

the circumstances, and having regard to the terms of the defenders' record, which does not deny either the existence or the alleged terms of the deeds, I think the action should be allowed to proceed, at least to the extent of obtaining the accountant's report. The deeds may yet be recovered in the procedure before him, and, failing production of the originals, his report will state the grounds on which the copies produced are presented as authentic."

The defenders reclaimed, and argued that there was no other way of ascertaining what the provisions of these deeds were but by an action of proving the tenor.

The pursuers argued—There was no necessity for such an action here. The contract of copartnership was produced in an action reported in 8 Macph. 419, and was there admitted by Thomas Shaw, and the assignations must be held to be confessed by the defenders, since the pursuer has produced receipts for them by Thomas Shaw to his agent, and the trustees are now in the place of Thomas Shaw. This was decided in the case of *Strachan v. Stewart*, 9 Macph. 116.

Authorities quoted—*Stair*, iv. 32, 2; *Clark v. Clark's Trs.* (Lord Cowan's remarks) 23 Dunlop, 80.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in saying that the record in this case is very unsatisfactory; but there is one thing that appears to be very clear, and that is, that the contract of copartnership dated 25th June 1847 is a necessary and fundamental part of the pursuer's title to sue. It is not his whole title; there are two assignations which are also part of his title as much as the contract of copartnership.

That being so, and these documents not having been produced, the question is—whether this action can be allowed to proceed till a proving of this tenor has been brought. I am of opinion that such a proving of the tenor is indispensable here. As to the cases quoted by Mr Campbell, they are not in point. There are many documents that in the course of an action may, as a mere incidental part of the probation in the case, be admitted to proof, but when the writing referred to constitutes the title of a party to sue, I never heard it contended that he could proceed without proving the tenor of it. The interlocutor must therefore be recalled, and the case sisted for the pursuer to bring an action for that object.

LORD DEAS—I agree with the Lord Ordinary and your Lordship that this record is most unsatisfactory.

The title of the pursuer consists of a contract of copartnership and two assignations. There is no want of evidence that these existed, and there are ample means of proving their tenor. The natural course is to do so. If there had been no means for doing it, and that had been shewn to be the fault of the other party, there might have been reason for proceeding to a proof at large; but that is not so. Without these materials for proving the tenor, I do not know to what course we might have been driven. We might have been forced to this conclusion—that we knew the pursuer was a partner, but knew nothing of the conditions of the partnership, but as we have them

I quite agree with your Lordship that this interlocutor must be recalled.

LORD ARDMILLAN—I am of the same opinion. It will not do to remit to an accountant merely because this is a case of accounting. It is based on a contract of copartnership, and there are no means by which the Court can know the contents of that contract without proving its tenor.

LORD MURE—I have no difficulty in concurring. The action is brought upon an alleged contract of copartnership. The moment that is disputed we must inquire into its terms, and unless it is produced that can only be done by an action of proving the tenor.

Interlocutor recalled and case sisted.

Counsel for Pursuers—R. V. Campbell. Agents—Hill & Fergusson, W.S.

Counsel for Defenders—Asher—M'Kechnie. Agent—John Carment, S.S.C.

Wednesday, June 14.

SECOND DIVISION.

[Lord Shand, Ordinary.]

CALEDONIAN RAILWAY COMPANY v.

WILLIAM BAIRD & COMPANY.

Nuisance—Pollution—Drainage—Property—Landlord and Tenant—Interdict.

Owners of property erected a mining village on the banks of a stream. Into this stream went drains intended for the conveyance of ordinary surface drainage; other arrangements being made for the sewage pollution of the village.

In a process of suspension and interdict at the instance of an inferior heritor complaining of pollution—*held* that the pollution being established, it was not a good defence to aver (1) that the drains were only surface drains, and were misused by the fault of the miners against the orders of the proprietor; or (2) that the proprietor could not be interdicted for the act of the tenant.

Observed (per Lord Justice-Clerk) that there is a distinction between the case where tenants are on lease, and where they are removeable at will.

Opinion (per Lord Gifford) that a proprietor in erecting a village is bound absolutely to prevent pollution.

