

undertakers — then the undertaker is to be responsible just as if the man had been employed by himself. He has relief against the employer of the workman who employed him under contract with himself as undertaker, if there is a ground of relief such as is specified in clause 4. Whether there was or not here we do not know, and have no occasion to inquire, but the workman who suffered was engaged in an employment coming within the Act, because it was employment in, on, or about a building over 30 feet in height, although he was employed, not by the undertaker, but by the contractor with the undertaker, and clause 4 makes the undertaker responsible. That leads exactly to the decision which the Sheriff has pronounced, and which I am of opinion therefore ought to be affirmed.

LORD TRAYNER — I am of the same opinion. In the case of *Macgregor v. Dansken*, referred to in the course of the debate, I used an illustration in the course of my opinion upon which the appellant in the present case to some extent founded. But in doing so I think he did not give full attention to the particular terms of the illustration. I repeat it. If A wishes to have a house built for him, and contracts with B to do it, B is the undertaker to build and not A. In this case the two characters in my supposed illustration, A and B, separate in the case I then put, are united. The statement of facts upon which we are to proceed given us by the Sheriff points this out well enough. This is a house which the appellant is building for himself—building for himself in the sense not merely that he is to pay for it, but building for himself in the more strict sense that he is actually constructing it, and his own men are doing the mason and joiner work of the tenement. He is therefore not merely what is called in some of the cases the building owner, or as I should prefer to put it, the owner of the building when built, but he is the builder of the house. He has undertaken to build a house for himself. He is the undertaker, and the persons that are assisting him in his work, although direct contractors with him, stand very much in the same position as the sub-contractor mentioned in the statute. He is himself building this house, and he has contracted with others to do for him that which he cannot do for himself, such as the plumber and plaster work. I take it to be quite clear upon the statement of facts before us that the appellant is the undertaker in the sense of the statute, and that therefore the Sheriff's judgment ought to be affirmed.

LORD JUSTICE-CLERK—I have felt myself in this case very much in the same difficulty as was expressed by Lord Justice Romer in the case of *Lysons*, which was brought under our notice in an earlier part of the day, and I think I cannot do better than express myself in the same words—"I feel very great doubt upon this point, but I am not prepared to

differ from the judgment of the rest of the Court."

LORD MONCREIFF was absent.

The Court answered the question in the affirmative.

Counsel for the Claimant and Respondent—Salvesen, Q.C.—D. Anderson. Agent—James Ayton, S.S.C.

Counsel for the Appellant—W. Campbell, Q.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, July 12.

## SECOND DIVISION.

[Lord Pearson, Ordinary.]

### KINCAID SMITH *v.* CAMERON.

*Nuisance — Water Pollution — Superior Permitting Feuar's Sewage to Run through his Lands on to Property of Another — Superior and Vassal — Joint Delinquents — Interdict.*

A superior feued part of his ground to a feuar, the titles providing that the superior was to be at no expense whatever in connection with drains, drainage, or sewage, except to provide a proper outlet for the same. The feuar sent his sewage through pipes on to the superior's lands, under an arrangement to the effect that the superior was to dispose of it by means of cess-pools, but he failed to do so efficiently, and the sewage flowed down through a pipe, which the feuars had been allowed to lay in the lands of a neighbouring proprietor for the purpose of carrying off surface water only, into a water course upon that proprietor's lands, and polluted the water therein to his nuisance.

*Held* that, in a question with the injured third party, the feuar who produced the nuisance, and the superior who allowed it to pass through his land on to the other's property, were joint wrongdoers, and were both liable to interdict.

