as the right and title to debts due to them respectively are concerned, there is no connection between the two firms.

Again, I do not think that even if the two firms could be regarded as being only technically and not in any practical sense unconnected persons, they have a joint interest in the matter libelled. No doubt they both claim debts incurred in respect that both firms in succession employed Pattullo to do business for them, and in some cases employment which was commenced by the old firm was continued by the new firm. But in whatever amount Pattullo may be indebted to the two firms, it must be divisible into two portions, the one due to the old firm alone and the other due to the new firm alone.

Again, even if it could be said that both firms founded on the same act of the defender, namely, his refusal to carry out the agreement alleged to have been made with the old firm and continued with the new firm when it came into existence, the action as laid would still be incompetent, because it would have been necessary to have separate conclusions, the one specifying the sum alleged to be due to the old firm, and the other the sum alleged to be due to the new firm—*Harkes* v. *Mowat*, 24 D. 701.

There are other grave objections to the form of the action, which, however, it is unnecessary to consider, because if the view which I take be sound it is sufficient for the disposal of the case.

I am therefore of opinion that the second plea-in-law for Pattullo should be sustained and the action dismissed.

LORD ARDWALL—I agree with the opinion just delivered by my brother Lord Low, but I would like to say in regard to what his Lordship seems to have had in view in the last sentence or two of his opinion, that I desire to reserve my judgment on the question of title to sue as viewed from the standpoint of form. I am of opinion that if the pursuers Brims & Mackay sue as agents for or in any other capacity representing the old firm of the same name—and they do apparently sue as such agents—that capacity or character should have been set forth in the instance of the summons.

It may be quite true, as stated in the record, that an arrangement was made with the old firm that "all accounts due to the late firm of Brims & Mackay are to be collected by and paid to the present firm of Brims & Mackay;" and we all know that it is a very common arrangement that all assets of a firm should be handed over to and collected by a succeeding firm, but if that is so in this case it should have appeared in some way in the instance of the summons, and the mandate, assignation, agreement, or other document conferring on them a title to sue for sums due to the old firm and to recover payment thereof ought also to have been mentioned in the instance of the summons. With this reservation I agree entirely with what has been said by Lord Low, and think that the action should be dismissed.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor reclaimed against, except in so far as it dismisses the action against the defenders M'Neill & Sime: . . . Sustain the second plea-in-law for the defender Pattullo: Dismiss the action, and decern."

Counsel for the Reclaimer (Defender)—Morison, K.C.—W. L. Mackenzie. Agents—M'Neill & Sime, S.S.C.

Counsel for the Respondents (Pursuers)—Hunter, K.C. — D. Anderson. Agents—Purves & Simpson, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Sheriff Court at Ayr.

ARTHUR AND OTHERS *v.* AIRD AND OTHERS.

Process—Interdict—Competency—Plurality of Pursuers—Community of Interest—Plurality of Estates—Trespass—Fishing.

The proprietors of the estates of A and B, on the river Ayr, brought a joint action of interdict against certain persons, praying the Court to interdict them "from unlawfully entering and trespassing upon the lands and estate of A, . . . or upon any part thereof, or from unlawfully entering and trespassing upon the lands and estate of B, . . . and, in particular, from fishing for, or trying to catch or kill in any way, yellow trout or greyling in the portion of the river Ayr so far as it flows *ex adverso* of the said estates of A and B."

Held (1) that the action was incompetent in so far as it concluded for an interdict against trespassing on the estates of A and B, neither pursuer having any title to or interest in the estate of the other, (2) that in so far as it concluded for an interdict against fishing, it was competent only as regarded a portion of the river which flowed between the two estates, because there, and there only, the two pursuers had a common interest in the stream, but was incompetent, for lack of that common interest, as regarded other portions, viz., a portion flowing wholly within the estate of B, and a portion flowing between the estate of B and the estate of C, the proprietor of which was not a pursuer in the action.

Property — Fishing — Trout — Rights of Members of Public.

