

was quite right. It is in this lady's power to call parties into the field by an action of transference, supposing that action to be a competent one. The trustees do not come here as pursuers in an action of divorce, they simply come to defend a judgment already obtained. If her reclaiming note be refused, the result will be that she has been divorced since the date of the Lord Ordinary's interlocutor, and so the position of the trustees is that of defending a decree of divorce already pronounced. Suppose that, instead of a reclaiming note this had been an action of reduction of a decree of divorce on the ground of some inherent nullity. The action would have to be directed against somebody, and the trustees would necessarily be called as defenders. The present proceeding is quite analogous to that; they are merely defending that which the husband gained during his own life, and I can see no reason why they should not occupy that position.

The other Judges concurred.

The Court refused the reclaiming note.

Counsel for Mrs Ritchie—J. Campbell Smith and A. J. Young. Agent—T. Lawson, S.S.C.

Counsel for Ritchie's Trustees—Balfour. Agent—John Galletly, S.S.C.

Friday, March 6.

SECOND DIVISION.

[Sheriff of Roxburghshire.

BROWN v. MURRAY AND OTHERS.

Spurious Race Card—Stopping of Sale—Police interference—Apprehension of Riot.

Certain incorrect race cards were being sold in a burgh during the races. The proprietors of the authorised cards having sought to stop the sale, and having obtained the assistance of the police superintendent,—held that the officer was justified in stopping the sale by apprehensions of a disturbance, but that he could not interfere in the interests of private persons.

This was an appeal from the Sheriff Court of Roxburghshire in an action at the instance of John Brown, stationer, Kelso, against Mrs Elizabeth Murray, Bridge Street, Kelso, George M'Call, auctioneer, Kelso, and John Moscrip, superintendent of police, Kelso, concluding for payment of the sum of £8, 6s. 8d. sterling, being damages sustained by the pursuer in consequence of the defenders having, the 2d day of October 1872, wrongfully, illegally, maliciously, and without probable cause, threatened to cause the pursuer to be apprehended and imprisoned for having sold, and if he should continue to sell, certain printed race cards, headed "Kelso Races, 1872," whereby he was wrongfully and illegally compelled and induced to discontinue his sale of the whole of the race cards then in his hands, being in number 1927 or thereby; and further, for having apprehended and conveyed to the police office in Kelso, for retailing one or more copies of the race card, which copies had been purchased from the pursuer, James Craig, residing at No. 52 Brodie's Close, Edinburgh; and having wrongfully, illegally, and maliciously, by threats of imprisonment, compelled and induced the whole or the greater number of

the persons to whom the pursuer had sold, for retail purposes, and who were retailing, copies of the card, to discontinue the sale thereof, and the pursuer to pay back to the persons so retailing them the purchase price of the whole of the copies then in their hands; by all which proceedings the defenders wrongously, illegally, maliciously, and without probable cause, prevented the pursuer from selling and disposing of his whole stock of race cards, being 2000 in number or thereby, to the loss, injury, and damage of the pursuer: and further, for £20 damages sustained by the pursuer in consequence of the defenders having wrongously, illegally, and maliciously, on several occasions upon the 2d day of October 1872, forcibly invaded and occupied the pursuer's shop, for the purpose of using, and having therein used, threats of imprisonment to the pursuer, thereby excluding his customers, and obstructing his business.

