

Monday, July 18.

TEIND COURT.

(Before the Lord President, Lords Deas, Shand, Craighill, and Lee.)

LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF THE CITY OF EDINBURGH (LOCALITY OF ST CUTHBERTS) — PETITIONERS.

Teinds—Process—Citation—A. S. July 5, 1809.

A Lord Ordinary having approved of a rectified scheme of locality as final, and having thereafter approved of the Auditor's report and decerned for expenses, and extract having been issued, an error was discovered in the said scheme, certain lands belonging to the City of Edinburgh having been twice entered therein and localised upon under different classifications. The magistrates accordingly proposed to raise an action of reduction of the said final decree of locality, and as preliminary thereto they petitioned the Court to dispense with the ordinary mode of citation of the heritors (of whom there were 1075), the cost of service on whom in the ordinary mode was estimated at about £250, besides agent's fees and other expenses, and to allow instead citation by means of public notice given by the precentor in kirk, and notice on the kirk door, and subsequent newspaper advertisements, in the manner prescribed by the Act of Sederunt, July 5, 1809, in regard to the raising of actions of augmentation. The Court granted the prayer of the petition.

Counsel for Petitioners — Mackay. Agent—Wm. White Millar, S.S.C.

Tuesday, July 19.

FIRST DIVISION.

SAWERS v. PENNEY (SAWERS' TRUSTEE).

Judicial Factor—Bankrupt.

Peter Russell Sawers was liferenter of the estate of Craigingall and others under the trust-disposition and settlement of his uncle Peter Sawers. He was also one of several trustees named by the said deed. On 25th May 1881 he executed, under decree of the Sheriff of Midlothian, a disposition *omnium bonorum*, by which he conveyed all his heritable and moveable estate whatsoever to J. C. Penney, C.A., as trustee for behoof of his creditors. The Court subsequently, by a decree pronounced in absence on 4th June 1881, on a petition by Mr Penney, removed Mr Sawers and the said other surviving trustee under the said trust-disposition (who had become insane) from their office of trustee, and appointed Mr Penney judicial factor on the estate.

This was an application by Mr Sawers for recall of the sequestration and of Mr Penney's appointment, and for his own restoration as trustee. He averred, *inter alia*, that "the free

rental of the estate was about £600." Mr Penney in his answers denied this, and averred that the estate was, owing to the fault and gross mismanagement of the petitioners, in the last stage of dilapidation, and would, if no factor were put upon it, soon cease to yield a rental at all. He submitted that the fact of the petitioner's bankruptcy, though not an absolute bar to his filling the office of trustee, was a strong element towards his disqualification.

The Court before answer remitted to Mr Dickson of Saughton Mains to inquire into the actual condition of the estate in question, and to report.

Counsel for Petitioner — Party. Agent — Andrew Clark, S.S.C.

Counsel for Respondent — Dundas. Agents — Dundas & Wilson, C.S.

Tuesday, July 19.

FIRST DIVISION.

MACDONALD v. MACDONALD.

Process—Petition—Aliment—Competency of Petition to Restrict Aliment.

It is competent for a husband to proceed by petition in order to have the amount of aliment payable by him under a decree of separation and aliment restricted.

On 29th November 1876 Mrs Mary Hume or Macdonald obtained decree of separation from her husband, with aliment at the rate of £40 per annum, payable half-yearly at Whitsunday and Martinmas. Macdonald was in business in Glasgow as a tailor, and he now alleged that he was unable to continue paying aliment to the amount decerned for owing to the depressed condition of his business, and that having failed to pay the amount due at Whitsunday last he was imprisoned in virtue of an extract-decree obtained by Mrs Macdonald. In these circumstances he presented this petition, in which he prayed the Court "to allow the petitioner a proof of his averments, if that should be found necessary, and to restrict the aliment to be paid by the petitioner to his said wife to £15 per annum as from and after Whitsunday last, and to find that the petitioner is only bound to pay aliment at said rate as from and after Whitsunday last, and to grant warrant for liberating the petitioner, reserving right to the petitioner or his said wife to apply to the Court to alter the rate of aliment if any change of circumstances should supervene; and to find the said Mrs Mary Hume or Macdonald liable in expenses in the event of her appearing to oppose the prayer hereof; or otherwise, to order the Deputy-Clerk Register, or other custodian thereof, to transmit the process in said action to the clerk at Lord Rutherford Clark's bar, and to remit this petition to Lord Rutherford Clark to proceed further herein as may be just; and meantime to grant interim warrant of liberation, and to decern."

