

ciently to show that the statute did not contemplate that decree should be pronounced without notice of any kind to the persons concerned. There must therefore be some intimation, although there need not be formal service. I am rather inclined to suggested that a registered post-letter will be sufficient.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for the Liquidators—Murray. Agents—J. & F. Anderson, W.S.

Saturday, March 18.

SECOND DIVISION.

[Sheriff of Forfarshire.

LYELL'S TRUSTEES v. FORFARSHIRE ROAD TRUSTEES.

Property—Statutory Right to Take Stones from "Lands" for Road Purposes—1 and 2 Will. IV. c. 43, sec. 80 (General Turnpike Act 1831)—41 and 42 Vict. c. 51 (Roads and Bridges (Scotland) Act 1878).

The General Turnpike Act 1831, by sec. 80, makes it lawful for road trustees to take stones for the purposes of repairing the roads under their care from "lands," both "open uncultivated land" and "enclosed lands." Held (1) that "lands" include the beds of rivers, but (2) that on a construction of that section, the privilege conferred on the trustees is intended to be "*innocua utilitatis*," and that the stones cannot be taken away to the detriment of the estate, or so as to defeat the right of the landlord who requires to use them for his own purposes.

The Act 1 and 2 Will. IV. cap. 43 (General Turnpike Act 1831) provides, by sec. 80, that the trustees of any turnpike road, or any person authorised by them, may search for, dig, and carry away materials for making or repairing such road "from any common land, open uncultivated land, or waste;" and also makes it lawful for such trustees, or other persons authorised by them, "to search for, dig, and carry away any such materials in or out of the enclosed lands of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface-damage done to the lands from whence such materials shall be dug and carried away . . . as such trustees shall judge reasonable." This section of the General Turnpike Act is to be read as incorporated with and forming part of the Roads and Bridges Act of 1878 (41 and 42 Vict. cap. 51).

In June 1881 Miss Caroline and Sophia

Georgiana Lyell, trustees of the deceased Charles Lyell of Kinnordy, presented a petition in the Sheriff Court of Forfarshire, craving the Court to interdict the Forfarshire Road Trustees and those in their employment "from lifting, removing, and taking or carting away from the beds of the rivers Prosen and Esk, or the banks thereof *ex adverso* of the lands of Inverquharity, in the parish of Kirriemuir, belonging to the pursuers, as trustees aforesaid, or from any other part of the pursuers' said property, boulders, stones, or other material, and to grant interim interdict, as craved; reserving always to the pursuers their right to have the defenders ordained to restore to the beds and banks of said rivers *ex adverso* of the pursuers' lands as aforesaid, the boulders, stones, and other material unwarrantably and illegally removed by them, as well as all claims competent to them for damages or otherwise, as also to grant decree for expenses.

The Prosen and Esk flow through the lands of Inverquharity, which are part of the lands of Kinnordy. The pursuers averred that during the month of June then current the contractor under the Road Trustees had unwarrantably and illegally lifted and removed from the beds and banks of the Prosen and Esk, *ex adverso* of their property, large quantities of stones and boulders, and had carted them away without the pursuer's consent or authority. The pursuers maintained, with reference to sec. 80 of the General Turnpike Act 1831, above quoted, that the beds of rivers are not "lands" within the meaning of that Act. They averred that the defenders could easily get stone suited for their purpose without taking stones from the Prosen and Esk; that the stones in the beds of these rivers were required for use on the estate; and that the removal of them in large quantities by the Road Trustees was doing damage to the banks of the rivers. They denied that there was any custom of taking stones for the Road Trustees' purposes from the beds of rivers. The Road Trustees defended the action, and maintained that the taking of the stones from beds of rivers was legal, and was warranted by sec. 80 of the General Turnpike Act. They alleged a custom of taking them, and denied that any damage was being done by their operations, or was likely to result from them.

