

COURT OF SESSION.

Wednesday, February 20.

SECOND DIVISION.

MACIVER.

Poor's Roll—Admission—Declaration and Certificate of Poverty—Bedridden Applicant—Remit to United Free Church Minister.

Where an applicant for admission to the poor's roll was bedridden and resided at a distance of twenty miles from the parish church, the Court remitted to a United Free Church minister who resided near the applicant's residence, and to two members of his kirk session, to take the applicant's declaration of poverty, and, if so advised, grant him a certificate of poverty in the usual form.

The Act of Sederunt of 21st December 1842 provides—section 2—"That no person shall be entitled to the benefit of the poor's roll unless he shall produce a certificate, under the hands of the minister and two elders of the parish where such poor person resides, setting forth his or her circumstances according to a formula hereto annexed—Schedule A."

Mrs Catherine MacIver, widow, residing at Croft No. 25, Upper Carloway, in the parish of Uig, Lewis, and county of Ross and Cromarty, presented the following note to the Court:—"My LORD JUSTICE-CLERK—The applicant, the said Mrs Catherine MacIver, is desirous of applying for the benefit of the poor's roll to enable her to carry on an appeal in the Court of Session in which she is the appellant, and Angus MacIver, crofter, 24 Upper Carloway, in said parish and county, her step-son, is respondent. The said applicant is a very old woman and is both blind and bedridden. It would be particularly difficult, if not impossible, to take her to the parish church to emit a declaration of poverty, especially as the said church is twenty miles distant from where she resides and a ferry has to be crossed on the way. At this time of the year it is so stormy that travelling is often impossible. There is a United Free Church minister, the Reverend Duncan Macleod, at Carloway, and quite near to where the said applicant resides. May it therefore please your Lordship to move the Court to remit to the said Reverend Duncan Macleod and to two members of his kirk session to receive the said applicant's declaration of poverty, and, if so advised, to grant her a certificate in the usual form, as required by the Act of Sederunt of 21st December 1842, or to do otherwise as to your Lordship may seem proper."

There was no opposition, and the Court, without delivering opinions, granted the prayer of the note.

Counsel for Applicant—Hart. Agent—John Grieve, W.S.

Saturday, February 23.

SECOND DIVISION.

[Sheriff-Substitute at Jedburgh.

HILSON v. JOHN SWAN & SONS,
LIMITED.

Complaint—Relevancy—Diseases of Animals Act 1894 (57 and 58 Vict. c. 57), sec. 52—Order of the Board of Agriculture 23rd June 1903—Cattle Market—Cleansing of Pens.

The Diseases of Animals Act 1894, section 52, provides that a person doing anything in contravention of an order of the Board of Agriculture shall be guilty of an offence against the Act. An Order of the Board of Agriculture dated 23rd June 1903 provided that "Any market place, highway, saleyard, or other premises in or upon which markets or sales are habitually held shall, as soon as practicable after being used for the purposes of a market or sale, and before being again so used, be cleansed and disinfected as follows:— (3) All pens, hurdles, and fittings used in connection with the market or sale shall, as soon as practicable after being used for such purpose and before being again so used, be cleansed. . . ."

A complaint set forth that the respondents "the proprietors and occupiers of The Southern Central Mart at ... on 20th September 1906 did hold a sale of animals without having since the date of their immediately preceding sale of animals at the said The Southern Central Mart on 17th September 1906, and before again so using it on said 20th September 1906, disinfected 140 unpaved pens," contrary to the said Act and Order.

Held that the complaint was irrelevant, in respect that it did not specify that the pens were used both on the 17th and on the 20th September.

Opinion (per the Lord Justice-Clerk and Lord Ardwall) that the complaint should have stated that sales were "habitually" held at the said mart.

Complaint—Title to Prosecute—Procurator-Fiscal—Diseases of Animals Act 1894.

Opinion (per the Lord Justice-Clerk and Lord Ardwall) that the title of the procurator-fiscal of a county to present a complaint as to the contravention of the Diseases of Animals Act 1894 was not expressly or impliedly excluded by the terms of the statute.

The Diseases of Animals Act 1894 enacts—Section 2—"The local authorities in this Act described shall execute and enforce this Act and every order of the Board of Agriculture so far as the same are to be executed or enforced by local authorities." Section 60—"In the application of this Act to Scotland (1) the local authority . . . shall . . . be (a) for each burgh not being a burgh to which section fourteen of the Local Government (Scotland) Act 1889 applies, the magistrates and town council . . . (b)

for each county and any burgh to which section fourteen of the Local Government (Scotland) Act 1889 applies, . . . the county council. . .” Section 52—“If any person without lawful authority or excuse, proof whereof shall lie on him, does any of the following things, he shall be guilty of an offence against this Act:—(1) if he does anything in contravention of this Act, or of an Order of the Board of Agriculture, or of a Regulation of a Local Authority.”

