very clear opinion that that is the proper course in any circumstances of the kind, where we are obliged to have an inquiry to our own satisfaction. In any circumstances I should have objected to a proof at large. What we are to decide is not a question of fact, because the fact of the expectancy of Captain M'Donald's life is not ascertainable. No man can tell us how long he will live. Scientific men can only say what the average or proportion is of men of his age in regard to the length of time they are likely to live, and that is the expectancy as well as we can reach it. But that is a question of pure medical science, and if I had my way—if I had the power—I should have inquired into the scientific matter in regard to the medical question just as I should have inquired into the scientific matter in regard to the actuarial question, and sending the actuarial question to a man of skill out of Court, I should have sent the medical question to a man of skill out of Court, and I should have been inclined to choose a man who had information already on which he could have made his report, with such other inquiry as he might have found Captain M'Donald willing to submit to. I only say these things in explanation, because I understand your Lordships do not concur in that view, and therefore we are driven to decide the general question; and on that general question my opinion is that no sufficient statement has been made by the two heirs of entail to render it necessary that we should step out of the ordinary course or ascertain this question of expectancy by any except the ordinary rules. On this matter, though I do not see all the difficulties, and I do not rate them quite so high as did my brother Lord Gifford, my main ground is this, that I do not think it was intended that in the matter of expectancy of life—a matter which can never be dealt with with certainty—there should be inquiry into details of the nature pointed out, unless there is a manifest and clear justice to be obtained by it. Now, on the statement which is made I can see very clearly that it is quite possible we might have the most conflicting statements from men of equal attainments in science as to Captain M'Donald's life. The statements that are made on the part of the heirs of entail are not statements as to specific diseases or specific causes which in all probability would shorten his life, but statements of long-continued causes which may weigh with an insurance company in reducing the value of the life and thus affect the payment to be received, but which are not statements in reality addressed to the fact that his expectancy is shorter than that of an average life. I am not willing to go into that matter, and I am not willing that on the general purport of this clause of the statute it should be understood either that in any other case there is to be an actual inquiry into an examination of the party whose life is in question, or that a general statement such as we have here is sufficient to compel the Court to enter into an inquiry of that kind. It is a different matter altogether if specific acts are stated which necessarily lead to the conclusion that the life in question is not likely to be of the average duration.

On the whole matter, therefore, as we must decide this case, I regret the difference of opinion, and, as I have already said, I do not hold so strong or confident an opinion either way as to make it quite satisfactory to my mind, but the result at which I have arrived is to concur with Lord Gifford, and I think we must remit to the Lord Ordinary to proceed on the footing that Captain M'Donald's life is to be taken as an average life.

The Court accordingly pronounced an interlocutor remitting to the Lord Ordinary to proceed with the cause on the footing that Captain M'Donald's life was to be assumed to be an average life, and to be estimated according to his present age, &c.

Counsel for the Petitioner—M'Laren—Pearson. Agent—A. P. Purves, W.S.

Counsel for Misses M'Donald—Kinnear—Robertson. Agents—Webster, Will, & Ritchie, W.S.

Wednesday, March 19.

SECOND DIVISION.

[Lord Adam, Ordinary.

SMITH *v.* POLICE COMMISSIONERS OF DENNY.

Property—Possession—Public Well—Right of Police Commissioners to Repair a Well on Private Property—General Police (Scotland) Act 1862.

The proprietor of certain lands on which there existed a well used by the inhabitants of an adjoining village for the prescriptive period, applied for interdict against the local authority constituted under the General Police Act (Scotland) 1862 for cleaning and enclosing the well, so as to protect it against alleged pollution by drainage. *Held* (*diss.* Lord Ormidale) (1) that the facts proved had established *prima facie* a possessory right on the part of the public; (2) that the local authority as such had a *locus standi* to vindicate the rights of the community represented by them to the effect in question.

Observations per Lord Justice-Clerk on the nature of the right to public wells and the mode of acquiring it.

Question as to the proper mode of establishing the rights of parties in such circumstances.

