

the Lord Ordinary knew much more about the facts than I do, and for this reason more than for any other I am content to abide by his decision. I am therefore for adhering.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent

The Court adhered.

Counsel for the Pursuer—J. C. Thomson—M'Lennan. Agent—Alex. Mustard, S.S.C.

Counsel for the Defender—Jameson—Watt. Agents—A. & S. F. Sutherland, S.S.C.

Wednesday, March 11.

## SECOND DIVISION.

[Lord Low, Ordinary.]

### M'NAB v. CAMPBELL'S TRUSTEES.

*River—Lease—Water in Ponds and "Streams Leading Thereto"—Diversion of Spring Percolating through Marsh.*

The lessee of a distillery had right under his lease to the water in two ponds "and in the streams leading thereto." There was a stream running into the upper pond, and through that pond down to the lower pond. Near the lower pond was a spring, the water from which, at the date when the lease began, percolated through a marshy piece of ground to the lower pond. The landlord collected the water from this spring into a tank, for the purpose of taking water to another tenant whose former supply had been polluted by piggeries erected by the distiller, precautions being taken against waste. In addition a second spring which had previously flowed in another direction, and from which the tenant's former supply had proceeded, was directed into the tank and an overflow pipe supplied to convey the surplus water to the pond. Held that the lessee was not entitled to interdict against these operations—by the Lord Justice-Clerk and Lord Trayner, on the ground that the expression, "streams leading thereto" in the lease did not apply to water percolating through the soil from a spring in no defined channel; and by Lord Young, on the ground that in the whole circumstances of the case there had been no prejudicial interference on the part of the landlord with the rights of the tenant.

By lease dated 5th, 9th, and 12th September 1889 the trustees of the late Sir George Campbell of Succoth, Baronet, let to Alexander Ferguson, wine and spirit merchant in Glasgow "all and whole the distillery of Tambowie, as presently occupied by David Chrystal, with the house occupied by the

Inland Revenue Officer, and other two cottages adjoining for workpeople, the land extending to about 13½ acres imperial, and forming part of the fields marked Nos. 99 and 142 on the Ordnance Survey map, and with the two ponds marked Nos. 140 and 134 on the said map, all lying in the parish of New Kilpatrick and county of Dumbarton, together with the right to the water in the said ponds and in the streams leading thereto, . . . reserving the right to the first parties to grant liberty to the agricultural tenant of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes; but declaring that any water returned by the tenant to the said ponds and to the streams leading thereto shall be returned in a pure state." The lease was for the period of 31 years from Whitsunday 1889.

A stream flowed from the hill above into the upper pond, through that pond, and down to the lower pond.

There was a spring which rose about 40 yards to the north of the place where the stream entered the lower pond. At the date when the lease was entered into, the water from this spring formed a marsh in the vicinity. Most of the water percolated through the ground down to the pond. There was also a field drain which came from the top of the field and ran into the pond near the place where the stream entered it.

The farm of Tambowie, which lay about 60 yards to the west of the pond and about 30 yards to the north of the stream, was supplied with water from the stream. After the date when the present lease of the distillery began, the farmer put in a tile drain to catch the spring, and at the end nearer the pond a yard of iron pipe. He opened up the ground from the dam in a small inlet and put a tub to catch the water. This water was used by the farmer to some extent, but he still obtained his principal supply from the stream. Even after the tile and pipe had been put in a considerable quantity of water still found its way into the pond by percolation through the soil. Much the greater part of the water which entered the pond came by the stream, and the proportion which came from the spring was only considerable in very dry weather. In time of flood more water came from the field drain than from the spring.

