receipt for the money. There is no more in this than is stated in every case where a tender is made while liability is denied. It is to be observed that the pursuer does not say that Mr Inglis represented that any further payment would be made; the £25, 4s. (not merely money to go on with, but seven months' wages) was all that the defenders offered to pay.

Next, it is to be observed that the pursuer and her husband were not hurried or taken by surprise; they were not asked to sign a receipt for a fortnight after the interview at which the offer was made, during which time they had ample opportunity to consult their agent.

Again, it is not said that the pursuer's husband did not hear or was incapable of understanding the receipt which was read over to him; he is said to have been listless and in a weak condition of body and mind; but such averments were disregarded in the case of *Mackie* which I have cited. Lastly, it is said that the defenders made this settlement with the deceased behind the back of his agent. Of itself this is not a sufficient ground of reduction; and besides, as I have explained, if the pursuer and her husband had had the slightest wish to consult their agent they had ample time in which to do it. They no doubt had their reasons for not communicating with him.

This is a hard case, but I think we must sustain the discharge.

The Court pronounced this interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Of new sustain the third and fourth pleas-in-law for the defender: Dismiss the action and decern.

Counsel for the Pursuer—Sandeman. Agent—William Cowan, W.S.

Counsel for the Defender—Vary Campbell —A. Moncreiff. Agents—Drummond & Reid, S.S.C.

Friday, January 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COUNTESS-DOWAGER OF SEAFIELD AND OTHERS *v.* KEMP.

Superior and Vassal—Feu of Distillery—Pollution of River.

S, by feu-contract, conveyed to the predecessor of K "the distillery of M, with the right to take water for the use thereof from the burn of R," declaring that "it shall not be lawful to nor in the power of" the vassal "to erect or carry on upon the piece of ground hereby disponed any manufactures or operations which may be legally deemed a nuisance or be dangerous or injurious to the amenity of the neighbourhood, but which declaration shall not apply to the carrying on of the said distillery." *Held* that, as it was not proved that the working of the distillery necessarily caused pollution of the burn, these clauses could not be construed to confer on the vassal any larger right than was possessed by the superior, and that consequently the vassal had no licence, as against the superior, to discharge into the burn such impurities as to create a nuisance.

River—Pollution—Salmon-Fishings—Injury to Spawning Beds—Lower Riparian Proprietors.

A riparian proprietor on a river at a distance above whose lands pollution was proved, who led no evidence as to the quality of the water *ex adverso* of her lands, but who complained of the pollution as injurious to spawning beds higher up the river, and consequently injurious to her salmon-fishings, *held* entitled to decree as a pursuer in an action of declarator and interdict against the author of the pollution.

Interdict—Nuisance—Pollution of River—Remedial Measures.

Where, in an action for interdict against the pollution of a river, pollution is proved within a recent period, the execution of remedial measures by the defender will not deprive the pursuer of the right to the security of interdict, unless the defender consents to his remedial measures being tested by inspection and analysis over a lengthened period, and not made *ex parte* but by neutral authority.

This was an action raised against Roderick Kemp, proprietor of the Macallan Distillery on the Ringorm Burn, a tributary of the river Spey, by the Countess-Dowager of Seafield, proprietrix of the estate of Easter Elchies, and Mrs Kinloch Grant, proprietrix of the estate of Arndilly, and the proprietors of the estates of Wester Elchies and Aberlour. The estates of Easter Elchies and Wester Elchies are situated on the Ringorm Burn and the river Spey, and the estates of Aberlour and Arndilly are on the Spey. The conclusions of the action were for declarator that the pursuers Lady Seafield and Mr Grant of Wester Elchies had a right to have the water of the Ringorm Burn, and that the whole of the pursuers had a right to have the water of the Spey, transmitted in a state fit for the use of man and beast, and for all primary purposes, and that the defender was not entitled to pollute the water of the Ringorm Burn or the Spey by putting into the burn discharges from his distillery, so as to make it unfit for primary purposes, and to the prejudice of the pursuers' salmon-fishings, and for interdict against his doing so.