This was a note of suspension and interdict presented by the Caledonian Railway Company against William Baird & Company, iron and coal masters, Glasgow, for the purpose of putting a stop to a system of drainage by which the sewage from the village of Auchinsterry, belonging to the respondents, was conveyed into a burn which flows into the Forth and Clyde Canal. The complainers prayed the Court to "suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents from carrying or conveying the drainage or sewage of the dwelling-houses and outbuildings connected therewith, recently erected by them at Auchin-

sterry, in the parish of Cumbernauld, into the burn or watercourse immediately on the west of said houses and buildings, and thence into the canal known as the Forth and Clyde Canal, the property of the complainers."

The Lord Ordinary passed the note, a record was made up, and proof led. The facts of the case, as brought out in the proof, are fully narrated by the Lord Ordinary in the opinion which accompanied the following interlocutor, dated 8d February 1876:—

"Having considered the cause and proof, Finds that the respondents, in the erection of the mining village belonging to them on the lands of Auchinsterry, have provided a system of drainage by the use of which, in accordance with the purpose and design of the works, sewage or drainage of a grossly polluting kind has been for some time carried into the burn to the west of these lands, and thence into the Forth and Clyde Canal, to the injury of the complainers, and in violation of their legal rights: Finds that in these circumstances, and unless the evil complained of shall be forthwith remedied, the complainers are entitled to the interdict asked, but supersedes consideration of the cause for one month to allow the respondents an opportunity of stating the means they propose to adopt to prevent further pollution of the water of the burn and canal: Grants leave to reclaim against this interlocutor; and meantime reserves all questions of expenses.

"*Opinion.*—The complainers, the Caledonian Railway Company, in this action complain of the pollution by the respondents of a burn or watercourse which flows into the Forth and Clyde Canal at Auchinsterry, in the parish of Cumbernauld, and of the pollution of the canal itself. The respondents, Messrs William Baird & Company, are extensive owners or lessees of minerals in the neighbourhood of Auchinsterry, and for the accommodation of their miners and workmen in that locality they have recently erected about 100 dwelling-houses, which at present contain a population of about 600 persons on the lands of Auchinsterry belonging to them, and which adjoin the property of the complainers, who are the owners of the canal and its banks. The erection of the houses was begun in November 1873, and the houses, and drains or sewers made in connection with them, were finished in August 1875. Immediately to the west of that part of the respondents' property on which the houses have been built, the burn, which is mainly fed by an important stream, flows northward to the canal. The complainers are proprietors of the ground through which this burn flows for a space of upwards of 10 yards, immediately before it joins the canal; and they maintain, as proprietors of this part of the burn, and separately, as proprietors of the canal, that the respondents in carrying the drainage or sewage from the miners' houses and their pertinents into the burn, have polluted the water of the burn and of the canal, to their injury.

"The natural slope of the ground from the miners' houses, which are built in several rows or streets, and the outhouses connected with them, is towards the west and north, that is, directly in the course which the burn takes towards the canal. The burn has from time immemorial emptied itself into the canal, and I see no reason to doubt that the respondents, as proprietors of

the lands of Auchinsterry, are entitled to have the natural drainage of these lands conveyed northwards by and in the course of the burn.

"The respondents deny that the pollution is of the nature or extent alleged by the complainers. They maintain that they are making a natural and lawful use of the ground belonging to them in erecting houses on it, and that such drainage water as is transmitted into the burn, and thence to the canal, being the result of the natural and lawful use of the subject, the complainers have no valid ground of complaint. Separately, they maintain that even if the pollution complained of be unlawful, they are not the parties responsible or liable to an action like the present, and that the occupants of the houses are the persons against whom alone the remedy of interdict can be asked.

