SUMMER SESSION, 1918.

COURT OF SESSION.

Tuesday, May 14, 1918.

FIRST DIVISION.

(SINGLE BILLS.)

GLASGOW CORPORATION *v.* JAMES HEDDERWICK & SONS, LIMITED.

Administration of Justice — Contempt of Court—Newspaper—Publication of Comment on Decision of Sheriff.

An elector, having the right to do so, challenged as illegal payments out of the common good of a burgh alleged to have been made to defray the election expenses of candidates for the municipal councils of adjoining burghs, which the burgh in question was seeking to annex. After decree in the Sheriff Court to the effect that the said payments were legal, a newspaper published an article commenting upon the decision, comparing the action of the burgh to the Government using State funds to back its candidates, stating that the latter used to be called bribery and corruption, and urging an appeal. When the article appeared the judgment was appealable, but had not been appealed, though it subsequently was. The article having been brought to the notice of the Court, the Court (*dis.* Lord Johnston) *found* it unnecessary to take action in the matter.

On 14th May 1918 the Glasgow Corporation, who were the respondents in an appeal then pending, *Kemp* v. *Glasgow Corporation*, brought under the notice of the Court in the Single Bills an article which had appeared in the *Glasgow Evening Citizen*. James Hedderwick & Sons, *compearers*, who were the publishers of that paper, having lodged a minute of compearance, appeared by counsel at the bar.

The *facts* were these—John Kemp junior, an elector in the City of Glasgow, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, craving "the Court to sustain the pursuer's objection to the item of £6666, 14s. 10d. contained in the Common Good accounts for the City and Royal Burgh of Glasgow for the year ending 31st May 1913 under the heading 'Parliamentary Expenses, Session 1912' and sub-heading 'Glasgow Boundaries Act 1912,' being 'fees for professional services;' to disallow the said item as a charge against the Common Good of the City and Royal Burgh of Glasgow, and to ordain the defenders to rectify the said Common Good accounts accordingly."

The pursuer *pleaded, inter alia* — "2. There being illegal payments in the items complained of the pursuer is entitled to have the findings of the Court upon these items, and, if so advised, to have the defenders ordained to rectify the said Common Good accounts accordingly."

The defender pleaded, *inter alia*—"1. The averments of the pursuer, so far as material, being irrelevant and insufficient to support the crave of the petition, the action should be dismissed. 2. The action being incompetent should be dismissed."

On 8th March 1917 the Sheriff-Substitute (A. S. D. THOMSON) repelled the first and second pleas-in-law for the defenders and allowed a proof.

Note from which the *facts* of the case appear — "The pursuer complains of the item of £6666, 14s. 10d. in the defenders' accounts in connection with the Common Good. As an elector he is entitled to complain of the item. It is not a common law right, for at common law the electors are not entitled to challenge the intromissions of the Corporation with the Common Good, but section 14 of the Glasgow Corporation Act 1909 expressly confers this right, and the pursuer bases his petition upon the statute.

"The complaint is that this item includes sums paid to certain writers in Glasgow employed by the Corporation in connection with their recent annexation scheme 'for professional services rendered,' and the basis of the complaint is that the Corporation employed these writers to procure the election to the town councils of the adjoining burghs affected by the Corporation Boundary Bill of candidates in favour of the Corporation's annexation scheme, and to do so by forming committees in support of such candidates, and by paying the election

expenses of the committees and candidates, including hire of halls, printing, advertising, and so on.

"The pursuer characterises these payments as illegal. He contends that the defenders had no right to 'pack' the various town councils affected by the annexation scheme with candidates pledged to vote for annexation any more than they might have to bribe members of the councils to vote for annexation; that if they had right to expend the Common Good in this way they might equally have right to expend it in furtherance of the candidature of persons pledged to vote for socialistic or syndicalist schemes, or the candidature of relatives of their own or of the officials of the Corporation. I think the pursuer's contention is right, and that if he can substantiate his averments he has just ground for complaint and may have the accounts rectified. I refer to the judgment of Lord Shaw in *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, at pp. 111 *et seq.*

"He has further averments that the accounts of these writers as first rendered included outlays which on the face of them were illegal on the lines indicated above, and that to conceal these outlays the accounts were collusively altered.

