

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

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

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

The LORD JUSTICE-CLERK concurred.

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

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

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

Tuesday, June 28.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

WALLACE v. MURDOCH.

Property—Watercourse—Interdict—Operations in æmulationem vicini.

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

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

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

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

from the point at which it entered the said meadow land till it reached the lands of Drumwhirn by a "natural sheugh," very crooked and narrow, which had little or no channel, and was unfit to contain or carry off the water which flowed into it in times of flood or during a wet season. It consequently overflowed and flooded several acres of valuable meadow land, and rendered the cultivation and profitable use of a large portion of the field impossible. After entering the lands of Drumwhirn it maintained the same character and pursued a similar zig-zag course.

Immediately on entering on his farm Samuel Wallace began to drain a portion of it which sloped towards the field through which the "sheugh" or watercourse ran, and the field itself. In carrying out these operations he found it necessary to form a channel of sufficient size to contain the whole surface and drainage water from that portion of the lands of Drumwhirn which sloped towards Nether Minnybuie, and from a considerable portion of Nether Minnybuie itself. For this purpose he cut a straight channel of an average width of 10 feet, which was carried into the old watercourse on the Minnybuie side a few yards from the point where it entered the lands of Drumwhirn. Here he erected an embankment to prevent the stream from overflowing into his own lower meadow, and to divert it at a slight angle into its old channel on the Drumwhirn side. Eighteen years thereafter the proprietor of Drumwhirn raised this action against Wallace concluding for interdict against interference with the original channel of the burn, for a decree ordaining the defendant to fill up the new channel, remove his embankment, and clear out the old channel, and for damages to the amount of £137 which he averred had been caused by the overflow of water and sand upon the said lands by and in consequence of the said improper and illegal operations of the defender.

The pursuer averred that this new channel, as also the embankment, caused to be carried down and deposited on his lands great quantities of earth, sand, and gravel, in consequence of which two acres or more of good meadow land had been rendered of no value whatever.

He pleaded—"(1) The defender had no right or title to divert or alter the original channel of the said burn or watercourse, or to make an embankment at the place where it enters the pursuer's said lands, so as to flood and spoil his land, or to fill up the said original channel, and interdict as craved should be granted, with expenses. (2) The defender ought to be ordained to restore the channel of the burn or watercourse to what it was before his said improper and illegal operations, and to remove the said embankment, and to clean out the said original channel, and failing his doing so the same should be done at his expense. (3) The defender is liable to the pursuer in damages and loss for his improper and illegal operations, and decree therefor should be granted, with expenses."

The defender, on the other hand, averred that the pursuer was well aware of the defender's operations, and took no steps to prevent them being carried out. Even in 1862 he had been in communication with the pursuer on the subject,

and offered at his own expense to carry a new and deeper channel through the lands of Drumwhirn to prevent any possibility of injury resulting to said lands or to the pursuer. This offer the pursuer had declined. The pursuer had made no provision on his own side for carrying off the water, and the defender's operations had had the effect of improving his farm.

He pleaded—"(3) The pursuer is barred by acquiescence and *mora* from insisting in the present action. (4) Interdict ought to be refused, in respect that the operations complained of having been completed and in use for seventeen years, an action of interdict is inappropriate and incompetent. (5) The whole prayer of the petition ought to be refused, with expenses, in respect—1st, that the operations complained of have been carried out on lands not belonging to the pursuer; 2d, that the said operations have been carried out by the defender in the legitimate exercise of his own and his landlord's rights, for the agricultural improvement of his farm, and not *in emulationem vicini*; 3d, that the natural outfall of the water on to the pursuer's lands has not been altered, and the defender is entitled to send down to the lands of the pursuer, as inferior proprietor, all natural surface water set free in the course of legitimate agricultural improvements."

A proof was allowed, the import of which will sufficiently appear in the Sheriff-Substitute's interlocutor and the Judges' opinions.

The Sheriff-Substitute (NICOLSON) found "That the Minnybuie burn, which flows partly through the defender's and partly through the pursuer's lands, had frequently done damage by overflowing on both sides for want of a sufficient channel and outfall: That the defender altered the course of the burn within his own lands by cutting a new and straight channel for it, of sufficient breadth and depth, for about 300 yards, so that instead of winding tortuously in a narrow sheugh through his meadow as it had formerly done, it flowed straight on his own side of the march dyke to that point where it entered the pursuer's land: That at that point the defender erected an embankment to prevent the stream from overflowing into his own lower meadow, and diverge it at a slight angle into its old channel on the pursuer's side: That the pursuer did nothing to improve the channel of the burn from that point to the bridge; that he made no reply to an offer by the defender to do it for him; and that to a letter on the subject from Mr George Dickson, dated 30th July 1862, he replied that he had had the damage done to his land by the defender valued, and had put the matter into the hands of his man of business: That no proceedings were taken by or for the pursuer to vindicate his claim, and that no further communication on the subject was made by him to the defender till 11th September 1877: In law, that the pursuer is barred by personal exceptions and *mora* from insisting in his present claim: Sustains the defender's 3d, 4th, 5th, 6th, 7th, and 8th pleas, and assoilzies him from the conclusions of the action."

