

Birrell v. Beveridge. The evidence was not intricate; it depended mainly on what took place at certain interviews, at none of which more than three witnesses were present. The Auditor's discretion should not be interfered with; but, in any view, one copy of the proof would have been sufficient, as only one counsel was allowed to address the Lord Ordinary on the evidence.

At advising—

LORD PRESIDENT—I think the general rule laid down in the case of *Birrell v. Beveridge* (15th Feb. 1868, 6 Macph. 421) is a very salutary one, and must be adhered to. But while that rule was very distinctly laid down by Lord Deas and myself, we said that there might and probably would be exceptional cases. As regards the case before us, I am not sure that I should have been disposed to hold it as an exceptional one, if counsel had been heard within a day or two of the conclusion of the evidence; for I do not think the evidence was of such a description that any study of it would be likely to lead to a more useful and better discussion than if the speeches had been taken at once. I think it would have been better if the Lord Ordinary had taken them at once. But he did not do so, and apparently contemplated that the case should stand over till after the Christmas recess. That in itself creates a specialty which I think ought not to have occurred, but which was not the parties' doing, but the Lord Ordinary's, and that in some degree necessitated copies of the evidence, for no counsel could be expected to carry the details of a proof in his mind for weeks after it was led.

In addition, we have the fact, which also occurred through no fault of the parties, that the Lord Ordinary who decided the case was not the same as the Lord Ordinary who heard the evidence, and it was therefore necessary to go more minutely into the details of the proof than if the judge had been the same. Putting these facts together—the lapse of time and the change of Judge—I think this may be held to be such an exceptional case as was contemplated in *Birrell v. Beveridge*. But it was not necessary that more than one copy of the evidence should be made, vizt., for the use of that counsel who was to address the Lord Ordinary upon the proof. I am therefore for allowing the charge for one copy, and one only.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court allowed the charge for one copy of the notes of evidence.

Counsel for Powrie—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Counsel for Louis—Rhind. Agent—W. Officer, S.S.C.

Tuesday, June 28.

SECOND DIVISION.

[Lord Rutherford Clark,
Ordinary.

EARL OF BREADALBANE *v.* COLQUHOUN'S
TRUSTEES.

Public River—Navigation—Right of Proprietor of Banks to Execute Operations which would Hinder Navigation.

The proprietor of both banks of a public navigable river *interdicted* at the instance of a superior heritor, in respect of an agreement entered into between them twenty years previously, from erecting a bridge which would interrupt free navigation of the stream, although since the date of the agreement the stream had become so silted up that free navigation was impossible without the execution of extensive deepening operations at the mouth of the river, which operations the superior heritor, in terms of the agreement, had power to execute, but did not allege he was about to undertake.

In the year 1858 John Alexander Gavin Campbell of Glenfalloch, and the then Marquis of Breadalbane, raised a process of suspension and interdict against the late Sir James Colquhoun of Luss, Bart., to have Sir James interdicted from making certain operations upon the banks of the river Falloch, near the mouth of the Arnan or Garabal burn, to which point on that river the steamers of the Loch Lomond Steamboat Company were at that time in use to navigate the Falloch. By a joint-minute of March 16, 1859, the parties to that process intimated that an agreement had been come to by the parties on the matters then in dispute, and the action was taken out of Court accordingly. By that agreement it was provided, *inter alia*, that Sir James might under certain conditions complete the operations against which interdict was sought, that steamers might under certain conditions navigate the Falloch as far as the mouth of the Arnan or Garabal burn, and might land passengers on the estate of Glenfalloch at a point designated in the agreement. Any damage caused to the lands of Sir James in consequence of the turning of the steamers or the surge of their passage was to be compensated by the steamboat company. By the 7th article of the said agreement it was provided that Sir James Colquhoun should be at full liberty to defend the banks of the river by wadding, 'or in any other way that does not interfere with the *alveus* or channel of the river.' In particular, he was to be at liberty to do so in the parts of the river therein specified, on the condition that Lord Breadalbane, and others interested in the navigation of the Falloch, shall be at liberty to erect and maintain poles or marks along that part of the river, so as to show the navigable channel on occasion of flood. By the eighth article of the said agreement it was provided as follows:—'Lord Breadalbane, and others interested in the navigation of the Falloch, shall be at liberty, by dredging or otherwise, to remove the sand, gravel, or other debris which may collect in the river, also the bar at the mouth of the river, and in Loch Lomond, so as to preserve the

free navigation of the river; but no such dredgings to be deposited on the lands of the said Sir James Colquhoun, nor shall any of the machinery connected therewith be placed on such parts of the banks of the river as belong to him, nor any of the individuals employed in such operations be allowed to trespass thereon." Within a very few years after the date of this agreement the steamers ceased to ply up the Falloch, and began regularly to use a pier at Ardlui, at the mouth of the Falloch, the property of Sir James Colquhoun. Since that year and up to the date of the present process, the mouth of the Falloch had gradually silted up, and a bar of sand had been gradually formed, and no operations had been performed by Lord Breadalbane under the eighth article (above quoted) of the agreement of 1859 with the view of clearing the channel.

