*Tuesday, October 22.*

## SECOND DIVISION.

[Sheriff of Perthshire.

### FLETCHER *v* GRANT.

*Reparation—Breach of Promise of Marriage—Where Woman had previously had an Illegitimate Child.*

Where a man had promised marriage to a woman, and it had afterwards come to his knowledge that she had had an illegitimate child eleven years before, *held* that he was entitled to draw back from his promise, and was not liable in damages for failing to fulfil it.

*Observed (per cur.)* that in a case of this kind, to make good a claim of damages the pursuer would require to prove that the promise had been given or renewed after it had come to the knowledge of the defender that there had been a previous illegitimate child.

Counsel for Pursuer (Appellant)—Moncreiff. Agent—John Gill, S.S.C.

Counsel for Defender (Respondent)—Mair—Rhind. Agents—J. L. Hill & Co., W.S.

*Wednesday, October 23.*

## FIRST DIVISION.

[Sheriff of Dumfries and Galloway.

### CARSWELL *v.* THE NITH NAVIGATION COMMISSIONERS.

*Sheriff—Jurisdiction—Heritable Right—Interdict—Possessory Judgment.*

A party infeft on a disposition of certain lands, "with the ground that then was or should be between the present floodmark and the river Nith," applied to the Sheriff for interdict against the removal of gravel or sand from the shore-ground belonging to him by the Navigation Commissioners of the river. They resisted the application, founding on the terms of an Act of Parliament empowering them to attend to the navigation of the river. *Held* that there was no such question of heritable title involved as to exclude the Sheriff's jurisdiction.

*Observations* on the power of the Sheriff, if there had been a competing title, to give protection against such operations by interdict pending a decision on the question of heritable right.

*River—Navigation Trustees—Power to take Ballast.*

Navigation trustees acting under a statute empowering them to maintain and improve the navigation of a river are not entitled by themselves to destroy the *solum* of the river banks by taking ballast therefrom, or by authorising others frequenting the river to do so.

This was an action at the instance of Robert Carswell, residing at Glencaple, in the parish of Caerlaverock and shire of Dumfries, who was infeft on a disposition to him by Robert Thomson, dated 14th and 15th May 1868, in "All and whole that portion of land at Glencaple erected into a village, and sometime called Thomsonstown, extending to 3 acres Scotch statute measure or thereby, with the ground that then was or thereafter should be between the present floodmark and the river Nith lying at Glencaple Quay, in the parish of Caerlaverock and shire of Dumfries." Mr Carswell applied to the Sheriff—calling as defenders the Commissioners for Improving the Harbour of Dumfries and the Navigation of the River Nith; Thomas Brisbane Anderson, solicitor in Dumfries, their clerk and treasurer; and George Little, their harbour-master—to interdict, prohibit, and discharge the defenders, and all other persons acting under their instructions or by their sanction or authority, from lifting or taking sand or other materials for supplying vessels with ballast from the shore-ground at Glencaple belonging to the pursuer. He averred —"Within a few days prior to the raising of the present action the defenders, or one or other of them, by means of carters and others employed by them or acting under their sanction or authority, unlawfully entered upon the said shore-ground belonging to the pursuer with horses and carts, lifted and carried away therefrom large quantities of sand and other material for supplying ballast to vessels frequenting the river Nith, and have otherwise injured the pursuer's said property by passing over it with horses and carts."

The defenders alleged, in the first place, that the piece of ground in question had been conveyed to the Provost and Magistrates of Dumfries by William Maxwell of Nithsdaill for the purpose of making a harbour and improving the navigation of the river. They also narrated in their statements various clauses of the Act of Parliament 51 Geo. III. cap. 147, by which the Nith Navigation Commission was consituted, giving the Commissioners various powers for the "carrying on, improving, supporting, and maintaining the navigation." *Inter alia*, they averred—"To enable ships and vessels to leave the river and port it is absolutely necessary that they shall be furnished with a certain quantity of ballast to fit them to do so, and proceed upon another voyage, and it has been since the year 1811, and still is, the practice of the Commissioners and their servants, in doing and executing what they deem necessary and expedient for carrying on, improving, supporting, and maintaining the navigation of the said river, and for the preservation of the shipping therein, to permit the masters and crews of such vessels to take from the bed and shores of the said river such quantities of sea sleech, sand, gravel, stones, and material as they have required and do require for the purposes of ballast."