After a proof the Sheriff-Substitute (ROBERTSON) pronounced this interlocutor:—"Finds it proved that the County Road Trustees have been in the practice for many years of taking stones from the banks and beds of the rivers Prosen and Southesk, as material for metalling the roads in the neighbourhood: Finds that they have done so without challenge from the proprietors of the estate of Kinnordy, through which estate these rivers flow: Finds in law, that although this may not constitute a prescriptive right, it places the Trustees in the favourable position referred to in section 80 of the General Turnpike Act: Finds that under a sound interpretation of this section the Trustees are entitled to search for and carry away such stones for road purposes without payment, under the condition that they shall be liable for surface damage done to the lands: Therefore recalls the interim interdict formerly granted; assoilzies the defenders from the whole conclusions of the petition, and decerns."

He added this note:—"The powers given to road trustees to enter lands and take materials for

the roads under section 80 of the General Turnpike Act are very broad; and where these powers are fairly exercised landed proprietors must submit. In the present case the Trustees claim the right to take stones from the beds or banks of two rivers. These stones are the debris of 'spates' and floods, and are brought down every year in large quantities—forming shingle beds or deposits which are left dry when the rivers recede and the waters abate.

"The section of the Act makes a distinction between entering on open uncultivated lands and entering on enclosed lands. In the former case the Trustees can search for and remove material for the roads without any restriction or exemption, whereas in the latter case the Trustees are hedged in by certain restrictions created in favour of the landowners. It is rather a nice point to say whether these shingle beds or banks are 'open uncultivated land' or enclosed lands in the sense of the statute. They lie between the water and cultivated fields, but can be approached from the fords across the river by a cart at several points. On the other hand, chains are stretched across the river to prevent cattle straying, which may be called enclosing the banks in a certain way. The case was argued on the assumption that these beds are 'enclosed lands' in the sense of the statute, and that the prohibitions and restrictions referred to in the Act apply, and must be observed by the Trustees. But even on this assumption, which is by no means clear, the Sheriff-Substitute has come to be of opinion that the Trustees cannot be interdicted.

"The Trustees are forbidden to take materials from enclosed lands if these materials are required by the proprietor for his own private use. They are forbidden to take materials from orchards, gardens, private policies, or the like. They are forbidden to take materials from enclosed ground planted as a shelter or ornament to any house. They are forbidden to take materials from enclosed lands without first giving fourteen days' notice to the proprietor. But while the statute creates all these prohibitions in favour of the proprietor—see the bracketed paragraph, section 80—it also creates an exception to these prohibitions. The last clause of the bracketed paragraph is as follows:—'Unless where materials have been previously in use to be taken by the said trustees.' As the Sheriff-Substitute understands this, the prohibitions fly off in such a case.

"It is very important then to turn to the proof as to the use and wont of the Trustees in previously taking these stones, because the statutory prohibitions will not affect them if for many years they have been in the practice of taking these stones. Fortunately the proof is quite clear on this point. The present road surveyor, as well as the late surveyor, have taken stones from these rivers for seven years. And the overseer on the estate, who has been there for thirty years, says that the Trustees have taken stones from the banks of the river ever since he can remember. A number of other witnesses speak to the same fact. The Trustees, until the action was raised, were never challenged for doing this. Now, according to the case of *Graham v. Renfrewshire Road Trustees*, 13 D. 1012, this unchallenged use of the subject is legal use. Lord Cockburn says—'I think it is clearly legal possession if the quarry

was wrought year after year without opposition or challenge either from proprietor or occupier.' Are the trustees then not exempted from the prohibitions? The Sheriff-Substitute thinks they are; and if so, the fact that the proprietor required these stones for his own private use cannot be pled against them.

