

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

become so polluted as to render it unfit for domestic purposes or for cattle, and is a nuisance : (5) That the defender is not entitled to discharge, or cause to be discharged, into the said drains on the pursuer's lands the sewage from the houses erected or to be erected on her property : Therefore declares the interim interdict formerly granted perpetual against the defender discharging or transmitting, or causing to be discharged or transmitted, into the drains on the pursuer's lands the sewage from any houses erected or to be erected by her on her lands of Wester Daldowie or Boghall : Finds the defender liable in expenses."

The following note was appended to his interlocutor :—"The question arises whether the defender is entitled to discharge the sewage from the houses erected or to be erected on her lands into or through any drain wholly or partly on the pursuer's lands? I have no difficulty in answering this question in the negative, and in doing so I may state at once that I can see no distinction in principle between this case and the cases of *Montgomerie and Fleming v. Findlay*, July 9, 1853, 15 D. 853; and *The Caledonian Railway Company v. Baird*, June 14, 1876, 3 R. 839. The rubric of the first of these cases is as follows :—"A proprietor erected upon his lands dwelling-houses, into which he introduced water by pipes from a water company's works, and by means of drains conveyed the sewage water into a streamlet which passed through a subjacent property. Held that whatever right the proprietor might have to lead into the streamlet the ordinary surface water arising from his lands, he had no right to discharge therein sewage water, and interdict granted against his discharging or permitting to be discharged such sewage or waste water upon the lands of the subjacent proprietor."

"It is not and cannot be disputed in the present case that the sewage from the houses erected and to be erected on the defender's lands will be discharged into drains wholly or partly on the pursuer's lands, but it was attempted to be proved by the defender that these drains were in themselves common sewers, and that the pursuer would not suffer in any way by the sewage from her lands being discharged into them; and it was contended for her that she was so entitled to discharge the sewage, she being in the position of an upper and the defender being in the position of a lower heritor. So far as the drain for the transmission of the sewage is on the defender's own property, the pursuer of course has no objection to it. But it is to be kept in view that it was only by means of a deep artificial cutting on the north side of the field belonging to the defender, situated on the south of the turnpike road, that a channel or drain could be made for the transmission of the sewage towards the pursuer's lands.

"The natural fall from the houses already erected on the defender's lands was in a different direction, namely, towards Broomhouse, and in this direction it was originally intended it should go. I am not satisfied, therefore, that the pursuer is in the position of a lower heritor to the defender, at least as far as the houses already erected on the defender's lands are concerned. If the pursuer is not in that position, the defender has no rights whatever affecting the pursuer's lands.

"But even assuming that the pursuer is in the position of a lower heritor to the defender, he is only bound to receive the surface water from the lands of the latter; if, however, it had been proved that the drains, wholly or partly on the pursuer's lands, were in fact common sewers, he would probably not have been entitled to complain of the defender making use of them in the same way. So far, however, from that being proved, I am of opinion that the contrary has been established. The only evidence led by the defender was that the water in the drains on the pursuer's lands was occasionally polluted in consequence of soap suds and dirty water having been sent into them from some miners' houses and the Boghall farm-house, all situated on the north side of the turnpike road. No water-closet sewage, however, was discharged into them. The evidence for the pursuer, on the other hand, shows clearly that the water in these drains or ditches on his lands was used by man and beast for drinking purposes till a period within the last ten years. Even although the water in these ditches or drains was occasionally dirty or polluted, the defender was not entitled to make it worse, and there can be no doubt that the discharge of sewage from inhabited houses would have this effect. That the water in these ditches or drains is now unfit for primary purposes, and is a nuisance in consequence of the defender's operations, has in my opinion been established."

The defender reclaimed, and argued that the cases relied on by the pursuer, viz., *Montgomerie and Fleming v. Findlay*, July 9, 1853, 15 D. 853; and *The Caledonian Railway Company v. Baird*, June 14, 1876, 3 R. 839, did not apply here, because to take advantage of them the pursuer must show what he cannot show here—(1) that primary uses having a substantial value had been destroyed by the defender's operations; and (2) that the water had been from time immemorial dedicated to primary purposes.

The pursuer in addition to these cases quoted the cases of *Rigby and Beardmore v. Downie*, March 8, 1872, 10 Macph. 568, and *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, Feb. 24, 1866, L.R. 1 Ch. App. Cases, 349.

At advising—

LORD YOUNG—We have allowed this case to stand over, not from any doubt as to the facts or the law applicable to them, but to enable the parties to effect an arrangement for the drainage of their properties which would be to their common advantage, and of which there seemed to be a reasonable prospect. The attempts which have been made have failed, and we must now decide the case as it is presented.