Observed (*per* Lord Justice-Clerk)—"1. No one has any right to trespass on the lands of another for the purpose of fishing. 2. No one, even if he is law-

fully on the bank of a river, has, merely because he is lawfully there, a right to fish in the stream. 3. It is not possible for members of the community having no title to establish a right to fish, by any usage of fishing for however long a period, as against a proprietor having a title to the land over which a stream flows."

Property—Fishing—Trout—River—Different Proprietors on Opposite Banks—Right to Cast beyond medium filum—Interdict.

Observed by Lord Low, and *concurred* in by Lord Ardwall—"In small rivers, which, with or without wading, can be commanded from bank to bank, ... a rule limiting the angler on either bank to his own side of the *medium filum* would be unworkable, and could not possibly be enforced; and unless the river were of considerable size, such a rule would hamper the angler upon either side to an extent which would greatly detract from the value and amenity of the right of fishing. Accordingly, so far as I know, such a rule is, in practice, unknown in Scotland so far as trout fishing is concerned."

Observed further by Lord Ardwall, that it followed that, where such a river flowed between the estates of different proprietors, an action of interdict against fishing would not be competent or effectual except at the instance of both proprietors, the only separate action open to either being an interdict against trespassing on his own estate by which he could exclude fishermen from using his bank or the *alveus* of the river on his side of the *medium filum*.

The river Ayr for part of its course (hereafter referred to as the portion lying between A B and C D upon a plan) forms the boundary between the estates of Montgomerie and Barskimming. Thereafter for part of its course (hereafter referred to as the portion lying between A B and G H on the plan) it forms the boundary between the estates of Barskimming and Failford. Thereafter for part of its course (hereafter referred to as the portion lying between G H and E F on the plan) it flows entirely within the estate of Barskimming.

James Arthur, tenant of the mansion-house, shootings, and fishings of the estate of Montgomerie, with the consent and concurrence of the heir of entail in possession, and his curator, and John Meikle, heritable proprietor of the estate of Barskimming, brought a petition for interdict in the Sheriff Court of Ayrshire at Ayr against Thomas Aird, John Jones, and Robert Wallace, miners, Hurlford, craving the Sheriff "to interdict the defenders from unlawfully entering and trespassing upon the lands and estate of Montgomerie, situated in the parish of Tarbolton and county of Ayr, or upon any part thereof, or from unlawfully entering and trespassing upon the lands and estate of Barskimming, situated in the parish of Stair and county of Ayr, and, in particular, from fishing for, or trying to catch or kill in any way, yellow trout or greyling in the portion of the river Ayr so far as it flows *ex adverso* of the said estates of Montgomerie and Barskimming; and to grant interim interdict; and to find the defenders severally liable in expenses; and to decern therefor."

The following statements and answers were, *inter alia*, made upon record:—"(Cond. 4) On or about Friday the 14th day of July last, the defenders were detected wrongfully trespassing upon the pursuers' said estates, and wrongfully fishing for yellow trout or greyling in the portion of the said river Ayr which forms the boundary between the said estates of Montgomerie and Barskimming. . . . When requested to desist by the pursuer, the said James Arthur's bailiff, Duncan Macfarlane, they refused to do so, but continued to fish. On the same day, and some time after the defenders had first been requested to desist from fishing by the said Duncan Macfarlane, they were again found fishing in the said river Ayr at places where it flows through the said estates of Montgomerie and Barskimming, and forms the boundary between them. . . . On being requested by the pursuer, the said James Arthur's gamekeeper, James Arthur, and Constable Murdoch M'Kay, Tarbolton, and the said Duncan Macfarlane to desist from fishing, the defenders refused to do so and continued fishing for some time thereafter." Ans. 4 for Thomas Aird (similar answers being made by the other defenders)—"Denied as stated. Admitted, under the explanation given in the succeeding article, that on or about the 14th day of July last this defender fished in the river Ayr at or near to the parts thereof specified in the pursuers' condescendence. Admitted that, having a right to fish there, he, on being requested by the gamekeepers and constable to desist from fishing, declined to do so. . . . (Cond. 5) The defenders had no authority or right of any kind to enter upon any portion of the said estates of Montgomerie or Barskimming, or to fish for yellow trout or greyling in any portion of the said river forming part of said estates, and their doing so is injurious and prejudicial to the rights of the pursuers. The pursuers believe that unless interdict be granted the defenders will again trespass upon the said estates and fish for yellow trout and greyling. Denied that the river Ayr . . . (*at those portions of it connected with the present case*) . . . is a public river, and that the right of trout fishing therein is the property of the public. Denied that the public have from time immemorial, and at least for upwards of the prescriptive period, fished for trout therein, and explained that members of the public fishing in said river at the points specified have done so on sufferance by the proprietors, the present pursuers and their authors. Explained that the river Ayr . . . (*at those portions of it connected with the present case*) . . . is neither navigable nor tidal, nor is it so given over to the uses of public works as to have become of the nature of a public river." Ans. 5 for Thomas

