# COURT OF SESSION.

*Tuesday, May* 13, 1884.

## OUTER HOUSE.

[Lord Fraser.

### LADY WILLOUGHBY DE ERESBY *v.* WOOD AND MACMILLAN.

*Property—Riparian Proprietor—Water-course—Mills—Regulation by the Court of Right of Upper Heritor to Use Mill-dams.*

An upper heritor is entitled to dam up and detain for the purposes of a mill on his lands the water of a stream flowing through them, although such detention may render irregular the supply of water to a mill on the lands of an inferior heritor, provided that such detention is not unreasonable, and where no unreasonable detention has been proved the Court will not interfere to regulate his use of his mill-dam.

The pursuer of this action, Lady Willoughby de Eresby, was institute of entail in possession of the lands of Stobhall, forming part of the estate of Drummond. On her property were the lands and saw and turning mill at Den of Brunty known as Brunty Mill. The defender, E. W. Wood, was proprietor of the lands of Keithick, including the meal mill of Keithick, of which Macmillan, the other defender, was tenant. The Brunty Mill and Keithick Mill were both on, and were both driven by, the Keithick Burn, the former being a quarter of a mile below the latter.

Brunty Mill had no mill-dam. For time immemorial before 1875 Keithick Mill had a mill-dam in which water was gathered and stored for the purposes of the mill.

In 1875, however, the defenders removed their then dam and made a new one a little lower down the burn nearer Keithick Mill, and near a quarry-hole belonging to a disused quarry, establishing a cut from the quarry-hole to the new dam. The defender Macmillan was in use to shut the sluices at night and also during the day in order to store and regulate the supply of water for Keithick Mill.

The pursuer alleged that these operations were prejudicial to her by preventing Brunty Mill, for which she alleged the natural flow of the burn sufficed, from having that natural flow, and she raised this action to have it declared that she was entitled to the full, free, and uninterrupted enjoyment of the water of the burn for all uses for which a heritor may lawfully enjoy the water of a stream which runs through his lands, and particularly for the use of Brunty Mill, according to use and wont; that the defenders had no right to make or use any reservoir or other *opus manufactum* for the purpose of diverting or detaining the stream, and keeping it dammed up, thereby preventing it flowing in its accustomed course through her property; she also sought to have the defenders ordained to demolish their works already made, and to have decree of interdict against the making of similar works. Alternatively, and in any event, she sought declarator that the defenders were not entitled at their own pleasure to raise, lower, use, work, or in any way interfere with, the sluices in the existing new dam, but that she was entitled to have them regulated so as to protect her just rights as an inferior heritor, and those of her tenant in Brunty Mill.

The defenders pleaded, *inter alia*—"(3) The defenders are entitled to absolvitor—1st, in respect that the existing arrangements do not innovate upon immemorial possession; 2d, that the same are not injurious to the pursuer; . . . . 4th, that the existing arrangements are necessary to the fair and reasonable use by the defender of the water of the said burn, and are within the defender's (Wood's) rights as a riparian proprietor."

After a proof, the Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds that the defender Mr Wood is proprietor of the corn or barley mill of Keithick, and that the other defender Alexander Macmillan is tenant thereof: Finds that the motive power by which the said mill is wrought is the Keithick Burn, which runs past said mill through the grounds of the defender Mr Wood: Finds that from time immemorial the proprietor and tenant of the mill of Keithick have had a mill-dam for storing the water of the burn for the purposes of the mill, and that the water in said mill-dam has been stored or gathered, and has been let out therefrom by the Keithick miller according as the water was necessary for the use of the mill, and that such storing and letting out of the water was always done without any interference from the lower heritors who had mills upon the burn: Finds that in the year 1875 the defender removed his mill-dam to a place nearer the Keithick Mill, at which place he formed a new dam, and opened a communication between this dam and an exhausted quarry: Finds that this new dam, with the water in the quarry-hole, has been in use by the defenders since the year 1875, and that the former mill-dams have been thereby superseded: Finds that the junction between the dam and the water in the quarry-hole was of great service in enabling a larger quantity to be stored than could have been effected by means of the dam itself: Finds that the pursuer is the proprietor of Brunty Sawmill, situated a quarter of a mile below Keithick Mill, and which mill is driven by the water of the burn which is sent down from Keithick Mill: Finds that the pursuer has good and undoubted right and title to the full, free, and uninterrupted benefit and enjoyment of the Keithick Burn for all uses to which a heritor may lawfully employ the water of a stream which runs through his lands, and particularly for the use of the mill at Brunty: Finds that Brunty Mill has no mill-dam by which water can be stored for its use, but is dependent entirely upon the flow as it comes down from Keithick Mill, and which, if not utilised as it descends, passes by Brunty Mill onwards: Finds that the Keithick miller, by shutting the sluice of his mill-dam, for the purpose of storing the water, thereby detains it, and prevents the Brunty Mill from working when the water is so detained: Finds in law that it is within the right of the Keithick miller to detain the water in his mill-dam for the purpose of obtaining a sufficient head for the working of his mill, and that unless such detention be for an unreasonable time the miller at Brunty is not