This was a suspension and interdict raised by Adam Smith of Dumbreck, proprietor of the lands of Boghead, in the parish of Denny, against John Archibald, clerk to the Police Commissioners and Local Authority, and also against the Police Commissioners of the burgh of Denny and Dunipace. The complainer sought interdict against the respondents from entering and trespassing upon the lands of Boghead, and from making, sinking, or "cradling" wells, or erecting pumps or other appliances in, upon, or in connection with any well or spring of water in the said lands, or otherwise using, appropriating, or interfering with the said well or spring; and also from occupying or possessing any part of the said lands, or laying down any materials thereon, or interfering with the surface or levels thereof, except in so far as authorised by or in conformity with the provisions of "The Public Health (Scotland) Act 1867;" and also from entering or

trespassing upon the said lands . . . for the purpose of using any well or spring of water therein, and taking, drawing, or removing any water therefrom, or in any other way interfering with the complainer's right of private property in the said lands; and further, he sought for an order upon the respondents to remove a pump and gearing or other machinery for raising water erected in connection with a spring of water upon the lands; and to remove all stones, earth, cinders, or other materials placed by them on the lands in question, and to restore the same to the state in which they were prior to the operations complained of. Denny and Dunipace had recently been erected into a burgh under the General Police Improvement (Scotland) Act 1862, of which, however, only the provisions as to lighting, cleaning, and paving had been adopted.

Statements 3 and 4 for the complainers set forth that the property of Boghead consisted of a villa called Duncarron, and of three grass-fields, the entrance to the southmost of which was by an access, maintained by the complainer to be private, passing along the side of the shrubbery which surrounded the subjects from the road to the point at which the field in question was entered, the field being there bounded by a small stream called "Sclander's Burn." A few yards within this field there was a spring of water at which a circular pool had been formed by Mr Smith and his predecessors for watering cattle and for domestic purposes. The police commissioners had erected a pump at the well, and raised the level of the surrounding area by enclosing and building it up to the extent of 10 feet. The complainer stated that these operations had not been performed in the exercise of any statutory power or authority, and that they were illegal, the spring in question and the lands of Boghead being his exclusive property. He added that the amenity and value as well as the drainage of his lands was affected; that he had been deprived of the use of the well and of the access, and that he had been thus prejudiced. The police commissioners, on the other hand, alleged that the circular pool or well, as they called it, had been formed by means of a public subscription raised by the inhabitants of the village of Denny, and had been used for greatly more than forty years prior to the operations complained of by the inhabitants in the neighbourhood for domestic purposes; and that there had been during that time a free and uninterrupted access by the road claimed as a private access to his field. They also averred that a public right-of-way past the spring or well and through a portion of the field had been used by the inhabitants from time immemorial. They had built up the well, they said, to prevent its being polluted by an overflow from "Sclander's Burn." They in their statement of facts quoted the Public Health (Scotland) Act 1867, section 89, subsection 4, which provided that "the local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants, to be continued, maintained, and plentifully supplied with water." They added—"The spring of water or well referred to which had been used from time immemorial for the gratuitous supply of water to the inhabitants of the surrounding neighbourhood within the limits of the respondents' authority, having become polluted through the side of the well or circular pool next the Sclander's Burn having been broken down or lowered by being trodden upon by the parties using the well, the respondents deemed it to be necessary, in the exercise of their duty, and for the protection of the public health, to cause the well to be covered, and to place a pump thereon, and with that view to level the top of the well. The said operations were, in the opinion of the respondents, necessary, or at all events expedient, in the interest of a considerable portion of the inhabitants of Denny, who depend upon the said well for their supply of water for domestic use."

The complainer pleaded, *inter alia*—"(1) The spring of water or watering-place referred to, and the lands on which the same is situated, being the exclusive property of the complainer, the respondents had no right or title to place a pump in, upon, or in connection with the said watering-place, or lay down materials on or in any way use, appropriate, interfere or alter the level of the said lands."

The respondents pleaded, *inter alia*—"(2) The said spring of water or well having been used for the gratuitous supply of water to the inhabitants of Denny, the respondents were entitled to protect the same from pollution, and the operations complained of having been executed with that object the complainer is not entitled to interfere therewith. (3) The spring of water or well referred to, and the access thereto, having been used by the public from time immemorial, the complainer is not entitled to the interdict sought by him. (4) In any view, the respondents having acted in the *bona fide* exercise of their duty as the local authority of the district, any conclusion against them as individuals is incompetent."

