Friday, January 23.

FIRST DIVISION.

[Lord Adam, Ordinary.

HUNTER & AIKENHEAD *v.* AITKEN AND OTHERS (AITKEN'S TRUSTEES).

River—Servitude of Water where Alleged by Upper Heritor who Owned a Mill—Rights of Upper and Lower Heritors to Water on a Stream—Prescription and Contrary Use.

For more than forty years the tenant of a corn-mill was in use to close his sluices, for the purpose of storing the water, from Saturday night till Monday morning, but at no other time. The effect of this was completely to stop the flow of the water below the dam during the period of stoppage. During the forty years the tenant of the corn-mill worked his mill continuously on week-days, by night as well as by day, using steam-power when the water-power failed. On a new tenant coming to the mill the use of steam-power was discontinued, and with it the possibility of continuous working, and the new tenant, in order to get as much out of the water as he could, began the practice of stopping his mill and putting down the sluices every night. The inferior heritor was the owner of a paper-mill, which worked continuously except on Sundays. He consequently required a continuous flow of water, and it was also necessary, from the nature of his works, that the water should be in as pure a condition as possible, but the effect of the corn-miller putting down his sluices every night was completely to stop the flow at night, and also to bring down, when the sluices were first opened in the morning, a quantity of dirt and rubbish from the dry bed of the burn. There was some evidence that previous to the commencement of the forty years the practice of the upper heritor had been to close the sluices every night. *Held*, assuming the practice previous to the commencement of prescriptive period to have been to shut down the sluices every night, that that right had been completely lost by a contrary use, and that the upper miller fell to be interdicted from arresting the flow of the water except on Sundays and at other times when the lower mill was not at work.

Observed per the Lord President (INGLIS) that in such a case the superior heritor must transmit to the inferior the water of the stream undiminished in quantity and undeteriorated in quality unless he has acquired by prescription a right so to deal with the water as to diminish its quantity or destroy its quality.

The following narrative of the facts in this case is taken from the note of the Lord Ordinary (ADAM):—"The complainers, Hunter & Aikenhead, papermakers, are proprietors of the Portobello Paper-mills, which are situated on the Figgate Burn. The respondents are tenants of the Duddingston Corn-mill, which is situated about a mile further up on the same burn. The Duke of Abercorn is proprietor of the corn-mill. The complainers require for the manufacture of their paper a constant supply of water. This is taken partly from the burn directly, and partly from a clear-water pond into which the water of the burn is conducted by means of a pipe. But as it is necessary for the manufacture of paper that the water in this pond should be clean, the water is not allowed to flow into it when the water of the burn is in a dirty state. The complainers' works are carried on both by night and by day—which seems to be the case with all paper-mills. There is a mill-dam at Duddingston Corn-mill. This mill-dam was partially destroyed by a flood in 1877. It was repaired or rebuilt, and again brought into operation in May 1878. But although more substantially built than before, and consequently more watertight, it is not proved to have been increased in size, or to be capable of storing more water. Mr Aitken, the original respondent in this case, became tenant of the mill at Whitsunday 1877. He died during the course of the present proceedings, but his trustees and executors have been sisted without objection as respondents in his place, and are maintaining the pleas previously maintained by him. They have also succeeded him as tenants of the mill.

The previous tenant of the mill was a Mr King, who had been tenant of the mill since about the year 1828. Mr King was in use to work the mill both by night and by day. Mr King finding that the water-power was insufficient to work the mill as he desired to work it, erected in the year 1835 a steam-engine, and thereafter continued to use it when necessary, in aid of the water-power; when the supply of water was ample water-power alone was used. The steam-engine could not be used independently, but only in connection with the water-power. Mr King was at first in use to work the mill on Sundays as well as on week-days, but in the year 1846 he gave up working on Sundays. Up to this time there had been a continuous flow of water to the Portobello Paper-mills, but after Mr King gave up working on Sundays he adopted the practice of closing the sluices on Saturday night, and keeping them closed till Monday morning, for the purpose of storing the water in the mill-dam, the water so stored being expended during the succeeding week. The consequence of this was that while the dam was being filled, little or no water passed down the channel of the burn to the Portobello Paper-mills. The complainers and their predecessors in these mills appear to have made no complaint of this, and as they did not work on Sundays, and did not require the water on these days, it caused them little or no inconvenience. At all other times during Mr King's long tenancy of the mill there was a constant flow of water to the paper-mills.

