

[26th August 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 38.)

JAMES PEDIE, Appellant.¹

[John Stuart.]

ARCHIBALD SWINTON and others, Respondents.

[Tinney.]

Nuisance — Interdict.—An application being made for suspension and interdict against the erection of slaughterhouses, the party complained against, after interim interdict, alleged that he had discovered a mode of conducting the proceedings in these houses which would prevent their being a nuisance. The Lord Ordinary (Corehouse) passed the bill, but in respect the party complained against “desired to go on with the erection of the buildings at his own risk, and agreed that his doing so shall not be considered as affording him any plea of favour when the question of nuisance shall be determined,” recalled the interdict in so far as it prohibited the erection of the buildings, but quoad ultra continued the interdict. Upon discussing the expedite letters, the Lord Ordinary (Fullerton) found that the erection of shambles or slaughterhouses in the situation proposed would be a public nuisance, and therefore sustained the reasons of suspension, and continued the interdict, and found the respondent liable in expenses. The court, upon a reclaiming note, after ordering a condescence of the precautionary measures the respondent (appellant) meant to adopt, and having examined plans and models of the buildings, adhered to the interlocutor of Lord Fullerton. The House of Lords (the party complaining having intimated that he had no desire to foreclose the party complained against

¹ 15 D., B., & M., 775.

from having his case reconsidered upon a change of circumstances,) declared, that the appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse; and that liberty be reserved to the appellant to apply for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his premises, mentioned in the appeal, without creating a nuisance.

THE appellant and respondents were proprietors of adjoining grounds near Stockbridge, in the neighbourhood of Edinburgh. A bill of suspension and interdict was presented to the Lord Ordinary on the bills, at the instance of the respondents, setting forth that the appellant was about to erect, upon his property, a range of shambles or slaughtering houses, which they alleged would prove a nuisance to their property, and would tend to pollute a mill-lead which passed in the neighbourhood. The bill prayed that the appellant should be interdicted “from proceeding with the erection of said
 “houses and buildings at present in progress on his
 “property aforesaid, as shambles or slaughterhouses for
 “the slaughtering of cattle and other beasts, and from
 “erecting any other buildings thereon for the said pur-
 “poses; and from letting, using, and occupying all or any
 “part of his said property, and the buildings erected
 “and to be erected thereon, as slaughterhouses or
 “shambles, for the purposes aforesaid; and from empty-
 “ing or depositing the offals or other impure matter
 “therefrom into the mill-lead aforesaid, or in any other
 “matter thereby prejudicing the interests and proper-
 “ties of the complainers.”

When this bill was presented an interim interdict was granted, *ex parte*, by the Lord Ordinary, in general terms. A hearing then took place before the Lord Ordi-

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nary, in consequence of which a minute was presented for the appellant, stating that he did not object to the passing of the bill upon caution, for the purpose of trying the question of nuisance; and with regard to the interdict, that he did not object to its being continued, in so far as related to the pollution of the mill-lead. He farther represented, that in case the Lord Ordinary should be of opinion that the interdict ought in the meantime to be continued to any greater extent, it ought at least to be recalled in so far as related to the erection of the houses and other buildings at present in progress, or any other buildings, and ought to be confined to the letting, using, or occupying all or any part of his said property, and the buildings erected or to be erected thereon, as slaughterhouses or shambles for the purposes aforesaid. That he was perfectly aware that the erection of these buildings must now, in consequence of this judicial challenge, be at his own risk. But he was confident that he would be able to prove to the satisfaction of the court that his projected operations, in a new and improved form, would constitute no nuisance such as to entitle the respondents to interfere. The following interlocutor was thereafter pronounced by Lord Corehouse.

“ The Lord Ordinary, having considered the bill and
“ answers, with the minute for Mr. Pedie, and having
“ heard counsel for the parties, and inspected the pre-
“ mises in question, passes the bill; but in respect that
“ Mr. Pedie desires to go on with the erection of the
“ buildings at his own risk, and agrees that his doing so
“ shall not be considered as affording him any plea of
“ favour when the question of nuisance shall be deter-
“ mined; recalls the interdict, in so far as it prohibits

“ the erection of the buildings, but, quoad ultra,
 “ continues the interdict.”

