Friday, March 8.

RIGBY & BEARDMORE *v.* DOWNIE.

River Pollution—Interdict.

In an action of declarator and interdict by a lower proprietor on a small stream against an upper proprietor, it was proved that, for twenty-eight years before the erection of a dye-work by the defender in 1869, the stream had been free from artificial pollution, and in the ordinary condition of a small burn flowing through an agricultural country, fit for the primary purposes of running water. Previous to 1841 a small chemical-work had been carried on beside the stream, which then finally ceased to work. The Court were of opinion that the defender had failed to prove that the pollution caused by the chemical-work was of an extensive or permanent character; and further, they expressed strong doubts whether the defender could found on the former state of pollution as entitling him to revive it. Interdict *granted* against the defender discharging from his dye-work into the stream noxious or impure matter of any kind, having the effect of rendering the water, in its progress through the pursuer's property, unfit for the primary uses of running water.

This was an action at the instance of Rigby & Beardmore, engineers and iron-founders near Glasgow, and of William Beardmore and another, as heritable proprietors in trust for the company, against Robert Downie, dyer, of the Carntyne Dye-works.

The works of the pursuers and the defender are both situated on a small burn called the Carntyne Burn, which flows into the Camlachie Burn, and are within the parliamentary and municipal boundary of the city of Glasgow. The pursuers' works are situated close to the junction of the Carntyne Burn with the Camlachie Burn, and the defender's works some two hundred yards above.

The conclusions of the summons, which was signeted 4th August 1870, were for declarator "that the pursuers have good and undoubted right to have the water of the Carntyne Burn or stream, so far as it flows through or by their property, transmitted to them in a state fit for the use and enjoyment of man and beast, and for all the primary purposes of water, or at least that they are entitled to have it transmitted to them in the state in which it flowed prior to July 1869, and unpolluted by any material which renders it unfit for use in their steam-boilers, or for ordinary manufacturing purposes, and that the defender has no right to pollute the said water, or to use it or the bed of the said stream in any way so as to render the said water unfit for its natural primary purposes, or for use in the pursuers' steam-boilers for the ordinary manufacturing purposes for which it was fit prior to the said date;" and for interdict against the defender "discharging into the said Carntyne Burn, from his dye-works, impure and noxious stuff or matter of any kind, whereby the said water in its progress through or by the property of the pursuers is polluted, and rendered unfit for its primary uses, or for the purposes of the pursuers, or other ordinary manufacturing purposes."

The pursuers' works have existed for about wenty years, but it was only shortly before the present action that they acquired a proprietary right to the ground on both sides of the Carntyne Burn. Before that they used the water of the burn by permission of the proprietor of the strip of ground which intervened between their works and the stream.

The pursuers averred that for time immemorial, and until the operations of the defender, the water of the Carntyne Burn had been clear and pure, fit for the use of man and beast, and for all the primary purposes of a stream; that it had been used by them for many years for supplying their boilers, for which purpose water must be fit for common use, and free from any pollution by chemicals; that since the erection of the defender's dye-work, in July 1869, he had discharged large quantities of noxious refuse into the burn, which so polluted the water as to render it entirely unfit for primary purposes, and to give it a dark colour and a putrid odour; in particular, they averred that the water was rendered unsuitable and even dangerous for steam-boilers, and that they had suffered great loss in consequence.

The defence was mainly founded on the allegation that the water of the burn had been for forty years or upwards devoted to chemical and manufacturing purposes.

The Lord Ordinary (MURE) allowed both parties a proof, which substantially bore out the pursuers' averments. It appeared that for twenty-eight years prior to 1869 no manufacture of any kind existed on the stream above the pursuers' work. A certain amount of manure from a farm-steading, and the water pumped from a colliery, found its way into the burn, but, nevertheless, it was clearly proved that the water was, and still is, above the defender's work, sufficiently pure to be used for drinking and domestic purposes. Much evidence was led by the defender, with the object of showing that prior to 1841 the stream had been polluted by a chemical-work for the manufacture of vitriol, which stood on the site of the defender's work. It did not clearly appear when this work commenced operations; the ground for it was acquired about the year 1801. The evidence was somewhat conflicting as to the extent of the pollution caused by the chemical-work, but on the whole it does not appear to have been very great. The work was suspended about the year 1827 for some time, and it finally ceased operations in 1841, and was pulled down in 1846. As to the present state of the water below the defender's work, it was abundantly proved that it was utterly unfit for domestic purposes, and highly deleterious for use in steam-boilers.