When Mr Aitken became tenant of the mill he gave up working at night. He also gave up using the steam-engine, and worked by water-power alone, and in order to get an increased supply of water to drive his mill during the day, he, after the mill-dam was repaired in the summer of last year, adopted the practice of closing the sluices every night, and keeping them closed until work-hours in the morning. The result of this proceeding is that while the sluices are closed no water escapes into the bed of the burn, which is thus left dry for many hours at a time—the time of course varying according to the

quantity of water flowing in the burn, and the longer or shorter time it consequently takes to fill the mill-dam. The complainers have proved that they are prejudicially affected by the water of the burn being thus arrested—in the first place, because it deprives them of the continuous flow of water which is necessary in the manufacture of paper, and, in the next place, because the water when the sluices are first opened in the morning brings down along with it a quantity of dirt and rubbish from the dry bed of the burn, and as the complainers get no notice when the sluices are to be opened, it necessitates constant watching on their part, as if the water be allowed to enter their clear-water pond in this state it would render the water in it useless for their purposes, and it would have to be pumped out again, necessitating the stoppage of the works for many hours for the purpose. The object of the present proceedings is to have the respondents interdicted from thus interrupting the continuous flow of the water of the burn to their paper-mills."

The complainers pleaded—"(1) The complainers having, in virtue of their rights and infeftments, and possession by them and their authors for time immemorial, good and undoubted right and title to the full, free, and uninterrupted benefit and enjoyment of the water of the said burn, are entitled to the interdict craved. (2) The respondent having illegally and unwarrantably arrested and detained the whole water of the said burn from time to time as above stated, to the serious loss, injury, and damage of the complainers, as well as imminent danger to their works, the complainers are entitled to the interdict craved."

The respondents pleaded—"(2) The water in the Figgate Burn having flowed into the mill-dam, and having been led therefrom by a lade to the Duddingston Mills, from time immemorial, and the course of said stream not having been altered by the respondent or his landlord, there are no grounds for the present application. (3) The respondent's use of the water in said stream and dam having been in the exercise of the proprietary rights of the landlord, and of his rights as tenant of said mills and dam, the complainers have no just ground of complaint. (4) The proprietors and tenants of the Duddingston Corn-mills having stored and used the water of the Figgate Burn from time immemorial, in substantially the same manner as the respondent has done, and to a like extent, the respondent cannot be interdicted from continuing the use thereof. (5) The mill-dam having been lawfully repaired, and no new *opus manufactum* having been made, the action is unfounded. (6) The mill-dam having been repaired and reconstructed within the knowledge of the complainers, and without objection by them, they cannot object thereto, or to the legitimate use thereof. (7) It being in the power of the complainers to store water for themselves, and so regulate their own supply, they cannot restrain the respondent in the legitimate exercise of his right to use said burn."

The Lord Ordinary after a proof pronounced this interlocutor—"Interdicts, prohibits, and discharges the respondents, George Aitken, &c. . . the trustees and executors of the deceased James Aitken, from detaining or arresting in its bed the water of the Braid or Figgate Burn, and preventing the same from continually running therein through or past the complainers' paper-mills, to the prejudice of the complainers, or from using any reservoir or other *opus manufactum* whereby the stream or water of the said burn may be detained or arrested and prevented from continually running in its bed through or past the complainers' said property to their prejudice, and decerns."

"*Note.*—[*After narrating the facts as above*]—An inferior heritor is entitled to have the water of a stream transmitted to him in its natural state and condition, subject to the primary uses of the water by the superior heritor, and to such rights as may have been acquired by prescription. It has been decided that an heritor is not entitled to use any reservoir or other *opus manufactum* whereby the stream of a river may be diverted from its bed for a time, or detained or arrested in its bed, and prevented from continually running therein through the property of an inferior heritor—*Glenlee*, Dict. 12,834. It is maintained, however, by the respondents that the proprietors of Duddingston Mill having had from time immemorial a mill-dam in connection with their mill, they, as in right of the proprietor, are entitled to use it to its fullest extent for the purposes of the mill, irrespective of the injury which may be occasioned to inferior heritors.

