

The
Scottish Law Reporter.

WINTER SESSION, 1885-86.

In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

**Thursday, October 15.*

FIRST DIVISION.

ROSS v. ROSS AND OTHERS.

Parent and Child—Custody of Child—Removal of Child out of Jurisdiction—Sequestration of Wife's Income while in Concealment to Avoid Jurisdiction of Court.

Procedure in a petition by a father for the custody of his children, where it was alleged that the respondent (the mother) had removed them out of the jurisdiction of the Court.

This was a petition by the Rev. W. Ross for custody of W. C. Ross and J. M. Ross, his pupil children. The petitioner alleged that he had been confined in an asylum on 24th May 1883, and had remained in confinement till July 1884, when he was discharged as of sound mind and capable of managing his own affairs, but that his wife had refused to live with him or give up the custody of the children, and had, while negotiations on the matter were pending, left her home in Edinburgh with the children, it being stated in a letter from her agents that she had, as the petitioner claimed the custody of the children, "for her own and their protection," left the country. He further stated that her address was unknown to him, and her agents refused to give it. The prayer of the petition was (after intimation on the walls and minute-book) to grant warrant to officers of Court to search for and take the persons of the children, and report

*Decided July 18.

to the Court; further, to appoint service on Mrs Ross by delivery of a copy of the petition at her dwelling-house in Edinburgh, and also to her agents, J. & R. A. Robertson, S.S.C.; to ordain her to appear and state where the children were, and meantime to interdict their removal from Scotland; and on resuming consideration of the petition, with her answers, if any, to find the petitioner entitled to the custody of his children, and to ordain them to be delivered up to him.

On this petition the Court appointed intimation on the walls and minute-book, and service on Mrs Ross and her agents as craved.

No answers were lodged.

This interlocutor was pronounced (4th December 1884)—"The Lords having resumed consideration of the petition, ordain Mrs Grace Methuen or Ross, wife of the petitioner, to compare personally at the bar of this Court on Thursday next, the 11th current, at ten o'clock forenoon, and in the meantime interdict, prohibit, and discharge the said Mrs Grace Methuen or Ross, and all others acting for her, from withdrawing the children, William Charles Ross and James Methuen Ross, mentioned in the petition, from Scotland, and decern."

The petitioner also sent a copy to the agents of Mrs Ross to be forwarded to her, and also a copy to her sister for the same purpose. The agents replied that they did not know the address. The sister did not reply, but sent an intimation through the agents that she declined to be mixed up in the matter.

On 11th December 1884, the petition being in the roll, Mrs Ross failed to appear in obedience to the interlocutor of the 4th, or to state where the children were.

Mr Ross then presented a supplementary peti-

tion, setting forth that Mrs Ross had a separate income, held in trust for her partly by the marriage-contract trustees and partly by her mother's testamentary trustees, which was being paid to her while she maintained herself and children in hiding from the orders of the Court; that the only method of effectually compelling Mrs Ross to surrender herself to the authority of the Court, and give obedience to the said interlocutor or order of 4th December 1884, and to such other interlocutors or orders as the Court might pronounce in the said petition, was to sequester the income of the said trust-funds presently payable to her as aforesaid, and to interdict the trustees by whom it was payable respectively from parting in any way with the capital funds of which the said income was the produce until the further orders of the Court; that the domicile of the petitioner and his said wife, and of their said pupil children, was in Scotland, and that the domicile of the said trusts was also Scottish. He prayed intimation of this petition on the walls and minute-book, "and to be served upon Mrs Ross by serving a copy hereof on herself personally in case she could be found, and if she could not be found, by leaving a copy for her at No. 7 Inverleith Gardens, Edinburgh, which was her last known address, and by delivery of a copy hereof to her known agents, Messrs J. & R. A. Robertson, S.S.C., or in such other manner as the Court might order, and also to be served upon the marriage-contract trustees of himself and Mrs Ross, and upon the testamentary trustees of Mrs Ross's mother, and to ordain them to lodge answers thereto, if so advised, within such short period as the Court might appoint; and on resuming consideration hereof, with or without answers, to sequester the income of the funds held by the trustees now acting under the said antenuptial marriage-contract, whoever they may be found to be, for behoof of the said Mrs Grace Ross, exclusive of the *ius mariti* of the petitioner, and also the income of the share of the estate of the said Mrs — held by the said trustees now acting under the said trust-disposition and settlement, whoever they may be found to be, for behoof of the said Mrs Grace Ross in liferent, exclusive of the *ius mariti* of the petitioner, respectively, and to nominate and appoint such fit person as your Lordships may select to be judicial factor to receive the said income and discharge the said trustees respectively therefor, and to retain the same until your Lordships' further orders, he always finding caution before extract, but with special power to him to advance to the said Mrs Grace Ross, on her request in writing, such sum out of the said income as may be necessary to bring her and the petitioner's said children from their present place of abode, wherever that may be, back to Edinburgh; and further, to interdict the said trustees from conveying away, or otherwise parting with, any of the capital funds of the said marriage-contract trust, or any of the capital funds representing the share of the said Mrs Grace Ross of the estate held under the said testamentary trust, respectively, until the recall of the said sequestration, and to decern *ad interim*; or to do otherwise in the premises as to your Lordships shall seem proper."