entitled to complain: Finds it not proved that the defenders did on any occasion detain the water at Keithick Mill for an unreasonable time, to the loss and injury of the pursuer and her tenant of Brunty: Therefore, subject to these findings, assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—Although the proof in this case is very lengthy, the material facts upon which the decision of the Court has to be given are really not in dispute, and are simple enough.

"A small burn, called the Keithick Burn, which runs past or through Coupar-Angus, and thence onwards to the properties of the defender and the pursuer until it falls into the Isla, has been turned to great practical service by the persons through whose properties it runs. Mills of various kinds, capable of being driven by water power, have been erected on its banks—corn mills, thrashing mills, saw mills—each proprietor turning the stream to the most profitable use he could by storing up the water in dams for the purpose of his mill. The upper heritors of course have an advantage over the lower in respect that they have the first use of the water; and it is only after their purposes have been supplied that the lower heritors can have the benefit of it. When the upper miller opens his dam and sets agoing his mill he gives freedom to the water to descend to the next lower mill, whose operations are dependent upon its advent from the upper neighbour. All this has gone on from time immemorial, and apparently the arrangement has worked satisfactorily, with now and then the expression of some impatience on the part of lower millers at the non-arrival of water which they expected.

"The defender is the proprietor of the Keithick Mill, situated upon the burn. This mill is a corn or barley mill, and has been in existence for a period beyond the memory of any of the witnesses who have been examined. It has always been driven by water from the burn, which in the summer time is stored up in a dam, but in the winter time such storage is unnecessary. The pursuer, again, is the proprietor of Brunty Mill, situated a quarter of a mile below the Keithick Mill. Brunty Mill is at present a saw and turning mill, and is worked only during the daytime. There is no dam at the Brunty Mill for storing water, which if there had been, there never would have been the present dispute. It is proved that there are such engineering difficulties as would prevent the erection of a dam at Brunty, and consequently all the water that comes from Keithick Mill immediately passes by Brunty whether that mill be working or not. The water is there taken directly from the burn by an intake into the lade at Brunty, and so flows away down towards the Isla.

"The tenants of the Brunty Mill have become dissatisfied with the intermittent supplies of water which they receive; and the present action is directed to the purpose of restraining the Keithick miller in the use that he makes of the water at his mill, in such a manner as to enable the Brunty miller to obtain a more regular and steady supply. The summons which the pursuer has raised concludes for declarator that she has right to the enjoyment of the whole water of the Keithick Burn for all uses to which a heritor may lawfully employ the water of a stream running through his lands, and particularly for the use of the mill at Brunty. To this conclusion there can be no answer. The pursuer is entitled to the usufruct of the stream as it flows through her lands for the purposes mentioned. Then come, however, the conclusions directed against the defenders, which are—1st. That it should be declared that they have no right to maintain a reservoir for the purpose of diverting or arresting and detaining the stream of the burn and keeping it dammed up. This is a conclusion which (even independent of prescriptive usage) cannot be given effect to consistently with the common law rights of the upper heritor, who, if he is entitled to use the stream as a motive power for his mill, has as incident thereto a right to store up the water in a dam. Then follow the petitory conclusions to the effect that the defenders should be decerned to demolish their reservoirs, and should be interdicted from making any so as to detain the water. If the pursuer is not entitled to declarator to this effect she is not entitled to interdict. But then follow alternative conclusions to the effect that it should be declared that the defenders are not entitled at their pleasure to work the sluices at the Keithick Mill, and that the pursuer is entitled 'to have the use of the same regulated as to our said Lords may seem proper, so as to protect the just rights of the pursuer as an inferior heritor on the said Keithick Burn, and of her tenants in said Brunty Mill.' How far this conclusion can be given effect to depends upon the rights which a superior heritor like the defender has at common law, and still more upon the proof as to prescriptive possession.

