fraud, they had succeeded in proving that the phrase "bile beans" was a "fancy name" of their own invention. The Lord Ordinary holds that this has not been proved in point of fact, and I am rather inclined to agree with him. I do not lay much stress on the old registration of bile beans as a trade-mark by J. F. Smith & Company, for their trade seems to have been insignificant. But the complainers can hardly be heard to say that the name is not descriptive when they advertised extensively that the title was given "to express exactly what the preparation was—a bean for the bile." Anybody who read that knew precisely that the article offered for sale was an antibilious pill; and, in face of such an intimation from the complainers themselves, no amount of evidence that "bean" is a novel and fanciful name for a pill can go very far. But it is unnecessary, in my view, to pursue this topic for the reasons I have stated. I am therefore for adhering.

LORD LOW—I agree with the result at which your Lordships have arrived. I am of opinion that the false and fraudulent misrepresentation by which the complainers have built up their extensive business disentitles them to have that business protected by the Court. I therefore think the application should be refused.

On the question whether if there had been no fraud the complainers would have been entitled to interdict I desire to offer no opinion. The question is not necessary for the disposal of the case, and seems to me to be attended with great difficulty.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Complainers (Reclaimers)—Dean of Faculty (Campbell, K.C.)—Clyde, K.C. — Cooper, K.C. — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondent—T. B. Morison — Gillon. Agents—Kirk Mackie, & Elliot, S.S.C.

HOUSE OF LORDS.

Monday, July 16.

(Before the Lord Chancellor (Loreburn), Lord Davey, Lord Robertson, and Lord Atkinson.)

EARL OF KINTORE AND OTHERS *v.* ALEXANDER PIRIE & SONS, LIMITED.

(In the Court of Session June 6, 1905, 42 S.L.R. 607, and December 18, 1902, 40 S.L.R. 210, 5 F. 818.)

Fishings—Salmon-Fishing—River—Rights of Upper Salmon-Fishing Proprietor—Rights of Lower Riparian Millowner.

The proprietors of salmon-fishing in the upper reaches of a river are not entitled, as against a lower riparian millowner, to insist upon having the condition and flow of the river left in their natural state, save in so far as affected by rights acquired by prescription; their right is limited to seeing that there is no obstruction or abstraction of such a character as materially to impede the free passage of salmon.

Question whether, in cases where water is abstracted, it is necessary that at least an equal amount of water to that abstracted be sent down the stream of the river on the ground that salmon always follow the main stream.

Prescription—River—Abstraction of Water from River—Prescriptive Right to Abstract Water at One Place—Right to Abstract the Same Amount of Water at Another Place—Right to Abstract at One Place Amount of Water Formerly Abstracted at Two Places.

"The effect of forty years' use of water of a river is to give the person so using right to continue that use, *modo et forma*, at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction."

Interdict — Competency — Form — Salmon-Fishing—Proprietors of Salmon-Fishing in Upper Reaches of River—Obstruction to Passage of Salmon by Lower Riparian Millowner—Rigidity of Interdict.

Where the proprietors of salmon-fishings in the upper reaches of a river allege obstruction to the passage of salmon up the river on the part of a lower riparian millowner, interdict at their instance is the appropriate remedy.

Where an interdict had been granted by the Court of Session defining the respective rights of the salmon-fishing proprietors of the upper reaches of a river and a lower riparian millowner in a question as to obstruction by the latter, the House of Lords in affirming the order added a declaration "that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy."

Process — Remit — Remit Subsequent to Proof—Terms of Remit—Competency of Remit.

In an action of declarator and interdict at the instance of the salmon-fishing proprietors of the upper reaches of a river against a lower riparian millowner, with the object of terminating or reducing his abstraction of water, a proof was taken, by which it was established that there was illegal obstruction to the passage of salmon on the part of the millowner. Thereafter a remit to men of skill was made "to

report (1) what depth or volume of water, measured by inches or otherwise, flowing over the S. dyke and thence downwards over the W. dyke to the foot of the said W. tail-race, would be in their opinion sufficient to secure the free passage of salmon in said part of the river; and (2) whether any, and if so what, arrangements are possible which would automatically or otherwise insure the observance by the defenders of the limitations attaching, as above expressed" (*i.e.*, in previous portion of interlocutor), "to their right to abstract water from the river at S. dyke." Objection was taken to the remit on the ground that it was submitting to the arbitrament of the men of skill after a proof the whole substance of the case.

