

prior in date to the whole or any part of the subject.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Asher—Shaw. Agent—R. W. Wallace, W.S.

Counsel for Defender (Respondent)—Scott—Kinnear. Agents—Wotherspoon & Mack, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Lord Young, Ordinary.

LORD BLANTYRE v. THE CLYDE NAVIGATION TRUSTEES.

River—Dredging—Powers of Statutory Trustees.

Held, upon a construction of the Clyde Navigation Consolidation Act 1858, secs. 76 and 84, that the Clyde Navigation Trustees were entitled to carry on dredging operations on a part of the river Clyde between high and low water-mark, which had been found to belong in property to the riparian proprietor, without prejudice however to any claim of compensation for damage which might be sustained by the latter.

This was a note of suspension and interdict by Lord Blantyre, proprietor of the lands of Erskine and others, on the banks of the Clyde, and the Master of Blantyre, as heir-of-entail next entitled to succeed, against the Clyde Navigation Trustees incorporated by "The Clyde Navigation Consolidation Act 1858." The object of it was to prevent the respondents "from entering upon, taking, occupying, using, or removing, or otherwise interfering with any part of the soil" within certain areas forming the shore and bank of the river Clyde between high water-mark and low water-mark *ex adverso* of the complainers' estate of Erskine. The complainers, *inter alia*, averred that under the Act 3 and 4 Vict. cap. 118, which dealt with the Clyde navigation, the Clyde Trustees' powers of compulsory purchase expired in eight years after the date of its passing, so far as regarded the lands in which the area in question was included. Further, the complainers' right of property in that ground was established in an action of declarator raised in the Court of Session on 11th December 1875. The Lord Ordinary (CURREHLL'S) interlocutor in that case was affirmed by the First Division on 19th December 1877, *ante* vol. xv. p. 382, and by the House of Lords on appeal on 19th June 1879, *ante*, vol. xvi. p. 661. The decree bore that the complainers "are proprietors of the foreshores of the river Clyde *ex adverso* of said lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the Trustees of the Clyde Navigation by their Acts of Parliament." The complainers now averred that notwithstanding that decree, and the expiry of the respondents' powers to take lands under the Act, the respondents had recently illegally and without authority entered upon and begun to re-

move by dredging and selling or carrying out to sea a portion of the ground in question without their consent.

The Clyde Trustees answered, *inter alia*, that by section 76 of the Clyde Navigation Consolidation Act 1858 the undertaking of the Trustees was defined as consisting, *inter alia*, of "deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least 17 feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil, or ground, part of the present or former course or bed of the river," &c. By sec. 84 of that Act it was further provided that "it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof . . . to the extent authorised by the recited Acts and by this Act," viz., to the depth of 17 feet at neap tides. The respondents admitted that they did not take under their compulsory powers of purchase the ground in question, but they stated that they were not bound to do so. They had, since 1840, and down to the present time, been in the habit of carrying on dredging operations upon the area in question; their right to do so was now for the first time questioned. The operations now complained of consisted of widening the deepened channel *ex adverso* of the complainers' lands of Erskine. "The site of these operations is in the estuary of the Clyde, and the portion of the *solum* which is to be removed for the purpose of widening the channel is far below high water-mark. Before the earlier operations of the respondents were commenced, the whole of that space was permanently under water, and the effect of these operations has been to confine the deep channel within its present limits." They further denied that they required the consent of the complainers to carry on these dredging operations, or that the statutory limit of eight years applied to their operations on the area in question. The respondents referred to an action of declarator raised against them by Lord Blantyre in 1864, which, as regarded some of its conclusions, was still in dependence, and to a suspension and interdict raised by his Lordship against them in 1866—5 Macph. 508, and 9 Macph. (H. of L.) 6.

The complainers pleaded—" (1) The ground in question being the property of the complainers, and the Clyde Trustees having no right to take or acquire the same, or to dredge thereupon, without the complainers' consent, the complainers are entitled to interdict as craved. (2) The operations complained of being illegal, unwarrantable, and unauthorised, the complainers are entitled to have the interdict made perpetual."

The respondents pleaded, *inter alia*—" (3) The complainers' rights to the foreshore in question are subject to the rights of navigation and other rights which the public have over the same, and to the rights conferred on the respondents by their statutes, and also to the rights created by the royal charters granted to the magistrates of Glasgow. (4) The respondents are entitled at common law, and *separatim*, under the foresaid statutes and royal charters, to widen and deepen the channel of the river by dredging the area of foreshore marked 131 to the depth of 17 feet. (5) The respondents' statutory powers (now expired) of taking and acquiring land compulsorily,

had and have no application to the dredging operations carried on by them on the said area or foreshore. (6) The respondents are not bound to obtain the complainers' consent to the said dredging operations, nor to pay compensation in respect thereof."

