

namely, that in 1792 the following letter had been granted by one of the pursuer's predecessors to one of the defenders, viz. :—

"Gardyne, 14th April 1792.

"Sir,—We, Thomas Lyell of Gardyne, and Mrs Elizabeth Lyell, tutor and factor for my son, Thomas Lyell, younger of Gardyne, own and acknowledge that neither we nor the tenants in the lands of Gardyne have any title, right, or claim of right to pass on foot, or with horses or carriages, along any roads within the park dykes of Middleton without your permission first obtained to that effect.—We are, Sir, your most humble servants,

"THOS. LYELL.

"ELIZABETH LYELL.

"To David Gardyne of Middleton."

The defender said that the roads now claimed were not included in this letter; but if they were, and if there had been use by the public after 1788, this seemed to introduce a new state of things. It did not, however, exclude the pursuer from now establishing a case of public right-of-way; but it made one look at the evidence in a way that might not otherwise be called for, and it became necessary to show that there was some change betwixt 1792 and the end of the century. Then, if the jury were satisfied that there had been forty years' use by the public prior to 1841, it would not avail the defender though from that year till now there had been an entire exclusion of the public. It would require exclusion for forty years to destroy the right which the public had acquired. His Lordship concluded by saying that the question was one of fact, and it was for the jury to say whether the evidence, which was conflicting, preponderated in favour of use by the public unchallenged, or of resistance by the proprietor.

The jury returned a verdict for the pursuer on the first issue, and for the defender on the third, and found it unnecessary to return any verdict on the second.

Counsel for Pursuer—Mr Watson and Mr Guthrie Smith. Agents—Webster & Sprott, S.S.C.

Counsel for Defender—Mr Millar and Mr Mackay. Agent—Alexander Howe, W.S.

SECOND DIVISION.

(Before the Lord Justice-Clerk.)

Monday, July 23.

THOMAS *v.* THOMSON.

Bankruptcy—Fraud—Stat. 1621, c. 18. In a reduction of two dispositions and a promissory-note founded on fraud at common law, and also on the Act 1621, c. 18.—Verdict for the pursuer.

In this case the pursuer was James Thomas, lessee of the Forthar Lime Works, near Kettle, in the county of Fife, and the defender was William Thomson, clothier in Dundee.

The issues sent to the jury were—

- "1. Whether, on the 20th January 1854, and on 17th February 1858, the pursuer was, and now is, a creditor of David Robertson, builder, Dundee?
- "2. Whether the disposition, No. 7 of process, by David Robertson to the defender, dated 20th January 1854, of a piece of ground in Hospital Westward of Dundee, and houses and buildings thereon, and a piece of ground, forming part of an acre of land or thereby, in Thain's

Park, Dundee, was granted by the said David Robertson to the defender, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said David Robertson, contrary to the Act 1621, c. 18?

- "3. Whether the said disposition was granted by the said David Robertson, and taken by the defender fraudulently to disappoint the rights of the creditors of the said David Robertson?
- "4. Whether the disposition, No. 9 of process, by David Robertson to the defender, dated 20th January 1854, of piece of ground marked 10 of the common meadows of Dundee, was granted by the said David Robertson to the defender, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said David Robertson, contrary to the Act 1621, c. 18?
- "5. Whether the said last-mentioned disposition was granted by the said David Robertson, and taken by the defender fraudulently to disappoint the rights of the creditors of the said David Robertson?
- "6. Whether the promissory-note for £5717, 3s. 1d., dated 17th February 1858, and payable one day after date, granted by the said David Robertson to the defender, was so granted by the said David Robertson to the defender, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said David Robertson, contrary to the Act 1621, c. 18?
- "7. Whether the said promissory-note was granted by the said David Robertson, and taken by the defender fraudulently to disappoint the rights of the creditors of the said David Robertson?"

BALFOUR opened the case for the pursuer. He explained the circumstances of the case as they would be brought out in the evidence, and went over the issues in detail, maintaining that the evidence which the pursuer would lay before the jury would justify him in asking a verdict on all the issues. He said that it was plain from a very early period that the building of the Infirmary would involve a loss to the builder of at least £5000, and that the effect of the dispositions referred to in the issues was to withdraw a property from being available to pay the debts of Robertson; but this was concealed from the creditors, and in the belief that Robertson was still solvent the pursuer Mr Thomas was induced to give more lime and to renew bills, which he never would have done if he had known that the property had been made away, and that at the time Mr Robertson was insolvent. Mr Robertson had asked the creditors to wait till a settlement was got from the Infirmary, when they would get 20s. in the pound, but at the end he called his creditors together, and offered them 2s. in the pound. In the whole circumstances of the case he thought the jury would have no difficulty, after hearing the evidence, in finding the pursuer entitled to a verdict on all the issues.

