to the same effect. But, fully aware these arguments were quite untenable, he demanded a farther proof; and, by the permission of the Court, he put in a condescendence (of particulars) of the facts he expected to prove, and of the names and designations of the witnesses whom he meant to bring forward. But, besides the danger and novelty of admitting new and additional proofs, in a case so peculiarly situated, the circumstances appeared to be either immaterial to the issue, or such as the persons mentioned could not swear to from their proper knowledge. And answers having been put in to this petition, the Court refused to allow the petitioner a farther proof, and adhered to the interlocutor reclaimed against.

Nov. 18, 1800.

Against these interlocutors James Sharp brought an appeal to the House of Lords, and, dying during its dependence, Anne Sharp, his daughter, carried it on.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

N. B.—No Appellant's case printed.

For Respondents.—*R. Craigie, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

CARRON COMPANY, - - - - *Appellants;*
JOHN OGILVIE, Esq. of Gairdoch, - *Respondent.*

(*Et e contra.*)

House of Lords, 7th March 1806.

NAVIGABLE RIVERS—RIGHT OF TOWING OR TRACKING PATH—PRESCRIPTION—IMMEMORIAL USAGE—INTERRUPTION—ACQUIESCENCE—EXPENSE.—1. This was an interdict brought by the respondent, with a declarator brought by the appellants, to have it declared that the Carron, being a public navigable river, all His Majesty's lieges navigating this river, had a right to use the banks thereof, so far as necessary for the purpose of navigation, and that, past the memory of man, a tracking path had been used for towing the vessels on both sides of the Carron, and that mooring posts had been placed on these banks to serve the same purpose. The Court of Session, after proof taken, held that there was established a right of towing and tracking vessels on both banks of the Carron, with the exception of a part marked out, and which belonged to the respondent, as to which there seemed to have been.

1806.

CARRON CO. *v.* OGILVIE.

some interruption acquiesced in by the public. Held in the House of Lords, that the right of tracking on the north side of the river, where this excepted part lay, was as good as on the south. That there was a clear right of tracking on both sides, in point of law; but that the acquiescence of the parties may have shut them out from the part excepted. 2. That the appellants were entitled to have mooring posts on this part so excepted, and that they were not liable to bear any part of the expense in keeping up the sea dykes or mooring posts.

The Carron is a navigable river, and has from time immemorial been frequented by vessels of different sizes, employed in various branches of trade.

The land on both sides of the river is very low and flat; and used at an early period to be overflowed by the tide. These parts of the land so overflowed were called "Sea Greens;" and, in order to reclaim the good improveable ground of that part so covered, the proprietors, at a very remote period, erected sea dykes, or mounds of earth, running along side of the river, so as to protect these lands from the tides, and to confine it within its channel.

The method of working vessels up and down the river was by tracking or towing; and these dykes, where such were erected, and where there were none, the banks along the river, had been used for time past the memory of man, by the people engaged in towing the vessels.

In process of time, other improvements were effected on the river, having in view to facilitate the navigation thereof. The great and many bends or windings of its course interposed obstacles and delays, to overcome which several cuts were made in a straight line,—thus cutting off the bends or windings, and at same time affording the proprietor an opportunity of turning the old bed or channel left dry into land fit for husbandry. The new banks and dykes on each side so formed by these cuttings, were used as formerly for tracking or towing the vessels up and down the Carron. And these tracking paths were used as common footpaths by every person, though not engaged in towing vessels up and down the river. Besides this, there was another right possessed from time immemorial, enjoyed on the same footing, viz. of mooring, and, for that purpose, of casting on shore anchors where there were no posts; but in some places there were permanent posts fixed into the sea dykes for this purpose.

The Carron Company, deeply interested in the navigation of the river, from the extensive trade carried on by them,

carried on their works further up the river than the respondent's property. Some years after they had erected their iron works, a shipping company was established by Francis Garbett and Co. at Carron Wharf. A large house was here built by them, part of which served as a dwelling house, and the rest of the building, which was extensive, consisted of warehouses, counting house, and other offices necessary for the concern. In front of the house there was a pier, and a crane erected thereon, for loading and unloading. In 1782 this shipping company failed, and the property and grounds were acquired by the respondent, Ogilvie.

