cised that discretion rightly, and that his judgment consequently ought to be affirmed.

LORD RUTHERFURD CLARK—I do not differ. The Lord Ordinary has refused the motion *in hoc statu*, and of course it will be open to the pursuer to renew her motion whenever the *status* has altered. Perhaps she may be able to induce the defender to give her a charge on the decree for expenses.

The Court adhered.

Counsel for Pursuer—Rhind—Gunn. Agent—D. Howard Smith, Solicitor.

Counsel for Defender—Moncreiff. Agent—David Hunter, S.S.C.

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*Tuesday, November* 10.

## SECOND DIVISION.

[Sheriff of Fife and Kinross.

## ROBERTSON *v.* WRIGHT.

*Property—Trespass—Interdict—Cattle Trespassing from One Side of a River to Lands on the Other Side—Reasonable Precautions—Act* 1686, *cap.* 11.

A proprietor of lands on one side of a river sought to interdict the tenant on the opposite bank "from allowing his cattle to illegally trespass across the river and graze on his lands." *Held* that it was the defender's duty to take reasonable precautions to prevent his cattle crossing the stream and doing damage to the pursuer's lands, but that it was not proved that he had failed to take reasonable precautions so as to warrant an interdict against him within the prayer of the petition.

In this action Donald Robertson, of Mayfield, Cupar, sought to interdict Andrew Muir Wright, a sheep and cattle salesman, "from allowing cattle or other bestial belonging to him, or grazing with his authority in the grass field on the lands of Wards, of which he is tenant under John Anderson, to illegally trespass on the pursuer's property, or any part thereof."

The pursuer's lands extended along the south bank of the river Eden for about a mile. There was a footpath used by the public along the pursuer's bank. The pursuer had fenced his land inside the footpath, leaving a strip of ground (along which there was a public right-of-way) from 12 to 15 feet wide between it and the edge of the river. The land on the opposite side of the Eden for about a mile, including the lands of "Wards," was leased for grazing purposes by Wright, and he was in use before fair-days in the district to place a large number of cattle there. The pursuer complained that the defender allowed cattle to illegally trespass on his lands by fording the Eden, breaking down the banks, and grazing on his side of the river. He averred that in this way they injured the bank.

The defender denied the trespass, and averred that he had men watching the cattle when they were on his lands, and that he took all reasonable precautions to prevent them straying or trespassing.

The pursuer pleaded—"The defender Wright's cattle, or those of others for whom he is responsible, having trespassed on the pursuer's property, and there being reason to apprehend they may again do so, the pursuer is entitled to have such trespass interdicted by the Court."

The defender pleaded—"(1) An interdict in the terms prayed in the petition cannot competently be granted. . . . (2) The application is incompetent, the pursuer's remedy—on the supposition that the wrong complained of has been committed—being an action of damages or the statutory remedy provided by the Act 1686, cap. 11. (6) The defender having taken all reasonable and necessary precautions to prevent his cattle trespassing on the lands of Mayfield, the application is oppressive, and interdict ought not to be granted."

On 27th October 1884 the Sheriff-Substitute (HENDERSON) refused interdict on the grounds that there was no common law obligation on the defender to fence his lands or to herd his cattle so as to keep them off the pursuer's ground (Stair, i. 3, 67), and that the pursuer's remedy was to proceed under the Act 1686, cap. 11.

On appeal the Sheriff (CRICHTON) "allowed the pursuer, if so advised, to lodge a minute containing the averments he offered to prove as to the defender having failed to take reasonable precautions to prevent his cattle straying on pursuer's lands."

In the minute, which the pursuer accordingly lodged, he stated—"The pursuer believes and avers that during the whole of defender Wright's tenancy of the said field he has wrongfully and illegally failed to take reasonable precautions, or any precautions, to prevent the cattle belonging to him, and the cattle under his charge, from straying from the said field on to the pursuer's lands, and has wrongfully and illegally failed to comply with, and has contravened, the provisions of the Act 1686, cap. 11, not only by not herding, or causing to be herded, his cattle sufficiently to prevent them trespassing on the pursuer's said lands, but by not in any respect causing them to be herded so that they might not destroy his grounds; and that the foresaid trespasses and injuries were caused by the defender Wright's said failure to take reasonable or any precautions as aforesaid, and by his said failure to observe, and contravention of, the provisions of the said statute."

On 7th February 1885 the Sheriff allowed a proof and recalled the Sheriff-Substitute's interlocutor of 27th October 1884 *in hoc statu*, and allowed the parties a proof of their respective averments.

"*Note.*— . . . The Sheriff thinks it right to state, that should it turn out that the defender has failed to comply with the provisions of the Act 1686, as stated in the minute now lodged, the Sheriff is of opinion that the pursuer, besides the remedies of poinding the strayed cattle under the statute, or suing for damages, would be entitled to interdict."

The import of the proof appears fully in the opinion of Lord Young and in the note to the Sheriff's final interlocutor.

