feet from the edge of the river and is sunk 9 feet below the level of the bed of the stream. The well is constructed so that the water enters only from the bottom. It so enters it through a gravelly stratum in which water percolates and lodges, this stratum extending across the ground enclosed by the bend of the river. The well as at present used fills by natural percolation through the soil, there being no works executed tending to draw the water towards the well. A drain was made near the well, but it has been closed up and the ground restored. There is no trace near the well of any channel in which water flows. At any point near, if a hole is dug the water stands in it. There is no evidence that any water passes through the bank of the stream, and if the water lodging in the gravel stratum does so from the bed of the stream, there is no evidence showing where it leaves the stream and how it reaches this ground. Thus the water must either be water in the ground which has never been in the stream or it must be water which, if it comes from the stream, does so by percolation through the soil, through the bed of the stream, and the neighbouring lower strata, but there being nothing to show where it escapes from the stream.

As regards the second alternative, I agree with the Lord Ordinary that the evidence does not prove that the water in the strata upon which the respondents draw by their pumps has ever been in the stream of the

Lossie. Unless the pursuer has proved this, the case must be dealt with upon the footing that the pursuer can only succeed by proving that the respondent is abstracting water which would naturally flow into the river above the pursuer's property. Now, it appears to me that the pursuer is met there by two insuperable objections. In the first place, on the assumption that the water which enters the well was at that point flowing in a channel, there is no evidence that it could or would enter the stream above the pursuer's property. And if not above his property, then he cannot complain of the operations of the respondents on the ground that they are abstracting water which, in the natural course of the stream, would flow in its channel past his property. And unless the water would have flowed past his property in the stream he can have no ground of complaint. In the second place, there is no evidence to prove that the water which enters the well was before it did so flowing in any channel at all. The evidence shows that there is nothing of the nature of a stream, either on the surface or underground at the place where the well is sunk. The water is water percolating through ground, the nature of which does not admit of a stream or flow. It is water working its way through what may be described as porous soil.

I am, therefore, of opinion that the judgment of the Lord Ordinary is right, the pursuer having failed to prove abstraction from the stream of water which in its ordinary course would have flowed in the stream past the pursuer's property. That is sufficient for the decision of the case, but I am further satisfied that, assuming that the pursuer had proved his case of abstraction, the respondents have not by their operations in any way materially affected the flow of the river.

I would move your Lordships to affirm the judgment of the Lord Ordinary, with expenses.

LORD YOUNG—I concur in what your Lordship has said, and also in the judgment of the Lord Ordinary. One thing in the case is clear, and that is, that the complainer has suffered no injury from the operations of the defenders. The complainer's case is really this, that the defenders, by making a hole in their own property about 12 feet from the river Lossie, has illegally and wrongfully seduced the water from the Lossie into their hole. I do not think that any case of this kind has been made out. Even if it had been proved that the water of the Lossie percolated to this place, I am of opinion that the defenders are quite entitled to its use. But it is quite sufficient to decide that no interference on the part of the defenders with the flow of the Lossie has been made out, and certainly none to the injury of the complainer.

LORD TRAYNER—I think the judgment reclaimed against is well founded and ought to be affirmed. It appears to me to be

established that the water obtained by the defenders from the well in question is water that finds its way into the well by percolation through the surrounding ground, and it would not, in my opinion, affect the judgment to be pronounced were it admitted that part of the water so obtained comes from the Lossie by percolation through the bank which intervenes between that river and the well. Even were it proved (as it is not) that the whole of the water pumped out of the well came from the Lossie, the quantity taken is quite immaterial in comparison with the flow of the river, and is not calculated to prejudice the rights of the pursuer. Taking the figures given by the Lord Ordinary, and which, I think, the proof fully warrants, it appears that after six weeks of dry weather the flow of the river was equal to nearly 15 million gallons a-day. From this quantity only 12 thousand gallons a-day (on the hypothesis I have stated) is abstracted by the defenders. This, too, which is about the amount of one minute's flow, is only taken twice a-week. On the same figures the flow of the river for a week is about 103½ million gallons; the quantity abstracted is 24,000 gallons, or about one gallon in every 4000 or 5000.

LORD MONCREIFF—I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

I think that the pursuer's case fails at its first stage. He has failed to prove that the defenders have interfered directly with the water of the Lossie. It is not proved that the tank draws from the Lossie by percolation water which would not otherwise come into the tank. It may be that it does, but I do not think this is proved. The whole of the ground in the neighbourhood of the tank is saturated with water of the same character as the Lossie water, and the water with which the tank is filled may just as reasonably be supposed to be such water.

But secondly, assuming that any water was induced by the construction of the tank to leave the bed of the stream, it is not proved that the abstraction is of such material amount as to affect the flow of the stream. The pursuer's action is based on the assumption that "a large portion of the water of the said river Lossie was directed from its natural channel." There is absolutely no proof of this. It could, I apprehend, have been ascertained to a certainty if accurate observations had been taken while pumping was going on. But this has not been done. The pursuer's calculations are based upon the assumption (1) that the tank is filled entirely with water drawn directly from the Lossie; (2) that the defenders are continually pumping and supplying the tank. The first point has not been proved; on the second point, it appears that only 24,000 gallons are drawn from the tank in a week, while the weekly summer flow of the Lossie is about 150,000,000 gallons.

I am therefore of opinion that the pursuer has not made out his case, and is not entitled to the interdict asked.

I should add that towards the close of the argument it was not seriously maintained that the defenders are not entitled to impound water running in undefined channels which has not been drawn from the Lossie, but which, if not intercepted, might find its way into it. The case of *Chasemore v. Richards* seems to be conclusive against any such contention.

The Court adhered.

Counsel for the Pursuer—Shaw, Q.C.—Laing. Agents—Philip, Laing, & Harley, W.S.

Counsel for the Defenders—Sol-Gen. Dickson, Q.C.—W. D. Murray. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, November 25.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

PARISH COUNCIL OF KILMARNOCK
v. PARISH COUNCIL OF LEITH.

Poor — Residential Settlement — Double Residence — Married Man Absent from Home for Purposes of Work or Business — Poor Law Amendment Act 1845 (8 and 9 Vict. c. 83), sec. 76.

A workman who was employed in Kilmarnock from October 1888 to May 1896 resided in that parish with his wife and family till May 1891. At that date, his rent being in arrear he was unable to obtain another house in Kilmarnock, and took a house for his wife and family in Ayr, where they resided till Martinmas 1892. He himself during that period lived in Kilmarnock, partly in lodgings and partly in the house of a relative, and was in the habit of visiting his family every Saturday, returning to his work on Sunday night. At Martinmas 1892 he brought his family back to Kilmarnock, and resided with them there till they became chargeable in 1896.

Held (dub. Lord Kinnear) that for the period during which the pauper's family resided at Ayr, his residence was in that parish, and that accordingly he had not acquired a residential settlement in Kilmarnock.

An action was raised by the Parish Council of the Parish of Kilmarnock against the Parish Council of the Parish of Leith for payment of the sum of £14, 9s., being the amount expended by the pursuers on behalf of a pauper named Mrs Margaret Miller and of her husband James Miller from the 27th May 1896 to the 2nd July 1897. In consequence of her husband's illness Mrs Miller became chargeable in May 1896, and received alimnt from the pursuers till July of that year. She again became chargeable in November 1896, and