"It has been proved beyond question that for time immemorial the stream or burn already referred to, which is of comparatively small extent, and has its origin within a short distance of the canal, in ordinary weather has always been clear and pure water, and was fit for all the primary purposes previous to the erection of the respondents' houses, and the introduction of the drainage from these houses into it. Several witnesses have stated that they frequently drank the water of the stream, and used it for all domestic purposes, and the chemists who were examined on both sides are agreed that down to the point at which the sewage or drainage from the property of the respondents is let into the burn the water is pure and wholesome. It has been further proved that the result of the discharge of the sewage or drainage water coming from the property of the respondents into the burn, at a point a few yards before it enters the complainers' property, is to destroy the water for its primary purposes, and to pollute it to a considerable extent. The witnesses vary in their views as to the amount of pollution. The respondents' servants, and others in charge of the drainage and sanitary arrangements of what may be called the mining village, represent the pollution as comparatively trifling. On the other hand, the complainers' servants, and others who have occasion to be frequently at that part of the canal, or who reside in the neighbourhood, state that not only is the water in the burn much fouled, but that in the canal itself it is quite usual to find a considerable line stretching outwards and on each side of the mouth of the burn, shewing an area of considerable discolouration, and that the discharge from the drain causes the offensive nauseous smell of ordinary town sewage in the burn, and in the canal where the burn flows into it. The chemists examined by the complainers—Dr Aitken and Mr Dittmar—speaking from an analysis of water taken quite recently from the mouth of the drainage pipe, pronounced it to be sewage of a most offensive kind; and on this subject the evidence of Dr Macadam and Dr Wallace, the chemists examined for the respondents, does not really differ very materially. They both stated at the close of their evidence that the water emptied from the pipe which forms the outlet of the drain contained a considerable quantity of organic matter in suspension and solution, so much as to destroy the water of the burn for its primary uses, although not so much as, in their opinion, materially to affect the water of the

canal, which they say itself contains a considerable amount of impurities. It has been further proved that in that part of the bed of the burn situated between the discharge pipe and the canal there exists to some extent a flocculent growth of vegetable matter, which the complainers' witnesses say is never present except where the excreta of ordinary town sewage has been carried along. The evidence as a whole, in my opinion, shows that the result of the discharge from the pipe used in connection with the drainage of the respondents' property is not only to destroy the water of the burn for its primary uses, but also sensibly and prejudicially to injure the water of the burn and of the canal, in consequence of the animal and organic matter which is thereby brought down, including to some extent the worst elements of town sewage.

"The respondents have led evidence to show that the system of drainage and arrangements for avoiding, or at least diminishing the pollution of the burn and canal by the inhabitants of their houses are of an unusually careful nature for such a village. Outhouses have been provided for the use of the persons occupying the different houses, containing privies, ash-pits, and washing-houses. Immediately beyond those outhouses, which are to the front of the lines or streets of dwelling-houses, there are open gutters or drains, by which the ordinary surface-water, and water used for cooking or otherwise in the houses, and thrown out of them, is carried away. It is stated that the arrangements are fitted to secure as effectually as can be done that excreta or other solid sewage matter shall not find its way into the drains, and that the only water which takes that course is the surface-water flowing through the drains or gutters just referred to, or water run off directly from the washing-houses. At the lower end of each of the rows of houses there are cesspools in the course of the drains to intercept any solid matter which may find its way through them, and which are cleaned out periodically, as required, and at a short distance above the discharge-pipe already referred to. Still lower down, and which is also emptied from time to time, there is a filter in three compartments, also well suited from its construction to intercept solid material. The proof appears to me to show that an effort has been made to reduce the amount of pollution of the burn to as small an extent as possible under the general system adopted, but I think it is clear that, notwithstanding the respondents' arrangements and regulations, and as the result of the system provided by them, there still exists a discharge of polluting material into the burn of the nature, and having the effects, already stated. The privies erected for the miners are quite unsuitable for use by women or children, and there appears to be no doubt that a considerable amount of excrement deposited on the floors of the outhouses or in the immediate neighbourhood of the open drains finds its way through the drains towards the burn. This is certainly so in wet weather, when the surface-water flows into the drains from the sloping ground above them. In the same way, a large amount of similar polluting matter must find its way through the drains, having been carried out, mostly in the mornings, from the miners' houses, and thrown into the open drains, which are intended to carry

away liquid refuse. The respondents, by means of their servants, check this practice where they can; but, as there are no drains in the houses, it is obvious that the liquid refuse thrown out from the houses must contain much foul and polluting material. The existence of excretal matter in the drains is proved by the evidence given as to the contents of the cesspools and filter already mentioned, spoken to by a number of the witnesses, and it accounts in a great measure for the observations of the chemists as to the noxious nature of the water discharged from the respondents' pipe into the burn. Even if it were the fact, as maintained by the respondents, that the only polluting matter which passes through the drains is from the fouled water used in the houses in cooking and otherwise, for which it is conceded they were and are intended, this would only show that what may be called the legitimate use of the drains, according to the respondents' view and intention, is of itself sufficient to produce the pollution complained of.