The pursuer, *inter alia*, pleaded—"(1) It is no part of the business of the Commissioners, and does not fall within the scope of their Act of Parliament, to supply vessels with ballast. (2) No relevant title to take ballast from the shore-ground belonging to the pursuer has been set forth by the defenders. (3) The ground in question being the property of the pursuer, and the defenders having no right to take material therefrom for ballast, he is entitled to interdict as craved."

The defenders, *inter alia*, pleaded—"(4) The right of property in the subjects in question, which is real property and heritable, and the right

to said property being in dispute, the jurisdiction of the Sheriff Court is excluded, and the petition should therefore be dismissed with expenses. (9) The river Nith being a public navigable river, the *alveus* thereof and the shore and beach thereof are *res publicæ*, and are not the property of the pursuer; and, in any event, the *alveus*, shore, beach, and banks of said river are subject and subservient to the purposes of the navigation of said river."

The Sheriff (HOPE) allowed the defenders a proof of their averments as to the state of possession, and thereafter pronounced an interlocutor in which, after certain findings of fact, he found in law "(1) that in the circumstances the pursuer is not entitled to a possessory judgment; and (2) that the action is incompetent in this Court, in respect that it involves a question of heritable right, and was raised before the passing of the Act 40 and 41 Vict. c. 50," and he therefore recalled the interim interdict which he had pronounced, and dismissed the petition. He added this note:—

"*Note.*—. . . It appears to the Sheriff-Substitute that the dispute involves an heritable question, and therefore the pursuer, however good his title may *ex facie* appear, cannot obtain in any view more than a possessory judgment, and if the view taken by the Sheriff-Substitute be correct, not even that, because he has not established possession. Even if any possession has been established, it is not exclusive possession, for the defenders' proof shows that down to the period when the operations complained of were carried on constant use was made of the ground by shipmasters and others, including the defenders, who may be said to have used it by—in the person of their harbour-master—giving authority to others to use it.

"It is unnecessary to quote from the defenders' proof to show that this is clearly proved.

"The Sheriff-Substitute regrets that further litigation will (in his opinion) be necessary if the pursuer wishes to have the question he has raised decided, and all the more so as he cannot see that the defenders have any power under their Act to dig out the banks of the river or the *alveus* except for purposes connected with the improvement or maintenance of the navigation. It seems to him to be no part of their duty to provide ballast for ships.

"As regards the pursuer's title, which is assailed in various ways, it is sufficient to say that while it seems to the Sheriff-Substitute to be good enough to found a title to a possessory judgment if possession had been proved, he reserves his opinion whether or not it would be sufficient in an action of declarator or other action for deciding heritable rights."

On appeal the Sheriff (NAPIER) adhered.

The pursuer appealed to the Court of Session, and argued—There was no competition of heritable rights here involving a question that could be tried by way of declarator. All that the defenders put forward was a right affecting the property of another, and that to the extent of a possessory judgment might be determined by the Sheriff—*Johnston* v. *Murray*, March 5, 1862, 24 D. 709; *Maxwell* v. *Glasgow and South-Western Railway Company*, February 11, 1866, 4 Macph. 447. Now, the Commissioners had no right to interfere with the property adjoining the river except for the purpose of furthering the navigation of the river. They had no right of property given them, nor had they any such right at common law—*Milne Home* v. *Allan and Others* (*Eyemouth Harbour Trustees*), January 8, 1868, 6 Macph. 189; *Clyde Navigation Trustees* v. *Trustees of the Harbour of Greenock*, July 8, 1875, 12 Scot. Law Rep. 595; *Lord Blantyre* v. *Clyde Navigation Trustees*, December 19, 1877, 15 Scot. Law Rep. 382. Trustees had large powers under such a statute as this, provided their object was to improve navigation, but had no other right—*Todd* v. *Clyde Navigation Trustees*, January 23, 1840, 2 D. 357.