The estate of Arndilly, which was situated on the Spey at some distance below the Ringorm Burn, was that which was farthest removed from the seat of the alleged pollution.

The pursuers averred that in the process

of distillation a large quantity of water was rendered impure by the defender, the whole of which up to the beginning of 1898 was discharged by him through a pipe into the Ringorm Burn, and after that time into ponds, from which, by leakage and percolation, the polluted water continued to find its way into the burn and the Spey, and that the water and the bed of the burn and of the river were rendered filthy by these discharges.

The pursuers also averred that the salmon-fishings *ex adverso* of their respective lands were being injured by the alleged pollution, that salmon would not stay in their waters, subject as they were to frequent discharges from the defender's distillery, and that these discharges had seriously injured the spawning beds in the Spey below the influx of the Ringorm Burn, and were destructive to fish life.

In answer, the defender stated that the distillery had been carried on for upwards of seventy years, and that until the end of 1896 a considerable amount of the waste products of the distillery was discharged into the Ringorm Burn, but that in the beginning of 1897 operations were carried out by him whereby the waste products of the distillery were carried through pipes into filtering-ponds and treated in such a way as to prevent any pollution escaping into the Ringorm Burn or the Spey.

The defender further stated that in 1886 the Countess of Seafield had entered into a feu-contract with his predecessor, whereby she conveyed to him "the distillery of Macallan, with the right to take water for the use thereof from the burn of Ringorm." The feu-contract contained also the following declaratory clause—"It shall not be lawful to nor in the power of the said James Stuart or his foresaids to erect or carry on upon the piece of ground hereby disponed any manufactures or operations which may be legally deemed a nuisance or be dangerous or injurious to the amenity of the neighbourhood, but which declaration shall not apply to the carrying on of the said distillery."

After a proof, the result of which sufficiently appears from the Lord Ordinary's note and the opinions delivered in the Inner House, the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"(1) Finds that until a recent period—or at all events until a period well within the years of prescription—the waters of the Ringorm Burn and also of the river Spey *ex adverso* of the properties of the pursuers were substantially unaffected by artificial impurities, and were under normal conditions fit for all the primary uses; Therefore declares and decerns in terms of the first declaratory conclusion of the summons: (2) Finds that the defender has no right or title to pollute the waters of the said burn or of the said river by discharges of waste products of his distillery or other artificial impurities to the effect of materially deteriorating the condition or quality of the water of the said burn and river; Therefore to that extent and effect declares and decerns in terms of the second declaratory conclusion of the summons: (3) Finds further that during each of the years from 1893 to 1897 inclusive the defender did discharge into the said burn and river waste products of his distillery, and did pollute the water of the said burn and river to the nuisance of the pursuers: (4) Finds further that the evidence led is insufficient to prove that the pursuers are adequately secured by the remedial works lately executed by the defender against the continuance or recurrence of the said pollution; but (5) in respect the pursuers are willing that before moving for interdict time shall be allowed for testing adequately under a remit by the Court the effect of the said remedial works or of other works which have since been or may be executed by the defender, and also the means which the defender has taken or may take for securing the due use of the said remedial works, supersedes in the meantime consideration of the conclusion for interdict," &c.

Note.—[*After dealing with the evidence by which he found that pollution was proved and was brought home to the defender, and that it was to the nuisance of Mr Grant of Elchies, his Lordship proceeded*]—"Neither is there (apart from the point which I shall presently notice) any doubt as to the position of Lady Seafield. She owns both sides of the Ringorm Burn, from the distillery downwards, with the exception of the portion owned by Mr Grant of Elchies. She also owns the left bank of the Spey for a considerable distance below the outlet of the Ringorm Burn. She is thus the heritor who—if there is pollution—suffers most directly, and in the greatest degree. Unless, therefore, she has barred herself from complaining, it cannot, I apprehend, be disputed, that if the defender pollutes he does so to her nuisance. But the defender points out that in 1886 Lady Seafield granted a feu of the distillery subjects to the defender's predecessor, and that the feu-charter contained a power to draw water from the burn for distillery purposes, and a declaration (qualifying a prohibition of manufactures or operations which might be legally deemed a nuisance) that that prohibition should not apply to the carrying on of the distillery in question. The suggestion is that this declaration implied a licence to carry on the distillery in the previously accustomed manner, and, *inter alia*, to discharge its waste products into the Ringorm Burn without responsibility at all events to Lady Seafield or her successors.

