

itself prudent; but, coupled with the bad reasons given for their destruction, was suspicious. And it was a very noticeable fact that there was no mention of any worrying of sheep subsequent to the destruction of the dogs. The fact being thus proved, the only question was the owners' liability. On one construction of the statute of 1863, the killing of sheep by a dog was sufficient to subject the owner to liability. [LORD KINLOCH considered it would be sufficient.] But it was said the old law remained unchanged by the statute of 1863, and required some *culpa* on the part of the owner of the dog. Even if so, there was sufficient *culpa*; for the worrying of sheep by Carmichael's dog was intimated on the 17th of May to his son, who was living in the house with him. And on this ground, therefore, the defender was liable in damages to the pursuer.

Agent for Pursuer—Wm. Mitchell, S.S.C.
Agents for Defender—D. Crawford, and J. Y. Guthrie, S.S.C.

Saturday, February 19.

ANDERSON v. TUACH & OSWALD.

Proof—Relevancy—Acquiescence—Lease—Parole—Promissory Note—Toll. A toll was let by verbal lease, and a promissory note for the rent granted by the tacksman. A dispute having arisen in regard to the subject matter of the lease, held—(1) that parole proof in regard thereto was admissible, as the promissory note did not constitute a lease; and (2) that allegations of acquiescence after special intimation were relevant.

In November 1867 the Highland Roads and Bridges Committee of the county of Inverness (the committee being part of the office of Commissioners of Supply) let to Tuach the toll dues leviable at Muirton toll-bar for the ensuing year. Tuach granted a promissory note for the rent, which was subscribed by Oswald as his cautioner. Tuach did not take possession of the toll, but continued to occupy another of which he was tacksman; and the Muirton toll was occupied by Hutchison, who had a fishing near it. Tuach made various payments to account of the promissory note, and being sued for the balance by the pursuer, who is clerk to the committee and Commissioners of Supply, alleged that it was not due, owing to the interchange of tolls having been intimated to the pursuer and acquiesced in, and for various other reasons.

The Lord Ordinary (NEAVES) allowed a proof of these averments by the following interlocutor:—

“*Edinburgh, 21st January 1870.*—The Lord Ordinary having heard counsel for the parties, and considered the closed record and whole process—before answer allows the defenders a proof of their averments on record, so far as tending to instruct that after the Drakies and Muirton toll-bars had been respectively let to James Hutchison and to the defender Tuach, an arrangement was made by which these parties exchanged their toll-bars, the said defender becoming the occupant of Drakies bar, and Hutchison the occupant of Muirton bar, and that this arrangement was intimated to the pursuer, and acquiesced in by him, and that he thereafter recognised the said defender as the occupant of Drakies, and Hutchison as the occupant of Muirton bar respectively;

and further, that the pursuer, in reference to the payments admitted or acknowledged by him to have been made to him by Hutchison, was aware that these payments were made from the proceeds of Muirton bar: Allows also to the pursuer a conjunct probation thereon; grants diligence against witnesses at the instance of both or either of the parties, and appoints the proof to be taken before the Lord Ordinary within the Parliament House, Edinburgh, on a day to be afterwards fixed.

“*Note.*—The bill sued on being for the rent of Muirton bar, and the set of that bar having not been in writing, it seems not incompetent to prove that a change of arrangements as to the bar took place. The effect of any such change upon the written obligation will remain for after consideration.”

The pursuer reclaimed.

SOLICITOR-GENERAL and MACKINTOSH, for him, argued—The promissory note granted for the rent constitutes a lease. The defenders' averments are therefore proveable only by writ or oath. Allegations of acquiescence are insufficient.

SHAND and MACDONALD in answer.

The Court adhered. The promissory note being only granted for the rent, could not constitute a lease, or change the character of the lease; and, as it was verbal, parole proof was admissible. Mere allegation of acquiescence would be insufficient; but here it was alleged that special intimation was previously given. The allegation of acquiescence was therefore not irrelevant.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defenders—Thomson, Dickson, & Shaw, W.S.

Saturday, February 19.

SPECIAL CASE—KIDSTON'S TRUSTEES.

Trust—Payment—Residue. Trustees were directed to set aside capital for payment of certain annuities, and to pay over to the truster's daughter the residue and the capital of each annuity as it fell due. By a later clause the truster directed the trustees, if his daughter died before receiving payment of the residue, to pay to any children she might leave the income of the residue; and then followed a declaration that this income was to be payable to his daughter exclusive of the *jus mariti* and right of administration of any husband she might marry. The truster was survived by his daughter, who is unmarried. Held the trustees were bound to pay over the residue, and not entitled to hold it for payment of the interest thereon to any husband the truster's daughter might marry.

