MACNAGHTEN, and LORD SHAND concurred in the opinion of the Lord Chancellor.

The appeal was accordingly dismissed, with costs.

Counsel for the Appellant—Bigham, Q.C.—Orr. Agents—Deacon, Gibson, & Medcalf, for Simpson & Marwick, W.S.

Counsel for the Respondent—Salvesen—Crole. Agents—Learoyd, James, & Mellor, for W. B. Rainnie, S.S.C.

Friday, June 16.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

M'INTYRE BROTHERS *v.* M'GAVIN.

(*Ante*, vol. xxvii. 678, 17 R. 818.)

River—Pollution—Prescriptive Right.

The proprietors of bleachfields bounded by the *medium filum* of the Dighty, a sluggish polluted stream, used from time immemorial for manufacturing purposes, sank a tank into the bed of that stream at its junction with the Fithie, a quickly flowing stream of pure water, in order to obtain for their works some of the pure water of the Fithie. After being impounded and used in the works the water was returned to the Dighty undiminished in quantity. Before the water was abstracted in this way the riparian proprietors below the junction of the two rivers were able to use the water for agricultural and bleaching purposes, but the result of the operations was that the flow became more irregular, and the water was sometimes so polluted as to be unfit for these uses.

Held (*aff.* judgment of the Second Division) that the proprietors of the bleachfield were not entitled to take the water of the Dighty in any other way or place than those sanctioned by their prescriptive right, and could not use it so as to add to the pollution of the stream.

This case is reported *ante*, vol. xxvii., p. 678, and 17 R. 818.

M'Intyre Brothers appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — My Lords, this is an appeal from a judgment of the Court of Session affirming a judgment of the Lord Ordinary. The action is brought by certain persons, who are the owners of land bordering upon a stream called the Dighty, to obtain an interdict against the pursuers to prevent their abstracting water from a point where the Fithie flows into the Dighty, and taking it to their works by means of an aqueduct and then returning it into the Dighty in a polluted state, the result being, as the pursuers say, prejudicial to them.

Now, the appellants would, of course, have no right to take pure water from the stream and return it in a polluted state unless they could make out that by prescription, or in some other lawful manner, they had acquired that right. The works which were put down by the appellants two or three years ago were new works. They placed a box, on their side, I will assume, of the stream, but at the point at which the Fithie flowed into that stream from the north (the stream of the Dighty running west and east), so as to catch in this box as much as they could of the pure water of the Fithie, and take it by means of an aqueduct into their premises for their bleaching purposes. The water of the Fithie was preferable to the water of the Dighty for those purposes, inasmuch as the Dighty water always comes down more or less polluted, while the Fithie water is pure. There is no controversy about the object which they had in view, nor as to the works executed or their effect, though there has been controversy as to the proportion which the water abstracted bore to the total water of the Fithie, and as to the effect upon the combined streams below their junction, of the operations of the appellants.

Prima facie, what the defenders in the action, the appellants here, have done was a violation of the rights of the proprietors lower down the river. They took from the river at this point pure water and returned it in an impure condition. Apart from any prescriptive right which they may have to pollute the river, there would be an end of the case. But they say that they have acquired by prescription the right to send polluted water into the river; that they were in the habit of taking in water from the Dighty some distance higher up the river (I believe somewhere about three-quarters of a mile) at times when it was running pure, such as Sunday or Saturday afternoons, and filling their reservoirs with it for bleaching purposes, and that such water they had been in the habit, for a period giving them a prescriptive right, of taking and returning into the stream in a polluted condition; and their case is that although it is true that what they now do or seek to do had not been done by them before, yet the effect upon the lower proprietors is no greater than that which was produced by their doing what they had acquired a prescriptive right to do.

I will assume that this would be a sufficient answer to the pursuers' case if it could be established by evidence. But I desire emphatically to say that even assuming that, it appears to me that the onus of proving it rests with those who are seeking to justify the pollution, who are seeking to justify the act of abstracting water which was pure and sending it back in an impure condition. The question is, Have the defenders in the present case discharged themselves of that onus and established that the heritors lower down the river (I will deal with the case of Mr M'Gavin presently) have no right to complain inasmuch as their condition now is

precisely what it was before? My Lords, upon that we have a finding of fact by the Lord Ordinary and the Second Division of the Inner House the other way; and really that is the only question before your Lordships. Are you to reverse the concurrent findings, on a pure question of fact, of these two Courts, and give judgment the other way?