"But even here, assuming that the Sheriff-Substitute has construed the section wrongly, and assuming that the Trustees were forbidden to take these stones if the proprietor required them, even in this case, and on these assumptions, it is very doubtful from the proof if the proprietor really required the stones for his private use. This leads to the consideration, what is 'private use' in the sense of the statute? On this point the case of *Yeats v. Taylor*, 9th January 1863, is very instructive. The Lord President in this case clearly lays down that it will not do for a proprietor merely to say, 'The materials are required for my private use.' Nor will it be enough for him to say, 'A use may arrive for these materials.' The proprietor must prove that he is actually making use of the materials, and that it is no imaginary or future use he refers to. In the present case the proof on that head is very weak. It is not proved at all clearly that prior to the interdict the proprietors of the Kinnordy estate were or had been in the practice of using these river stones. The factor Mr C. Lyell, who ought to be the best witness on this point, says,—'One of my reasons for interdicting the Trustees was, that I doubted their legal right to take the stones; and secondly, I did not know when I might require stones to repair the embankments of the river, which are often injured.' The overseer says,—'We intended this year to repair the embankment with stones taken from the river.' This witness also says in his evidence, 'All the stones in the river are required for estate purposes.' This sort of evidence is too vague, and will not satisfy the Court as to 'private use.' In the case of *Yeats*, above quoted, the proprietor was proved to have metalled roads of his own with the chips or stones which the Road Trustees claimed a right to take; but the Judges even in that case declined to interdict them. The Sheriff-Substitute thinks that in refusing this interdict he is as nearly as possible following the lines laid down by the Court of Session in cases of a similar nature. He has not, however, been able to discover any case where the precise point raised, namely, the right to take material from river beds, has been decided before."

On appeal the Sheriff (TRAYNER) pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that the defenders have no right to lift or remove boulders, stones, or other material from the beds or banks of the rivers Prosen and Esk, mentioned in the petition, in so far as these rivers flow through or bound the pursuers' property: Therefore interdicts and prohibits the defenders, their servants and others on their order or authority, from lifting, removing, taking, and carting away boulders, stones, or other material from the beds or banks of said rivers as aforesid: *Quoad ultra* dismisses the action," &c.

He added this note:—"The defenders maintain their right to remove stones, &c., from the banks and beds of the rivers Prosen and Esk on statutory authority, but I am of opinion that the statute relied on does not warrant the defenders' pro-

ceedings. By the 80th section of the General Turnpike Act (1 and 2 Will. IV. cap. 43) persons in the position of the defenders, charged with the care and maintenance of public roads, are authorised to take stones, &c., for the purpose of the roads, from 'common land, open uncultivated land or waste,' and also (under certain restrictions) from 'enclosed land.' It appears to me immaterial whether the rivers in question are fenced or not, as to which the parties maintain different views. The question is, whether rivers can be held to be included in the description 'common land,' 'open uncultivated land or waste,' or 'enclosed waste,' and I am of opinion that they can not. Rivers are not lands of any kind in any proper sense, and I know of no authority for so defining them. If I am correct in this, the defenders have no statutory right to remove materials for their roads from the rivers above mentioned, and their defence fails. But the defenders argue that rivers are included in 'lands' by statutory interpretation. Their argument is this—The 80th section of the General Turnpike Act is to be read as incorporated with and forming part of the Roads and Bridges Act of 1878 (41 and 42 Vict. cap. 51); by that Act it is declared that the words 'lands and heritages' shall have the same meaning as is attached thereto in the Lands Valuation Act (17 and 18 Vict. cap 91), that 'lands and heritages' in the latter Act comprehend 'fishings, docks, canals,' &c., that therefore the word 'land' in the General Turnpike Act includes 'fishings, docks, canals,' &c. This syllogism is plainly fallacious, because the terms 'land' and 'lands and heritages' are not the same, nor are they co-extensive. But even if they were, it is nowhere said that 'land' or 'lands and heritages' shall include rivers. If it were either permissible or necessary to consider what the intention of the Legislature was in framing the 80th section of the General Turnpike Act as they did, it would not be difficult to maintain that rivers were excluded from its operation of set purpose. Interference with land may produce or inflict damage, but when that damage is done there is an end of it—it is fixed and ascertainable. But interference with the bed of a river is a very different thing. 'The smallest interference with the course of running water may be productive of effects which nobody can foresee or could have contemplated; and although engineers are very skilful, no doubt, in title, in foreseeing what the action of water will be, I doubt whether an engineer can absolutely ensure one as to what shall be the precise effect of an alteration, however slight, in the course of a running stream'—*per* L. J.—C. Inglis in *Morris v. Bicket*, 2 Macph. 1039. The defenders do not in their record plead a prescriptive right to take stones, &c., from the Prosen and Esk, but on the proof they have argued that they have such a right, apart from the statute, in respect of forty years' use. I think the argument untenable. I am of opinion—(1) That the defenders have not proved uninterrupted use for forty years; (2) That if they had, they had and have no title on which to base a prescriptive right; and (3) That even forty years' wrongdoing would not entitle the defenders to continue it."

