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ther we are to make the agent pay the witnesses, and I think it clear from the clause in the statute that we ought, as, unless you construe it in this manner, we have no power as to expenses of witnesses, and a power is given of inflicting punishment to compel witnesses to attend. The legislature enacted wisely and generally, and the Court is to find out the law of Scotland. The principle of law being established, and being confirmed by two Judges, I cannot doubt on the subject.

J. A. Murray and *Pyper*, for the Pursuer.
Cockburn and *J. H. Robertson*, for the Defender.
(Agents, *Thomas Megget*, W. S. and *M'Kenzie* and *Innes*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1830.
Jan. 8.

GRANT *v.* BARCLAY, ALLARDICE, &c.

Damages for killing two dogs.

AN action of damages against a master and servant for killing two dogs.

DEFENCE.—The dogs had been frequently alone in the grounds of the master, and near a valuable stock of sheep, and he was justified in ordering his servant to shoot them. He offered full and reasonable compensation for the dogs.

ISSUE.

"Whether, on or about the 9th day of No-
"vember 1827, on or near the muir of Ferro-
"chie, in the parish of Fetteresso, and county
"of Kincardine, the defenders, or either of
"them, did wrongfully shoot, or cause to be
"shot, a dog or dogs, the property of the pur-
"suer, to the loss, injury, and damage of the
"pursuer?"

Jeffrey, *D. F.*, opened the case, and said, This is a novel action, not from any doubt of the law, but from the nature of the defence.

The defender invited this action, and comes to try to get you to sanction an unlawful order which he published, that all dogs straying without masters would be shot. He paid a premium to his keeper for killing vermin and *dogs*. It is said that notice was given. We deny the notice; but notice of an unlawful purpose does not make it lawful. Dogs are valuable property, and must be protected.

In England, it is decided that a dog going into a neighbouring field, is not a ground for an action of trespass, unless he had done damage. Even when doing mischief, the killer is liable in damages.

Com. Dyg. 401. 11 East, 568. 2 Marshall, 584. 7 Taunt, 503 and 504. Wright *v.* Ranscott. 1 Saunders, 84.

Skene opened for the defenders.—We do

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not maintain that a person may kill a dog because it is on his property. There was no special order to kill these dogs, and the general order was reasonable, in defence of a valuable stock of sheep. In Clayton's case, the Judges differed as to the facts; but here there is no doubt of the trespass. It is said, that, if a dog is killed in self-defence, the killer is liable in the value. In the case in Saunders, the fact did not justify the killing.

Todridge *v.* Androw, Jan. 1678, 3 Br. Sup. 223.

In this country it was found that farmers might follow a fox, on enclosed ground, for the purpose of destroying him, without being guilty of a trespass, though this is not the case when following one for amusement.

Colquhoun *v.* Buchanan. 6th August 1785. Mor. 4997.

In this case the pursuer lost his dogs by his own negligence.

In an action for killing dogs, incompetent to prove the practice of killing them in a different district of the country.

A sheep-farmer, from a different part of the country, was called for the defender, and asked whether it was the practice of the country where he lived to kill dogs going at large.

Jeffrey, D. F.—This is proving law, or what, in the opinion of the witness, ought to be law.

Skene.—I wish it as an important fact, that on sheep-farms, it is found necessary to act as the defender did, and also as an answer to it being done vindictively.

LORD CHIEF COMMISSIONER.—There is one, and only one, way in which the evidence of this person can be relevant, if he were called to prove the nature of the flock, and the effect of dogs going near them. But what is asked goes to prove the practice of the part of the country where he resides as general law.

Jeffrey, in reply.—I deny that a likelihood of injury justifies killing. Even when a dog chases or bites sheep, it is only necessity will justify killing, as the proper remedy is by action against his master. The law is with me, but there is here no fact to raise a question. The value of the dogs is not what they would have sold for, as no one is entitled to force me to sell.

LORD CHIEF COMMISSIONER.—This is not a case in which I am to lay down to you any abstract doctrine of law, as it must be decided on considering coolly the facts and circumstances of the case. I am at a loss to know how such a general order as was here given can be vindicated; at the same time I do not say that a case might not be made out, on proof of the disposition of the dog, and the circumstances in which he was found, justifying his being shot.

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It is admitted that the dogs were shot by the one defender by directions from the other, so that the only questions remaining on the issue are, whether this was a wrongful act, and to the injury and damage of the pursuer. If it was, then there must be a verdict against both defenders. If a dog is known to be a sheep-killer, and is found on the property of a gentleman having sheep, I do not say it is necessary to wait till he is near his prey, annoying or worrying the sheep, before he is killed. But the case is very different when this is not the character of the dog. It is always a question of degree what entitles the person to prevent the apprehended injury.

The order in this case was general, without reference to the character of the dog, and in reason it is not fit that such an order should be given.

There was no evidence in the present case to show that the dogs were sheep-stealers, or that they were approaching to, or in the habit of approaching, the sheep; or that they were causing or risking any injury. The facts and circumstance are sufficient for the decision of this case without laying down any general law upon it. If the dogs wandered too frequently, expostulation with their master was the proper remedy.

Verdict—"For the pursuer, damages L.50."

Jeffrey and *A. M'Neill*, for the Pursuer.
Skene and *J. H. Robertson*, for the Defender.
(Agents, *John Turner*, W. S. and *Walter Duthie*, W. S.)

PRESENT.

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.
Jan. 9.

PROMOTER LIFE INSURANCE CO. *v.* BARRIE'S REPRESENTATIVES.

Finding for the defender in a reduction of a policy of insurance, on the ground of misrepresentation.

REDUCTION of a policy of insurance, on the ground of misrepresentation as to the health and habits of the person whose life was insured.

DEFENCE.—The representations were true.

ISSUE.

"Whether the Policy of Insurance No. 9 "of Process, bearing to be an Insurance by "the pursuers, of the sum of L. 1000 on the "life of the late Andrew Barrie, surgeon in "the Royal Navy, for a year, from the 29th "day of August 1827, is not the Policy of the "pursuers?"