Friday, June 9.

(Before Lords Young, Craighill, and Adam.)

M'DONALD *v.* WHITE.

Justiciary Cases—Relevancy—Wilful Obstruction of Street—Obstruction—Annoyance—Annoyance or Danger of Residents or Passengers—Act 25 and 26 Vict. c. 101 (General Police and Improvement (Scotland) Act 1862), sec. 251.

The General Police and Improvement (Scotland) Act 1862 provides by section 251 that every person who in any street or private street, "to the obstruction, annoyance, or danger of the residents or passengers, . . . places or uses any bench or stall on any footway" shall be liable in certain penalties. A person was charged before a Police Magistrate under this section with "wilfully causing an obstruction" on a footway by means of a bench or stall. *Held* that the complaint was relevant—*diss.* Lord Craighill, who held that the words "to the obstruction, annoyance, or danger of the residents or passengers" were essential to the relevancy of the complaint.

Jurisdiction—Public Thoroughfare—Street—Act 25 and 26 Vict. c. 101 (supra).

It having been objected to a conviction for the offence of obstructing the footway of a public street, obtained before a Police Court, that the part of the footway on which the obstruction was said to have been caused was the private property of the accused, the proprietor of a shop and tenement abutting on the footway in question, and that a question of heritable right being thus involved, summary proceedings in the Police Court were incompetent—*held* that the Magistrate was entitled to decide for the purposes of the case whether the place in question was actually part of the public thoroughfare or not, and that in convicting the accused he must be held to have considered and decided that question of fact.

It is provided by section 251 of the General Police Act 1862 (25 and 26 Vict. c. 101) that "Every person who in any 'street' or 'private street,' to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction, be liable in a penalty not exceeding 40s., or to imprisonment not exceeding 14 days. . . . Every person who places or leaves any furniture, goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or places or uses any standing place, stool, bench, stall, or showboard on any footway. . . . Every person who places, hangs up, or exposes to sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same project into or over any footway or beyond the line of any house, shop, or building at which the same are so exposed, so as to obstruct or incommode the passage of any person over or along such footway."

James M'Donald, proprietor of a tenement in High Street, Portobello, in part of which he carried on the business of a greengrocer and provision-dealer, was charged before the Magistrates of Portobello with a contravention of the section of the General Police Act of 1862 above quoted, in so far as on the 4th day of March 1882, or about that time, and upon High Street, within the burgh of Portobello, he the said accused did, by means of a bench or stall loaded with flowers, fruit, and vegetables, or other goods, wares, or merchandise, wilfully cause an obstruction on the footway in front of the shop occupied by him at 190 High Street aforesaid.

A preliminary objection was made to the competency of the proceedings, on the ground that the titles of the accused and relative plans which were produced in Court disclosed the fact that the alleged obstruction was on his own private property, and that he was entitled, in the exercise of his right of property, to place the board with shrubs and flowers complained of as and where he had placed them. The following averment as to this right of property is taken from the statement in the note of suspension hereafter referred to:—"II. The premises in which the complainer carries on business as a provision merchant are situated at No. 190 High Street, Portobello. These premises are part of a tenement of houses of which the complainer is proprietor, and are erected on ground which was formerly separated from the highway or public turnpike road, now the High Street of Portobello, by a stone wall, and are built backwards thirty-three feet from the centre of the highway, and are about six feet and a half from where the boundary-wall formerly stood. The line of the old boundary-wall is marked out in the pavement in front of the complainer's tenement of houses. The breadth of the pavement between the old boundary-wall and the High Street is six feet and a-half. On the eastward of the complainer's tenement of houses is another tenement which is nearly built close up to the old boundary-wall, and projects about six feet further forward towards the High Street than the complainer's property. An iron railing is erected in front of this house where the old boundary-wall formerly stood. III. In front of the complainer's shop is an entrance to a cellar beneath his premises, which is used constantly in connection with his business. This entrance is within the property contained in the complainer's title, and within the old boundary-wall. In order to protect people from falling into this entrance when open, the complainer placed four iron posts and chains around the same, and placed boards over the chains, on which were placed shrubs and flowers so as to make the protection more ornamental."