The defenders appealed to the Court of Session, and argued—The beds of rivers were "lands" in a very obvious sense, and therefore in the sense

of the General Turnpike Act. The proof showed that there had been a custom for many years to take stones from the beds of rivers, and it negatived the private use averred by the pursuers.

Argued for respondents—A fair reading of the statute showed that "lands" was a word not to be there given the very widest sense known to the law. It divided land into "enclosed" and "unenclosed," provided for depositing of mud and refuse on uncultivated lands (which could not there mean beds of rivers), and made provision for compensation to proprietors for damage done in certain cases. The private use was established, and so was the damage which the unreasonable removal of stones by the Road Trustees had caused.

At advising—

LORD JUSTICE-CLERK—This case, which we greatly regret has not been settled, raises two questions of law. The first of these questions is, Whether the bed or channel and bank of a river are included under the term "land" in the 80th section of the Act 1 and 2 Will. IV. c. 43? On that question the Sheriffs differ. The Sheriff-Substitute holds that the banks and beds of rivers are land in the sense of that section, while the Sheriff holds that they are not.

The second question, supposing the word "land" to extend to banks and beds of streams, is, Whether the fact that stones are required for the purposes of the estate in which the streams are is sufficient to exclude the Road Trustees from taking such stones, even if they have been in use to take them?

On the first question I am of opinion that the Sheriff is wrong in holding that the beds of rivers are not included in the term "land" in the sense of the Act of Will. IV. I think the term "land" is sufficient for the purpose of the statute to include a right in the Road Trustees to take stones in the beds and channels of streams. I think so because, first, the term "lands of Kinnordy" includes streams both in a popular and legal sense, and secondly, because "land" in the statute is meant, I think, to include all parts of that area which are capable of producing what the Trustees are entitled to obtain. I think that the privilege of the Trustees, however, is intended to be *innocua utilitatis*. The Trustees are not meant to have any right to the detriment of the landowner; on the contrary, the privilege is to be confined to places where no damage will be done. Within that limit there is no reason for excluding any part of the whole area from the privilege.

The Sheriff-Substitute holds that on a construction of section 80, if there has been a use by the Trustees of taking stones, it is immaterial and irrelevant for the proprietor of the land to say that they are required by him. That opinion proceeds, as I think, on an erroneous reading of the clause relating to enclosed lands—[*His Lordship here read sec. 80 of the Act 1 and 2 Will. IV. c. 43, above quoted*]. While that provision admits of being read as the Sheriff-Substitute has read it, I am of opinion that the words "unless where materials have previously been in use to be taken" are intended to qualify, not the words "such materials not being required for the private use of the owner or occupier," but the subsequent words only, "such land or ground not being an orchard, garden," and so on.

The next question is, whether the stones here in dispute have been shown to be required for the proprietor's use? If so, it is a good answer to the right of the Trustees to take them from that place. To carry out the right of the Trustees regulation will be necessary, since there is so much variation in the condition of the place from time to time. That the Road Trustees would ever go vexatiously and dig out the channel of a river is out of the question, and it is equally out of the question that there should be need for a constant resort to a court of law. We shall prepare an interlocutor under which the rights of parties may be regulated from time to time, unless the parties, having now heard our views upon the legal questions raised, can see their way to arrange this matter. The case will be continued till the first sederunt-day in May. The petition will be dismissed, and no expenses will be found due.

The Court did not at this stage pronounce any interlocutor.

Counsel for Appellants—J. P. B. Robertson—Hay. Agents—J. C. Brodie & Sons, W.S.