"As regards the case of the upper and lower heritors upon a stream, the principles of law are now well ascertained and are not of difficult application. Every person through whose land a stream flows is entitled to the usufruct of it as it passes by, and consequently neither a heritor above nor a heritor below is entitled to perform any operation which may interfere with this right,—saving always to such upper heritor or to such lower heritor his own right in the stream, the exercise of which may somewhat impinge upon the full use of it by his neighbour. The right of a party to the uninterrupted and full use of the water as it flows naturally past his land is not an absolute right, but a natural one, qualified and limited by the existence of the rights of others. His enjoyment must necessarily be, according to his opportunities, prior to those below him, and subsequent to those above him, and liable to be modified or abrogated by the reasonable use of the stream by others. An upper heritor is not entitled to divert the stream from its natural course to the injury of a lower one, except in so far as it may be necessary for him to do so, in order to the enjoyment of it himself. He is entitled to take off the water for the service of his household, for the drinking of his cattle, nay, even for manufactories, or for irrigation, under the condition that those purposes being served he shall return what remains of the water to its old channel, so as to enable his neighbours below to enjoy what is left of it. He is entitled even to alter the course of the channel within his own lands, providing that before it leaves his

lands, he sends it into the old channel leading to the lower heritors' grounds.

"But besides a complaint for diverting the water for other than the uses to which the upper heritor may apply it, a complaint may be made against him for unreasonably detaining it to the injury of the lower heritor. 'It is,' says Mr Angell (in his "Treatise on Watercourses,' condensing the import of the decisions of the Courts), 'as illegal to *detain* the water unreasonably as it is to *divert* it; for though all persons have an equal right to erect hydraulic works on their own land, yet they must so construct them and so use the water that all persons below may participate without interruption in the enjoyment of the same water. A millowner, for instance, who shuts down his gate and detains the water for an unreasonable time, and thus deprives others of a fair participation of the benefits of the stream, is answerable in damages' (section 115). It will be observed that the doctrine here depends altogether upon whether the act of the upper heritor is unreasonable before he can be challenged for the detention of the water. The mere fact of detention itself may be an injury to the lower proprietor, but an injury of which he cannot complain if the detention only be made in the exercise of the just and legal rights of the upper heritor. Accordingly, as property in a water-course consists in its use, and as it cannot be used in the most beneficial manner, and not at all for hydraulic works, without collecting a body of water, there must be incident to the privilege of use, a right to erect a dam and detain the water long enough to use it to advantage. In fact the retardation or the acceleration of a stream is implied in the right of using the stream at all. This was early determined in the Scottish Courts in *Cunningham* v. *Kennedy* (M. 8903, 1713), where an heritor was found entitled to build a dam dyke, both ends of which rested on his own ground, above a mill belonging to an inferior heritor, the water returning into the same channel. The reporter states the opinion of the Court in these words:—'It seemed also to weigh with the Lords that this running water was but *flumen privatum* or a burn, which is considered as a part of the lands it runs through; and therefore the heritor of the lands can dispose of it at pleasure by damming up or otherwise, for his own use, *qui hoc facit in suo*, provided the natural course be not diverted, so as to hinder the water to turn into the former channel, when it comes to the bounds of the heritors of the lands below.'

"The rule laid down in this case is that which has been consistently followed in Scotland, and is in accordance with the decisions of the English and American Courts. In *Wright* v. *Howard* (1 Sim. & St. 190) Vice-Chancellor Leach stated the law thus—'Each proprietor of land on the banks has a right to use it, consequently all the proprietors have an equal right; and therefore no one of them can make such an use of it as will prevent any of the others from having an equal use of the stream when it reaches them. Every proprietor may divert the water for the purpose, for example, of turning a mill, but then he must carry the water back into the stream so that the other proprietors may in their turn have the benefit of it.'

