

# CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1830.

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The MAGISTRATES of EDINBURGH, and the GOVERNORS of No. 1.  
HERIOT'S HOSPITAL, Appellants.—*Campbell—Simpson.*

DICKSONS BROTHERS, Respondents.—*Spankie—MacDougald.*

*Reparation—Superior and Vassal.*—Held, (affirming the judgment of the Court of Session), That superiors who had feued out ground for building to a considerable extent in streets, and constructed a common sewer or drain for the use of the streets, and, long subsequent to the conveyance of the feus, acknowledged dominion over the drain, by stipulating with a third party to keep it in repair, were liable for damage occasioned by the disrepair of the drain.

DICKSONS BROTHERS, nurserymen, had for many years been the tenants of a piece of nursery ground belonging to Heriot's Hospital, situated on the east side of the Broughton Road, near Edinburgh, but on a lower level than that road. The main drain or common sewer from York Place, Albany Street, Forth Street, Broughton Place, and other streets in that quarter of Edinburgh, had, since the year 1797, when York Place was built, run down under a flag-stone cover towards the north, by the side of the Broughton Road, till it emptied itself into a grating at the corner of the nursery ground; after which, it continued its course to the eastward in an open ditch. Some years before 1822, the water in the drain displaced the flag-stone cover, about a hundred yards higher up the Broughton Road than the nursery; and although the ordinary run of the sewage still kept its course in the drain, there was always, on occasion of sudden and violent rains, an overflow at this rupture.

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On the 4th of June 1822, one of these showers fell, and was noticed in all the newspapers as one of the most violent thunder-showers in the memory of the oldest person living. The drain was quite inadequate to carry off so sudden and immense a rush of water, which therefore ran down the road; and not passing freely at the grating, rushed through the hedge upon the nursery ground, overflowed it, and did considerable injury to the plants. Dicksons Brothers then presented a petition to the Sheriff, first against Heriot's Hospital, and subsequently against the Magistrates of Edinburgh, as superiors of the streets making use of the drain, praying for indemnification of the damage sustained, and for repairs or enlargement of the drain by the Magistrates and the Hospital, in respect that they, or either of them, constructed the drain, in reference to which they had feued out their property into streets, and thereby, by their own act, greatly increased the drainage upon the inferior properties. They farther alleged, and without contradiction, that the Magistrates, in 1806, induced the trustees of the road to remove an interdict obtained by them on some operations at Bellevue, in the immediate neighbourhood, by agreeing to alter the form of the common drain on the Broughton Road, and keep it in repair in all time coming.

The Magistrates and Hospital stated in defence, that they were only superiors of the streets; and that, whether they constructed the drain or not at first, it was no longer theirs, but belonged to the feuars, who made use of it, and who, having the *commodum*, were subject to the *onus*: That this was true, whether the right of the feuars was to be viewed as property or servitude; for, in the latter view, the feuars, as the owners of the dominant tenement, were bound to keep the subject of the servitude in repair: That neither the Magistrates nor the Hospital had undertaken any obligation relative to the drain,—the lands having been made over to the respective feuars precisely as held by themselves: That the dimensions of the drain, and extent of the streets, had long been before the pursuers' eyes, as had the rupture of the flag-stone cover, and nevertheless they had never complained; and had even renewed their lease without complaining.

On the other hand, the pursuers maintained that the defenders were liable, because, 1st, The defenders had made the drain, and were proprietors of it; 2d, They had crowded their lands with buildings, and let in other drains without challenge, besides those coming from their own feus; 3d, They drew large feu-duties, and therefore ought to bear the burden in question; 4th, They had

feued out the grounds on a plan relating to the drain; and, 5th, The Magistrates had bound themselves to the road trustees, to keep the drain in repair, to prevent damage in another quarter. Feb. 17. 1830.