The presiding Magistrate having repelled this objection to the competency of the proceedings, it was, *inter alia*, objected to the relevancy of the complaint that it was not therein set forth that any obstruction or annoyance or danger to the residents or passengers had been caused by the alleged obstruction complained of, and also that the penalty or forfeiture and the alternative, in which the accused was liable for the alleged contravention, were not set out as was required by the Summary Procedure Act of 1864, under which the complaint bore to be taken. The Magistrate repelled these objections, and after hearing evidence convicted the accused, and found him liable in a penalty of twenty shillings with the alternative of five days' imprisonment.

This suspension was then brought.

The suspender pleaded, *inter alia*—"No ob-

struction to residents or passengers was averred in the complaint, or proved, or attempted to be proved, at the trial. (3) The complainer's titles to the property, and plan thereof, having been produced at the trial, and these *ex facie* showing that the bench or stall, with what was thereon, were upon the private property of the complainer, a *prima facie* question of title to heritable property was established, and it was incompetent to proceed with the case in a summary manner in a Police Court."

Argued for him—The complaint was irrelevant, and the conviction was therefore bad. The words "to the obstruction, annoyance, or danger of the residents or passengers" at the beginning of section 251 were of the essence of the offence, and the statutory offence could not be properly charged unless it were alleged that the act charged was done to the obstruction or annoyance or danger of some-one. To say merely that there was "wilful obstruction" was not enough. "The description of the offence can never be less particular than that given in the statute, and may require to be much more so"—Paley on Summary Convictions, 6th ed. p. 228. (2) The Magistrate should have at least sisted process till the question of heritable right was determined—*Barlas* v. *Chalmers*, April 4, 1876, 3 R. Just. Ca. 26. *Bailey* v. *Linton*, Nov. 1871, 2 Couper 158, quoted on the other side, was distinguishable, because there the claim made was a right to obstruct at pleasure the whole width of a lane which the public had been allowed to use as a public place. (3) The nature of the penalty was not set out as required by Summary Procedure Act 1864, as amended by and incorporated with the Summary Jurisdiction Act 1881—see Schedule A annexed to former Act. Besides, "penalty" meant fine both in the Summary Jurisdiction Act and in the General Police Act. But here the Magistrate might either fine or imprison. The complaint therefore required to state, if it stated either alternative, what the other alternative was, and this had not been done—*Thomson* v. *Wardlaw*, Jan. 23, 1865, 5 Macph. 45; *Holland* v. *Gaucholland Coal Company*, Dec. 24, 1867, 5 Macph. 561; *Gall* v. *Ritchie*, July 16, 1873, 2 Couper 470.

Argued for respondent—(1) The complaint alleged "wilful obstruction." That was sufficient on a fair construction of the Act. It must mean that residents or passengers might so be obstructed, since no other class of persons could well be suggested, and it was unnecessary to bring a witness who had been obstructed. [On the other point the Court did not call for reply.]

The Court made avizandum.