"In the case of *Orr Ewing & Co.* v. *Colquhoun's Trs.* (30th July 1877, 4 R. (H. L.) 127; L.R., 2 App. Cas. 856), Lord Blackburn, in an appeal from the Court of Session, thus expressed himself—'The owner of the banks of a non-navigable river has an interest in having the water above him flow down to him, and in having the water below him flow away from him as it has been wont to do; yet I apprehend that a proprietor may, without any illegality, build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont, and without asking the leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land. It would require strong authorities to lead me to believe that the law of Scotland does give the proprietors on the banks of the stream a right to act the part of the dog in the manger to such an extent as to hinder this. None were cited at the bar, and I find that in the *Magistrates of Linlithgow* v. *Elphinstone* (Kames' Dec. 332) it is laid down that "a man who builds a mill is entitled to make an aqueduct, provided after using the water for his mill he restores it to the river from whence it was taken. This right he has from the law of nature without the aid of prescription."'

"But the present case does not entirely turn upon these general principles, and irrespective of prescriptive use. The defender is not obliged to rely upon his common law rights as an upper heritor to deal with a stream flowing through his grounds, seeing that he can appeal to prescriptive usage which entitles him to dam back and to store the water as it passes by his mill. There have been dams at Keithick Mill from time immemorial. The first dam called 'The Damhead,' was situated upon the burn, further up than the present dam at the mill. It seems to have been a very primitive contrivance, but it was effectual for its purpose. A croy or weir was simply thrown across the stream, which checked its progress, and made the water regorge for nearly a mile and a-half, until it came within 200 yards of Coupar-Angus. Along the banks of the stream there were boggy and marshy grounds, and the water spread over this ground, of course rendering it useless for agricultural purposes. The inconveniences of such a mode of storing the water were felt at last, and the remedy was adopted of making a new dam in the year 1839, as described by Mr Dunn, an old witness, who was at the time tenant of Keithick Mill. This dam was situated further down than 'The Damhead,' and nearer the mill. The cubical capacity was far less than the former dam at Damhead, as proved by the engineers who have been examined. Between 1839, and until it was superseded by the present dam in 1875, it effected its purpose of storing water during the summer months. It was frequently repaired, and once entirely reconstructed in the year 1860. In the year 1875, the proprietors interested in the district, with the view of improving their land, determined to carry out a drainage scheme, which necessitated the deepening of the burn and also the removal of this second dam, as stated by Mr Ritchie the engineer who carried out the operations. The

result was that in 1875 the present dam was made nearer the Keithick Mill. Its cubical capacity is proved to be less than the dam No. 2 which it superseded. But adjoining the present dam there was the site of an exhausted quarry filled with water, and a communication was made between the dam and the quarry in such a way as to make the water in the quarry to a certain extent a portion of the dam. The whole of the water in the quarry cannot be used for that purpose, because much of it is at a level below the sluice, and the stagnant water cannot flow into the dam. Mr Ritchie states that this could be very easily cured by raising the level of the water in the quarry, and so making the whole one effective dam of water which could be used to the last drop for the purposes of the mill. The expense of this operation, which it is surprising has not been carried out before this time, would not be more—according to Mr Ritchie—than from £50 to £60.