By trust-disposition and settlement the late Dr Kidston conveyed his whole estate, heritable and moveable, to trustees for certain purposes. By the third purpose the trustees were directed to realise the truster's means and estate as soon as convenient, and pay from the proceeds certain annuities from capital to be set aside for that purpose. And it was declared that, as each annuity lapsed by the decease of the annuitant, the capital should become part of the residue of the trust-estate. By the fourth purpose the trustees were directed, after providing for the annuities, to pay over to the

truster's daughter "the whole rest, residue, and remainder of my said means and estate, heritable and moveable, real and personal, and that absolutely, and take her discharge therefor; and likewise, as any portion of the capital invested to meet the foresaid annuities becomes, by reason of the death of any of the annuitants, available for that purpose, in like manner to pay over such part of said capital absolutely to my said daughter, and that from time to time as the annuities lapse in manner foresaid, and until the whole capital thus invested is paid over or accounted for to my said daughter." By the fifth purpose the truster directed his trustees, if his daughter predeceased him, or survived him but died without having received payment of the whole residue of the estate, by reason of any annuitant being in the enjoyment of an annuity, and left a lawful child or children, that they should hold and retain the residue, or such part thereof as might become due and divisible subsequent to Miss Kidston's decease, for behoof of the children, and ultimately to divide the residue of the estate in a certain manner specified; and it was then "expressly provided and declared that said annual income or interest shall be payable by my trustees to my said daughter, exclusive always of the *jus mariti* and right of administration of any husband whom she may marry, and that the receipt of my said daughter, by herself alone, without the consent of such husband, shall be sufficient to my trustees therefor, the rights of such husband and that of his creditors being hereby expressly excluded and debarred."

Dr Kidston was survived by his daughter, who is unmarried; and a considerable sum remained after payment of the legacies and annuities directed. This Special Case was brought to have it settled whether a right to the fee of the residue had vested in Miss Kidston, and whether she was entitled to payment of the capital from time to time as realised; or whether the trustees were bound to hold the capital of the residuary estate during the life of Miss Kidston, and to pay the annual income or interest thereof to her, exclusive of the *jus mariti* and right of administration of any husband she might marry.

KINNEAR for the Trustees.

SPENS for Miss Kidston.

The Court held Miss Kidston was entitled to immediate payment of the residue in hand, and of the rest as it fell in.

Agents for Trustees—Morton, Whitehead, & Greig, W.S.

Agents for Miss Kidston—Neilson & Cowan, W.S.

Tuesday, February 22.

CALEDONIAN RAILWAY COMPANY v. CLYDE NAVIGATION TRUSTEES.

Harbour-Dues. Under the schedule of an Act of Parliament dues were leviable on vessels "arriving at or departing from the harbour of Glasgow." *Held* these dues were not payable by vessels not coming above a part of the river much lower down, as it was not the harbour.

This was a note of suspension and interdict presented by the Caledonian Railway Company, now proprietors of the Forth and Clyde Canal, and by certain parties, owners of vessels trading to and

from the canal, or the harbour at Bowling connected with it, to have the respondents interdicted "from charging and levying any portion of the harbour rates or dues specified in the first three sections or clauses of Schedule (G) of the Act 21 and 22 Victoria, cap. 149, upon the complainers' vessels using the river Clyde in trading to and from the Forth and Clyde Canal and Harbour at Bowling, but not arriving at or departing from the Harbour of Glasgow; or at all events to interdict, prohibit, and discharge the respondents from charging and levying such rates, or any portion thereof, upon the complainers' vessels trading to and from said canal and inner basin thereof, and using only the third or lowest stage of the Clyde Navigation, being that portion of the river extending from the mouth of the Dalmuir Burn to the Castle of Newark."

The various Acts relating to the river Clyde and Harbour of Glasgow were consolidated and amended by 21 and 22 Victoria, cap. 149. By section 97, certain rates specified in Schedule (G) annexed to the Act were imposed, "subject to the provisions of this Act," on and in respect of all vessels entering or using the river or harbour. By the 98th section certain other rates were authorised to be levied on all goods shipped or unshipped in the river or harbour. And by the 99th section the river was divided into three stages, as in a previous Act—the third or lowest stage extending from the mouth of the Dalmuir Burn to the Castle of Newark, within which limits the junction of the Forth and Clyde Canal with the river Clyde is situated. The first three clauses of Schedule (G) authorise the charging of rates upon all vessels "arriving at or departing from the harbour of Glasgow;" and the complainers, insisting on the alternative part of their prayer, maintained that dues were not exigible from their vessels coming to and from the harbour of the Forth and Clyde Canal, as these vessels could not be said to be "arriving at or departing from the harbour of Glasgow;" and as the Act imposes rates on vessels "entering or using the river" and not liable for the above rates.

The Lord Ordinary (JERVISWOODE) gave effect to this contention of the complainers, and granted the interdict.

The respondent reclaimed.

DEAN OF FACULTY and WATSON for them.

SOLICITOR-GENERAL and JOHNSTONE in answer.

The Court adhered and made the interdict permanent.

Agents for Complainers—Hope & Mackay, W.S.

Agent for Respondents—James Webster, S.S.C.

Wednesday, February 23.

ROY v. HAMILTON & CO.

Agency—Commission—Dash—Mandate—Salary—Services—Travelling Expenses. The pursuer having been taken into the defenders' service with a salary of £100 a-year "and a dash;" and, in the second year, in respect of the value of his services, his salary having been raised to £200, *held* (1) that the defenders were not entitled now arbitrarily to assert that this dash was not in addition to it; (2) that having been allowed a commission by the defenders' agent on the cargoes traded for, he was entitled to this commission subsequent to this date, though previous to the granting of an agency and mandate direct from the defen-