The Markets and Sales Order of the Board of Agriculture dated 23rd June 1903 provides—Section 2—“(1) Any market place, highway, saleyard, or other premises in or upon which markets or sales are habitually held shall, as soon as practicable after being used for the purposes of a market or sale and before being again so used, be cleansed and disinfected as follows:—(i) The premises shall be thoroughly scraped or swept, and such parts thereof as permit of the same being effectually cleansed by washing shall be so cleansed; (ii) after such cleansing the premises shall be thoroughly sprinkled with a solution of carbolic acid and limewash containing not less than five per cent. of actual carbolic or cresylic acid; (iii) all pens, hurdles, and fittings used in connection with the market or sale shall, as soon as practicable after being used for such purpose, and before being again so used, be cleansed by scraping and washing, and after such cleansing shall be thoroughly sprinkled with a solution of carbolic acid and limewash as prescribed above; and (iv) the scrapings and sweepings shall forthwith be well mixed with quicklime and be effectually removed from contact with animals.” Section 3—“The provisions of this Order, except where it is otherwise provided, shall be executed and enforced by the Local Authority.”

The Markets and Sales Order of the Board of Agriculture of 1904 provides that the Board of Agriculture may by licence modify the requirements of article 2 of the Order of 1903.

This was an appeal by way of stated case from a conviction in the Sheriff Court of Roxburgh, Berwick, and Selkirk in a complaint at the instance of Sydney Hilson, procurator-fiscal of Roxburghshire, against John Swan & Sons, Limited, cattle salesmen and auctioneers, Edinburgh. The complaint was in these terms—“That John Swan & Sons, Limited, cattle salesmen and auctioneers, 6 Clifton Terrace, Edinburgh, and having their registered office at No. 21 Hill Street, Edinburgh, the proprietors and occupiers of The Southern Central Mart at Newtown St Boswells, in the parish of Melrose and county of Roxburgh, on 20th September 1906 did hold a sale of animals without having since the date of their immediately preceding sale of animals at the said The Southern Central Mart on 17th September 1906, and before again so using it on said 20th September 1906, disinfected 140 unpaved pens by thoroughly sprinkling them with a solution of carbolic acid and limewash, contrary to the Diseases of Animals Act 1894, section 52, and to section 2 (1), sub-sections (i), (ii), and (iii) of

the Markets and Sales Order of 23rd June 1903, and to the Markets and Sales Order of 3rd February 1904 made by the Board of Agriculture (now the Board of Agriculture and Fisheries) by virtue and in exercise of the powers in them vested under the Diseases of Animals Acts 1894 to 1903 and of every other power enabling them in this behalf: Whereby the said John Swan & Sons, Limited, are guilty of an offence against the said first-mentioned Act, and are liable in terms of section 51 thereof to a fine not exceeding £20, said fine in default of payment to be recovered by arrestment and pouncing and sale in terms of the Summary Jurisdiction (Scotland) Acts 1864 and 1881. May it therefore please your Lordship to grant warrant to cite the said John Swan & Sons, Limited, to appear before you to answer to this complaint, and thereafter to convict them of the aforesaid contravention and to adjudge them to suffer the penalty provided by the said first-mentioned Act, also to order that one-half of any money penalty imposed shall be paid to the complainer in terms of section 57 of the said first-mentioned Act.”

In the Sheriff Court the respondents, before tendering a plea, stated the following objections to the complaint:—(1) That the instance was bad in respect that the Order of 1903, section 3, and the Diseases of Animals Act 1894, section 2, specially provided that the Order and Act should be enforced by the local authority, while this complaint was at the instance of the procurator-fiscal. (2) That the complaint was incompetent and irrelevant and void from want of specification, in respect that, *inter alia* (a), it was not averred in the complaint that this was a place where sales were habitually held; (b) that it was not set forth in the complaint that the pens in question were used at the sale on the 17th September and again on 20th September.

The Sheriff-Substitute (BAILLIE) repelled these objections and allowed a proof. From the evidence adduced at the proof the Sheriff-Substitute held it to be proved that the respondents were occupiers of the said Southern Central Mart, where they held their usual fortnightly sales and also certain special sales to the number of six or seven annually; that the total area of the sale-yard was $5\frac{1}{2}$ acres or thereby; that it contained a large number of pens, and in addition to the pens used at the fortnightly sales there were the 140 unpaved pens in question which were only used in connection with the special sales; that on 17th September 1906 they held a special sale of 12,000 sheep, and on 20th September 1906 another special sale when some 10,000 sheep were sold; that the respondents employed a mart keeper to attend to the cleansing of the mart; that on 18th September two men, and on 19th September three men, were engaged cleaning and disinfecting the sale-yard; that on these dates the respondents were unable, owing to the harvest, to obtain further additional labour; “and that the 140 pens occupied on the 17th were not disinfected before being occupied on 20th September aforesaid.”