Having converted this house and warehouses into a mansion house, and occupying the same under the title of Carron House, he began to interfere with, and quarrel and interrupt the sailors in tracking their vessels along this part of the river. He cut down the mooring posts, and erected a high wall across the tracking path, running from the west end of his house into the water, to prevent any person passing that way. He afterwards brought a suspension and interdict, to prohibit all from invading the privacy of his grounds; whereupon the appellants brought an action of declarator to have it declared, that in this public river, by "the public law of the land, all his Majesty's lieges have "the right of navigating rivers within his Majesty's terri- "tory, upon all occasions, and of using the banks of these "rivers so far as may be necessary for the purpose of navi- "gating the same; yet notwithstanding the right so vested "in his Majesty's subjects, by the public law of the land, "and that a tracking path has been used for tracking ves- "sels along the banks of the river Carron, and that mooring "poles have been placed upon the said banks past the "memory of man, the said John Ogilvie, Esq. (respondent), "proprietor of the ground upon the banks of the said river, "has thought proper, at his own hand, without any form of "law, to build a dike, and place railways across the tracking "path upon his property, on the north bank of the river "Carron, and to cut down the mooring poles thereon, by "which the navigation of the Carron is much interrupted;" and therefore concluding that he had no right to erect these obstructions, and that the pursuers (appellants) and all others, navigating the said river Carron, had right to use the banks for towing or tracking their vessels, and to moor their vessels thereon, &c. In defence, it was pleaded, that a towing or tracking path was not an essential accessary of a

1806.

CARRON CO. v. OGILVIE.

navigable river; that, in the present case, it is unnecessary; and as the defender purchased his estate without the burden of any servitude, he is not obliged to submit to such tracking path along his grouuds, which, until these few years, was never used or heard of.

After proof of the immemorial usage, the Lord Ordinary reported the case to the Court, who pronounced an interlocutor, finding "that the pursuers (appellants) have a right "to track their vessels along *both banks* of the Carron," on bearing a proportion of the expense of keeping up the dykes. Both parties reclaiming, the appellants only against bearing a proportion of keeping up the defender's sea dykes, the Court pronounced this interlocutor:—"Find that the "pursuers have a right of tracking on the whole south side "of the river, so far as the defender's property on that "side extends: Finds that although a usage has also been "proved of tracking occasionally by men landed from ves-"sels on the north side of the river, yet as the same is not "essential to the navigation, and has, at times, and in dif-"ferent places, been obstructed by the state of the bank on "that side, and by alterations on the bank which may have "been acquiesced in, the pursuers are not at liberty to track "*over the whole* of the said north side; but of tracking by "men, on that side, from the east corner of the square "building marked on the plan, where the pitch house for-"merly stood, downward to the eastern mark of the de-"fender's property, and in so far remove the interdict; but "find that they are not at liberty to track on that space "which is interjected between the east corner of the said "square building where the pitch house formerly stood, and "the old boundary of the defender's property to the west "of his mansion house, and in so far continue the interdict: "Find that, in so far as the pursuers make use of the sea "dykes, for the purpose of tracking, they must pay any "damage thereby occasioned to the dykes: Find that the "pursuers may fix mooring posts at convenient places on "either side of the river, as near the brink of the river as is "consistent with their being firm; they being answerable "for all damage thereby occasioned to the sea dykes, or "otherwise; and with this exception, that there are to be "no such posts on the north side, between the upper end "of the sea dyke near the pitch house, and the old march "aforesaid, to the west of the defender's house; and remit "to Lord Balmuto to proceed accordingly." On reclaiming

Jan. 15 and 18, 1798.

Feb. 5th and 7th, 1800.

petition from both parties, the Court superseded consideration of the prayer of the appellants' petition, in so far as it prayed to find them entitled to place mooring posts upon every part of the north bank; and *quoad ultra* adhered. The respondent's petition prayed to alter the interlocutor, and to find, 1st, That the pursuers had no right to track upon any part of the north bank, upon the petitioner's property. 2d, To find that they have no right to track upon the petitioner's sea dykes; and, 3d, No right to place mooring posts, except those which are proved to have been placed and used beyond the years of prescription. But the Court refused as to the first prayer, and *quoad ultra* ordered answers. Upon consideration of which they adhered.