"I have accordingly to decide whether such an implied licence can be deduced from the stipulations of the feu-charter.

"I am of opinion that it cannot. It is admitted, to begin with, that the alleged licence cannot be held to cover the material increase of the pollution which has taken place since 1886. But apart from that, it appears to me that a permission to carry on a distillery on ground feued cannot be stretched by implication so as to constitute a right to pass the bounds of the feu, and in effect to trespass by discharging refuse or

otherwise upon the superior's adjacent property. Nor can it extend the feuar's rights that while a tenant of the superior such acts of trespass may have been tolerated. The fair meaning of the declaration in question is, I think, satisfied far short of the licence suggested. If the feuar had desired the right which he now claims, it would, in my opinion, have been necessary to use very express and quite different words. I am accordingly of opinion that the defender has polluted to the nuisance of Lady Seafield.

[*His Lordship then dealt with the case for the proprietor of Aberlour, which he found to be proved, and continued*]—

"The case which remains is that of Mrs Grant of Arndilly, and I think it might have been perhaps as well if her instance had been dispensed with. It is not, in my opinion, proved that any pollution that has yet occurred, whether caused by the distillery or other polluting agencies, has as yet affected the Spey water so far down as Arndilly. Mrs Grant's case accordingly rests entirely on her interest as a salmon-fishing proprietor in the spawning beds in the neighbourhood of the Ringorm Burn, and as to these I must say that I think the evidence is somewhat narrow. Still it is impossible to deny that the spawning beds in the Spey for some distance below the mouth of the Ringorm Burn have been appreciably affected by the discharges from the distillery. And if the spawning beds are affected, it seems equally impossible to deny the interest of Mrs Grant in those spawning beds. Accordingly I am not prepared to throw out the action so far as at the instance of Mrs Grant. On the contrary, I think she is entitled—if the point is considered of importance—to have it affirmed that the defender's pollution has been to her nuisance.

"The result therefore is that if the case had gone to a jury under the usual issue the pursuers must have had a verdict, and on that verdict judgment must in ordinary course have followed, giving the pursuers decree substantially in terms of the declaratory conclusions of their summons, and judgment also finding and declaring that the defender has in fact polluted to the nuisance of the pursuers.

"It remains to consider as to interdict. Now, I had thought it possible that I might be relieved from considering that question, because the pursuers at the close of the proof intimated that they did not propose to move for interdict until an opportunity had been given of ascertaining by experiments and periodical tests extending over a sufficient period, the adequacy of the remedial works which the defender has lately executed. And it appeared to me that the attitude thus assumed was a moderate and reasonable attitude, and one which has in a number of similar cases led to satisfactory results. But the defender maintains that he has in this case proved (whether relevantly to the main issue or not) that at the date of the action—or at all events at the date of the proof—he had executed and set agoing works which, if kept in order and duly used, must cure the alleged pollution, and on the strength of this his counsel contended that they were entitled to have, at all events, the conclusion for interdict *de plano* dismissed. Indeed, I am not sure that they did not also insist for dismissal of the whole conclusions of the summons.

