

The next point taken by the defenders had reference to the pursuer's averments of fault. In a case of this sort a pursuer must prove (1) injury, (2) caused by a defective state of the pavement, and (3) that this state of defect was due to the fault of the defenders. Under this last head the pursuer will have to establish (a) that there was a duty to inspect, and if necessary repair, the pavement, and (b) that the defenders had reasonable opportunity to inspect and repair. The existence of a duty to inspect and repair is admitted by the defenders, but it is said by them that there is no relevant averment by the pursuer of reasonable opportunity to inspect and repair. The pursuer avers that the dangerous condition of the pavement had existed "for a considerable time prior to the accident." This is the averment the vagueness of which is considered by the Sheriffs to be fatal to the relevancy of the pursuer's averments. If the defenders' pleadings had alleged that the condition of the pavement had been recently occasioned, and that there had not been reasonable time for inspection, the pursuer would have been called upon to make her averment of opportunity more definite. As it is, I think the pursuer ought to have been more specific as to this averment, but I am not prepared to hold that it is so vague as to justify the judgments of the Sheriffs. As I read the averments relating to the alleged defects, the condition of the pavement seems to have been caused partly by a fracture of a corner of a flagstone, and partly by that broken corner having been made more dangerous by the wear of foot-passengers. This latter element involves length of time, and explains the sense in which the phrase "considerable time" is used.

The third point taken by the defenders' counsel had reference to the pursuer's averment in condescendence 2 that her daughter was injured while playing in the street. It was maintained that the defenders had no duty to make the pavement of a street safe for children while at play, and that accordingly no case of fault had been relevantly averred against them. As I have already indicated, the facts when ascertained may raise this question for determination, but it does not seem to me to be properly raised on the pleadings. The averments do not disclose what the girl was actually doing when she was injured. It was for the defenders if they wished to raise this point on the pleadings to find out and aver what the girl was doing when injured, but they have not done so, and the averment of the pursuer may mean nothing more than this, that her daughter was not at the time going a message, but was merely sent to the street as to a playground. If it should appear on inquiry that the girl was actually playing a game when injured, the defenders would then have established the necessary foundation on which they would be justified in asking the presiding Judge to direct the jury that the defenders were under no duty to make the street safe for what the injured girl had been doing.

I am therefore of opinion that the appeal

should be sustained and issues ordered.

The Court recalled the interlocutor appealed against and approved of an issue.

Counsel for the Pursuer—Aitchison, K.C.
—Duffes. Agents—W. G. Leechman & Company, Solicitors.

Counsel for Defenders—Moncrieff, K.C.
—Dods. Agents—Campbell & Smith, S.S.C.

Tuesday, June 5.

FIRST DIVISION.

JOHNSON v. GRANT AND OTHERS.

Administration of Justice — Interdict — Breach — Imprisonment — Remission of Sentence — Release.

On a petition and complaint for breach of interdict the Court pronounced sentence of two months' imprisonment. The respondents after serving ten days of the sentence presented a note tendering an unqualified apology to the Court, and undertaking to comply with its orders in future. The Court in the circumstances, and in view of the fact that the complainer stated that he no longer required the protection which the original interdict gave him, pronounced an order for release.

Observed (per the Lord President) that the phrase "contempt of Court" did not in the least describe the true nature of the class of offence committed, viz., interfering with the administration of the law in impeding and preventing the course of justice. Imprisonment for breach of interdict being in vindication of public law, it must not be assumed that an order for release would follow upon an apology and promise of obedience to the orders of the Court, even though such apology was accompanied by a statement on behalf of the complainer that he no longer required the protection which the original interdict gave him.

Walter Lyulph Johnson of Strathaird, Skye, with the concurrence of the Lord Advocate, presented a petition and complaint against John Grant and others, all resident in Skye, founded upon alleged breach by the respondents of interdict pronounced against them prohibiting them from entering upon and in any way encroaching on the lands of Kilmaree, part of the said estate of Strathaird, and of interim interdict pronounced against them prohibiting them entering upon certain other parts of the said estate.

On 26th May 1923 the respondents appeared at the bar of the First Division, when the Court pronounced sentence of two months' imprisonment.

On 5th June 1923 counsel for the respondents tendered to the Court an apology on their behalf with an undertaking that they would comply with its orders, and moved the Court to remit the remaining part of

the sentence and to pronounce an order for the respondents' release.