The pursuer averred that on the morning of 2d October 1872, the second day of Kelso races, he had in hand a stock of 2000 race cards, and that about eleven o'clock in the forenoon he commenced to sell the race cards in his shop, and continued the sale until he had sold to a number of persons, including James Craig, altogether 173 cards, at the price of sixpence per dozen wholesale, and one penny each for single cards. About twelve o'clock the defenders came into the shop, accompanied by Mrs Murray's two sons, and George M'Call's son, and threatened to apprehend and imprison the pursuer for having sold the race cards, and if he should continue to sell more. On two or three subsequent occasions on that day the defenders entered the shop and repeated the threats, with much abusive language, whereby the pursuer was put in fear of being apprehended and imprisoned, his fear being increased by the threats being used by and in presence of defender Moscrip, who is a member of the police force, and by his having been informed that James Craig had been already apprehended and conveyed to the police office in Kelso; and in consequence he was compelled to discontinue his sale of race cards. Further, it was alleged that the defenders apprehended and conveyed James Craig to the police office in consequence of his having sold certain of these race cards, and compelled the whole parties to whom race cards had been sold, by threats of apprehension and imprisonment, to accompany the defenders to the shop, where the pursuer was compelled, by similar threats, to repay the purchase price of the cards, and that this was done without legal warrant or authority. Finally, the pursuer stated that the defender Mrs Murray was the printer of another race card called the "Official List," applicable to the day's races, and the defender George M'Call was her manager, and that they interfered with the sale because these cards were successfully competing with the sale of the cards printed by them.

The defenders in answer stated that on the second day of the races it was reported to them that a spurious card of the races was being sold in Kelso, and that M'Call intimated the fact to the clerk of the course, who instructed him to try and get the sale stopped. That when he was about to make further inquiry into the circumstances along with the defender Moscrip, a number of the public complained that they had been imposed upon, and Craig was nearly mobbed. James Craig was asked by M'Call and Moscrip where he got the cards, and

said that he had got them from pursuer. He was asked to go down to the police office and see Mr Porter, the superintendent of police of the county, as to the selling of the cards, and he did so. The defenders averred that Craig was not compelled to go, but went of his own accord, and was not apprehended, and never was in custody. Moscrip and M'Call subsequently went, as they said, to Brown's shop to buy a card, which he refused, as he said from fear to sell. The account given by the pursuer in his evidence as to what passed between M'Call, Moscrip, and himself in the shop was as follows:—"I know the defender M'Call. He is manager for Mrs Murray (co-defender), in the 'Kelso Courier' office. He came into my shop soon after I had sold cards to several individuals. He said to me, 'you sell race cards here, don't you?' I said, 'yes.' He said, 'hand them over this way.' I said, 'not very likely; what was I to hand them over to him for?' He said, 'I dare you to sell these cards.' Superintendent Moscrip, standing at the threshold of the door, then came in, and said, 'What is all this about?' I said, 'you know well what it is about. I suppose you have taken a man away to jail for selling these cards, which you had no right to do. You ought to have come to me who supplied them, which I was quite justified in doing.' M'Call then said again, 'that he dared me to sell them.' I said, 'I could sell them.' Moscrip then took a shilling out of his pocket and laid it down on the counter, and said 'Sell me one, and I'll let you see what I'll do with you.' That threat made me a little afraid, and my wife said, 'Don't do it,' and I refused to sell a card.

On October 4th the '*Kelso Courier*,' the property of Mrs Murray, one of the defenders, contained the following paragraph:—"A spurious race card was submitted for sale in Kelso Market Place on Wednesday, the second day of the races. It had neither the colours nor the arrivals, and in fact was nothing else but a mass of confusion. The police, at the solicitation of the printer of the official card, and of several parties who had been imposed upon with it, stopped the sale of them. The person who was supplying the cards to the public was John Brown, newspaper vendor, Bridge Street, and we understand the sheet was the emanation of a Jedburgh firm. There was no printer's name attached to the card, which makes it an illegal act, and the authorities are making investigation into the affair. Several hundreds, we are sorry to learn, were passed away into the hands of unsuspecting country people."

The pursuer pleaded—" (1) The defenders having wrongously, maliciously, and without probable cause, used the said threats of apprehension and imprisonment and other interference, and thereby prevented the pursuer from selling his said stock of race cards, the defenders are liable to the pursuer as concluded for in the first conclusion of the summons. (2) The defenders having wrongously, maliciously, and without probable cause, forcibly invaded and kept possession of the pursuer's shop, and having thereby excluded his customers therefrom, and obstructed his business therein, the defenders are liable to the pursuer in loss and damage to the extent sued for under the second conclusion of the summons. (3) The pursuer not having circulated and sold a spurious card, or practised a fraud upon the public, or caused an imminent breach of the peace, but having been stopped by defenders in his legitimate sale of the

cards libelled on, he is entitled to decree in terms of the first conclusion of the summons. (4) The defenders had no right to interfere in any way between the pursuer and the public with reference to the sale of said cards."