In August 1880 Sir James Colquhoun's trustees began operations with a view of throwing an iron suspension foot-bridge—for the convenience of their tenants, and particularly for children who resided on the side of Falloch, opposite to that on which the public school was built—across the Falloch, at a point 300 yards above the point at which it falls into Loch Lomond. This bridge was of a construction which, if it had been completed, would have prevented the passenger steamers which formerly went up to the Garabal burn from passing up, but which the trustees maintained, and Lord Breadalbane denied, would have permitted the largest of the scows or gabbarts, which for more than seven years had been the only vessels navigating the Falloch, to go up the river. At all events the trustees offered to make their bridge such as would allow any such scow to navigate the river. Lord Breadalbane objected to the erection of any bridge over the Falloch, maintaining that the Falloch was a navigable river, and that therefore nothing ought to be permitted which would impede its being used for all purposes of navigation. He further maintained that the operations proposed were contrary to the good faith of the agreement of 1859.

In these circumstances Lord Breadalbane brought this process of interdict to have the trustees interdicted from the erection of any bridge which would obstruct his right of navigation in the Falloch.

The Lord Ordinary (RUTHERFURD CLARK) after a proof granted interdict as craved.

Colquhoun's trustees reclaimed, and argued—What was proposed was to make for the convenience of their tenants a bridge, both piers of which would stand on their own lands, and which would not, as the proof showed, interrupt any vessel of the kind which had for more than seven years been the only kind of vessels passing up the Falloch, or indeed any vessel which could get up the Falloch unless the mouth of the river should be cleared of the sand which had silted it up. The complainer did not even say he meant to execute any such operations. The bridge, therefore, could not stop any navigation of which the river was or was likely to be capable. The evidence showed that this was not a public navigable river.

Authorities—*Colquhoun's Trs. v. Orr Ewing*, Jan. 26, 1877, 4 R. 344, and (H. of L.), 4 R. 116.

Answered for Lord Breadalbane—The Falloch

was proved to be a public navigable river. It was in the power of Lord Breadalbane at any time to deepen the mouth of the river, and that was contemplated in the agreement of 1859. The respondents were not entitled to do anything which would make the navigation less free than it naturally was.

At advising—

LORD JUSTICE-CLERK—This case comes in the end to a very short and narrow issue. I will not say I have no sympathy with Sir James Colquhoun's trustees, for as far as we see there is no material interest which their proceedings in building this bridge would interfere with; and I should have been glad if the various proposals for settlement had not fallen through, but had been accepted by the Earl of Breadalbane.

But we must decide this question as one of law, for there are other interests behind. Now, the state of matters is this. The river Falloch discharges itself into Loch Lomond, and the only question is, whether it is navigable or not? In my opinion it is navigable, though I do not feel it necessary to enter into the matter at length. It is sufficient to say that steamers were in the habit of going up the river Falloch to a certain point, where it is joined by the Arnan or Garabal burn.

Lord Breadalbane had a great interest in the Falloch, and he was engaged in a lawsuit between 1858 and 1859 connected with Sir James Colquhoun's operations on the stream. Against these operations Lord Breadalbane brought a process of interdict which was ultimately settled by an agreement dated 9th December 1858 and 1st March 1859. This agreement contains a great variety of provisions, but certainly it does not contemplate such an erection as this—indeed it is framed entirely on the assumption that the river is navigable. It is quite manifest, therefore, that it would be a breach of that agreement to interpose any obstacle to the navigation.

The state of the facts is this, Sir James Colquhoun says that since 1861 no steamers have come up the Falloch and that the river has so silted up at the mouth where it enters Loch Lomond that it is impossible for them to do so. He contends, therefore, that it is needless now to keep up the stipulations of the agreement, and that the only question for decision is, whether it is within his power to erect this bridge at a part of the river where both banks belong to him.

But it is quite evident that this will interfere with the passage of steamers, and if it does so, then I am satisfied that it will be a breach of the agreement.

It is said that to stop the proceedings of Sir James Colquhoun can be of no material advantage to anybody, but I cannot admit that it will be of no advantage to anybody, for Lord Breadalbane by this agreement may at any time remove the bar at the mouth of the river and enable steamers to go up.

The conclusion I have come to is, that the proceedings are in breach of the agreement, and I am disposed to adhere to the Lord Ordinary's interlocutor.

LORDS YOUNG and CRAIGHILL concurred.

