

self a changed and a happier man. I am not here to lay it down that total abstinence is incumbent on every man, but to a man like you, in whom an element of disease so dangerous to himself and to others has developed itself, no duty can be more imperative than absolutely and altogether to avoid the indulgence which, if again given way to, may naturally be expected to produce similar or still more lamentable results than it has already done.

Your sentence is for the shortest period of penal servitude the statute allows, namely, penal servitude for five years.

Counsel for Crown—Montgomerie, A.-D.

Counsel for Panel—Asher—Mackintosh.

## COURT OF SESSION.

Tuesday, January 7.

### SECOND DIVISION.

[Lord Shand, Ordinary.]

#### FRASER'S TRUSTEES V. CRAN.

(*Ante*, May 31, 1877, vol. xv., p. 179; 4 R. 794.)

*Nuisance—Interdict—Works Carried on so as to Create a Nuisance—Procedure where a Breach of Interim Interdict Proved.*

In an action of declarator and interdict brought in the beginning of 1876 against a manure manufacturer by a neighbouring proprietor to have a nuisance removed, the Court made a remit to a man of skill, who recommended improvements which were carried out, and in consequence of which a great diminution of the nuisance followed. Subsequently a second remit was made, and in the meantime interim interdict was granted against the works being carried on so as to be a nuisance. A complaint was afterwards lodged of breaches of the interdict, and the Court granted the respondent three months in which to carry out improvements. A minute was lodged in June 1878 complaining of further breaches on a number of occasions, which were found to be proved. Suggestions of compromise on both sides proved abortive. The pursuers thereafter moved for decree, which—in respect that it was not alleged that anything further could be done to abate the nuisance, and in view of the fact that the breaches of interdict had not been wilful—was granted to the effect that the respondent should not be entitled to carry on his manufacture so as to create a nuisance, and interdict against his so doing was declared perpetual.

*Interdict—Breach of Interdict—Penalty.*

Circumstances in which, under a petition and complaint for breach of interdict granted against the continuance of a nuisance arising from the smell from manure works erected close to a residential estate, the only penalty inflicted was the whole costs of the judicial proceedings consequent thereon.

*Observations on the Esk Pollution case (Duke of Buccleuch v. Cowan, June 10, 1873, 11 Macph. 675).*

(The facts and previous procedure in this case have already been reported, *ante*, vol. xv., p. 179). On 6th June 1878 the complainers Fraser's trustees lodged a minute to the Second Division stating

that the interim interdict granted had been broken. Answers thereto denying any breach were lodged on 15th June. Their Lordships, after discussion on the minute and answers, allowed a proof, which was taken before Lord Gifford, and the case was subsequently debated on the proof on 12th November and subsequent days, their Lordships (*diss.* Lord Gifford) finding that though the respondent had in perfect good faith done his best to abate the nuisance, and had spent a great deal of money upon alterations, still that a breach of interdict had been committed. The question then arose as to what was to be the result of that finding, and the case, at the suggestion of the Court, was delayed till 7th January 1879, to give the parties an opportunity of settling.

An offer was made by the respondent, dated 6th December 1878, with this view, which was to the following effect:—"The defender is anxious to do what he can to carry out the suggestions made by the Lord Justice-Clerk—that parties should endeavour to effect a compromise. With this view, he is willing to undertake to cease dissolving for six months in the year, and to confine that operation to the period from October to March inclusive in each year, or to any other six months the pursuers may select. Mr Cran is also willing to restrict dissolving and emptying the den to the hours between 8 P.M. and 5 A.M., and to carry on the works under the superintendence of a party to be appointed by the Court, who shall have instructions to report to the Court whenever a nuisance is caused by his operations." Alternative proposals followed regarding a sale of the works, &c., which it is unnecessary to quote.

These terms were refused by the complainers, who proposed that if the respondent would remove his works within three months, and bind himself not to erect them within one or two miles of Bunchrew, they would abandon any claim of damages they might have, and pay him £500. This offer was refused by the respondent, and the case then came up for final settlement.