The Sheriff, (27th June 1822), before answer, remitted to Mr George Nicol, nursery-gardener, who reported upon the amount of the damage; and the Sheriff then pronounced the following interlocutor:—‘ Finds that the defenders, the Magistrates of Edinburgh, and the Governors of Heriot’s Hospital, when they feued their grounds in York Place and the adjoining streets, ought to have taken care that proper drains were constructed for carrying off the water and fuilzie from the different feus on the grounds feued out, without any damage to the inferior grounds; and are, therefore, liable for any damage which may have been done to the pursuers in consequence of the drains for carrying off the water and fuilzie from their feus not having been properly constructed: Before further answer, remits to Mr Robert Stevenson, civil engineer, to make a survey of the sewers and drains from the said feus, and of all other sewers and drains falling into the common drain running under the Broughton Road complained of, whether these come from the feus of the defenders or not; and to report as to the original construction, and present state of repair, of the said sewers and drains, and of the common drain; and, in particular, whether the damage to the pursuers has been occasioned by any of the said sewers or drains having been either originally improperly constructed, or being now in bad repair; and to specify the particular sewers or drains thus improperly originally constructed, or presently in bad repair; and to state in his report the manner in which the faulty sewers or drains should either be constructed or repaired; and also, in the event of the common drain not having been constructed for properly and effectually carrying off the fuilzie and water conveyed into it by all the other sewers and drains, or, being now in a bad state of repair, to specify how it ought to be constructed or repaired: Also, of new remits to the said Mr George Nicol to inspect the pursuers’ premises, and to report, *quam primum*, as to the amount of additional damage sustained by the pursuers in consequence of the floods which have taken place since the date of his last report; reserving entire all questions as to the liability of the present defenders, or any other person, to repair the said sewers and drains, or to indemnify the pursuers for said damage.’

Both defenders reclaimed without success. Mr Stevenson re-

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ported as follows: ' The present state of disrepair in which this  
 ' drain has for some time been, independently of its smallness, is  
 ' one of the chief causes of the flooding of the nursery grounds :  
 ' Because, instead of the drainage waters being at once conducted  
 ' by a close drain of proper dimensions into the open ditch upon  
 ' the southern side of Nursery Lane, they are wholly discharged  
 ' upon the public road; and, during heavy falls of rain, the small  
 ' eye or aperture at the point marked B on the plan, measuring  
 ' only about nine by twelve inches, which communicates with this  
 ' ditch, is constantly exposed to be suddenly choked. The ac-  
 ' cumulated drainage of the district is consequently allowed to  
 ' collect on the public road, in the hollow at the western extremi-  
 ' ty of Nursery Lane; and being here cut off by the stoppage at  
 ' the point B from the open ditch, the water thus collected dis-  
 ' charges itself into the grounds of the pursuers, which are unfor-  
 ' tunately considerably under the level both of the public road and  
 ' of Nursery Lane. By this means, the damage complained of is  
 ' from time to time incurred, and must continue, until at least the  
 ' lower part of the drain under Broughton Road is enlarged, and  
 ' properly connected with the open ditch on the southern side of  
 ' Nursery Lane. It seems farther necessary to the reporter, that  
 ' a stone wall of about fifty-five yards in length should be built  
 ' along the northern side of Nursery Lane, to connect with that  
 ' already built on the western side along the public road, to pre-  
 ' vent the surplus water, which may still collect near the point B,  
 ' from falling into the nursery ground, through the roots of the  
 ' thorn hedge, even after the completion of a proper drain under  
 ' Broughton Road. This dike being extended eastward round a  
 ' turn in Nursery Lane, a drain should be formed at its eastern  
 ' extremity across the lane, to conduct such surplus waters into the  
 ' open ditch. The expense of the proposed arched elliptical drain  
 ' from Albany Street down to the open ditch at Nursery Lane,  
 ' being about three hundred and ten yards in extent, is estimated  
 ' at L.3 per lineal yard; it will cost L.930. Should your Lord-  
 ' ship, however, be of opinion, that it will be sufficient to carry the  
 ' proposed elliptical drain from the open ditch till it joins the  
 ' drain under Broughton Road, at or near the point marked A  
 ' upon the plan, where the drain is still entire, then the distance,  
 ' being only about one hundred and ten yards, will cost the sum  
 ' of L.330; and the proposed wall on the northern side of Nur-  
 ' sery Lane, similar to that on the western side, is estimated at the  
 ' rate of 18s. per lineal yard, or L.49. 10s. for fifty-five yards.'

