

JOHN JAMIESON, Sheriff Clerk of Alloa,
 STEVEN MAXWELL, Merchant in Glas-
 gow, and JOHN HAIG, Distiller in
 Lochrin, } *Appellants;*

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 JAMIESON, & C.
 v.
 RUSSEL, & C.

JOHN RUSSEL, W.S., and JOHN SAW-
 YERS of Bell's Mills, (Water of Leith), } *Respondents.*

House of Lords, 18th April 1792.*

USE OF A STREAM OR BURN—NUISANCE—SERVITUDE.—The Lochrin burn, which receives the common sewers of part of the city of Edinburgh, and then discharges itself into the Water of Leith, had been used at one time by the respondents, as it passed their property, as pure water for dressing victuals, watering cattle, cleansing and rinsing linen, and other purposes; but after the erection of the Lochrin distillery, it was stated, that the said burn and the said Water of Leith, had become so polluted as to be unfit for any use, by the dregs, refuse, or other poisonous matter thrown into the burn from the distillery, and that the effluvia arising from it was most nauseous and unwholesome. A proof in a declarator and interdict was allowed, which was conflicting; but the respondents admitted that the common sewers of certain parts of the city flowed into the Lochrin burn, and this by prescriptive right. Held, in the Court of Session, that the appellants, by the operations in their distillery, had no right to throw their dregs or refuse of the distillery into the burn. In appeal to the House of Lords, remit was made, to inquire how far the burn was liable to the servitude of a common sewer, and how far the actual use made of it by the distillery, could, in that case, be impeached in law as a nuisance.

The common sewers from George's Square, and the different streets in that neighbourhood, namely, Nicolson Street, Potterrow, and Sciennes, fall into the Meadow, which is situated to the west and south-westward, and pass along the main drain, which leads to Lochrin, where the contents form a small rill, which runs from thence in a north-westerly direction.

In addition to the contents of these common sewers and ditches, the rill which thus passes Lochrin, thus receives the foul water which falls from the washing ground of Bruntisfield Links, that which is thrown into it by the dyers, and other tradesmen and manufacturers, and that which falls from all the cow-houses in the immediate neigh-

* Omitted at its proper date.

bourhood, besides the discharge from the common sewers and gutters of the whole of that suburb.

JAMIESON, &c.
v.
RUSSEL, &c.

This burn of Lochrin, as it has been called, might have been smelt at a great distance, and, as the city increased towards that quarter, its volume became larger, and the effluvia greater.

Such was the account of it given by the appellants, but a different history of this burn is set forth in the respondents' action.

About twenty years before this action was raised, *Lochrin* belonged in property to Alexander Ponton, architect, who had resided there several years, and left it on account of the nauseous smell which at all times, particularly in summer, this rill of putrid water sent forth. He sold it in the year 1772, to Alexander Reid, who converted the place, which was formerly a brewery, into a distillery, and carried on the business of a distiller there, without interruption. In the year 1784, the ground and distillery were purchased by the appellant, Mr. Haig, who carried on the same business without interruption, having previously erected additional buildings and machinery, until the present action was raised. The property then came into the hands of the other appellants, Mr. Haig's trustees.

Conceiving that the water of the said burn was polluted, by the operations of Mr. Haig in working his distillery, from alleged poisonous matter thrown into it from the distillery, the respondents brought a declarator and interdict. The summons set forth: " That the burn (rivulet) called Loch-
" rin, when it comes out at the west end of the meadow,
" commonly called Hope's Park, and which afterwards
" passes under the name of Cross Burn, runs through part
" of the said lands belonging to the pursuer, John Russel,
" and in the course thereof, waters four several enclosures
" belonging to him, and falls into the said Water of Leith,
" a little above Coltbridge. That John Sawyers is pro-
" prietor of the lands of Bell's Mills, situated upon the river
" or Water of Leith. That the said pursuers, their authors, or
" tenants, have been in the immemorial right and possession
" of the water of the said burn and river, and in the practice
" of using the same for the purpose of dressing victuals,
" washing and bleaching clothes, watering their cattle, and
" other domestic uses; and which, till within these few
" years past, was *good and wholesome water*; but, since the
" time the distillery at Lochrin, which is situated upon the
" bank of the said burn, came to be the property of, or pos-

“ sessed by John Haig, distiller, owing to the operations of
 “ the said John Haig, and his conveying by some means or
 “ other, the dregs, refuse, filth, or other nauseous sub-
 “ stances, issuing or arising from the said distillery, into the
 “ said burn, the water both of the said burn and river, has
 “ become putrid, unclean, and unfit for the use either of man
 “ or beast.” And concluding to have it decerned and de-
 clared, “ That the said pursuers (respondents) and tenants
 “ had, and have good and undoubted right to possess and use
 “ the water in the said burn and river respectively, for
 “ watering their cattle, washing and cleansing clothes, and
 “ other family uses as formerly, and to have it declared,
 “ that by the operations of Mr. Haig, the water both in the
 “ Lochrin burn and river of Leith, has become, and is now
 “ polluted, as to render the same useless. That they ought
 “ not so to be molested in their possession, nor Mr. Haig
 “ any right to make the water useless, in the manner set
 “ forth; and further, that he ought to be interdicted
 “ from putting any of the refuse or other materials into the
 “ burn or river, and from polluting and poisoning the water
 “ thereof, in all time coming.”