Argued for the respondent—The offer made was reasonable, and the course suggested in it was one which the Court might very reasonably adopt.

Argued for complainers—To ask more time was most unreasonable. The respondent had had sufficient time to remove the nuisance, and he had failed to do so; they were now entitled to interdict as prayed for. The same course should be followed as in the *Esk Pollution case (Buccleuch v. Cowan, June 10, 1873, 11 Macph. 675)*.

At advising—

LORD JUSTICE-CLERK—On the question of breach of interdict we have already decided that the interdict was broken, and therefore the complainer has succeeded in the ground of his complaint. It appears to me that expenses must follow in that case, and I say so because I do not think that any farther visitation on the respondent would be appropriate in the present circumstances. Although the interdict was broken, it was not broken wilfully, in this sense, that I think the respondent *bona fide* believed, and had good and reasonable cause to hope, that his manufacture had ceased to be the nuisance which it unquestionably was before. That being so I should not propose to inflict any farther penalty on the respondent beyond the expense of the inquiry which has been the result.

Then as to the case itself, I think, after the discussion which we have heard, that there is no alternative left us—that is to say, I think that the mildest result as regards the manufacturer is that we should declare in terms of the alternative declaratory conclusion in the summons, that the defender is not entitled to carry on the manufacture to the nuisance of the pursuer, and that we should of new grant the interdict with that qualification, and declare it perpetual. I have had a strong impression from the beginning of this discussion that the real alternative was either not to grant the interdict at all, or to grant it against carrying on the work; because it is plain enough that the same question as to breach of interdict may arise again as it has arisen before, and that if the suggestions that are now made as to the time and mode of carrying on the work are resorted to, and if the respondent employs, as he is entitled to employ, some one to report to him whether he thinks there is a nuisance, we may have to consider and determine precisely the same question that we have now before us. Whether I should be prepared at this moment to find that the proof establishes that the work cannot be carried on without creating a nuisance I do not say. That question has not been raised, and it is an important one. But I shall only say this, that this case belongs to a large and important category of public questions, namely, the antagonism between improved manufacture and the rights of property. But I think experience has shown that these manufactures in general can be carried on without any detriment to those in the neighbourhood, and that it is unquestionably the duty of the manufacturers who in the perfectly laudable attempt and desire to improve the manufactures of the country alter the relations and the value of property. To see that their new improvements are carried out in a way which shall not injure their neighbours; and looking to it as a public and social question, I do not think that that is any undue or injurious restriction upon the adventure or the invention or the enterprise of the commercial public. With these observations I propose that we should declare in terms of the second declaratory conclusion, that we should of new grant the interdict in terms of the alternative conclusion, and declare that interdict perpetual.

**LORD ORMDALE**—I agree with your Lordship in all the views which your Lordship has now expressed. It is satisfactory to think that the respondent can perfectly well, looking at the scientific evidence which he has himself adduced, carry on this manufacture without creating a nuisance to anybody. That is the statement of his own scientific witnesses, and that evidence, which was pressed upon us very much at the debate, went far to satisfy me that the nuisance had arisen in consequence of want of attention at sometime or another on the part of the people engaged in this work. Now, if that is so, there can be no justification whatever on the part of Mr Cran in going on in such a way that in consequence of inattention or negligence on the part of his employees nuisance is committed. We must either assume that it is so, or that those scientific witnesses whom he adduced are going beyond what they had any warrant for in their statements, and that in point of fact this is a manufacture

which in that particular place, and on the principle on which it is conducted, cannot be carried on except to the nuisance of the neighbourhood. In either view that we take of the matter it is excessively hard for the complainers. This manufacture was brought to the verge of the estate, quite close to it, within 600 yards of the mansion-house, and quite close to the grounds; the nuisance undoubtedly did exist for some time, and it has been held by the majority of the Court, and therefore must be held to be so, that the nuisance has been continued down to the very last.