Held that the remit was rightly made.

The case is reported *ante ut supra.*

Alexander Pirie & Sons, Limited, the defenders, appealed to the House of Lords, submitting the whole case to review. The Earl of Kintore and others, the pursuers, lodged a cross appeal seeking to have the defenders restricted to their prescriptive rights of abstraction.

At delivering judgment—

LORD CHANCELLOR—I have had the advantage of reading in print the opinion of my noble and learned friend Lord Robertson, and I so fully concur in it that it will not be necessary for me to enter upon the merits of this appeal.

I desire to add that my only difficulty in this case has been in regard to the terms in which the decree should be framed. In England the ordinary course is to grant an injunction in general terms prohibiting any invasion of the rights declared by the Court. It works well in practice and leaves those against whom the injunction is directed as much freedom as is compatible with a due observance of the rights of their adversary. In the course of the argument a suggestion was made to the counsel on both sides that this course might with advantage be adopted in the exceptional circumstances of the present case. On both sides, however, counsel were disinclined to accept this course, and alleged that it is the custom in Scotland to prescribe in the decree with particularity both what is permitted and what is prohibited. I do not presume to question the wisdom of the course they prefer or the propriety of the rule usually followed in Scotland, but in those circumstances I feel that no alteration of the decree appealed from is possible beyond that suggested by my noble and learned friend Lord Robertson.

LORD DAVEY—I think that both parties to this appeal have put their case too high. The appellants contended that the respondents had no right to any interdict, and that their only remedy was an order either from the Court or from the Fishery Board for a new salmon ladder. Of what use this would be to the respondents in a case like the present where the appellants for six days in the week leave the bed of the river dry but for a few disconnected pools I do not know. I am of opinion that it is established by two cases which were referred to that to interfere with the free passage of the salmon up the river is a wrong against the proprietors of the upper fisheries for which interdict is the appropriate remedy. But what should be the nature and extent of the interdict? The respondents say their right is to have the river maintained in its natural condition, and any interference however slight to the natural flow of the stream is therefore a wrong which may be restrained by interdict. I think this puts the right of the fishery owners against the lower riparian proprietors too high, and that their right is only that no interference shall be made which materially obstructs the passage of the fish.

Having said this much I can find nothing else in this case which has been placed before your Lordships with such copiousness of material and such a wealth of illustration. There is no other question of law and there is no question of fact in dispute, and the only real question is as to the form of the interlocutor. In substance I agree with my noble and learned friend Lord Robertson. The interdict and mandatory part of the order are in a form which is not common in England but is preferred by Scotch lawyers. It is, however, said that the order is inelastic, and a change of circumstances may arise to which it is not adapted. In order to meet this objection my noble and learned friend Lord Robertson proposes to add some words which I think will have the desired effect. But in substance your Lordships confirm the interlocutor, and I think that the amendment should not affect the costs of the appeal, which should be paid by the appellants, and the cross appeal should also be dismissed with costs.

LORD ROBERTSON—The record in this case is extremely voluminous, and your Lordships heard a very long and anxious argument for the appellants. In the result, however, the question before the House lies in comparatively narrow compass.

The Don is a salmon river; and the respondents own salmon fishings in some of its upper reaches. They have therefore clear right to insist that the appellants, who are lower proprietors of lands on the banks of the river, shall not obstruct the free passage of salmon up the river. The present action, although the summons contains a great many conclusions, is strictly confined to the enforcement of this one right, the right to secure the free passage of the salmon against artificial obstruction or denudation of the channel.

What the appellants have done is to divert the water of the Don from its natural channel into artificial channels serving the uses of their paper mills. This has been done to such an extent as to leave the natural channel opposite the mills at times bare of water, and therefore necessarily impossible of passage to salmon.

It is superfluous to add that the artificial channels do not furnish a safe passage for salmon.