The defenders pleaded—" (1) The pursuer having circulated and sold a spurious card, as stated in the defences, the defenders were justified in protecting the public. (2) the pursuer having committed a fraud on the public by selling a spurious card, the defenders were justified and bound to give notice thereof to the public. (3) James Craig referred to never having been threatened by the defenders, and never having been apprehended, the action *quoad* the first conclusion of the summons ought to be dismissed. (4) The defenders never having used threats to the pursuer, nor invaded his premises, or interfered with his business therein, or excluded his customers therefrom, the action *quoad* the second conclusion of the summons ought to be dismissed.

The Sheriff-Substitute (RUSSELL) pronounced the following interlocutor:—

"*Jedburgh, 16th October 1873.*—Having heard parties' procurators, and thereafter considered the closed record, productions, proof and whole process, Finds as matters of fact (1) that the defender Mrs Murray printed and published, by authority, official cards or lists of the races held at Kelso on the 1st and 2d October 1872, and that the production, No. 9 of process, is one of the cards so published by her, and contains a correct and authentic list of the races for the second day, revised by the clerk of the course; that the pursuer likewise caused to be printed for his own use, and sold, a card or list of the races for the same day, which was not official, and which was neither complete nor accurate, but contained material errors, and would necessarily tend to mislead any persons who might purchase and rely on it as to the number of the races and as to the horses which were to run in each race; that in consequence of complaints made to him by purchasers of the last named card, the defender John Moscrip, being the chief-officer of the police force for Kelso, used remonstrances with one of the persons selling the card, a man of the name of Craig, and afterwards went with him, and the witness M'Call (who was acting in the interests of Mrs Murray), to see Mr Porter, superintendent of police for the county, and afterwards to the shop of the pursuer, in order to remonstrate with him on the subject, and to induce him to discontinue the sale of the cards objected to as incorrect and misleading, but finds it not proved that any violence, or threats of violence, or of causing him to be apprehended, were used by any one of the defenders towards the pursuer, or even towards the witness Craig, in regard to the sale of these cards; (2) And with reference to the second ground of damages set forth in the summons, Finds that while the defenders M'Call and Moscrip certainly entered the pursuer's shop in order to remonstrate with him respecting the sale of the cards, they did not jointly and severally so invade or occupy his shop as to interfere to any appreciable extent with the conduct of his business therein, or so as to exclude intending purchasers therefrom: And finds, *separatim*, that the defender Mrs Murray did not, by herself, or by others acting under her authority or by her instructions, use any violence or threats of violence, or of imprisonment towards the pursuer, or invade his shop, or interfere with

the conduct of his business therein, or otherwise do any act in reference to the sale of the cards referred to, to the loss, injury, or damage of the pursuer: Therefore assolis the defenders from the whole conclusions of the summons; Finds the pursuer liable in expenses, &c.

"*Note.*—The facts of the case are so fully stated in the preceding interlocutor that little further seems to be required of the nature of explanation.

"It is certain that the race cards sold by the pursuer were incorrect, and Mr Moscrip gave it as his opinion, he says, that they ought not to be sold, as the sale of them might lead to a breach of the peace,—a result by no means improbable, as appears from the evidence of M'Call, who states that a crowd of persons was gathered round Craig, who was selling the cards, some of them demanding back the money they had paid, and that one of the crowd had taken hold of Craig. In these circumstances Moscrip and M'Call persuaded Craig to go with them to see Porter, the superintendent of the county police, who properly declined to interfere so long as the sale of the cards was confined to the burgh. Craig then led Moscrip and M'Call to the shop of the pursuer at which the cards had been purchased. It is impossible to ascertain exactly what took place in the shop, the evidence being conflicting; but it is not proved that the threats of apprehension averred in the summons were actually used either by Moscrip or M'Call.

"On the other hand, it appears that the pursuer repaid to persons who had purchased cards from him the money they had paid for them.