Counsel for Respondents—Keir. Agents—Dundas & Wilson, C.S.

Friday, April 14.

OUTER HOUSE.

[Lord M'Laren, Lord Ordinary
on the Bills.]

APPEAL—SHAND.

Bankrupt—Discharge—Cessio—44 and 45 Vict. cap. 22, sec. 6, sub-sec. (1), b (Bankruptcy and Cessio (Scotland) Act 1881).

Held (per Lord M'Laren), on a construction of the above statute, that a bankrupt is not absolutely deprived of his right to be discharged by improvident trading on his part or failure to give assistance to his trustee in the course of the sequestration, if his inability to pay fiveshillings in the pound is to some extent due to innocent misfortunes—but the Court has discretion in such a case to postpone the period of discharge.

John Clark Shand, the petitioner, commenced in 1866 a china business in Glasgow on borrowed money. The business succeeded, and he paid off his loans and saved enough money to purchase also a publican's business in West Clyde Street and Mitchell Street, with which he combined a restaurant, and expended about £800 on alterations. About three years before his failure the front wall of this restaurant had to be taken down in consequence of large public building schemes and railway extension, which along with other causes led to a diminution of the business for about a year. But for two years before the failure this West Clyde Street business was a good paying business. Shand had also his china business. He also some years before his failure lent £400 to a brother, which turned out to be nearly a dead loss. Further, he got mixed up with a loan society, and lost £200 thereby. In the end of 1879 his restaurant began to flourish

again, and a year and a-half after he had been carrying on his business with apparent success he called a meeting of his creditors and offered a composition of 12s. 6d., to which all agreed but two, and thus his estates were sequestrated on 10th January 1880. The trustee was confirmed on 27th January. At this time the stock in the china shop was priced by himself and a friend at £925. It was inserted by the trustee in the state of affairs of 16th February at about £850, allowing for what had been sold since the trustee's appointment before that date. Ultimately, however, it only realised about £550.

The trustee had to present a petition for the ejection of the bankrupt from possession of his restaurant, and owing to various contentions between him and the bankrupt, the former in realising the estate was unable to sell the goodwill of the business.

The petitioner presented a petition for discharge on 31st December 1881. This was accompanied by a report from the trustee to the following effect:—"The trustee has to report, in terms of the 146th section of the Bankruptcy (Scotland) Act 1856, that the bankrupt has fulfilled the terms of the statutes in so far that he has attended the diets of examination fixed by the Court.

"The bankrupt does not appear to the trustee to have given up a full and true state of his estates as at the date of the sequestration, in so far that a debt of £400 due by his brother Andrew W. Shand, of the Salutation Hotel, Dumfries, to him was only discovered by the trustee in the course of the bankrupt's public examination on the 6th day of February 1880.

"The trustee has not received any sum in respect of household furniture. Neither did he receive any of the drawings of the restaurant in Great Clyde Street, Glasgow, which was in the bankrupt's possession from the date of sequestration up till the 23d day of March 1880 (a period of three months).

"The trustee has also to report that the estate has been put to considerable expense in consequence of the bankrupt having declined when requested to deliver up possession of the said restaurant. In consequence of this refusal the trustee was compelled to present a petition to the Court on the 23d March 1880 for his ejection from said restaurant, and it was only in Court that the keys were given up.

"On the 13th day of February 1880 the trustee's agent had a meeting with the bankrupt in regard to the action against him at the instance of Black & Son, of Edinburgh, and founding on the information given by the bankrupt the trustee was advised to sist himself as a party to the action and defend it. This action was afterwards lost, and the estate made liable in £24, 15s. 3d. of law costs, in consequence of the information having turned out to be incorrect.

"Though upon many matters the explanations given by the bankrupt have not been satisfactory, the trustee does not, upon the whole, think that he has been guilty of any collusion, and the trustee considers that the bankruptcy has arisen, not from innocent misfortunes or losses in business, but from culpable or undue conduct in respect of rash and reckless trading."

A majority in number and value of the creditors concurred in the petition for discharge.

The Bankruptcy and Cessio (Scotland) Act 1881