"In this state of the facts, it does not appear to me to admit of serious doubt that the complainers are entitled to the interdict which they ask. It was maintained in argument, on the assumption that the respondents can be regarded as the parties causing the pollution, that they were entitled to run into the burn water polluted to some extent, if the pollution arose from what was called the natural occupation and use of their property. No authority was cited in support of this view, and I see no reason to doubt that the complainers, who have hitherto had a flow of pure wholesome water into and through their lands into the canal, are entitled to resist any material change in the character of the water as a violation of their rights. The erection of a mining village may be a fitting and proper use by the respondents of their property, but in that use they are not entitled to invade the rights of their neighbours by destroying the flow of pure water which has hitherto been enjoyed. They must make their arrangements for disposing of the sewage without invading the rights of the lower heritors, or otherwise discontinue a use of the subjects which involves an invasion of these rights, and which, on that account, is not a proper or lawful use of their property. But again, it is said the respondents are not the parties who have caused the pollution, or who are responsible for it, and that the complainers' remedy is by interdict against the true wrongdoers—the occupants of the houses. On this point it cannot, I think, be disputed that in erecting so many houses to be occupied by hundreds of persons the respondents were bound to make some provision for carrying off the filth and sewage which is necessarily incident to the occupation of the buildings, without violating the rights of others. If no provision had been made, and the tenants of the houses had been left to discharge filth of every kind directly into the burn, which no doubt they might have been interdicted from doing, I cannot doubt that the respondents would also have been liable to interdict against a use of their property which must necessarily result in pollution of the stream. The respondents have recognised their obligation to make proper drainage or sewage arrangements, and the question is whether the works executed are of a nature sufficient to relieve them from responsibility. If it

could be shown that pollution would not occur from the natural and ordinary use of these works, which are in all respects sufficient to provide the means of drainage without causing pollution, but has arisen entirely from the wilful acts of the occupants of the houses, in declining to avail themselves of the provisions made by the respondents to prevent pollution, the complainers' complaint and remedy might not be against the respondents. But this is not the true state of the facts. The respondents have no doubt made arrangements which will secure that the houses and outhouses and surrounding ground shall be kept free from any permanent accumulation of filth, and so far as regards the sanitary arrangements for the houses, these arrangements may be entitled to the commendation bestowed on them by some of the witnesses. But the drainage works provided for the use of the village are not only of a kind which will admit of pollution being caused by their misuse, but are such that, if used as it may naturally and reasonably be expected they will be, will and do cause pollution. The respondents' case is that no excretal matter finds its way into the drains, which are used only, as intended, for the liquid refuse from the houses and the draining of the wash-houses. It is clear there is pollution in fact, and if this be as the respondents allege, then the pollution is the direct and inevitable result of their draining scheme, used quite in the way they intended and designed it should be by their tenants. I am of opinion, however, from the evidence, that the drains do carry off to some extent sewage material of a more noxious character than the respondents admit; and, in particular, convey excreta carried out from the houses and thrown into the open gutter, and washed into the gutters in wet weather from the outhouses and surrounding ground. That the drains and gutters are used and act in this way is, I think, the natural result of the situation in which they are placed, for they form the only means of carrying away filth which has accumulated in their neighbourhood in wet weather, and the most likely and convenient means to be used by the inhabitants for getting rid of much of the filth and refuse from their houses. On these grounds, I am of opinion that the pollution complained of is the result of the use by the inhabitants of the drainage system provided by the respondents which might naturally and reasonably be expected. This being so, the pollution is to be traced to the respondents' works, and for the result of these works the respondents are responsible.

"It does not appear to me that any separate or difficult case arises in reference to the canal as distinguished from the burn. The complainers are entitled to resist the discharge of sewage or polluted drainage water into the canal as effectually as into the burn, but, on the other hand, their rights are no higher in regard to the canal than in reference to the burn. They have an obvious interest to prevent the water of the canal being made a receptacle for gross impurities, for the water being, comparatively speaking, stagnant, such impurities are calculated to make it most offensive, and so to injure the canal seriously for the purposes of navigation. It is surprising to find from the evidence that at some points considerable quantities of sewage are per-

mitted to run into the canal. The fact that this is so does not, however, give the respondents a right to use the canal in this way for a new village, and it may be found that other parties so using the canal have no better right to do so than the respondents.

