the danger of the residents or passengers. Now, does this not appear here? If the complaint had stated that the suspender had placed his goods on the street to the obstruction of the passengers, that would have been using the very words of the statute, and would have been unexceptionable. But is it not the same thing to say that he caused an obstruction on the footpath? Who possibly could be obstructed but passengers or residents? I should hardly think it a reasonable thing to say that the word "obstruction" could be used without thereby meaning the obstruction either of the residents or of the passengers. No other reasonable construction of the complaint can possibly be suggested. I therefore think the complaint ought to be sustained as relevant. I cannot for a moment assent to the view that it is necessary to set forth or to show that some residents or passengers had in fact been obstructed, annoyed, or endangered. If a person were to dig a trench in a street, and then left the street in that condition all night, I cannot doubt that that would be an obstruction or a danger although nobody chanced to fall into the trench. It is the nature and character of the thing that makes it an obstruction, not its actual results. It is an obstruction if it necessarily causes obstruction to passengers who chance to be there. Indeed, the alternative in the statute between passengers and residents shows that this is the true view, for a resident who is not also a passenger cannot actually be obstructed. It is in order to prevent obstruction in fact that a penalty is imposed on those who create possible and, if there should in fact be passengers, necessary sources of obstruction—on those who place the obstructive thing in the street. On this question therefore I concur with Lord Adam. I think that the complaint is substantially, almost literally, in the words of the statute.

On the other point also I agree with Lord Adam. The *solum* of any street may be the private property of an individual. It may suit the convenience of private individuals to turn their property into streets. That frequently occurs. But having become a street *de facto*, it must be regulated by those provisions and bye-laws which are considered to be necessary for the safety of those passengers whom the proprietor has invited to frequent it. It must be subject to the police rules, and one of these rules is that there shall be no obstruction to those who are invited to make use of the street. There are many such private streets, the *solum* of which may be reconverted into its former private uses whenever the proprietor pleases. Now, here the Magistrate was of opinion that the ground on which this obstruction was placed was *de facto* part of a street, and in this suspension we must so take the fact to be. There may be something in the contention that the street at this particular point widens, and in consequence that the ground in dispute does not belong to the street at all. We proposed therefore to the suspender that if the matter was of such importance to him he might take the question before a higher tribunal, proceeding in a more solemn manner to have his rights there determined. But this he declined to do, acting no doubt on good advice, on the ground that the matter was not sufficiently valuable to him to make it expedient to incur the expense. What, then, does he ask us to do? He asks us to look at the plans and then to say that the Magistrate has erred. But looking at the plans, I cannot say that the Magistrate has erred. I therefore think there was an obstruction here on the public street, and that the conviction must be sustained.

The Lords refused the suspension.

Counsel for Suspender—Rhind—Sym. Agent Thomas M'Naught, S.S.C.
Counsel for Respondent — Pearson. Agent R. P. Stevenson, S.S.C.

# COURT OF SESSION.

*Saturday, June* 10.

## FIRST DIVISION.

### HOME *v.* THE POLICE COMMISSIONERS OF DUNSE.

*Nuisance—Property—Pollution of River—Prescriptive Right.*

The right of an inferior riparian proprietor to object to the pollution of a running stream is defined by the use enjoyed by the superior heritor for the prescriptive period.

In a question between the proprietors of land through which flowed a small burn that received the sewage of a town before reaching the said lands, a jury found by special verdict "that for more than forty years continuously prior to the date of raising the action the water of the said stream was, as it flowed through the estate of the pursuer, polluted by the sewage of" the town "to such an extent as to render it unfit for some of its primary uses, and that within the said period of forty years, and particularly within the period embraced in the issue, the water of the said stream from the same causes became polluted to a materially greater extent than it was previously." After various remits to men of skill, and the formation of irrigation works as suggested by them, the Court *found* that the proprietors of the lands were entitled to have the water transmitted in a state suitable for the primary purposes of bleaching, washing, and watering of cattle, the verdict of the jury being interpreted as meaning that the water had been fit for these purposes for the prescriptive period.

On the 11th June 1875 an action was raised by Mrs Jean Milne Home and David Milne Home junior, the liferentrix and fiar respectively of the entailed lands and barony of Wedderburn, in the county of Berwick, against the Chief-Magistrate and Police Commissioners of the burgh of Dunse. The action concluded that the pursuers were entitled to have the water of a natural stream which passes near the town of Dunse, and subsequently flows *ex adverso* of certain parts of the lands of Wedderburn, transmitted in a state fit for the primary uses of running water, and that the defenders were not entitled to, and should be interdicted and prohibited from allowing any sewage or impure matter to flow into said stream, or from doing anything to render its water, in so far as it flowed *ex adverso* of the said

lands, unfit for the use of man and beast, and for the primary uses already referred to.

