Wednesday, June 28.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

COOK *v.* CRANE.

Process—Sheriff Court—"Further Proof"—Novi testes—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 27, *as Amended by the Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28).

The Sheriff Courts (Scotland) Act 1907, sec. 27, as amended by the Sheriff Courts (Scotland) Act 1913, enacts—"It shall be competent for the sheriff when the action is before him on appeal on any point . . . to allow further proof."

In an action of affiliation after the proof had been closed the pursuer lodged a minute craving leave to lead the evidence of three additional witnesses. The Sheriff, to whom the case had been appealed, allowed the additional proof, and ultimately granted decree in favour of the pursuer. The Court *refused* to interfere with the discretion of the Sheriff, and *affirmed* his decision allowing the additional proof.

Jessie Cook, Echt, *pursuer*, brought an action of affiliation in the Sheriff Court of Aberdeen against John Crane junior, Dunecht, *defender*, in respect of an illegitimate male child of which she alleged the defender was the father.

After the proof had been closed on 20th June 1921 the pursuer lodged a "minute of *res noviter*," in which she averred—"The pursuer respectfully states to the Court that since the proof in this case was led on 20th June 1921 she has received information of, and avers and offers to prove, the following facts:—First, that William Lauderdale Cooper, engine driver, Walkendale, Dunecht, witnessed an act of carnal connection between the parties in a wood within the policies of Dunecht House in the end of March or beginning of April 1920, and that the said William Lauderdale Cooper on several occasions both before and after the said act of connection saw the pursuer and defender walking together on the paths and in the woods around Dunecht House, the defender having his arm round the pursuer's waist. The said William Lauderdale Cooper did not reveal the foregoing facts to anyone until he heard on the day following the said diet of proof that defender had denied on oath having carnal intercourse with pursuer, when the said William Lauderdale Cooper disclosed said facts to pursuer's sister. Second, that James Meldrum, farm servant, Damseat, Dunecht, a companion of the defender, during the months of February, March, and April 1920 saw pursuer and defender walking together and also sitting together about the woods and buildings within the policies of Dunecht House, and that on an occasion in the summer of 1920, on the public road opposite Leslie, the merchant's shop in Waterton village, the defender admitted to the said James Meldrum that he had been having carnal intercourse with the pursuer, and that on another occasion after pursuer returned from England, and about a week before the child in question was born, the defender again admitted to the said James Meldrum in the course of a conversation between them with regard to pursuer's approaching confinement that he could not deny having carnal dealings with pursuer, but thought he might get clear of it because the last occasion they were in company together pursuer had her monthly illness. The said James Meldrum did not reveal the foregoing facts to anyone until 24th June 1921, when in answer to a challenge by pursuer's sister he disclosed same to her. Third, that in the spring of 1920 while pursuer and defender were keeping company together, the defender in the course of a conversation with Leslie Duthie, postman, Waterton, Dunecht, in regard to one of the female servants at Dunecht House other than pursuer, expressed surprise that her sweetheart had kept company with her so long without there having been misconduct between them, and stated that he (defender) was all right in that respect with Jessie (meaning pursuer). The words used by defender were intended by defender, and understood by the said Leslie Duthie, to mean that defender was having sexual intercourse with pursuer. The said Leslie Duthie did not reveal the foregoing facts to anyone until 22nd June 1921, and did so only on being questioned on the subject. Pursuer was not aware of and had no means of ascertaining said facts before the said diet of proof, and she respectively craves the Court to open up the record to the effect of adding said averments to her condescendence. She further craves the Court to allow her a proof of said new averments."

On 28th July 1921 the Sheriff-Substitute (LAING) refused the crave of the minute and granted absolvitor.

The pursuer appealed to the Sheriff (M'CLURE), who on 21st December 1921 pronounced this interlocutor—"Allows the defender within ten days from this date to lodge in process his answers thereto as argued at this diet, and on said answers being lodged allows the proof craved to be led by the pursuer, and to the defender a proof of his averments in said answers: Remits to the Sheriff-Substitute to take the proof, and to report same to the Sheriff for further procedure."

Note.—"The averments contained in the minute show a plain case of *res noviter* supporting the evidence already given by the witness Drumsfield, and I think a miscarriage of justice might result if an opportunity of proving them were denied. The evidence, however, must be strictly limited to the matters set forth in the minute and answers."