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On this report the Sheriff (20th January 1823) pronounced the following interlocutor:—‘ Finds it instructed by Mr Stevenson’s report, that the drains constructed for carrying off the water and fuilzie from the feus in York Place were sufficiently ample for that purpose; but that, when the drains from the feus in the adjoining streets were allowed to communicate with the York Place drains, the lower part of the Broughton Road drain ought to have been proportionally enlarged, so as that the original drains should be rendered sufficient for carrying off the water and fuilzie from all the different streets whose drains were allowed to communicate with the York Place drains: Finds it sufficiently instructed by said report, that the flooding of the grounds occupied by the pursuers was directly occasioned by the imperfect state of the common drain under the Broughton Road, both in regard to its dimensions, and the ruinous state of its lower compartment: Therefore, decerns against the defenders, as representing Heriot’s Hospital, and the Town of Edinburgh, conjunctly and severally, for the sum of L. 24. 8s. 6d. sterling, being the amount of the damages sustained by the pursuers previously to the date of the original application, as ascertained by Mr Nicol’s report, No. 16. with interest thereof from the date of citation: Farther, finds the defenders, conjunctly and severally, bound to rebuild and repair the drains in question, in the least expensive of the two modes pointed out by Mr Stevenson; and ordains them to do so at the sight of Mr Stevenson, within three months from this date: Finds the defenders, conjunctly and severally, liable in expenses; reserving to the pursuers to raise an action against the defenders for the damage sustained by them subsequent to the date of the original application in this process; and also reserving to the defenders their relief against each other, according to the value of their respective feu-duties in the streets in question, or in any other competent manner; reserving also all claim the defenders may respectively have against their feuars, and to the feuars their objections as accords, and decerns.’ To this interlocutor the following note was added:—‘ If the defenders are dissatisfied with this interlocutor, they can try the general question of their liability in the Court of Session; and their doing so may render it unnecessary for the pursuers to bring any action for the damage sustained since the date of the petition.’

The defenders having reclaimed, the Sheriff pronounced (19th

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\* From an overflow by a subsequent heavy rain.

Feb. 17. 1830. March 1823) the following interlocutor:—‘ Recalls the interlocutor of 20th January last, in so far as it finds the defenders, conjunctly and severally, bound to rebuild and repair the drains in question in the least expensive of the two modes pointed out by Mr Stevenson, and in so far as it ordains them to do so at the sight of Mr Stevenson, within three months from the date of the said interlocutor: Quoad ultra refuses the petitions, and adheres to the said interlocutor; reserving to the defenders their relief against Messrs Burn, Forsyth, and Jollie, and others, who have feued out for building the ground, streets, or areas, the drains from which have been allowed to communicate with the main drain from York Place down Broughton Road, and against the feuars of the said Messrs Burn, Forsyth, and Jollie, and to the said Messrs Burn, Forsyth, and Jollie, and their said feuars, their objections as accords.’

Thereafter the defenders complained by advocacy to the Court of Session of the judgments of the Sheriff. Lord Mackenzie as Ordinary repelled the reasons of advocacy, remitted the case simpliciter to the Sheriff, and found the defenders liable in expenses. His Lordship added the following note:—‘ It appears to the Lord Ordinary, that the Hospital and the Town having feued their property upon plans connected with this drain, were bound to the neighbouring proprietors, to one another, and to the public, on account of the road, to keep the drain, or see it kept, in proper condition; and that the respondents having obtained their lease, had right to the benefit of this obligation, both against their own landlords, the Governors of the Hospital, (who must be held to have undertaken to fulfil this duty in favour of their own land so let), and against the Town, which was bound to all parties acquiring real right in that land. It appears, then, that the respondents having suffered damage from neglect to perform this obligation, must have right of reparation against both the advocates.’