In 1891, after the farmer had put in the tile and pipe from the spring, the complainer in the present action acquired right to the lease of the distillery, conform to assignation thereof in his favour dated 29th and 30th April 1891. In 1893 he increased the output of the distillery considerably. In order to consume some of the larger quantity of draff and pot-ale thus available, and also partly to obviate the necessity of sending pot-ale down the stream, which had been objected to by the manufacturers lower down, he erected a piggery. In 1894 he built a second piggery. In these piggeries he kept from 250 to 300 pigs. The sewage from the piggeries ran over the neighbour-

ing fields and polluted the water supply of another tenant, a blacksmith, whose house and smithy were situated about 160 yards from the piggeries. This supply ran through the field where the piggeries were situated, and apparently came originally from a spring near the spring mentioned above. There was no stop-cock on the pipe at the blacksmith's house, and the water which was not used ran to waste. This water stopped after two or three weeks of dry weather. There was a trough on the roadside about 150 yards to the south-east of the smithy from which the smith also got water.

The blacksmith complained to the respondents' factor about the pollution of the water in the pipe which ran to his house. The sanitary inspector also served a notice on Mr M'Nab with regard to the pollution of the water. The factor being satisfied that the complaints were well-founded, took steps to provide the smith with another supply. It was determined to use the water from the springs near the pond, and to lead it down by the road from the farm past the distillery so as to avoid the piggeries. Mr M'Nab objected to this as an interference with his water supply under the lease of the distillery.

On 31st October 1894 Mr Thompson, the complainer's manager, wrote to Mr M'Nab as follows:—"Dear Sir, . . . I saw the factor and his clerk the other week up measuring for the water for the smith's and Galbraith's houses, and the plumber was up along with some more men looking at the place. The place that they propose taking it from is 'a spring that runs into our dam, and about 360 yards from the houses; it is a very good spring, and was nearly all the water we had to keep us going when we started. I note what you say regarding the water, and will not let them start or meddle with the water in any way unless I get other instructions from you.' . . . I have plenty water just now, and have mashed 4 backs this week."

On 29th November 1894 Mr Ralston, the respondents' factor, wrote to Mr M'Nab:—"Dear Sir, . . . As to the question of the spring water above Tambowie, had I thought that I was injuring you in any way by taking the water therefrom, I would not have gone into the matter. The daily quantity of water which will be required is, however, so small that it is quite absurd to say that you will be injured to any appreciable extent, especially as the overflow from the tank will be led into the dam as at present. Before I accepted the contract I took legal advice in the matter, and I am advised I am within my rights in my operations. I have the pipes on the ground, but although it is to put me to a great deal of inconvenience to do so, I shall as a point of courtesy to you delay commencing operations till we have met at Tambowie, when I think I shall be able to prove to you that I am not doing you any injury, which is certainly against my wish."

The factor then proceeded with the operations to obtain the new water supply for the smith. The water from the spring

was collected into a tank. A two-inch pipe was put in which carried the water down towards the blacksmith's. From this pipe a half-inch branch pipe was taken to the farmer's garden, a half-inch pipe to a cottage behind the blacksmith's house, and a three-quarter-inch pipe to the blacksmith's house itself. All these pipes were fitted with taps.

There was also an overflow pipe down to the pond.

When the ground was opened up, the spring from which it was supposed the water ran down to the smithy by the piggeries was found, and in order to get as much water into the tank as possible the old drain by which the water ran away was puddled and the water thrown back into the tank. Water still ran from the old pipe at the blacksmith's, but it stopped after two or three days' dry weather.

The amount of water which reached the pond by the overflow pipe as compared with what came in before the operations complained of was not quite clearly ascertained, as there was a conflict of testimony on the subject, but it rather appeared that though generally there may have been fully as good a supply as formerly, it was not quite continuous and stopped altogether in dry weather, whereas the run from the spring by the pipe into the tub, before the tank was put in, never ceased. Owing to the water being all collected into the tank there was no percolation into the pond. The explanation suggested by the complainer for the diminution alleged by him was that the springs having been tampered with, some of the water was escaping away in some other direction underground.

The blacksmith required and used a considerable quantity of water for purposes connected with his trade.