The following unreported cases were referred to in which the Court had in similar circumstances granted an order for release:—*Gordon Cathcart v. Campbell*, 1908, Minute Book, vol. cxxvii, pp. 343 and 435; *Matheson v. Morrison*, 1914, Minute Book, vol. cxxxiii, pp. 217 and 241.

Counsel for the petitioner and complainer intimated that owing to altered circumstances his client no longer required the protection of the interdict.

LORD PRESIDENT—In addition to the apology which the prisoners have just tendered through their counsel, there arrived in Edinburgh by this morning's post a letter addressed to myself (as Lord Justice-General) and to the Lords of Session, dated 2nd June and signed by them, in the following terms:—"We respectfully beg to express to your Lordships our deep regret at having disregarded the interdicts pronounced against us by the Court, and to offer to your Lordships our sincere apology. We undertake to conform to the orders of the Court, and to show every respect for its decisions." By the courtesy of one of His Majesty's Junior Ministers, I personally received in the middle of the afternoon of the 2nd a telegram announcing that such a letter had been written, but the letter itself did not reach Edinburgh or my hands until this morning. Further, I was informed yesterday that a note addressed to the Court had been handed to my clerk. Why it was not lodged in the ordinary way I do not know; that will require to be done now. But in this note the respondents further tender their humble apology for having disobeyed the interdict, undertake to comply with the orders of the Court in every respect, and crave the Court to remit the unexpired portion of their sentence, and to order their release.

I think it may be as well to clear away one or two misconceptions which appear to prevail in connection with this matter. In the first place, a sentence of imprisonment on petition and complaint for breach of interdict is the sentence of the Court that pronounces it, and no application with regard to it can be dealt with except by that Court. No individual judge has the right or power to deal with the interlocutor which this Court in either of its Divisions has pronounced, and it is quite improper to approach any individual judge with such an object in view. In the next place Mr Morton used a phrase which is in common use, but which is used most unhappily in relation to matters such as this. He spoke of this prosecution as one for contempt of Court. The phrase "contempt of Court" does not in the least describe the true nature of the class of offence with which we are here concerned, and which is prosecuted in the Civil court by petition and complaint with the concurrence of the Lord Advocate. The offence consists in interfering with the administration of the law in impeding and perverting the course of justice. The malversation of an officer of

Court is an example of it. Another and often venial example is the publication in the press of references to a pending litigation calculated to prejudice one of the parties or to bias the jury. A third and a much more serious instance is where people take upon themselves to break the law and then to defy its administration—in short, directly to impede and to pervert the course of justice. The currency of the phrase is particularly regrettable, inasmuch as it seems to have encouraged the idea that all that has to be done by a person who has, however deliberately, committed this class of offence and then wishes to avoid the consequences of his conduct is to present an apology as for an offence against the dignity of the Court. It is not the dignity of the Court which is offended—a petty and misleading view of the issues involved—it is the fundamental supremacy of the law which is challenged. That is why conduct of this kind is properly treated as deserving of criminal punishment. It is intolerable in any civilised and well-ordered society. Further, not only has no one the power to purge himself of a deliberate offence by saying he is sorry, but the mere circumstance that he presents a belated expression of contrition has with regard to the public aspect of the matter almost no importance at all. There is ample opportunity in the procedure by petition and complaint for repentance before sentence is pronounced. The appeal is simply to the clemency of the Court. There is no palliation of the offence at all, and the idea must not be harboured that a person who has wilfully committed a breach of interdict can obtain remission of sentence by coming to the Court and saying "I realise my transgression and apologise for it," however sincerely such an apology may be made.

Now in the present case the position of matters is (1) that the prisoners after serving ten days' imprisonment have presented an unqualified expression of repentance, and given an undertaking to desist from law-breaking of this kind in future, and (2) the complainer in the prosecution (in view of changed circumstances in which this Court has no concern) has informed us at the bar that he is no longer in the position of requiring the protection which the original interdict gave him. These circumstances do not necessarily draw after them any release of the prisoners from their present incarceration. The general interest in the vindication of public law is not less important than the protection of private legal rights. But it appears that in one unreported case in 1908 this Court has in apparently similar circumstances pronounced an order for release. It must not be assumed that in all cases which present the two features above described an order for release will be obtained. On the contrary, the public interest in the maintenance unobstructed of the course of justice remains, and will and must be maintained by this Court in the future as in the past. But where it is made clear that the private rights against which the original offence was committed no longer require protec-

tion, then I think the case is one upon which it is legitimate for the Court to entertain an appeal for reconsideration of the sentence if it thinks the public interest has been sufficiently vindicated. These prisoners have served sentence of imprisonment for ten days. It is easy to be lenient, while it is always difficult to be just, but in my view of the circumstances of this case—and each case must depend upon its own circumstances—they are such that the Court may exercise the clemency for which Mr Morton appeals, and pronounce an order similar to that which was pronounced in the case to which I have referred.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court pronounced this interlocutor—