On advising representations for the defenders, his Lordship issued the following note:—‘ The Lord Ordinary wishes to have more precise explanation respecting the feus granted by the Hospital. It seems now to be stated, that the Hospital never feued out for building any of the ground held from them, and now connecting with the drain in question, but feued away all this ground by ordinary feus, without reference to any drain, to vassals who have sub-feued it for building at their own hand. This appears a new statement, and, if correct, seems material. The Lord Ordinary wishes explanation also respecting the feus granted by the Town of Edinburgh; for the Magistrates now

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‘ seem to aver, that the Town did not feu by a plan with refer-  
 ‘ ence to this drain, as made, or to be made, by the superiors  
 ‘ so feuing, or even with reference to such drain at all, as a  
 ‘ thing to which the feuars were to have right, and to be bound  
 ‘ to use. Indeed, the Magistrates do not seem now distinctly to  
 ‘ admit that the Town feued for building at all. All these matters  
 ‘ of fact must be cleared up.’

Thereafter his Lordship ordered condescendences, ‘ of what  
 ‘ they aver and offer to instruct with respect to the feuing out of  
 ‘ the ground on which the houses communicating with the drain  
 ‘ running down Broughton Road stand; and on the conditions  
 ‘ of such feus with regard to the drainage, and the ground or  
 ‘ drainage plans, if any, with reference to such feus.’

On advising these condescendences with answers, his Lord-  
 ship refused the representations, and adhered to the interlocutor  
 represented against.

On reclaiming petitions and answers, the Lords of the Second  
 Division, on the 7th December 1826, adhered, and found ex-  
 penses due.\*

The Magistrates and Heriot’s Hospital appealed.

*Appellants*.—1. The pursuers have failed to establish that the  
 damage in question was occasioned by the disrepair of the drain.  
 On the other hand it is evident, that the sudden deluge of rain  
 which occasioned the overflow, and which was of the nature of  
 a *damnum fatale*, would have done so even if the drain in its  
 then construction had been perfectly entire; for it would have  
 done so by the run of water on the surface of the road. The  
 drain, when entire, could not carry more than the drain full; the  
 rest must have run on the road; and every drain in or near  
 Edinburgh upon that occasion overflowed.

2. The defenders were not liable for damages to the pursuers for  
 not having a larger drain, in as much as the pursuers had been te-  
 nants in their nursery garden for many years, with the drain, such  
 as it was, before their eyes, and had made no complaint; and had  
 more than once renewed their lease, even since the rupture of the  
 drain, without any stipulation on the subject. Moreover, the drain,  
 in its then construction, was a source of profit to the pursuers, in  
 respect of the manure which they were enabled to collect from it;

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\* Sec 5. Shaw and Dunlop, No. 61. p. 94.

Feb. 17. 1830. an advantage which they would have lost, if the sewage water had been carried past their nursery grounds in a large covered drain.