At the close of the proof a minute was put in for the defender:—

"REID, for the defender, stated that the defender is willing that it should be found and declared that the defender is not entitled to discharge into the Carntyne Burn, from the Carntyne Dye-work belonging to him, any material which may render the water of the said burn unfit for use in the pursuers' steam boilers at Parkhead Forge, and that decree of interdict to the extent and effect foresaid should be pronounced against him. And he further stated that the defender is willing, and hereby offers, in implement of such decree of declarator and interdict, to make such alterations on his works as are necessary, at the sight of Dr Stevenson Macadam, or such other skilled person as shall be named by the Court."

The Lord Ordinary pronounced the following interlocutor:—

"17*th June* 1871.—Finds (1st) That at the date of the erection of the defender's works in the year 1869, the Carntyne Burn, where it flows between the property of the defender and that of the pursuers, was well adapted for use in steam-boilers, and was also fit for most of the ordinary primary purposes of river water: Finds (2d) that immediately after the erection of the defender's works the water of the said burn became unfit, and, down to the date of the present action, continued to be unfit, for the ordinary uses of river water, and in particular for use in steam-boilers, in consequence of refuse water of a noxious character which was discharged into it from the dye-works of the defender: Finds (3d) that since the present action was raised certain experiments have been made by the defender, by means of a tank and other apparatus, for the purpose of removing impurities from the water used by him in the works before it is discharged into the burn, and which it is alleged by him are calculated to have the effect of rendering the water so discharged safe for use in steam-boilers; and, before further answer, remits to Mr Alexander Crum Brown, Professor of Chemistry in the University of Edinburgh, to inspect the defender's said dye-works and manufacture, and the discharge of refuse water therefrom into the burn by means of the said tank and other apparatus; and to report whether, in his opinion, the water so passed into the burn is in a condition to be used with safety in the steam-boilers belonging to the pursuers; and if not, whether there is any other, and if so what, process to which he would recommend that the refuse water at the defender's works should be subjected before being restored to the Carntyne Burn, in order to render it safe for use in steam-boilers; and reserves all questions of expenses.

"*Note.*—It is, in the opinion of the Lord Ordinary, pretty clear upon the evidence that since the erection of the defender's works the water of the Carntyne Burn has, owing to the discharge of refuse water from those works, been rendered quite unfit for the purposes to which it was in use to be applied by the pursuers. As at present advised, however, the Lord Ordinary is not satisfied that the case can be dealt with on the footing that the water of the burn had for time immemorial, before the erection of the defender's works in the year 1869, been fitted for all the primary purposes of river water where it flows past the property of the pursuers. At and for some years prior to that date there is, he thinks, evidence sufficient to instruct that the water was so used. But there is a considerable body of evidence, on the other hand, to show that from about the beginning of this century, down to about the year 1841, there was a chemical manufactory carried on upon the ground now occupied by the defender, in which the water of the burn was used, and thereafter returned to the burn in such a state as to render the water of the burn, during that discharge, unfit for its primary uses. And assuming that to be the fact, the case may, it is thought, require to be dealt with as being under the category referred to in the decision in the case of *Cowan*, Dec. 21, 1866, where a stream has been to a considerable extent devoted to secondary purposes.

"In these circumstances, the Lord Ordinary has thought it better, before pronouncing any operative decree, and having regard to the offer made in the minute for the defender, to remit to a neutral person of skill to report upon the defender's works, and the condition of the water as now discharged therefrom. If it shall appear from the report that, by means of some process recommended by the reporter, the water when discharged from the defender's works may be made quite fit for use in the pursuers' boilers, and the defender undertakes to adopt and carry out that process, an interdict of the nature suggested in the minute may suffice to meet the circumstances of the case. If it shall appear, on the other hand, that there is no process, the application of which will render the water when discharged fit for use by the pursuers, or if the process recommended is of a description which the defender cannot undertake to carry out, it will still be for consideration whether, assuming the water of the burn to have been fit for the ordinary purposes of river water at the time when the defender's works were erected, the pursuers can now be precluded from insisting in decree of declarator and interdict in the terms concluded for, on the ground that, for a series of years prior to 1840, the water of the burn was rendered unfit, in consequence of the discharge from the chemical works for any but secondary purposes."