"The second ground on which damages are claimed is equally unmaintainable. There is no evidence to show that the pursuer suffered any appreciable loss in consequence of the obstruction of his business by the presence in his shop of M'Call and Moscrip, as averred by him. This ground of action is truly frivolous.

"It only remains to be added that if the pursuer found himself in difficulties in reference to the sale of his cards, the blame rests with himself. The cards were unauthentic, grossly inaccurate and misleading, and the sale of them naturally led to public dissatisfaction and remonstrance. Having failed to prove that the sale of these cards was unlawfully interfered with, or that his premises were unlawfully invaded by any of the defenders, to his loss or damage, he necessarily fails in his action, and must be found liable in expenses."

The pursuers appealed to the Sheriff-Dupute, (PATTISON) who, on 6th December 1873, pronounced the following interlocutor:—"The Sheriff having considered the reclaiming petition for the pursuer, answers thereto, closed record, proof, productions, and whole process,—Recalls the interlocutor appealed from: Finds as matter of fact that the pursuer procured to be printed two thousand copies of a card or list of races to be run at Kelso on 2d October 1872, for which he paid £3, 11s., and this for the purpose of then retailing the same or selling the same to hawkers to be retailed by them: Finds that he sold some of these lists or cards to three persons for the purpose of their retailing them, namely, James Craig, Elizabeth O'Connell, and a man named O'Brien: Finds that when James Craig was attempting to sell said list the defender George M'Call, the manager of the defender Murray, and acting on her behalf, and the defender John Moscrip, the superintendent of the Kelso police, acting at his request, challenged Craig for so doing,

and thereafter took him or caused him to be taken in custody to the police station at Kelso, and afterwards took him between them, or at least accompanied him while still in charge or custody of the defender Moscrip, to the pursuer's shop: Finds that in consequence of what then took place and what was then said and done by the defender M'Call, acting as aforesaid, and the defender Moscrip, the pursuer paid back to the said James Craig the purchase-price of the whole of the lists which had been sold to him by the pursuer, except one, and took back the said lists: Finds that the said James Craig, before being so taken to the police station, had not sold any copies of the said list, and that the only copy which he sold was sold to the defender Moscrip: Finds that at or about the same time the defender M'Call, acting as aforesaid, took the man O'Brien with force to the pursuer's shop, and caused or compelled the pursuer to pay back to him the price of the copies of the said lists which he had purchased from the pursuer, or the greater part of it, and that at or about the same time the pursuer was compelled to pay back to Elizabeth O'Connell the price of the copies of the said lists which she had purchased from him: Finds that the said defenders did by these means interfere with and prevent the sale by the pursuer of the copies of the list which he had obtained to be printed: Finds it sufficiently proved that the defender Moscrip in stopping the sale of the copies of the said list printed by the pursuers, in manner aforesaid, acted at the solicitation of the defender Murray, as authorised printer of the official card list of the said races: Finds in point of law that the proceedings of the defenders in so doing were wrongful and without legal authority or warrant, and that the defenders are liable to the pursuers in damages therefor: Modifies the same at the sum of £5 sterling, for which decerns against them conjunctly and severally: Finds, *quoad ultra*, the pursuer has failed to prove the averments in his record, and except to the above extent, assolis the defenders from the conclusions of the action, and decerns Finds the defenders liable to the pursuer in expenses, subject to modification.

"*Note.*—The Sheriff is of opinion that the pursuer has a good ground of action against the defenders, at least to the extent to which he has sustained it, although his case is both in the summons and record stated in terms stronger than the facts altogether warrant.

"It cannot be said in strict language that the defenders threatened to cause the pursuer to be apprehended and imprisoned for having sold, and if he should continue to sell, the copies of the printed list or card referred to. Neither can it be said, in the strictest sense, that the defenders 'apprehended James Craig, or caused him to be apprehended.' On the other hand, it is impossible to justify the conduct of the defender Moscrip, the superintendent of the police of Kelso, in acting as he did, or of the defenders in making use of his presence and authority to stop the sale of the card. That Moscrip acted at the solicitation of the defender Murray is sufficiently established both by the evidence of the witnesses and by the paragraph printed in the '*Kelso Courier*' of the 4th October, produced in evidence, of which paragraph the defender Murray, the printer and publisher of that newspaper, when examined as a witness, refused to disclose the author, or to say whether or not she was the author, and assumed the whole responsi-

bility of it. And she must therefore be held as adopting the statement therein that the police stopped the sale of the lists in question on the solicitation of the printer of the official list, *i.e.* herself.