"As the result of my judgment, the complainers are entitled to put a stop to the present use of the drains leading to the burn and canal. But before granting interdict I think it is reasonable in the circumstances that the respondents should be allowed some time to make other arrangements; and while I shall find that the respondents have caused the pollution complained of in violation of the rights of the complainers, I shall in the meantime supersede consideration of the case for one month, to allow the respondents an opportunity of stating what they propose to do to put a stop to the existing evil."

The respondents reclaimed, and argued—A person cannot be interdicted from doing a thing which is done against his will. The fact of contamination is not sufficient unless it be shown that something nimious and improper has been done by the party whom it is sought to interdict. Nothing was done in the present case except to provide artificial channels for taking in its natural direction surface-water, which the inferior proprietor was bound to receive.

Authorities cited—*Campbell v. Bryson*, 3 Macph. 254; *Montgomerie and Fleming v. Findlay*, 15 D. 853; *Young v. Coll's Trustees*, 10 Shaw 666; *Collins v. Hamilton*, 15 Shaw 895; *Weston v. Incorporation of Tailors*, 1 D. 1218; *Attorney-General v. Richmond Commissioners*, May 1866, 14 L. T. 398.

Authorities cited for suspenders—*Attorney-General v. Birmingham Commissioners*, 4 Kay and Johnson, 528; *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R., Chan. App. 153; *Duke of Buccleuch v. Cowan*, 5 Macph. 214; *Egremont, Moody and Malkin*, 404; *Tenant v. Golding*, 1 Salkell 21; *Cockwell v. Russell*, 26 L. J., Com. Law Excheq. 34.

At advising—

LORD JUSTICE-CLERK—I think in the shape in which the case has now been presented any difficulty that I felt on one part of it has been entirely removed. I have no difficulty on the question of nuisance. It is quite clear from the evidence that the amount of pollution which is caused by the burn to the canal is greater than it was before, and the superior heritor was not entitled to increase the amount of impurity. But it goes a great deal beyond that, because, making all allowance for difference of opinion among scientific men, it cannot be doubted that the state of the burn between the outlet of the syvers and the canal, and the state of the canal itself where the burn flows into it, is a nuisance in the strongest sense of the word. I have no doubt about that at all. Neither have I the slightest doubt that the defenders, Messrs Baird & Co., or their tenants, had no right to do this, and that it was no part of the natural right of the riparian proprietor to discharge these syvers into the burn. The only defence that appeared to be important was, that Mr Baird said,—“I have done nothing that I was not entitled to do. I provided this means of outlet, not for polluted water, but for clear water, or at

least water that would not be productive of a nuisance, and it is only the bad habits of my tenants in this village which have created the nuisance such as it is." That defence might have had some importance if the facts of the case had been sufficient to sustain it. But in the present case it appears to me that that question does not arise. In the first place, it is not pleaded. Mr Baird not unnaturally assumes the responsibility and challenges our verdict on that footing, for he raises no question as to his not being the perpetrator of the nuisance, if nuisance there was, but he denies that there was a nuisance. And secondly, he says—"I have done no more than exercise the right which I had." Therefore, although I do not think there would have been any inconsistency in maintaining both pleas if he had done so, I find nothing in this record which indicates that his defence was that he had done nothing to aid or assist it. It turns out that the inhabitants of these houses are his colliers, who are working in his mines, and I suppose receive their habitations as part of their wages, and only so long as they remain his servants. In such a matter as this I am disposed to look on those men as being entirely under the control of their landlord, and truly as representing him in what they have done, and I think he is responsible for what they have done. He can at any time turn them out of their houses; and even if he had pleaded, which he has not done, that they are wrong-doers and not he, I should not have been disposed in the circumstances to sustain that plea. I do not think a tenant who has an independent position—even a tenant for a year—would be in the same position as his landlord. The landlord would not then be liable for all the tenant might do. But I regard these men as being truly only the servants of the landlord, occupying these houses as part of their wages, and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD ORMDALE—I am of the same opinion. There are two questions in the case which have been contested throughout—1st, Has a nuisance been committed? or, in other words, Has there been a breach of the laws of neighbourhood? 2d, Are the respondents liable? In regard to the first of these questions, I concur in thinking that there can be no reasonable ground for doubt. The proof is to my mind quite satisfactory, and I think it was all but conceded at the outset that there was evidence of the canal having been made more offensive and more a nuisance than it had been originally. The canal did not, I suppose, contain the very purest water, and probably it was not fit for primary uses; but you are not entitled to make it worse. You might go from one step to another till you rendered it a complete puddle, so that it would become impossible for any vessel to traffic upon it. On the question whether there has been a nuisance here of which the canal proprietors are entitled to complain, I entertain no doubt whatever. The other question might be a very nice question in many circumstances, but it appears to me that in the circumstances of this case there is not much difficulty, and I think the Dean of Faculty made that very clear indeed before he stopped. The case of *Dunn v. Hamilton* was a different case from the present. There