Aird (and the other defenders)—"Denied as stated. The river Ayr . . . (*at those portions of it connected with the present case*) . . . is a public river, and the right of fishing for trout therein is the property of the public. The public have from time immemorial, and at least for upwards of the prescriptive period, fished for trout and salmon therein. . . . (Cond. 6). On Saturday, 13th May last, the defender Jones was detected wrongfully trespassing upon the pursuers' said estates and wrongfully fishing for yellow trout or greyling in the portion of said river Ayr at a place where it forms the boundary between the said estates of Montgomerie and Barskimming. . . . On being requested by the pursuer the said James Arthur's bailiff to desist, he refused to do so and continued fishing for some time thereafter." Ans. 6 for John Jones—"Admitted that on or about Saturday 13th May last this defender was fishing in the said portion of the river Ayr at or near a place where it forms a boundary between the said estates of Montgomerie and Barskimming, and that he refused to desist when requested by the gamekeepers to do so. *Quoad ultra* denied. Specially denied that on this occasion he trespassed on the lands and estates specified."

The pursuers pleaded—"(1) The defenders having wrongfully trespassed on the pursuers' said estates, and fished for yellow trout or greyling in the pursuers' portion of the said river Ayr, are entitled to interdict as craved, with expenses. (2) The river Ayr, at the points referred to, not being a tidal river, the right to fish for trout therein is the exclusive possession of the riparian proprietors. (3) The right of trout fishing in a non-tidal river being a right incapable of being acquired as a servitude right by use of fishing by the public for the prescriptive period, or for any period, it is irrelevant for the defenders to prove for how long the public have fished on sufferance of pursuers. (4) The defences stated are irrelevant."

The defenders pleaded, *inter alia*—"(1) No jurisdiction. (2) The action is incompetent and irrelevant. (3) No title to sue. (4) The river Ayr, at the points referred to in the pursuers' condescendence, being a public river, the right to fish for trout therein is common property. (5) That the public have from time immemorial, or at least for the prescriptive period, with the knowledge of the pursuers or of their authors, exercised the right to fish for trout and salmon in said river at the points specified in the pursuers' condescendence. This defender, as a member of the public, is entitled to fish therein."

On 19th December 1905 the Sheriff-Substitute (SHAIRP) pronounced the following interlocutor:—"Repels the pleas-in-law stated for the defenders: Sustains the fourth plea-in-law stated for the pursuers, and accordingly interdicts the defenders from unlawfully entering and trespassing upon the lands and estate of Montgomerie, situated in the parish of Tarbolton and county of Ayr, or upon any part thereof, or from unlawfully entering and trespassing upon the lands and estate of Barskimming, situated in the parish of Stair and county of Ayr, or upon any part thereof, and, in particular, from fishing for or trying to catch or kill in any way yellow trout or greyling in the river Ayr between the lines—(1st) E F and G H; and (2nd) between the lines A B and C D on the plan No. 19 of process."