The cottage to which the half-inch pipe was taken was let along with the farm, but as a separate subject.

On 23rd March 1895 the complainer's agents wrote to the agents of the respondents:—"Dear Sirs,—We are instructed by the tenant of the distillery, Mr Alex. M'Nab, to bring an interdict against the trustees of the late Sir George Campbell, Bart., of Succoth, for whom we understand you act. The ground of complaint is that the trustees are attempting to take away part of the spring water which is the supply let for the distillery by a pipe of considerable size for some house or houses which never had the use of such water. They are also opening up one of the fields to lay down this pipe, and are thus encroaching on the ground let to our client without his permission. Unless the intended works are immediately stopped, and everything restored to its former condition, we shall be obliged to apply for interdict and restoration of the ground.' We shall be obliged by your letting us have the names and addresses of the present acting trustees, and saying whether you will accept service if the matter is to be contested."

They replied on 27th March:—"Dear Sirs,—We have now heard from the factor at Garscube with reference to your letter of

'the 23rd. It turns out that Mr M'Nab has erected several pigsties in a field which adjoins the house to be supplied with water, and these sewage from these pigsties has so contaminated the present supply of water that a new supply is necessary. Unless, therefore, Mr M'Nab will undertake to remedy the contamination, the introduction of a new supply must be proceeded with. What is being done is quite right and proper, and there is no interference with any of the subjects let to Mr M'Nab. It is not the case that any field of his is being opened up."

Immediately thereafter the complainer presented a note of suspension and interdict in which he craved the Court to interdict the respondents "from abstracting water from the two ponds or from any of the streams leading to the said ponds, and from diverting any water from any of the said streams, or interfering in any way with any of the said streams, or with the right which the complainer has, as lessee of the said distillery, under the said lease to the water in the said two ponds and the streams leading thereto . . . and further, to ordain the respondents to fill up any trenches or other excavations made on the lands let under the foresaid lease, and to restore the ground near to the said two ponds, and the streams leading thereto, and the said ponds and streams themselves, to the same condition in which they respectively were prior to the operations complained of."

The complainer averred—" (Stat. 3) The respondents, for the purpose of abstracting water from one of the streams leading to the said ponds for the use of the tenant of a house and smithy situated at the distance of 250 yards or thereby therefrom, are proceeding to cut a track and to lay down a pipe 2 inches in diameter or thereby from the said stream to the said house and smithy."

He pleaded—" (1) The respondents having threatened, in violation of the complainer's rights under the said lease, to withdraw water from one of the streams leading to the said two ponds in the manner above stated, the complainer is entitled to suspension and interdict and warrant for restoration as craved, with expenses."

The respondents pleaded, *inter alia*—" (3) The respondents being within their right in carrying on the operations complained of, the note should be refused and the respondents found entitled to expenses."

The Lord Ordinary (Low), after a hearing in the procedure roll, by interlocutor dated 16th July 1895 allowed a proof before answer, which was taken on 3rd and 4th December 1895, and the result of which so far as material is embodied in the foregoing narrative. His Lordship thereafter on 4th February 1896 pronounced the following interlocutor:—" Finds (1) that by the lease of Tambowie distillery granted by the respondents, and to which the complainer has acquired right, the two ponds therein mentioned were let to the lessee, together with the water in the said ponds and in the streams leading thereto; (2) that the