Major Ronald Kincaid Smith of Polmont House, Stirlingshire, presented a note of suspension and interdict against William Cameron, farmer, Crossgatehead, in the parish of Polmont, the School Board of Polmont Parish, and Mrs Jane Baxter or Grant, Alexander Hunter, and James Baxter, all residing there, in which the complainer prayed the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents, and all others acting by their authority, from sending or discharging on, to, or upon the complainer's lands of Polmontside, in the parish of Polmont and county of Stirling, or into the drains or ditches within the complainer's said lands, or into the streams of water passing

through the complainer's said lands from the lands of Crossgatehead in said parish and county belonging to the said William Cameron, or the feus off said lands of Crossgatehead, and buildings thereon, held or occupied or possessed by the said the School Board of the Parish of Polmont, Mrs Jane Baxter or Grant, Alexander Hunter, and James Baxter respectively, any sewage or any other impure stuff or matter of any kind, or impure liquid or water, whereby the complainer's said lands may be fouled, or the water of the said drains, ditches, and streams in their progress through or along the said lands may be polluted or rendered unfit for domestic use, or for the use of cattle and horses, and to find the respondents jointly and severally liable in expenses."

The respondent William Cameron and the School Board of Polmont lodged separate defences. The other feuars did not appear to defend the action.

A proof was led. The facts of the case and the contentions of the parties sufficiently appear from the opinion of the Lord Ordinary (PEARSON).

On 24th April 1900 the Lord Ordinary pronounced the following interlocutor:—

"Finds that prior to the feuing of part of hisland by the respondent William Cameron to the other respondents, the water in the water-course in the complainer's lands and farm of Polmontside, marked LM on the plan, was and had all along been unpolluted by sewage and fit for drinking by man and beast; and that the ditches on the said farm to the west of said water-course were unpolluted by sewage, and fit for watering cattle, and that at and near the said water-course, and to the west thereof, the complainer's said lands were free from contamination by sewage: Finds that by and through the immission of sewage and other impure matter from the said feus into and upon the complainer's said farm, the respondents have fouled the land thereof in various places, and have polluted the water of the said ditches and water-course, and rendered the same unfit for the use of cattle, all to the nuisance and injury of the complainer: And before further answer on the question of interdict, Allows the compearing respondents respectively to state in a minute, to be lodged by the third sederunt-day in May next, what steps, if any, they are willing to take to remedy the said state of matters and to prevent its recurrence: Finds the compearing respondents jointly and severally liable to the complainer in the expenses of the proof, and remits," &c.

*Note.*—"The complainer is proprietor of the lands of Polmontside, in the county of Stirling, which are occupied as a dairy farm by his tenant William Carlaw. The respondent William Cameron, dairy farmer, is proprietor of the adjoining lands of Crossgatehead, which slope downwards towards Polmontside, and the other four respondents are feuars on Crossgatehead. The subjects feued have all been given off quite recently, and were previously agricultural ground.

"The feus, taking them from west to east, are Baxter's, Polmont School Board's, Hunter's and Grant's. They are bounded on the north by a road about 20 feet wide, and parallel to the road, at a distance of about 30 feet further north, runs the march between Cameron's ground and the complainer's. Thus the ground between the feus and the complainer's march remains the property of Cameron, consisting of the road and the intervening strip of 30 feet.

"On three of the feus (Baxter's, Hunter's, and Grant's) there have been built dwelling-houses with offices, nine in number, with a population in all of forty-three. The School Board have built on their feu a public school, which besides five adults, has an average attendance of 34 children. Each feu has a drainage system, the closets being dry earth closets, except on Grant's feu, where an ash-pit serves instead. The feus all drain to the north, according to the lie of the ground. The school drains go under the road in two 6-inch pipes, which then cross the intervening strip belonging to Cameron, and connect with a 9-inch pipe in the complainer's land. This 9-inch pipe, which was specially laid by the School Board under the circumstances aftermentioned, runs eastward, and empties itself into a small water-course which runs through the complainer's dairy farm and falls into the Polmont Burn. The drains from the other three feus are carried in pipes under the road, on the north side of which they debouch into the open on Cameron's ground. Thence their drainage finds its way by various routes to the complainer's land. Grant's goes straight down the aforesaid water-course from the top. Hunter's finds its way to an old grassy ditch almost on the line of the 9-inch pipe, and so eastwards to the water-course, though in part it makes its way to an open farm ditch further north, and through this it reaches the water-course. Baxter's goes into this open ditch with the same result.