On 25th July 1879 the Lord Ordinary on the Bills (CURRIE HILL) granted interim interdict, which was continued on 30th December following; and on 21st January 1880 LORD YOUNG (Ordinary) repelled the reasons of suspension, dismissed the suspension and interdict, and recalled the interdict formerly granted. His Lordship delivered the following opinion:—

"I understand this case, and I see no reason for delaying to give judgment in it. The river Clyde at the place in question is undoubtedly an estuary,—that is to say, the tide ebbs and flows there, so as to give a foreshore upon either side,—ground which is covered at high-water and dry at low-water. The limits of the channel of the river, within which the powers of the trustees extend, are specified by Act of Parliament, and are considerably—on the south side at least—within high water-mark, consisting therefore entirely of the channel of the river, where the ground is always covered with water, and a proportion of the shore on the south end, but not the whole of it. Within that channel the trustees are empowered and required, according to the funds at their disposal, to keep the channel dredged so as to render it available for the purpose of navigation. It is their duty to do so to the extent of their means; and of course the power is expressly given to them to discharge that duty. Of the foreshore,—which comprehends a portion of the channel not always covered with water, or sufficiently covered with water to be available for sailing over it, but sometimes so covered,—of that foreshore there can be no question that Lord Blantyre is the proprietor. That has been determined in his favour by a judgment of the House of Lords; but by that judgment his property is declared to be subject to any rights of navigation or other rights which the public may have over the same; and subject also to any rights conferred upon the trustees of the Clyde Navigation by their Acts of Parliament. Now, the public certainly have the right to make all reasonable use of it for the purpose of navigation, and the Clyde Trustees have the powers by their statutes, as I have stated, and a corresponding duty, to dredge and deepen it so as to make it more available for that public purpose. They are engaged in doing so now, and their operations to that end are the operations which Lord Blantyre seeks by the present proceedings to put a stop to. I am of opinion that these operations are within their powers and according to their duty, and that no reason for this Court interfering to stop them is presented on this record.

"If any damage is by these operations done to Lord Blantyre as a riparian proprietor, his claim for damages accordingly, or compensation for the injury he thereby sustains, is in no way prejudiced by the judgment which I have pronounced. I do not inquire—certainly I have not determined—whether these operations, which I do decide to be within the powers and duty of the trustees, are productive of any damage to him. If they are not, of

course he has no claim; if they are, his claims are not prejudiced by anything which I now do; but I do determine that for the purpose of performing that duty which is within their power—of deepening the channel of the river within the limits to which I have referred, and therefore including a portion of the foreshore now in question which is within these limits—the trustees are not required to take land so as to make themselves proprietors of it under the Act of 1840. Upon these grounds—certainly without any prejudice to Lord Blantyre's claim to compensation if he has already or shall hereafter suffer any damage—I refuse the present suspension and dismiss it, recalling the interim interdict already granted, and of course with expenses to the respondents."

The complainers reclaimed.

At advising—

LORD PRESIDENT—Before giving judgment in this case I was anxious to make myself thoroughly acquainted with the import of the judgments we had previously pronounced in questions between the same parties, and particularly with the judgment which we pronounced on 29th May 1868 in a suspension and interdict at Lord Blantyre's instance. That judgment was carried by appeal to the House of Lords, along with a previous judgment in a process of declarator, and both were affirmed on the 3d of March 1871, 9 Macph. (H. of L.) 6. By force of these judgments we determined that we could not interfere with the operations of the Clyde Trustees in deepening the river within the limits prescribed by the Act of Parliament, by means of dredging or otherwise, and carrying away soil which was taken out of the river out to sea. Since that time a process of declarator was raised by Lord Blantyre claiming the property in the foreshore of the Clyde opposite his estate, and in that process this Court pronounced a judgment finding that he is proprietor of the foreshore of the river Clyde *ex adverso* of the said land, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the Clyde Navigation by their Acts of Parliament.