The record being closed upon reasons and answers, and pleas in law, the Lord Ordinary (3d March 1836) pronounced the following interlocutor:—“ The Lord Ordinary (Fullerton) having heard parties procurators, and considered the closed record, and visited the ground, finds that the erection of shambles or slaughterhouses, in the situation proposed by the respondent (appellant), would be a public nuisance, and therefore sustains the reasons of suspension, and continues the interdict, and decerns; finds the respondent (appellant) liable in expenses; and remits the account thereof when lodged to the auditor to tax the same, and to report.” *Note.* “ It has been repeatedly decided that the slaughtering of cattle in the suburbs of a town, or in the immediate neighbourhood of inhabited houses, is a common nuisance. Whether or not it be possible to devise means by which the various offensive consequences of such operations may be mitigated, or entirely avoided, it is not for the Lord Ordinary to determine; primâ facie, it does not seem likely; but at any rate, if there be such a possibility, it was incumbent on the respondent (appellant) to show how it was to be accomplished. But the respondent (appellant), though perfectly apprized by the proceedings in the Bill Chamber of what would be expected of him, gave no explanation, but merely avers in general ‘ that the shambles are to be erected on a new and improved plan, by which there will be nothing offensive to the sight or smell,’ &c. In these circumstances

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“ the Lord Ordinary thinks the interdict must be con-
“ tinued.”

Against this interlocutor the appellant presented a reclaiming note to the First Division of the Court, and their Lordships, pronounced this interlocutor :—6th Dec. 1836, “ The Lords, having advised this reclaiming
“ note, and heard the counsel for the parties, appoint
“ the reclaimer to lodge in process plans of the build-
“ ings he proposes to erect, and a special condescen-
“ dence of the precautions he means to adopt, in order
“ to satisfy the Court that his shambles will not be a
“ public nuisance.¹”

¹ The following was the condescence lodged for the appellant :—“ The condescender herewith produces a ground plan and an elevation plan
“ of his proposed buildings, part of which are already erected; and he
“ has also prepared a model in wood, on a large scale, of such a portion
“ of the building as will enable any one who examines it, to understand
“ the details. The slaughter-houses are to consist of two ranges of build-
“ ings, parallel to each other, running from east to west, at the distance
“ of about twenty feet from each other. The interposed space, which is
“ to form a court, being flanked with high walls on the east and west,
“ will be entirely excluded from view. The only access to it is to be by
“ an opening in the northmost range of buildings, where there is to be a
“ gateway. This opening establishes a communication between the court
“ and a stable-lane, which is to run parallel with the court, and the two
“ extremities of which, on the east and west, open out to public roads or
“ lanes. This stable lane is interposed between a range of stables and
“ coach-houses on the south, and a range of byres on the north. Still
“ farther to the north, the ground between the byres and the public road
“ is to be occupied by a range of self-contained dwelling-houses, with
“ back greens attached to them. The eastern end of the stable lane
“ opens upon a parish road running north and south, by means of which
“ cattle coming from the eastward may be introduced. The western end
“ of the stable lane opens upon a lane which is shewn upon the plan,
“ &c. The slaughter-houses consist of several separate killing places,
“ which all open into the court, and have windows in the roof. The
“ buildings consist of stone and lime, and the roofs are slated. The
“ court is causewayed with whinstone causeway. Each killing place
“ occupies an area of about nineteen feet square within walls; the floors
“ consisting of the best and strongest Craigleith ashlar pavement, eight

Thereafter the Court pronounced the following interlocutor:—“ The Lords, having resumed consideration
 “ of this reclaiming note, with the condescendence or-
 “ dered, and answers thereto, and the plans and models
 “ of the buildings, and heard counsel, adhere to the
 “ interlocutor of Lord Fullerton of 3d March 1836,
 “ and refuse the desire of the note, but find no ex-