"Now (as I took leave to point out in the course of the proof) when in an action for pollution it is once established that the defender, at a period reasonably recent, in fact polluted, that is in itself *prima facie* ground for granting of interdict. And that especially holds, where as here, the defender has come into Court denying the pollution and maintaining his right—on the ground of prescription or otherwise—to continue the proceedings of which the pursuers complain. Even therefore if it could be affirmed that the defender had at the date of the proof, or at the date of the action, put in operation with apparent success a method of preventing future pollution, it would by no means, in my opinion, follow that the pursuers should be denied if they claimed the security of an interdict. Nor if the success of the remedial works was real and complete, would such an interdict be necessarily injurious to the defender. In point of fact, however, I am not able, so far as the case has gone, to hold it established that the defender's remedial works have yet even effected a permanent and reliable cure. There has been a great deal of evidence on the point—conflicting evidence which I should have been glad to restrict if that had been possible. But assuming the defender's view of its import, it cannot, in my opinion, be overlooked that the defender's case was rested entirely on certain laboratory analyses made, I think, of five samples of water, taken on certain occasions between 20th November and 15th January last. Now, without in the least impugning either the fairness or the skill of the eminent chemists who made those analyses, it seems to me to be impossible to hold a test so limited as conclusive one way or the other. The practice of the Court has, in my experience, always been to require that such remedial works should be tested by inspection and analyses made over a lengthened period, and not made *ex parte*, but by neutral authority. That has been the practice in cases of this description—so far as I know without exception—from the Esk case downwards; and I confess I see no reason why—unless the defender is prepared to submit to an interdict—it should not be followed here. In short, however honest have been the defender's efforts, and however promising his method of purification, he must, in my opinion, submit his works and methods, as others in a similar position have done, to a period of probation, a period which may be long or short according to circumstances."

The defender reclaimed. So far as it is necessary for the purposes of this report to notice the arguments presented, the reclaimer argued—The Countess of Seafield was barred from complaining of the defender's operations by the feu-contract

entered into in 1886 between her and the defender's predecessor. It would deprive the right to take water from the Ringorm Burn, granted by her in that contract, of any meaning if the defender were to be bound to return the water absolutely pure, because that was not possible. The size of the distillery was doubled on the faith of that contract. Having acquiesced in the use of the water for the only purpose for which the right to use it was or could have been granted, Lady Seafield could not now complain — *Hamilton* v. *Dunn*, July 30, 1838, 3 S. & M'L. 356. That case was not a direct authority, but the principle that a landlord was liable for the operations which he allowed his tenant to carry on was illustrated by what was said by the Lord Chancellor, p. 379, and that principle applied in the present case to the relations between Lady Seafield and the defender, and the grant by Lady Seafield protected the defender from responsibility—*Robertson* v. *Stewarts and Livingston*, Dec. 6, 1872, 11 Macph. 189. The feu-contract was granted for distillery purposes, the feuar's obligation being to dispose of the refuse in the way customary at the date of the contract, and in a question with the superior his obligation was satisfied if he returned the water to the burn as pure as the business of the distillery would permit. The measure of Lady Seafield's right was use and wont, and the Lord Ordinary's interlocutor gave her a higher right than she had at the date of the contract—*Cairncross* v. *Lorimer*, August 9, 1860, 3 Macq. 827, Lord Chancellor, p. 829. Mrs Kinloch Grant of Arndilly had failed to prove that she was injuriously affected. No witness was cited by her as to the quality of the water *ex adverso* of her lands, which were too far distant from the defender's distillery to be affected by it, and her case amounted to a mere inference that injury to the spawning beds would prejudice her; no such injury was proved, nor was it proved that there had been any falling off in the fishing in the Spey, or that any injury had been done to fish life or to the spawning beds.