This interlocutor was pronounced (18th December 1884)—"Appoint this petition to be intimated on the walls and in the minute-book for eight

days, and to be served on the petitioner's wife, Mrs Grace — or Ross, in manner craved in the prayer of the petition, and to be also served on the other parties mentioned in the prayer of the petition, as respondents, in the manner prayed for; and ordain the said Mrs Grace — or Ross, and the other parties aforesaid respectively, to lodge answers to the petition, if so advised, by the box-day in the ensuing recess."

Answers were lodged for (1) the marriage-contract trustees, and (2) the trustee of Mrs Ross's mother. It was admitted that one of the trustees knew the address of Mrs Ross. The respondents maintained that the supplementary petition was irrelevant, and they denied the statements of fact in it.

Argued for petitioner—Mrs Ross was evading the jurisdiction of the Court, and doing so by means of this separate income, and was in contempt of Court. She might, if found, be imprisoned. Indeed, one refusing to give information as to the address of a party in a somewhat similar case had been imprisoned—*Muir v. Milligan*, July 18, 1868, 6 Macph. 1125. This petition proposed to deprive her of the means by which she was acting in contempt of Court.

Authorities—Ross' Lect. p. 234; Ersk. i, 1, 8; *Towie*, 1669, M. 7417; *Darby v. Love*, 1796, M. 7907, and *vide observations per cur.* at p. 7908; *A B v. C D*, February 27, 1834, 12 S. 504; *Spalding v. Lawrie*, July 7, 1836, 14 S. 1102; *Lord Advocate v. Jamieson*, February 1, 1822, 1 S. 285 (N.E. 264); *Lord Advocate v. Hay*, February 1, 1822, 1 S. 288 (N.E. 267); *Lord Advocate v. Galloway*, December 4, 1839, 2 Swinton's Just. Reports, 465; *Lord Advocate v. Hunter*, March 5, 1833, 11 S. 514; *Paterson v. Kilgour*, July 19, 1865, 3 Macph. 1119; Daniel's Chancery Practice, 6th ed., i. 912, note; *Miller v. Miller*, L.R., 2 Prob. and Mat. 54.

The respondents replied that the diligence proposed by the petitioner was entirely unknown in practice.

This interlocutor was pronounced (23d January 1885)—"Having resumed consideration of the petition for the Rev. William Ross, dated 25th November 1884, together with the second petition for him, dated 17th December 1884, and answers to the said last-mentioned petition for Mr and Mrs Ross' marriage-contract trustees and the testamentary trustees of Mrs Ross' mother, and heard counsel—Conjoin the said petitions; and in respect that Captain Dugald Graham, one of the respondents, admits that the present address of the said Mrs Grace Ross is known to him, of new appoint the said Mrs Grace Ross to lodge answers, if so advised, to the said petitions, both or either of them, and that within twenty-one days from the date of this order; and ordain her to appear personally at the bar of this Court on Tuesday the 17th day of February next, at ten o'clock forenoon, under certification; and appoint the said Captain Dugald Graham to transmit to the said Mrs Grace Ross a copy of this order, certified by the Clerk of Court, enclosed in a registered post letter, and to report to the Court what answer, if any, he may receive to the said letter, *quam primum*; reserving to the said 17th day of February next consideration of the prayer of the said second petition, of date 17th December 1884."

A copy of this order having been transmitted to Mrs Ross by Captain Graham, she appeared by counsel, and stated that she had returned to Scotland, and undertook to abide the judgment of the Court in the first petition at her husband's instance; she also craved the Court to dispense with her appearance at the bar on 17th February, which crave the Court granted.

Answers to the petition for custody were lodged for Mrs Ross on 12th February 1885, and the Court allowed a proof, directing Mrs Ross to lead.