Now, the Court have not been premature or hasty, I think, in the conclusion they have come to on this matter, for I find that Lord Shand, the Lord Ordinary, so far back as the 24th of March 1876, close upon three years ago, found that this manufacture of Mr Cran's had been committing a nuisance, and in an elaborate judgment he set out the grounds on which he had come to that conclusion. His interlocutor in substance has been adhered to by this Court, and during those three years which have elapsed since that interlocutor and judgment of the Lord Ordinary, the Court have allowed from time to time the greatest possible indulgence to the manufacturer. They have allowed him to make his experiments, and under the supervision of men of the very highest skill that could be obtained in the country to endeavour to carry on his works without committing a nuisance; and now, at the end of three years, and after we have found that he has been committing a nuisance down to the last, and has so been committing a breach of the interdict which had been granted, we are asked still to allow him to go on with his experiments. I do not think there is any good ground for that at all, and the *Esk* case appears to me to be a precedent for not allowing it. It is quite true that in that case the interlocutor of the Court bears to proceed in respect that no new statement or proposal was made, but I think we must take that in connection with what the report bears that the defenders there did, for I find at p. 677 of the report that the defenders argued that "they had done their best hitherto to mitigate the nuisance, and had greatly abated it. They were still going on experimenting, and hoped to be able to cure it altogether. They were willing, and craved the Court to appoint men of skill to endeavour to do so. If that was not done, and if interdict was granted as craved by the pursuers, the works must be stopped. It was more reasonable to allow the nuisance to proceed for a time until the experiments for its removal were exhausted than to put an end to such important industries. The defenders were willing to make every experiment and to carry out every suggestion, but if interdict was granted, such experiments would be carried on at a risk of a breach of the interdict."

Now, nothing can express more distinctly the argument that has been addressed to us on the part of the respondent. It is very much to the same effect. All the difference seems to be that he is willing now to confine the operation of the works which is said to be causing a nuisance to between the hour of eight in the evening and five in the morning, and he is willing also to allow the complainers to have somebody there on their behalf to watch the proceedings. Now, these proposals might be all very well if the complainers were agreeing to them, but I do not think that

they are such as the Court can take cognisance of or entertain, any more than they could do so in the Esk case. The parties said, "We have not yet exhausted our experiments—we are going on with them—we ask to be allowed to go on till we have exhausted our experiments, and we expect the nuisance will be entirely cured." These proposals, after the great lapse of time which had taken place, the Court thought they were not bound to entertain; and the statement in the report that no proposals were made means no farther proposals of a nature that could be entertained by the Court. That is what is meant by the passage in the judgment of the Court to the effect that no further proposals had been made.

Now, I think no farther proposals have been made in this case that the Court can entertain after all that has taken place.

Your Lordship proposes that in the application for breach of interdict no farther consequence should be visited upon the respondent than to find him liable in the whole expenses that have been incurred. I concur with your Lordship as to that. I think the respondent has been endeavouring to do what he could to abate the nuisance. Whether he may be able to carry on the works under this interdict, so as not to commit any nuisance or not, I cannot tell. It is for him to consider that. That is entirely a matter for himself. But seeing that he has been at very great expense in endeavouring to carry on his work without committing a nuisance, I think that it will probably be sufficient to visit him with the whole expenses that have been incurred by the complainers so far as the petition and complaint is concerned. And in the same way as to the principal action, I concur with what your Lordship proposes, that we should give judgment (for it really comes to that) in terms of the second alternative of the summons, which is all that the pursuers ask, and in that action also that the defender should be found liable in expenses.

