

the above finding, with power to his Lordship to dispose of the Inner House expenses."

Counsel for Petitioner—Balfour—Pearson.
Agents—J. & J. Gardiner, S.S.C.
Counsel for Respondent—Lord Advocate
(Watson)—Rhind. Agents—Ferguson & Junner,
W.S.

Friday, December 13.

FIRST DIVISION.

[Sheriff of Fife.

BONTHRONE V. DOWNIE.

Property—Running Water—Primary Uses—Right of Burgess to Water for Secondary Purpose as against Lower Heritor holding Title.

In a disposition by the magistrates of a royal burgh a right to a supply of water from a stream which ran through it was included. The water was used to supply mills erected by the disponee upon the subjects conveyed. From time immemorial the inhabitants of the burgh had been in use to lift the water in pitchers from the stream for all necessary purposes. A portion of the stream above the place where the mills were situated having been afterwards diverted for the purpose of supplying water-closets in houses erected by a party whose property did not abut upon the stream, Held that that was an illegal interference with the right under the deed above-mentioned, and interdict granted accordingly.

Question. Whether a burgess, with the approval of the Magistrates, can claim the ordinary rights of a riparian proprietor in a stream that passes through the burgh, although his property does not abut upon the stream.

William Bonthrone, M.D., Crail, raised an action in the Sheriff Court against George Downie asking decree "ordaining him instantly to remove the pipes or conduit under ground which he has recently laid or made for the purpose of taking water from the stream called the Bye burn, which flows from the St Andrews road through the town of Crail by the Tolbooth Wynd to the sea, and to restore the bank or side of said Bye burn where he has made a breach for abstracting and diverting water from the burn for supplying said pipes or conduit, and that to the same state it was in before the defender interfered therewith." There was a further conclusion for interdict.

The pursuer had in 1835 acquired from the Magistrates of Crail, which was a royal burgh, the ground where the King's Mills once stood, and the mill rood of land. The disposition further conveyed to him "all and sundry privileges and pertinents thereof, and particularly with a right to the use of the stream of water that was formerly employed in driving the mills, for the purpose of supplying such manufactories, engines, mills, or other machinery as the said William Bonthrone and his foresaids shall think proper to make, and which they shall be at liberty to erect and use; declaring that the said William Bonthrone and his foresaids shall take the water by conduits or pipes (under ground) as shall best suit them, from the opening in the lead at the east side of the dwelling-house belonging to the town, and possessed by

Baillie Fleming, and from the Bye burn at the east side of William Elder's yard; they shall have liberty also to make a water-turn in the Bye burn, and to make conduits, and lay pipes under the street, which they shall be bound to repair when necessary, so that the streets shall not be injured thereby; and further declaring, that although the town has become bound not to interrupt or divert the course of the water, yet it shall be in the power of the Town Council to regulate it at the dams, as at present, so that an equal quantity shall be sent down the mill-lead and Bye burn till the opening in the stone in the lead at the West Knaps shall run full, then the rest shall be sent down the Bye burn." The Magistrates further bound the pursuer four times a-year to turn his sluice so as to send the water to flush the common sewer.

He thereafter erected a meal-mill, with machinery, upon the ground, and formed a conduit for conveying water from the burn to a reservoir at the mill.

The defender in 1878 began to erect a row of villas on his property, which was on the other side of the Bye burn from the pursuer's property, and at some distance from the burn, and proposed to supply the water-closets in these villas by means of the pipe which the pursuer sought by this action to have removed.

The following admissions, *inter alia*, were miuted:—"That at all places where there is access to the Bye burn, the inhabitants of Crail, including the owners and occupants of the houses on the sites of which the defender's villas are erected, have been in use for time immemorial of taking water from it by lifting it in pitchers or such like for all necessary purposes, but not hitherto by pipes. That the defender has only led a single pipe from the Bye burn to the tank at the back of his villas. The extremity of the pipe within the defender's tank has been fitted with a ball-cock, which is intended to prevent the passage of water along the pipe after the water within the cistern has reached a certain level. That the defender has no property conterminous to the Bye burn, and the water proposed to be taken therefrom by the pipe complained of will not be returned thereto. The defender explains that it is intended to use on the premises all the water taken from the burn, and the sewage will be conveyed by drain to the sea. That the water in the Bye burn in its passage through the town and Tolbooth Wynd is not suitable for the preparation of food or drinking or culinary purposes. The said water has never before been used for water-closets, nor conveyed from the burn in its passage through the town by means of pipes by the inhabitants. One object which the defender has in conveying said water to his villas is to supply twelve water-closets therein when his rain-water supply fails. The defender explains that he will also use the water for washing clothes and such other purposes as it may be fit for."