water of the spring situated upon the banks of the lower pond, and which flowed into the pond, was a stream leading into the pond within the meaning of the lease, although the said water did not flow into the pond by any definite or visible channel, but by percolation through marshy ground; (3) that the respondents have interfered with said spring by impounding the water thereof in a cistern for the purpose of providing a supply of water for certain cottages, and that only the overflow from the cistern now passes into the said pond; (4) that a supply of water for the said cottages is not among the uses of the water of the said ponds and streams leading thereto, which the respondents reserved right to make in said lease; (5) that the respondents have failed to prove that their operations have not diminished the supply of water to the said pond to the injury of the complainer. In these circumstances, finds in law that the respondents were not entitled to interfere with the said spring, or to divert the water thereof, and that they are bound to remove the said cistern and restore the ground to its former condition so that the whole water of said spring shall flow as formerly into the said pond: Therefore to that extent and effect sustains the reasons of suspension and interdict, prohibits and discharges the respondents from abstracting water from or interfering with or diverting the said spring, and ordains the respondents to remove the said cistern, and to restore the ground at the place where the said cistern is situated to the condition in which it was prior to the operations complained of so that the water of the said spring may flow into the said pond as formerly; reserving always, and without prejudice to the respondents' right in terms of said lease to grant liberty to the agricultural tenant of Tambowie farm to use the water power for thrashing or churning at all reasonable times, and to have the use of the water for the steading and for agricultural purposes, and decerns," &c.

*Opinion.*—"The first question is whether a certain spring of water is to be regarded as one of the 'streams leading' into the pond to which the complainer is given right by his lease.

"The complainer's occupation of the distillery began in 1891, when he obtained an assignation of the lease which is dated in 1889. The point of time, therefore, which must be kept in view in determining whether the spring is a 'stream' within the meaning of the lease is 1889. That is of importance, because after 1889, but before the assignation in the complainer's favour, a tile drain was put in connecting the spring with the pond, and through which a stream of water ran from the spring into the pond. Before the drain was put in there was no visible stream from the spring to the pond, but from the lie of the ground the water of the spring undoubtedly found its way through a marsh into the pond.

"In 1889 the output of the distillery was very much smaller than it now is, and there was not the same necessity for economising

all the available water, and accordingly I think that very probably Mr Macfarlane was right when he argued that the parties to the lease had not the spring in view when they made the contract. Even, however, if that was the case, it would not affect the construction of the lease. Assuming that there was a stream of water within the meaning of the lease, of which the parties did not know, that stream would nevertheless fall within the lease.

"By the lease two ponds are let to the tenant, 'together with right to the water in the said ponds and in the streams leading thereto.' That, in my opinion, includes as between lessor and lessee all the sources of supply of the ponds. Thus the upper pond is supplied by a stream coming down from the hills, and a stream runs from the upper to the lower pond. I do not think that the lessor could divert a spring by which either of these streams was fed, even although the water of the spring did not find its way into the stream by any defined channel. In like manner seeing that the water of the spring in question naturally and necessarily flowed into the pond, I do not think that it makes any difference that the flow was not in any defined or visible channel, but was of the nature of percolation.

"If, then, the water of the spring was part of the subjects let to the complainer, *prima facie*, the respondents were not entitled to interfere with it in spite of the complainer's remonstrances, and the *onus* lies with them to show that the complainer has not been prejudiced by their operations.

"The conformation of the ground in the neighbourhood of the spring appears to be peculiar. One spring, which is the strongest of the springs discovered, undoubtedly flowed into the pond; but other springs, rising within a few feet or yards of the first, appear to have been carried by the lie of the ground in an opposite direction. The respondents have formed a cistern into which the first spring is carried, and from the cistern pipes are taken to the blacksmith's house, to a cottage, and to the adjoining farm. The respondents, however, say that the overflow of the cistern which goes into the pond is not less than the whole natural flow of the spring before their operations, because they have dammed back the water of certain other springs which previously flowed away from the pond, and diverted it also into the cistern. If that was clearly established, I think that it would be a good answer to the present complaint, especially as I have little doubt that the old supply to the blacksmith's house was polluted, and a new supply rendered necessary by the discharge of the sewage from the complainer's piggeries.

[His Lordship then reviewed the evidence.]