As a result of the proof the Court found that Mr Ross was, though much recovered, still unfit to have the custody of the children.

Counsel for Petitioner—H. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Trustees—Sol.-Gen. Asher, Q.C.—Pearson—Salvesen. Agents—J. & R. A. Robertson, S.S.C.

Wednesday, August 12.

FIRST DIVISION.

[Exchequer Cause—Lord Fraser.

LORD ADVOCATE *v.* D. J. THOMSON & COMPANY AND OTHERS.

Revenue—Spirits—Spirits Act 1880 (43 and 44 Vict. c. 24, secs. 129, 130)—Forfeiture.

Held that in order to forfeiture, under the Spirits Act of 1880, of spirits containing methylated spirit, found in possession of one not entitled to have such in his possession, it is not necessary that there be knowledge by him of the existence of such methylated spirit, it being sufficient that it is, in fact, in his possession.

Evidence—Crime—Evidence of Accused.

Held that in a prosecution for preparing methylated spirit for a beverage, or otherwise for having it in possession contrary to the Revenue laws, the evidence of the accused is incompetent.

The Spirits Act 1880 by section 129 provides that a fine of £100 shall be incurred by one who, not being an authorised methylator, has in his possession any methylated spirits not obtained from a person authorised to supply them.

Section 130 provides that if any person prepares or attempts to prepare any methylated spirits as or for a beverage, or as a mixture with a beverage, he shall incur a fine of £100, "and the spirits with respect to which the offence is committed shall be forfeited."

This was an information by the Lord Advocate on behalf of the Crown against D. J. Thomson & Company and James Ford and Richard Dickson, rectifiers of spirits, Leith, stating that the officers of Inland Revenue did, on 11th June 1885, seize in the premises of the defenders James Ford and Richard Dickson 534 gallons methylated spirits, and that (1st count) the said James Ford and Richard Dickson did prepare or attempt to prepare the said methylated spirits for use as or for a beverage contrary to 43 and 44 Vict. c. 24, sec. 130, whereby the said

methylated spirits became forfeited; and (2d count) that the said James Ford and Richard Dickson, not being authorised methylators within the meaning of said Act, had the said methylated spirits in their possession, the same not having been obtained from a person authorised to supply the said methylated spirits, contrary to said statute, section 129, whereby the said methylated spirits became forfeited.

D. J. Thomson & Company claimed to be owners of the goods seized.

D. J. Thomson & Company and James Ford and Richard Dickson lodged defences, denying that any methylated spirits were seized as alleged, averring that the goods seized were bought from spirit merchants as free from methylated spirits, that they had been tested for such, and contained none. They denied the first count. They also denied the second count, and averred that they had no knowledge of there being any methylated spirits in their possession, if any was so found. They therefore pleaded not guilty.

A proof was led. It appeared that a firm named Warrick & Sons, who were not authorised to traffic in methylated spirit, had been buying quantities of it from Raimes & Co., authorised dealers in it. They bought it by a gallon at a time, that being the largest amount allowed to be sold at one time. This was mixed with other spirit and sold, as was alleged, to the respondents by Warrick & Sons. The respondents were not aware when buying it that it contained methyl, and bought it in the course of their trade as rectifiers. The defenders tendered themselves as witnesses for the purpose of proving that there was no methyl in the spirits that were seized, and if there were, that they were entirely ignorant of it.

The SOLICITOR-GENERAL objected to the competency of this evidence, on the ground that this was a criminal case, and the evidence of the accused could not be received.

The DEAN OF FACULTY replied that this was not a criminal case, but merely a prosecution for a breach of Excise laws—a civil prosecution—and where therefore a defender, as in an ordinary civil suit, was a competent witness.

LORD FRASER—The point here raised is not new to me. I argued it for the accused in the case of *Alison v. Watson*, 1 Macph. 87, unsuccessfully. I would like to see the law otherwise, but I am bound by that decision, and must refuse to receive the evidence of the defenders.

The proof being concluded, LORD FRASER pronounced judgment as follows:— I do not think it necessary to make a *avizandum* of this case, and am prepared to give judgment at once. I have listened very carefully to the evidence adduced, and which has been so ably commented upon by the two gentlemen who have addressed me. The question which I have to try arises out of the relaxation of the Revenue laws made in recent years for the purposes of trade. Spirits were necessary in very many trades, but these trades could not afford to purchase spirits upon which duty had been paid, and hence it was desirable, in order to encourage trade, that spirits should be allowed to be used without being duty paid. The difficulty was to discover some substance that would prevent these spirits being used as a beverage,