The facts are within narrow compass. The appellant feued certain portions of her property for building, and four dwelling-houses have been erected on them. To accommodate the feuurs she has constructed on her property outside the limits of the feus a common sewer or drain, into which they are authorised and invited by their titles to convey the sewage from their houses. This sewer or drain is made to open and discharge itself into an open ditch or water-run running for some distance between the properties of the appellant and respondent, and thereafter between the property of the respondent and Wallace's

trustees, who are not here represented. It is not disputed, or at least it is in our opinion not doubtful, that the respondent has a proprietary interest in this ditch or water-run, and is entitled to the use of it for watering his cattle, and that it has in fact been so used by him and his predecessors in title. The appellant's feuars have used and are now using the common sewer for the purpose for which it was intended and in fact constructed by the appellant, and the consequence is that the sewage from their houses is thereby discharged into the ditch or water-run, which we agree with the Sheriff in thinking is thereby polluted to such an extent as to render the water in it unfit for use as formerly and to create a nuisance. The appellant is not responsible for what is done by the feuars within their own property, or even on hers, without her aid or authority; but having given them permission to discharge their sewage into her property outside their feus, she is not entitled to convey it therefrom into the water-run in question to the nuisance of her neighbour, the respondent, and having done so we are of opinion that the respondent's complaint is well founded, and that he is entitled to have the continuance of the nuisance restrained by interdict. It is, we think, immaterial from whence the sewage reaches the appellant's property. She voluntarily, and apparently by contract, receives it there and from thence by a work of her own construction discharges it, illegally as we think, into the water-run in which the respondent is interested. The findings in fact in the Sheriff's interlocutor seem to us to be supported by the evidence, and the interdict thereby granted is within the respondent's right; for, as already observed, the appellant is not entitled to create a nuisance to the respondent by discharging sewage from her lands, wheresoever the original source of it may be.

LORD CRAIGHILL—This question appears to me to be foreclosed by the decisions of the Court in the cases of *Montgomerie & Fleming v. Findlay*, 9th July 1853, 15 D. 853, and the *Caledonian Railway Company v. Baird & Co.*, 14th June 1876, 3 R. 839. In the former the facts were that the proprietor had erected upon his lands dwelling-houses into which he introduced water-pipes from the water company's works, and by means of the drains conveyed sewage water into a streamlet which passed through a subjacent property, and on these facts the Court held that whatever right the proprietor might have to lead into the streamlet the ordinary surface water arising from his lands, he had no right to discharge drainage and sewage water, and interdict against such discharge was consequently granted. The only distinction attempted to be made betwixt that case and the present was that in the former the place into which the sewage was discharged was a streamlet, whereas here, according to the contention of the appellant, the place into which the drainage is to be discharged is only a dry ditch. Such a distinction appears to me to be no warrant for a difference in the judgment that ought to be pronounced. If anything, the present case appears to me to be worse than the case with which the Court had to deal in *Montgomerie & Fleming v. Findlay*. The nuisance created by the discharge of sewage

into a dry ditch must, as regards the lands of the respondent, be even a greater nuisance than it would have been if the discharge had been made into a streamlet, greater or less, by which in whole or in part the sewage constituting the nuisance would have been carried sooner or later away from the respondent's property. I entertain no doubt of the applicability of the cases referred to as precedents on the present occasion, and therefore concur in thinking that the interlocutor appealed against ought to be affirmed.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and found the respondent entitled to expenses.

Counsel for Appellant—Mackintosh—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—R. V. Campbell. Agent—Alexander Wylie, W.S.

Tuesday, June 28.

## SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

WALLACE v. MURDOCH.

*Property—Watercourse—Interdict—Operations in æmulationem vicini.*

A and B were conterminous proprietors between whose lands flowed a crooked stream which in times of flood did considerable damage. B, with a view to remedy this, cut within his own lands a new straight channel, by means of which the water was carried on his own side of the march dyke to a point where he proceeded to erect an embankment for the purpose of preventing the stream overflowing into his own meadow and of diverting it into its old channel on A's lands.

The Court dismissed an action of interdict and damages at A's instance, raised eighteen years thereafter, on the grounds (1) that he was barred by *mora*; and (2) that B's operations were within the legitimate use of his rights for the agricultural improvement of his farm, and not in *æmulationem vicini*.

*Observation (per Lord Justice-Clerk) on the case of Jackson & Ors. v. Marshall*, July 4, 1872, 10 Macph. 913.

At Whitsunday 1861 Samuel Wallace became tenant of the farm of Nether Minnybuie and others under a lease for nineteen years from that term. This farm was bounded on the south-east and partly on the south by the lands of Drumwhirn, the property of James Murdoch. On the southern boundary the lands of Drumwhirn slope towards the lands of Samuel Wallace, so that the surface and drainage water from them and from a portion of the farm of Nether Minnybuie, after intersecting a portion of Nether Minnybuie, flow on to a field of meadow and arable land on said farm. The water from Drumwhirn and from a portion of Nether Minnybuie found its way