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“ inches thick, squared and jointed, and broached or droved on the surface.
 “ The walls immediately above the pavement, all round, are coursed, and
 “ the stones laid square, so as to be perfectly tight. The pavement is not
 “ laid horizontal, but forms an inclined plane; so as that any liquid spilt
 “ upon the floors, will immediately find its way into the cess-pool. By
 “ this means the floors can be made perfectly clean by merely pouring
 “ water upon them. Between each pair of killing places a cess-pool or
 “ dung-pit is constructed, which is somewhat like a closet of six feet
 “ square, the floor of which is sunk considerably below the level of the
 “ adjoining pavement, and consists of a hewn stone trough, well jointed,
 “ and neatly broached, so as to be perfectly tight. Into this trough,
 “ whatever liquid is spilt, or water is poured upon the pavement of the
 “ killing places, will find its way, by means of a small aperture. No
 “ liquid can ever escape from the killing places to the outer court; but
 “ from the inclination of the floors, and the construction of the doors of
 “ access, the whole is immediately discharged into the cess-pool. The
 “ upper part of this square closet is completely shut in, and excluded
 “ from the outward air, there being merely an opening to each of the
 “ killing places, for the purpose of discharging into it any refuse, which
 “ opening can be shut by a close lid. These cess-pools are to be cleansed
 “ every second day by the farmer to whom the manure is let, before five
 “ o'clock in the morning. For this purpose there is an access from the
 “ outer court into the cess-pool by a locked door, of which he has a key.
 “ The cattle are to be brought into the killing places at a very early hour
 “ in the morning, so that there will be no such thing as danger from the
 “ driving of the cattle, either in the street or in the lanes. By means of
 “ these contrivances there will be neither danger nor offence either to the
 “ sight or smell. It will be perfectly impossible for any one on the out-
 “ side of the establishment to see any thing that goes on either in the
 “ slaughter-houses or in the court. Even in the court itself there will be
 “ no appearance of filth or of blood, and from it there will be no immis-
 “ sion into the mill-lead, of any filthy or offensive substance whatever.
 “ There will be no smell of an offensive kind even in the court, and far
 “ less on the outside of the buildings, or in the neighbourhood. This
 “ will be effectually prevented by keeping all the refuse from being
 “ exposed to the action of the outer air, and by its being regularly
 “ and frequently taken away.”

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“penses due since the date of said interlocutor; of
“new, remit the account,” &c.

Against the interlocutors of the Lord Ordinary of 3d March 1836, and of the Court of 9th March 1837, the appellant entered his appeal, contending that the effect of these interlocutors was to exclude him from making a trial of his slaughter-houses, with a view to determine the question, whether they would create a nuisance; that this was unjust, because it was impossible determine, without a trial, whether such nuisance would be occasioned; and that it was also illegal, because, by special act of parliament, the determination of questions of nuisance are, in Scotland, appropriated exclusively to the cognizance of a jury.

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LORD CHANCELLOR.—My Lords, according to the facts, as they appear before the House, and according to the natural construction I should put upon the interlocutor complained of, I have no difficulty in suggesting to your Lordships that the course ought to be pursued which has been suggested at the bar. I therefore do not propose, at this moment, to move your Lordships judgment, but to give the appellant an opportunity, if he can, of satisfying your Lordships that the course of proceeding would not be open to him, which, from the papers before the House, I apprehend would.

The suit in discussion is to prevent the appellant from proceeding to erect slaughter-houses upon a very large scale. Now, the erection of slaughter-houses, generally speaking, would be a nuisance according to the law of Scotland, which is not disputed. Several decisions have established that it is so; and it is accord-

ing to the practice of the law in Scotland, when erections are made which, if completed, would amount to a nuisance, to interdict the proceedings of the party, for the purpose of protecting persons interested, and the neighbourhood, from any injury that might be sustained from such a nuisance. The course of proceeding in Scotland is similar to the course of proceeding in this country. In England the Court interferes by injunction, or finally by a discontinuance of that injunction, if there is any doubt of the fact of a nuisance, for the purpose of enabling the parties to try it.

The appellant in this case, not pretending to dispute the rule of law, that generally speaking a slaughterhouse would be a nuisance, suggests various modes by which the nuisance might be avoided.

Now, it so happens that these plans which are suggested would not depend upon any mode of proceeding which would prevent the nuisance independently of the act of the party; he says he means to clean out the cesspools every second day, and that the cattle are to be driven by a certain hour in the morning: all that entirely depends upon his volition, and is not a fact which can be tried, if the question were sent to a jury. An inquiry, before a jury, to ascertain whether if this thing were done there would be a nuisance or not, could lead to no conclusion at all affecting the rights of the parties. On the other hand, if the suggestions were of the same nature as in Trotter's case¹, then indeed the Court could see grounds upon which it might safely proceed.