"The question upon the evidence is very narrow, but I have come to the conclusion that the respondents have failed to prove that by interfering with the spring they have not injured the complainer's water supply. Of course, the intention of the respondents was to compensate the com-

plainer for any water drawn out of the cistern by the additional springs which were made to flow in that direction; but it is well known that the effect of operations upon springs of water is uncertain, and I should think that it was especially so at a place where the natural flow of springs, rising within a few yards of each other, is in opposite directions. Further, I am unable to disregard or to explain away the evidence of the complainer and his manager, that the flow into the pond is greatly less than it formerly was.

"The next question is, whether the use which the respondents have made of the water is within the reservation in the lease. The lessor there reserves right 'to grant liberty to the agricultural tenant of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes.'

"I am of opinion that the use which the respondents have made of the spring does not fall within that reservation. The occasion of the respondents' operations was the pollution of the blacksmith's water supply. If it had not been for that, the spring would not have been touched, and it is plain that a supply of water to the blacksmith's house is not a supply for the steading or for agricultural purposes. The same thing may, I think, be said in regard to the cottage to which a branch pipe is taken. A branch pipe was also taken to the farmer's garden, but I do not think that that fact aids the respondents. It does not appear that the farmer wanted an additional supply of water, and he says that it is of little use to him now that it is there. It is plain that it is equally convenient for him to draw water with a pail where the spring flows into the pond; indeed, it is apparently more convenient, because the practice is still continued.

"I am therefore of opinion that I must pronounce decree in the complainer's favour."

The respondents reclaimed, and argued—The owner of land was entitled to drain a marshy piece of ground, and to appropriate or divert the water, which previously ran over or percolated through the soil, in no definite channel, even if by so doing he prevented the water from reaching a watercourse or reservoir which it formerly fed, and thus reduced the water supply of a neighbour—*Raustron v. Taylor*, June 23, 1855, 11 Ex. 369; *Broadbent v. Ramsbotham*, January 12, 1856, 11 Ex. 602. The principles which regulated the rights of owners of land in respect to water flowing in defined channels, above or below ground, did not apply to water percolating through the soil—*Chasemore v. Richards*, July 27, 1859, 7 H.L. Cas. (Clark) 349; *Magistrates of Linlithgow v. Elphinston*, 1767, Mor. 12,805. The case of *Holker v. Porritt*, February 8, 1875, L.R., 10 Ex. 59, was not in point, because there was a servitude, and the water came by a tunnel, and not by percolation. On the lease the case was even stronger than at common

law, because water percolating through the soil could not be called a "stream," and what was let to the complainer was the water in the ponds and in the streams leading thereto. That expression was intended to apply only to the stream from the hill to the upper pond and the stream from the upper pond to the lower.

Argued for the complainer—The owner of land was not entitled to prevent water running in an invisible underground channel, which was shown by the proof to have been the case here, from getting down to a lower lessee with water rights to such water—*Holker v. Porritt, cit.* This was a stream within the meaning of the lease, the true intention of which was to include all the water which fed the ponds. If so, then the drainage and percolation cases quoted were inapplicable, because the proprietor here had let all the water, however it reached the ponds, and he had no right to interfere with it now. It was no answer to a person entitled to get certain water that other water from a different source was given instead of it—*Stevenson v. Hogganfield Bleaching Company*, November 18, 1892, 30 S.L.R. 86. This use of the water was not within the exception in the lease, because the smithy and the cottage near it were not part of the farm steading.

LORD YOUNG—This is a case of importance to both parties, and we have had a full and I think quite satisfactory argument on both sides presenting the case of the parties respectively before us in a manner which I think enables us to deal with the case now.