the landlord had granted a lease, and he not only denied the existence of a nuisance, but he said that the purpose for which the lease was granted, viz., a dye-work, was not calculated to produce a nuisance. He adopted the defence of the tenant on that footing; and when it turned out that it did create a nuisance, he was held to be identified with the tenant, and equally responsible. But the present case is quite different. The Messrs Baird do not identify themselves in that way with the tenants. They throw the tenants out of view, and they take up the matter and say, "We deny that there is any nuisance;" but, alternatively (and I think they are entitled so to put it), they say, "If a nuisance has been committed, we did not authorise it, and it is not done by us." But I think the record and pleas amount to this, that if there is a nuisance they are responsible for it, and the facts on this branch of the case undoubtedly show that they are responsible. They have erected the village for the occupation of their own workers; they have created the system of drainage, but unfortunately they do not completely filter the water so as to make it quite pure where it enters the burn. It is there the evil arises. But they created the system, and they entirely control it, so that they in a manner tell their work-people—"You have no business with the carrying away of these offensive matters. We will manage that you may rely upon us to do it." Well they have failed to do it perfectly, so that the burn is polluted, and the necessary consequence is that the canal also is polluted. In these circumstances, I entirely agree with your Lordship in thinking that the interlocutor of the Lord Ordinary is well-founded and should be adhered to.

LORD GIFFORD—I am entirely of the same opinion. I cannot help regarding this case as one of very considerable importance to the general law, because it raises the question how far a landowner, who is laying out his ground for feuing or for the erection of houses, is bound to take the necessary precautions to secure that a pure and potable stream which flows through his property shall continue to be transmitted in the same state to the heritor below him. Now, I think the heritor is bound to secure that. In the present case there is no material dispute, I think, and there can be no great variety of opinion, as to the facts. I think it is completely proved—first, that this burn was a pure and potable stream, fit for primary uses, before the respondent's village of Auchinsterry was erected there; second, the burn is no longer a pure and potable stream, fit for primary uses, but is a polluted and polluting stream; and in the third place, I think it is proved that the pollution which has made this change on the burn is sewage water. I use the word sewage in its large and general sense—polluted fluid coming from dwelling-houses, or from a village, or from streets where men and women reside. I do not think there is any good distinction between sewage created by any other means by which water is made dirty. The one is worse than the other, but they are both polluting water, and in the general sense of the word all the polluted fluid which comes from human dwellings is sewage water. I dare say there may be a distinction