On 11th July 1885, after proof had been led, the Sheriff recalled the Sheriff-Substitute's interlocutor of 27th October 1884, repelled the first and second pleas stated for the defender: Further, after findings in fact to the effect stated in

the foregoing narrative of the facts (and a finding to the effect that the defender had ceased to be tenant of Wards), found "(6) that the defender Wright employed men to prevent his cattle fording the Eden, and straying on the banks on pursuer's side of the river; (7) that notwithstanding this precaution some of the cattle did, on the dates specified in the record, cross the Eden and graze on the lands of Mayfield; (8) that the defender, during his tenancy of the field on the farm of Wards, took in the circumstances all reasonable precautions to prevent his cattle trespassing on the pursuer's lands: Therefore finds that the pursuer was not entitled to the interdict prayed for, and dismissed the petition.

"*Note.*—When this case was debated by counsel before the Sheriff so far back as 12th January 1885, it was stated that as the defender had at Martimas 1884 ceased to be tenant of the field on the lands of Wards, on the opposite side of the river Eden from the pursuer's lands of Mayfield, the question of interdict was not of importance. The pursuer, however, desired to have the opinion of the Sheriff on the question raised by the defender in his second plea-in-law, to the effect that the application was incompetent. This plea had been given effect to by the Sheriff-Substitute in the interlocutor of 27th October 1884, he being of opinion that the pursuer had no redress against the alleged trespass by the defender except by poinding of the cattle or by an action for damages. In the note to the interlocutor by the Sheriff of 7th February 1885 he stated the opinion, that if the facts then averred by the pursuer were proved he would be entitled to interdict. The Sheriff observes that in the case of *Boreland* v. *Potts and Others*, decided on 21st February 1885, where the circumstances were somewhat similar to the present, Lord Fraser held that interdict was a proper means of obtaining redress.

"The Sheriff has considered the proof which has now been led, and he has come to be of opinion that the pursuer would not have been entitled to interdict in the broad terms of the prayer of the petition.

"The defender had always men on the field to prevent as far as possible in the circumstances his cattle straying across the Eden on to the pursuer's lands. It is true that in consequence of the great length of the field next the river Eden, and the shallowness of the river, some of the cattle did occasionally get on to the pursuer's ground, but it appears to the Sheriff that reasonable precautions by the employment of cattle drovers were taken to prevent this, and that the interdict asked was in the circumstances uncalled for." . . .

The pursuer appealed, and argued—It had been established by the proof that the herding was insufficient, and that cattle had in consequence strayed on to his lands. There had not been then, in point of fact, reasonable precautions taken to prevent the straying. As a matter of law, then, on these facts the pursuer was entitled to the remedy of interdict.—*Turnbull* v. *Coutts*, February 23, 1809, 15 F.C.; *Macleod's Trustees* v. *Macpherson*, March 15, 1883, 10 R. 792.

The defender replied—Interdict was not the appropriate remedy, for at common law there was no obligation on the defender to fence his land. The only remedy open, then, to the pursuer was the statutory one (1686, cap. 11), or to sue for damages. But on the proof nothing like wilful inaction had been proved. Every reasonable precaution was taken by the defender to prevent straying. The action of interdict fell, then, to be dismissed.

At advising—

Lord Young delivered the opinion of the Court, as follows—This is a somewhat difficult case, and an interesting one, but its interest is diminished considerably by the fact that the defender's possession was of so temporary a nature—he having in fact ceased to possess the field a year ago. The facts are within the narrowest possible compass. The pursuer is proprietor of land bounded by the Eden. On his side of the river is a public footpath, and he fenced his land inside the footpath leaving a strip of ground from 12 to 15 feet wide between it and the edge of the river. On the other side of the river, extending along the banks for about a mile, there is a field occasionally used for cattle when being driven to market, and the defender, who is a cattle salesman, prior to Martinmas 1884 possessed the field for that purpose, putting large numbers of cattle there from time to time on the eve of fair-days. I cannot say that I think for myself that on the evidence the herding was good. It was not so. There were too few herds, or at all events if the number was sufficient they did not attend to their duties, for the cattle did in point of fact get on to the strip of ground across the river. But the Sheriff, on consideration of the whole matter, is of opinion that any neglect or omission to have seen that the herding was effectual was not here shown to have existed to any such extent as to induce him to interfere in the somewhat unhandy manner of an interdict. Some damage no doubt he said might have been done, but he did not see his way to interfere by way of interdict by prescribing the number of cattle that might safely be put on the ground at the time or the number of herds which there ought to be.

Now, I do not see my way to interfere with the Sheriff here. Interesting as the case is, in its general aspect it is a trifling one; the trespass is small and the difficulty of managing the use of the field on the other side of the river by an interdict within the terms of the prayer of the application must be manifest to anyone. On the whole matter I entirely agree with the spirit of the Sheriff's judgment, and think that the case is not one to induce us in our discretion to interfere by endeavouring to frame an interdict. I therefore propose that we approve of his findings, making a verbal alteration on his 8th finding, and finding for ourselves that "it is not proved that the defender had failed to take reasonable precautions so as to warrant an interdict against him within the prayer of the petition"—I hesitate to say that he took all reasonable precautions, because that would interfere with the other remedy which the pursuer may have.