"I see no ground for holding that the petition is incompetent, and I think the averments are sufficiently relevant to be remitted to probation, and I accordingly allow a proof. I find nothing in the case of *Eadie* v. *Corporation of Glasgow* to lead me to take a different view."

The defenders appealed to the Sheriff (A. O. M. MACKENZIE), who on 25th February 1918 recalled the interlocutor of the Sheriff-Substitute, sustained the first plea-in-law of the defenders, and dismissed the action.

Note—[*After narrating the facts of the case*]—"The question raised, shortly stated, is whether it was illegal for the defenders to apply moneys from the Common Good in paying the election expenses referred to, and in my opinion this question falls to be answered in the negative. At the time when liability for these expenses was incurred the defenders were promoting a Bill for the extension of the boundaries of the city of Glasgow. This Bill afterwards received the approval of Parliament, becoming the Glasgow Boundaries Act 1912. Section 80 of the Act provides 'that the costs, charges, and expenses of and incidental to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the Corporation . . .' The effect of this section is to make it quite clear that the Corporation are entitled to apply money forming part of the Common Good of the city to meet expenses incurred 'in preparing for, obtaining, and passing' the Act, 'or otherwise in relation thereto,' provided the purposes for which the moneys were expended were not illegal, for I concede to the pursuer that section 80 cannot be read as authorising expenditure of an illegal nature, *e.g.*, on bribery. If accordingly the expenses objected to come within the classes of expenditure described in the section, and are not illegal, the funds of the Common Good might properly be applied in paying them. Now I do not think that it could reasonably be maintained that the expenses objected to were not expenses incidental to 'the preparing for, obtaining, and passing the Act.' The defenders as promoters of the Bill were entitled to lay their scheme before the inhabitants of the districts which would be affected by the changes they proposed, and to endeavour to form and develop opinion among these inhabitants in its favour, and any legitimate expense which they might incur in so doing was in my opinion, in the sense of section 80, an expense incidental to the obtaining of the Act. This was practically conceded by counsel for the pursuer, who admitted that no exception could be taken to the expense of propaganda of various kinds, as, for example, by meetings and canvassing. The question thus comes to be whether there is any valid ground of distinction between expenditure on such objects and the expenditure objected to? For myself I can find none. I concede that in ordinary circumstances, that is, when no such proposal as the Boundaries Bill was being agitated, it would be illegal for the Corporation, as administrators of the Common Good, to apply its funds to payment of the expenses of candidates at elections in neighbouring municipalities or county districts, but it would be equally illegal for the Corporation to apply money from the Common Good to propaganda work in the adjoining burghs and county districts, and the reason would in both cases be the same, namely, that such expenditure could not be regarded as in any reasonable sense expenditure for the benefit of the citizens of Glasgow, for whom the Common Good is held and falls to be administered. But when it has to be admitted that expenses incurred on propaganda work in the adjoining localities might properly be met out of the Common Good Fund, I fail to see why the payment of the election expenses of candidates should be regarded as illegal, such expenditure being well adapted to achieve the object in view—the formation of opinion in favour of the Bill, and the obtaining of the Act, and not being in itself expenditure of an illegal character, for it cannot be maintained that there is any illegality in one person paying the election expenses of another.

"In holding the pursuer's averments to be relevant the Sheriff-Substitute appears to have proceeded, in part at least, on the view that the expenditure complained of in this case was open to objection on the same ground as that on which Lord Shaw held the Parliamentary Fund levy imposed by the Amalgamated Society of Railway Servants upon its members to be illegal—*Osborne* v. *Amalgamated Society of Railway Servants*, 1910 A.C. 87, at p. 111, *et seq.* This, however, was not contended at the debate before me, and I have failed to find anything in Lord Shaw's opinion which bears on the present case. The ground on which Lord Shaw, in the case referred to, held the levy to be illegal was that the rules under

which the Parliamentary Fund was administered bound the Members of Parliament who received payments from it to vote, not according to their own convictions, but according to the directions of the Labour Party. In the present case it is not suggested that any pledge was exacted from the candidates whose expenses were paid.

"On the whole matter I am of opinion that the defenders' first plea-in-law falls to be sustained and the action dismissed.

"The defenders also plead that the action is incompetent, but although this plea was not abandoned no argument was submitted to me in its support, so that it is unnecessary to consider it."

On 9th March 1918 the following *article* was published in the *Glasgow Evening Citizen*:—

"CIVIC PURITY.