Now the mode in which, upon a mere question of fact, the concurrent findings of two Courts ought to be dealt with has been more than once before your Lordships' House. In the case of *Owners of the P. Caland* v. *Glamorgan Steamship Company* that matter was considered. In that case I believe all the members of your Lordships' House who took part in the judgment conceived an impression from the evidence different from that which had been arrived at by the two Courts below; so that if the matter had in the first instance come before those who were sitting as the Appellate Judges in your Lordships' House, their decision might probably have been the other way. Yet all the noble and learned Lords who were present on that occasion concurred in thinking that that was not enough to justify their reversing a concurrent finding, upon a mere question of fact, of the two Courts below, and that that could only be done where it could be demonstrated either that some cardinal fact had been overlooked, or that some altogether erroneous view had been taken of the bearing of the evidence upon the case—something, in short, which made the balance incline decisively and unequivocally in a direction opposite to that in which it had been found to incline by the Courts below. Now, my Lords, nothing of the sort can really be suggested here. A good deal of argument may be urged, and it must be admitted that there is a great deal to be said on both sides; but having heard all that was to be said, the two Courts below have concurred in the view to be taken of the facts; and I must say that, though I admit that there is much to be said on both sides, I do not see any sufficient reason for thinking that I myself should in the first instance have come to a different conclusion. But even if it were not so, I suggest to your Lordships that there are no grounds upon which this judgment could be reversed. There is nothing to show that the learned Judges below have so distinctly erred as to justify your Lordships in saying that the concurrent finding of these two Courts ought not to stand.

That really disposes of the substance of the appeal. But it has been pointed out that as regards Mr M'Gavin, who was not a heritor lower down, but whose land was immediately opposite the land of the defenders on the Fithie and at the junction of the Fithie and the Dighty, the case was a different one. He had not the same ground of complaint as the lower heritors had, and the Lord Ordinary in fact came to the conclusion that he had not established the case which was set up so far as he was concerned. The only ground upon which he gave judgment was one which did not include the case of Mr M'Gavin, and he dealt with the question of expenses upon that basis. Probably by an oversight no distinction was made in the interlocutor between M'Gavin's case and the case of the other pursuers; and again, in the Inner House the matter seems also to have been overlooked. Nevertheless, now that your Lordships' attention has been called to it, the learned counsel for the respondents assenting to that course being taken, which I certainly think was perfectly right on his part, I shall move your Lordships, whilst otherwise affirming the interlocutors, to reverse the interlocutor in so far as it relates to the respondent M'Gavin, and to dismiss the application in so far as insisted in by him, without prejudice to his right to bring any such action as he may think fit.

Attention has also been called to the fact that the interlocutor itself is somewhat wider than probably would have been the case if the matter had been brought to the notice of the Court. The interdict is against "using the conduits, aqueducts, or opera manufacta," "or any of them, for the purpose of withdrawing water from the stream or streams mentioned in the note of suspension, and conducting the same into the tanks or reservoirs at the respondents' works." It has been pointed out that that is drawn wide enough to interdict the appellants from even taking water from the Dighty and bringing it into their works. Now, obviously there was no such intention on the part of the Court. The purpose obviously was merely to deal with the water taken in at the junction of the two streams, which might be said to be either the Dighty or the Fithie or a combination of both. I therefore think that it would be proper to add a few words after the words "stream or streams," simply to carry out what is obviously the intention of the Court. In other respects, I move your Lordships that the interlocutor be affirmed.

LORD WATSON—My Lords, the appellants have for the prescriptive period taken a supply of water from the Dighty, as it passes their works, on Sunday and Monday morning, at which times the water is comparatively pure, and have returned it to the river polluted. They now assert their right to take throughout the week, from a point about a quarter of a mile below their works, water entering the Dighty which had remained pure, notwithstanding their prescriptive pollution, and to return it to the river in a polluted state.

A prescriptive right to take, in a particular way and at a particular place, pure water which is returned to the stream in an impure state infers no right to take the supply of pure water in any other way and at any other place. I think the appellants had no right to make the alteration which they did upon the mode of supplying pure water to their works unless they were in a position to show that the change could not by possibility affect the interest of heritors

below. A proprietor who has prescribed a right to pollute cannot in my opinion use even his common law rights in such a way as to add to pollution.