Evidence was then led for the pursuer.

WATSON opened for the defender. He said there was no intention on the part of the defender to dispute the first issue, as he was willing to admit that on the 20th January 1854, and on 17th February 1858, the pursuer was, and now is, a creditor of the late Mr Robertson. As to the second issue, relating to the disposition by Mr

Robertson of certain properties to the defender, on 20th January 1854, the question put in that issue was whether that disposition was made "without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said David Robertson, contrary to the Act 1621, c. 18?" In reply to that issue the defender could either prove that there was no insolvency at the date of the alienation, in which case he would be entitled to a verdict, or that there did exist "a true, just, and necessary cause" for the alienation of the property, in which case the defender would also be entitled to a verdict, because the purpose of the Act 1621 was to strike at alienations made gratuitously without onerous consideration; and it was not within the scope or effect of the statute to cut down any alienation which was made for a just and substantial consideration, whether the alienation should be in the form of an absolute disposition, or be in truth and substance a security. Now, in the present case, it was not necessary for the defender to go further than to say that, on the 20th January 1854, there did exist "true, just, and necessary cause" for the conveyance of the properties, because he thought that, according to the evidence led by the pursuer himself, it was clear that the debt which was due to the defender by Mr Robertson on the 20th of January 1854, amounted to £2000, and if that was the case, then undoubtedly the statute had no application. In the third issue the jury were asked to say whether there had been an intentional fraud committed with the view of injuring the other creditors; and he was confident that the evidence would show that the defender was undoubtedly entitled to a verdict on this issue. The reply of the defender to the fourth and fifth issues would be substantially the same as to the second and third—that there was no insolvency at the date of the disposition, and that the alienation was made for a true, just, and necessary cause. In reference to the sixth and seventh issues, relating to the promissory-note for £5717, granted by Mr Robertson to the defender, it was sufficient to entitle the defender to a verdict upon these issues to show that the sum of £5717 was actually due to the defender by Mr Robertson at the date of the promissory-note, so that there was no prejudice to prior creditors. That promissory-note was granted for a debt actually due to the defender, and it created no preference over other creditors, so that it could not prejudice the rights of prior creditors.

Evidence was then led for the defender.

The SOLICITOR-GENERAL addressed the jury for the pursuer.

YOUNG addressed the jury for the defender.

The LORD JUSTICE-CLERK charged the jury.

The jury found for the pursuer on all the issues.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agents for Defender—Webster & Sprott, S.S.C.

July 30 to August 10.

DUKE OF BUCCLEUCH AND OTHERS *v.*
COWAN AND OTHERS.

Nuisance—River—Pollution. In an action at the instance of proprietors on the banks of a stream against other proprietors for polluting a stream—verdict for the pursuers.

In this action, which has been before the Court of Session since 1841, the Duke of Buccleuch, Lord

Melville, and Sir J. W. Drummond are pursuers; and Messrs Cowan & Sons and other gentlemen, proprietors of mills on the banks of the North Esk, are defenders. The following issues were sent to the jury:—

- "1. Whether, between 1st January 1835 and 1st October 1853, the defenders, the first-mentioned firm of Alexander Cowan & Sons, did, by discharging refuse or impure matter at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, or any of them, pollute the water of the stream or river called the North Esk, to the nuisance of the pursuers, or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "2. Whether, between 1st October 1853 and 20th May 1864, the defenders Alexander Cowan & Sons, the present occupants of said mills, did, by discharging refuse or impure matter at or near their said mills, or any of them, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "3. Whether, between 1st January 1835 and 15th May 1856, the defenders, the first-mentioned firm of William Sommerville & Son, did, by discharging refuse or impure matter at or near their mill called Dalmore Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "4. Whether, between 15th May 1856 and 20th May 1864, the defenders William Sommerville & Son, the present occupants of said Dalmore Mill, did, by discharging refuse or impure matter at or near their said mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "5. Whether, between 1st January 1835 and 1st July 1856, the defenders, the first-mentioned firm of Alexander Annandale & Son, did, by discharging refuse or impure matter at or near their mills called Polton Papermills, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?"
- "6. Whether, between 1st July 1856 and 20th May 1864, the defenders Alexander Annandale & Son, the present occupants of said Polton Papermills, did, by discharging refuse or impure matter at or near their said mills, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?"
- "7. Whether, between 15th May 1856 and 20th May 1864, the defenders James Brown & Company, did, by discharging refuse or impure matter at or near their mill called Esk Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?"
- "8. Whether, between 1st May 1848 and 20th May 1864, the defender Archibald Fullerton Somerville, did, by discharging refuse or im-