3. Supposing that the damage had been occasioned by the state of the drain, and that the drain had been constructed by the defenders, or either of them, it is contrary to every principle of feudal law to hold the superiors connected with the drain, after they have conveyed the feus to the feuars. The drain is for the exclusive benefit of the latter; they alone use it, and reap the benefit of it; and are responsible for the effects of over-using it, on the principle 'cujus commodum ejus onus.' It has been said that the common drain is not within the property of the feuars, and that they cannot, therefore, get access to it to repair it: but the answer is, that their right to use it is a right of servitude, not of property; and that as they, and not the superiors, are the owners of the dominant tenements, namely the feus, they, and not the superiors, are bound to keep the subject of the servitude in repair, and of course to pay all damage arising from its disrepair. Neither do the specialties on which the pursuers rely affect these general principles; and there is no authority or precedent for the plea, that it would have required an express stipulation to bind the feuars to keep the drain in repair. An express stipulation would be requisite to render the superiors liable; but the vassals, the owners of the dominium utile, and the sole parties benefited by the drain, were bound, by the established principles of law, to uphold it. It is true, that the drain was formed by the defenders; but this is of no relevancy, because it merely shews that they had constructed the subject of the servitude. And neither is it relevant to allege, (what is no doubt true), that the Magistrates had, subsequently to conveying the feus, entered into an agreement with the road trustees in relation to this drain.

LORD CHANCELLOR.—It appears to me, that the fact which the learned Counsel has just stated, would in the absence of other circumstances be decisive of this case, namely, that the appellants have exercised an actual dominion over this drain, deciding what persons should have authority to make drains to communicate with this, so as to increase the quantity of water to pass through it. If they have by any act on their part occasioned this damage, they are answerable for it.

*Simpson.*—I submit, that the Magistrates of Edinburgh could not compromise the rights of Heriot's Hospital.

LORD CHANCELLOR.—It is quite clear, that they were all acting together on those occasions, as to the communication of the new with the old drain. It appears to me, that they have clearly made themselves jointly liable. The House do not feel it to be necessary to hear



the Counsel for the respondents. It is sufficient to shew that the evil arises in consequence of the original defect in the construction of the drain,—I mean by that, the construction of the drain with all the accessories to it. That being established, I think there is an end of the case; and I shall move your Lordships to affirm the decree of the Court of Session. Feb. 17. 1830.

*Spankie*.—I hope your Lordships will affirm it with costs: We are contending with very rich bodies—The whole town of Edinburgh belongs to these two bodies; they have immense funds.

LORD CHANCELLOR.—I am of opinion, that there ought to be costs. This is an appeal from the unanimous judgment of the Court below; and I see no reason at all to quarrel with the principle of the judgment. I move your Lordships, that the judgment be affirmed with L.60 costs.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be affirmed, with L.60 costs.

*Appellants' Authorities*.—Stair, 2. 7. 8. Ersk. 2. 9. 5. and 2. 9. 12. and 2. 6. 1. Parson of Dundee v. English, July 1687, (14,521.)

*Respondents' Authorities*.—Stair, 1. 9. 5. Ersk. 3. 1. 15. Gray v. Maxwell, July 30. 1762, (12,800.) Downie v. Earl of Moray, June 19. 1824, 3. Shaw and Dunlop, 158. and Nov. 12. 1825, Ib. 4. 169.

SPOTTISWOODE and ROBERTSON—MACDOUGALD,—Solicitors.

ARCHIBALD FARQUHARSON, Appellant.—*Brougham—Alderson*. No. 2.

MISS FRANCES BARSTOW, Respondent.—*Campbell—Jarvis*.

*Usury*.—Where L.12,000 of Government stock, of the value of L. 7620, were sold for an heritable bond of L. 10,000, with interest thereon at 5 per cent; but the payment of the principal was dependent on, and substantially affected by several contingencies; and, in one view, the seller and her heirs were exposed to receive for a perpetuity less than 5 per cent on the sum sold;—Held, (affirming the judgment of the Court of Session), that the transaction was not usurious.

*Title to Pursue*.—Circumstances of confidence between the seller and purchaser of an estate burdened with a bond, found to be no bar to the title of the purchaser to challenge the bond on the head of usury.

MISS FRANCES BARSTOW was possessed of L.12,000, three per cent consols. In 1797 she came to reside in the family of Mr and Mrs Russell of Blackhall, paying board, and contributing to the expense of part of the common establishment. She was a cousin of Mrs Russell, and placed much confidence in the

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1ST DIVISION.  
Lord Medwyn.