"The complainer now seeks to have the respondents interdicted from discharging sewage 'on, to, or upon the complainer's lands of Polmontside, or into the drains or ditches within the complainer's said lands, or into the streams of water passing through the complainer's said lands . . . whereby the said lands may be fouled or the water of the said drains, ditches, and streams . . . may be polluted or rendered unfit for domestic use or for the use of cattle and horses.'

"This is resisted only by William Cameron and his feuar the School Board. The other three feuars make no appearance, and it may be taken that if there be pollution, they materially contribute to it.

"Each of the two compearing respondents denies pollution on record. The first question therefore is, whether the complainer has succeeded in proving pollution, and from what source? There is a question behind, namely, who is responsible in law for it; and on this question each of the compearing respondents pleads that the other is the culprit.

"In my opinion the complainer has proved his averments of pollution both to land and water. The former is more nearly akin to the ordinary case of nuisance, while the latter, the pollution of running water, is usually accompanied by a declarator of the extent of the pursuer's right to have the water maintained at a certain standard of purity. The complainer's case is rested on both grounds, and in the circumstances I do not think the evidence requires to be treated separately as regards the two grounds of complaint. But I observe in passing, that while the prayer seeks for interdict against the ditches and streams being 'rendered unfit for domestic use, or for the use of cattle and horses,' there is no averment that the water in the water-course was fit for domestic use, or was so used, though I do not doubt that it was in fact up to that standard. Even the proposition that it was previously fit for the watering of beasts is only stated inferentially in statement 7, in the averment that it is so polluted by the respondents as to be rendered unfit for that purpose.

"On this question of pollution I accept the testimony of William Carlaw, and of his sister and nephew. Mr Carlaw has been tenant of the dairy farm of Polmontside for fifty-four years, aided during the whole of that time by his sister, and for the last nineteen years by his nephew Archibald Carlaw. No doubt the very length of their stay in the farm renders it impossible for the complainer to multiply evidence on the matter. But it also renders that unnecessary if their evidence is accepted (as I do accept it) as honest, accurate, and free from exaggeration. These things are clear—(1) that until the feus were given off no house sewage found its way into any of the drains or water-courses (always excepting the Polmont Burn, which had a bad character before it reached Polmontside farm, thereby making pure water the more valuable to the farmer); (2) that the water in the water-course was previously fit for drinking by man and beast—a good potable water, partly spring and partly surface water, and at all events, in point of fact, serving for the ordinary use of the cattle grazing in the adjoining parks during all that long period; (3) that as soon as the feus came to be occupied it gradually became polluted, and that the opening of the school on 1st November 1898 was followed by a considerable increase of pollution, with the result that the cattle now refuse to drink, and show evident signs of distress both in the field and at the byre.

"The main source of the water-course seems to be a field drain coming from the higher ground. It runs with a fair stream in winter, though small in volume, but in summer it is often nearly dry, and the tenant has been in the habit of damming it up at two or three places, especially near the top and near the bottom (where its channel is not so deep), to collect water for the cattle. This has not been done latterly since the pollution declared itself, as the cattle refused the water altogether.

"The evidence of the Carlaws is strongly

supported by the observation of several witnesses, who testify to what they actually saw in the way of house-sewage pollution in and about the exit of the various drains and the grassy ground adjoining. I refer to the evidence of Mr Belfrage, Mr Black, and Mr Wakelin on this matter, and especially to that of Mr Gow. In my opinion, this body of testimony is very far from being overborne or even much affected by the negative evidence adduced against it.

"All this coincides with the introduction for the first time of an efficient cause for the deterioration of the water and the fouling of the land. No other source for it is suggested except the four feus given off by Cameron; and what goes on upon these feus is sufficient to account for all that has been observed. Indeed, it is not easy to see how the result could have been avoided considering the drainage arrangements.