The Magistrates declined to interfere with the question raised between the parties.

The pursuer pleaded, *inter alia*—"(2) The defender having no right or privilege in the water of said burn, is not entitled to divert the same by conduit or pipes to his villas. (3) Even if the defender had a right of servitude of taking water by pitchers or similar means from the burn, that

would not entitle him to extend the servitude, to the prejudice of the pursuer, by taking the water by a pipe or conduit."

The defender pleaded, *inter alia*—“(3) As the defender is to take and use the water only for primary purposes, his right is preferable to that which the pursuer holds under the disposition founded on, and preferable also to any right which can belong to him as the owner of a piece of ground which is uninhabited. (4) The defender, as proprietor of subjects within the royal burgh of Crail, being entitled to a supply of water for all domestic and sanitary purposes from said stream, according to immemorial usage, and the operations complained of being formed merely to facilitate the conveyance of water to his property for these purposes alone, and as the general supply will not be thereby unduly diminished, the operations are unchallengeable.”

The Sheriff-Substitute (BEATSON BELL) dismissed the action, adding this note:—

“*Note. [After stating the facts].*—The cases chiefly relied on were those of *Lord Melville v. Denniston*, 21st May, 1842, 4 D. 1231; and *Home and Milne v. Young*, Dec. 18, 1846, 9 D. 286, relating to rights to wells in Lasswade and Eyemouth respectively. Neither of these cases is precisely in point. Lasswade appears only to be a village, and Eyemouth a burgh of barony, but Crail is a royal burgh, where the inhabitants have higher privileges than in either of the other cases. The corporation is the owner of the streams *inter fines burgi*; and the right of the inhabitants to draw water is not in the nature of a servitude *aque haustus*, but is a quality or incident of the right of property in the stream conveyed by the royal charter. The magistrates are bound to regulate the use of the water for the best interests of the whole inhabitants, and any exclusive grant to one should be *ultra vires*. Their disposition, however, conveys to the pursuer no exclusive grant to the water, but only ‘a right to the use of the stream,’ and such grant must be subordinate to the right of the magistrates from time to time to regulate the use of the water among the inhabitants. The magistrates do not seem to have given any distinct permission to the defender to insert the pipe, but they have acquiesced in his doing so, and have allowed him to open the street for the purpose. It appears, therefore, that the magistrates are satisfied that the arrangement is a fair one for the inhabitants, including the pursuer and the defender, and without their being called I should not be disposed to entertain the demand to have the pipe removed.

“It is right, however, farther to say that, even independently of the absence of the magistrates from the process, I should not, as at present advised, interfere by giving the remedy sought. The use of the water for primary purposes must always take precedence of that for secondary ends, and that the domestic use of water in the way proposed is a primary purpose I cannot doubt. The doctrine that a riparian proprietor is entitled to use the water for primary purposes only upon two conditions, *viz.*, that he shall not take it away to a non-riparian property, and that he shall return the surplus before it leaves his lands, appears to me inapplicable to the case of a stream in a royal burgh, to which all the inhabitants, whether their burghage holdings

be riparian or not, have a right to resort. And if the defender has a right to take the water for primary purposes, it seems that, with the acquiescence of the magistrates, and under obligation not to waste (which the magistrates may enforce), the owner of a mill cannot complain that an improved method of exercising the right of taking the water for preferable purposes is substituted for the former primitive plan of lifting by pitchers.”