Argued for the pursuers—Though Lady Seafield by the feu-contract of 1886 had consented to water being drawn from the burn for the purposes of the distillery, she had not consented to its being returned in a filthy condition—*Dunn* v, *Hamilton*, 11 March 1837, 15 S. 853, Lord Gillies, p. 871, Lord Corehouse p. 872; *Henderson & Thomson* v. *Shaw Stewart*, 23 June 1818, reported 15 S. 868. In this case the feu-contract had not given the defender any right to let filthy matter into the burn—*Robertson* v. *Stewarts & Livingstone*, *ut sup.*, Lord President p. 196—the defender's distillery could be carried on without any nuisance. Consent to what was being done in 1886 did not entitle the defender to increase the size of the distillery and the consequent pollution to such an extent as to materially change the situation. The fishing was the main interest, and neither Lady Seafield nor anyone else suffered any damage by what was being done before 1886. The defender's case gained nothing by the fact that he had a right to take water from the burn, the feu-contract gave no right to create a nuisance of any sort, and Lady Seafield was in the same position as the other pursuers. Mrs Kinloch Grant of Arndilly had an interest to resist any pollution that injured her interests as a proprietrix of salmon-fishings. The pollution from the defender's distillery was having a serious effect on the fishi ng, and on the spawning beds, but it was not necessary to prove actual destruction of fish or fishing; it was sufficient to prove, as the pursuers had done, that if the pollution continued damage would result.

At advising—

LORD PRESIDENT—The main question in this case is a jury question, and my judgment is with the Lord Ordinary. The condition of the Ringorm and of the Spey immediately below the confluence of the Ringorm forty years ago, and the condition of those waters now, are matters of plain fact. There is, I think, abundant evidence to establish that those waters were (to use the Lord Ordinary's phrase), until a period well within the prescriptive period, unaffected by artificial impurities and fit for the primary uses. Their present condition, as spoken to by credible witnesses, is one of manifest pollution. That the defender's distillery materially contributes to this pollution is proved by very conclusive evidence. The Ringorm Burn affords the sharpest test of this last fact, for to the artificial pollution of that stream there has never been any other contributor, but the influence of the defender's discharges on the water of the Spey is distinctly traced. These general propositions rest upon evidence which in quality and in amount leaves no reasonable doubt.

It is necessary, however, to distinguish between the pollution before and the pollution after the execution of the defender's remedial works. These works have apparently made some differences, although it cannot be said that those differences are all for the better. What is quite certain is that the water continues to be polluted from this distillery to a material extent. It matters little whether since those works were executed less stuff goes into the Ringorm and more directly into the Spey, or whether there is now less of one offensive substance and more of another. The scientific evidence, led at enormous length, does not prove, and does not even go towards proving, that the nuisance has been abated.

Accordingly I hold that the illegal act of polluting these waters is brought home to the defender. There remains, however, the question whether the pursuers have proved that they have been injured, and I agree with the defender that the case of each pursuer must be considered separately. The position of Mr Grant of Wester Elchies is the narrowest geographically but the strongest argumentatively. He is proprietor of the right bank of the Ringorm, and of so much of the Spey as is *ex adverso* of the west half of the channel of the Ringorm. He is therefore directly interested both in the polluted part of the Ringorm

and the polluted part of the Spey, and no exception can be taken to his title. As regards the proprietor of Aberlour, I hold with the Lord Ordinary that it is proved in fact that the Spey *ex adverso* of his lands has been materially polluted by the defender's discharges. That Lady Seafield's estate has been injured, if there be pollution at all, cannot be disputed as matter of fact, as regards both the Ringorm and the Spey, her lands extending *ex adverso* of both streams on their left banks. The argument against her Ladyship is founded on a feu-contract entered into between her and the defender's predecessor in 1886, and it is said that she is barred from insisting in the present action. I am happy to know that Lord Kinnear will discuss this branch of the case more fully, but I may say that although the feu-contract commits Lady Seafield to the use of the ground as a distillery and the use of the Ringorm water for the purposes of the distillery, it confers no licence to pollute, unless that is implied in those uses. That a distillery may be carried on at the place in question, and may use the Ringorm water without pollution, is not only credible, but is proved in this case —for forty years ago there was a distillery, and the water was not the less fit for primary purposes. Accordingly, it was for the defender, if he had a case of that kind, to prove that the distillery could only be carried on, and could only use the water on condition of polluting the two streams, and that in fact this was being done in 1886. This, however, has not been proved. Indeed, evidence to this effect would have been inconsistent with the defender's general case, and inconsistent also with the salient fact that the enormous increase in the size of the distillery after 1886 has been the true origin of the gross pollution which is now complained of. Accordingly I think that Lady Seafield is not barred by the feu-contract.