"It is not matter of dispute that the proprietors of the mill have from time immemorial maintained a mill-dam in connection with it, and, as the Lord Ordinary thinks, of substantially the same size as it is at present, but the Lord Ordinary does not think that it therefore follows that they are entitled to use it for the purpose of storing water to the fullest extent of its capacity, if by so doing they injure the complainers. The Lord Ordinary was referred to Erskine, ii. 9, 4, where he says that 'where one has acquired by prescription a servitude of building a dam-head as a reservoir for water on the property of another . . . the servitude truly acquired is a right of collecting water, and that of building a dam-head is only a consequential right, the true measure of which therefore is the utility of the mill, colliery, or other subject to which the servitude is due.' It appears to the Lord Ordinary that the doctrine thus laid down by Mr Erskine has no application to the circumstances of the present case. Mr Erskine is referring to the case of a person who has acquired a right to erect a mill-dam upon another man's ground. He is not referring to the use which may be made of it as affecting the rights of inferior heritors. In the present case the mill-dam was erected by the owner of it on his own ground. Inferior heritors might only become aware of its existence by its effects upon the stream as it reached their lands. So long as it was only used in a manner which did not prejudicially affect them, they might not feel themselves called upon to object, but if they do object as soon as it is being used in a manner which does prejudicially affect them, it seems to be no good reason for refusing them protection that the mill-dam had been capable of being used to their prejudice, although it had never been so used—Bell's Pr. sec. 1107; *Lyon* v. *Gray*, M. 12,789. There can be no doubt that the use which the respondents are making of the mill-dam is greatly in excess of the use of it which was made by their predecessors, and is very injurious to the

complainers, and in the Lord Ordinary's opinion they are entitled to protection against such use.

"The Lord Ordinary, however, thinks that the respondents ought not to be prevented from using their mill-dam for the purpose of controlling the use of the water in so far as that can be done without prejudice to the complainers' use of the water to the extent to which they have hitherto enjoyed it—*Marquis of Abercorn* v. *Jamieson*, Hume 510. No suggestion, however, was made to the Lord Ordinary that the use of the mill-dam and sluices should be made matter of regulation, and if the respondents are right in their contention there is no room for it."

The respondents reclaimed.

Authorities cited—*Lyon & Gray* v. *The Bakers of Glasgow*, Jan. 7, 1749, M. 12,789; *Bruce* v. *Dalrymple*, Dec. 11, 1741, Elchies *voce* Servitude, No. 2; *Breadalbane* v. *Culdares* June, 1741, 5 Br. Sup. 710; *Marquis of Abercorn* v. *Jamieson*, Hume 510; *Lord Blantyre* v. *Dunn*, Jan. 28, 1848, 10 D. 509; *Duke of Buccleuch* v. *Cowan*, Dec. 21, 1866, 5 Macph. 214; *Bicket* v. *Morris*, July 13, 1866, 4 Macph. (H.L.) 44; *Orr Ewing* v. *Colquhoun*, July 30, 1877, 4 R. (H.L.) 116; Ersk. Inst. ii. 9, 4; Bell's Prin. 1107.

At advising—

LORD PRESIDENT—This is a question between two heritors upon the banks of a small stream, one being the superior and the other the inferior, the inferior heritor being the proprietor of a paper-work at Portobello, and the superior heritor being represented by his tenant in a corn-mill at Duddingston. Mr Aitken, the tenant of the mill, entered into possession so late as Whitsunday 1877, and died during the dependence of the present proceedings, but his representatives have been sisted, and they are also his successors in the mill, so that the matter stands exactly as it did before Mr Aitken's death. The dam which supplies the corn-mill with water was repaired or rebuilt somewhere about the beginning of 1878, and was brought into use in its present shape in May 1878, but it is not contended that the reconstruction or restoration of the dam has altered its character or its capacity for storing water. It is not built higher than it was before, and the only difference between it and the old dam is, that being new and better built it retains the water more readily than the old one did. But there is no complaint of the height or nature of the dam; the complaint is substantially this—that of late years, since Mr Aitken came to the corn-mill, he has been in the habit of shutting down his sluices in such a way as to arrest and retain the entire water of the stream for certain periods in order to fill his dam and store the water, with the view of having a larger supply when he sets the mill in motion; and the injury which the complainers say results to them through these proceedings is, that the water does not come down to them continuously as a running stream of water necessarily does, but is sometimes suspended altogether for a time, and then when it does come down, after the sluices below the corn-mill have been opened, it comes down in a foul state, not polluted by manufacture indeed, but by mud, which, as they allege, is an injury to their paper-works.