On appeal the Sheriff (CRIGHTON) adhered, for these reasons:—“The pursuer maintained that as he was owner of the Bye burn at that part where the pipe in question had been placed he was entitled to prevent water being intercepted or diverted from the burn in the manner and for the purpose complained of. This contention was founded on the terms of the disposition in his favour by the Magistrates and Council of Crail. The Sheriff is of opinion that this contention is not well founded. The disposition, according to the Sheriff’s reading of it, did not convey to the pursuer the whole water of the burn, but only ‘a right to the use of the stream of water.’ The inhabitants of Crail have right to the water of the Bye burn for primary purposes, and all that the Magistrates could convey to the pursuer was the right to any surplus water after these purposes were satisfied.

“It was further contended, however, that even although the defender as one of the inhabitants of Crail had a right to take water from the Bye burn for primary purposes, he could only do so by lifting it in pitchers or such like—that being the mode in which it is admitted the inhabitants of Crail have from time immemorial been in use to take the water from the Bye burn. Assuming that the water is only to be taken by the defender for primary purposes, the Sheriff is of opinion that in taking his supply he may do so by means of an artificial channel or pipe for the purpose of filling his cistern or tank. In the present case there is no complaint that provision is not made for the return of any surplus water to the Bye burn. It was admitted on the part of the pursuer that if the defender was entitled to take the water from the Bye burn in the manner stated on record then what was required for the villas must be considered as consumed.

“But it was further very urgently pleaded by the pursuer that the water was not to be taken for a primary purpose. On this part of the case the Sheriff has had some difficulty. The principal primary use of water is for drink for man and beast, and for the family purpose of cooking; but it is admitted ‘that the water in the Bye burn in its passage through the town and Tolbooth Wynd is not suitable for the preparation of food or drinking or culinary purposes.’ There are other primary purposes, however, to which water may be applied, which have been described as domestic purposes, such as washing, bleaching, brewing. The question is, whether the purpose to which the water is to be applied by the defender comes within the category of domestic purposes. The Sheriff agrees with the Sheriff-Substitute in thinking that it does.”

The pursuer appealed, and argued—The defender was not a riparian proprietor, and although he were he would not be entitled to withdraw the water without returning it again to the stream. And the pursuer further had the grant from the

Magistrates whereby the right to use the water in the burn was given subject to the use of the inhabitants in the way and to the extent then enjoyed by them. To store the water in cisterns was a very different thing from taking it up in pitchers—*Lord Melville v. Dennison*, May 21, 1842, 4 D. 1231. The use proposed was not a primary use—*Bell's Prin.* secs. 1104–5. Primary uses were where the water was consumed. If it was not consumed, then it must be returned to the stream—*Maclean v. Hamilton*, July 15, 1857, 19 D. 1006.

The defender argued—The right of every burgess to a stream passing through burgh was that of a riparian proprietor. This was not a question with the Magistrates, but with a lower proprietor, and in such a question every burgess had all the rights of the community. That being so, a riparian proprietor might by means of pipes take water to be consumed for primary purposes—*Ogilvie v. Kincaid*, November 25, 1791, Hume 508; *Ritchie v. Johnstone*, February 15, 1822, F.C.; *Hood v. Williamsons*, February 8, 1861, 23 D. 496, Lord Kinloch and Lord Justice-Clerk (Ingliš). *Lord Melville's* case was the case of a servitude whose extent was to be measured by use and wont. What, then, was a “primary purpose?” In *Ritchie v. Johnstone* it was used as convertible with “domestic.” As civilisation advanced, so did the meaning of such a term.