"In regard to the pursuer Brown, there was nothing which he had done in printing the card and selling it which justified the defender Mrs Murray, or her manager M'Call, in calling in the assistance of, the police, or which warranted John Moscrip, the superintendent of police of the burgh of Kelso, to interfere in the manner in which he did. There was no disturbance or breach of the peace, or any other police offence committed or complained of in the pursuer's shop, to warrant Moscrip's interference.

"With regard to the printing of the card, that was not a police offence. The mere fact that the defender Murray was employed and authorised to print the official card of the races on the terms mentioned in the letter No. 12 of process did not give her any monopoly. It would not have entitled her to prevent any other person in Kelso from printing a list of the races, and selling it to any person who would purchase it. If such person had called his list 'official' Mrs Murray might have interfered by way of interdict against the use of the word 'official,' but if he did not use that word to designate his list the Sheriff knows of no law which would entitle Mrs Murray to prevent the printing and sale of such a list. The question, therefore, whether the list was correct or not, is not of any relevancy in this case. The pursuer did not call his list or card 'official.'

"What right, then, had Mr Moscrip to go into the pursuer's shop and interfere with the sale, and use the words which he did? He certainly had none, and he very much mistook his duty in lending himself as he did to the high-handed attempt of the defender Mrs Murray to put down the sale of the pursuer's list by police interference. It was an abuse of his office of constable which the Sheriff cannot but disapprove of. It is true that there were no actual threats of apprehension and imprisonment used to the pursuer Brown. But the avowed purpose of M'Call and Moscrip's visit to the pursuer's shop was to prevent the further sale of the lists, and to make him cancel the sales which he had already made. Now, the very appearance of the superintendent of police and M'Call upon such an errand implied a threat of other procedure. The Sheriff believes the statement of the pursuer and his wife, that when Moscrip asked the pursuer to sell him a copy of the list and took a shilling out of his pocket and laid it down on the counter, he said, "sell me one card and I will let you see what I will do with you," which words were certainly a threat *not of civil proceedings*, though they might not imply apprehension and imprisonment.

"With regard to James Craig, also, although Moscrip did not actually lay hands on him, it is undoubted that he interfered to prevent him selling the copies of the pursuer's list of the races, and that after some altercation he asked him to go to the police office. Here, again, when a police constable asks a man to go to the police station it is presumed that if he won't go voluntarily he will be taken against his will. Substantially, therefore, it was a threat of apprehension followed by something very like apprehension. Craig was marched off, first to the police station, and after-

wards to the pursuer's shop, by these two, Moscrip and M'Call, who never let him out of their sight or out of their power. James Craig himself understood that he was in charge. Most people who saw the occurrence would be of the same opinion. The Sheriff must say that he concurs with James Craig rather than with Moscrip and the defender, who shelter themselves under the technical meaning of the word 'apprehend.'

"What took place as to the woman Elizabeth O'Connell and the man O'Brien were, so far as the sale of the pursuer's list is concerned, *pars ejusdem negotii*, and cannot be received separately or as isolated from the other proceedings.

"The defender Moscrip alleges that he interfered because he apprehended 'a row' or breach of the peace,—a statement, by the way, which implies that he did use his official authority in taking Craig from the market place to the police station,—in other words, that he compelled him to go there, and took him in charge. There is no proof of anything to justify this fear of a breach of the peace. It appears that Moscrip had been previously spoken to by M'Call about what they call the 'spurious list.' There is no independent or neutral proof of anything approaching 'a row' or breach of the peace. It appears that Craig had not sold any of Brown's cards or lists when Moscrip went up to him. The only copy which he sold was to Moscrip himself afterwards. And therefore there could not be any complaints or cries such as Moscrip alleges. Besides, if Craig had sold any, and the people who purchased them were dissatisfied, that would not have justified them in committing a breach of the peace. If they did so it would have been Moscrip's duty to apprehend them. Moscrip's mere anticipation of such a thing could not justify his apprehending these people, and Craig, or either of them.