The pursuers reclaimed, and maintained that the remit was unnecessary, and that they were entitled to decree in terms of the conclusions of their summons.

Solicitor-General and Lancaster for them.

Watson and Reid for the defender.

On 2d November 1871 the Court, before further answer, remitted to Professor Crum Brown to carry out the remit contained in the Lord Ordinary's interlocutor.

Professor Brown returned a report, in which he states that he had visited the defender's works in accordance with the remit; that he had found the water passed from the dye-works into the tank was the refuse from the "scouring-frames;" that he took samples of it as it was run into the burn, and found that it frothed on being boiled; and that on this account, and also in consequence of the presence of free sulphuric acid, it was quite unsuitable for use in steam-boilers. He then details several experiments which he made to carry out the second part of the remit, the result of which he states at the conclusion of the report, "I am therefore of opinion that the refuse water as at present discharged from the defender's dye-works, from his tank into the Carntyne Burn, is not in a fit state to be used in steam-boilers, and I am unable to suggest any method by which the said refuse water can be rendered fit for use in steam-boilers."

The case having again been put out for debate, counsel for the defender stated that Professor Brown's report was defective, in as much as the reporter had only examined the discharge from the defender's work. The contents of the tank were, it was said, mixed with 500 times their volume of water, and thus were rendered innoxious. It was also said that a considerable proportion of the organic matter found by the reporter existed in the stream above the defender's work. He therefore asked for a second remit, to ascertain the state of the water (1) above the defender's works; (2) as it flowed past the pursuers' works.

The pursuers again asked for decree in terms of their summons.

Parties were then heard on the evidence.

Argued, for the defender, that if he could show that in 1841 he had acquired a right to use the stream in a certain way, supposing the question

had then arisen, it would require something done by the pursuers to deprive him of that right before the expiry of forty years; just as in the case of a right of way, where the public had once acquired a right to a way by forty years' use, it would require the lapse of another forty years of possession of his property by the proprietor, independent of the right of way, to deprive the public of that right; *Rodgers* v. *Harvey*, 4 Murray, 36.

Reference was made to the directions to the jury by the Lord Justice-Clerk in *Duke of Buccleuch and Others* v. *Cowan and Others*, 5 Macph. 217, 219.

At advising—

Lord President—In this case the Lord Ordinary, on the 17th June 1871, pronounced an interlocutor containing findings which almost necessarily led to decree in favour of the pursuers. He, however, accompanied these findings with another finding, that since the present action was raised certain experiments have been made by the defender for the purpose of removing impurities from the water used by him in the works before it is discharged into the burn. He accordingly remitted to Professor Crum Brown—(*reads terms of remit*). His Lordship by this remit obviously pointed at the possibility of some adjustment between the parties, so as to enable the defender to carry on his works, and at the same time not interfere with the use of the water by the pursuers. The remit was a very natural course to adopt. The pursuers were not, however, satisfied with it. They reclaimed, and insisted on immediate decree, in terms of their summons. We thought this was an unnecessary interference with the course taken by the Lord Ordinary, and we pronounced an interlocutor, in which we in no way disposed of the merits of the Lord Ordinary's findings, but, before further answer, remitted to Professor Crum Brown to execute the remit contained in the Lord Ordinary's interlocutor. Professor Brown now reports that he is of opinion that the refuse water as at present discharged from the defender's dye-works, from his tank into the Carntyne Burn, is not in a fit state to be used in steam-boilers, and that he is unable to suggest any method by which the said refuse water can be rendered fit for use in steam-boilers. This is a complete answer to the remit. The defender contends that there should be a further remit, for the purpose (1) of reporting on the state of water before it reaches the defender's work; and (2) whether, when it reaches the pursuers' works, it is in such a state of pollution as to render it unfit for use in steam boilers. This contention appears to me to be entirely beyond the scope and object of the remit to Professor Brown. What is now sought is a remit on the merits of the case, whereas the remit was made for a collateral purpose, viz., for the object of seeing whether such a process had been adopted by the defender as to remove the cause of complaint. The report is conclusive on that point. The impurities still continue to be discharged, and no process or device has had the effect of removing the pollution.