"Election Funds from Common Good.

"*Ratepayers' Federation View.*

"We have received the following communication from the Ratepayers' Federation Ltd., a society of which Mr Arthur Kay is chairman and Mr Robert Bird secretary, and which includes among its directorate some of the best-known commercial men in Glasgow. Though our space is limited, the subject is one of such vital importance to municipalities that we give the statement in full:—

"War so overshadows all things that matters which during peace would be regarded as of vital importance to the city are at present in danger of being overlooked. We should like, therefore, to call public attention to the recent decision of Sheriff Mackenzie in the electors' case of *Kemp* v. *The Corporation*, a decision which cuts at the root of the purity of our civic administration.

"For several years there has been a question at issue between certain electors and the Corporation. These electors hold that during the agitation for and against the Annexation Bill of 1913 the Corporation used funds taken from the Common Good to pay the election expenses of candidates to the Burgh Councils of Govan, Partick, &c., who had beforehand pledged themselves to vote in these councils in favour of annexation. A suspicious item of £6666 appeared in the Corporation accounts as 'fees for professional services.' It was challenged by electors on the ground that it covered illegal expenditure. On various and varying pleas the Corporation has so far successfully resisted the request of the electors to know exactly how the money was spent. The Corporation has contested what appears to be the natural interpretation of the section of the Act of 1909, which gives the electors the right to challenge the accounts. But while opposing that right the Corporation also contended that the payment by it out of the funds of the Common Good of the election expenses referred to above was not illegal. This plea, even apart from the dogged reluctance to give the particulars of the expenditure challenged, was tantamount to the admission that funds had been spent in the payment of such expenses.

"With regard to the legality of such expenditure, Sheriff-Substitute Thomson decided that the electors were entitled to the information asked; and that the Corporation had no right to pack the outside Town Councils with candidates pledged to vote for annexation, any more than it would have the right to bribe members of these councils to vote for annexation.

"After long delays this judgment came up on appeal before Sheriff Mackenzie on 4th February. The Lord Advocate (J. Avon Clyde) appeared for the Corporation. Tacitly admitting the right of the electors to the information asked, his defence was that the Corporation was entitled to use the funds of the Common Good to pay the election expenses of selected candidates to these outside councils. And Sheriff Mackenzie in his interlocutor of 25th February followed the lead of the Lord Advocate and dismissed the electors' case, saying—'I fail to see why the payment of the election expenses of candidates should be regarded as illegal, such expenditure being well adapted to achieve the object in view—the formation of opinion in favour of the Bill and the obtaining of the Act—and not being in itself expenditure of an illegal character, for it cannot be maintained that there is any illegality in one person paying the election expenses of another.'

"In our view the learned Sheriff has failed to distinguish between what an individual may do with his own money and what in a position of public trust he may not do with the money of others.

"The question is of great importance to the citizens of Glasgow, and to all who are anxious for the purity of civic administration. The tramways are now on the Common Good. In the past they have contributed as much as £160,000 in one year—more than enough to pay generous expenses to annexation candidates for the entire Town Councils of Clydebank and Rutherglen when in the opinion of the Corporation the hour for their annexation has struck.

"If the Sheriff's judgment is right why should not the millions of the Common Good Fund be used in paying candidates to stand both outside and inside the city pledged to vote for any object which the majority of the Council may have in view? What would be said of a Government that used the State Funds to back their candidates? In days gone by that used to be called bribery and corruption.

"At one stage in the struggle for the rights of the electors the opinion of one of the leading Scotch barristers in England was taken on the whole matter, and he replied that he entirely agreed with Lord Salvesen's opinion in favour of the electors in the case of *Eadie* v. *The Corporation*, and he added these words at the end—'I presume there is no chance of the Lord Advocate taking proceedings in the public interest?'

"We cannot but admire the public spirit of the elector who has borne the burden of

this fight for the purity of public life, and the question now is whether Sheriff Mackenzie's judgment is to be acquiesced in and become the standard of conduct and morals for the Corporation; or whether it is to be appealed to the Court of Session for rectification, as it affects the rights not only of the electors of Glasgow but of every burgh in Scotland. We think it should be appealed." [*Eadie* v. *Glasgow Corporation* is reported 53 S.L.R. 139.]