The defenders pleaded—1st, That they did not pollute the water-course in question; and 2d, That the said water-course had been for the prescriptive period unfit for primary uses, and had been dedicated to the reception of the the defenders' sewage.

On the 17th June the following issue was adjusted between the parties:—"Whether between the 5th May 1872 and 5th May 1875 the Commissioners of Police for the burgh of Dunse did by discharging sewage or other impure matter, or permitting sewage or other impure matter to be discharged, from the sewers or drains under their charge, at or near the burgh of Dunse, pollute the water of the stream . . . . which flows through and *ex adverso* of certain parts of the lands and barony of Wedderburn, belonging to the pursuers—to the nuisance of the pursuers?"

The case was tried before the Lord President and a jury, and the following special verdict was returned:—"(3) That for more than forty years continuously, prior to the 5th May 1875, the water of the said stream was, as it flowed through the estate of Wedderburn, polluted by the sewage of the town of Dunse to such an extent as to render it unfit for some of its primary uses; and (4) That within the said period of forty years, and particularly within the period embraced in the issue, the water of the said stream has, from the same causes, become polluted to a materially greater extent than it was previously."

It appeared that the primary uses for which the water still continued to be fit, and which had not for the prescriptive period been destroyed by the defenders' use of the stream, were the coarser kinds of primary uses, such as are enumerated in the interlocutor *infra*, viz., washing, bleaching, and watering cattle. The jury were held to have negatived the contention of the pursuers that the water had within that period been fit for cooking or drinking, or other primary purposes of the highest rank.

Following upon this verdict a remit was made to Mr Thomas Stevenson, C.E., Edinburgh, and at a later stage also to Professor Dewar of Cambridge, in the first place to visit the ground and to report what could be done to remove the nuisance, and subsequently to report whether the works erected upon their recommendations were effectual. Objections as to the unsatisfactory character of the works were at various times taken by the pursuers, and especially on the 3d February 1879, when it was maintained by them that owing to the flocculent nature of the organic matter held in suspension in the sewage a great part of it passed through the concrete tank and could not be retained without having recourse to chemical means for causing precipitation.

On the 7th June the defenders stated that the works erected on the recommendation of the reporters were completed, and that it was unnecessary to resort to chemical agency to assist the mechanical arrangements.

Messrs Stevenson and Dewar reported on 30th June 1880, *inter alia*—That chemical treatment of the sewage was not required, and would do no good, and suggested various ways in which the water might be purified; their methods would require to be properly attended to and skilfully worked.

These opinions were substantially adhered to in their various subsequent reports, and especially in that of 22d May 1882, the last, in which it was pointed out as essential that there should be a systematic inspection of the management of the works, "a distribution of the sewage, and a proper cropping and removal of the crop at regular intervals." If these recommendations were given effect to, the reporters believed that the purification works at Dunse would be permanently efficient.

The defenders put in a minute undertaking to comply with the recommendations of the reporters.

The Court pronounced the following special interlocutor:—

> "Find and declare that the pursuers have good and undoubted right to have the water of the stream, which after the confluence of its several sources or upper tributaries near to the town of Dunse flows eastwards through the lands and farm of Crumstane, and other lands belonging to William Hay, Esq., of Drummelzier, and thereafter enters and flows through and *ex adverso* of certain parts of the lands and barony of Wedderburn, lying in the county of Berwick, transmitted to and allowed to flow through and *ex adverso* of the said lands and barony of Wedderburn in a state fit for the primary uses and purposes of washing, bleaching, and watering of cattle; and that the defenders have no right to pollute the said water or to use it or the bed of the said stream, or of its sources or tributaries, in any way or for any purpose so as to render the said water unfit for any of the primary uses or purposes foresaid, when and so far as it flows through or *ex adverso* of the said lands or barony of Wedderburn: And in respect of the said report and minute for the defender, find it unnecessary to dispose further of the conclusions of the summons, and dismiss the same, and decern," &c.

Counsel for Pursuers—Robertson—Jameson. Agents—Waddell & M'Intosh, S.S.C.

Counsel for Defenders—Mackintosh—Rankine. Agents—J. & J. Turnbull, W.S.

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*Saturday, June* 10.

## SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Lord M'Laren, Ordinary.

### BUCHANAN *v.* BLACK.

*Process—Recal of Arrestments on Dependence—Petition Presented before Defences Lodged—Personal Diligence Act* 1838 (1 *& 2 Vic. c.* 114, § 20).

A person having raised an action of reduction arrested certain funds on the dependence. Before defences had been lodged the defender presented a petition for recal of these arrestments, and a record was made up upon this petition, with condescendence and answers thereto.

*Question* as to the competency or expediency of such procedure.