It remains to dispose of the case on its merits, as disclosed in the evidence. I have come to the conclusion, without hesitation, that the pursuers are entitled to judgment, nearly, though not quite, in terms of their conclusions. The condition of the Carntyne Burn before the defender's works were erected was the ordinary condition of a small stream exposed to the atmosphere, and to such small impurities as running water is ordinarily exposed to. No burn water is absolutely pure, in fact no water except distilled water is so. Purity is a comparative term. Spring water is in general in a very pure state, but it may be infected at its source with vegetable impurities, which render it unfit to drink. But the condition of purity, as known to the law, was just the condition in which this burn was. It is said that there is a small portion of organic matter to be found in the stream above the defender's work. Some organic matter is to be found in every stream in this country. We are dealing with the ordinary purity of burn water. That this stream was pure in this sense there can be no doubt, and as little doubt that no one else but the defender has been polluting it.

It is said that the burn had been polluted at some former period. I do not think there is any evidence whatever that there was anything of the nature of pollution or the importation of artificial impurity at a later date than 1841. For twenty-eight years prior to the erection of the defender's works this burn has flowed in a state of purity. The defender thinks to rely on the improper use of the stream at an earlier period to justify his own pollution. He likens this to a right of way case, and argues that, although a right of way has not existed for thirty-nine years, still if the pursuer in such an action can show that a right of way existed for forty years previous to that, he is entitled to have it declared that a public right of way exists; and so in the same manner, although the stream has run pure for thirty-nine years, if he can show that for forty years before that it was in a polluted state, he is entitled to revive that state of pollution. I think the analogy is entirely false. No one in any proper sense acquires the right to pollute water as the public acquire a right of way. What is effected is this—the party below loses the right of complaint by the lapse of time. The question then here is, Whether a party who might have lost his right of complaint against the old work has lost his right of complaint against any subsequent pollution? It is not a question with the public, it is one between a superior and inferior heritor.

Even if we look at the evidence of this early pollution, it is most imperfect and inconclusive. The forty years are reckoned back from 1841. The proof shows that the chemical work existed till 1841, and that the ground on which it stood was acquired in 1801—a bare forty years. When the chemical work was erected, there is no evidence. There is evidence of the work being suspended for some years out of the forty. There is also evidence that the whole amount of pollution was not very great, and varied considerably. It is certainly a very weak case of justifying by previous pollution, even if, as I greatly doubt, the defender is entitled to found on the previous pollution.

This is the only defence, for it is in vain to say that this refuse does not pollute the stream. That is abundantly shown by the evidence of the scientific witnesses. For these reasons, I have come to the conclusion that the pursuers should have decree in terms nearly of their conclusions.

Lord Deas concurred.

Lord Ardmillan—I am entirely of the same opinion. *First*, I am of opinion that at the time when the defender's work was erected the burn was as free from impurity as could be expected. No burn water is absolutely pure, but it was fit for the primary purposes of life. *Secondly*, in consequence of the operation of the defender's work, the

stream became so polluted as to be unfit for the pursuers' work. *Thirdly*, I agree with your Lordship that this is not at all an analogous case with a right-of-way case. There is no dedication to pollution. For twenty-eight years prior to 1869 the burn came down to the pursuers' works free from any substantial pollution. It is very doubtful if the defender is entitled to go back to 1841, and prove that before that period there existed a work which polluted the stream. But even if he be, there is no evidence at all satisfactory of the continuous pollution of the stream.

LORD KINLOCH concurred.

The following interlocutor was pronounced:—

"*Edinburgh*, 8*th March* 1872.—The Lords having resumed consideration of the cause, as to the report of Professor Crum Brown, and heard counsel, Finds that the experiments or operations of the defender, since the institution of this action, have not had the effect of preventing the water of the Carntyne Burn being polluted by the impurities or refuse discharged into it by the defender; adhere to the Lord Ordinary's interlocutor of 17th June 1871; repel the defences; and find and declare that the pursuers are entitled to have the water of the Carntyne Burn, as it flows by or through their property, transmitted to them in a state fit for the use of man and beast, and for the other primary uses of running water; and interdict and prohibit the defender from discharging into the said Carntyne Burn from his dye-work impure or noxious matter of any kind having the effect of polluting the said water in its progress by or through the pursuers' property, and rendering it unfit for the primary uses of running water, and decern: Find the pursuers entitled to expenses, subject to a deduction of £25 from the taxed amount thereof, in respect of the proceedings in which they were unsuccessful between the 17th June and the 2d November 1871; allow an account," &c.