"It appears that there is no general drainage system in the district, though there has for some time past been an application before the County Council for the formation of a drainage district. Perhaps for this reason the arrangement as to the feus is obviously and admittedly a temporary arrangement—a makeshift. There is not even an attempt at a common system among the feus themselves; and they use the modern appliances of sinks, piping, and the like just up to the point at which their effect is most detrimental to other people, and there they leave it. The result is that instead of spreading and absorption and evaporation, such as took place under the older methods, the sewage is delivered in a concentrated form at definite points, and is then left to take care of itself.

"Passing by the other three feus, it is right I should explain briefly at this stage the position of parties as regards the School Board drainage.

"The school feu was given off in August 1896. By the title the School Board were taken bound at their own expense to form and maintain good, proper, and sufficient drains for the effectual drainage of the buildings to be erected, it being 'specially understood that the superior is to be at no expense whatever in connection with drains, drainage, or sewers, except to provide a proper outlet for same.' The Board proceeded to erect school buildings to accommodate over 300 children. The drainage pipes provided were two 6-inch pipes which were carried under the road northwards, and across the respondent Cameron's intervening strip of ground, to the complainer's march. I entertain no doubt that (as spoken to by Mr Walker and Mr Strang) this was done by the School Board in the knowledge and with the permission of Mr Cameron. Indeed, it seems to have been his way of implementing his obligation to provide an outlet. Of these two 6-inch drains, the westmost carried the sewage from all the school urinals and from the boys' wash-basins; the eastmost served the other wash-basins. Each drained part of the school yard by means of gratings. The school buildings were begun by May 1898, and they were

completed and the school opened on 1st November. Early in May an encroachment on the complainer's lands, by the deposit of some of the excavated soil, led to a meeting on the ground, held on or about 16th May. There were present Mr Mitchell (chairman of the School Board), Mr Strang (their architect), and Mr Carlaw. At this meeting it was suggested, apparently by Mr Carlaw, that a 9-inch pipe should be laid in the complainer's ground near the march, practically in the line of an old grassy ditch, in order to diminish the chance of flooding by surface water. This proposal was further considered at a meeting on the ground, held on 27th May, attended by Mr Cameron, Mr Carlaw, Mr Wakelin (the complainer's agent), Mr Strang, two members of the School Board, and the clerk of the Board. The result was that the proposal as to the 9-inch pipe was approved, and it was shortly afterwards laid by the School Board. Apparently some members of the Board supposed that this was provided by arrangement for the carriage of the school sewage. I think it clear that this was a mere misapprehension. Mr Wakelin's note made in his attendance book at the time clearly shows that in his view the 9-inch pipe was to carry only surface water, and I find it difficult to understand how the School Board took up the contrary view in spite of the explicit statement in Mr Wakelin's letter of 28th May.

"Six weeks later the matter came up again upon a protest by Mr Wakelin. On 12th July he wrote to the School Board, calling attention to the nearly complete arrangements for a system of drainage of the sewage into the 9-inch pipe, and claiming that the sewage drains should at once be disconnected from it. The Board on 18th July resolved so to disconnect the sewage drains, and to call on Cameron to provide an outlet in terms of his obligation. On the following day Mr Strang reported that the disconnection had been made, and this was intimated to Mr Wakelin. In point of fact the disconnection was effected by stopping the pipes within the school urinals and at the wash-basins, but as the school was not then open there was no visible change.

"The matter rested on this basis until 27th September 1898, when the School Board, who were anxious to open the school as soon as possible, met to consider the failure of Mr Cameron even to reply to their letter of July, requiring him to provide an outlet. They instructed their agents to enforce the demand, and the result was an action in the Sheriff Court, to which the defence stated by Mr Cameron was that he had never been asked to provide an outlet and had not refused to do so. The action being sisted to enable parties to arrange, a meeting was held on the ground on 15th October between Mr Strang, Mr Cameron, and Mr Denholm, the sanitary inspector of the district, which, however well-meaning, had an unfortunate issue. While the three were together the arrangement made was that