"The Sheriff therefore is of opinion that the proceedings by which the sale of the pursuer's list was stopped and the pursuer compelled to take back his lists and pay back the price which he had received for those sold, were wrongful and illegal, and that the defenders are liable to the pursuer in the damages occasioned thereby. These the Sheriff has modified to £5, which he thinks, in the whole circumstances, sufficient.

"With regard to the other elements of damage set forth in the condensation, the pursuer has not proved any considerable interruption to his business or loss ensuing therefrom, and the Sheriff cannot award him any damages on that account.

"The defenders plead that the fact of the pursuer's list being inaccurate entitles them by way of protecting the public to do what they did, and that they are therefore not liable in damages. The Sheriff cannot accede to this. The pursuer did not call his list 'official.' He printed it with the intention of its being correct. He says he copied it from the list printed in the '*Kelso Mail*,' which was his authority for believing it correct. In printing and selling his list as impliedly a correct list, therefore, there was no deception wilfully practised. It was a perfectly fair and lawful speculation. Inaccuracy might prevent its sale,—but it did not imply fraud. The pursuer's list was sold at a penny. The official list was stipulated to be sold for twopence. The interest of the defenders Murray and M'Call to stop the sale of the pursuer's list was obvious. By stopping it they caused the pursuer loss, while they secured

to themselves a profit. That would have been justifiable had it been done on sufficient grounds, and in a lawful and proper manner. But the high-handed proceedings which the defenders took did not proceed on sufficient grounds, and were not of a legal nature. They were not charged with the protection of the public interest, and cannot plead immunity from the consequences on any ground of that kind.

"The pursuer's expenses are found due, subject to modification, because to some extent the proof and record relate to those parts in which he has not succeeded. The modification, however, will not be great."

The defenders appealed to the Court of Session.

Argued for appellants—(1) The card sold by Brown and his agents was grossly incorrect, and this they were aware of. That being so, it was a fraud upon the public, and they cannot claim or obtain damages. (2) There was no printer's name on the spurious card. This was in contravention of the Act, and is also a ground on which they cannot get damages. (3) The Superintendent of Police, acting in the interest of the public (not in the interest of the other defenders), was entitled to interfere to prevent a breach of the peace or expected breach of the peace.

Argued for respondent—It is an established doctrine of English law that any person who is hindered from pursuing his trade by threats has a valid ground of action. Addison on Torts. *Keble*. [LORD JUSTICE-CLERK. If you believe that the Police Superintendent honestly thought, whether rightly or wrongly, that there was likely to be a disturbance, what was he to do? Your strong point is that he makes common cause with the private party, mixing up the police offence and the question of these cards.] We maintain that he was acting with the other defenders in preventing the sale of the cards and interposing his authority. [LORD NEAVES—If such cards were permitted to be sold, Mrs Murray would have been entitled to go on to the course and proclaim the genuineness of her own cards, and probably the spuriousness of the others, and a disturbance would result.] No one who saw the list on our cards would expect all the horses to run, for we had on them every horse that was entered. [LORD JUSTICE-CLERK. The mere fact that your list was inaccurate would never have justified Moscrip in acting as he did in this case.] *Besley v. Bignold*. [LORD JUSTICE-CLERK—The Act, you say, renders it quite legal for you to sell these cards, although you are liable in consequence to a prosecution by the Lord Advocate.] Quite so. The penalty is manifestly not due *ex delicto*, or I might be imprisoned for it. [LORD JUSTICE-CLERK—It is a strong case to put when you seek damages for being prevented doing that which, if done, would render you liable to prosecution.] Damages cannot be obtained when a person is prevented doing an illegal act. This I cannot think to be a statutory obligation; the Lord Advocate has it in his power to enforce it in cases that seem advisable. [LORD ORMIDALE—Are you perfectly certain that these cards would fall under the statute at all?] That is by no means clear from the Act.