taken in the case of hydropathic establishments, where there are large baths, and where the water may be very little polluted; but in the ordinary case it is that which flows from a house into its drain for carrying off polluted matters, and which contains the whole polluted matter created in the house. Now, I think it is proved here that the polluted matter comes from the village of Auchinsterry, and is sent down or flows down a pipe, cess-pools, or filtering-ponds, and ultimately into a discharge pipe, all the property of, and all constructed and maintained and upheld by, the respondents. Now, what is the law in a case of this kind. I think the law may be laid down—and I am disposed to lay it down in very broad terms—that an upper proprietor is not entitled in any circumstances, or by any means whatever, to pollute a pure and potable stream which passes through his property, and to send it down an impure and unwholesome stream into his neighbour's property. I cannot go along with the argument so ably maintained by Mr Balfour, that in this case it is practically inevitable, and therefore that he has a right to do it. I think he has no right to do it. If he cannot erect a village without polluting this stream, then he must not erect it. I do not see that he has any right to interfere with the property of another man by building a village for his own behoof. I do not think it necessary to go into the questions about agricultural drainage, and how far agricultural drainage tainted with manure might or might not be stopped, but I find that a proprietor cannot in any circumstances send sewage water into a pure stream to the effect of destroying that stream for its primary uses. I think that is the result of the cases referred to. One of these cases was a very strong case. There were hundreds of thousands of inhabitants, and it was asked, where are they to send their sewage? The answer was—anywhere except into their neighbour's property; and that was the judgment of the Court. A stronger case than that could hardly be, and it is an *a fortiori* case to the present. The only other point is—Is this pollution substantially caused by the defenders, and is the remedy rightly asked for? I think it is. If they had demised all their property, including this system of drainage, to somebody else; and if they had feued the property generally, and the vassal had erected villas or houses, the case would have been quite different. But the proprietors of this village are the Messrs Baird; they draw the rents, and they let the property; the system of drainage is exclusively their property, devised and upheld by them alone, and it is by means of that system of drainage that the injurious substance which destroys the defenders' pure stream is sent into it. I cannot hold that any remedy lies at the instance of the pursuers against the tenants. One tenant might be interdicted from doing a particular thing, but the sewage will still come down that stream, and it is very conclusive against the respondents that they intended it to come down. They made provision for sewage water coming down in that way, making the ordinary arrangements for stopping the solid sewage by means of cesspools, and ultimately by means of a filtering tank, but having the fluid sewage, which is the thing which does the mischief, to flow from the cesspools into the filtering tank, and from the filtering tank direct into the

stream, which it absolutely destroys. I cannot doubt that the defenders are doing that. It is said, What will happen if nothing is done, and the case comes up for breach of interdict? I quite agree that the Court is bound to take care that they do not give such an interdict as it is impossible to enforce, or such an interdict as the parties against whom it is directed cannot obey. But I do not see that there can be any difficulty as to that here. I have a little doubt as to the words of the Lord Ordinary's interlocutor, for he finds "that unless the evil complained of shall be forthwith remedied, the complainers are entitled to the interdict asked." I hesitate about affirming that, because it defines what we are going to interdict. The complainers are entitled to a remedy to have the pollution stopped, and when we come to frame the terms of the interdict I think there will be no difficulty in doing it. The thing to be prevented is the discharging of polluted water from the village of Auchinsterry into this pure burn, by means of any apparatus belonging to the defenders for that purpose. I do not think we could prevent a miner running out at night with his pots—that might not be a thing for which Messrs Baird would be answerable; but they must not have this drain and these pipes and filtering tanks to overflow and pollute the burn. That is what I am prepared to interdict if Messrs Baird do not adopt some remedy. In the meantime I do not doubt that a remedy is possible, and if it is said that this matter may be worse than ever if the present system is put a stop to, there will be another remedy for that, namely, a proceeding under the Sanitary Acts, or a prohibition with reference to inhabiting these houses. I take a pretty strong view of this case. I think this burn must at all hazards be kept pure, and the canal company, as proprietors, are entitled to assert their right to it by interdict against any one who makes it unfit for primary uses.

LORD NEAVES concurred.

The Court adhered to the interlocutor of the Lord Ordinary, and allowed the respondents a month from the date of this judgment to consider what steps should be taken to obviate the nuisance.

Counsel for Respondents and Reclaimers—Balfour—Mackintosh. Agents—Webster & Will, S.S.C.

Counsel for Complainers and Respondents—Dean of Faculty (Watson)—Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Wednesday, June 14.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.]

PETITION—THE HONOURABLE MRS ELIZABETH BINNY OR MAULE, AND MISS PATRICIA MAULE.

Entail—Rutherford Act (11 and 12 Vict. cap. 36, sec. 3)—Disentail—Fee and Liferent—Heir of Marriage—Marriage-Contract—Fiduciary Fee.

An entail contained in a contract of marriage, dated 9th April 1844, was executed by