The orders, as they stand printed, undoubtedly would shew that the appellant is not prohibited from continuing the erection of these buildings; but if the appellant

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can satisfy your Lordships to the contrary, it will be material before you finally dispose of this case. It appears that, in the first instance, he was prohibited from erecting the buildings at all. That was altered by an order, which, as printed, is thus: "But in respect that
" Mr. Pedie desires to go on with the erection of the
" buildings at his own risk, and agrees that his doing
" so shall not be considered as affording him any plea
" of favour when the question of nuisance shall be de-
" termined, recalls the interdict, in so far as it prohibits
" the erection of the buildings." The moment that interdict was pronounced it stood good as an interdict against what was alleged to be nuisance, but it was no interdict against continuing the buildings. In March 1836, the Lord Ordinary sustained the reasons of suspension, and continued the interdict. The only interdict was the one I have just stated. The question came before the Inner House; and the Court adhered to the interlocutor of Lord Fullerton, namely, of the 3d March 1836, which was the interlocutor I last stated; and the result of that would show, that at this moment there is no interdict against continuing the building. If however the appellant is able to show your Lordships that some mistake has been made in the mode in which the interdict is printed, and that there is an interdict against continuing the building, he might possibly induce your Lordships to alter the interlocutor in that respect.

What he says is in substance, "I am so satisfied that
" I can prevent any nuisance,—and I will satisfy the
" Court of Session, or this House, that no nuisance
" will arise in carrying on the business of a slaughter-
" house in these premises,—I am willing to be at the

“ expense of erecting slaughter-houses, taking the “ chance of being able to carry on the business.” Certainly, so far, there is room for confidence that he will be able ultimately to succeed in carrying on the business without creating a nuisance. The court however were not satisfied that that which he suggested was sufficient to enable him to call upon them to rescind the interdict altogether; and I am clearly of the same opinion. The business itself is declared and recognized by the law of Scotland as a nuisance; and certainly, that he means to carry it on in a particular form, is not a reason why the Court of Session ought to entrust him with a power to expose the interests of the inhabitants to that which the law considers a nuisance.

Then comes the other question to which I would also wish to draw your Lordships attention. It has been argued at the bar, that he is precluded from saying to the Court at a future time that he has devised means by which he will be able effectually to prevent the nuisance. In the case of Trotter¹ I find that this House adopted the course which, subject to what may hereafter be shown by the appellant, I should advise your Lordships to adopt; but, practically, notwithstanding the judgment of the Court, in the first instance, and of this House affirming it, the party was permitted to show that by pursuing the mode he intended to adopt, that that which, *primâ facie*, would be a nuisance, would not be a nuisance. I cannot doubt therefore, but that in the present case the same course of proceeding might be open to the appellant, as was practically proved to be

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¹ Trotter v. Farnie and others, 7th Dec. 1830, 9 S., D., & B., 144; affirmed, 1st Oct. 1831.

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open to the appellants in the case to which I have referred. There the party was about to erect a building for the purpose of boiling whale blubber, which by prior cases had been held to be a nuisance. It was suggested to the Court, that although, *primâ facie*, that was a nuisance, and, if conducted in an ordinary manner, would be a nuisance, yet he had the means, from a particular form or system of carrying it on, to prevent it being a nuisance. The Court of Session were not satisfied that the course suggested would be sufficient to protect the property of persons in the neighbourhood, and they interdicted him “in so far as regards the boiling whale blubber in the premises in question;” and this House¹ affirmed the interlocutor, and prevented further proceeding. So far the cases are similar. He afterwards procured the assistance of a gentleman of great eminence², who suggested means by which they were enabled to apply to the Court of Session for that purpose; and I have no doubt that a similar course is open to the appellant in the present case. It is quite impossible to suggest a mode at the present time for trial, according to the suggestion of the appellant.

I am anxious, undoubtedly, to give the party an opportunity of satisfying your Lordships that the interlocutor would prevent him from applying to the Court of Session for a discharge of the interdict, upon the ground that he has discovered the means of avoiding the nuisance, and can satisfy the Court that he might safely be permitted to proceed with his work and his business, securing those whose interests are likely to be affected. If he can satisfy your Lordships that he cannot

¹ 1st October 1831.