The Lord Ordinary (Adam), after a proof, the result of which sufficiently appears below, pronounced an interlocutor interdicting, prohibiting, and discharging the respondents in terms of the prayer of the note. He added this note—"On the 1st August 1878 the respondents caused an open well in the village of Denny to be covered in, and placed a pump thereon. They professed to do this in their character as local authority of the burgh of Denny, and under authority of the 4th subsection of the 89th section of the Public Health (Scotland) Act, which provides that the local authority may cause all existing public cisterns, pumps, wells, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water.

"The question is, whether the well in question is a public well in the sense of the Act? If it is, then the suspender has no right or title to complain of the respondents' operations. If, on the other hand, it is not a public well, but a private well situated in his ground, then the respondents' operations would appear to be unauthorised.

"There is no doubt that the well is situated in the complainer's property of Boghead. It is proved, as the Lord Ordinary thinks, beyond doubt that the inhabitants of the adjoining village of Denny have from time immemorial been in use to take water from the well. The well in fact was originally cradled, and has since been cleared out and maintained, at the expense of the inhabitants. But Denny was merely a village;

it was not a burgh; it had no burghal territory; it was not a corporation. The Lord Ordinary does not think that there was any legal person in whom it can be held that the property of the well was vested for the benefit of the inhabitants. The Lord Ordinary thinks that the right, if any, which the inhabitants have acquired to the well is of the nature of a right of servitude. It was maintained by the complainer that Denny not being a burgh, the inhabitants could not competently acquire a servitude of taking water from the well; but the Lord Ordinary does not think it necessary to determine that question, because, assuming that they could competently acquire, and had acquired, such a right, he does not think that that would make the well a public well in the sense of the Public Health Act. He thinks that the clause founded on applies to wells which are the property of the public, and not to wells which are the private property of other parties, as he thinks this well is. He does not think that it was the intention of the Act to authorise the local authority to interfere with private property, and to make such changes upon it as have been done here."

The Police Commissioners reclaimed, and argued—The well in question was a public well. The law recognised public rights in water as in other things. Here there was a long-continued use by the public for more than the prescriptive period, and there was evidence of the well having been repaired and kept up by subscription among the inhabitants. No doubt the well was situated on private property, but water was a right which was paramount. The police commissioners were the local authority through whom such rights were vindicated, and accordingly they represented the inhabitants in a proper capacity. The whole operations complained of were protective in their character, and did not interfere with Mr Smith's lands save to prevent pollution of this spring on which the village relied for their water-supply.

Argued for the complainer—The well in question was not a public well in the sense of the statute. It was situated in a field, the property of Mr Smith, and the evidence established the fact that there was no public road-way by which it could be reached. The right to use a well was not *publici juris* like a right-of-way. It could not be acquired by use alone, nor could it be vindicated by any member of the public, or by the inhabitants of a village, who were nothing more than members of the public. The law of Scotland recognised no such thing as dedication to the public in a question with a private individual. Such a dedication could only be maintained as between the inhabitants of a burgh (whether a royal burgh or burgh of barony or regality)—*Home* v. *Young*—*Mackenzie*—*Sanderson*—*Dyce*—*Henderson*. The only wells which were public in the sense of the Act were those standing at the market cross or in the public street or highway, in which no private right or property existed. The Act required not only that the well should be used for the gratuitous supply of water, but that it should be a public well. Both these characteristics were found in the wells referred to in the above cases. In wells like that in question, where private right of property existed, even though there had been long use by the public, only one of the necessary elements was present. Even assuming the well to have been subject to a servitude, it was still a private well, and did not fall within the Act.

Authorities—*Home* v. *Young* (*Eyemouth Case*) Dec. 18, 1846, 9 D. 286; *M'Kenzie* v. *Learmonth* (*Water of Leith Case*) Nov. 17, 1849, 12 D. 132; *Sanderson* v. *Lees* (*Musselburgh Case*) Nov. 25, 1859, 22 D. 24; *Dyce* v. *Hay*, July 10, 1849, 11 D. 1266, and May 25, 1852, 15 D. (H. of L.) 14; *Henderson* v. *Earl of Minto*, June 1, 1860, 22 D. 1126.

At advising—

Lord Justice-Clerk—This is entirely a possessory question, and I propose to deal with it only on that footing.