At advising—

Lord Craighill read this opinion—Several grounds of suspension were maintained at the bar on the part of the suspender, but the only one of these on which it is necessary for me to say anything is that in which it is maintained that the complaint is irrelevant, inasmuch as it is not there averred that the bench or stall loaded with flowers, fruit, and vegetables, or other goods, wares, or merchandise, said to have been placed by the complainer upon the High Street, was to the obstruction, annoyance, or danger of the residents or passengers. My opinion is that this objection is well founded, and ought to be sustained. The words "to the obstruction, annoyance, and danger of the residents or passengers" which occur at the beginning of the 251st section, being the section libelled on in the complaint, override every one of the clauses or sub-sections by which particular offences have been created. The words are too clear to be consistent with any other interpretation, for they are, that every person who in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall on conviction, on the evidence of one or more credible witnesses, be liable to the punishment authorised by this section of the Act. Proof of "obstruction, annoyance, or danger of the residents or passengers" is indispensable, otherwise there would be no authority for the punishment of the accused as one by whom this provision of the statute had been contravened; and if proof was indispensable at the trial, the averment in the framing of the libel was equally necessary. It is said, no doubt, that the words used in the complaint are equivalent, and therefore that the objection, which at the best is said to be of a technical character, ought to be overruled. My opinion as to this is, first, that what is alleged is not an equivalent, and, in the next place, that even if it were, there is no good reason for a dispensation from the obligation to libel the statutory offence in the very words, or substantially in the words, of the statute. The case as it was laid was one in which any magistrate might, unless he looked to or was familiar with the language of the statute, reasonably conclude that the placing of anything upon the street, whether it was or was not an obstruction or annoyance or danger to residents or passengers, was an offence within the meaning of the Act. And there being no reason why the prosecutor in such a case should be excused for framing his complaint otherwise than in the language of the statute, and there being a risk of miscarriage, not to say an illegal conviction, should such a departure from the words constituting the offence be sanctioned, it appears to me that the proper administration of justice in a case like the present requires that the objection at present under consideration should be sustained and the sentence quashed.

The importance of this question is greater in this case than perhaps it would be in many others, because taking the place where the bench was put down to be as the Magistrate has found it to be—a part of the High Street of Portobello—it is not in the line of thoroughfare, but is in a recess, the house of the complainer being six feet further back than the houses on the east and the houses on the west. It may well be, therefore, that the bench is not to the obstruction, annoyance, or danger of passengers or residents. These residents could not be inconvenienced or subjected to annoyance or danger, and a passenger passing along could not be obstructed, for he must leave off from his course before he could come in contact with the alleged obstruction. Hence the importance of the statutory condition being expressly made part of the charge upon which the suspender was to be put upon his trial.

Lord Adam — In this case the suspender is the proprietor of a shop in High Street,

Portobello, and he was prosecuted for a contravention of the 251st section of the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101). What he himself says he did is thus set forth in the third article of the condescendence. He says—"In front of the complainer's shop is an entrance to a cellar beneath his premises, which is used constantly in connection with his business. This entrance is within the property contained in the complainer's title, and within the old boundary wall. In order to protect people from falling into this entrance when open, the complainer placed four iron posts and chains around the same, and placed boards over the chains, on which were placed shrubs and flowers, so as to make the protection more ornamental." According to his own showing, therefore, he has placed these posts and boards, &c., upon what he alleges to be his own property, but in fact forms part of the footway of the public street, and it is in these circumstances that this complaint was brought against him. He was charged with a contravention of the General Police and Improvement Act, "In so far as on the fourth day of March 1882 years, or about that time, and upon High Street, within the burgh of Portobello, he the said accused did, by means of a bench or stall loaded with flowers, fruit, and vegetables, or other goods, wares, or merchandise, wilfully cause an obstruction on the footway in front of the shop occupied by him at No. 190 High Street aforesaid." The suspender was convicted, and has in this suspension stated a variety of objections to the conviction, but there are only two of these objections which I think now require to be considered. The first is founded upon the construction of the section libelled, which bears that "every person who in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers," commits any of the following offences, shall on conviction be liable in certain penalties. Then follows a number of sub-sections, in which a variety of offences are specified, and in what has been called in the argument the 13th sub-section the offence with which we are here dealing is thus described—"Every person who places or leaves any furniture, goods, wares, or merchandise, or cask, tub, basket, pail, or bucket, or places or uses any standing-place, stool, bench, stall or showboard on any footway." And the objection is that there are no averments in the complaint to the effect that what the suspender did was done to the obstruction, annoyance, or danger of the residents or passengers, or that anyone was obstructed; and that forms an essential element of the charge which must be set forth. Now, it appears, as I have said, that the complainer on that spot and on the boards placed as described did put shrubs and flowers, and that there is no doubt that the spot forms part of the footway of the public street, and the only question is whether the words in the complaint "and did by means of a bench or stall, &c., wilfully cause an obstruction on the footway in front of the shop occupied by him at 190 High Street" are a sufficient averment of the offence under the statute. I quite agree with Lord Craighill in thinking that the words "to the obstruction, annoyance, or danger of the residents or passengers" override all that follows in the section, and that each of the enumerated offences must be done to the obstruction or annoyance or danger of the residents or passengers. But the question is, whether or not this is not sufficiently set forth in the complaint? Now, it humbly appears to me to be common sense that if a person put on the footway a bench loaded with flowers, it necessarily follows from the nature of the thing that he thereby causes an obstruction to the residents of the district and the passengers. To construe the complaint in a Police Court so literally and strictly as to require the exact words of the statute is what I am not prepared to do. I am therefore not prepared to sustain the objection to the relevancy.