 JAMIESON, &C.

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RUSSEL, &C.

No averment was made in the summons as to prohibiting
 Mr. Haig from conveying into the burn or river, simple
 water, either from his distillery, or the fire or steam engine,
 by which he raised pure water from a well for his manufac-
 ture, and, in point of fact, the appellants contended that they
 issued nothing from their distillery into the Lochrin burn
 but plain, unmixed, or undiluted water. Nor was it alleged
 that the distillery itself was a nuisance, or had become so
 by its operations. Other actions were brought, one by the
 proprietors of the Canon Mills, and another by certain wash-
 erwomen on the River of Leith, and were conjoined. The
 Lord Ordinary allowed a proof before answer, reserving all
 questions as to the relevancy of the averments.

The proof led seemed to be conflicting. On the one hand,
 many witnesses declared, that, previous to Mr. Haig work-
 ing the distillery, the burn had always a nauseous smell,
 and indeed, previous to any distillery being erected, that
 the water was both so foul and thick, as to prevent a neigh-
 bouring gardener from watering his plants in the nursery
 with it. That this burn issued from the ditches in the
 Meadows, or Hope Park, and that the common sewers and
 gutters from the houses in George Square, Nicolson Street,
 Potterrow and Sciennes, &c., emptied themselves into it. That

JAMIESON, &c.
v.
RUSSEL, &c.

a chemist had been ordered to examine the water, both above and below the distillery, who, having analyzed samples of the water before it reached the distillery, and also a sample after it passed the distillery, declared that both had the same smell, like putrid, or ditch water. The water in both samples contained but a very small quantity of vitriolic acid, and not so much as ordinary hard water. That they contained no poisonous quality, but were very offensive both in taste and smell.

Some of the witnesses, on the other hand, declared that the water at the distillery was so bad, that no use could be made of it there. That long before the distillery's operations, the water of the burn was perfectly pure and *wholesome*, and that their families had used it for dressing victuals. Some had watered their cattle, and others had used it for bleaching and rinsing their linen. Thereafter it became polluted, and was unfit for any use, having a nauseous smell, and being putrid. The appellants, willing to conceal nothing, stated further, that the washes or low wines which have been got by the process of distillation, are distilled a second time, and produce the spirits of the second extraction, and when no more spirit arises from the still, the *residuum* being pure transparent water, is thrown out. With this residuum nothing could be mixed, everything being extracted before being thrown out into the burn.

Dec. 7, 1789.

The Court pronounced this interlocutor: "In the process respecting the distillery at Lochrin, in which Messrs. Russel and Saywers are pursuers, repel the defence, find the defenders (appellants) are not entitled to convey the water from their fire engine and distillery, or to throw the dregs, refuse, or materials of their manufacture into the burn called Lochrin, or Cross Burn, discharge and interdict them from so doing in all time coming, and decern and declare accordingly; and, in the other process respecting the distillery at Canonmills, in respect that the pursuers do not appear, dismiss the said process."

The appellants presented a petition to the Court against this interlocutor. In the answers to this petition, the respondents maintained, that no person is entitled, in carrying on a manufactory, to convert it into a nuisance, by corrupting and rendering unfit for man or beast a perennial rivulet, or stream of water, running through another's grounds. The appellants, on the other hand, contended, that so far from the distillery being the cause of this alleged nuisance,

they offered to prove, that at the period when the distillery ceased to be worked, the water of this burn, from the place where it passed through Lochrin, till it fell into the Water of Leith, was in its whole course, so black, putrid, and nauseous, as to be utterly unfit for the use of man or beast, or for any domestic purpose whatever. But the Court adhered to the former interlocutor. Two other petitions were presented, but the Lords refused the prayer of the same.

JAMIESON, &c.
v.
RUSSEL, &c.