Mar. 4, 1800.

June 24, 1800.

On the last petition from the respondent, the Court, of same date, refused "the desire of the petition, in so far as it "prays the Court to find that the pursuers have no right to "track upon the sea dykes, and adhere to their interlocutor "thereby reclaimed against; and before answer *quoad* "*ultra*, remit to the Sheriff-depute of the county of Stirling, "after proper inquiry at persons acquainted with the navi-"gation of the river, and other persons of skill, to report "the number of mooring posts necessary for the navigation "of the river, and the places where they ought to be "fixed."

June 24, 1800.

Upon advising this report, the Court found that certain mooring posts were necessary for the navigation of the river, and within the defender's property, both on the north and south side of the same, at places marked out and specified.

June 18 and 23, 1801.

Against these interlocutors the appellants brought an appeal, in so far as it was found that they had no right to track their vessels on that space of the defender's property which is interjected between the east corner of the square building where the pitch house formerly stood, and the old boundary of the defender's property to the west of the mansion house, and also in so far as it makes them liable in any damage to the sea dykes, in using them for the purpose of tracking, and also in any damage occasioned by mooring poles; and also in placing such poles at any place along the banks of the river, in so far as restricted. The respondent brought a cross appeal against these interlocutors, praying that the appellants have no right of tracking on any part of his property, nor of placing mooring poles thereon.

Pleaded for the Appellants.—In point of fact, it is established by the evidence, that from time immemorial there

1806.

CARRON CO. v. OGILVIE.

has been a public, general, and very considerable trade carried on in the river Carron, as far up as the Carron shore belonging to the appellants, and which is past the respondent's property. That, as necessary to this trade, and the navigation of the river, there has been, from time immemorial, an uninterrupted practice of tracking on both banks of the river, and also the right of mooring the vessels at fixed posts on the sea dykes along the banks, so as to establish a prescriptive right on the part of the public. But, in point of law, this river Carron being a public navigable river—*juris publici*, the lieges have, at common law, a right to use the banks of all such navigable rivers, for all necessary purposes of navigation, just as they have a right to use the sea shore; and therefore the appellants have a right to track along the banks of this navigable river, which tracking is necessary, from the peculiar nature of this river, in its many windings, to the navigation. It is truly a creek or arm of the sea, the tide going much further up than the respondent's property. The tracking, therefore, as well as the placing of mooring poles on the banks, are rights beyond dispute; and the interlocutor of the Court, in so far as it restrained the appellants from tracking and placing mooring poles on the north bank of the river, ought to be altered.

Pleaded for the Respondent.—The right of tracking is not an essential accessary to the navigation of a public river, and therefore such right of tracking and fixing mooring posts upon the banks of any navigable river, does not exist as a common law right. The appellants have not otherwise established a prescriptive right of tracking on the banks of the river Carron, by the evidence adduced; and even if such right of servitude were established as a servitude, it would be still subject to regulation in a way the least burdensome to the servient tenement; and tracking, which is a right of servitude, is not necessary on both banks of the river. And, if allowed at all, it must be confined to the mere banks, and cannot extend to the sea dykes, which are at some distance from the bed of the river, leaving between them and such bed, ground upon which it is possible to track, and where it might be performed with less injury to the owner than upon the sea dykes. And further, the appellants have no right, either at common law, or by prescription, to fix mooring posts on the banks of the river, except where they are proved to have existed upwards of forty years before the commencement of this action.

After hearing counsel,

The LORD CHANCELLOR ELDON said,—

" My Lords,

" This is a case of an appeal and cross appeal, from the Court of Session, in regard to a towing path along the banks of the Carron. It appears to me, that this was a case which was very fit to be settled by compromise, and it was delayed accordingly with that view; but as, after the lapse of a considerable length of time, there seems to be no hope of this, it is necessary, in justice to both parties, to give decision on the matters arising from both appeals.