Cameron should put in a cesspool or tank on the line of each 6-inch pipe within his own ground north of the road, that the cesspool should receive and retain the whole contents of the pipe, and that its cover should be so constructed as to admit a pump, by means of which Cameron was to empty the cesspools from time to time into carts and use the contents for manure. Mr Cameron at first suggested built cesspools, but on Mr Denholm's suggestion it was agreed that sunk water barrels would suffice. That this was the arrangement is plain from the evidence, and from Mr Strang's jottings and letters written at the time. But in his absence it appears that Mr Denholm afterwards advised Mr Cameron to substitute for the cesspool a perforated barrel, with nine to twelve inches of cinders outside, the idea being not to use the barrels as cesspools to be periodically emptied, but as filters in combination with the surrounding ashes. If the surrounding soil had been sufficiently porous to dispose of the fluids by percolation, this might possibly have worked well enough. But the soil is clayey, and although the topmost three feet (or thereabouts) was forced earth, the result in point of fact was that the barrels were water-logged, and that the effluent water had to be provided for by leaving open the end of the 6-inch pipe as it left the barrel. Mr Strang shortly afterwards, being in ignorance of this vital change, and being assured by Cameron that he had carried out the agreement as to cesspools, reopened the connection of the school drainage system with the 6-inch pipes. This (so soon as the school should be opened) involved the transmission of the whole school sewage through the 9-inch pipe; because (as I have said) the barrels filled up, and the sewage that came in at one side simply flowed across the surface and went down the pipe at the other side.

"Mr Wakelin, who seems to have been vigilant throughout, warned the School Board by letter of 24th October of this state of matters. The clerk merely replied that Mr Cameron was to find them an outlet, and that he was understood to be executing some operations on his own lands to deal with the school drainage, with which the Board had nothing to do. He added that the Board understood there would be no sewage from the school passing those drains. On 28th October, four days before the school was opened, Mr Wakelin wrote letters in the most explicit terms both to Mr Cameron and to the School Board. By this time, although the school had not been opened, the sewage from the other feus had begun to affect the dairy farm injuriously; and in writing to Mr Cameron, Mr Wakelin demands that the sewage both from the houses and the school should be stopped from coming on the complainer's lands. In his letter to the School Board clerk he points out distinctly the actual state of matters at the cesspools, and the certainty of increased pollution after the opening of the school. The replies are instructive, but I need not

advert to them. The point is that both had explicit warning of what was likely to happen; and in particular, the School Board cannot, after this correspondence, justify the 'surprise' with which their officials, Mr Strang and Mr Allen (the solicitor), found a year later, in October and November 1899, that the original arrangement with Cameron had been departed from, and that after all there was an outflow from both barrels into the 6-inch and the 9-inch pipe.

"I have dealt with the proof of pollution apart from the evidence of the analytical chemists. It is perhaps fortunate for the complainer that, in my opinion, his case does not depend on that evidence; because if the strict rules observed (and properly observed) by some chemists were applied, some doubt would be thrown upon the results of the analysis by the procedure in taking the samples. It happens that sample 3, by far the most favourable for the complainer's view, was taken in a bottle obtained for the occasion from a neighbouring shop. Of its previous contents nothing is known; and the best that can be said of it is that 'it looked all right.' The other two samples, taken from near the eastmost barrel, were above suspicion, and Dr Macadam pronounces them to be unfit for human consumption, and not of proper quality for the use of cattle. The third sample, with its enormous excess of ammonia, suggests to Dr Macadam the presence of urine in large quantity; and it is worthy of notice that this was obtained from the westmost barrel, into which goes (contrary to the theory of the respondent Cameron's witnesses) the whole drainage from all the school urinals. That is a coincidence which suggests to my mind that after all the third sample bottle was quite clean (and there is no reason for supposing it was not), and that sample 3 is a true sample of that effluent. One other observation certainly falls to be made upon the complainer's samples, namely, that none of them is taken at and below the point or points of exit upon the complainer's land. In the ordinary case this observation would be of considerable weight; but here the sewage is confined in a pipe, and must reach the water-course a few yards down in practically the same condition; and the volume of sewage is so unusually large in proportion to the run of the water-course in dry weather, that a question can hardly arise whether the pollution would be immaterial. As to the respondent's experts, their evidence, besides being largely theoretical and remote from the proved facts of this case, is based on a standard of purity which sounds strangely low when applied to the question whether this little water-course, almost dry in summer, but with an untainted character, is now to receive sewage for the first time. I do not think that the standard of purity required on admitting the effluent of sewage works into rivers has much to do with the present question; and the proprietor of this water-course may well object to be tried by any such test. Upon the whole, on a balance