The Court pronounced this interlocutor:—

"Find that the defender Andrew Muir Wright employed men to prevent his cattle from crossing the river Eden and straying on the banks on the pursuer's side of the river, but that notwithstanding this precaution some of the cattle did, on the days spe-

cified in the record, cross the Eden and graze on the lands of Mayfield: Find that it is not proved that the said defender failed to take reasonable precautions to prevent his cattle from trespassing on the said lands so as to warrant an interdict within the terms of the prayer of the petition: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against; of new dismiss the petition and find the defender entitled to expenses in the Inferior Court, subject to modification; find him entitled to expenses in this Court," &c.

Counsel for Pursuer — Rhind — M'Kechnie. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for Defender — Mackintosh — Ure. Agents—Dove & Lockhart, S.S.C.

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*Thursday, November* 12.

## FIRST DIVISION.

[Lord Fraser, Lord Ordinary on Exchequer Causes.

## M'INNES *v.* MUAT (SURVEYOR OF TAXES).

*Revenue—Inhabited-House-Duty—Separate Tenements—Customs and Inland Revenue Act* 1878 (41 *and* 42 *Vict. cap.* 15), *sec.* 13, *sub-secs.* 1 *and* 2—*Act* 48 *Geo. III. cap.* 55, *Schedule B, Rule* 3.

Premises consisted of a front building of two storeys and attics with a back building of one storey. The proprietor occupied the ground floor of the front building as a shop, and the first floor and attics as a dwelling-house. *Held* that the whole premises formed one tenement for the purpose of assessment for inhabited-house-duty, and that neither of the exemptions conferred by the Customs and Inland Revenue Act 1878, sec. 13, applied.

Dugald M'Innes, wine and spirit merchant, 15 Rue-End Street, Greenock, appealed to the General Commissioners against an assessment to inhabited-house-duty made upon him for the year 1884-85, amounting to £2, 2s. 6d., being inhabited-house-duty at 6d per £ on £85, the annual value of a shop, store, and dwelling-house at 15 Rue-End Street, of which he was the proprietor and occupant. In the valuation-roll of the burgh of Greenock the annual value of the shop and store was entered at £65, and the dwelling-house at £20.

The facts stated in the Case for the Court were:—"The premises in respect of which the assessment is made consist of a building of two storeys and attics fronting Rue-End Street, and a back building of one storey. At the east end of the buildings there is an open close or passage leading from Rue-End Street to a door situated at the back and bottom of a turnpike stair, by which stair common access is obtained from Arthur Street to a property of three storeys in that street also belonging to the appellant M'Innes. Between the front and back building there is a court opening from the said close or passage, a portion of which at the inner end has been covered. The ground floor of the front building is occupied by the appellant as a shop, with a front entrance from Rue-End Street and a back entrance from the said court through the portion thereof covered as aforesaid. This back entrance not only gives access to the said shop, but also affords access by a back door to another shop, also occupied by the appellant in the aforesaid property in Arthur Street belonging to him, separately entered in the valuation-roll at a rental of £16, but not included in the present assessment. Both shops have a common entrance from the said court, and have internal communication with each other under the portion of the court covered as aforesaid. The first floor and attics of the premises assessed are occupied by the appellant as a dwelling-house. Access is obtained to the first floor by an open and uncovered stair from the said court, and to the attics by an internal stair leading from the first floor. The back building is occupied as a store or cellar entered by a door from the said court. There is internal communication by a door between the said store or cellar and the shop in Arthur Street. The appellant has thus access from the shop to the house, and also to the stores or cellars, without going into the open close or passage here referred to, but there is no communication between the shop and the house except by means of the said outside stair from the court."

M'Innes contended that the assessment should be restricted to the house, the annual value of which was £20, on the ground that there was no internal communication between the house and the shop; that the shop and store were only part of one tenement, which consisted of these subjects and the shop in Arthur Street; that the said tenement was used solely for business premises, and was part of a property which was divided into and let in different tenements, and as such he was entitled to exemption from duty thereon under the Customs and Inland Revenue Act 1878, sec. 13, sub-sec. 1; also under the second sub-section of section 13 of the same Act, as the house fell under the designation of a house or tenement according to the meaning of these words in that sub-section.

The Surveyor of Taxes contended that the shop in Rue-End Street and the dwelling-house above it formed one inhabited house in the sense of the Act; that the said shop with the store or cellar behind was attached to the dwelling-house, and that these premises being entirely occupied by the appellant he was liable to the assessment under rule 3 of Schedule B, 48 Geo. III. cap. 55.

The Surveyor further maintained that the division of a dwelling-house into different tenements, when such tenements remain in the occupation of the owner, has no effect upon the liability to inhabited-house-duty, and that the premises assessed not being divided into and let in different tenements, the exemption contained in section 13, sub-sec. 1, of the Customs and Inland Act 1878 (41 Vict. cap. 15), did not apply, and neither did the exemption in sub-sec. 2, the house not being occupied solely for trade or business purposes.

The Commissioners confirmed the assessment.

M'Innes took a Case.

Argued for him—Although the house was not let out to separate tenants, yet it was structurally divided, and was capable of being