Mrs Macdonald lodged answers, in which she denied that the petitioner's circumstances were so reduced as to make it impossible to continue

the payment of the aliment originally decerned for.

Doubts having been suggested as to the competency of this petition—

LORD PRESIDENT—I may state that at first I had some doubts as to the competency of the present proceeding. It is undoubtedly the practice to proceed by way of suspension, but in the old case of *MacLachlan v. Campbell*, May 25, 1809, F.C., a wife used caption against her husband for arrears of aliment. He presented a bill of suspension, which was refused on the merits. He also pleaded “that his funds had turned out much less than was supposed at the time of modifying the aliment, and that he was unable to pay it.” The Court did not think that that appeared from his statement, and they also seem to have indicated an opinion that it was doubtful whether suspension was the proper form of raising the question, and that it “should have been brought forward by a petition to the whole Court, which it was open to the suspender to give in, since the decree of aliment was only *in hoc statu*.” I think therefore that the present petition is a competent proceeding.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court granted interim liberation on caution.

Counsel for Petitioner—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Baxter. Agent—Andrew Fleming, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff Court of Argyllshire
at Tobermory.

ALLAN v. CAMPBELL.

Feu-Contract—Construction.

Terms of a feu-contract which were held to bar the feuar in an attempt to alter a weir with a view to convey an increased supply of water therefrom to his distillery.

By feu-charter dated 25th October 1823, John Sinclair of Lochaline obtained from “The British Society for Extending the Fisheries and Improving the Sea Coast of the Kingdom,” a feu of a lot of ground at Ledaig, Tobermory, of which they were then heritable proprietors, for the purpose of erecting a distillery and other public works thereon, “together with liberty to use as much of the water of the main stream or river that runs on the west side of the said piece of ground as shall be sufficient for carrying on such works as have been or may be erected thereon by the said John Sinclair or his forefathers, to be conveyed in a lead or drain under the road, without raising its level, to and from the said piece of ground, in the direction and channel in which it is presently and has been hitherto used by the said John Sinclair, and not otherwise.” John Sinclair erected the distillery and used it in terms of this feu-charter till 1854, when he disposed

the subjects to John Clark junior, thread manufacturer, Milend, Glasgow, who again in 1863 disposed them to John Cameron Thomson. In 1870 they were made over to John Patten, W.S., Edinburgh, from whom finally they passed to Neil M’Nab Campbell, surgeon, Oban, with entry as at the term of Martinmas 1876, conform to disposition granted in his favour by the said John Patten.

This action was brought by Alexander Allan, Esquire of Aros, Tobermory, heritable proprietor of the estate of Aros, Tobermory, and as the lower proprietor of the river of Tobermory, which flows through his lands for more than a mile before discharging itself into the sea, to have the said Neil M’Nab Campbell and all those whom he might employ interdicted from erecting or constructing any works on the bed, run, or sides of the river of Tobermory, and to have him ordained to restore the said bed, run, or sides of the said river to the state in which they were before the operations complained of were begun.

In support of this action the pursuer averred that the defender had without right or title erected a dam or waterway, altogether 20 yards in length, running in a slanting direction in the bed from the right bank across the river, having its commencement at a point in the river 120 yards above the bridge of Tobermory. The works commenced with a sluice at the entrance to the lead or drain across the road, and extended into and beyond the centre of the river to a much higher level than the highest part of the lead or drain aforesaid. The lower side of the waterway wall so erected had been extended across the river to the bank on the opposite side of the river, thereby throwing the whole water in dry weather into the lead or drain. These erections interfered materially with the natural run of the water, and prevented the fish from getting up the river. He pleaded—“(1) The defender having no right or title to erect any works in the bed or at the side of the said river, interdict falls to be granted against him as prayed for. (2) The defender having no right as aforesaid, decree to remove the works complained of, and to restore the bed of the river to the state in which it was before the same were begun, falls also to be granted against him as prayed for.”

The defender, on the other hand, averred that his operations were altogether confined to the lead, which had been used since time immemorial as aforesaid. The right to the water supply for the distillery works was a heritable right of great value to him. He pleaded (1)—“The defender, as heritable proprietor of the distillery works and others aforesaid, having acquired right to the use of the water of the Tobermory river so far as he requires the same for said works, and having right to complete the repairs necessary to convey the same to the said works by the channel and lead which has hitherto been used for that purpose, the present action, which is raised to interpel his so doing, should be dismissed with expenses. (2) Apart from the direct grant of the use of the water from said river, the defender, by himself and his predecessors, had by force of time, for more than the prescriptive period, acquired a servitude right to said water, and to convey the same as hitherto to the distillery work.”