ceedings which may be competent before the arbiter, under the clause of reference aforesaid, sustains the defences, dismisses the action, and decerns: Finds the defenders entitled to their expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report.

"*Note.*—The questions embraced within the present action have formed the subject of elaborate and anxious discussion before the Lord Ordinary, at an expense to the parties, as he fears, which is much to be regretted; but, at the same time, while the Lord Ordinary is conscious that the responsibility of this rests mainly with himself in consequence of his desire to possess adequate knowledge of the facts before he pronounced any judgment, he trusts it may be found, in any stages through which the process may hereafter pass, that the costs of the inquiry have not been altogether thrown away."

The pursuer reclaimed.

CAMPBELL SMITH for him.

MACKENZIE and KEIR in answer.

The Court held that Mr Coyne, the architect of the building, was not at first excluded from being arbiter between the parties; but, in consequence of his subsequent examination as a witness in the cause, he was disqualified from now acting as an arbiter in the matter, as contended for by the defenders in their defences to the action of reduction; and therefore that the jurisdiction of the Court was not excluded by the reference. There was nothing wrong in the architect of the building being the arbiter between the parties. Railway engineers acted notoriously in that capacity, and without saying that that was the most desirable thing, it was often a matter of necessity in the exigencies of the case. But matters were now completely changed. The parties had chosen to examine the architect as a witness. He had already expressed an opinion on the question in issue. The Court would not say that, in that respect the architect had not acted quite fairly and honestly, but it would be a mockery after what had taken place to allow him to act as an arbiter in a matter which he had prejudged. The defenders had themselves to blame for this result. On the merits of the case, which the Court thought they were in a position to decide, the pursuer was found entitled to a sum of £78 odds, on the principle of *quantum meruit*. On the matter of expenses, the Court decided (1) that the defenders should get one half of their expenses up to the date of the proof; (2) that neither party should get expenses of the proof; (3) that since the date of the Lord Ordinary's interlocutor the pursuer should have expenses, subject to modification by one-fourth.

Agents for Pursuer—Douglas & Smith, W.S.

Agents for Defenders—Macdonald & Roger, S.S.C.

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*Friday, February* 18.

## FIRST DIVISION.

### M'INTYRE *v.* CARMICHAEL.

*Sheep-worrying*—Culpa—*Evidence—Intimation*—26 *and* 27 *Vict.* c. 100. *Held*, on the evidence of one party corroborated by circumstances, that a dog had worried sheep; and that its owner was liable in damages, as intimation of the dog's worrying sheep had on a prior occasion been made to the owner's son, who resided with him.

*Question*—Whether, under 26 and 27 Vict. c. 100, the sole fact of sheep being worried by a dog is sufficient to import liability of the owner? *Opinion* (per Lord Kinloch)—That it would.

John M'Intyre, tacksman of certain lands in the island of Lismore, brought this action in the Sheriff-court of Argyllshire to have Duncan Carmichael and Peter M'Dugald, schoolmaster at Balliveolan in Lismore, found liable to him in damages for injury done to his sheep by the dogs of the defenders. The pursuer alleged that on three occasions, but especially on the 10th of May and 4th July 1868, the dogs of the defenders had killed, worried, or driven off his lands a considerable number of sheep, lambs, &c.; and he estimated the damages at £40. A proof was led, and the principal point of difficulty was the identification of the dogs. On the first occasion M'Millan, the pursuer's shepherd, saw the dogs amongst the sheep about 600 yards off, and he stated that Carmichael's dog had white on its tail. He did not however then know whose the dogs were. On the 17th May he again saw the same two dogs amongst the sheep, and having gone to the defenders' houses saw the dogs, and informed Carmichael's son of what the dogs had done. The guilt of the dogs was denied. The same thing occurred on 4th July; and on 20th July the action was raised. No blood was ever seen on the dogs; but after the occurrences alleged they were seen to be wet as if they had been out, though their owners denied it. There are various crofters, some of whose houses are nearer to the field where this occurred than the houses of the defenders, and all of whom kept dogs. Both defenders killed their dogs; and thereafter there were no cases of sheep being worried. Carmichael said he killed his dog because he had got another, to avoid taxation, and because of the story about the sheep.

The Sheriff-Substitute (HOME) assoilzied the defenders, holding the dogs had not been identified.

The Sheriff (CLEGHORN) found that on 4th July the acts alleged had taken place on 4th July.

Carmichael appealed.

SCOTT, for him, argued—The evidence is insufficient for identification of the dogs. Even if it were, it must be shewn that the dogs were addicted to worrying sheep. The statute of 1863 does not change the old law that *culpa* of the dog's owner must be shewn. Nor was any sufficient intimation made to the defender of the dogs having worried sheep. Authorities—Stair I., 9, 5; Elchies, Reparation, No. I.; Doddridge, 3 Br. Sup. 223; *Fleming* v. *Orr*, 2 Macq. 14; 26 and 27 Vict. c. 100, § 1.

BALFOUR, for the pursuer, was not called on.

The Court held that whether the act alleged to have taken place on 4th July occurred or not depended on M'Millan's testimony. There was nothing to shake his credibility; his not being able to speak anything but Gaelic made him only a bad witness. His evidence was sufficient, if corroborated by circumstances, and there were sufficient corroborating circumstances here. Even the defender's evidence was in some points against himself. The offence, though committed in daylight, was in its nature an occult one, and difficult of proof. The killing of the dogs *per se* might be in

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. Tauch 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 thereanent; 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