What, then, are the rights of the appellants which can be opposed to those of the respondents? They come from two sources. First of all, as riparian proprietors having right (for this I shall assume) to both banks in this part, they are entitled within their own boundaries to divert the water of the river. The condition of this right is that the water must be returned, and this condition is merely one of the consequences of the general principle that the water of a running stream can only be dealt with by anyone so far forth as is consistent with the rights of the other proprietors interested in it.

Second, the appellants have by prescriptive use acquired right to abstract from the river for a certain part of its course a quantity of water, stated at 7000 cubic feet per minute.

The operations complained of, however, cannot possibly be justified by this prescriptive use, for the abstraction of 7000 cubic feet per minute was for practical purposes harmless to the salmon; and this second of the appellants' rights is therefore immaterial to the controversy. The appellants have indeed attempted to piece on to their prescriptive use of the water in question, which was 7000 feet, the use had of the river for another part of its course by themselves or by persons whose rights they have acquired. I do not think that this argument requires any elaborate refutation. The effect of forty years' use of water of a river is to give the person so using right to continue that use, *modo et forma*, at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction.

Accordingly the true position of the appellants must be found in harmonising their right to divert water, such as it is, derived from the two sources specified, with the respondents' right to the free passage of the salmon. *Primâ facie*, on the facts found and not now disputed, the appellants are wrongdoers; they have exceeded their rights to the injury of the respondents. The logical result would be a general interdict against encroachment. In the practice of the Scotch Courts, however, it has been usual to avoid the controversies which might arise as to the effect of general interdicts by proceeding to practically harmonise the contending rights by prescribing remedial works or restrictions on use. This is what the Court of Session has done in the present instance. Such procedure generally, and what has been done here in particular, is subject to the criticism that the decree which ultimately is pronounced is apt to appear as rigid as the general interdict appears to be vague. Subject, however, to one safeguard, which I am to suggest, I think the Court have well performed this difficult administrative work.

I am bound to add that in the performance of this task the Court did not receive due assistance from the appellants, and if, in the sequel, they should suffer from the rigidity of the system established, they may impute it to themselves. When the appellants were found to be wrongdoers (and that they were exceeding their rights to the respondents' injury was manifest all along), their proper attitude was that of deprecating interdict, which was the strict legal consequence, and pointing out to the Court means which would in future safeguard the interests which they had injured. The initiative in this stage, strictly speaking, lay with them, to be allowed to propose remedial measures. This was not the course taken by the appellants; they have acted as critics of the action of the Court, and of the practical recommendations of the Court's skilled advisers. Now I am not disposed too readily to accept such criticism.

Lord Kyllachy, in my opinion, accurately stated the conditions on which the Court entered on this inquiry about remedial works, when in his interlocutor of 20th March 1903 he laid it down that "when the defenders' (appellants') operations at Stoneywood do by themselves or in conjunction with similar operations or other causes affect the flow of the river between the point of abstraction and the point of return so as to impede the free passage of salmon between the said points, the defenders are limited, both with respect to the amount of abstraction and the point of return, to the usage existing prior to 1882, and are only entitled to innovate upon that usage when and so long as the river flows and continues to flow over Stoneywood Dyke and thence downwards to the actual point of return, in such volume as to ensure the free passage of salmon between the point of abstraction and the point of return." I think also that the men of skill were properly directed to report "(1) what depth or volume of water, measured by inches or otherwise, would be, in their opinion, sufficient to secure the free passage of salmon in said part of the river; and (2) whether any, and if so what, arrangements are possible which would automatically or otherwise ensure the observance by the defenders of the limitations attaching, as above expressed, to their right to abstract water from the river at Stoneywood Dyke."

Now, it is not my intention to examine minutely the report of the men of skill or the final Order of the Court. That Order prohibits the abstraction of more than the prescriptive quantity, 7000 cubic feet per minute, except when 9 inches of water are flowing over the crest of the upper dyke and thence to the Green Burn, and lays it down that even on these excepted occasions they are not to withdraw a larger quantity than 31,850 cubic feet per minute, except when and so long as there shall be left to flow over the said dyke to the Green Burn at least one-half of the whole water flowing down the river at the time. There follow detailed conditions about the return of the water and about gauges and marks. All this is enforced by interdict against

abstracting more than the prescriptive quantity, except on the occasions and under the conditions specified, and against deviating from the prescribed place and conditions of return of the water.