The position of Mrs Kinloch Grant of Arndilly is different from that of any other of the pursuers, for her property is much further down the Spey. Now, I find it impossible to affirm anything about the condition of the Spey at Arndilly either forty years ago or now, for there is no evidence on the subject. For anything I know, the Spey may have rid itself of the defender's pollution before it reaches Arndilly, and be perfectly potable; and on the other hand, the water may have been hopelessly polluted for generations from other quarters. In the potability or the pollution of the water *ex adverso* of other people's lands this lady cannot acquire an interest merely by joining them as a pursuer, and she can only prevail in the action in so far as she has proved injury to herself. Now, I think that Mrs Kinloch Grant has done so in the single article of salmon fishing. Every proprietor of salmon-fishings is injured if the spawning-beds are spoiled, even in a part of the river away from his fishings. The community of interest among the proprietors of salmon-fishings in a river is recognised by law, and it is a fact. Now, in the present case there is adequate evidence that these discharges are deleterious to the bed of the river for spawning purposes. The summons contains a conclusion appropriate to the protection of Mrs Kinloch Grant, and to this extent, and to this extent only, I think she is entitled to declarator. The matter is not of much practical importance, but as it is challenged, I do not think we could allow the general decree of declarator about primary uses to stand in Mrs Kinloch Grant's favour, and I propose that our judgment on the whole matter should be to adhere to the findings and decrees of declarator in the two first heads of the interlocutor, in so far as those relate to the pursuers other than Mrs Kinloch Grant of Arndilly, and in regard to the said Mrs Kinloch Grant, in place of the said findings and declarators, find and declare that the defender has no right or title to discharge into the Ringorm Burn, and through it into the river Spey, any impure matter or liquid prejudicial to the salmon-fishings of the said pursuer Mrs Kinloch Grant, and decern; *quoad ultra* adhere to the said interlocutor as regards all the pursuers.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I also concur with your Lordships. I think the main questions to be considered in this case are pure questions of fact, and upon these I agree entirely with your Lordship and with the Lord Ordinary, and therefore I think it would be an idle encroachment on the time of the Court if I were to add anything to what your Lordship has said.

But there is a separate point which raises a different kind of question altogether—the defence that is rested on the defender's construction of the feu-contract of 1886—and upon that I may state the reasons for which I have come to the same conclusion as your Lordship has. I think the defender's construction of that feu-contract cannot be maintained. This raises quite a different question from that which has been considered in various cases where it has been proposed to make a landlord responsible for the nuisance created by his tenant because of his having let this land for a special purpose, which in ordinary course of business would probably create a nuisance. In these cases it has been maintained that a heritor complaining of nuisance is entitled to the same remedy against the landlord as against the tenant, because the landlord must be responsible for the direct consequences of his own act which he could not lawfully do by another, that is, by the tenant, if he could not lawfully do it himself. But the relation between Lady Seafield and the other parties to the feu-contract of 1886 is not that of landlord and tenant, but of vendor and purchaser, and the purchaser who becomes the vassal acquires under that title an absolute right of property in the use of which he cannot be controlled by the superior so long as he performs the conditions on which he holds the land, so as to give the superior no right to put an end to the feu. It would be quite impossible to interdict Lady Seafield (which the argu-