" There are many interlocutors in the present cause; it is my purpose, at present, to state them briefly, with the circumstances of the case, to explain the principles which influence my mind, in forming the judgment which I shall submit to you; and to move an adjournment till Friday, when I shall lay the words of that judgment before you.

" To make this case intelligible at present, I shall state its circumstances shortly. It is alleged by the Carron Company, that a right of navigating the river Carron, and of the use of its banks for the navigation, and for fixing mooring posts, is created by the common law of Scotland. Without entering into this, it is quite clear, in my apprehension, that this river has been a navigable river; that its banks have been used as tracking paths, and that a right of using mooring posts in it has existed for a great number of years, much beyond the years of the long prescription, and past the memory of man.

" From a plan exhibited of the former and present state of the river, the course of it appears to have been altered, by making shorter cuts in different parts of it; part of the grounds on its banks, overflowed at high tides, was protected by sea dykes as they are termed—and thus the conterminous heritors made additions to their properties. Part of these improvements was made before Mr. Ogilvie's time; part since he acquired the estate situate on the banks of this river. Before his time, considerable interruption had been created to the tracking, at one part of the river, by the buildings and erections at the Carron Wharf.

" Mr. Ogilvie became proprietor of the estate in 1783; and he, as the appellants allege, began to make very considerable improvements upon it, which were encroachments upon the right of tracking. Then a forcible removal took place of some of the impediments; and Mr. Ogilvie brought a complaint against the shipmasters concerned in doing so, before the Justices of the Peace of the county, for destroying his plantings and inclosures, under an act of the parliament of Scotland.

" A bill of advocation carried this matter before the Court of Session. Mr. Ogilvie then presented a bill of suspension and interdict, and obtained a temporary prohibition against landing or tracking on the north side of the river.

1806.

CARRON CO. v. OGILVIE.

" The appellants, and certain of the shipmasters, then raised declarators against Mr. Ogilvie before the Court of Session, for ascertaining their rights in this matter. (Here his Lordship read the recital and conclusions of the appellants' summons, from page 2 and 3 of their appeal case.)

" Mr. Ogilvie, on the other hand, contended, that a towing path was not an essential accessary to a navigable river, and that, in the present case, it was unnecessary. The demand was of a towing or tracking path on both sides of the river, and, in the future proceedings of the most extensive litigation, the defence was restricted to this, that there was only a towing or tracking path on one side.

" It was a material allegation, which Mr. Ogilvie made in the commencement of the cause, that the tracking path had never been heard of till of late years. If this were so, the appellants would have been obliged to make out their right at common law ; and that such right was not lost by non-use or prescription. On the other hand, I cannot imagine how it could be made out, that a towing path was not necessary. The question appears to turn wholly on the custom and usage.

" I am sorry to have observed, in this case, a strong appearance of the parties amusing themselves by unnecessary expense. They have taken the trouble of inquiring what was the usage of tracking, not only on the navigable rivers and canals of Scotland, but on those of other countries. I believe it may be asserted, that there are few rivers where a right of tracking on both sides exists ; but if such is used, it cannot be shut out on any ground of the want of necessity. The state of the river Carron is such, that it is convenient to track on both sides of the river ; but I do not inquire into the matter of convenience ; the sole question is, How the tracking has been practised *de facto?*

" In a condescendence of facts given in by the appellants, they insisted upon the exercise of the right of tracking on both sides of the river, and also upon the necessity of this, that mooring poles had been used for many years, till they were cut down by the defender ; that the river Carron had been long navigable for ships from 60 to 100 tons burden ; and they stated the circumstances that had led to the building of Carron Wharf, and the defender's house, which had given interruption to the exercise of the right of tracking.

The defender gave in a condescendence upon his part ; and contended that no proof was necessary of the usage of tracking, on account of the interruption given thereto and acquiesced in ; but this opposition was ineffectual, and a proof was allowed.

" The Court then pronounced the interlocutor 15th Dec. 1798." (His Lordship read the same, and mentioned that it was appealed from on both sides.) " I might call your particular attention to part of this interlocutor, finding that the pursuers must bear a proportion of the expense of keeping ' up the defender's sea dykes used by them

'as tracking paths;' this is one point made in the appeal of the Carron Company.