Now, in so far as the parties before us are concerned, they are each of them standing upon their natural rights, and the law which regulates the mutual rights of superior and inferior heritors upon a stream of this kind is clear and well settled. The superior heritor must transmit to the inferior the water of the stream undiminished in quantity and undeteriorated in quality, unless he has acquired by grant or prescription a right so to deal with the water as to diminish its quantity or destroy its quality. As between two parties so situated, and apart from grant or prescription, there is no servitude at all. The superior heritor is not proprietor of a servient tenement, and the inferior heritor is not proprietor of a dominant tenement. The right to the stream which each of them enjoys is just a natural adjunct of the right of property in the banks and channel of the stream. It is a right which goes with the property, and requires no additional grant or prescription in order to its existence. Now, if matters had stood upon this principle of law only, without any allegation of a servitude right, what the tenant of this corn-mill has been doing is clearly unlawful, because he has been interrupting the continuous flow of the water, and to arrest water in the bed of the stream by means of artificial erections is just as illegal as to divert its course from the property of the inferior heritor. It deprives the inferior heritor of the use of the water for a time as a motive power, and that the superior heritor has undoubtedly no right to do. But then the corn-miller says, on behalf of his landlord and himself, that the mill has acquired a servitude of storing the water for the purpose of making it more available for the uses of the miller. This is a very small stream, and there can be no doubt that it must be the object of all parties interested in it to make the most of it, but one heritor or tenant upon the stream is not entitled to make the most of it at the expense of another. As long as he endeavoured to make the most of it for the benefit of all, he is within his right, and is acting quite legally, but if he tries to make the most of it for his own benefit, and to the prejudice of the inferior heritors, then he is acting illegally. Now, what is the state of the possession? Is it such as to justify the owner of the corn-mill as superior heritor in storing this water so as to make it more available for his own mill to the prejudice of the inferior heritor?

It appears that this corn-mill before Mr Aitken came there was for a very long period in the possession of a person of the name of King, and it had been used for forty years prior to the date of these proceedings as a corn-mill. It depends entirely upon what Mr King did and was allowed to do whether the owner of the corn-mill has prescribed any such right as I have suggested. Now, there is no doubt that Mr King regulated the flow of water at his dam, and in doing so he was trying to make the most of the water as a water-power; but during the whole of Mr King's possession the result of the evidence is that there was always a continuous flow in the stream, or, what is the same thing, in the tail race, which naturally joined the bed of the stream before it reached the complainers' property. But what the present tenant of the corn-mill is doing is something entirely different. He stores the water for the purpose of making a great flow occasionally. Mr King stored the water and regulated the flow for the purpose of creating as great a continuous flow as possible. Now, it is quite evident that

this latter method of King's was a proceeding for the benefit of all concerned. He was doing as great a service to the inferior heritor as to himself in making as large and continuous a flow as possible. Mr Aitken, on the other hand, has his own interest merely in view in what he is doing. He stops the flow of the water when it suits his own convenience, and so stops the use of the water for that time by the inferior heritors. And then he regulates the flow in such a way that there is no continuous flow, and only an occasional and larger flow, and thus he plainly prejudices the inferior heritors.

Now, that has been the state of possession for the last forty years or more. The reason why it was so has been explained in the course of the evidence. Mr King during all that period used water and steam together as his motive power, and while he desired to make the greatest possible use of the water, he aided the water-power by the addition of steam. They were always used together, so far as that could be done, and after this time the corn-mill was worked day and night. The engine was worked to supplement the water-power in order that the flow might not be diminished. He had thus no temptation to do more to interrupt the flow of the water than what he actually did, and that was for the benefit of the lower heritors as well as for his own. No doubt King occasionally did stop the water entirely, but then that was acquiesced in by the inferior heritor, and for the same reason that it was beneficial to both parties, because that stoppage was only on Sundays, when neither the paper nor the corn-mill were worked; but both paper and corn-mill during that period worked day and night, and therefore there was no stoppage of the water during the night. Now, what Mr Aitken proposes to do is entirely different from that. He would not be satisfied with having the right to store this water during the Sundays, when neither the one mill nor the other is at work, but he insists on storing it during the night, because he does not work during the night, while the paper-mill does. Now, that is a very different state of matters from what prevailed during Mr King's possession. Mr King worked day and night just as the paper-mill did, and therefore he had the same interest as the paper-miller in having a continuous flow of water during the whole twenty-four hours.