The Sheriff-Substitute convicted the appellants of the contravention charged and imposed a penalty of £3.

The respondents appealed.

The questions of law for the opinion of the Court were, *inter alia*—“(1) Was the complaint maintainable at the instance of the procurator-fiscal? (2) Was it necessary for the respondent to aver specifically that this was a place where sales were habitually held, and that the pens in question were used on 17th and 20th September 1906 respectively?”

Argued for the respondents and appellants (John Swan & Son, Limited)—(1) The instance of the complaint was bad. The Diseases of Animals Act 1894, section 2, and the Order of 1903, section 3, provided that the Act and Order should be enforced by the local authority. These provisions plainly excluded the title of the procurator-fiscal. Further, it was clear also from sections 57 (5) and 64 (4) of the Act, which provided that a half or such part as the Court should think fit, of any penalty recovered under the Act should be paid to the person who proceeded for the same, and that the remainder of the penalty should be paid to the parties or authorities therein mentioned, that the procurator-fiscal was not entitled to present a complaint, because in the event of his doing so these provisions would be rendered nugatory. In the similar case of *Roberts v. The Local Authority of Inverness*, December 12, 1889, 17 R. (J.C.) 19, 27 S.L.R. 198, the complaint was at the instance of the local authority. (2) The complaint was irrelevant in respect that it did not state either that the Southern Central Mart was a place on which markets or sales were habitually held or that the pens in question were used on both the 17th and 20th September, and unless both of these statements were made there was no relevant specification of a contravention of section 2 of the Order of 1903. It was not mentioned in the complaint where the pens in question were located; and although it was true that the respondents were described as proprietors and occupiers of the Southern Central Mart and the sale of 20th September was stated to have been held there this was insufficient, because it did not follow that all the pens were used when a sale was held in the market.

Argued for the complainer and respondent (Hilson)—(1) The instance of the complaint was good. Section 3 of the Order of 1903 merely repeated the provision in section 3 of the Diseases of Animals Act 1894, and sections 35, 43 (1), and 64 showed that the procurator-fiscal was not divested of his title at common law to prosecute for offences. [*The Court intimated that no further argument on this point was required.*] (2) The statutory offence was duly set forth in the complaint. The appellants were described as owning the Southern Central Mart and the offence was libelled as having been committed in the mart; the definition of a mart was that it was a place where sales or markets were habitually held, and any further statement on this

point was therefore unnecessary. The charge was that the Orders of 1903 and 1904 were contravened, and these two Orders were therefore to be held as incorporated in the complaint. In any event the defect fell within the provision of section 5 of the Summary Procedure Act 1864 (27 and 28 Vict. cap. 53) that no objection on the ground of any defect in form or substance not changing the character of the offence should be allowed.

LORD JUSTICE-CLERK—I think that the case may be disposed of on the ground dealt with by Lord Stormonth Darling, although I should also have been prepared to find the complaint irrelevant in respect that it contains no statement that the Southern Central Mart was a place in which sales were habitually held. It was urged on behalf of the prosecutor that the word “mart” implied a place where sales were habitually held. In a question of relevancy I cannot in the least assent to that proposition. There are many markets in which sales are only held occasionally, and I consider it essential that in libelling an offence under this Order there should be a definite statement that the place where the offence is said to have been committed is a place where sales are habitually held.

On the second branch of the second question I think there can be no doubt. All that is stated in the complaint is that sales took place at the Southern Central Mart on 17th and on 20th September, and that the respondents before using the mart on 20th September failed to disinfect 140 unpaved pens. There is no statement that the pens were used on the 20th; it is not even stated that they were in use on the 17th. If the pens were not used on the 20th no offence was committed, because the Act says nothing about keeping pens in an uncleansed state unless they are in use. I think that the lack of specification on this point is a fatal defect in the complaint.

It is not necessary to deal with the other questions stated, but I may say, in regard to the first question, that I have no doubt that the procurator-fiscal had a good title to maintain the complaint.