The defenders argued—Ballasting ships was *inter regalia*, and was a right held by the Crown for the benefit of the public—Stair, ii. 1, 5; *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309 (Lord Cowan's judgment, 330). Besides, the provisions of the Act of Parliament regulating the operations of the Commissioners here, inasmuch as it prohibited the taking of ballast beyond a certain extent, permitted the taking of it up to a reasonable extent.

At advising—

LORD SHAND—In this case Mr Carswell, the pursuer, residing at Glencaple, in the parish of Caerlaverock, founding on a title which gives him, as he alleges, the property adjoining the river Nith down to low watermark, seeks an interdict against the River Commissioners that shall have the effect of prohibiting them by themselves or by other persons acting on their instructions, or by their sanction or authority, from taking sand or other material for supplying vessels with ballast from the shore-ground at Glencaple belonging to him. The statements by the defenders on record substantially come to this, that they assert a right to take ballast and to give others using the river for navigation right to take away ballast. The Sheriff and Sheriff-Substitute have both held that in respect the defenders, founding on the provisions of their Act of Parliament, substantially maintain a right to take ballast and to give others authority to do so, this petition raises a question of heritable title which cannot be properly raised in the Sheriff Court. I am of a different opinion, and I think their judgment is not well founded.

In the first place, the contention that there is a question whether the pursuer's property extends down to low watermark is not such as can be given effect to. The title may be open to construction in a process of declarator, but in the meantime there is a conveyance on which the petitioner has been infeft and in possession for ten years, in which his boundaries are thus described—"bounded by the floodmark and river of Nith on the west parts, with the ground that now is or hereafter shall be between the present floodmark and river of Nith." One of his boundaries is the flood-mark, the other is the river Nith, and the fair construction of the language used is that what lies between the floodmark and the river at low-water is expressly conveyed to him. We have then enough here to entitle the petitioner to say that he is infeft in a property that extends to the low watermark, which is sufficient to give a right to insist in a possessory action.

The question remains, Whether in this action of a possessory character the pursuer is entitled to succeed. This is not a proper case of a competing title; the defenders do not aver any right of property. Their case is presented entirely on the provisions of the statute, and the sole effect of these is that there is vested in the defenders a right of making and maintaining the river as a navigable river, and of executing such operations as may have the effect of improving the navigation. Had their object in removing sand or gravel been to make the channel better for navigation, that might have been a good defence here. But the effect of the Act of Parliament is obviously limited to conferring powers for the improvement of the navigation. It gives no right such as is claimed. On this point we have, I think, very direct authority in the case of the *Eyemouth Harbour Trustees*. In that action trustees of a harbour maintained a right to take ballast, and it was held that they had no title enabling them to do so. It is not enough to make a competing title that the defenders should assert the right, or set up a statute the provisions of which do not in any way profess to give such a right.

We have thus a title here on one side, and no competing title on the other. The pursuer therefore is, in my opinion, entitled to succeed. Even if it could be truly said that there is here a competing title, still as the act objected to is a removal of part of the property, the Sheriff, I think, would have been quite entitled to have stopped such operations pending the question whether the property belonged to the one party or the other. I may refer for authority on that point to the cases of *Johnston* v. *Murray* and *Maxwell* v. *The Glasgow and South-Western Railway Company*. It was there held that a Sheriff had jurisdiction to grant interdict against such dilapidation. The view of the case I have formed is quite irrespective of the proof. I think the interlocutor should be recalled, and interdict pronounced as in a possessory question, leaving the Commissioners to take further action if so advised.

With regard to the right at common law to take ballast, I may say that, so far as I am concerned, I am not prepared to say that there is such a right, but if there be, it must be asserted in a very different process, and probably by persons having a different title.