"From this history it is seen that the defender and the tenants of Keithick Mill have performed no new work at that mill. There have been dams there, as there are apparently at every other mill on the Keithick Burn except Brunty, since mills were established upon the stream. The change of the exact spot where the dam was placed to other and more suitable localities was within the power of the Keithick proprietor. He was entitled to improve his dam both as to locality and also as to capacity. It is proved clearly that the present dam, including the quarry, has not the capacity of 'The Dam-head,' nor of the second dam superseded in 1875. But granting that with the addition of the quarry a greater quantity of water can be stored, what is this—at the worst but an act *innocuæ utilitatis*—but rightfully considered, and according to sound reason, an act of the greatest usefulness and service to both the Keithick and the Brunty Mills. It is of the greatest moment to both to have a store of water which will enable them to work five or six hours a day instead of three or four; and every hour that the Keithick Mill can work so can the Brunty. The complaint therefore that by taking in the quarry an injury is done to the Brunty Mill is utterly without meaning. It would be well founded if the water which is detained were never released so as to give Brunty the benefit from the waters after the Keithick Mill had used them. No doubt there might be a case for the interference of the Court if there had been anything like proof of an unreasonable detention on the part of the Keithick miller, or of capricious, unneighbourly, useless raising and shutting off the sluices at Keithick to no advantage of that mill and to the disadvantage of the Brunty. But there is no evidence whatever to this effect. It is proved no doubt, that two or three times a month, in the summer time, when work is pressing, the Keithick miller during the night keeps his mill agoing, and the water which is thus run off passes uselessly by Brunty Mill, where there is no dam to catch it, and where there is only work during the day. This, no doubt, is a misfortune so far as regards Brunty, but the Keithick miller is within his legal right if he choose to work during the night, and it is no fault of his if in consequence of Brunty Mill not being capable of having a dam of its own the water that is used at Keithick runs by Brunty to no purpose, and Brunty finds in the morning that no water comes from Keithick because the dam is then empty.

"The usage upon this Keithick Burn has been proved by various witnesses. The upper heritor is entitled to regulate the mode in which he uses the water according to the requirements of his trade. He gives no notice to the inferior miller when he is to let off water and when to withhold it. The inferior miller must just watch for the arrival of the water from the upper dams, and store it as it comes or immediately proceed to use it. Sometimes the waters from the upper dams come at 12 o'clock, sometimes in the afternoon, but at whatever time they come the inferior miller must be content. Until the present tenants came to Brunty Mill no complaints were ever made as to how the sluices at the Keithick Mill were worked. The present Brunty millers seem to be more impatient than their predecessors. Their predecessors instead of setting up the pretensions now advanced by the pursuer's tenants, acted in a more reasonable spirit. The son of a former tenant of Brunty Mill, William Crichton, shows how good sense triumphed in the former intercourse between the two millers. The Brunty miller then recognised a community of interest with his brother at Keithick. He sawed planks which he gave to the Keithick miller for the purpose of enabling him to raise the weir or embankment of the dam so as to increase the storage; and the Brunty people now and then helped to deepen the Keithick dam.

"Holding, therefore, that there is no ground here for saying that the Keithick miller has unreasonably detained the water, there is no ground upon which the Court can interfere, either by way of interdict or by the establishment of regulations for the use of the water,—even assuming the latter course to be practicable, which the Lord Ordinary thinks it is not. The remedy sought by the pursuer for the alleged wrong of which she complains is either interdict or, alternatively, regulations to be made by the Court as to the use, by the upper heritor, of the stream. Neither of these remedies is applicable to the circumstances of the case. It is true that the Court did in the case of *Glenlee* v. *Gordon*, M. 12,834, grant interdict against the upper heritor from 'using any reservoir or other *opus manufactum* whereby the stream of the river may be diverted from the bed for a time, or detained or arrested in its bed and prevented from continually running therein through the pursuer's property.' The upper heritor had constructed a reservoir for the purpose of accumulating the water during the night—which of course detained it for a time from the lower heritor. But he was proceeding further to add another reservoir, which would have increased the detention and very materially affected the mills below; and complaint was also made that by the detention of the water the amenity of the lower property and the fishing in the stream were destroyed. This case was one where the Court must have held that by the construction of the second reservoir there was an unreasonable detention of the water, and redress would be given against such a wrong. But if the decision be read as one to the effect that a superior heritor is not entitled to dam back a running stream so as to collect the water for his mill, it runs counter to all the authorities prior and subsequent to it.

"Next, in regard to the conclusion that the

Court should regulate the use of the water as between the upper and the lower heritors, there is a case which has some bearing on this point. In the case of *Abercorn* v. *Jamieson* (Hume, 510) it appeared that the upper heritor had formed several fish-ponds and artificial pieces of water in his grounds, and had made bulwarks and sluices thereat, whereby the water was detained from the lower heritor, and the Court found that the upper heritor 'in forming fish-ponds in the course of the said stream, or making use of the said fish-ponds, must not do anything to prejudice Mr Jamieson's' (the lower heritor's) 'use of the said stream, and therefore must be subjected to proper regulations to prevent damage to Mr Jamieson, by shutting or opening the sluices of the said ponds at improper times or in an improper manner, and remit to the Lord Ordinary to proceed accordingly, and to do further as he shall see cause.' How the Lord Ordinary regulated the matter does not appear. In this case there was a complaint that besides detaining the water the upper heritor often suddenly opened the sluices, so that the water came down in a torrent, to the injury and the disturbance of the lands and the mills below. The distinction between that case and the present one is, that the person detaining the water was not an upper miller storing it for the purposes of his trade, but a person who retarded it and let it out according to his notions as to the proper management of fish-ponds. To subject such an upper heritor to some restraint in his mode of dealing with the water was reasonable and practicable, but cannot be cited as a precedent for adopting the same course in regard to the case of two millers.