Now, having carefully considered this scheme, I think that it is as well adapted to the difficult problem to be solved as any that could be constructed; and, as I have said, it rests on sound principles. The learned Judges who considered it have had much and successful experience in this branch of administrative justice. Lord M'Laren in his interesting judgment has made one criticism which, for safety's sake, may well be referred to. I do not understand the Court in requiring one-half of the whole water of the river to flow down the old channel, to proceed upon or to assert any general principle of law, but to adopt that formula as an appropriate additional guarantee in the present case. Whether it has not a more general application as founded on physical laws, has at least not been examined or decided in this action, and is a question which may recur in similar cases.

In the result I am satisfied that this case has been dealt with in accordance with the rights and interests involved. I have, however, been unable to divest myself of the apprehension that, occurring as it does in a final decree which terminates the litigation, this order might prove inconveniently rigid. The flow of rivers is subject to inscrutable change, and it may be well to make it clear that the system now set up is calculated with reference to the existing condition of things, and might, in unforeseen contingencies, prove inadequate or inappropriate. Not, then, as inviting future litigation, but for preventing possible technical embarrassment, I suggest that with our affirmance of these judgments, there should be coupled a declaration that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy.

I wish that I could say that I have any definite understanding of the theory of the cross appeal. As I consider the judgments impugned by it to be right, I think that it ought to be dismissed. It may be allowed to the cross appellants that Lord Kyllachy's later judgment purports, or at least may be read as purporting, to modify what had previously been done. But the ultimate decision was right, and, in my opinion, gives effect to the cross appellants' rights. The best that can be said of the cross appeal is that it has not substantially added to the costs of these elaborate proceedings.

LORD ATKINSON—I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Robertson. I entirely concur in it and have nothing to add.

The decision of their Lordships was—"That the order appealed from be affirmed, with a declaration that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy."

The appeal and cross appeal were both dismissed with expenses.

Counsel for the Appellants (Defenders)—Clyde, K.C.—Nicolson. Agents—Davidson & Garden, Advocates, Aberdeen—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents (Pursuers)—Dean of Faculty (Campbell, K.C.)—Lord Kinross. Agents—Wilsone & Duffus, Advocates, Aberdeen—Alexander Morison & Company, W.S., Edinburgh—A. & W. Beveridge, Westminster.

Friday, July 20.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten and Lord Robertson.)

VAN EIJCK & ZOON (OWNERS OF THE "ANGLIA'S" CARGO) *v.* SOMERVILLE AND ANOTHER (OWNERS OF THE "ANGLIA").

(*Ante sub nomine Owners of s.s. "Olga" v. Owners of s.s. "Anglia" and Owners of the Cargo on board s.s. "Anglia,"* March 16, 1905, 42 S.L.R. 439, and 7 F. 739.)

Ship — Collision — Decree in Favour of Owners of One Ship Obtained in Conjoined Actions for Damages—Petition by Owners of the Other Ship for Limitation of Liability and Distribution — Opening up in the Petition at the Instance of Claimants not Represented in Conjoined Actions the Decree Obtained therein — Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503, 504.

In conjoined actions for damages for collision in which both ships were found to be to blame, the owners of the "Anglia" obtained against the owners of the "Olga" decree for a sum which exceeded their total liability as limited by section 503 of the Merchant Shipping Act 1894. The owners of the "Olga" having presented under that Act a petition for limitation of liability and for distribution, the owners of the "Anglia" claimed to rank for the sum in their decree; the owners of the "Anglia's" cargo, however, having appeared and put in a claim, sought to have such decree opened up, maintaining that the value of the "Anglia" had been overstated and had not been contested by the owners of the "Olga" because they had had little or no interest to do so, but that the finding of such value could not be binding on them when they were not represented in the actions.

Held that the owners of the "Anglia" were bound to try again