The lease of this distillery and a few acres of ground was granted in 1889, and the present complainer acquired right to the distillery in 1891. By the lease his predecessor acquired what he is now in right of—the two ponds marked 140 and 134 on the map referred to in the lease together with right to the water in the said ponds and in the streams leading thereto. He proceeded shortly after entering into possession, to erect piggeries—very extensive piggeries—upon the ground let to him. His business as a distiller required, as he quite intelligibly explains, that he should have pigs to consume a lot of the draff and refuse which were produced at the distillery, with some profit to himself. But these piggeries had the effect of polluting in a distressing manner the water which formerly supplied the needs of some tenants of the respondents, particularly a blacksmith, who complained that he must have another supply of water unless this pollution ceased. Well, that led the factor upon the estate to consider how this evil could be remedied, and he appears to have proceeded—I am speaking from the evidence here—very cautiously and circumspectly and with due attention to the legitimate interests of the parties with whose interests he was concerned, and it appeared to him that he could carry off the water in a pipe through a part of the estate

without at all interfering with either of the streams running into the pond or with the legitimate supply of water to the pond. The distiller—the complainer here—was not of opinion that that could be done without interfering with his rights under the lease and prejudicing him in his business by a violation of these rights. Mr Thomson, Mr M'Nab's manager, writes to him on the 31st October 1894—[*His Lordship read the letter.*] Well, I suppose in consequence of communications from the distiller the landlord's factor, Mr Ralston, writes to Mr M'Nab upon the 29th of November a letter which I think it important to call attention to—[*His Lordship read the letter.*]

Then the distiller's agents write to the respondents' agents on 23rd March—immediately antecedent to the present note of suspension—[*His Lordship read the letter.*] Now, I think the answer to this by the respondents' (the landlords) agents is also material, and I may preface the reading of it by saying that without a strict regard to legal rights—strict legal rights—I should be much disposed to stop any wanton or unduly selfish proceedings on the part of a landlord which would interfere with the legitimate interests of a tenant, which he knew the tenant had been relying upon, even although it could not be said that he was not proceeding strictly in the exercise of a legal right. It would be a matter to be taken into consideration in an application for interdict to stop him whether the proceedings which he was taking were necessary in his own legitimate interests, and also whether he was paying a due regard to the legitimate interests of the tenant, which he knew he had in view in taking the lease and in keeping the lease. Now, here is a letter of 27th March—a day or two before application is made to the Court—[*His Lordship read the letter.*] The only answer which they get to that, before the note is presented, is on the 28th of March to this effect—[*His Lordship read the letter.*]

Now, I am disposed, without any antecedent prejudice against the landlord interfering in these circumstances to provide pure fresh water for his tenants, to consider whether he was exceeding his legal right or violating any right—which would of course be exceeding his—which he had granted to a tenant. Now, I keep in view that consideration, and I refer to it in connection with the purpose for which I have read these letters, which was to explain how the landlord was prompted to take action in this matter at all. I may also observe that the lease reserves right to the first parties to grant liberty to the agricultural tenant of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and for the use of the water for the steading and for agricultural purposes. I should be disposed to think that even an interference with the supply to the distillery for the legitimate supply of a house like the smith's house here, whose former supply had been diminished by the distiller's proceedings, would not be unfavourably regarded if it was

kept within due bounds—that is, such bounds as were shown to be necessary in consequence of the pollution of which he was the author. But I am of opinion upon the evidence—and I am speaking now distinctly and directly to the question whether the operations sought to be interdicted interfered with the streams running into the pond or the supply of water theretofore made through these springs to the pond—I am disposed to hold upon the evidence, and that I confess without any serious doubt, that the operations did not so interfere. I think the view expressed by the factor in his letter as the result of all his inspection and inquiry and consideration, is the true one, viz., that he could remedy the damage which had been done to the smith without at all interfering with the streams flowing into the pond or interfering with the tenant of the distillery's right. If that be so, then that is a conclusive answer to this action, for the averment upon which it proceeds is stated in statement 3—*[His Lordship read the averment quoted above.]* Now, I cannot affirm that. On the contrary, I am prepared to negative it, and therefore to affirm the respondents' 3rd plea-in-law which is to the effect that the whole operations which are the subject of complaint here were within their legal right, and were no interference with the complainer's legal rights in a question between them and the complainer. In that view I should be prepared to recal the interlocutor of the Lord Ordinary, and to give a decree to that effect, and of course with expenses.