Now, that is the whole case but for one additional circumstance which is alleged, that at some period before, and considerably before, the last forty years there was the use to store this water by the corn-miller in the same way and to the same extent as Mr Aitken is now attempting to do. That was prior to 1835. The date is fixed by the circumstance that 1835 is the time when Mr King introduced his steam-power and began to use both water and steam together, and to work night and day. Now, it is stated that before that time there existed a practice of storing the water in the manner now complained of. I think the evidence upon that subject is very unsatisfactory. It is extremely obscure what was the precise practice at that time, but even supposing that for the short period to which the witnesses spoke there was such a practice, I think that cannot be taken into account now when for a period of more than forty years prior to the institution of these proceedings the water has been enjoyed by the two parties together in such a way that no one has a preference over the other, and no servitude has existed or been enjoyed by the one or the other. If ever there was such a right, it has been entirely interrupted and destroyed by the long period of immunity from servitude which has been enjoyed by the paper-miller down the stream. There are no doubt a great many things which are done by way of arrangement and in a spirit of good neighbourhood between millers upon the same stream, and there was cited in the course of the argument a very remarkable passage in the judgment of the Lord Justice-Clerk (Hope) in the case of *Blantyre* v. *Dunn* (Jan. 28, 1848, 10 D. 521), which I think very correctly explains the nature of arrangements that are usually made in such circumstances. He says—"The general rule as to an upper mill of course is, that if the mill is not going the water must be allowed to run down the lead past the mill so as not to interrupt at all the flow down to the lower heritor. But very many, probably most very old mills, have right also to larger dams than that created merely by the back-water from the damhead at their intake, and so have got right to store the water in a large artificial dam. This is to prevent waste of the water at hours when none of the mills are working, if no rights of fishing interfere. The lower mills come equally to have the benefit of this storing and saving of the water. At meal hours mills will not be working, nor generally at night, nor on Sundays. Hence when the upper heritor begins, either each morning, or after each meal hour, or on Monday morning, to work, each lower heritor benefits by that very accumulation which has taken place in the interval, and each accommodates his operations to that kind of detention to which the upper mill heritor has acquired right, and which, so far from impeding, in truth aids and assists him nearly as much as if the artificial dam were immediately above his own mill." Now, so far as rights of the kind are concerned, they are very easily acquired, and they exist I have no doubt, very naturally, for the simple reason assigned by his Lordship in that passage, that they are for the benefit of all concerned. The lower miller benefits by it just as much as the upper miller, and such undoubtedly was the nature of the arrangement of the practice which subsisted in this stream during Mr King's time.

While, therefore, I am clearly of opinion that we ought to adhere to the Lord Ordinary's interlocutor, I should be very much disposed to adjust the terms of the interdict in such a way as to give the parties the benefit of the practice which subsisted during Mr King's time, because I think the complainers have no interest to resist that. They have no interest to prevent the upper miller from storing water at hours when the lower heritor has no use for water—as, for example, on Sundays, when the works are not going,—and therefore I should be disposed to modify a little the terms of the Lord Ordinary's interlocutor as regards the expression of the interdict, and in place of that to put it thus—"To interdict the respondents from using any reservoir, dam, or other *opus manufactum* to arrest or detain the water of the Figgate Burn, so as to prevent it from flowing continuously in its natural bed or channel through the property of the complainers,

except on Sundays and at other times when the complainers' mill is not at work."

Lord Deas concurred.

Lord Mure—I agree in the proposed alteration which your Lordship has suggested with reference to the terms of the interdict, because I think it is quite clear upon the evidence that the respondents are entitled to carry on their mill by means of this dam and by storing the water in the way in which King, the preceding tenant, was in use to store it; and if it had not been for the difficulty connected with the fact that there is in the present system no continuous flow of water allowed to go down at all times to the paper-works of the complainers, I should have been of opinion that there was no ground here for maintaining the interdict. That dam has been there as long as anybody can recollect, and has been of the same size during all that time. It was repaired by the respondents when they became tenants of the mill, but in repairing it they did not enlarge it. They confined themselves simply to repairs, and therefore we are dealing with a case where there has been a continuous existence of this dam for the purposes of this mill as far back as anybody can recollect. Now, the ground upon which the interdict is granted is, that there has been a change in the mode of working, the effect of which is to stop the continuous flow of the water of the stream, and also to do damage to the complainers, because when the mill of the respondents is begun to be worked after the water has been stored in the dam, the first flushing of the water makes the stream beyond muddy, and dirties the water in the ponds that the complainers have erected for the use of their works and the engines therein. Now, it appears to me that this argument, if given effect to, would stop the practice of storing of water in dams altogether, because one necessary consequence of retaining water by sluices is, that on Monday morning, or at any other time, on the first flush, sand or mud must be brought down by the water, and therefore on that ground I do not think there is any room for interdict.