Lord Mure—The Sheriffs have sustained the defenders' fourth plea, which amounts to this, that they have no jurisdiction, because this is a question raising a competition of heritable rights. If that question were raised on record, the case could not have proceeded in the Sheriff Court, I am, however, very clearly of opinion that there is here no competition in the proper sense. There is a mere denial by the defenders of the pursuer's right under his title, but there is no assertion of any heritable right on their own part. There is, in short, no adverse title set up except the Act of Parliament, which gives the Commissioners right to attend to the navigation of the river. I was at first struck with the passage in the defenders' statement of facts, that this piece of "shore-ground is a portion of the six acres of ground granted by William Maxwell of Nithsdale to the magistrates and town council of Dumfries for the purpose of making a harbour and improving the navigation of the river as aforesaid." But that is, as explained by the pursuer's counsel, no averment of a title in the Navigation Commissioners. There is, in short, no averment on the part of the defenders that can be held relevant in a question with the pursuer, who holds a right to the foreshore under his title of 1868. As that is so, I am of opinion that the judgment of the Sheriffs is not well founded. Any party who holds a title such as the pursuer does here is entitled to come into the Sheriff Court and ask to have his property protected from being dealt with as he says it is being dealt with here. The defenders admit that they have been in the habit of allowing people to take ballast. I think that the pursuer's title is quite sufficient to found his prayer for interdict against such proceedings.

Lord Deas—Mr Carswell has a disposition on which he is infeft of three acres "or thereby, with the ground that then was or thereafter should be within the present floodmark and the river Nith, lying at Glencaple Quay, in the parish of Caerlaverock and shire of Dumfries." That, on the face of it, is a title to a portion of the shore so far as anyone can have such a right. It is quite true that it is not traced back to the Crown grant which must have preceeded it, and in an action of declarator that would be imperative, but in an action of this kind it is quite enough that the title has not been challenged, and that it shows that the party has that ground in property.

The defenders have certain rights under the statute. It is not contended that the statute gives a right of property, nor does it give a right to take sand themselves or to allow others to take it. That is not protection of the navigation; that is giving away the *solum*, which belongs to another party. I cannot see that the pursuer has not a perfectly good title to insist in a possessory action against parties who have no title at all. There is nothing to prevent the Sheriff from considering the titles to heritable property of any value for the purpose of seeing whether *prima facie* there is a title in a party to insist in a possessory action. Even if there be some show of a competing title, it does not follow that the Sheriff would not have had jurisdiction to look at it, but there is none here. The Sheriff does not doubt that the pursuer has a title to a possessory judgment. He says "it appears to the Sheriff-Substitute that the dispute involves an heritable question, and therefore the pursuer, however good his title may *ex facie* appear, cannot obtain in any view more than a possessory judgment, and if the view taken by the Sheriff-Substitute be correct, not even that, because he has not established possession. Even if any possession has been established, it is not exclusive possession;" and again—"all the more so as he cannot see that the defenders have any power under their Act to dig out the banks of the river or the *alveus* except for purposes connected with the improvement or maintenance of the navigation. It seems to him to be no part of their duty to provide ballast for ships. As regards the pursuer's title, which is assailed in various ways, it is sufficient to say that while it seems to the Sheriff-Substitute to be good enough to found a title to a possessory judgment, if possession had been proved, he reserves his opinion whether or

not it would be sufficient in an action of declarator or other action for deciding heritable rights." So that his ground of judgment comes to this, that the pursuer has not proved exclusive possession although he has produced a good title. Now, in a question with a party who has neither right, title, or possession—and according to the Sheriffs the defender has none—it is not necessary for the pursuer to prove possession of his own property exclusively. I do not say the Sheriff-Substitute was wrong in allowing the proof as to the exercise of rights, but supposing he was right the defenders have not proved exercise of them in any other way than as trespassers. I come therefore to the same conclusion as your Lordships. The judgment I propose will not touch the rights of parties in a proper action of declarator.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively the 7th December 1877 and the 8th February 1878, except in so far as the preliminary pleas therein mentioned are repelled: Find, in point of fact, that the defenders (respondents) have had no possession during the possessory period prior to the date of the action of a right or privilege of taking sand for ballast from the portion of foreshore now in dispute, or of granting leave to others to do so, otherwise than by occasional acts of trespass or by tolerance of the pursuer (appellant): Find, in point of law, that the pursuer had and has a sufficient title to raise and insist in the said action for interdict, and that the defenders have instructed no title to maintain the pleas stated for them in defence: Find the pursuer entitled to a possessory judgment: Therefore and to that effect repel the defences and grant interdict as craved, and decern: Find the pursuer and appellant entitled to expenses both in the Inferior Court and in this Court," &c.