Authorities—Addison on Torts, p. 9; *Keble*, 11 East. 574, and Holt, C.-J. there; *Besley v. Bignold*, 3 Barn. and Ad. 325.

At advising—

LORD BENHOLME—The grounds upon which the Sheriff-Substitute has proceeded in deciding this case commend themselves much more to my mind than those stated by the Sheriff Principal in the interlocutor appealed against. I do not think that the evidence itself carries out the view which the Sheriff takes. Accordingly, I am for altering the interlocutor appealed against.

LORD NEAVES—I am of the same opinion, and I think that the judgment of the Sheriff-Substitute was a correct one; that it was applicable to the case, and was improperly reversed. These parties, the defenders, Mrs Murray and Mr M'Call, are not shown to have used any violence towards any one. With regard to Moscrip, the superintendent of police, I do not say that I approve of all his conduct, but I cannot help remembering that there is much sympathy to be felt for a police officer in a burgh, and a rather peculiar burgh, where the excitement consequent on a race meeting, and the irritation produced by the discovery on the purchasers' part that the cards were incorrect, were perhaps sufficient to excite the fear of a disturbance, and to justify the course actually pursued. As to what was done to Craig, the pursuer has nothing whatever to say. The complaint was made to Moscrip, and he being of opinion that there was good reason to apprehend a breach of the peace, goes to the pursuer Brown and lays the case before him, practically asking him, "such and such is the position of matters, what do you say to it?" The pursuer thereupon, with what in the circumstances appears a very suspicious readiness, will not sell any more cards, will not in fact do anything. Why, it may fairly be asked, if he knew he was right did he not continue to sell? Therefore, on the whole, I am for altering, and would add, that even had the appeal been sustained, I should not have felt disposed to give any but Small-debt court expenses.

LORD ORMIDALE—We have here three defenders. As to the first, Mrs Murray, there is no case at all, none certainly is stated on record against her. No doubt it is said, and that is the only thing by which she is mixed up with the matter, that there is the paragraph in the *Courier*, printed in the appendix to the case, and that she is answerable for that paragraph according to her own statement, and she is so were there anything libelled upon it. As to M'Call, the next defender, he seems to have gone to the pursuer's shop and had a wrangle with him as to the sale of the cards. Was there any harm in that? He did not use any threats or do any illegal act. He seems merely to have gone to inquire into matters. Lastly there is Moscrip. Now, according to Craig, it is M'Call who first brings in Moscrip, and it would seem a little equivocal whether he ever apprehended Craig at all, and looking at the whole matter I think he did not. On the entire case I agree with the result at which your Lordships have arrived.

LORD JUSTICE-CLERK—I concur in the opinions delivered by your Lordships. I do not think that if there had not been any grounds for fearing a breach of the peace, a mere violation of privilege would have justified Moscrip in interfering. The law is very jealous of such interposition. But I am satisfied that there was ground sufficient in the circumstances for such an apprehension. The

circulation of false information at such a time and in such a place was sure to produce excitement which might lead to something more, and therefore I think Moscrip was justified in going to the pursuer and suggesting that the sale should cease.

The Court pronounced the following interlocutor:—

“Find that the pursuer has failed to prove that the defenders, or any of them, illegally interfered with the sale of the cards libelled, or impeded the ordinary business of the pursuer: Therefore sustain the appeal: Recal the judgment of the Sheriff: Affirm the judgment of the Sheriff-Substitute, and decern: Find the appellants entitled to expenses in this Court and the Inferior Court, and remit to the Auditor to tax and report.”

Counsel for Pursuer (Respondent) — Rhind.
Agent—R. Menzies, S.S.C.

Counsel for Defenders (Appellants)—Moncreiff.
Agent—D. Hunter, S.S.C.

Saturday, March 7.

SECOND DIVISION.

[Sheriff of Roxburghshire.

WOODS v. PATON.

Landlord and Tenant—Damages by Rabbits—Relevancy.