But there is a much more difficult question on the evidence—which is in some respects conflicting—depending upon whether there has been such a difference between the uses to which this dam is now put by the respondents and the uses to which it was put by King prior to the respondents. Now, I think upon the evidence that it is proved that prior to 1835 King used this dam very much in the same way as the respondents now seek to do. About that time there was a change of considerable importance in King's mode of working, for I think about that time he got a steam-engine, and by the combined operations of the engine and the dam he worked the mill, and the way he worked the mill after that time appears to have been quite continuous, night and day, only stopping on Saturday nights. There is some evidence, however, that ever after he put up the steam-engine he was in the habit of shutting the sluices on other occasions than on Saturday nights, and thereby storing the water. There is evidence to that effect, but it is very meagre, and I am satisfied that the great preponderance of the evidence goes to show that from the time King put up the steam-engine, he did not, except on Saturday, in any way that can be called frequent, stop the continuous flow of the water in this stream; and that being the case, I do not think that, having regard to the principles of law regulating such rights, it has been established here that the respondents have any right to store up the water of this stream by means of a reservoir for their own exclusive use. I think that upon the practice as carried on by King there was one kind of use of the water, and another use of it by the respondents, and in that view I concur that there should be an interdict, and the terms suggested by your Lordship clearly bring out what was the true state of possession in King's time, which must be that of the respondents.

Lord Shand—I am also of opinion that the judgment of the Lord Ordinary should be adhered to, with the modification on the terms of the interlocutor which your Lordship has suggested, and I concur in the view of the evidence which is taken by the Lord Ordinary, and which has been expressed by your Lordship in the chair. One fact, I think, is clear, and that is that the recent acts of the late Mr Aitken, now represented by his trustees as defenders, constituted an entire inversion of the state of matters which has existed on this stream for the last forty years as established by the proof. It is true, as my brother Lord Mure has observed, that there has been no substantial change made upon the dam and works existing on the respondents' property, and I take the case and decide it, so far as I am concerned, on the footing that the sluice and dam and other works connected with the respondents' mill are substantially the same in reference to the storage power and otherwise as they have been from time immemorial. But I think it of little consequence that that is so where the question that arises is not as to the capacity of the dam or the use that may possibly be made of the dam, but has reference to the actual use that has been made of the sluice and dam as affecting the rights of parties lower down the stream. And so I say I think it is proved that there has been an entire inversion of the state of matters which existed for the last forty years—that is, a recent inversion—because I think it is shown that for forty years and upwards there has been a continuous and uninterrupted flow of the water, whereas within the recent period complained of in this action that continuous flow has been interrupted at the will of the upper heritor, or his tenant as in his right, with the result not only, as I think the proof shows, of depriving the complainers of the regular and continuous use of the water, but also of injuring them by the water dammed up flowing down from time to time with more *débris* than it would do if the use were continued as it had been in former times. I think it is scarcely disputed that for the period of prescription—forty years—the flow has been continuous. If it be disputed, I can only say that I think it is proved as matter of fact. What, then, is the defence that the respondents maintain? It is not that the upper heritor has any grant in his titles which enables him in a question with the complainers, taking from a common author, to maintain the right to do what is complained of, nor that there is any obligation in the titles by which the complainers hold their property under which they are bound to submit to what has been done,

or to the exercise of any special rights on the part of the upper heritor. The defence is this, that admitting the effect of what has been recently done is entirely to disturb what has been the state of possession for forty years, if you go beyond the period of prescription—beyond the forty years—you find that there is proof of an exercise of larger rights. It is said, indeed, that the proof amounts to this, that at that earlier period the upper heritor—the miller—had the entire control of the water—dammed it as he pleased, and regulated it as he pleased; and on the authority of the leading case of *Rodgers* v. *Harvey*, 3 W. & S. 251, it is maintained that the proof applicable to the earliest period being to this effect, it must be presumed that the rights exercised had been acquired by prescriptive possession. It is said to follow from this that, although for forty years before the proceedings complained of matters have been in quite a different position, the respondents are entitled to revert to the former state of matters, and either to exercise the same control—and that is an absolute control—of the water, or at least, as I think it was expressed by the counsel for the respondents, to have such reasonable use of the water as they find necessary for the driving of this corn-mill. I found it very difficult to appreciate precisely what is the right that the respondents maintain. If it is an absolute right to use the water and store it as they think fit, I can understand it; but the second alternative of a right to such reasonable use as they find necessary for the service of their mill would be very difficult to define in any judgment of the Court.

