say, looking to the fact that the legacies here are so much a mere repetition of one another, that a slight indication that the one was intended to be the mere duplicate of the other would probably have been sufficient to displace the presumption for cumulation. But there is no such indication to be found here. In *Lady Baird Preston's* case the legacy to Miss Rennie forms a very strong contrast to the present, because the second document founded on was in these terms—"The enormous expenses into which I have been led by lawsuits having circumscribed very much my funds, I have this day altered my list of legacies." The inference to be drawn from this evidently is that the later document was intended to alter the earlier, and so here, if there had been any similar indication that Mr Muir intended to alter his legacies, I should have been very ready to adopt that view, but finding nothing of the kind, I think that the Court are shut up to the view that each writing gives a separate legacy. To hold otherwise would be to run the risk of defeating instead of giving effect to the testator's intention.

The Court answered the question put to them in the affirmative.

Counsel for First Parties (Royal Infirmary and Others) — Trayner — Thorburn. Agents—A. & G. V. Mann, S.S.C.

Counsel for Second Parties (Muir's Trustees) —D.-F. Kinnear, Q.C.—Pearson. Agents—Boyd, Macdonald, & Co., S.S.C.

Friday, December 16.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

MURRAY *v.* BROWN AND PORTEOUS.

Reparation—Damages—Sheep-Worrying — Culpa —26 *and* 27 *Vict.*, *c.* 100, *sec.* 1.

Question—Whether in an action under the Statute 26 and 27 Vict., c. 100, sec. 1, it is necessary for the pursuer to aver and prove fault on the part of the owner of the dog?

Opinion (*per* Lord Mure) that it is.

Reparation—Damages—Liability of Joint-Delinquents in solidum.

Held that the owners of two dogs which had worried sheep were liable each for the whole damage, on the ordinary rule applicable to joint-delinquents.

William Brown, farmer, Burnton, in the parish of Laurencekirk, brought an action in the Sheriff Court of Aberdeen and Kincardine against David Scott Porteous, Esq., of Lauriston, and William Murray, farmer, Stoneydale, concluding for decree against the defenders, jointly and severally, for £250 in name of damages for the loss of a number of pursuer's sheep and lambs which he alleged to have been destroyed and injured by two dogs belonging to the defenders respectively.

The pursuer averred—"(Cond. 2) During the night of Saturday the 24th or morning of Sunday the 25th of July 1880, or about that time, a dog, the property of the defender Mr Porteous, and another dog, the property of the defender Mr Murray, having been culpably and negligently allowed to go at large and unsecured in any way, invaded the pursuer's said grazings, and set upon, attacked, and worried, or otherwise ran down, destroyed, and killed, seventy lambs and nine ewes belonging to the pursuer, and so disturbed, frightened, and exhausted the remainder of the flock by pursuing them that they were greatly deteriorated in value, all to the serious loss, injury, and damage of the pursuer."

The dog for which Mr Porteous was alleged to be responsible was an old collie which belonged to the tenant of one of his farms, who having been obliged, owing to embarrassed circumstances, to vacate his farm at Whitsunday 1880, had left the dog there. Mr Porteous was informed by his steward of this fact, and being told that the dog was not troublesome, he allowed it to remain at the farm, where it was fed at his expense. Both defenders denied the guilt of their respective dogs.

Proof was led before the Sheriff-Substitute (Comrie Thomson). The case against both dogs depended mainly on the testimony of a witness named Paterson, who deponed that he saw the sheep worried by them. Some evidence was led with a view of impugning Paterson's credibility as a witness. On behalf of Murray's dog there was some evidence in support of a plea of *alibi*, the Murray family swearing that the dog slept in the house on the night in question. With regard to the pursuer's allegations of fault on the part of the owners, there was evidence to show that Mr Porteous' dog had been known to handle sheep harshly, that neither dog was in use to be tied up at nights, that the two dogs had frequently been seen in company together, sometimes at night, and that Murray's dog was of a ranging disposition. There were also witnesses who spoke to the previous good character of both dogs.

The Statute 26 and 27 Vict., c. 100 (an Act to render owners of dogs in Scotland liable in certain cases for injuries done by their dogs to sheep and cattle, 1863) provides—"Sec. 1. In any action brought against the owner of a dog for damages in consequence of injury done by such dog to any sheep or cattle, it shall not be necessary for the pursuer to prove a previous propensity in such dog to injure sheep or cattle. Sec. 2. The occupier of any house or place or premises in which any dog which has injured any sheep or cattle has been usually kept or permitted to live or remain at the time of such injury shall be liable as the owner of such dog, unless such owner can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept or permitted to live or remain in the said house or place or premises without his sanction or knowledge."