At advising—

LORD PRESIDENT—In this case the appellant and respondent are both proprietors in the burgh of Crail. The appellant is proprietor of a mill known of old as the King's Mill, under a title obtained from the Magistrates of Crail. The respondent, who has erected a number of houses on the ground belonging to him, is alleged to have interfered with the stream of water that supplies the appellant's mill, and to have diverted a considerable portion of that stream. Now, the right which the appellant has to the use of the stream is to be ascertained from the disposition in his favour by the Magistrates, dated 1st July 1835, in which they convey to him the ground where the King's Mill stood, and the mill road, the whole being described as bounded in a particular way, with “all and sundry privileges and pertinents thereof, and particularly with a right to the use of the stream of water that was formerly employed in driving the mills, for the purpose of supplying such manufactories, engines, mills, or other machinery as the said William Bonthrone and his foresaids shall think proper to make, and which they shall be at liberty to erect and use; declaring that the said William Bonthrone and his foresaids shall take the water by conduits or pipes (under ground) as shall best suit them, from the opening in the lead at the east side of the dwelling-house belonging to the town, and possessed by Bailie Fleming, and from the Bye burn at the east side of William Elder's yard; they shall have liberty also to make a water-turn in the Bye burn, and to make conduits, and lay pipes under the street, which they shall be bound to repair when necessary, so that the streets shall not be injured thereby; and further declaring, that although the town has become bound not to interrupt or divert the course of the water, yet it shall be in the power of the Town Council to regulate it at the dams, as at present, so that an equal quantity

shall be sent down the mill-lead and Bye burn till the opening in the stone in the lead at the West Knaps shall run full, then the rest shall be sent the Bye burn.”

Now, in order to ascertain the meaning and effect of these provisions, it is necessary to understand the nature of the locality and the state of the stream at the time this disposition was granted. This water comes from the high ground to the north of the burgh, and as it approaches the boundary it is divided into two branches; one is the mill-lead, which comes to the appellant's property and supplies his mill; the other is the Bye burn, which runs through the town. There is a street in the town called St Andrews Road on one part and Tolbooth Wynd at another, and it is along the line of that street that the Bye burn flows. The property of the appellant lies to the west of the Tolbooth Wynd, and near the sea, and the respondent's property is also near the sea, on the east side of the Tolbooth Wynd. The disposition gives Dr Bonthrone authority to take water from the Bye burn itself, as well as from the mill-lead, to drive his mills; he has, in terms of that disposition, taken off a portion of the Bye burn as it flows through the Tolbooth Wynd at a point considerably north of his property, and it has been enjoyed by him to the present day. It is also to be remarked that the water of these burns has been quite unfit for primary uses as far back as the memory of man goes, and therefore at the date of the disposition. If this had been the proper water supply of Crail—if the inhabitants of Crail had been dependent on it for domestic purposes, or if they had been in the habit of using it for such purposes—the Magistrates of Crail would not have granted such a disposition as they did, or, if they had, it would probably have been subjected to a different construction. The water, in short, is useful, as a water power, not for primary purposes. But it is also conceded, on the other side, that this stream, flowing as it did along the street, although impure, was of some use, and accordingly it is admitted that the inhabitants did use it by carrying it off in pitchers for such purposes as they could, probably for coarse washing purposes. The inhabitants must therefore be held to have retained through the Magistrates a certain right in the water; subject to that right the use of the water belongs to the appellant, whom it provides with the power to drive his mill.

Now, what is the respondent alleged to have done? It is not said that he used the water in the way it was previously used by the inhabitants of Crail; on the contrary, he makes what is quite a novel use of it. He takes it off by a pipe at a point above the place where the appellant's pipe goes off. He carries it underground along the Tolbooth Wynd and across the Nethergate, another street in the burgh, to a set of villas which he has built near the sea. He stores it in cisterns there, making constant use of it for water-closets in these villas. A considerable portion of the stream is therefore abstracted by this pipe underground, and is devoted to what is an entirely new use. Of course the water is not returned to the stream, but finds its way in a still more polluted state into the sea.

Such a use of this water is entirely inconsistent with the right to the water granted to Dr Bonthrone by the disposition of 1835. For, subject

to the uses formerly made of it by the inhabitants, the primary right to the water was in Dr Bonthrone, and to divert it in this wholesale way and for entirely new purposes is wholly inconsistent with his right, and therefore I am for granting decree in terms of the first part of Dr Bonthrone's petition.