Note.—"The defenders' substantial defence in the present action is that as members of the public they are entitled to fish in the river Ayr at the places mentioned, in respect that the public have acquired by prescription a right to fish for yellow trout or greyling in these waters. It is admitted by the defenders' agent that at these portions of its course the river Ayr is neither tidal nor navigable. This point is not in dispute between the parties. In the case of *Grant* v. *Henry*, January 12, 1894, 21 R. 358, the law laid down by previous decisions is expressly re-affirmed, that a right of trout-fishing cannot be acquired by prescriptive use in a question between the public and a riparian proprietor. The present is not a case where the defenders allege any title competing with that of the pursuers, and if it were held that on their present record the defenders are entitled to go into a close investigation of the pursuers' titles, then such a course would be open to every poacher who is challenged for fishing in waters that do not belong to him. In these circumstances I have no choice but to grant the interdict which pursuers crave.

"The above interlocutor has been expressed in the foregoing terms, because I am of opinion that the pursuers are entitled to interdict against the defenders fishing for yellow trout or greyling where, either together or singly, the pursuers hold riparian rights on both sides of the river Ayr. Matters are in a somewhat different position wherever their riparian rights are limited to one bank. In the latter case the pursuers are in my opinion entitled to interdict the defenders from trespassing upon their lands, and this, of course, would cover the case of the defenders walking on the bed of the river belonging to the pursuers up to the *medium filum*. It is of course conceivable that where the pursuers do not hold both the banks of the river the riparian proprietor of the opposite bank, not represented in the present action, might allow the defenders to fish from his side, and in that case they might be able legally to fish over the whole breadth of the river at that part without walking beyond the *medium filum*, and so trespassing on the pursuers' lands. It is because I have had these considerations in view that the foregoing interlocutor has been expressed in the terms in which it is couched."

The defenders appealed to the Sheriff (BRAND), who on 19th June 1906, pronounced an interlocutor adhering to the interlocutor of the Sheriff-Substitute.

Note.—"It cannot be disputed that the pursuers have a completed title to the land on both sides of the waters in question, and

a completed title to the land on one side at least of another part of the said waters. When the defenders began their angling operations they had, so far as appears, no written title, and made no attempt to show that the pursuers' title was in any sense whatever bad in law. So far from making such an attempt, they in effect admitted that for a considerable period the pursuers had carried on angling operations as persons in exclusive possession of the rights of angling in the waters in question. For the defenders to commence now angling operations without producing a title, and so far as appears without having a title of their own, is, to say the least of it, somewhat startling.

"The case of *Grant* v. *Henry*, January 12, 1894, 21 R. 358, specially referred to by the Sheriff-Substitute, leaves it clear beyond doubt that an angler cannot acquire by prescription a right of fishing for trout and greyling, as in a question between a member of the community and a riparian proprietor. If he cannot do so, and has no title, or at least entirely fails to produce any title, then his case falls to the ground. The idea of the pursuers being called on to produce their whole titles is out of the question. At present the doubt resting on one's mind is whether the defenders have any title of any kind.

"I concur with the view taken by the Sheriff-Substitute as to the terms in which the interdict has been granted where the pursuers are riparian owners of land on both sides of the river in question. Of course, in the case where the rights of ownership are limited to one bank there can only be interdict to a limited extent.

"Upon the whole matter I am clearly of opinion that the judgment appealed against is well-founded in fact and in law."

The defenders appealed to the Court of Session, and argued—They did not now maintain, as had been maintained on record and in the Court below, that the public and they as members of the public had any right to fish in the river Ayr. They admitted that they had none. The interdict, however, was incompetent as laid. The pursuers had no community of interest entitling them to combine against the defenders in a joint action of interdict. With regard to the conclusion against trespassing, each was asking for an interdict against trespassing not only upon his own but his neighbour's estate, in which latter he had no interest. With regard to the conclusion against fishing, there was only one portion of the river in which there was even a semblance of community of interest, viz., where it formed the boundary between the estates belonging to the pursuers, and that was quite insufficient to form a foundation for an interdict in the terms craved—*Gray and Others* v. *Steuart*, 1741, M. 11,986; *Gibson* v. *Macqueen*, December 5, 1866, 5 Macph. 113, 3 S.L.R. 83; *Smyth* v. *Muir*, November 13, 1891, 19 R. 81, 29 S.L.R. 94; Mackay's Manual of Practice, p. 136.