Nov. 22, 1791.
Dec. 7, ———
Feb. 20, 1792.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The interlocutors pronounced are not warranted by the action, but depart from the pleadings and issue of fact, and evidence thereof, contained in the summons. The injury described in the summons is, “that owing to the operations of the said John Haig, and his conveying, by some means or other, the dregs, refuse, filth, or other nauseous substances, issuing or arising from the said distillery, into the said burn, the water, both of the said burn and river, has become putrid, unclean, and unfit for the use either of man or beast.” The grievance is not ascribed to John Haig *generally*; but the nature of his operations, and the *manner* in which they are said to produce the effect complained of, are specially described. He is charged with conveying *nauseous* dregs, refuse, or filth, into the said burn, although there is not a vestige of proof on this subject, and the summons concludes, that he should be discharged “from polluting and poisoning the water in all time coming, so as to render the same unfit for the pursuers’ use.” But the interlocutor complained of prohibits what is not within the scope of the summons, namely, conveying the water from their fire engine, or throwing their refuse, dregs, or other materials into the said burn, and therefore widely departs from the conclusions of the summons. Further, while it is apparent that the action is directed against the misuse to the burn by throwing into it poisonous dregs, refuse, and other materials, there is no question made or put into issue disputing the appellants’ right of conveying away simple water or innoxious matter into this burn. They offered to prove that the water and refuse which fell from their distillery into the burn had nothing nauseous or noxious in it; but this tender of proof was rejected. 2nd, Supposing the interlocutors fall under the subject matter of the action, yet there is no law to prevent any person from throwing water or other innoxious matter

 JAMIESON, &c.
 v.
 RUSSEL, &c.

into a common stream of running water. It would be a law against nature and the existence of society if such existed ; for it is by means of running waters that substances are carried off which would otherwise corrupt and taint the atmosphere. The exercise of this natural right, common to all, can only amount to an injury, when so great a quantity of matter is thrown into the stream as to divert its course or overflow its banks, or when the matter or substances so thrown into it are of a poisonous or pernicious quality. And if this be the law with respect to clear running water, it must *a fortiori* be the law as to the dirty burn now in question. 3d, But the appellants have only continued a manufactory that has existed for many years before the appellant, Haig, acquired it, only on a greater scale.

Pleaded by the Respondents.—1. It is a general rule of law, that a person whose property lies on the banks of a perennial stream, cannot appropriate it entirely to himself. He may use it for all domestic purposes, and may apply it to artificial purposes, such as driving wheels employed in manufactures. But he must allow it to descend in the usual channel, and in such state as to enable those whose property is in lower situations to make every lawful use of it. Many authorities might, if necessary, be quoted in support of this doctrine, which is founded not on the municipal law only, but on natural justice and reason. And if the superior heritor cannot deprive the inferior of the benefit of the stream of water by diverting its course, as little can he be permitted to do so by corrupting it to such degree as renders it unfit to serve the primary uses of water. 2. The evidence in this cause establishes, beyond a doubt, that the stream, called Lochrin, was formerly pure in its course through the respondents' grounds, and that it was used for watering cattle, and all domestic purposes; that it became contaminated and unfit for use by the operations at the appellants' distillery; and that these operations were the sole cause of its becoming unserviceable; because, when they were stopped for a time, the water became pure as before. It is also established, that these operations not only rendered the water unfit for use, but highly offensive to the smell, and consequently prejudicial to the health of those who live near it. The respondents are therefore entitled to a decree confirming them in their former innocent right to the use of the water, and to the removal of a recent nuisance. 3. Nor can the respondents admit that the cause

Stair, B. ii.
 tit. 7, § 11.
 Dict. vol. iii.
 p. 350.

of this burn being polluted, is to be ascribed solely to its being a common receptacle of the common sewers of a part of the city of Edinburgh ; because it is proved by the evidence, that the rivulet has other sources, and that the water was pure and fit for use when it reached the respondents' grounds, and would be so at this moment, notwithstanding the drain from the city, were it not for the appellants' works. If the drain from the city of Edinburgh were to render the water unwholesome, or unfit for use, the respondents behoved no doubt to submit to it, because it is necessary, and the citizens have a right by prescription ; but that is no reason why the appellants should be permitted to increase that mischief to the injury of the respondents.

After hearing counsel, it was

Ordered and adjudged, That the cause be remitted back to the Court of Session, in Scotland, in order that the said Court may inquire how far the rill, called Lochrin burn, or Cross burn, is liable to the service of a common sewer, and to receive the offscourings of houses and other trades, and in what parts built and established, or hereafter to be built or established, and to what extent : Also, how far the actual use made of the distillery in question can be impeached in law as a nuisance of a rill so circumstanced, and by what means, in particular, within the description of the libel, such annoyance is occasioned, and how far the same affects the parks of Mr. Russell, the pursuer (respondent) in the said libel mentioned."

For Appellants,—*W. Adam, Thomas M'Donald.*

For Respondents,—*W. Grant, J. Austruther.*

NOTE.—The judgment of the House of Lords seems to have been decisive of the question, as no further steps appear to have been taken in the case under the remit.

JOHN PETER DU ROVERAY and Others, Creditors of MACKENZIE of Redcastle,	}	<i>Appellants.</i>
JOHN MACKENZIE and Others, Creditors on said Estate,		
	}	<i>Respondents.</i>

House of Lords, 1st June 1795.

ADJUDICATION—INTIMATION—PROVISION—JUS CREDITI.—If intimation be given in the first effectual adjudication in order that cre-

1795.

DU ROVERAY,
&c.
v.
MACKENZIE,
&c.