The Court adhered.

Counsel for Suspender—Trayner—Pearson.
Agents—Davidson & Syme, W.S.
Counsel for Respondents—Asher—Baxter.
Agents—Tawse & Bonar, W.S.

Tuesday, June 28.

SECOND DIVISION.

[Sheriff Court of Dumfries
and Galloway.

M'BRIDE v. WILLIAMS & CO.

*Process—Action raised before Term of Payment
of Debt Sued for.*

Andrew M'Bride, master of a ship called "Royal Alice," ordered on 20th February 1879 from Peter Williams & Co., wholesale clothiers, Liverpool, a quantity of drapery goods, to be paid for a year after the date of order, when he should return from a voyage to Calcutta. In November thereafter the latter raised an action against him in the Sheriff Court of Dumfries and Galloway for the price of the said goods. The defender pleaded that the account sued for being not yet due the action was premature and uncalled for. On 10th February 1881 the Sheriff-Substitute (REIND) sustained the defence and dismissed the action as premature. The pursuers having appealed, the Sheriff-Principal (MACPHERSON) on 13th April 1881 recalled the interlocutor appealed against, on the ground that more than a year had elapsed since the sum sued for was admittedly due and there had been no tender of payment nor any proposal to consign.

Under these circumstances the Court, on appeal, adhered to the Sheriff-Principal's judgment.

Counsel for Appellant—Hon. H. J. Moncreiff.
Agent—Edward Nish, Solicitor.

Counsel for Respondent—Shaw—Watt.
Agents—Martin & M'Glashan, S.S.C.

Tuesday, June 28.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SCOTT v. SCOTT.

Nuisance—Sewage—Pollution.

Where a proprietrix who contemplated feuing a portion of her lands proposed a scheme in her feu-contracts for carrying away the sewage of houses to be erected thereon by means of a drain which was ultimately to empty itself into a ditch situated on the lands of a neighbouring proprietor—the Court sustained an action of interdict by the latter to restrain her in these operations on the ground of nuisance.

In this case the pursuer, who was proprietor of a portion of the lands of Wester Daldowie or Boghall, on the south side of the turnpike road leading from Glasgow to Hamilton, raised an action against Mrs Agnes Scott, who was the proprietrix of portions of these lands on the north and south

sides of the same turnpike road, to interdict her from discharging or transmitting, or causing to be discharged or transmitted, the sewage from any houses erected or to be erected on any part of the lands of Wester Daldowie or Boghall belonging to her into or through any drain situated wholly or partly on any part of the estates of his lands.

It appeared that the defender had feued certain portions of her lands on the north side of the turnpike road, and contemplated also feuing her lands on the south side thereof. Several houses had been erected on the north side, and the feu-contracts contained a system of drainage to carry a drain across the turnpike road into a field belonging to her, and thence to carry it along the north and west ends of this field and to discharge the sewage into a drain running along the north side of a field belonging to the pursuer, and thereafter into a ditch on his lands.

The pursuer pleaded—“(1) The defender is not entitled, without the pursuer's consent, to use any drains, situated wholly or partly on pursuer's property, for the purpose of transmitting and discharging the said sewage, and interdict should therefore be granted as craved, with expenses. (2) As the said intended transmission and discharge of said sewage will create a nuisance on pursuer's property, and be injurious and damaging thereto, he is entitled to interdict as craved, with expenses.”

The defender, on the other hand, pleaded—“(1) The pursuer is not the proprietor of any part of the land through which said ditch passes. (2) Said ditch, which is the natural receptacle and vehicle of the defender's sewage, has from time immemorial being used by the pursuer and others as a common sewer. (3) Any sewage from the defender's lands would not appreciably affect the ditch or change its character; and (4) No nuisance would be created by the sewage from the defender's lands.”

The Sheriff-Substitute (MAIR) found “(1) That the pursuer is proprietor of a portion of the lands of Wester Daldowie or Boghall, situated on the south side of the turnpike road leading from Glasgow to Hamilton, and that the defender is proprietrix of a portion of these lands on the north and south sides of the said road: (2) That at the date of the present action the defender was in course of constructing a drain from her lands for the purpose of transmitting sewage from the houses erected and to be erected thereon, and contemplated that the sewage should be transmitted and discharged into a drain or ditch running along the north side of a field belonging to the pursuer, and thereafter into a drain or ditch on the pursuer's lands: (3) That since the present action was raised the defender has completed her drain, whereby the sewage from the houses erected on her lands is now discharged into the drain running along the north side of the said field, and thence into the ditch or drain on the pursuer's lands. (4) That previous to the said sewage matter being led into the said last-mentioned drains the water therein was suitable and had been used for domestic purposes, and for the use of cattle drinking; but that since the transmission of the said sewage the water has