If there had been no evidence as to the effect of the new arrangements made by the defenders in 1887 and 1888, I should have thought that they were of such a character as *prima facie* to entitle the respondents to an interdict. But the Courts below have concurred in finding that the effect of the arrangement was to diminish the purifying effect of the water of the Fithie upon that of the Dighty below their junction, and thereby to increase its pollution.

The appellants have in my opinion, failed to demonstrate that these findings are erroneous, and I therefore concur in the judgment proposed by the Lord Chancellor.

LORDS ASHBOURNE, MACNAGHTEN, and MORRIS concurred.

LORD SHAND—My Lords, the complaint in this case by the respondents is that the appellants have unduly interfered with the waters of a stream admittedly pure, called the Fithie Burn. The appellants make no claim to any prescriptive right to pollute the water of the Fithie Burn, and it has been found by concurrent judgments of the Courts below, that by their operations pure water has been withdrawn from that burn and returned into the Dighty Burn in an impure polluted state, with the result that the combined water of the Dighty and Fithie Burns passing the respondents' property has been polluted to a material degree beyond the condition of the water previous to these recent operations.

If this had been a case which had originated in the Sheriff Court, and there had been combined findings of fact, first by the Sheriff-Substitute or the Sheriff in dealing with the case before him, and again by the Division of the Court in affirming that decision—if there had been findings of fact combined and to the same effect — then by statute—Judicature Act of Scotland, 1825 (6 Geo. IV. c. 120), sec. 40—this House would have been excluded from reviewing those findings, and the appellants would have been shut up to an appeal upon law only. There is no such statute applicable to cases which have originated in the Court of Session; but it is obvious that the same reasoning applies, and I think I may fairly say that if concurrent findings of the Sheriff or the Sheriff-Substitute and the Court of Session are conclusive upon matters of fact, there seems to be even more reason for holding that the same concurrent findings in the Court of Session, of a Judge in the Outer House and of Judges in the Inner House, should have the same weight and effect.

Your Lordships have distinctly decided that this is so in the case to which the noble and learned Lord on the woolsack has already referred, and in an earlier case, which I believe was referred to by my noble and learned friend opposite (Lord Watson), namely, *Gray* v. *Turnbull* (L.R., 2 H.L. Sc. 53), which came from the Scotch Courts. In that case Lord Chelmsford says—"This, my Lords, is a question of fact on which there are the concurring decisions of two Courts and of no less than five Judges, and therefore it seems to me to be absolutely essential, on principle, to hold the appellants' counsel to the necessity of not merely showing that there may be some ground for doubt in the case, but to satisfy us convincingly and conclusively that the judgments complained of are entirely wrong."

That being the state of matters, it is conceded in this case that if the verdict of the learned Judges in the Court below (and there were five Judges, just as there were five Judges in the case referred to) be well founded, the legal result cannot be disputed, that the appellants must fail in this House. Now, have the appellants succeeded in this case, either in showing convincingly and conclusively that the Court below came to a wrong conclusion upon the facts, or have they succeeded in showing that there is any clear error in the judgment upon the facts, for some reason which can be very distinctly pointed out? I think there has been an entire failure to show anything of the kind. This House has been invited to go into all the details of the evidence given before the Court below, to weigh that evidence, and to deal with it as if this were a Court of first instance. But that falls a long way short of discharging the *onus* which lies upon the appellant in such circumstances as these.

As far as I can see, the Lord Ordinary and the Second Division of the Court have come to a sound conclusion upon the facts in this case; but even if I had very serious doubts upon that question, I think, looking at the authorities to which I have referred and to the reason on which these authorities proceed, this House should not be asked in such a case to review the decision upon a question of fact. Therefore I am of opinion with your Lordships that the judgment of the Court below should be affirmed.

The House ordered that the said interlocutors of the Lord Ordinary of the 21st of May and the 14th of November 1889, and also the said interlocutors of the Second Division of the 30th of May and the 16th of October 1890, be, and the same are hereby reversed, in so far as they relate to the respondent Robert M'Gavin: Further ordered, that the application, in so far as insisted in by him, be, and the same is hereby dismissed, without prejudice to his right to bring any such action as he may think fit: Further ordered with respect to the remaining respondents, that the said interlocutor of the Lord Ordinary of the 21st of May 1889 be, and the same is hereby varied, by adding thereto after the words "stream or streams" the following words, "at or near their junction": Further ordered, that the said interlocutor of the

21st of May 1889, subject to this variation, also the said interlocutor of the Lord Ordinary of the 14th of November 1889, and also the said interlocutors of the Second Division of the 30th of May and the 16th of October 1890, be, and the same are hereby affirmed: Further ordered, that the said cause be remitted to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and this judgment: And it is further ordered, that the appellants do pay to all the said respondents the costs incurred by them in respect of the said appeal to this House.