On 11th March 1918 the pursuer appealed to the First Division of the Court of Session.

Argued for Glasgow Corporation—The action was in dependence, for the Sheriff's interlocutor was appealable when the article was published, and that was the footing on which the article was written, for it urged an appeal. In those circumstances comment was improper—*Henderson and Others* v. *Laing*, 1824, 3 S. 384 (N.E. 271); *M'Lauchlan* v. *Carson*, 1826, 5 S. 147 (N.E. 133), *per* Lord President Hope at p. 149; *Smith* v. *Mitchell*, 1835, 14 S. 172; *Smith* v. *Ritchie & Company*, 1892, 20 R. (J.) 52, 30 S.L.R. 329; *Gillette Safety Razor Company* v. *A. W. Gamage, Limited*, 1896, 24 Pat. Cas. 1, *per* Warrington, J., at p. 5. *Cowie* v. *Outram & Company, Limited*, 1912 S.C. (J.) 14, 49 S.L.R. 454, was distinguished, for there the newspaper merely narrated facts known to the public. Further, the comment in the present case was not fair and respectful.

Argued for the compearers—When the article was published the case had been decided in the Sheriff Court, and had not been appealed. Consequently there was no question of prejudicing the administration of justice. It would be unreasonable to hold that there should be no comment on a case until after the expiry of the time for appealing; until recently that would have meant the stifling of fair comment for two years. Here there was no misrepresentation or prejudging of the facts as there was in the *Gillette* case (*cit.*) and in *Ritchie's* case (*cit.*). In the other cases cited the question in the case was *sub judice* when commented on. Further, the case could not come before a jury chosen from the public to whom the article was *primo loco* addressed.

LORD PRESIDENT—None of the cases which have been cited to us to-day in support of this application, or complaint, or whatever it may be, may be assumed to have any application here. I cannot find in this article to which our attention has been drawn anything that indicates a desire on the part of the writer of the article to influence the public administration of justice or to commit a contempt of this Court.

The object of the article is very obvious. It is designed to urge an appeal against the judgment of the Sheriff of Lanarkshire, and, as I gather, to suggest that funds be contributed by the citizens in order to enable the judgment to be brought under the review of this Court.

The article was written, it appears, some twelve days after the Sheriff of Lanarkshire had issued his interlocutor. For aught that the writers knew the interlocutor might have been acquiesced in. There were no proceedings pending at the time, but the appealing days had not expired; there was yet time to bring the judgment under review.

No doubt it is a strong thing to characterise what, so far as we can see, is purely a legal question as a "straining for the purity of public life," and to characterise the learned Sheriff's interlocutor as "a decision which cuts at the root of the purity of our civic administration," and sets up, as the writers say, "a standard of conduct and morals for the Corporation" of which they disapprove. It is still stronger to suggest that if that standard remain then it looks very like the sanction by judicial decision of what in old days would have been called bribery and corruption. But in the present state of the process, that is to say the judgment having been pronounced and there being no pending appeal, it does not appear to me that any member of the public who so characterises the judgment is committing any contempt of court or is saying anything which can prejudice the administration of justice.

I am not, therefore, having fully in view the strength and vigour of the language used, disposed to take any further notice of the article to which our attention has been drawn.

LORD JOHNSTON—I regret that I cannot agree with the judgment that your Lordship proposes. I think that this case is on all-fours with the authorities which have been quoted to us, which are only a sample of the authorities which exist both in this country and in England. If the object of the writer of the article in question (and therefore of the publisher who adopts it) had been merely to urge that the matter was of such importance that it was desirable that it should be submitted to a higher court, there would have been nothing in that to which objection could be taken. Accordingly if this communication had stopped with the passage to which I referred during the discussion, viz., "The question is of great importance to the citizens of Glasgow and to all who are anxious for the purity of civic administration," and had proceeded in the language of the last paragraph of the communication to press the propriety of the judgment of the Sheriff being taken to review, and indirectly to canvass for support of the private individual who had crossed swords with the Glasgow Corporation, there would have been no impropriety whatsoever. But it was not necessary, and it was in my opinion highly improper, to insert the three paragraphs which intervene between the two to which I have referred. They are not necessary for the assumed object of the article. Their object is to throw contempt on the judgment of the Sheriff while it was still an open judgment and when the writer knew it was appealable, because his very end in writing was to secure that it should be appealed. In these circumstances I think that the conduct of the writer ought to be judged of on the same footing as if he

were commenting on a case still *sub judice*.