Counsel for Pursuer (Appellant)—Balfour—Robertson. Agent—James Somerville, S.S.C.

Counsel for Defenders (Respondents)—Kinnear—M'Kechnie. Agents—J., C., & A. Steuart, W.S.

## COURT OF JUSTICIARY.

* *Wednesday, October* 23.

### GLASGOW AUTUMN CIRCUIT.

(Before Lord Craighill.)

STEVENSON *v.* M'PHEE (FISCAL IN GLASGOW POLICE COURT).

*Justiciary Cases—Riotous and Disorderly Behaviour under Glasgow Police Act* 1866—*Statutes* 14 *and* 15 *Vict. cap.* 27, *and* 25 *Vict. cap.* 18—*Whipping over Fourteen.*

Upon a complaint, brought under the 135th clause of subsection 5 of the Glasgow Police Act of 1866 (29 and 30 Vict. cap. 273), charging the crime of being "riotous and disorderly in his behaviour by throwing peasemeal or soot, or otherwise creating a noise or disturbance," the stipendiary magistrate sentenced a youth of fifteen years of age to receive fifteen stripes. The statutes set forth in the warrant upon which the sentence proceeded were the Acts 14 and 15 Vict. cap. 27, and 25 Vict. cap. 18. The sentence which had been asked in the complaint was a fine or alternatively imprisonment.

In support of a suspension of the sentence, it was pleaded (1) that the complaint did not set forth a relevant charge; (2) that a different penalty had been imposed from what the statute stated and contemplated, and from what was craved; (3) that the sentence was illegal, because one of the statutes on which it proceeded had been repealed, and the other did not apply. *Held*, apart from the other questions raised, that the conviction fell to be quashed, in respect (1) that the Act 14 and 15 Vict. cap. 27, was repealed, and the Act 25 Vict. cap. 18, gave no warrant for whipping except in the case of boys not above fourteen; and (2) that whipping was not sanctioned by the common law in such a case as that in question.

This was an appeal against a sentence pronounced by the Stipendiary Magistrate of the city of Glasgow in a complaint charging George Stevenson, a boy between fifteen and sixteen years of age, with the crime of being "riotous and disorderly in his behaviour by throwing peasemeal or soot, or otherwise creating a noise or disturbance." The charge was brought under the 135th clause, subsection 5, of the Glasgow Police Act of 1866 (29 and 30 Vict. cap. 273), which provided that all persons guilty of certain acts or omissions should "be liable to a penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods hereinafter mentioned, viz.—To a penalty of ten pounds, or alternatively without penalty to imprisonment for sixty days." Subsection 5—"Every person who is riotous, disorderly, or indecent in his behaviour."

On the 24th May, which was held as the Queen's Birthday in Glasgow, between seven and eight o'clock in the evening, Stevenson had gone out to amuse himself with some of his companions, at one of whom, as they passed along the street, a girl had thrown a small bag of peasemeal. It struck Stevenson, who retorted by throwing it back. He was then caught hold of by two individuals in plain clothes, who turned out to be policemen, and taken to the Police Office, where he was incarcerated. Upon his mother giving an undertaking that the boy would come to Court in the morning he was released. No complaint was served upon him, according to his statement, but after the evidence of the two policemen the Magistrate pronounced a sentence adjudging the boy, whose age in the opinion of the Magistrate did not exceed fifteen, to receive fifteen stripes. The sentence was carried out, and this suspension was afterwards presented to the Circuit Court of Justiciary.

Argued for the suspender — The conviction should be quashed, because (1) the complaint was insufficient or irrelevant; because (2) the Magistrate had imposed a penalty for a statutory offence which the statute did not contemplate and did not mention, and which the prayer of the complaint

* Decided September 7, 1878.