The pursuer is the proprietor of the lands of Boghead, in the immediate neighbourhood of the village of Denny. The respondents are the police commissioners of the police burgh of Denny and Dunipace, erected under the Police Act of 1862. They are also the Local Authority under the Public Health Act of 1867.

It appears that there is a well in the vicinity of this police burgh which the inhabitants of Denny and the neighbourhood, and the public generally, have for time immemorial used for the gratuitous supply of water, and the respondents, conceiving that this was a public well within the provisions of the Public Health Act 1867, sub-section 4 of section 89, have recently covered it over and placed a pump on it, to protect the water from impurities which from time to time polluted it.

The complainer asserts that this well is his private property, and has brought this process of interdict accordingly.

The Lord Ordinary has substantially granted this prayer, for he has not only prohibited the operations complained of, and directed the pump to be removed, but has interdicted the respondents from otherwise using, appropriating, or interfering with the well or spring.

Some matters of importance are placed beyond doubt by the proof.

In the first place, the use of this well (which is reached by a road constantly traversed) for time immemorial by the inhabitants of Denny and the public is proved beyond all question, and cannot be disputed.

Secondly, it is certain that the operations complained of are solely intended and calculated to protect the purity of the water, and are not productive of injury either to the complainer or to anyone else. It is also to my mind sufficiently established that there was an absolute necessity for some precaution of this kind.

Thirdly, it has been proved that the well has not only been immemorially used for a supply of water by the inhabitants, but that the possession of the well has been asserted without challenge or obstruction as a public right for a period far exceeding the years of prescription. It is proved that between the years 1807 and 1811 the inhabitants, by public subscription, repaired this well, and lined it with an inner casing of hewn stone. This seems to have been done without any communication with the proprietor, and any repairs which have been made on it since have been defrayed in the same way by the inhabitants.

Lastly, it does not appear that the proprietor of Boghead has ever interfered with the

well, or performed any act of proprietorship in regard to it. It is not even proved that it has ever been used for watering cattle, and no other act inferring exclusive property on his part is alleged or proved.

In these circumstances, I see nothing in the evidence to lead me to suppose that this has ever been other than a public well, but, at all events, in this possessory question I am of opinion that its long continued use for a gratuitous supply of water to the public gives it a character sufficient to entitle the a Local Authority to continue the possession until some contrary right is formally established. I am inclined to think that the section of the statute referred to extends the right of a Local Authority to all wells used immemorially for such gratuitous supply; and that the long continued possession cannot be inverted under an application of this kind.

The difficulty which is set up on the other side arises out of the fact that this village of Denny is not in any sense a corporate community, capable of receiving or retaining for itself and the public any real right of this nature; and it is contended that a mere aggregation of inhabitants, not constituting a burgh or barony, or otherwise, cannot acquire it. In the present case, however, which relates to possession and not to title, it does not appear to me necessary to solve that question. The respondents as the police commissioners have an undoubted *locus standi* to vindicate any right possessed by the community which they represent, and if that community have enjoyed that right in perpetuity on any title, that is sufficient to regulate possession until the question of title is raised and decided in a declarator. I shall, however, say a word or two on the aspect of the question raised by the complainer's pleas.