"In looking through the notes of the judges' opinions, which have been handed to us, I cannot find that counsel have ever been heard upon this point. There was a difference of opinion among the judges, whether a hearing upon this should take place or not; but the majority of the judges, without hearing an argument upon the point, were of opinion expressed in this interlocutor.

"Upon this, I am free to deliver my opinion. that if the Carron Company have established a right of tracking on both sides of the river, as I think they have clearly done, I cannot imagine on what ground it is, that those using the sea dykes are obliged to maintain them. In Scotland, the owner of the dominant tenement is not liable in expenses to the owner of the servient tenement: those who possess the lower apartments of large houses are obliged to keep them up to support the upper apartments.

"Let us see what the case was here, the right of tracking was clearly established before the erection of the sea banks; and this right of tracking must have been upon the banks as they naturally were. Those using the right of tracking could not call upon the owners of the adjacent lands to put the banks of the river into better order than they were by nature. If these owners, to improve their lands, choose to build dykes, the act of tracking on those dykes arose from the act of the owners of the lands. If these owners had left room for the tracking path this might have been different. But why call upon the tracker to pay any part of the expense which was to be applied to a purpose totally different? In the present case, he was obliged to go upon the sea banks; he could not be compelled to track in the river, nor on the grounds beyond the sea dykes, because these grounds were lower than the sea dykes, and the tracking would thereby have been interrupted.

"What proportion too of the expense could be settled here between the appellants and respondent? The right of tracking is not one confined to the appellants, but is open to all His Majesty's subjects. The interlocutor of the Court, on this point, appears to me to say, that if a proprietor raises sea banks for his own purposes, he shall be entitled to take a toll to maintain them from those who, in the exercise of their right of tracking, are obliged to use them. I think such a principle utterly unmaintainable.

"If the fact be, that the respondent was not heard upon this in the Court below, and if substantial reasons could be shown on behalf of the respondent's claim on this point, I should be extremely sorry to shut him out from being heard thereon. I feel a difficulty whether to move for a reversal of the judgment upon this, or to allow the respondent to be farther heard thereon. If it is not argued to us betwixt and Friday on his part, that he could support this by a hearing, I shall take it for granted that this part of the interlocutor is not to be sustained.

1806.

CARRON CO. v. OGILVIE.

"Both parties reclaimed against the interlocutor which I have stated, and new writings bearing upon the points at issue were discovered, and laid before the Court. Then the interlocutor of 5th February 1800 was pronounced, (here his Lordship read the same.)

"My mind cannot see, what there is in the right of tracking on the south side of the river that does not also apply and exist with reference to the north side, except where such right, may be gone, by interruption, and an interruption acquiesced in. The right must either amount to a legal usage, or must not be sufficient to found one. The language of this part of the interlocutor, therefore, appears to me inaccurate. My observation on this is made only to inquire, if it will enable us to sustain the subsequent part of the interlocutor, limiting the right of tracking on the north side of the river within certain definite points.

"Speaking as an English lawyer, it appears to me that this interlocutor contains a great deal more of what I may term *judicial compromise*, than we could allow in our courts of this country. But, after looking as narrowly at this case as I possibly can, and having reference to the principles of the law of Scotland upon prescription, and the interruption of prescription, though I am not prepared to say that I understand the facts upon which it is to be supported; yet, on the other hand, I do not see sufficient grounds on which to advise your Lordships to reverse the opinion of the majority of the the Court as to this.

"As to the declarations in the interlocutor, that the pursuers may fix mooring posts at convenient places at either side of the river, this appears to be right; but if the king's subjects have a right to mooring posts upon this river, even upon the sea dykes or other erections made by the neighbouring proprietors for their own accommodation, it will be very difficult to sustain the latter part of this interlocutor, with regard to the damage done to the sea dykes by the mooring posts.

"One principal difference between the parties as to these was, with regard to the propriety of the reference to the Sheriff. But this reference was made; and, in the subsequent directions with regard to the placing the mooring posts, it does not appear to me that the Court has gone beyond their powers in this species of arrangement.