ment implies would be the right of the other pursuers) from polluting the Ringorm Burn or the river Spey by discharges from the defender's distillery, because she could do nothing whatever to carry out the order of the Court except by obtaining an interdict herself against the defender, which, *ex hypothesi* of the argument, she is not entitled to do. But then it is said—at least so I understand the argument—that treating the case as one of superior and vassal, by the terms of the deed Lady Seafield expressly confers on her vassal the right to use the water of the Ringorm Burn so as to pollute both that stream and the river Spey in the manner complained of, or at all events, that she expressly surrenders her own right to complain if the stream should be so polluted. That is rested on two clauses of the feu-contract—first, the dispositive clause, by which the superior "sells and in feu-farm dispones . . . to James Stuart . . . the distillery of Macallan, with the right to take water for the use thereof from the Burn of Ringorm by pipes laid or to be laid from the said burn through the farm of Overton;" and the clause by which it is declared "that it shall not be lawful to nor in the power of the said James Stuart or his foresaids to erect or carry on upon the piece of ground hereby disponed any manufactures or operations which may be legally deemed a nuisance, or be dangerous or injurious to the amenity of the neighbourhood, but which declaration shall not apply to the carrying on of the said distillery." Now, I think that those two clauses must be considered separately, because they raise different questions, both as regards construction and legal effect. The first is said to be an express grant of the right to use the water of the Ringorm Burn in the very manner of which the pursuer now complains. I do not think it can be so construed. It is a right to take water from the burn, and that is expressed certainly in very general terms, and I do not at all doubt in terms wide enough to cover all the right to take water from the burn for that purpose which the granter possessed. But in any fair construction of the words of grant it cannot mean more than that. It is a grant of a special right along with a conveyance of land, and it is covered just as much as the grant of the land by the warrandice clause, and therefore Lady Seafield gives right and warrants it to the grantee in general terms to take water from this burn. Now, there can be no question at all as to the nature and extent of the right she herself possessed, and which alone she could give to anybody else. She was not the sole riparian proprietor, and therefore though she was entitled to divert water from the stream for the purpose of any manufacture if she chose to do so, she could only do it upon the condition and obligation of returning all the water which she did not consume for primary purposes to its channel within her own ground, undiminished in quantity and undeteriorated in quality. She had no right whatever, as against the lower heritors, to pollute either the Ringorm Burn or the river Spey, and therefore the grant of all the right she had or could pretend to have would not enable her grantee to pollute this stream either. I think it the more difficult to put a wider construction on the terms of the contract so as to make them cover rights which she did not possess and could not dispone, because the warrandice must be equally comprehensive, and the defender's argument, if it were carried to its logical conclusion, would mean that Lady Seafield is not only precluded from complaining of pollution herself, but is bound to protect him against complaints of lower heritors, and to make good to him any loss that may be occasioned by their interference with the right which she has conferred. I cannot put that construction on the clause, and cannot read into it words which are not there, so as to make it mean that the superior grants to the vassal the right to take and use the water of the burn free from any condition or obligation affecting the superior herself to restore it unpolluted lower down the stream. Lady Seafield could not grant that right, and I do not think that, if it had been expressed in clear terms, any superior would have signed the feu-contract, and therefore I am unable to import by implication words which would have so serious an effect on the rights of parties when they are not expressed. But then it is said that this is implied by the specification of the use for which the water may be taken. It is to be taken for the use of the distillery, but that appears to me to add nothing to the meaning, fairly read, of the words of grant, unless it could be maintained that as matter of fact the distillery could not be carried on in the ordinary course of business without polluting the stream in the manner complained of. Now, that is not alleged, and it certainly is not proved, and it therefore appears to me that these words add nothing to the fair meaning of the words of grant taken apart from them. Another view was suggested—that at all events the feu-contract must be read with reference to the condition of the burn at the time it was executed, and therefore that the vassal must have right to continue the same kind of pollution to the same effect as existed in 1886—the doctrine invoked being that the contract must be construed with reference to the facts to which it relates. Now, I think it would be extremely difficult to apply that method of construction to such a title as this, because it is a grant of land in perpetuity, and a special heritable right is granted along with the land, and as a pertinent of it; and I think it would be extremely difficult to hold that the character and measure of that grant, into whose hands soever the lands may come at any distance of time, has to be determined, not by reference to anything expressed in the title, or preserved on record, but by reference to an extrinsic state of facts known *ex hypothesi* to the granter and grantee at the time, but which their singular successors could not possibly know anything about at a distance of time, because there is no record of evidence to