LORD JUSTICE-CLERK—I am entirely of the same opinion. I think that the terms of the lease as to the streams are completely covered. There were two streams, and that is quite sufficient. There is therefore no ground for suggesting that the word "streams" referred to anything else than the two visible streams upon the field which were therefore to be taken into consideration and disposed of. I think that when you have a stream in the sense of a stream which might be diverted from its course, or the water of it removed, it must be a tangible running stream. It may be very small, but it must have a water channel for itself. I do not think that any question such as was referred to in some of the cases which were cited, viz., the question relating to the water disappearing from a stream underground and reappearing, or not reappearing till it came out at the bottom of a lake, affects the question here. That question really is, whether at the place you are dealing with there is a stream. It may afterwards disappear, and it may afterwards re-emerge. But if any water emerging does not form a stream, but merely a marsh upon the ground with no defined outflow which is visible, then I think that is not water which can be held to fall under the definition of the words in the lease here. It is quite in accordance with the common law upon the matter that a proprietor is entitled to impound and get possession of such water, and to

keep it, not being water flowing in a stream upon the surface of his land, and not in fact running down on the surface to the lower ground, or to a pond or lake or another stream. Although by doing so he may possibly affect the water interests of other heritors further down—perhaps miles down below—nevertheless that is his right.

Upon the whole matter I agree entirely with your Lordships that the complainer has not established that any stream has been taken away from him which he was entitled to under the lease, and that we ought to recal the interlocutor, and, as Lord Young has suggested, sustain the third plea-in-law for the respondent with expenses.

LORD TRAYNER—I agree. I think there has been no invasion or violation of the complainer's rights. The lease in question lets to the complainers the two ponds with the water therein and right to the water in the streams leading thereto. The lower of the ponds is fed by a stream (in the ordinary and popular sense of that term) flowing out of the upper pond, and the upper pond is fed by a similar stream flowing from the hill above. To hold that these are the ponds "and streams leading thereto" let to the complainer seems to me to satisfy completely the terms of the lease, without looking for anything else as included to which those terms would not, in popular language, directly apply. The spring which the complainer claims, and the interference with which is the immediate subject of complaint, does not appear to me to fall within the subjects let. A spring and a stream are different things. The water from a spring may flow away in a stream no doubt, and that is said by the complainer to have been the case here. But that is not supported by the evidence. It rather appears that the water from the spring in question simply gathered on the land round the spring and formed a kind of marsh. That some of that collected water found its way by percolation through the earth into the lower pond I think is certain—how much or how little has not and probably could not be ascertained. But I am quite clear that such percolation cannot be regarded as a stream leading into the pond in the sense of the lease.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Repel the reasons of suspension and interdict: Sustain the third plea-in-law for the respondents: Therefore refuse the note of suspension and interdict, and decern."

Counsel for the Complainer—Dundas—Abel. Agents—Gill & Pringle, W.S.

Counsel for the Respondents—Macfarlane—C. K. Mackenzie. Agents—Tait & Crichton, W.S.

Friday, March 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SELKIRK (STEVENSON'S TRUSTEE)  
v. CAMPBELL & SONS.

*Cautioner—Proof—Liability, whether Primary or Cautionary.*

Evidence upon which it was held, on the principle of *Birkmyr v. Darnell* (1 Smith's Leading Cases, 10th ed. 287), that an obligation for the price of goods was primary and not cautionary.

Thomas B. Campbell & Sons, metal merchants, Glasgow, lodged a claim with James Landells Selkirk, C.A., Glasgow, trustee on the sequestrated estate of the deceased James Wilson Stevenson, to be ranked as creditors for £192, 12s. 7d., and to draw a dividend from said estate.

The trustee having pronounced a deliverance rejecting the said claim, Messrs Campbell & Sons appealed to the Sheriff of Lanarkshire.