The other objection stated to the conviction is thus set forth in the print before us—"The complainer also objected to the proceedings being brought in the Police Court, on the ground that the complainer's titles and relative plans produced in Court, and hereafter referred to, disclosed the fact that the alleged obstruction was upon and within his own private property, and that he was entitled, in the exercise of his right in the property, to place thereon the boards, shrubs, and flowers referred to. That a question of heritable right being involved, a Police Court was not the proper tribunal to determine such right." Now, I think that there is not here raised a question of heritable right. The question is one of fact—whether the spot upon which the stall was placed was or was not part of a street, whether public or private? It appears to me to be no answer at all to say that the ground had at one time been the property of the complainer, if he had afterwards admitted the public to have access to it and to use it as a street. The Magistrate was of opinion that it was part of the High Street, and I see no ground for interfering with his judgment upon that point. He offered to the complainer an opportunity of having his rights ascertained in a superior Court by showing that it did not form part of the street—that he had never allowed the public so to use it,—but he did not choose to avail himself of that offer. I see, therefore, no reason for interfering with the judgment complained of on the ground that this was private property, and that the case involved a question of heritable right. I am therefore for refusing to sustain this objection also, and am for dismissing the bill.

Lord Young—I concur with Lord Adam. It is quite true that the statute contains the words "to the obstruction, annoyance, or danger of the residents and passengers," and provides that "every person who in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, places or leaves any furniture, goods, wares, or merchandise, or any cask, &c., on any footway," shall be liable in a certain penalty. These are the whole words of the provision bringing together all that is necessary to make it intelligible, and it must appear on the face of the complaint or of the conviction that what was left on the footway was to the obstruction or annoyance or danger of the residents or the passengers. These are alternative conditions, and the complaint need not set them all forth, and if the conviction set them all forth it might possibly be void from uncertainty. But it must appear that what was placed on the footway was to the obstruction or the annoyance or

the danger of the residents or passengers. Now, does this not appear here? If the complaint had stated that the suspender had placed his goods on the street to the obstruction of the passengers, that would have been using the very words of the statute, and would have been unexceptionable. But is it not the same thing to say that he caused an obstruction on the footpath? Who possibly could be obstructed but passengers or residents? I should hardly think it a reasonable thing to say that the word "obstruction" could be used without thereby meaning the obstruction either of the residents or of the passengers. No other reasonable construction of the complaint can possibly be suggested. I therefore think the complaint ought to be sustained as relevant. I cannot for a moment assent to the view that it is necessary to set forth or to show that some residents or passengers had in fact been obstructed, annoyed, or endangered. If a person were to dig a trench in a street, and then left the street in that condition all night, I cannot doubt that that would be an obstruction or a danger although nobody chanced to fall into the trench. It is the nature and character of the thing that makes it an obstruction, not its actual results. It is an obstruction if it necessarily causes obstruction to passengers who chance to be there. Indeed, the alternative in the statute between passengers and residents shows that this is the true view, for a resident who is not also a passenger cannot actually be obstructed. It is in order to prevent obstruction in fact that a penalty is imposed on those who create possible and, if there should in fact be passengers, necessary sources of obstruction—on those who place the obstructive thing in the street. On this question therefore I concur with Lord Adam. I think that the complaint is substantially, almost literally, in the words of the statute.