² Professor Leslie.

do that as the matter now stands, there may be a reason for a variation of the interlocutor.

For the purpose of giving the appellant an opportunity to communicate further information to your Lordships upon the points to which I have alluded; I will now suggest that your Lordships should abstain at this moment from finally disposing of the case. But, undoubtedly, unless the appellant can satisfy your Lordships upon those points, considering the circumstances of the case, I will advise your Lordships to dismiss the appeal, with costs. If it become necessary for counsel to attend here, of course you will give them the opportunity. If the appellant hand in a written statement, the House will then say whether the other side shall have an opportunity of answering it.

Statements were thereafter given in on both sides, the only part of which material to notice will be found in the following speech :—

LORD CHANCELLOR.—My Lords, at the hearing of this appeal I expressed my opinion that the Court was right in continuing the interdict under the then existing circumstances. But, as the Lord Ordinary's interim interdict, whilst it prohibited the nuisance, permitted the appellant to go on with the buildings at his own risk, (he agreeing that his doing so should not be considered as affording him any plea of favour when the question of nuisance should be determined,) was founded upon a representation on the part of the appellant, that he should be able to show that from the manner in which he proposed to conduct the business of slaughtering cattle, all nuisance to the neighbourhood would be avoided, I thought it unjust, after

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the appellant had proceeded upon the faith of such an arrangement, that any interdict should be subsequently pronounced, preventing the further building of the projected premises, or which should not be capable of being relaxed, (for the purpose of enabling the appellant to try the experiment by which he hoped to be able to prevent the nuisance usually arising from his business,) and, if necessary, ultimately recalled.

How far the existing interlocutors were consistent with this view of the case was the subject of a difference of opinion. The case therefore stood over for the purpose of ascertaining that point. The result has been a statement on each side, contending for directly opposite positions; but on the part of the respondents an offer has been made which precludes the necessity of coming to any conclusion upon that subject; for after contending that the interdict, as it exists, does not prevent the appellant from proceeding with the building, they say that they have no desire to foreclose the appellant from having his case reconsidered upon a change of circumstances, and the interdict recalled upon cause shown, or a remit to the Court, with power, if they shall see cause, to entertain and dispose of such an application.

The appellant has not shown that the existing interdict prevents his continuing the erection of the building, nor has he succeeded in proving that he should be able effectually to prevent the nuisance, if permitted to commence the business of slaughtering cattle; and yet he has appealed against the whole of the interlocutor granting the interdict. In this he was, I think, wrong; but I am by no means satisfied that the interlocutors are altogether right, because I think they ought, after what had before

taken place, to have been so framed as to give to the appellant an opportunity of applying in the cause to the Court for liberty to try the experiment he has suggested, and that there should have been reserved to the Court the power of dealing with the interdict as might be just after such experiment had been tried.

I therefore think that the right order for the House to make will be to declare that the appellant ought to be interdicted in the terms of Lord Corehouse's interlocutor, which will enable him to proceed with his intended buildings, if he shall think proper to incur the risk of so doing; and that liberty ought to be reserved to the appellant to apply to the Court for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon those premises without creating a nuisance; and that power ought to be reserved to the Court to recal, alter, or vary the interdict, and to make such order therein as shall be just, after the result of such experiment shall have been ascertained. And with this declaration the cause ought to be remitted to the Court of Session to be reviewed, and to have such alterations, if any, made as may be necessary for these purposes. There can be no costs of the appeal.

The House of Lords declared, That the said appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse, Ordinary, pronounced on advising the minute of the appellant; and that liberty be reserved to the appellant to apply to the said First Division of the Court of Session for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his, the appellant's, premises, mentioned in the appeal, without creating a nuisance; and that power be reserved to the said First Division of the Court of Session to recal, alter, or vary

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the said interdict, and to make such order therein as shall be just, after the result of such experiment shall have been ascertained: And it is ordered, That with this declaration the cause be remitted back to the First Division of the said Court of Session, to review the said interlocutors, and to have such alterations, if any, made therein as may be necessary for the said purposes, and as shall be consistent with this declaration.

A. DOBIE — RICHARDSON and CONNELL,
Solicitors.