The appellants averred that the deceased Mr Stevenson, the bankrupt, was the senior partner of the firm of Stevenson & Lauder, house-factors; that he and his firm "financed" William Stark and his firm, builders in Shawlands; that the said William Stark was in 1892 and 1893 engaged in the erection of dwelling-houses in Shawlands; that the said Mr Stevenson and his firm gave the said William Stark and his firm sufficient money to pay the workmen engaged at said property; and made the other disbursements required for said erections and drew the advances from the superior.

The appellants further averred that William Stark had been under sequestration and obtained his discharge in 1892; that the appellants had sold lead and ironmongery goods to the said William Stark and the bankrupt's firm previous to the sale of the goods for which they now claimed to rank; that the said goods were paid for by Stevenson & Lauder; and that between January and August 1893 the appellants delivered to William Stark goods to the net value of £192, 6s. 7d. "The said goods were sold and delivered on the order and on the credit of William Stark, William Stark & Son, and Stevenson & Lauder, and the appellants looked, and in virtue of the said orders and previous course of dealing were entitled to look, to the said Stevenson & Lauder for payment, as well as the said William Stark & Son."

The appellants went on to aver that in June 1893, in pursuance of the previous practice, they drew on William Stark & Sons for £84, 13s. 2d. on account of the then current account between the appellants and the bankrupt; that the said bill was duly endorsed by Stevenson & Lauder, who thus made themselves liable as obligants for the amount of said bill; that the bill was not met at maturity, though the appellants had continued to supply goods in reliance on Stevenson & Lauder; and that

the total claim of the appellants, including fees of noting the bill, was £192, 12s. 7d.

The appellants pleaded—"(1) The appellants having sold and delivered the goods mentioned on the order and credit of the bankrupt's said firm, they are entitled to be ranked for the sum claimed."

The trustee in bankruptcy denied that the said goods were sold and delivered on the order and on the credit of Stevenson & Lauder, and that the appellants were entitled to look to that firm for payment thereof.

The trustee pleaded—"(2) The account for the said goods not having been incurred or guaranteed by the bankrupt's said firm, the trustee's deliverance should be sustained, with expenses."

The appellants produced detailed accounts of the goods supplied by them, from which it appeared that orders for items to the extent of £22, 1s. 10d. were initialed by Stevenson & Lauder.

A proof before answer was allowed, of which the following is a summary:—

Thomas Macfarlane Wallace, cashier to the appellants—"... I told Mr Stevenson that we were not fond of giving Stark goods unless we had some security for the money. Mr Stevenson told me that Stark was doing work entirely for him. Mr Stevenson was a property speculator. It did not suit him to have the account in J. W. Stevenson's name, but he said his firm of Stevenson & Lauder would bind and oblige themselves to see us paid. ... It was arranged that Mr Stark was to order the goods, and that we should render the accounts and draw on Stark, and Stevenson should endorse the bills. I looked to J. W. Stevenson as the party ordering the goods. ... The endorsement, Stevenson & Lauder, was put on the bill founded on with the view of being an obligation to us for that account. ... The bill was always in that form. The bills were always paid by Stevenson. Mr Stevenson died before the £84 bill became due. But for his death the open portion of the account would have been drawn in the same way. ... We stopped Stark's account immediately we knew that Stevenson was dead. ... *Cross-examined*—... Mr Stevenson told me that he would see me paid for what Stark ordered."

Ebenezer Gilchrist, a partner of the dissolved firm of Stevenson & Lauder—"My firm acted as financial agents in connection with certain properties in Langside and Shawlands. Stark was carrying on the building operations in connection with these transactions. My firm drew all the advances in connection with the buildings, and paid Stark's wages and the material in connection with the work. ... I had general instructions from Mr Stevenson that if Mr Stark presented the appellants any orders I was to sign or initial them. (Q) Did you not understand that Mr Stevenson had agreed to pay the material got from the appellants; was that not the footing on which you were dealing with them? —(A) It practically amounts to that."

William Stark, builder—"I understood