**LORD GIFFORD**—In the present position of this case we are really shut up to the course which your Lordship has proposed. Whether it might not go farther is another question. But as the only interdict which the pursuers now ask is an interdict against carrying on the works to the nuisance of the pursuers, I cannot doubt that they are entitled to that. Admittedly these works as originally carried on previous to the judgment of Lord Shand on 24th March 1876 were carried on to the nuisance of the pursuers. In accordance with the usual practice of this Court, which is always adverse to put down a work if it can by any means be rendered innocent, ample opportunity has been given to the defender to make such alterations on his works as will be effectual to abate the nuisance. That has been done on the report of very eminent men. But notwithstanding these alterations the pursuers complain that the works are still carried on to their nuisance. A long proof has been led on that question, and the result has been that by a majority of this Court the pursuers' averments have been affirmed, and notwithstanding all the alterations recommended by Professor Dewar it has been found that the nuisance still exists to some extent. Admittedly the defender has done all that he can—all that skill can suggest—and there is no averment on his part that he wants to try any farther or different

experiment. I could have understood that to have been said, and it was said in the Esk case; but here the defender has not said that he will be more careful than he was before, and he could hardly say that, because he produced evidence that the utmost possible care was taken.

Now, although I happened to be in the minority on the last occasion, the result of the judgment then arrived at is that the work must not go on as it has been proved to have been going on. It is the mildest remedy that we can give, to interdict the works from being carried on to the nuisance of the pursuers. I quite sympathise with the argument which was pressed on us by Mr Asher and Mr Mackintosh, that an interdict of that kind is very vague, and I may go farther and say that it is unsatisfactory, for the reason stated by them that it is very difficult for the defender to know whether his utmost efforts will or will not be successful, and it is very awkward indeed to find that though he has done everything he can he may nevertheless be disobeying an injunction of the Court. But I cannot help that. That has been the condition on which he has been carrying on the work for the last three years. Since 1876 there has been an interdict against him, and the result has shown that that interdict was justifiable, because the wrongs complained of have been found to have been committed. Therefore I do not see why the interdict should not be continued or made perpetual; and I think that is the least that the pursuers are entitled to. Anything less than that would put the defender in a more favourable position than he has been, in since 1876, and I cannot put him in that position in face of the proof that has been led. I therefore entirely concur with your Lordship that that is the very least we can do. I think that it is perhaps all that we are bound to do. We do not decide the question whether it is absolutely proved that this work cannot be carried on without being a nuisance; but it is evidently a work that requires the greatest care and attention, and it is attended with so much risk of nuisance, to go no farther, and the result of the operations in time past has been such as to entitle the pursuers to the interdict to which they limit their present demand. No doubt it is awkward for the defender, but that arises from the circumstances of the work and the position in which it has been placed. I also sympathise a good deal with what your Lordship in the chair said,—that under the compulsion of law remedies have been found or ingenuity has been exercised so as substantially to abate nuisances. And if for the future the defender resolves to carry on the work under such limitation as to season of the year or as to period of the day as will really abate the nuisance, he must take the risk of that. I think the pursuers are well entitled to the interdict which they ask, and therefore I concur with your Lordship's proposal. I need hardly add that I also concur in the opinion of your Lordship that this case, in the special circumstances, calls for the infliction of no penalty. That is perfectly plain. I think we are all of opinion that Mr Cran has been honestly labouring to abate this nuisance. He has not succeeded it seems, but the honesty of purpose and the circumstances under which he carried on the work are sufficient to exempt him from any penalty for what cannot be deemed to be a wilful breach of interdict.

I therefore concur in the judgment which your Lordship proposes.

The Court therefore pronounced an interlocutor finding the respondent liable to the petitioners in the expenses incurred by them, and remitted to the auditor accordingly.

Counsel for Pursuers (Complainers) — Lord Advocate (Watson)—Trayner—Moncreiff. Agents —Irons & Roberts, S.S.C.

Counsel for Respondent—Asher—Mackintosh. Agent—Thomas Carmichael, S.S.C.

Tuesday, January 7.\*

## OUTER HOUSE.

[Lord Curriehill, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.*  
STOCK OR MOON (WM. MOON'S TRUSTEES) AND OTHERS.