Counsel for the Appellants—The Lord Advocate (Balfour, Q.C.)—Guthrie. Agents—Loch & Company, for Henderson & Clark, W.S.

Counsel for the Respondents—H. Johnston—C. K. Mackenzie. Agents—Andrew Beveridge, for Mackenzie & Kermack, W.S.

Thursday, June 22.

(Before the Lord Chancellor (Herschell) and Lords Watson, Ashbourne, Morris, and Shand.)

RIXON *v.* EDINBURGH NORTHERN TRAMWAYS COMPANY AND OTHERS.

(*Ante*, vol. xxvi. p. 405, vol. xxviii. p. 209; 16 R. 653, and 18 R. 264.)

Company — Shareholder — Title to Sue — Contract — Fraud — Ultra vires—Reduction.

A company incorporated by a private Act for the construction of a tramway, with a nominal capital, which was never offered to the public, but which was taken up partly by the promoters of the company, and to the extent of the remainder of the shares was acquired by the contractor in payment of the price of the work performed, entered into a contract for the remainder of the work with the same contractor.

A shareholder sought to reduce this contract (1) on the ground of fraud, alleging that the majority of the shareholders who voted in favour thereof were nominees of the contractor, and had obtained their shares gratuitously and for the purpose of voting in his favour; (2) on the ground of *ultra vires*, as the contract had not been offered to competition as required by a clause in a contract which was scheduled to the company's Act.

Held (*aff.* judgment of the First Division) (1) that the contractor's influence in the company had been legitimately acquired; and (2) that the pursuer not being a party to the contract, which provided for competition, he had no title to insist in the plea of *ultra vires*.

This case is reported *ante*, vol. xxviii. p. 209, and 18 R. 264.

Rixon and others appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — My Lords, this is an appeal from an interlocutor of the Court of Session affirming an interlocutor of the Lord Ordinary. The ground of the action brought by the appellant, who is a shareholder in the Edinburgh Northern Tramways Company, was that an agreement entered into by that company through its board with a firm named Dick, Kerr, & Company ought to be reduced, inasmuch as it was not honestly entered into by the directors on behalf of the Edinburgh Northern Tramways Company, but was really part of a fraudulent scheme by which, in disregard of the interests of the shareholders whom they professed to represent, the directors should obtain for themselves a benefit as directors of another company.

My Lords, I shall not trouble your Lordships at any length in this case, inasmuch as the learned Judge who tried the case, who heard and saw the witnesses, came to the conclusion that they were witnesses of truth, and that fraud had not been established, and the Inner House have affirmed his decision. Under these circumstances it would be contrary to the precedents upon which your Lordships have acted to overrule the judgment so arrived at by the Inner House unless it is clearly established—conclusively established—that the fraud had been committed, and that the Court below in coming to the contrary determination had erred by overlooking some cardinal fact or disregarding some consideration which manifestly ought to have controlled and determined their judgment.

My Lords, the directors of the Assets Corporation had taken over from the Debenture Corporation, of which they were also directors (the directorates being almost identical), certain securities which had been made over to them by the Cable Corporation in consideration of an advance of about forty thousand pounds. The Debenture Corporation may be dismissed from consideration, because although at law they were the holders of the security in equity the transaction had been transferred to the Assets Corporation, who were in reality the persons entitled to the securities. A large part, or a considerable part at all events, of the securities which the Assets Corporation held consisted of the debentures and shares of the Edinburgh Northern Tramways Company which had been made over by them to the Cable Corporation as part of the consideration for the Cable Corporation constructing a tramway line which under their Act the Tramways Company were empowered to make. The directors of the Assets Corporation being the holders as part of their security of the great bulk of the shares of the Edinburgh Northern Tramway Company, were desirous of obtaining the control of the management of that company. They held 3190 shares out of a total of 4500. They accordingly took steps in the early part of the year 1888 to obtain the control of the direction of that company. They did not