The ground on which the present application is founded is thus summarised by the complainer in his two pleas-in-law.—[*His Lordship read those pleas.*] The only novelty in the position of Lord Blantyre since the previous judgment was pronounced in 1867 (5 Macph. 508) is, that he has had his title sustained to the property of the foreshore, but then the qualification expressed in that judgment affords a sufficient answer to the 1st plea which I have just read, because that property is held by him subject to the rights conferred upon the trustees of the Clyde Navigation by their Acts; and the question comes to be, therefore, irrespective altogether of the right of property which is vested in Lord Blantyre, whether the operations complained of are authorised by the statute. The same question, and no other, is also raised by the 2d plea-in-law. Now, on that question I confess I entertain no doubt. It appears to me that the operations which are here complained of are quite within the 76th section of the Clyde Consolidation Act of 1858. It is needless to read that clause of the Act over again; it has been read frequently in the course of the discussion; but certainly what is here going on in the way of operations for deepening

ing the river was quite within the powers reserved or conferred by that section. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am also of the same opinion. The operations complained of, as explained in the note of suspension and interdict, are entirely on a part of the river between high water-mark and low water-mark. They are really taking place on parts of the river channel as it exists at high-water. Again, there is no taking of ground in property, such as the Clyde Trustees might require to do, for the purpose of a dock or otherwise above high water-mark; nor is there any taking of ground for the purpose of permanent occupation in any sense whatever. The operations entirely consist in the removing of soil by dredging, and the trustees for that purpose do not propose to take or occupy property permanently. The operation being of that kind, it appears to me, as your Lordship has said, that it falls directly under the powers granted to the trustees by the 76th section of the statute. If this were not so, the effect would be entirely to paralyse the trustees in their operations to improve the navigation by deepening the river, for dredging could only take place with the leave of Lord Blantyre or other riparian proprietor whose right of property extends to and includes the foreshore, and if such leave were refused, then dredging would not take place at all.

But if there were any doubt as to the effect of section 76, I think it would be entirely removed when we look at section 84 of the Consolidation Statute of 1858 (21 and 22 Vict., cap. 149), which contains very careful provisions with reference to this very property of Erskine belonging to Lord Blantyre. There are a number of matters dealt with in that section, and dealt with in this way, that the trustees are prohibited from doing certain specified acts or operations *ex adverso* of that property until they have obtained the consent of Lord Blantyre or his successors. But the section concludes with this proviso, notwithstanding prohibitions in other respects—"That it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof within the said limits" (that is, within the limits which had been shown, and were indicated by the number 131 upon the plan lodged with reference to the Act of 1840) "by machinery worked by the power of steam," or other machinery, to the extent authorised by the recited Acts and this Act. That provision seems to make it perfectly clear that the operations here complained of are within the power of the trustees, and it is not only within their power, but according to their duty, to proceed with the deepening of the river for the purpose of navigation.

On these grounds, having regard to the decision of the Court in the former action of suspension on 29th May 1868, and affirmed on appeal, and as I think there is no obligation on the trustees to take land from the complainer for dredging operations in the river channel, and within the parliamentary lines shown on the statutory plan, I am of opinion that this application must be refused.

The Court adhered.

Counsel for Complainer (Reclaimer)—Balfour—J. P. B. Robertson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—Asher—Lorimer. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, March 10.

FIRST DIVISION.

[Dean of Guild, Greenock.

M'EWAN v. SHAW STEWART.

Superior and Vassal—Property—Restriction in Feu-Contract.

A feu-contract provided that houses to be erected on the subjects feued "shall not consist of more than three nor less than two square storeys in height." *Held* that that did not imply a prohibition against the use as attics of the space within the roof above the three square storeys, and that for that purpose storm windows might be thrown out.

Observed that an objection at the instance of the superior to proposed erections by a feuar which were alleged to be in contravention of his feu-contract could competently be entertained and adjudicated upon in the Dean of Guild Court.

John M'Ewan petitioned the Dean of Guild of Greenock under the Greenock Police Act 1877 (40 and 41 Vict. c. 193), sec. 281, to obtain sanction for erection of certain dwelling-houses in Bruce Street, Greenock. The Dean of Guild having ordered citation of the Master of Works, and of certain neighbouring proprietors, among whom was Sir M. R. Shaw Stewart, the superior of the ground in question, and the Master of Works having reported that the plans were satisfactory, subject to certain alterations which were then made, objections to the petition were lodged for Sir M. R. Shaw Stewart. The plans showed three square storeys and an attic, with storm windows in the roof. An outside stair gave access to each flat, the top part leading to the attics only. The feu-contract provided that the houses to be erected "shall not consist of more than three nor less than two square storeys in height."

The objector alleged, *inter alia*, as follows—"The plans showed that the said tenement was to consist of three storeys, and also an attic storey, and on considering them, the said factor, on behalf of the objector, disapproved thereof, in respect that they showed attics or an attic storey, and refused to authorise the erection of the said tenement with attics or an attic storey. The said attics consist of possessions of rooms and kitchens, and the objector objects to them on the ground that they would be a violation of the provisions and restrictions in the foresaid feu-contract, and that too many tenants would be crowded in one tenement. The locality is fully built upon, and contains a large population. None of the houses in the section of Bruce Street in which the said piece of ground is situated contain attics. These houses are all only two and three square storeys in height."