

Wednesday, July 9.

FIRST DIVISION.

CHRISTIE MILLER v. ANDERSON AND BAIN.

*Interdict—Breach of Interdict where Penalty inflicted.*

Sentence of one month's imprisonment imposed by the Court in a case of breach of interdict against removing sand from a foreshore.

*Proof—Competency of Examining the Respondent in a Petition and Complaint for Breach of Interdict—Act 16 Vict. c. 20, sec. 3.*

Held that the respondent in a petition and complaint for breach of interdict may competently be examined as a witness under the provisions of the Act 16 Vict. c. 20, sec. 3.

Mr Christie Miller was proprietor of the lands and barony of Craigentenny. On October 19, 1877, he obtained an interdict against William Anderson, gravel merchant, Leith, prohibiting him from removing gravel, sand, &c., from the lands of Craigentenny and from the sea-shore *ex adverso* of these lands.

On April 27, 1877, Mr Christie Miller obtained an interim interdict to the same effect against William Bain, carter, Edinburgh, which became perpetual on 22d May 1877.

Notwithstanding these interdicts Anderson and Bain continued to take sand from the Craigentenny foreshore, and on March 19, 1879, Mr Christie Miller presented a petition and complaint for breach of interdict, with consent of the Lord Advocate, against Anderson, and on May 17, 1879, one against Bain.

Proof was led in both petitions on an order of the Court before Lord Mure on the 23d of June. At the proof counsel for the respondent Bain proposed to examine him as a witness. Counsel for the petitioner stated that while not consenting he did not object to this being done, subject to a doubt as to the competency of such a proceeding. At the hearing of the case before the Division it was argued for the respondent that the admission of his evidence in a quasi-criminal action of this kind was not struck at by sec. 3 of the Act 16 Vict. c. 20, as this was "neither an indictable offence" nor was it "punishable on summary conviction," and that as matter of fact it had been allowed in former cases.

Authorities—*Bruce v. Linton*, Dec. 13, 1861, 24 D. 184; *Henderson*, May 23, 1874, 1 R. 920; *Mackay*, Sept. 23, 1853, 1 Irv. Just. Rep. 288; *Stevenson v. Scott*, Sept. 8, 1854, 1 Irv. Just. Rep. 603; *France v. Anderson*, June 29, 1877, 4 R. (Just. Ca.) 42; *Dickson on Evidence*, secs. 828, 1396; *Blair v. Mitchell & Malloch*, July 9, 1864, 4 Irv. 545.

At advising—

LORD PRESIDENT—It appears to me that this is a question on the interpretation of section 3 of the Statute 16 and 17 Vict. cap. 20. That is a remedial statute, and its object is to provide for the admission of evidence which formerly was not competent at common law. That is the leading enactment of the clause. There is therefore in the clause an empowering or permitting enactment, but there is also an exception, on the con-

struction of which this question depends. But the ordinary rule of construction of such a statute is that the leading enactment shall be construed literally, and that the construction of the exception shall rather be strict.

The leading enactment is—"It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not." These words are very comprehensive. The exception is—"But nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland," &c. Now, here there are two, and only two, particular kinds of proceedings specially meant, namely, criminal proceedings in which the person is charged with an "indictable offence," and proceedings in which the offence is "punishable on summary conviction." In every other class of proceeding the party is allowed to give evidence for himself. I think therefore that this evidence is not within the exception.

In one sense this is undoubtedly a criminal proceeding, but it is also one in which civil interests are often largely concerned, and therefore it is often called a quasi-criminal proceeding. If the nature of the interdict is so plain that the proof of a fact is conclusive evidence of the charge that it has been broken, such a civil interest does not emerge, but sometimes civil interests of great importance are concerned. I remember a case in which such a question having arisen the Court saw that the judgment on the complaint would decide the extent of a right in salmon-fishing. We therefore adjudge, and sent an issue to a jury, preparatory to the decision of the petition and complaint.

I think that there is good reason for holding that evidence in such a case as this was not in the contemplation of the Legislature when it excepted only two kinds of proceedings. These two classes are well known to our law, and do not correspond with the proceeding now before us.

LORD DEAS, LORD MURE, and LORD SHARP concurred.

The Court, after hearing counsel on the evidence, unanimously found the charges of breach of interdict to be proved, and sentenced both respondents to be imprisoned for one calendar month.

Counsel for Petitioner—Balfour—D. Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondent (Bain)—Rhind. Agent—C. B. Hogg, L.A.

Wednesday, July 9.

SECOND DIVISION.

SPECIAL CASE—M'JANNET AND OTHERS  
(HAMILTON'S TRUSTEES) v. HAMILTON  
AND OTHERS.