LORD STORMONTH DARLING—I have come to the conclusion that the complaint is irrelevant upon one ground and one ground only, namely, that mentioned in the second branch of the second question of law. That question, omitting the first branch, is—“Was it necessary for the respondent to aver specifically . . . that the pens in question were used on 17th and 20th September 1906 respectively?” I think it was necessary for the respondent so to aver, and, this averment being omitted, the complaint is irrelevant. The reason I say so is this—The appellants, Messrs Swan & Sons, are charged with a contravention of the Diseases of Animals Act 1894, and also of two Orders passed by the Board of Agriculture in 1903 and 1904, which have statutory force. Of these Orders the Order of 1903 is alone material. By the second article it provides that “any market-place, highway, saleyard, or other premises, in or

upon which markets or sales are habitually held, shall, as soon as practicable after being used for the purposes of a market or sale, and before being again so used, be cleansed or disinfected as follows;" and then, after a precise description as to the manner of disinfecting and cleansing the premises, the third sub-head provides—"All pens, hurdles, and fittings used in connection with the market or sale shall, as soon as practicable after being used for such purpose, and before being again so used, be cleansed by scraping and washing, and after such cleansing shall be thoroughly sprinkled with a solution of carbolic acid and limewash, as prescribed above." Now this reference to all pens, &c., shows that it is not enough to state generally that the place where the sales were held was a mart or market, and that "it" was not disinfected between the dates of the two sales, but that it is necessary to specify the particular pens as having been used on both occasions; and the reason why such an averment is required is I think obvious. It does not follow as a matter of course that every pen is used at each sale, and if a pen is not used at the first sale there is no necessity for immediately disinfecting and sprinkling it before the second sale is held. Hence there was a good reason for the Order requiring a specification of the particular pens, and, in any case, it is sufficient that the Order does so require. A very few words would have made it clear whether the pens in question were used on both occasions, but, as there is no such averment it follows that the complaint is defective, and therefore I hold that the complaint is irrelevant for want of it, and that the conviction must be quashed. The Sheriff-Substitute may or may not have been satisfied on the proof that the pens in question were used on the occasion of both sales—his statement is not absolutely clear on this point—but in any case this would not cure the defect. The procurator-fiscal cannot say that this objection to the relevancy has been sprung upon him, for it along with other objections was duly taken at the first calling of the case on 15th November, when it would have been open to him to move for leave to amend the complaint, and it would then have been for the Sheriff to allow or refuse the amendment.

LORD ARDWALL—In regard to the first question stated for our opinion, I think there is no doubt as to the title of the procurator-fiscal to present this complaint, his title not having been expressly or impliedly excluded by the terms of the statute.

In regard to the first branch of the second question, I think it would have been desirable, to say the least, to have set forth explicitly in the complaint that the Southern Central Mart was a place in which sales were habitually held, for we know that there are marts where sales are not habitually held, and to which the provisions of the Order would not apply. But when we come to the objection raised by the second

branch of the question I have no doubt that it is well founded, and that the complaint is bad for want of specification. The gravamen of the charge against the respondents is that they used certain pens without having had them cleansed after their use on a previous occasion. Now it appears that the respondents' saleyard is of large dimensions, extending to about $5\frac{1}{2}$ acres, and that the pens in question are only used in connection with special sales held by them. One of these special sales was held on 17th September 1906, and another on 20th September. It might well be that some of the pens which were used on the 17th were not occupied on the 20th, especially in view of the fact that 2000 fewer sheep were sold on the second occasion than on the first. Accordingly, in order to libel an offence under the Act it was necessary for the complainer to state specifically in his complaint not only that the pens in question were used on the 17th but also that they were again used on the 20th, and that they had not been cleansed in the interval. This he has failed to do, and I think that the complaint is irrelevant in consequence of such failure.

With regard to the remaining questions stated, it is not necessary to express any opinion.

LORD LOW was absent.

The Court answered the second question of law by stating that it was necessary for the respondent to aver specifically that the pens in question were used on 17th and 20th September 1906 respectively, and found it unnecessary to answer the other questions.

Counsel for the Complainer and Respondent—**J. R. Christie**—**W. T. Watson**.
Agent—**A. Elliot Keay**, Solicitor.

Counsel for the Respondents and Appellants—**M'Lennan**, K.C.—**D. Anderson**.
Agents—**Dalglish, Dobbie, & Company**, S.S.C.

Saturday, March 2.

FIRST DIVISION.

[**Lord Johnston**, Ordinary.]

HUGHES v. THE THISTLE CHEMICAL COMPANY AND OTHERS.

Master and Servant—Process—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Sched. II (8)—Recorded Memorandum of Agreement for Compensation—Reduction in Court of Session—Declarator that there was no Agreement—Appeal from Deliverance on Petition to Rectify—Competency.

Employers sent for registration a memorandum of agreement for compensation under the Workmen's Compensation Act 1897. The agreement was based on certain receipts granted by the workman, his father, and his mother. The genuineness of the memo-