Argued for the pursuers (respondents)—The interdict was competent and convenient, and caused no prejudice to the defenders. The pursuers had a sufficient community of interest to justify them in bringing it jointly—*Montgomery* v. *Watson*, February 28, 1861, 23 D. 635; *Somerville* v. *Smith*, December 22, 1859, 22 D. 279; *Killin* v. *Weir*, February 22, 1905, 7 F. 526, L.P. at 527, 42 S.L.R. 393; *Cowan & Sons, &c.* v. *Duke of Buccleuch, &c.*, November 30, 1876, 4 R. (H.L.) 14, 14 S.L.R. 189.

LORD JUSTICE-CLERK—Judging from what is to be found in the proceedings in the Sheriff Court in this case I think it right, before dealing with the case as presented to this Court, to state the following propositions in law, which are beyond doubt:—1. No one has any right to trespass on the lands of another for the purpose of fishing. 2. No one even if he is lawfully on the bank of a river has, merely because he is lawfully there, a right to fish in the stream. 3. It is not possible for members of the community having no title to establish a right to fish, by any usage of fishing for however, long a period as against a proprietor having a title to the land over which a stream flows.

As regards the case as now presented to us I have to point out that the action is somewhat strange in its conclusions, for it is raised by two proprietors of separate estates for interdict against trespass on both estates. The view I have formed of the case can be stated in a few sentences. I have no doubt in holding that no such interdict upon joint application can be granted as is prayed for by the pursuers, as it would be to give a right to sue for breach of interdict to persons having no right as regards the lands respectively of which they were neither proprietors nor tenants.

But in so far as the prayer of the interdict is directed against fishing for trout in the Ayr so far as it flows altogether *ex adverso* of the estates of Montgomerie and Barskimming—that is to say, where the two estates face one another on the river—the case is somewhat different. For the river being there the division between the two proprietors, I hold it to be settled that the proprietors have a common interest in the stream, their rights in the *solum* of which extend to the *medium filum* respectively, which is the boundary between them. I therefore am of opinion that the pursuers are entitled to interdict as regards that part of the river which lies between the letters A B and C D on the plan.

On the other hand, for the reason already stated, I hold that the pursuers are not entitled, suing jointly as they do, to any interdict as regards those parts of the river to which either of them has the right of property or tenancy on one bank only.

I would propose that your Lordships should adhere to the interlocutor of the Sheriff in so far as it grants interdict as between A B and C D, and *quoad ultra* to recal the interlocutor and dismiss the action.

LORD STORMONTH DARLING—I concur with Lord Low.

LORD LOW—The pursuers in this action are (1) the tenant of the mansion-house, shootings, and fishings of the estate of Montgomerie, with the consent and concurrence of the heir of entail in possession, and (2) the proprietor of the estate of Barskimming. These are entirely separate estates, but the leading crave in the prayer is that the defenders—of whom there are three—should be interdicted from unlawfully entering and trespassing upon the estate of Montgomerie or upon the estate of Barskimming.

It appears to me that that is an incompetent application. The proprietor of Montgomerie has no right or title whatever to interdict trespassers upon Barskimming, and the proprietor of Barskimming has no right or title to interdict trespassers upon Montgomerie. It follows that the two of them cannot obtain a joint interdict against trespassing upon either estate.

The prayer, however, proceeds to ask that the defenders should be interdicted "in particular from fishing for or trying to catch or kill in any way yellow trout or greyling in the portion of the river Ayr so far as it flows *ex adverso* of the said estates of Montgomerie and Barskimming."

Now the river Ayr forms the boundary between Montgomerie and Barskimming for that part of its course which lies between the letters A B and C D on the plan. There is then a stretch of the river (lying between the letters A B and G H on the plan) which forms the boundary between Barskimming and another estate, the proprietor of which is not a party to this action, and finally there is a stretch of the river (G H to E F on the plan) which lies wholly within the estate of Barskimming.