How far a title to a real right, in property or in possession, can be acquired by a community having no legal bond of combination or incorporation, merely by inhibition and exercise of it, is a well-known subject of controversy. It has certainly been found in a series of cases that there are some rights which cannot be so acquired. Such was the judgment in *Henderson* v. *Lord Minto*, 22 D. 1126, which related to a claim to use waste ground for recreation; and that in the drove-road case (*Breadalbane* v. *M'Gregor*). 7 Bell's Apps., 43, in which the House of Lords held that the use of stances or resting-places for cattle on a highland road could not be acquired by the public, or rather by the traders in cattle, by prescriptive use. But something may depend on the nature of the right alleged, and in both these instances the claim was one unknown to the law. It does not follow that the right to obtain so necessary a requisite of domestic and social life as a supply of water may not be constituted by immemorial possession, presuming either that the fountain had always been public, or had been devoted or gifted to public use. I am not ready to concede—although I do not mean to do more than indicate doubts—that a well cannot become or be public unless there be either a corporation to receive it or trustees appointed to administer it, and that it may be reclaimed after centuries of public use by the proprietor of the surrounding or adjoining land. I suspect there are numberless public wells in this country which can show no such evidents. This has never been in terms decided as far as I know. The Eyemouth case comes nearest the present (*Home* v. *Young*, 9 D. 286), and although Eyemouth is a burgh of barony, there were views thrown out by all the judges as to the effect of mere inhabitancy which are worthy of study. Although in its primary nature only a servitude, the question is whether a right to draw water may not be raised by constant and universal possession into a public privilege analogous to rights-of-way which the adjoining proprietor cannot obstruct. Possibly the right of the community in the present case may be vindicated on the lower ground of servitude, although in this possessory question we have not the means of estimating the position with accuracy. But it would be a sufficient answer to the complainer's challenge, if, as may be very safely inferred, the village proprietors in Denny holding feus of the large barony of Cumbernauld have acquired for themselves and their tenants a servitude of using this water supply on the adjoining property of Boghead, for then they would have a title to continue use and wont as they had enjoyed it in times past, and one of the incidents of that use was the right to repair and protect the well when necessary for the enjoyment of their servitude rights. If the community of village feuars had possessed this well in virtue of a servitude right, the possession has been so ample and so complete as to satisfy any reasonable definition of a public well for the purposes of the Public Health Act.

But these are matters which may remain over to be considered if the complainer deems it worth his while to pursue this matter further. At present I am not in a position to pronounce on the title on either side. The complainer has suffered no tangible injury. He is no worse than he was. The well, to whomsoever it belongs, is protected; and it is worthy of his consideration whether after all the well would not be better in the hands of the local authority, as it has hitherto with his consent been in the hands of the inhabitants, rather than in his own.

Lord Ormidale—In this case of suspension and interdict the suspender, who is proprietor of Boghead, complains of certain operations which the respondents—the Commissioners of Police and Local Authority of Denny—have carried out on a well called the Boghead well.

The well is situated in a field, part of the property of Boghead, and must therefore be held to belong to the suspender unless the contrary is shown. But in place of the contrary being shown, the respondents, according to my reading of the record, and particularly the third and fourth articles of the suspender's statement, with the answers thereto for the respondents, must be taken to admit that the well is part of the suspender's property of Boghead, as indeed the very name of it would imply. And nowhere can I find any statement by the respondents to the effect either that the well belongs to them or that it does not belong to the suspender. Whether it is necessary for the respondents to show that it is their property, or whether it is enough if they can show that it is a public well in the sense of the Public Health Act, on which they found, are questions which will be afterwards more particularly dealt with. In the meantime, and in the first instance, it is material

I think, that it should be distinctly understood what are the rights of parties in and to the Boghead well independently of the Public Health Act; and it is with this view that I have indicated the grounds on which it must, in my opinion, be held that the property of the well belongs to the suspender, and not to the respondents.

It appears to me also to be material to know whether the respondents, although not proprietors of the well, may not have a right of servitude in or over it. Now, it is clear at least that the respondents have no conventional servitude in or over the well. They do not say that they have any such right and no evidence of it has been either adduced or referred to. And as to a servitude created by prescriptive possession, it is impossible that the respondents as commissioners of police or as the local authority can have acquired any such, for the Police Act was partially adopted by them only in 1877, and the Public Health Act was passed only in 1867.

Nor is it averred or shown by the respondents that they, in place of the inhabitants of Denny, are in right of any servitude in or to the Boghead well, constituted in any way whatever. There could not indeed be any such servitude, having regard to the fact that Denny, so far as appears, is merely a village, and, as the Lord Ordinary remarks, not a burgh or corporation. The respondents no doubt, say that Denny is a police burgh in respect of their recent adoption to a partial extent of the General Police Act of 1862, but, as I have already observed, that can afford them no right or title to a servitude over the Boghead well if none such otherwise existed.