But however that may be, I think there are two answers to this defence. In the first place, I think the respondents fail in their proof on the question of fact. I do not think there is that distinct evidence which one would require to entitle the respondents to the large right they demand—I mean in regard to the use at a period before the beginning of the forty years. There is some evidence no doubt—I think it is confined to two witnesses—that there was a regulation of the water to an extent that does not now exist, but I do not gather from the evidence of these witnesses that the heritors lower down the stream were by any means at the mercy of the miller, or that there was an interruption to what I may call the substantial, regular, and continuous flow of the water in this stream. But even if that were proved, which I think it is not, the respondents have a difficulty which appears to me to be insuperable in point of law; for I am of opinion with your Lordships that a right of this kind, not founded upon any grant in the titles of the parties, but resting entirely upon possession for the prescriptive period, and acquired by such possession, may equally be lost by non-user or non-possession for the subsequent prescriptive period. The right that is acquired is gained by virtue of possession or occupation, and by virtue of possession only, and the lower heritor is bound to submit to the exercise of that right, because there has been a 40 years' possession adverse to him, but I think that a right so acquired may equally be lost by the water being allowed to flow onwards without interruption during a subsequent period of prescription. The ground of this becomes, I think, apparent if the question be looked at from the complainers' point of view—I mean from the point of view of the lower heritors. Though prior to 1838 they had a limited right, because another had possessed against them, yet subsequently to that date they have continued in possession of a regular and uninterrupted flow of the water. And what, then, is their position? They have been actually acquiring by prescription this right to have that regular and uninterrupted flow continued. Take the case that the complainers and their predecessors, seeing that the water for 40 years has been running in this continuous way, make their arrangements accordingly, and have mills erected on the stream in reliance on their having the benefit of the water so running, is it to be said that while they have made their arrangements upon the 40 years' possession, and being in the enjoyment of the water, they are liable to have that interrupted because during the 40 years antecedent to the period of prescription the state of possession was different? I think that would be an anomalous and unfortunate state of the law, and I do not think it is the law. It appears to me that the complainers and their predecessors are practically in the position I have supposed, and the evidence shows, I think, that not only the complainers but other parties on the stream, who were also exercising rights with reference to the use of this water, having it flowing down in that continuous way, would be entitled to object to any interruption of those rights, simply because they have acquired by prescription the right to use the water, while the upper heritor has at the same time lost the right to interrupt the continuous flow. And while that is, I think, the law of this country, it is satisfactory to notice that it appears also to be the law which regulates the use of watercourses in America, where the subject has received much consideration, and is distinctly in accordance with what is laid down in the civil law. I find in Angell's book on Watercourses, in the 4th edition, published in 1850, sec. 240, the law is thus stated—"A prescriptive or presumed right to a watercourse may become lost or extinguished by a non-user for such length of time as that which created it. It is laid down by Bracton that an incorporeal right may be both acquired by long enjoyment and lost by disuse and neglect 'Seeing,' says Domat, 'a service may be acquired by prescription, with *much more* reason may a freedom from a service be acquired in the same way. Thus he who had a right to water both by day and night, loses the use of it in the night-time, if he lets it prescribe.'" And there is a passage quoted from the Digest which bears out that view, and is to this effect—"*Si is qui nocturnam aquam habet, interdiu per constitutum ad admissionem tempus usus fuerit, amisit nocturnam servitutem, qua usus non est. Idem est in eo qui certis horis aquæductus habens, aliis usus fuerit, nec ulla parte earum horarum.*"—Dig. L. 10. It appears to me, therefore, that in accordance with the principles of our own law, and of the civil law, which is the most direct authority, and in accordance also with what seems to have been adopted in the law of America, there is no doubt as to the legal principle applicable to this case, and I have no difficulty on the facts in agreeing with your Lordships that the Lord Ordinary's judgment should be adhered to.

The Court interdicted, prohibited, and discharged the respondents from using any reservoir, dam, or other *opus manufactum* to arrest or detain the water of the Braid or Figgate Burn so as to prevent the same from flowing continuously in its natural bed or channel through the property of the complainers, except on Sundays and at other times when the complainers' mill was not at work.

Counsel for Complainers (Respondents)—Lord Advocate (Watson)—R. Johnston—J. A. Reid. Agents—Gibson & Strathern, W.S.

Counsel for Respondents (Reclaimers)—Gloag—Rutherfurd. Agents—Mackenzie & Kermack, W.S.

Friday, January 23.

FIRST DIVISION.

[Lord Craighill, Ordinary.

WALTER GRIEVE, SON, & COMPANY *v.* KONIG & COMPANY AND OTHERS.