“The Lords having considered the note for the respondents John Grant, Alexander Mackinnon, Donald Mackinnon, Alick Robertson, John Nicolson, and Alexander Mackinnon, and heard counsel for the parties (the complainer not opposing), order the immediate liberation of the said respondents presently incarcerated in the prison of Edinburgh, and grant warrant to the Governor of the prison accordingly.”

Counsel for Petitioner and Complainer—Black. Agent—Chas. J. Penn, W.S.

Counsel for Respondents—Morton, K.C.—Walker. Agent—Donald Shaw, S.S.C.

Friday, June 8.

FIRST DIVISION.

(SINGLE BILLS.)

M'CORQUODALE, PETITIONER.

Process—Proof—Commission—Evidence for Indian Court—Appointment of Commissioner—Application by Attorney of Indian Litigant for Appointment of Sheriff or Sheriff-Substitute as Commissioner—Evidence by Commission Act 1859 (22 Vict. cap. 20).

The attorney of a party to proceedings in an Indian tribunal presented a petition under the Evidence by Commission Act 1859 craving the Court to order the examination of a witness before the Sheriff of the county in which the witness resided or his Substitute. *Held* that the application did not differ in principle from an application under the Foreign Tribunals Evidence Act 1856 (19 and 20 Vict. cap. 113), and commission granted to a member of the Bar.

Baron de Bildt, Petitioner, 7 F. 899, 42 S.L.R. 690, *followed*.

The Evidence by Commission Act 1859 enacts—Section 1—“Where upon an application for this purpose it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in Her Majesty’s

Dominions has duly authorised by commission, order, or other process the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal and within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner or form directed by such commission, order, or other process as aforesaid of such witness or witnesses accordingly. . . . Section 5.—Her Majesty’s Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland . . . and any judge of any such Court . . . shall respectively be courts and judges having authority under this Act.”

Alexander Croal M'Corquodale, solicitor, Carnoustie, attorney for the Comptoir National d'Escompte de Paris, Bombay, India, presented a petition craving the Court to order the examination of a certain witness in Scotland before the Sheriff of Forfarshire or his Substitute at Dundee.

The petition set forth, *inter alia*—“That on 25th April 1923 a note was addressed by the additional subordinate Judge, Agra, United Provinces, India, to “the Senior Master of the Supreme Court of Judicature, Edinburgh, Scotland,” forwarding a letter of request issued by the said additional subordinate Judge desiring that certain evidence be obtained from the managing director of the Anderson-Grice Company, Limited, Carnoustie, Scotland, in connection with a suit pending in the Court of the said additional subordinate Judge at Agra aforesaid at the instance of Messrs R. G. Bansal & Company, Agra, against the Comptoir National d'Escompte de Paris, Bombay, and setting forth that the petitioner had been appointed by the party applying for the commission as their attorney for the purpose thereof. That the said letter of request along with the interrogatories and relative documents accompanying the same is produced herewith as evidence that the said Court of the additional subordinate Judge at Agra has duly authorised the obtaining of the testimony of the witness above mentioned. That in these circumstances it appears to the petitioner to be proper that he should make this application to your Lordships to obtain the examination of the said witness as desired by the said additional subordinate Judge, and the petitioner respectfully suggests that in view of the nature of the case as disclosed in the said letter of request and relative documents your Lordships should appoint the Sheriff of Forfarshire or his Substitute at Dundee as the person before whom the said witness shall be examined.”

No answers were lodged.

Counsel was heard on the petition, when the following authorities were cited—The Foreign Tribunals Evidence Act 1856 (19 and 20 Vict. cap. 113); *Baron de Bildt, Petitioner*, 7 F. 899, 42 S.L.R. 690; *Lord Advocate, Petitioner*, 1909 S.C. 199, 46 S.L.R. 159.