I must hold it to be also clear on the authorities which were cited at the debate, and in particular the cases of *Home and Milne* v. *Young*, Dec. 18, 1846, 9 D. 286; *Mackenzie* v. *Learmonth and Others*, Nov. 17, 1849, 12 D. 132, and *Henderson* v. *Minto*, June 1, 1860, 22 D. 1126, that a servitude to the use of a well situated on the property of another could not be acquired by the inhabitants of a village simply as such. I could understand that a servitude might be acquired by a feuar or several feuars, for in that case the facts might be sufficient to show that there was a dominant tenement, but in the present case there is no dominant tenement in respect of which any servitude could have been acquired or could exist — at least none such has been mentioned or referred to in the record. All the respondents say is, that the water of the well has been used "for greatly more than forty years prior to the operations complained of by the inhabitants in the neighbourhood for domestic purposes."

It must be taken therefore as clear, I think, that whatever may be their right in or to the Boghead well, it is not of the nature either of property or servitude. Nor can the well be said to be among the subjects which are considered in law to be *res publicæ*. These are enumerated by Mr Erskine (book ii. tit. 1, sec 5, and tit. 6, sec. 17), but he makes no allusion to a well.

But even supposing that it could be maintained that the respondents have a servitude right to use the water of the Boghead well, that would not make it a public well, any more than a servitude right to a road could make it a public road. The two things are fundamentally different and distinct.

I understood it, however, to be maintained for the respondents that the Boghead well may, notwithstanding, be held, in the sense of the Public Health Act, to be a public well used for the gratuitous supply of water to the inhabitants of Denny, and therefore that they as the local authority were entitled to carry into effect the operations complained of, in order that, in the words of the Act, the well may be "continued, maintained, and plentifully supplied with water." This might be so provided the Boghead well was a "public well," but how that can be, keeping in view that it is situated not in the village of Denny at all, but in a neighbouring field belonging to the suspender, I fail to understand. If Denny had been a royal or other burgh duly incorporated, having a certain extent of territory, including some open space, street, or square, with a well on it for the use of the inhabitants, just as there is in most towns, the Public Health Act might apply to it. But the village of Denny is not of that character at all. The territorial extent of it is not even stated; and whatever may be its territorial extent, it is not said that the Boghead well is within its bounds.

In these circumstances, I must own my inability to see upon what ground the respondents could take possession of or interfere with the Boghead well in question in the way they have done. To justify them in doing so it must be shown, in accordance with the terms of the Public Health Act—(1) that the Boghead well is a public well; and (2) that the inhabitants of a defined district have had a right gratuitously to use its water. I am very clearly of opinion that the respondents have not shown or even averred that such is the case.

The only ground, other than those which have been already noticed, upon which it was suggested by the respondents at the debate that their operations were warranted, was that they were necessary to prevent the water of the well becoming polluted. But to this it is sufficient to answer that the respondents as the local authority were not, even on that assumption, entitled to interfere with the suspender's private property without first giving him notice and adopting against him the procedure required by the Act. And, independently of that consideration, it is not to be overlooked, that although the suspender in his present application for interdict excepts from the operation of it what may be "authorised by or in conformity with the provisions of the Public Health (Scotland) Act 1867," the respondents nowhere say that their operations are within this exception. What the respondents were bound to have shown was that the Boghead well is a public well, and this in my opinion they have not done. Merely to say that some of the inhabitants of Denny have been permitted to take water gratuitously from the well for making their tea or mixing with their whisky, in return for which they contributed labour or money towards keeping it in repair, cannot make it a public well. It cannot do so any more than the parties who used the drove stances in the case of *The Marquis of Breadalbane* v. *M'Gregor* could, according to the judgment of the House of Lords (14th July 1848, 7 Bell's Apps. 43), claim them as matter of public right merely because the use of them had been had for centuries, or at least for forty years or time immemorial.

In conclusion, I have only to add that it does

not appear to me that because the disputed question is in one sense a possessory one, the disposal of it should stand over till the rights of parties are cleared up in a declarator. A similar plea was disregarded very recently in the case of *The Clyde Trustees* v. *Laird & Company*, in the First Division, after a hearing by seven Judges (*ante* p. 401), although there the state of possession complained of had existed for fifteen years before any attempt was made to disturb it, while here no time was allowed to elapse after the operations complained of were carried into effect before the present application for suspension and interdict was made. Besides, no such plea is to be found in the record in this case, which was manifestly made up and a proof allowed on the assumption that no such plea was to be taken. It is, indeed, impossible to conceive how the disputed question could be determined better in a declarator than in the present process. Why, therefore, should effect be given to a mere technicality which can result in no good but which must occasion a great deal of expense and delay? It appears to me to be anything but just to allow the respondents to join issue without objection with the suspender in the present process on the merits of the dispute, and in the end to hold that the merits cannot be determined except under another and technically different form of process.