On the other point also I agree with Lord Adam. The *solum* of any street may be the private property of an individual. It may suit the convenience of private individuals to turn their property into streets. That frequently occurs. But having become a street *de facto*, it must be regulated by those provisions and bye-laws which are considered to be necessary for the safety of those passengers whom the proprietor has invited to frequent it. It must be subject to the police rules, and one of these rules is that there shall be no obstruction to those who are invited to make use of the street. There are many such private streets, the *solum* of which may be reconverted into its former private uses whenever the proprietor pleases. Now, here the Magistrate was of opinion that the ground on which this obstruction was placed was *de facto* part of a street, and in this suspension we must so take the fact to be. There may be something in the contention that the street at this particular point widens, and in consequence that the ground in dispute does not belong to the street at all. We proposed therefore to the suspender that if the matter was of such importance to him he might take the question before a higher tribunal, proceeding in a more solemn manner to have his rights there determined. But this he declined to do, acting no doubt on good advice, on the ground that the matter was not sufficiently valuable to him to make it expedient to incur the expense. What, then, does he ask us to do? He asks us to look at the plans and then to say that the Magistrate has erred. But looking at the plans, I cannot say that the Magistrate has erred. I therefore think there was an obstruction here on the public street, and that the conviction must be sustained.

The Lords refused the suspension.

Counsel for Suspender—Rhind—Sym. Agent Thomas M'Naught, S.S.C.
Counsel for Respondent — Pearson. Agent R. P. Stevenson, S.S.C.

COURT OF SESSION.

Saturday, June 10.

FIRST DIVISION.

HOME *v.* THE POLICE COMMISSIONERS OF DUNSE.

Nuisance—Property—Pollution of River—Prescriptive Right.

The right of an inferior riparian proprietor to object to the pollution of a running stream is defined by the use enjoyed by the superior heritor for the prescriptive period.

In a question between the proprietors of land through which flowed a small burn that received the sewage of a town before reaching the said lands, a jury found by special verdict "that for more than forty years continuously prior to the date of raising the action the water of the said stream was, as it flowed through the estate of the pursuer, polluted by the sewage of" the town "to such an extent as to render it unfit for some of its primary uses, and that within the said period of forty years, and particularly within the period embraced in the issue, the water of the said stream from the same causes became polluted to a materially greater extent than it was previously." After various remits to men of skill, and the formation of irrigation works as suggested by them, the Court *found* that the proprietors of the lands were entitled to have the water transmitted in a state suitable for the primary purposes of bleaching, washing, and watering of cattle, the verdict of the jury being interpreted as meaning that the water had been fit for these purposes for the prescriptive period.

On the 11th June 1875 an action was raised by Mrs Jean Milne Home and David Milne Home junior, the liferentrix and fiar respectively of the entailed lands and barony of Wedderburn, in the county of Berwick, against the Chief-Magistrate and Police Commissioners of the burgh of Dunse. The action concluded that the pursuers were entitled to have the water of a natural stream which passes near the town of Dunse, and subsequently flows *ex adverso* of certain parts of the lands of Wedderburn, transmitted in a state fit for the primary uses of running water, and that the defenders were not entitled to, and should be interdicted and prohibited from allowing any sewage or impure matter to flow into said stream, or from doing anything to render its water, in so far as it flowed *ex adverso* of the said