*Mora—Taciturnity—Where Claim of Compensation made against Railway Company for Injuries to Property through Works Executed Twenty Years previously.*

A railway company in 1846 obtained an Act of Parliament to maintain certain piers and works, with the necessary quays, approaches, and conveniences connected therewith. The works so authorised were completed in 1851. At that time there were certain negotiations between the parties with a view to a sale, but these had fallen through. In 1877 a claim for compensation for injuries done to a property by the execution of the works in question was for the first time made by the trustees of the proprietor, who had died the preceding year. Held (by Lord Curriehill, Ordinary, and acquiesced in) that in the circumstances the claim was barred by *mora* and taciturnity.

In the year 1846 the Edinburgh and Northern Railway Company obtained two Acts of Parliament, viz., "The Edinburgh and Northern Railway (Newport Railway Extension) Act 1846," authorising an extension of their system from Cupar to Newport *via* Ferry-Port-on-Craig, and "The Edinburgh and Northern Railway (Tay Ferry) Act 1846," authorising the purchase of the ferry between Ferry-Port-on-Craig and Broughty on the north shore of the river Tay.

In the following year the same company obtained an Act for the improvement of the ferry, intitled "The Edinburgh and Northern Railway (Improvement of the Ferry between Ferry-Port-on-Craig and the North Shore of the River Tay) Act 1847." By this Act the company, subject to the provisions thereof and to the various Acts recited in its preamble, were authorised to make and maintain the requisite piers and works in the lines or course and upon the lands delineated on the Parliamentary plans, with the necessary quays, approaches, and conveniences connected therewith.

In February 1848, while the works so autho-

aised were in the course of being executed, a note of suspension and interdict was presented to the Court of Session at the instance of Mr William Moon, of Russell Mill, against the railway company and their contractor, in which it was alleged by the suspender that he was proprietor of a warehouse and wharf at Ferry-Port-on-Craig lying between the pier commonly used by the ferry-boats on the ferry on the west, and the harbour or pier of Ferry-Port-on-Craig used for shipping purposes on the east; that the said company had built a stone pier, and were proceeding with the execution of other works which would have the effect of destroying the advantages belonging to the wharf or warehouse.

An interlocutor was pronounced in the suspension and interdict by Lord Robertson (Ordinary on the Bills) on 17th March 1848 refusing to grant the interdict craved. This interlocutor was acquiesced in by Mr Moon, and the action was not further proceeded with.

The whole of the works authorised by the Act of Parliament for the improvement of the ferry were duly completed by the company in or about the year 1851. The name "Edinburgh and Northern Railway Company" was changed in 1849 into the "Edinburgh, Perth, and Dundee Railway Company," and this railway company was amalgamated with the North British Railway Company in 1862.

Mr Moon died in 1876, and on 21st September 1877 a notice and claim was served on the complainers by the respondents, who were Mr Moon's trustees, in which they alleged that the Edinburgh and Northern Railway Company, in virtue of their Acts therein recited or some of them, had required and taken for the purposes of the works a portion of the subjects in question, and had also injuriously affected the remainder thereof by reason of the formation and construction of the works, whereby the deceased William Moon and his trustees were entirely deprived both on the north-east and north sides of the subjects, of frontage and access and egress by the river Tay and beach thereof, and were prevented from landing goods in their warehouse, for which previous to the construction of the railway works the pier and shore had been used.

The trustees claimed in the notice and claim (1) the sum of £1000 as and for compensation for the portion of the subjects including the pier taken and used as aforesaid; (2) the sum of £1000 as and for compensation for the damage done to and sustained by the remaining portions of the subjects through the execution of the works.

The railway company nominated an arbiter with a view to provide against their losing the benefit of the Lands Clauses Consolidation Act, and thereafter brought this suspension against Mr Moon's trustees and the arbiter to prevent their proceeding with the arbitration.

The complainers denied that they had taken any portion of Mr Moon's property, or in any way injured it by the execution of the works. They also averred that although Mr Moon had survived the formation of the works for thirty years, no claim for compensation had been made by him, and that they were placed at a great disadvantage and subjected to the greatest possible prejudice by the undue delay which had taken place in making it, as they were thereby deprived of evidence which would otherwise have been available

\* Decided January 3, 1879.