"To attempt in any way to adjust the rights of parties in the present case by means of interdict or by regulations laid down by the Court would be inconsistent with the rights of the Keithick miller and with the proved facts of this case, which are to the effect that there is no unreasonable detention. To what extent could an interdict be granted? The defender has a right to a mill-dam, and he has consequently a right to use that dam according to the exigencies of his trade. He could not be interdicted from working his mill during any specified hours of the day. He is entitled to the free use of his mill—entitled to work it when he pleases and at times when he has water in his dam to carry on the work. Nor could he be prevented from working during the night twice a month, or every night, if he had business warranting such continuous labour; nor could the Court by any regulations adjust and determine how much water he is to store, when he is to let it off, whether he is to give notice to the miller below that the water is coming. Nothing of the kind has ever been attempted with the Keithick Burn since mills were put upon its banks. The evidence of usage and practice of the millers upon this stream was admitted by the Lord Ordinary as being a useful element in determining the rights of parties. This kind of evidence, the Lord Ordinary observes, is admitted in the American Courts —*Dumont* v. *Kellog*, 18 Am. Rep. 102; Washburn on the Law of Easements, 351.

"If the facts of the case had supported the pursuer's complaint of unreasonable detention, the mode of redress open to the pursuer is not a demand for interdict, or for permanent regulations to be made by the Court, but for damages for such unreasonable detention. The mode in which this matter is left to the juries is brought out in an American case very clearly. The complainer in that case averred that the upper heritor withheld the water three, four, and five days, and at one time thirteen days, and that at times he discharged the water in such quantities as to flood the mill of the lower heritor. The charge given to the jury in that case by the Judge, which was upheld by the Court, was as follows:—'The defendant had a right to use the water as it passed through his land. If he detained it no longer than was necessary for his proper enjoyment of it the plaintiff cannot recover; whether, if you believe from the evidence that he did detain the water three days at times, at other times five days, and at one time thirteen days in his own dam, to the injury of the plaintiff's mill, this was longer than was necessary for the defendant's proper enjoyment of the water at his mill as it passed through his land, is left to your determination. If you believe it was, you will find for the plaintiff. If you believe it was not, you will find for the defendant, unless you believe that the defendant did vexatiously or wantonly detain the water, or that there was some degree of malevolence in the time or quantity of water discharged, to the injury of the plaintiff's mill; for if you believe this your verdict should be for the plaintiff'—*Hetrich* v. *Deachler*, 6 Barr (Penn.) R. 32.

"Of course the remedy of an action of damages is one which is only applicable to a particular case, and in no way lays down a regulation for the future management of the water supply. This is the necessary result of the respective rights of the parties."

The pursuer reclaimed but subsequently withdrew the reclaiming-note and acquiesced in the judgment of the Lord Ordinary.

Counsel for Pursuer—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders—Jamieson. Agents—Tods, Murray, & Jamieson, W.S.

---

*Wednesday, March* 4, 1885.

## SECOND DIVISION.

[Sheriff of Lothian and Peebles.

## COCKBURN *v.* CLARK.

*Agent and Client—Fitted Account—Taxation—Right of Client to have Account Taxed.*

In an action by a person against his former agent, in which the pursuer claimed to have the defender's accounts taxed, the defence was that seven months before raising the action the pursuer had adjusted and fitted the defender's whole accounts with him, including both a cash account and those under challenge, and had granted a receipt (which was produced) for the balance brought out. *Held* that, assuming this to be so, a client and agent do not in such a matter meet on an equal footing, and that the pursuer was still entitled to have the account taxed.