The Sheriff-Substitute, in an interlocutor to which the Sheriff adhered, interdicted the defenders from "trespassing upon the lands and estate of Montgomerie, or upon any part thereof, or from trespassing upon the lands and estate of Barskimming, or upon any part thereof, and in particular from fishing for or trying to catch or kill in any way yellow trout or greyling in the river Ayr between the lines (1st) E F and G H, and (2nd) between the lines A B and C D on the plan."

Now, for the reasons which I have already given, I am of opinion that that interlocutor, in so far as it is directed against trespassing in general terms, was incompetent. I think that it was also incompetent to grant interdict at the joint instance of the proprietors of the two estates against fishing in the Ayr between the lines E F and G H, because that part of the river is wholly within the estate of Barskimming. I do not think that a riparian proprietor has any right or title to interfere with fishing in a part of the river which is wholly beyond the limits of his estate. Plainly, the proprietor of Montgomerie, if he had sued alone, and with no other title than that of proprietor of Montgomerie, would not have been entitled to interdict anyone from fishing between E F and G H. He would have had no more right to do so than an outsider who had no property upon the river at all. Therefore I think that an interdict at the joint instance of the proprietor of Barskimming and the proprietor of Montgomerie is just as incompetent as if it had been at the joint instance of the former and of a member of the public who had no connection with the river.

I would further observe that there is no foundation for an interdict even at the instance of the proprietor of Barskimming in regard to the part of the river with which I am now dealing, because it is not averred that any of the defenders ever fished that part of the river.

A different question, however, arises in regard to the part of the river between A B and C D. There the river flows between the two properties, and although each property only extends *ad medium filum*, it may very well be that the proprietors have a common interest in the whole of that part of the river sufficient to make it competent for them to sue together in one action a person by whose act both of them have been aggrieved. It has never been expressly decided whether the proprietor of lands upon one side of a river only is entitled to cast his line across the *medium filum* and to take trout out of water flowing over the half of the *alveus* belonging to his neighbour. In regard to that question I would only say that it seems to me to be plain that in small rivers, which, with or without wading, can be commanded from bank to bank (a category which includes the great majority of trout streams, and among them the Ayr at the point in question), a rule limiting the angler on either bank to his own side of the *medium filum* would be unworkable, and could not possibly be enforced; and, unless the river were of considerable size, such a rule would hamper the angler upon either side to an extent which would greatly detract from the value and amenity of the right of fishing. Accordingly, so far as I know, such a rule is, in practice, unknown in Scotland so far as trout fishing is concerned. I therefore think that riparian proprietors upon opposite sides of a trout river have a common interest in that part of this river which flows between their estates which entitles them to take joint action against anyone fishing the water from either side.

Now, all the defenders admit that they fished in the Ayr between the points marked A B and C D on the plan, and that they refused to stop fishing when requested to do so. I infer from the pursuers' averments that all the defenders were fishing from the Montgomerie side of the water, but none of them found upon that fact as a reason why interdict should not be granted against them. Their defence is that as members of the public they were entitled to fish in the river, which, of course, is an entirely untenable proposition.

I am therefore of opinion that the Sheriff-Substitute's interlocutor should be affirmed in so far as it interdicts the defenders from fishing in the river between the points A B and C D, and that *quoad ultra* the interlocutor should be recalled and the action dismissed.

LORD ARDWALL—A number of questions are raised by the pleadings in the present action, but the discussion in this Court was limited by the counsel for the defenders to the second and third pleas stated for them, which are directed respectively against the competency and the relevancy and the pursuers' title to sue.

The pursuers are, first, James Arthur, the tenant of Montgomerie, and William Robert Paterson, the proprietor of that estate, with his curator; and second, John Meikle, proprietor of the estate of Barskimming. At the instance of these pursuers the Court is asked, first, to interdict the defenders from trespassing on the estate of Montgomerie, and next, from trespassing on the estate of Barskimming.

I am of opinion that up to this point the pleas of incompetency and no title to sue must be sustained. The proprietor and tenant of Montgomerie have no title to sue for interdict against trespassing on the estate of Barskimming, nor has the proprietor of the estate of Barskimming any title to sue for interdict against the defenders' trespassing on the estate of Montgomerie, and accordingly the two sets of proprietors are not entitled to obtain jointly an interdict against trespassing on either estate; and it was incompetent to make them joint pursuers in an action for interdict against trespass on lands in which it could not be said that both of them had an interest.