of the expert evidence, I do not think it makes against the complainer's case, and I am the more disposed to say so when Dr Brock backs out of his assertion that this is certainly a polluted stream, with the explanation that there is no pure water in nature; and Dr Aitken, while declaring that all his samples are unfit for primary purposes, and all contain traces of urine, suggests that cattle may prefer polluted water.

"As regards the legal question of the liability of the several respondents, this is certainly a case of some peculiarity, owing (1) to the existence of the interposed strip of Cameron's land; (2) to the attempt by him to remedy matters by means of the barrels; and (3) to the position of the School Board in still using for sewage the 9-inch drain pipe which they laid down in the complainer's land, and which, I suppose, remains their property. I am of opinion that the drainage must be regarded as coming on Cameron's ground with his own approval and assent, and that, when he receives it there, he is bound to deal with it in a legal manner; and that this is specially so as regards the school sewage, owing to his obligation to provide an outlet. On the other hand, the School Board were parties to the putting in of the barrels as in implement of an arrangement which they wrongly assumed (after distinct warning to the contrary) was being adhered to by Cameron. And further, they are still transmitting sewage through the 9-inch pipe, which they were allowed to lay in the complainer's ground under an arrangement (as they themselves expressly aver on Record, Answer 5) 'that the surface water from the school should flow through the complainer's ground, but that no sewage should be discharged there.' I hold that in these circumstances both Mr Cameron and his feuars are rightly called to answer the complaint, and that all of them are jointly liable for the pollution and the nuisance. I think, however, that the appearing respondents should have an opportunity of remedying the existing state of matters before the question of interdict is disposed of."

The respondents the School Board of Polmont reclaimed, and argued—If a nuisance existed they were not the wrongdoers. Under their feu-disposition they were entitled to make drains in their own property, and drain their sewage to an outlet to be pointed out by Cameron within his grounds. Under their contract with Cameron the latter was thus bound to dispose of the sewage. He was paid by them to do so. If the sewage had been properly disposed of by Cameron after it reached his ground there would have been no nuisance. But if Cameron dealt with the sewage or failed to dispose of it and allowed it to run down into the complainer's property, he alone was responsible. He got it by contract from them and allowed it to run down into the property of another through a pipe not intended for the purpose. He and he alone was therefore the author of the nuisance. Besides, when a person feued

out his ground for dwelling-houses, the drainage of which caused a nuisance, the superior was liable therefor, and was the person who ought to be sued. The feuars merely made the use of the lands which the superior authorised them to make. The superior was therefore the real author of the nuisance—*Mackay v. Greenhill*, July 14, 1858, 20 D. 1251; *Caledonian Railway Co. v. Baird & Co.*, June 14, 1876, 3 R. 839; *Scott v. Scott*, June 28, 1881, 8 R. 851. Even if they were held to be liable, they should not be found liable jointly and severally in expenses. They had taken no part in the proof as to pollution. The proof on that point had been led by Cameron alone, and they ought only to be found liable in expenses so far as caused by their appearance.

The respondent Cameron took advantage of the School Board's reclaiming-note, and argued—There was no proof of material pollution. Even if there was, he was not the party responsible. All that he had undertaken was to give the School Board a proper outlet. A proper outlet meant a sufficient outlet, or in other words a way-leave over his lands. But it was not the pipes that caused the pollution, it was what was in them. For that the School Board were alone responsible. They caused the pollution, and were thus clearly the true authors of the nuisance. This was not a case in which the superior formed drains for his feus and allowed the feuars to put their sewage into his drains. This fact distinguished the present case from that of *Scott, supra*, and similar cases.