The Sheriff-Principal (MACPHERSON) having recalled this interlocutor, the defender reclaimed, and argued—(1) The doctrine of Erskine (ii. 9, 2) as to the burdens imposed on the owners of

inferior tenements was not to be overstretched to their prejudice. This was recognised in the case of *Campbell v. Bryson*, 16th Dec. 1864, 3 Macph. 254, the test in that case being held to be the necessity for the inferior proprietor proving that the superior proprietor's operations had been conducted in disregard of his convenience or interest. In the present case the pursuer could not show this, and moreover he had, in point of fact, reaped good and not bad results from the defender's operations, which formed a proper and reasonable agricultural improvement on his own lands. (2) The pursuer was barred by *mora*. During the twenty years which had elapsed, some of the defender's most important witnesses had died.

The pursuer in reply founded on the case of *Jackson & Ors. v. Marshall*, 4th July 1872, 10 Macph. 913.

At advising—

LORD JUSTICE-CLEBK—In this case, which has been very ably stated on both sides, I cannot say that I have felt much difficulty. I do not think I have ever seen an action like it before. It is an action for alleged damage which was not challenged when it first began, but has been allowed to continue for twenty years, and now the claim is made against an outgoing tenant. I repeat, I never saw an action raised in such circumstances before. Of the two parties to the cause, the pursuer is the proprietor of certain lands, and the defender tenant of certain other lands, on either side of one of those brawling streams so common in highland districts. Of course this burn overflowed its banks during the winter floods and did damage to the bordering lands. This burn is sometimes the boundary between the pursuer's and defender's properties, and sometimes flows exclusively in one of them. Through the ground occupied by the defender it flowed in a circuitous channel. Below that it entered the lands of the pursuer, and there again it begins to meander in an eccentric line. The defender, finding that the land would be better if an open cut were made to carry the burn in a straight line through his property, performed the necessary operations, and this I assume he did without entering into any agreement with the pursuer. Having done that, he built an embankment on his own side of the stream, which would have undoubtedly the effect of altering the current. He then proposed to the pursuer to make a similar alteration in the course of the burn as it ran through his grounds, and actually proposed to make the alteration at his own expense. He evidently had no intention or design to injure his neighbour. The pursuer however refused to make any change, and wrote one or two letters to the defender threatening damages. After writing those letters he thought better of it, and from 1862 to 1877, at soonest, he never made any complaint. He now raises an action concluding for all manner of things—interdict and damages amongst others. I am of opinion that the action is excluded by the circumstances, and I do not think the case raises any general or abstract principle of law. As long as an agriculturalist is merely performing operations on his own side of a stream for the benefit of his own farm, it will require a very substantial amount of damage to be made out before the law will inter-

fere with him. Now, in this case I am quite satisfied that there was not really any substantial damage done; on the contrary, I am rather inclined to think that what was done was beneficial, and not injurious to the pursuer. I might have felt some difficulty on the subject of the embankment if the case had been raised *de recenti*. The case of *Marshall* is very close to this one, though there the damage was greater. Though I concurred in the judgment pronounced in that case, I thought it a very narrow one, and further reflection has induced me to doubt whether we there allowed sufficient modification of the general rule, which I should not be sorry to see receive some modification. It is, however, not necessary to say anything about that just now, because I am of opinion that the defender was, in what he was doing, improving both his own and the pursuer's agriculture, and that if any damage was done it was so inconsiderable as to be not worth mentioning. The very length of time that elapsed before this action was raised proves that the damage was not substantial. On the whole case, therefore, I think the Sheriff's judgment should be altered and the defender assolizied.

LORD YOUNG—I entirely concur with your Lordship, and that without reference to the alleged *mora*, which is a mere topic in this or any other case, though it may be very important in their decision. I am prepared to agree with your Lordship in giving effect to two and a-half lines of the defender's 5th plea-in-law, and they are more important than all the rest put together. They are these—"That the said operations have been carried out by the defender in the legitimate exercise of his own and his landlord's rights for the agricultural improvement of his farm, and not *in emulationem vicini*." I think that that is so, and that is also the opinion of the Sheriff-Substitute; and the importance of the *mora* is to aid us in coming to that conclusion. The tenant made this improvement twenty years ago, and it is hard to say now that he was not at the time when he made it acting in a legitimate course of farm cultivation. I do not think that cases of riparian proprietors on rivers need perplex us, as this is not a river; it is one of those little streams which flow down the hills, and it is not until several of them are collected together that they form what can even be called a burn. The stream wanders about in a circuitous course in passing through the defender's land, and to say that he is not entitled to straighten its course so as to make it more available is extravagant. Such a thing is done in every part of the country, and agriculture would be very different to what it is if it were not so. All that the defender did twenty years ago was done for a quite legitimate purpose within his own farm. The pursuer, however, says, that by building the embankment the defender is sending down to him the water which would otherwise spread itself over his meadow, and that he is not entitled to do so. But I think there is nothing more legitimate. He is not interfering with the *abveus* by that embankment; he is simply protecting his own land from inundation, and thereby making his land more valuable. I think that the law is in accordance with the familiar practice of the country, viz., that an upper heritor is entitled to do anything to make

a stream passing through his land as beneficial and also as little hurtful as possible to his own property; and if he sends down all the water which he gets in as pure a condition as he got it to the lower heritor the latter has nothing to complain of. On the ground pleaded by the defender in his 5th plea I think he is entitled to be assolizied.