LORD DEAS—There is no doubt that Mr Downie has made great improvements in the burgh of Crail, and I cannot help regretting that he cannot get water for the purposes he desires, for perhaps he would make a better use of it than that to which it is to be put. The water in question is not the water in the old mill-lade; it is the water of the Bye burn, to which Dr Bonthrone only got a qualified right. In that state of matters if the magistrates had taken the use of that water or the surplus of it under their charge or administration so as to limit and superintend the use that should be made of it, and had by minute of council, or in some other way, given Mr Downie right to the water, I should have thought a great deal of the views of the Sheriff and Sheriff-Substitute as to the difference between the rights of parties to water that is within a burgh and that which is in some rural district. But Mr Downie has got no title from them, nor are they willing to give him any. What he claims is an absolute right of his own, and in that state of matters the question does not arise as to the difference between the law applicable to the use of water in burghs and in country districts.

LORD MURE—I agree with Lord Deas that it is not necessary here to deal with the question as to the right of persons within burgh to use water even when they are not riparian proprietors; for on the facts of this case being explained to us, I have not had any difficulty or hesitation in dealing with it. I think it is clear that the respondent is diverting water to the prejudice of an inferior heritor. The respondent admits that—"The water proposed to be taken therefrom by the pipe complained of will not be returned there. The defender explains that it is intended to use on the premises all the water taken from the burn, and the sewage will be conveyed by drain to the sea." That is clearly a diversion of the water; and it is also admitted that "for some months in the year the water in the Bye burn is very low, and then it does not rise to the top of the sluice in the burn. The water is often insufficient for the pursuer's requirements. On these occasions the defender's said pipe, if running, will lessen the pursuer's supply for his mills." Now, what has the respondent done that is to prejudice the pursuer? He proposes to put in twelve water-closets in these villas, with tanks, in which there will be a constant supply of water from the Bye burn to these houses. That will be a most material prejudice to the appellant in the use of his mills, and therefore the respondent must show very clearly that he has a right to this water. That I think he has failed to do.

LORD SHAND—I have great difficulty in holding that the respondent has the rights of a riparian proprietor to the water in the stream as passing his subject, for it appears that the respondent's property is not on the bank of this stream, but at a considerable distance from it. In the absence of

any system of regulation by the Magistrates, or of any authority by them to use the water, I cannot see that he can claim the benefit of being a riparian proprietor. It is, however, unnecessary to decide that question. Assuming that he has the right of a riparian proprietor, he would be only entitled to take the water of the stream for washing purposes, that being the only domestic use of which it is capable. It further does not appear that Dr Bonthrone has any right that could preclude that use, for under his title he gets his right to the water under the declaration that "Although the town has become bound not to interrupt or divert the course of the water, yet it shall be in the power of the Town Council to regulate it at the dams, as at present, so that an equal quantity shall be sent down the mill-lead and Bye burn till the opening in the stone in the lead at the West Knaps shall run full, then the rest shall be sent down the Bye burn." The title leaves the riparian proprietors a right to use the water for domestic purposes, but would preclude them, as the common law would preclude them, from diverting it. They might take it off even by pipes for washing purposes, but the right insisted in here is not a right to use the water for any such limited purpose. The respondent explains that he will use it for washing clothes, but the substantial purpose is to supply water-closets. I agree in thinking that is not a use for which he is entitled to have it. The purpose is practically that he may flush the drains belonging to his houses. For that purpose it is necessary to have a considerable body of water, and to withdraw it absolutely from the stream, for it is not to be returned; and I think that is not a use to which the respondent is entitled as a matter of right. I therefore agree in the judgment proposed by your Lordship.

The Court remitted to the Sheriff to give decree in terms of the conclusion of the petition, and to grant interdict.

Counsel for Pursuer (Appellant)—Dean of Faculty—Rhind. Agents—Adamson & Gulland, W.S.

Counsel for Defender (Respondent)—Balfour—Mackintosh. Agent—John Galletly, S.S.C.

Thursday, December 12.

SECOND DIVISION.

SYME v. BENHAR COAL CO.

Public Company—Companies Act 1862, sec. 85—Provisional Liquidation—Application to Restrain Decree—Debenture.

An application was presented to the Court by the provisional liquidator of a limited company to restrain a debenture holder from obtaining decree for the amount contained in his debenture bond. *Held* that the debenture holder was entitled to have decree, the liquidator not being prepared to find security for any damages the creditor might suffer, and application refused.

Reid, a creditor of the Benhar Coal Company, had presented a petition for the judicial liquidation of the company. Upon representations by the com-