Argued for complainer.—Material pollution was plainly proved. Both respondents were liable. The polluted matter was produced by the School Board on the ground that Cameron had feued to them, and with Cameron's consent it was run on to his land, and from thence flowed down into the land of the complainer. The School Board and Cameron by their united action thus caused the nuisance. They were joint delinquents, and if two or more people by their joint action caused a nuisance they were both liable—*Duke of Buccleuch v. Cowan*, December 21, 1866, 5 Macph. 214, charge of Lord Justice-Clerk Inglis, p. 216. As to expenses, the two comparing respondents had been rightly found liable jointly and severally. Both of them denied the existence of pollution on record.

LORD JUSTICE-CLERK—This case lies in a small compass. The defender Cameron feued off a portion of land to the School Board to erect a school, and undertook to provide an outlet for the sewage of the school. The only outlet so provided was into a strip of land about 40 feet wide belonging to himself. What was done was that the sewage from the school was conducted by a pipe into barrels or cesspools situated in the said strip of ground, and from these barrels it was carried out of Cameron's property by a pipe which discharged into the complainer's ground. The evidence as to the pollution which resulted

is perfectly distinct. Cattle are very good witnesses in such a matter, and it is proved that they refused to drink the water at their usual watering-place, and indicated that they suffered for want of drinking water, although the quantity was quite sufficient if the water had been good. And when the water is analysed it is found to be polluted so as not to be potable but dangerous. The School Board say that they are not liable for this nuisance, because all they have done is to bring the sewage from the school into Cameron's property, and that he had undertaken to give them an outlet for their sewage. Cameron, on the other hand, says that the operations complained of were entirely the operations of the School Board, and although undertaken with his consent he is not liable therefor. As regards the School Board, the case stands thus. They have adopted an arrangement for the disposal of their sewage through Cameron's land, and if the result of that arrangement is that the complainer suffers injury, the complainer has a good title to sue them in respect of that injury. As against Cameron the case is this. He gave an outlet for the sewage into his land, and from his land it reached the complainer's land through certain pipes and barrels. Now this was either done with his consent or as the result of an obligation binding on him by contract, in both of which cases he is responsible, or it was done without his consent and with no obligation binding on him to allow it, and again in either case he is liable for permitting the nuisance to continue. On the whole matter I am of opinion that the judgment of the Lord Ordinary is right and should be affirmed.

LORD YOUNG—I am substantially of the same opinion. It is clear that when the School Board feued this ground for the erection of a school, they were in duty bound to take into consideration that there would be some production of sewage, and that it would be necessary that an outlet should be found for it. It was their duty to consider how such an outlet could be obtained, consistently with the health of the school, and also consistently with the rights of their neighbours. Their immediate neighbour was their superior, the respondent Cameron, whose land consisted of a strip of ground fifty feet in width, and a proprietor who had a stream running through his land. They stipulated with the superior that he should find an outlet, and the outlet which he found was by giving them permission to have a pipe which should take the sewage through his strip of ground into certain cesspools or barrels. From these the sewage has overflowed into a pipe upon the complainer's lands, which had been laid down merely for the purpose of carrying off surface water. The result of these operations is that the sewage has gone through this pipe, beyond the barrels, and into the pipe for surface water; and it is established by indisputable evidence that it has seriously polluted the complainer's stream, into which it ultimately flows.

The question is, Are the School Board responsible? I am clearly of opinion that they are not entitled to send their sewage in these pipes across this fifty foot strip, and into the pipes for receiving surface-water, and so into the stream. They say that this is not due to their fault, but to the superior's failure to prevent such overflow, in terms of his obligation undertaken to them. In my opinion, in a question with the complainer they were not entitled to bargain for an outlet which has resulted in their sewage finding its way into their neighbour's stream. I think they are responsible for the nuisance thereby caused, and that they must be stopped accordingly. The outlet which has been provided has proved insufficient, and it is their duty to find another which will avoid the discharge of the sewage into the complainer's stream.