*Trust—Voluntary Trust-Disposition—Vesting—  
Power of Apportionment—Alimentary Provision.*

H executed a voluntary *inter vivos* trust-disposition and assignation in favour of trustees, whereby he assigned £20,000 to them for various purposes, *inter alia*—(1) to pay him for his alimentary use alienarily the whole free annual income; (2) to hold the fee for behoof of the whole lawful children born and to be born of him, and the issue of the bodies of such of them as might die, in such shares and proportions as he might fix by any writing under his hand, failing such writing equally *per stirpes*. The deed was further declared irrevocable, and was duly delivered when completed, payment to be made to the children on their attaining majority after the father's death—prior to that date the income, so far as necessary, to be applied for their behoof. The trustees possessed the estate under it for twenty years. H then executed a deed of apportionment and division, and relative deed of renunciation, in part exercise of the power reserved in the trust deed, by which he renounced his liferent over £8500, being part of the £20,000 which was in the hands of his trustees, and directed them to divide it among his children, of whom there were seven, the youngest being seventeen years old. H at the time was sixty-eight years old and a widower. *Held*—in a question whether the deeds of renunciation and apportionment were within H's power—(*diss.* Lord Ormisdale) (1) That the fee of the £20,000 vested in the children who were born at the date of delivery of the trust deed; (2) That he was entitled to renounce his liferent to the extent to which he had so done, it having been granted by himself for his own behoof, and that the deed of apportionment was therefore within his power, and was reasonable in the circumstances.

The question involved in this Special Case related to the disposal of a sum of £20,000 which was left by Mr Ferguson of Cairnbrock, sometime baker in Irvine, and afterwards residing there, by his trust-disposition and settlement dated 13th May 1853 and 22d September 1855.

Mr Ferguson left this sum to John Hamilton in liferent, and to his children equally among them in fee, and after Mr Ferguson's death a question arose between the parent and children as to the fee of the fund in question. After various procedure both in the Court of Session, 22 D. 1442, and the House of Lords, 24 D. (H. of L.) 8, and 4 Macq. 397, Mr Hamilton was found entitled to the fee. During the progress of the litigation Mr Hamilton executed a trust-disposition and assignation in favour of William M'Jannet, banker in Irvine, and others, whereby he assigned to them the £20,000, as trustees for the ends, uses, and purposes therein narrated. These trustees

were the first parties to this case. The purposes of this trust deed were, *inter alia*, as follows:—The £20,000 was assigned to the trustees in trust, *inter alia*, as follows—*Second*, "My trustees shall make payment to me the said John Hamilton, for my alimentary use alienarily, of the whole free annual income or revenue of the trust-funds, and that half-yearly and periodically from time to time as the same falls due, during the whole term of my life. *Third*, I reserve to myself the power at any time of making to a widow who may be left by me a liferent provision, not exceeding £150 value per annum, which my trustees shall be bound to satisfy out of the trust-funds or property as I may direct. *Fourth*, My trustees shall hold the fee or capital of the free trust-funds and produce thereof after my death (subject to the eventual provision to my widow as aforesaid) for behoof of the whole lawful children born and to be born of me the said John Hamilton, and the issue of the bodies of such of them as may die, in such shares and proportions as I may fix by any writing under my hand, but failing such writing, then among such children and their issue equally *per stirpes*." Then followed a direction to apply the free income of the estate after the grantor's decease, as far as the trustees considered necessary, to the maintenance and education of his children until they attained twenty-one years, and then from time to time to convert into cash as much of the capital as might be necessary, and divide and pay the same to his children according to their respective rights in the fee. The deed was further declared irrevocable. In the litigation above referred to, these trustees after their appointment took the place of Mr Hamilton, and when the fee was ultimately found to belong to him, they got possession of the £20,000, less expenses, and had held and administered it ever since.

By deed of apportionment and division, and relative renunciation, dated 17th January 1879, Mr Hamilton, in exercise and execution in part of the power of apportionment, division, and appointment reserved to him in the trust-disposition and assignation above narrated, renounced his right of liferent over, and directed and apportioned the sum of £8500, part of the trust-funds in the hands of his trustees, to and amongst his whole children, in the shares and proportions mentioned therein, and directed and appointed his trustees to pay the respective sums therein named to his children immediately on delivery of the deed to them. At the date of the execution of this deed of apportionment Mr Hamilton was sixty-eight years of age. He was a widower, his wife having died on 16th March 1877. His whole children were in life. They formed with him the second parties to this case, and were seven in number, three of whom were married, and the youngest of whom was born in April 1861.

The question raised related to the power of Mr Hamilton to execute this deed of apportionment and division and relative renunciation. For the first parties, viz., the trustees, it was maintained that the deed was contrary to the provisions of the trust-disposition and assignation in their favour, particularly to the fourth purpose thereof, and was therefore invalid. They considered that they were bound to retain the whole sum of £19,230, as the balance of the £20,000 conveyed to them, till the death of Mr Hamilton. For the second parties it was