In the next place, interdict is asked against the defenders from fishing for yellow trout or greyling in the portion of the river Ayr so far as it flows *ex adverso* of the said estates of Montgomerie and Barskimming. This portion of the prayer requires to be considered with reference to the different parts of the river to which the interdict is to apply. With regard to the portion of the river between the letters E F and G H, it flows through the estate of Barskimming and both banks of the river are in that estate. For the reasons above adverted to with reference to the estate generally, it is evident that the proprietor of Montgomerie has no title to ask for interdict as regards this part of the river; and the interdict being asked at the joint instance of all the pursuers, it is, so far as this portion of the river is concerned, incompetent.

With regard to the part of the river between the points marked A B and C D on the plan the question stands in a different position. During that portion of its course the river flows between the estates of Barskimming on the one side and Montgomerie on the other, and as the river Ayr is a water of such a size as that it can be practically fished across its whole breadth from either side of the *medium filum* thereof, it seems to follow that no interdict against fishing in that portion of the river would be effectual unless obtained at the instance of the proprietors on both sides. Further, both proprietors have a common interest in the fishing over this portion of the river, and therefore a right to obtain a joint interdict against fishing there. I may refer to the case of *Lord Forbes and Others* v. *Leys, Mason, & Company*, 1824, 2 Shaw (N.E.) 515, where a number of upper heritors were held entitled to sue jointly for the removal of a dam which injured their salmon fishings, and in the case of the *Duke of Buccleuch* v. *Cowan & Sons*, 2 Macph, 653, it was held that a number of riparian owners were entitled to sue jointly an action of declarator and interdict for putting a stop to the pollution of the river Esk which flowed past their respective properties; while with regard to the conjunction of Mr Arthur, the tenant of Montgomerie, in the action, I may refer to the case of *Jolly* v. *Brown*, May 28, 1826, 6 Shaw, 872, where two persons jointly raised an interdict against trespassing on the estate of which they were respectively proprietor and tenant.

I agree with what Lord Low has said with regard to the law of angling in a burn or river of such small size as that the angler can cast his line across the *medium filum* and practically command the whole stream from either side of it, and I have nothing further to say except that I agree *in omnibus* with his remarks on this subject, on which, however, I am unaware there is any direct authority to be found in the legal text books or reports.

Assuming the law to be as stated by Lord Low, it follows, I think, with regard to the remaining portion of the river between A B and G H that it would be incompetent to grant an interdict at the instance of the proprietor of Barskimming against fishing in that part of the river seeing that the proprietor of Failford is not a party to these proceedings. From what has been above said with regard to the rights of angling in a water such as the Ayr, it would seem to follow that interdict as regards this part of the river would not be competent or effectual except at the instance of the proprietors on both sides, though of course the proprietor of Barskimming alone could, if he so desired it, in another action obtain an interdict against trespassing on his own estate which would prevent fishermen from using the Barskimming banks of the water of Ayr at that place or the *alveus* of the stream up to the *medium filum* for the purpose of fishing therefrom.

I am accordingly of opinion that the interlocutors of the Sheriff and the Sheriff Substitute should be recalled, and interdict granted against the defenders fishing for yellow trout or greyling in the river Ayr between the lines A B and C D on the plan.

The Court pronounced this interlocutor:—

"Recal the said interlocutors appealed against: Interdict the defenders from unlawfully entering upon and trespassing upon the lands and estate of Barskimming, and in particular from fishing or trying to catch or kill in any way trout or greyling in so far as that portion of the river Ayr lies between

the lines A B and C D on the plan No. 19 of process: *Quoad ultra* refuse the interdict craved. . . ."

Counsel for the Defenders (Appellants)—Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for the Pursuers (Respondents)—Morison, K.C. — Smith Clark. Agent — James Ayton, S.S.C.

Tuesday, July 2.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

HASTIE *v.* THE CITY OF EDINBURGH.