With regard to the respondent Cameron, he is in the position of having undertaken to find an outlet that would relieve the School Board, and would not cause a nuisance to the neighbours immediately at hand. He has not done so, but has allowed the sewage to pass through these barrels, which he has taken no trouble to clean out, and flow on to the complainer's property. I am of opinion that both respondents are responsible for the nuisance complained of, and I therefore agree with your Lordship that we should adhere to the judgment of the Lord Ordinary.

LORD TRAYNER — I am of the same opinion. The material fact is that the sewage complained of comes from the School Board feu and passes through the respondent Cameron's ground to the ground of the complainer. That is an infringement of the complainer's rights which he is entitled to interdict. The question that we have to determine is, Who is the wrong-doer? In my opinion both respondents must be so described: I can quite understand that where under contract A undertakes to remove, say, noxious matter from B's lands, that B may not be responsible if A puts it in an improper place. But that argument is not applicable to the circumstances of the present case. Here the School Board had to get an outlet for their sewage, and they accordingly contracted with the respondent Cameron to provide that outlet. But the outlet which he provided was an outlet to his neighbour's land. That outlet the School Board are using, and they are thus, to adopt an expression used in some of the cases, the "authors of the nuisance," and as such the present complaint is directed against them. On the other hand, Cameron is under obligation to provide an outlet for the sewage in question, and he, by way of fulfilling his obligation, is carrying the sewage, or allowing it to pass through his land on to the complainer's. He may be interdicted accordingly for so doing; he is encroaching on his neighbour's rights. In my opinion, therefore, both the respondents are doing a wrong to the complainer, and are both liable to interdict.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Complainer — John Wilson, Q.C. — Ralston. Agent — Henry Wakelin, Solicitor.

Counsel for the Respondent William Cameron — Craigie — Laing. Agents — Laing & Harley, W.S.

Counsel for the Respondents the School Board of Polmont — Salvesen, Q.C. — Orr. Agent — Robert D. Ker, W.S.

Thursday, July 12.

## SECOND DIVISION.

### TURNBULL'S TRUSTEES v. TURNBULL'S TRUSTEES.

*Succession — Vesting — Fee or Liferent — Declaration that Fee not to Vest till Majority and Expiry of Liferents — Interest of Beneficiary Restricted to Liferent under Power Given to Trustees — Intestacy.*

A testator, after providing a liferent of his whole estate to his widow, directed his trustees to hold the residue of his estate, "one-half for behoof of the issue of my said deceased son John in fee, and the other half for behoof of my said son James in liferent and his issue in fee," declaring that the fee should not vest in the issue of either son during the said liferents, nor until such issue should respectively attain majority. He further empowered his trustees to limit the interest of any beneficiary of whose conduct they did not approve to a liferent, and to suspend the vesting of the fee of his share during his life, and to hold the same for behoof of his or her issue. The trustees validly and properly exercised the power of restriction in the case of W., a son of John, while he was still in minority. W. attained majority, and died without issue, survived by a sister.

*Held* that no right of fee had vested in W., and that on his death without issue the fee of his share fell into the intestate succession of the testator.

*Lindsay's Trustees v. Lindsay*, Dec. 14, 1880, 8 R. 281; and *Dalgligh's Trustees v. Bannerman's Executors*, March 6, 1889, 16 R. 559, distinguished.

William Turnbull, Daldowie, Old Monkland, who died on 20th December 1869, left a trust-disposition and settlement dated 23rd October 1866, whereby he conveyed his whole estate to certain trustees for the purposes therein specified.

By the second purpose of his settlement the testator provided a liferent of his whole estate to his widow.

The third purpose was as follows:—"In respect I gave outfits to my sons John Turnbull, now deceased, and James Turnbull, farmers at Daldowie (my whole children), I direct my trustees on the decease of my widow, or on my death in