Shipping Law—Owners and Master of Ship—Liability where Master Signed Bills of Lading for Cargo not on Board, which was afterwards Shipped.

A master of a ship signed bills of lading which led the purchaser of the cargo to believe, contrary to the fact, that it had all been shipped at the date of the signature, and thereby prevented him from rejecting it as disconform to a stipulation in the sale contract. In an action of damages brought by the purchaser against the master of the vessel and his owners for the loss thereby sustained, *held* that, assuming the guilt of the master, the owners could not be liable for any such misrepresentation or fraud as that in question, in which he was acting outwith the scope of his authority.

Observed that the date is not an essential of a bill of lading, and that a bill of lading could not be held bad if it were without a date.

Observations upon the mode of estimating the damage in such a case, assuming its relevancy.

Agreements and Contracts — Purchase of Goods "for August Shipment"—Condition-Precedent—Right to Rescind where Part not Shipped till September.

A purchase of sugar was made from merchants in Java "for August shipment." One-fourth part of the whole quantity sold was not shipped till September. It was not proved that there was any materiality or virtue in shipment during August. *Held* (*per* Lord Shand) that there had been a non-observance of the plain terms of the contract, such as would entitle the purchasers to rescind it.

On 8th May 1877 Walter Grieve, Son, & Company, merchants, Greenock, bought, through Messrs J. V. Drake & Company, sugar-brokers, from Konig & Company, merchants, Sourabaya, from 500 to 700 tons of Java sugar. J. V. Drake & Company also acted as brokers for A. P. Francke of London, the agent of the sellers, and the contract of sale was contained in the following letter:—

"9 *Mincing Lane,*
"*London, E.C., 8th May* 1877.

"Mr A. P. Francke.

"We have this day sold by your order for account of Messrs Konig & Co., of Sourabaya, to Messrs W. Grieve, Son, & Co., of Greenock, about 5/700 tons Java sugar. . . . . Shipment to be made during August next by first-class sailing vessel (of neutral flag at time of shipment), chartered to call off English coast for orders for any safe U.K. port, and with usual Continental option, but if buyers order vessel to Continent all extra freight to be for their account.

"Sellers to declare ship's name in due time for insurance to be effected here.

"Buyers undertake to accept sellers' drafts for invoice amount (without any interest or discount) at six months' sight, payable in London with B/L's attached thereto, said B/L's to be delivered up on payment of drafts. Buyers also agree to confirm a credit available against this purchase. . . .

"J. V. Drake & Co."

On 16th August 1877 Konig & Company wrote to Messrs Walter Grieve, Son, & Company a letter in which they, *inter alia*, stated that—"Mr A. S. Francke, of London, who sold to you for our account a cargo $\frac{500}{700}$ tons Java sugar, sent us a letter of credit by which you open as a credit available against our shipment of sugar, in consonance with the contract passed between you and him. We proceeded to the execution of the contract in chartering the British barque 'Truth,' Captain Edward George, of about 550 tons carrying capacity." The charter-party was dated "Batavia, July 27, 1877." On the 6th of September 1877 Konig & Company wrote to Messrs Grieve with invoice of the shipment of sugar per the "Truth," comprising 2886 baskets of sugar, amounting to £18,146, 19s. 3d., minus freight. Against this amount they intimated that they had valued on them, in terms of the letter of credit given by them dated 26th May 1877, per six bills of exchange dated 6th September 1877, and payable six months after sight, which drafts Konig & Company requested the pursuers to protect on presentation. They also intimated that the bills of lading and charter-party accompanied the drafts, which they had negotiated with the Chartered Bank of India, Australia, and China, Batavia agency. The bills of exchange were in due course presented to Messrs Grieve & Company for acceptance, but before accepting them Messrs Grieve made inquiry at the holders of the bills of lading in order to ascertain from the dates upon them whether the cargo had been shipped during August 1877. They were informed that the dates of the bills of lading were 27th and 31st August 1877 respectively.

The bills of lading were made out in tripticate, and were dated 27th August for 1232 baskets of sugar shipped at Sourabaya, and 31st August 1877 for 1654 baskets shipped at Passoeroean. Messrs Grieve thereafter sold the cargo to Messrs Blair, Reid, & Steele, sugar-refiners, Greenock, and delivered over the bills of lading to them. It subsequently came to the knowledge of Messrs Grieve that the whole cargo in question had not been on board the "Truth" during the month of August, as stipulated in the contract of sale, and they brought this action of damages against Messrs Konig & Company, the sellers of the sugar, Edward George,