Reparation—Negligence—Burgh—Artificial Pond in Public Park—Accident to Child—Relevancy.

A child four and a half years old having fallen into an artificial pond in a public park and been drowned, his father brought an action of damages on the ground of fault against the magistrates, and averred that the pond was badly constructed and dangerous, inasmuch as the bank, level at the top with the adjoining path, sloped at a sharp angle to the bottom of the pond, which was unnecessarily deep near the edge, and was slippery, being made of stone and cement, and that the pond should have been fenced or sufficiently watched.

Held that the averments were irrelevant, and defenders *assoilzied.*

On 28th April 1906, Charles Hastie, labourer, 73a Cumberland Street, Edinburgh, raised an action against the Lord Provost, Magistrates, and Town Council of Edinburgh, in which he claimed £500 as damages for the death of his son William Lee Ross Hastie, who had, on 1st November 1905, being at that date four years and four months old, been drowned in an artificial pond in the public park at Inverleith.

The pursuer averred—"(Cond. 5) The pursuer's son met his death through the fault or negligence of the defenders. The said pond is badly constructed and dangerous in that the inner bank of the pond slopes into the water at an angle of 55 degrees, and it is impossible for a child having slipped down the bank to get to the top of it again. Also the inner bank is slippery, and it is difficult even for an adult to obtain a foothold on it. The said William Lee Ross Hastie, on the occasion in question, having slipped into the pond was unable to climb out of it or to get out of the water in the pond, and his drowning was due to the steepness of the said bank. Further, the depth of the water at the edge of the pond is unnecessarily great, being two to three feet deep at a distance of five feet from the top of the bank, and the bank of the pond is far too steep. Had the water been shallower at the edge and the fall of the bank more gradual, the pursuer's son would have been able to gain a footing and to keep himself above the water till rescued. This, however, he was unable to do, and his death was accordingly due to the faulty construction of the said pond in that the artificial bank is far too steep both above and below the water line. Further, the defenders have made no provision for preventing children of tender years from being on the banks of the said pond, which is a danger to them. This could be accomplished by railing in the pond or keeping an attendant near it, whose duty would be to prevent young children from being on its banks, which they failed to do, or otherwise the bank should have been constructed in a series of steps which would have prevented children slipping in. The only steps provided are single stones placed every 15 feet round the pond, each stone being about 10 inches long and projecting 3 inches above the bank, which is quite insufficient as a protection against the said danger. Only two attendants are employed to watch the park, and as it is very extensive, it is impossible for them to give the pond effectual supervision, particularly as during meal hours there is only one in attendance, and part of the park which he has to supervise is over three-quarters of a mile away from the pond. On the occasion in question neither of the park rangers came to the pond until a considerable time after the pursuer's son was drowned. Not known what workmen or park officers the defenders employ or what their duties are. . . ."

On 30th June 1906 the Lord Ordinary (SALVESEN), holding the averments to be irrelevant, assoilzied the defenders.

Opinion.—"In this case the pursuer sues the defenders for damages for the death of his child, a boy of four years and four months old, who was drowned in a pond situated at Inverleith Park. The defenders plead that the action is irrelevant.

"The pursuer's averments may be summarised as follows. The pond in question is an artificial structure, with a stone bank round it, the top of which is level with the adjoining footpath. The bank slopes at an angle of 55 degrees to the bottom of the pond, in which the water has a depth of two or three feet. The slope is a steep one, and composed of stone and cement, on which it is difficult to keep a foothold.

"The deceased boy had gone to the public park along with some companions, and while playing on the edge of the pond, slipped into the water, which was beyond his depth, and was unable, owing to the steepness of the sides, to get out.

"The negligence averred is that the pond was badly constructed, and dangerous because of its construction; that it was unnecessarily deep, and that it was not provided with a railing to prevent young children from falling into it. An alternative ground of fault is that the Magistrates should provide an attendant to see that no harm comes to children of tender years.

"In my opinion these averments disclose no case of actionable wrong. It has been repeatedly pointed out that there is no obligation at common law to fence, or otherwise protect, natural ponds of water,