The defender thereafter lodged answers, in which he averred—"The defender denies the material averments of fact contained in the pursuer's minute, and explains and avers that the evidence proposed to be led has been extorted improperly by the pursuer's sister Jean Cook, who after the proof

before the Sheriff-Substitute was closed, and being informed of the weakness of the evidence led for the pursuer, in order to endeavour to obtain corroboration of the pursuer's case, canvassed several persons for their evidence in pursuer's favour, including the parties whose evidence it is now proposed to obtain, and she also called on Hector Shepherd, Lyne of Skene, Dunecht, a brother of the defender's witness Shepherd, and asked him to say falsely that he had seen the parties having illicit intercourse, which he refused to do. Pursuer's witness Drumsfield also asked Shepherd to do so. The evidence proposed is not in the sense of the Act new matter or *res noviter veniens ad notitiam*, in respect that there are no new facts alleged, but at the best merely new or additional evidence which the pursuer by her own negligence failed to adduce at the proper time. The pursuer is bound to show that the proposed evidence could not with reasonable care and diligence have been available at the proof. Even if the evidence is true, it was quite available for the pursuer had she chosen to exert herself to prepare her case in order to enable her to lead the same at the diet appointed for the proof. In such circumstances the Court have invariably refused such evidence, and the defender respectfully refers to the authorities quoted by the Sheriff-Substitute, and likewise to the judgment of the First Division of the Court of Session pronounced on 22nd December 1921 in the case of *Miller* v. *Mac Fisheries, Limited.* The defender accordingly craves the Court to refuse the pursuer's minute craving to be allowed to lead the additional evidence proposed, and to pronounce judgment in the case on the evidence already led. Alternatively, in the event of the Sheriff granting the crave of the pursuer's minute, leave should be granted only on payment of expenses, and further the defender respectfully craves leave to appeal to the Court of Session."

On 30th March 1922 the Sheriff having considered the cause along with the additional evidence, sustained the appeal.

The defender appealed to the Court of Session, and on the question of the competency of the additional proof argued—The Sheriff had erred in allowing the additional proof. Where such proof was of a nature that it could originally have been produced, and no valid reason was given why it had not been produced, then whether it consisted in new witnesses or the recal of previous witnesses it had been uniformly refused—*Taylor* v. *Provan*, 1864, 2 Macph. 1226; *Drain & Company* v. *Scott*, 1864, 3 Macph. 114; *Brown* v. *Gordon*, 1870, 8 Macph. 432, 7 S.L.R. 257; *Mabon* v. *Cairns*, 3 R. 47, 13 S.L.R. 23; *Allan* v. *Stott*, 1893, 20 R. 804, 30 S.L.R. 728. These were decisions under the Act of Sederunt of 10th July 1839, section 83, but the law had not been altered either by our Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70) or by the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 27, as amended by the Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28), First Schedule. The same principle had been applied in the case of *Miller* v. *Mac Fisheries, Limited*, 1922 S.C. 157, 59 S.L.R. 182—a case under the Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), section 6.

Counsel for the respondent was not called on.

LORD ORMIDALE—In this case the Sheriff-Substitute refused and the Sheriff allowed a proof of averments contained in what purported to be a minute of *res noviter*, and we are asked to hold that the Sheriff was wrong. The Sheriff has the right under the Act of 1907, as amended by the Act of 1913, to allow additional proof, and I take it that although he has referred to the matter as *res noviter* he was really proceeding under his statutory powers, which are without limitation of any kind, and that in doing so he was exercising a statutory discretion. While the Court would certainly interfere to correct anything done extravagantly, still the Court would not be disposed to interfere with the discretion of a Sheriff who had not appeared to act unreasonably. In these circumstances, and for that reason alone—that he was not doing anything unreasonable—I am disinclined to interfere with the Sheriff in the present instance, especially as he says that he allowed additional proof in order to prevent a miscarriage of justice. The case of *Miller* v. *Mac Fisheries* (1922 S.C. 157), which was a case in the Court of Session in which the right to have a second jury trial was being considered, was regulated by an entirely different Act of Parliament. But in that case the Court, dealing with what was strictly a matter of *res noviter*, indicated the view that it was inconceivable that anything should be excluded from the proof if to exclude it would necessarily lead to injustice being done.

Accordingly I think that we ought to affirm the Sheriff's decision allowing the additional proof.

LORD HUNTER—I take the same view. It appears to me that cases where either in the Court of Session or in the Sheriff Court additional proof will be allowed to one of the parties after proof has been led will be extremely few. In all cases where such indulgence is given to one or other of the parties special cause must be shown for the indulgence craved. At the same time I am not prepared to take the view pressed upon us by Mr Scott, that the same considerations which will weigh with the Court in refusing to allow additional proof after a verdict has been returned in a jury trial will necessarily be conclusive when we are considering with regard to a proof taken in the Sheriff Court whether a motion for additional proof should or should not be granted.