For the reasons now stated, I am of opinion that the interlocutor of the Lord Ordinary reclaimed against is right, and ought to be adhered to.

Lord Gifford—I agree with the result arrived at by your Lordship in the chair, and very much upon the same grounds.

The Court recalled the Lord Ordinary's interlocutor, and refused the note of suspension and interdict.

Counsel for Complainer (Respondent)—Guthrie Smith—Strachan. Agents—Waddell & M'Intosh, W.S.

Counsel for Respondents—Dean of Faculty (Fraser)—Mair. Agent—James Wilson, L.A.

HIGH COURT OF JUSTICIARY.

Wednesday, March 19.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord Adam.)

RODGER *v.* HISLOP AND OTHERS.

Justiciary Cases — Tweed Fishery Acts — Tweed Fisheries Amendment Act 1859 (22 *and* 23 *Vict. cap.* 70)—*Rake-Hook.*

Several persons during the month following the close of the net-fishing used rod and line with artificial flies and fished in the river Ettrick for salmon, but by allowing the hook to sink they dragged it along much as a rake-hook might be used, and captured thereby a large number of fish. *Held* that a complaint alleging the above facts was relevant, and that the parties so charged had contravened the provisions of the 6th section of the Tweed Fisheries Amendment Act 1859.

This was an appeal presented by George Rodger, Procurator-Fiscal for Selkirkshire, against a judgment of the Sheriff-Substitute for that county (Milne) in a complaint by the appellant against John Hislop, Buccleuch Road, Selkirk, and others, respondents. The complaint was laid under the Tweed Fisheries Amendment Act 1859, and specially with reference to sections 6 and 14. The complainer set forth that on Saturday, 30th November 1878, at Selkirk Cauld in the river Ettrick, Hislop and the other respondents did "all and each or one or more of them, with rod and line, having attached thereto a hook, which all and each or one or more of them used, not as a bait or allurement, but as an instrument for dragging for salmon, or otherwise than by means of rod and line and artificial fly only, as provided by section 6 of the said Act, take or aid, or assist in taking, forty-three or thereby salmon, or other fish of the salmon kind;" and alternatively, that these fish were taken by the respondents, "all or each or one or more of them, by means of a rake-hook or similar engine of the description of those used for killing salmon."

The Sheriff-Substitute (Milne) on the evidence held that it was proved that the respondents had killed the salmon in question; that the water was low and clear and quite shallow, being only about two or three feet deep, and that salmon in large numbers were lying congregated in these shallow pools waiting for sufficient water to enable them to ascend the cauld to the upper waters, and that the accused were in some instances standing congregated together and using the rod and line and artificial fly, and casting the fly into the water, letting it sink, and dragging it along the bottom of the pool, and then jerking it into the fish, which were for the most part caught otherwise than by the mouth, being thus foully hooked. The Sheriff-Substitute further found that this mode of fishing was carried on from morning till dark in the midst of a crowd of persons numbering upwards of a 100, several of whom besides the accused were fishing or taking salmon in the same manner, and some of whom in dragging the pools dragged out also old boots, sticks, and other rubbish to the bank. For the defence several objections were stated to the relevancy, and one of these was that the trials should be separated, on the ground that there was no common purpose, and that trying them together gave the fiscal a larger penalty than if they were tried separately. The Sheriff repelled the preliminary objections, but held that it had not been proved that the accused had been acting in concert, or that they had all been at the river side at the same time, and also that the facts as proved did not constitute the offence which was defined by the Tweed Fisheries Act.

In these circumstances the following questions were stated by the Sheriff for the opinion of the High Court of Justiciary:—(1) Whether the complaint contained a relevant charge? and (2) Whether the facts proved amounted to the offence charged under the statute?

The sections of the Tweed Fisheries Amendment Act 1859 founded on were as follows:—"VI. It shall not be lawful for any person to fish for or take or aid or assist in fishing for or taking any salmon in or from the river at any time between the fourteenth day of September in any year and the fifteenth day of February