"Upon the whole, if it be sufficiently proved, (as I think it is), that a right of tracking exists on both sides of this river, then the general law has nothing to do with this case; and the alteration of the course of the river is nothing. The right of tracking still continues, without regard to such alteration. His Majesty's subjects might for a time yield to this, and use a boat. I see no principle upon which the right of tracking should be confined to the south side more than to the north; and I think I see too much of *judicial compromise* in what the Court has done; but I think, at same time, that the *acquiescence* of parties has *shut them* out

from their right of tracking at the particular places alluded to. But there appears to be no ground on which to throw upon the appellants any part of the expenses of, or damages occasioned to the respondent's sea dykes, constructed for the improvement of his lands.

"On these grounds, it is my intention to propose an adjournment till Friday, that we may learn, in the meantime, if the respondent wishes to be farther heard in the Court below; and to hand in what occurs to me as a form (of the judgment), which, on account of the number of interlocutors, is involved in some difficulty."

On his Lordship's motion, the cause adjourned accordingly.

On 7th March 1806, *Case resumed.*

THE LORD CHANCELLOR ELDON said,—

"My Lords,

"I have to state, that I found, upon inquiry, that the points with regard to the expense of keeping up the sea dykes had beeu fully discussed in the Court below, and I do not find it necessary to have any farther hearing thereon; but as to these, I shall reverse the interlocutors."

It was ordered and adjudged, that so much of the interlocutors dated the 5th and signed the 18th Dec. 1798, as finds that the pursuers (now the original appellants), must bear a proportion of keeping up the defender's (now original respondent) sea dykes used by them as tracking paths, and as remits in the process of declarator to the Ordinary on the Bills to hear parties' procurators on the proportion of expenses to be paid by the said pursuers, be *reversed;* and that so much of the said interlocutor as finds that the pursuers have a right to track on both sides of the river be affirmed, with the exception hereinafter mentioned. And it is further ordered and adjudged, That the said interlocutor, dated the 5th, and signed the 7th Feb. 1800, be affirmed, so far as it finds that the pursuers having right of tracking on the whole south side of the river, as far as the defender's property on that side extends; and also so much of the said interlocutor as relates to tracking on the north side, finding as follows: That the pursuers have a right to track on the whole of the north side of the river, so far as the defender's property extends, with this exception, that in the circumstances proved in this case, they are not at liberty to track on that space which is interjected between the east corner of the square building marked on the plan where the pitch house formerly stood, and the old boundary of the de-

1806.

CARRON CO. v. OGILVIE.

fender's property to the west of the mansion house, and so far continue the interdict; and as to the rest of the north side down to the eastern march of the defender's property, remove the interdict. And it is further ordered and adjudged, That so much of the said interlocutor dated 5th, and signed 7th Feb. 1800, as can be understood to find that, in so far as the pursuers make a reasonable use of the sea dykes, or otherwise of their right, for the purpose of tracking, they must pay any damage thereby occasioned to the dykes, be *reversed*. And it is further ordered, That the said interlocutor, so far as the same relates to mooring posts, and so far as the same is not altered with respect thereto by any subsequent interlocutor or interlocutors appealed from, be affirmed. And it is declared and adjudged, That the said interlocutor, so far as it finds the pursuers answerable for any damages occasioned to the sea dykes, or otherwise, by the due execution of the right of placing, or by the reasonable use of mooring posts lawfully placed, be reversed. And it is further ordered and adjudged, That all the other parts of the said interlocutor of the 5th Feb. 1800, and also the interlocutors of the 4th March and 24th June 1800, and the interlocutor dated the 18th and signed the 23d June 1801, be affirmed, with such variation only, if any, as may be necessary to make them consistent with what is hereby ordered and adjudged with respect to the several parts of the said interlocutors of 14th Dec. 1798, and 5th Feb. 1800. And it is further ordered, That the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *Wm. Adam, John Clerk.*
For Respondents, *Wm. Alexander, Arch. Campbell, W. Murray.*

NOTE.—Unreported in the Court of Session.