An action of damages was brought by a tenant against his landlord for injury done by rabbits to a portion of the way-going crop on a farm. The lease allowed liberty to the tenant to destroy the rabbits, and some time previously he had objected to the employment of a trapper by the landlord—held that the facts set forth were not relevant to sustain the conclusions, there being no allegations as to the introduction of or as to means taken unduly to increase the stock of rabbits on the lands.

This case came up by appeal from the Sheriff of Roxburghshire, at the instance of Alexander Wood, Denholm, and others, sons of the late Alexander Wood, sometime tenant of the farm of Littletonlees, pursuers against John Paton of Crailing, Roxburghshire, for payment of £38, 6s. 3d. The sum sued for was stated to be the price or value of a crop of barley, which was portion of the way-going crop of 1872 on the farm belonging to the pursuers, and which, they averred, was destroyed by rabbits or other game or vermin on the lands of Crailing belonging to or under the control of the defender, during May, June, July, August and September 1872, after the term of Whitsunday of that year, at which term pursuers' occupation of the farm under lease expired, and after they had been served severally with a summons of removal at the defender's instance. The sum sued for was stated to have been fixed by arbiters in a submission for the valuation of the way-going crop; and the pursuers further averred that the rabbits or game, being known to the defender to be destructive to the crop, were culpably and negligently allowed by him to destroy and injure the same after the pursuers had left the farm, and when it was consequently out of their

power to protect the same properly, or employ others to do so for them. In defence, it was maintained that there was a reservation under the lease to the landlord of the game, with the exception of the rabbits, which the tenant or his sons should have liberty to destroy, but not to allow poachers or unqualified persons to go upon the land; that the pursuers were not warned away from the land on which the way-going crop was growing until the separation of the crop from the ground; that it was the pursuers' duty to have protected and looked after their out-going crop; that about seven years previously they had objected to a person employed by the defender to kill the rabbits on his property killing the rabbits on their farm, and since then no person had been employed in this way. The damage done to the waygoing crop, if any such there existed, was not, the defender further said, caused by rabbits; also, he was not a party to the alleged award, and was not represented at the valuation of the way-going crop.

The defender pleaded in point of law—(1) That there was no obligation on him to protect the pursuers' way-going crop; (2) *separatim*, the pursuers having previously refused or objected to allow him to kill rabbits on their farm, the action ought to be dismissed; and (3) The pursuers not being warned away from the land under crop until the crop was separated from the ground, there was nothing to prevent them protecting the crop.

The Sheriff-Substitute (RUSSELL), on the 23rd October 1873, pronounced the following interlocutor:—

“*Jedburgh, 23d October 1873.*—Having considered the closed record, and heard parties' procurators, before further answer allows to the parties a proof of their respective statements, with conjunct probation: Grants diligence against witnesses and havers, and appoints a meeting with parties' procurators on the 27th instant, in order to fix a time for taking the proof.

“*Note.*—It was contended on the part of the defender that there are materials for the disposal of the case without further probation, but in this view the Sheriff-Substitute cannot concur. The phraseology in which the reservation of the game is expressed in the minute of agreement, under which the lands were let to the pursuer's father, is peculiar, and possibly admits of different interpretations; but being satisfied that a proof is necessary, the Sheriff-Substitute deems it better, at the present stage of the case, to avoid all expression of opinion as to the true import of the words employed.”

On appeal, the Sheriff-Depute (PATTISON) recalled the interlocutor appealed against and found as follows:—

“*Edinburgh, 6th December 1873.*—The Sheriff, having resumed consideration of the cause, recalls the interlocutor appealed from: Finds that there are not in the summons and record facts set forth relevant to support the conclusions of the action: Therefore assolvies the defender therefrom, and decerns: Finds the pursuers liable in expenses, of which allows an account to be lodged, and remits the same when lodged to the Auditor of Court to tax and to report.

“*Note.*—The pursuers allege that they succeeded to the farm of Littletonlees as tenant under a lease to their deceased father granted by the defender, dated 23d June 1853, which expired at Whitsunday 1872; and they conclude against the defender for