LORD CRAIGHILL.—I concur, and have very little to add. I grant that as far as drainage operations are concerned a lower heritor is not entitled to complain of what the upper heritor does, but I am not prepared to say that if the course of a burn is for any reason changed, and if injury is thereby done to the lower heritor, there will not be a good claim for damages against what may in some views be a wrong. It does not follow from the general rule that an upper heritor may do anything he pleases irrespective of the interest of a lower. If substantial damage is done, I should be disposed to give a measure of redress such as is given by the Sheriff, but looking at the circumstances I am driven to conclude that the operations done here were such as the defender might reasonably carry through. The silence of the pursuer in reference to the damage for so long a time satisfies me that he would have been more wise if he had never made any complaint, and that now that he has made one that we cannot sustain it.

The Lords sustained the appeal, reversed the judgment, and assolizied the defender from the conclusions of the summons.

Counsel for Appellant—Macdonald, Q.C.—Jameson. Agents—Thomson, Dickson & Shaw, W.S.

Counsel for Respondent—Keir. Agent—David Milne, S.S.C.

Tuesday, June 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DUKE OF ROXBURGHE, PETITIONER.

Entail—Provisions to Younger Children—5 Geo. IV. cap. 87 (Aberdeen Act), sec. 4.—How to Calculate “Three Years’ Free Rent.”

An entailed proprietor by his marriage-contract bound himself to make provisions in favour of his younger children, in terms of the Aberdeen Act, to the amount of three years’ free rent of his entailed estates, if there should be three or more younger children. There were four children of the marriage, and in the marriage-contracts of the three younger children their father, being a party to the contracts, bound himself to pay certain sums to their marriage-contract trustees, and thereafter granted bonds for these sums in terms of the statute. Subsequently, with consent of the three next heirs, he disentailed his estates and re-entailed them, along with certain other lands, declaring the provisions undertaken by him in his marriage-contract to be

real burdens upon the estate so entailed. Held that in estimating the amount of the free rental in order to determine the whole amount due to his younger children on his death, the rental of the lands originally entailed must be taken, and not the rental of the lands included in the second deed of entail.

By antenuptial contract of marriage entered into between the late Duke of Roxburghe and Miss Susanna Stephania Dalbiac, afterwards Duchess of Roxburghe, dated the 2d, 14th, 19th, and 26th days of December 1836, and recorded in the Books of Council and Session on the 4th day of July 1874, the said Duke, with consent of his curators, in contemplation of his marriage, and in exercise of the powers vested in him by the Act 5 Geo. IV. c. 87 (the Aberdeen Act), section 4, as heir of entail then in possession of the entailed lands and estates of Roxburghe and others, known as the Roxburghe estates, thereby bound and obliged himself, and the whole heirs of entail and provision succeeding to him in the said entailed lands and estates, to make payment out of the rents or proceeds thereof of the provisions following:—To the child or children to be procreated of the said marriage who should be alive at his death, and should not succeed to the said entailed lands and estates, and to the representatives or assignees of those children who should predecease him, claiming in virtue of special settlement by marriage-contract, viz., to one such child one year’s free rent or value of the whole of the said entailed lands and estates; to two children two years’ free rent or value of the said whole lands and estates; and to three or more children, three years’ free rent or value of the foresaid whole lands and estates, as the amount of the said free rent or value should be ascertained at the date of his death, the said provisions to bear interest from and after his death, and to be payable one year after that event. It was thereby declared that these provisions were granted by the said Duke under all the conditions and subject to all the restrictions and limitations whatsoever contained in the said statute; and further, “that the said provisions shall be divisible among the said children if more than one, and the representatives or assignees of those who shall predecease claiming as aforesaid, in such proportions as the said noble Duke shall appoint by a writing under his hands at any time of his life,” and failing such appointment, the same were to be divided among such children equally, all as more particularly set forth in said contract of marriage, an extract of which is herewith produced and referred to.

By a contract of marriage, dated the 5th day of August 1857, entered into between James Grant Suttie, afterwards Sir James Grant Suttie of Prestongrange and Balgone, Bart., now deceased, and the Right Honourable Lady Susan Harriet Innes Ker, now Grant Suttie, elder daughter of the said late Duke of Roxburghe, to which the said late Duke was a party, he thereby bound and obliged himself to provide, content, and pay to the trustees therein named, and to the survivors and survivor of them, and to such other person or persons as might be assumed in manner therein mentioned, the sum of £25,000