The way in which that matter stands seems to be this—Prior to the Act of 1876 the procedure in the Sheriff Court was regulated by an Act of Sederunt of 1839, the 83rd section of which provided—"When a proof is reported and an interlocutor pronounced thereon, no further proof shall be allowed except upon very weighty reasons shown. . . . When such further proof is applied for, the facts and the witnesses by

whom they are to be proved must be particularly condescended on in the petition craving the additional proof." Some of the cases to which we were referred were cases under that Act of Sederunt. But the Sheriff Courts (Scotland) Act of 1876 made what I cannot help thinking was a substantial difference in the position, because it was provided by section 28, sub-section 3, of that Act that "It shall be competent for the Sheriff where the action is before him on appeal on any point to open the record *ex proprio motu* if the record shall appear to him not to have been properly made up, or to allow further proof." So far as I can see, no qualification on the allowance of proof was made by the statute, although I do not for a moment doubt that the exercise by the Sheriff of the power so conferred upon him was a power that he had to exercise judicially. Unless good and substantial cause was shown for the allowance of further proof, I take it that the Sheriff would not have allowed such proof. Assuming that the Sheriff apparently unwisely exercised his discretion, then the Court of Session would no doubt be entitled to put him right. But that is not the case made here. When the Act of 1907 was passed an entire omission was made to give the Sheriff such powers as he had under the Act of 1876. A correction, however, was made by the Act of 1913. Under the 27th section of the 1907 Act as amended it is provided, just as in the Act of 1876, that it shall be competent for the Sheriff when the action is before him on appeal to allow further proof.

In the present case the Sheriff, before whom the case came on appeal, considered it was right and proper to allow further proof, and as your Lordship has pointed out, in exercising his discretion he said that unless he did so there might be a miscarriage of justice. He has stated clearly that having seen the averments and heard argument upon them it was essential that there should be this allowance of proof. I think it would be improper in such circumstances, unless a far stronger case was made out than was made in this case, to interfere with the discretion of the Sheriff.

LORD ANDERSON — I agree. The Act which regulates Sheriff Court procedure at the present time is that of 1907, as amended by the Act of 1913. Section 27 empowers the Sheriff on appeal to allow further proof in a case in which the proof has been closed. Now *ex facie* of the statutory provision the Sheriff would seem to have an unfettered discretion in the matter of the allowance of additional proof. But the Sheriffs in Scotland are experienced lawyers and they will only allow additional proof for good and sufficient reasons. In the present case the Sheriff says the reason which moved him to allow the additional proof which has been led was that he thought that otherwise there would be a miscarriage of justice. As I understood Mr Scott's argument, founding upon *Miller* v. *Mac Fisheries* (1922 S.C. 157), it was that additional proof should not be allowed by the Sheriff except where there was a real case of *res noviter veniens ad notitiam*, just as in the Court of Session under the provisions of the Jury Courts Act. Mr Scott maintained with some force that this was not a case of *res noviter*, but merely a case of *novi testes*. It seems to me that Mr Scott's contention is not well founded. In my opinion the Sheriff is not limited to such a case in the way of allowance of further proof, but may allow further evidence, though it is merely that of new witnesses adduced to speak to matters already spoken to. Therefore I agree with your Lordships that we should follow the course of the decisions which were alluded to, most of which were, I think, founded upon the Act of Sederunt of 1839, the effect of these being that the Court will not lightly interfere with the discretion of the Sheriff in this matter.

The LORD JUSTICE-CLERK did not hear the case.

The Court refused the appeal.

Counsel for Pursuer and Respondent—A. R. Brown. Agents—W. & J. L. Officer, W.S.

Counsel for Defender and Appellant — MacRobert, K.C.—Scott. Agents—Ronald & Ritchie, W.S.

Tuesday, July 4.

FIRST DIVISION.

[War Compensation Court at Edinburgh.

MONYPENNY *v.* LORDS COMMISSIONERS OF ADMIRALTY.

War—War Compensation Court—Jurisdiction—Compensation for Acts Done under Defence of Realm Regulations—Explosion of Mine by Naval Authorities on Claimant's Property—Injury to Farm Steading — Competency of Claim — Averments — Relevancy—Indemnity Act 1920 (10 *and* 11 *Geo. V, cap.* 48), *sec.* 2 (1) (*b*), *and Schedule, Part II—Defence of the Realm Act* 1914 (5 *Geo. V, cap.* 8), *sec.* 1 (1)—*Defence of the Realm Regulations, Reg.* 2 (*f*), *Dated 28th November* 1914.

A mine which had drifted ashore on ground forming part of a farm was exploded by Admiralty officials. The explosion caused damage to the farmhouse and steading situated some little distance away, and the proprietor claimed compensation in the War Compensation Court for the damage done. The mine was a British one, and when exploded was above the high-water mark. *Held* (recalling the deliverance of the War Compensation Court) that on a sound construction of the Indemnity Act of 1920, particularly section 2 (*b*) and the Schedule, Part II, the claim was one which the War Compensation Court was competent and had jurisdiction to entertain, and that on the facts averred it could not be dismissed as irrelevant.