Agents for Pursuers—Jardine, Stodart, & Frasers, W.S.

Agent for Defender—P. S. Malloch, S.S.C.

Friday, March 8.

JAMES WALLACE *v.* ROBERT WALLACE.

Contract—Family Arrangement.

Circumstances in which a father was held entitled to recover a sum of £500 from his son, in accordance with a somewhat peculiar family arrangement, although the action was solely laid on an alleged contract of sale between the pursuer and the defender.

This was an action at the instance of James Wallace, Rutherglen, against his son Robert Wallace. The conclusions of the summons were for payment—(1) of £500, more or less, as might be ascertained to be the value of the stock of drapery and other goods, said to have been made over by the pursuer to the defender on 8th September 1858, with interest thereon; (2) of £406, 3s. 3d., being rent at the rate of £25 per annum and interest thereon, for the shop occupied by the defender from 8th September 1858 to Whitsunday 1871.

The averments of the pursuer were as follows:—Previous to 1858 he had carried on business as a draper, and also as a spirit merchant, in certain premises belonging to him in Main Street, Rutherglen. In September of that year, being then about sixty-six years old, he entered into an arrangement with his son, the defender, by which the latter received possession of the shop as tenant, and took over from the pursuer the stock and goodwill of the business, which were of the value of £500, and granted a bill to the pursuer for that amount (now prescribed). The pursuer's only pleas were based respectively on the contracts of sale and location.

The Lord Ordinary (GIFFORD), after a proof, held that the pursuer had failed to prove either the contract of sale or of location, and therefore assoilzied the defender.

His Lordship's view of the facts is stated in his Note:—"The father, who was getting up in years, and who had been assisted by his son in business, agreed to make over the business to the son as his successor, but the whole to be carried on just as formerly, and from the proceeds of the business the expense of the maintenance of the father, his daughters, and his son, who were all living in family together, were to be defrayed as formerly. The father was proprietor of the shop, but no rent was to be charged to the son, because the common benefit of the business was to a large extent to be reaped by all, just as it had formerly been. In short, the son was to be colleague and successor to his father rather than purchaser from him."

The pursuer reclaimed.

SOLICITOR-GENERAL and CRICHTON for him.

FRASER and JAMESON for the defender.

The Court were not disposed to take so strict a view of the summons. It was not necessary for the pursuer's case that he should instruct an actual sale for a present price to the defender of the stock in trade. It was enough if he had proved a family arrangement, under which the stock and goodwill of the business was, for the purposes of that arrangement, estimated at £500.

The view which their Lordships took of the arrangement sufficiently appears from the interlocutor pronounced.

"*Edinburgh*, 8*th March* 1872.—Recal the said interlocutor reclaimed against: Find—(1*st*) That in or about September 1858 the pursuer, being then about sixty-six years of age, entered into an arrangement with his son, the defender, whereby the pursuer agreed to give up to the defender the goodwill and future profits of the business of draper and spirit dealer, then carried on by the pursuer in the premises belonging to him in Main Street of Rutherglen, and mentioned in the record, together with the stock in trade, and the occupancy rent free of the said premises, including that portion thereof in which the pursuer and his family then resided, on condition that the defender should become debtor to the pursuer in the sum of £500, and should maintain the pursuer and the family living in the said premises and assisting in the business; (2*d*) That no particular time, at the lapse of which the said sum of £500 should be payable, and the said free occupancy of the said premises should cease, was expressly mentioned or stipulated between the parties, but it sufficiently appears that the said sum was not to be payable, and that rent was not to be exigible, so long as the pursuer and the members of his family, for the time being, continued to live and to be maintained in common with the defender, in the premises foresaid, which they did till on or about July last 1871, when, in consequence of misunderstanding between them,