explain it. But if such a method of construction were applicable at all, then I agree with an observation that was made by your Lordship, that it lies with the defender—maintaining that the words of a feu-contract are to carry a wider meaning than that which, if construed alone, they would bear by implication from a specific state of facts—to aver on record that state of facts, and to establish it by evidence. Now, there is no such averment on record, and there is no evidence—no specific evidence—of the actual condition of the water in 1886, which would enable us to say what is the measure of the right conferred on the vassal by the feu-contract. There is no attempt to clear up the contract in that way by evidence, if it was possible to clear it up; and I am of opinion, therefore, that this clause at all events cannot be so construed as to confer on the vassal any higher right than Lady Seafield possessed.

But then it is said that the second clause, to which I adverted, bars the superior from the present complaint. That is an exception from the clause for the prevention of nuisance. It is declared that the vassal shall not be entitled to carry on manufactures which may be deemed a nuisance—excepting from that declaration the carrying on of the said distillery — and as I understand the argument, it is said that is an express permission to carry on the distillery, and that therefore the pursuer cannot complain on the maxim *volenti non fit injuria*. I think that would be a very good answer to an action at the pursuer's instance to put down a distillery as a nuisance. I do not think that she would be in a position to maintain that the distillery as such is a nuisance prohibited by this clause. But the only purpose of the exception is to take the distillery out of the scope of the clause prohibiting nuisances, and when it has served that purpose there appears to me to be no other meaning that can be given to it, and therefore on this branch of the contract also, as on the other, it would be indispensable for the defender to show that the distillery could not in fact be carried on without producing this particular nuisance of which the pursuer complains; and as your Lordship has pointed out that has not been proved. Indeed, it is not consistent with the defender's case to maintain it. That there may have been a discharge of impurities into the Ringorm Burn at the time the contract was granted, or that such a discharge may be very probably, if not necessarily, a consequence of carrying on the distillery, is a very different matter, because in all these cases the question is one of degree. It cannot be alleged of any running stream that it is absolutely free from impurities at any time, and therefore the question always is, whether the person complained of has discharged into the river impurities so much greater in character and degree than what had been discharged within the prescriptive period as to create a nuisance. I think that is the true question in the present case, and that it is proved that the defenders have polluted the stream to a much greater extent than had ever been done before, and therefore if the clause in question were held to contemplate that some degree of impurity may be discharged into the stream, it does not follow that it contemplates what the defender is now doing. It appears to me that the condition of the contract which is founded on, by which the carrying on of the distillery is excepted from the general prohibition of nuisances, cannot be carried further than to bar the superior from complaining of the distillery as such being necessarily in itself a nuisance. That she does not do in this action, and therefore I think the plea of bar falls.

On all the other points in the case, as I have said, I entirely agree with your Lordships.

The Court pronounced the following interlocutor:—

"Adhere to the findings and decrees of declarator in the two first heads of the interlocutor reclaimed against, in so far as these relate to the pursuers other than Mrs Kinloch Grant, Arndilly: And in regard to the said Mrs Kinloch Grant, in place of the said findings and declarators, Find and declare that the defender has no right or title to discharge into the Ringorm Burn, and through it into the river Spey, any impure matter or liquid prejudicial to the salmon-fishings of the said Mrs Kinloch Grant: *Quoad ultra* adhere to the said interlocutor as regards all the pursuers," &c.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—Cooper. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Shaw, Q.C.—Wilson. Agents—Davidson & Syme, W.S.

Saturday, January 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ANDERSON *v.* ANDERSON'S TRUSTEES AND OTHERS.

Husband and Wife—Aliment.

A widow is entitled, as a creditor, to aliment out of the capital of her husband's trust-estate, although she has accepted a liferent of the estate in lieu of her legal provisions under his settlement, which proves inadequate for her maintenance.

Howard's Executor v. *Howard's Curator Bonis*, 21 R. 787, *distinguished.*

Alexander Anderson, farmer, Kirriemuir, died in 1877 survived by his widow and two children, and leaving a trust-settlement whereby he gave to his widow a liferent of the household furniture in their