I cannot myself understand how your Lordship draws any justification of this article from the fact that the appeal had not actually been taken, ten days only having elapsed since the judgment had been pronounced, and *ex hypothesi* the question of appeal being under consideration. To support such an excuse is, I think, entirely a begging of the question—which I conceive to be, whether it is allowable in the public prints to throw contempt on a judgment of a judge of first instance while the matter is *still sub judice*, in terms which infer that the superior Court will be chargeable with the same support of bribery and corruption if they should come to refuse the appeal.

It may be that such comment will have no effect upon the course of justice in this Court. But it is a style of comment which tends to obstruct the untrammelled exercise of the Court's jurisdiction, and in principle is a form of contempt of Court which ought not to be allowed to go unnoticed. The respondents have very properly stated at the bar that if their article is held by the Court to contain improper matter, as such was not their intention, they will at once tender their apologies to the Court. I think that they should be allowed the opportunity of doing so.

LORD MACKENZIE—I agree with your Lordship in the chair. I do not think that this is an article of which this Court should take any notice. The position of the case was that the matter had taken end in the Sheriff Court. The Sheriff-Substitute had taken one view and the Sheriff had taken another. It is in reference to the view taken by the Sheriff that the article is written. There is in it, admittedly, no misstatement of fact. The article contains a criticism of the view of the law taken by the learned Sheriff. I have referred to the note appended to the interlocutor by the Sheriff-Substitute, and it appears to me that so far as regards the criticism of the law it is a restatement of the argument which had appeared to the Sheriff-Substitute to be right.

No doubt the article proceeds to say that if the law is as stated by the Sheriff it "cuts at the root of the purity of our civic administration." It appears to me that that is comment upon a matter of public importance which it was within the right of the newspaper to make.

There is only one matter in the argument of Mr Constable on which I say a word. It would, of course, be no protection to the publishers of the newspaper, if the article were objectionable, that they had disclosed the source from which their information was obtained. The fact that their communication came from a ratepayers' association and that the names of the chairman and secretary of the society were disclosed would be no protection to the newspaper.

None of the cases cited appears to me to touch the present case. We were not referred to any case in which comment was made on a judgment that had been given. This is not the case of an attempt to present a view of an action which has not yet come to judgment, and it differs entirely from the class of case in which newspapers present a view of the facts of a case which is to go before a jury.

I do not think that an article of this kind would have the remotest effect upon the mind of any judge who came to consider the question.

LORD SKERRINGTON—I agree with your Lordship in the chair and Lord Mackenzie. I should have taken a serious view of this article if the Corporation's position had been that they denied that in fact corporate funds had been applied in the manner objected to, and if the newspaper writer had proceeded to constitute himself judge of that question, and thereby arrogate to himself the functions of a judicial tribunal. But I find nothing of that kind. All that I find is a criticism of the state of the law as that law was laid down by the Sheriff.

I think that anyone is entitled to criticise the law provided that he does so in a manner which is not disrespectful to the court, and which is not calculated to interfere with the administration of justice. In this article I find nothing disrespectful to the Sheriff, and it is idle to suggest that it could affect, or was intended to affect, the decision of a pure question of law in the event of an appeal.

The Court pronounced this interlocutor—

"The Lords having heard a statement made by counsel for the respondents the Corporation of the City and Royal Burgh of Glasgow relative to an article which appeared in the minuters' newspaper of 9th March 1918 commenting on this cause, and having also heard counsel for the compearing minuters, find it unnecessary to take any action in the matter: Further find the said respondents liable to the said compearers in the expenses of their compearance," &c.

Counsel for Glasgow Corporation—Sandeman, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Compearers—Constable, K.C.—A. M. Stuart. Agents—Graham, Johnston, & Fleming, W.S.

Tuesday, May 28.

SECOND DIVISION.

[Sheriff Court at Glasgow.

FARME COAL COMPANY *v.* MURPHY.

Workmen's Compensation — Expenses — Tender—Discretion of Arbitrator—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (7).

The discretion as to the expenses of an arbitration under the Workmen's Compensation Act 1906, conferred upon the arbitrator by the Second Schedule (7) of that Act, must be exercised judicially, and consequently the arbitrator