The Sheriff-Substitute (Comrie Thomson) found the case proved as against the dog belonging to Mr Porteous, but that it was not proved that the dog which accompanied it was the defender Murray's dog; assoilzied Murray accordingly, and found Porteous liable in damages, assessed at £75.

In the note appended to his interlocutor, after referring to the remarks of the Lord President in the case of *M'Intyre* v. *Carmichael*, 8 Macph. 570, quoted by Lord Shand in his opinion *infra*, he proceeded thus—"Accordingly in that case the Court varied the terms of the interlocutor under review, and in place of finding merely that the damage was caused by the defender's dogs, they also found that the damage was occasioned through the defender's fault. I do not, however, read that judgment as settling that there must be

culpa brought home to the owner of the dog that does the mischief before he can be held liable in damages. If that were a sound view of the law, my decerniture against Mr Porteous would be justified only on the footing that he ought to have made inquiry as to the past history of the dog, and to have kept him shut up when unaccompanied. There is no evidence that either Mr Porteous or his servants had any cause to suspect that the dog was of bad character. My judgment accordingly proceeds mainly upon the view that if one of the dogs is identified to belong to one of the defenders he is responsible for the damage which that dog caused. The direct evidence in the case consists of the testimony of the witness Paterson, and the important inquiry is whether there are circumstances proved sufficient to corroborate his evidence. . . . It is undoubtedly a very hard case for the defender Porteous. He had never seen the dog, and apparently it was only through good nature that he had allowed himself to assume the position of its owner. By the 2d section of the statute above referred to it is proved that the occupier of any place in which a dog which has injured any sheep or cattle has been usually kept or permitted to live or remain at the time of such injury shall be liable as the owner of said dog, unless he can prove that he was not the owner of the said dog, and that such dog was kept or permitted to live or remain in the place without his sanction or knowledge. In the present case the dog in question had belonged to a tenant of Mr Porteous who gave up his farm, leaving his dog behind him. The farm was taken into the defender's own management, and was occupied by his servants. On the defender's overseer mentioning to him that the dog had been left by the previous occupant, he consented to let it remain, and it was subsequently fed and otherwise treated as the defender's own dog. As to the amount of damages, I confess to feeling very great difficulty. There were undoubtedly two dogs engaged in the worrying, and it is impossible to say how much damage was caused by each. The principle, however, that persons jointly concerned in the perpetration of a wrongful act are liable *singuli in solidum* does not seem to me to apply to a case such as this. I am following the precedent of the case of *M'Intyre*, above quoted, in finding the defender Porteous liable only in one-half of the damage sustained by the pursuer. The expenses due by the defender Porteous to the pursuer will be subject to very substantial modification."

The pursuer having appealed, the Sheriff (Guthrie Smith) recalled the Sheriff-Substitute's interlocutor and pronounced the following findings:—"Finds it proved that on the morning of the 25th of July 1880 two dogs, one the property of the defender Murray, and the other dog for which the defender Porteous is liable under Statute 26 and 27 Vict., c. 105, as owner or occupier of the premises where he was usually permitted to live, trespassed on the grazings occupied by the pursuer adjacent to his farm of Burnton, and attacked and worried a flock of sheep, his property, to the loss, injury, and damage of the pursuer; assesses the damage at £120 sterling, for which decerns: Finds the defenders liable in expenses," &c.

In the course of his note the Sheriff observed—"... As the Sheriff-Substitute observes, the case is a hard one for Mr Porteous, who is now involved in considerable liability from his allowing a dog, as a piece of good nature, to remain about the premises when the farm was taken over from the former tenant. But as a wandering ownerless cur is the very dog likely to prove mischievous to a neighbourhood, the Act of Parliament has been carefully expressed to meet such a case as the present, it being enacted that the person who permits a dog to go about the premises is to answer for his conduct just as if he were the owner—26 and 27 Vict., c. 105, sec. 2. The claim is substantially still an action of damages, and the only change effected by the statute is, that whereas in such an action it was formerly necessary to prove the owner's knowledge that the dog was in use to kill sheep (as in *Turnbull*, Elchies, 1735), evidence to this effect is not now required. It follows that the damages cannot be separated. The trespass committed on the pursuer's flock was one wrong; the two defenders are jointly charged. If one only of the dogs had been convicted, the owner must have been held liable for the full amount of the pursuer's loss, and in like manner when both are held guilty the judgment must go against both for the entire sum—2 Sedgewick on Damages, 624. As in the case of *M'Intyre*, referred to by the Sheriff-Substitute, this point was not taken, the present decision does not seem to the contrary."

The defender Murray appealed to the Court of Session. The defender Porteous took advantage of Murray's appeal to appear there also.

Argued for Murray—(1) On the evidence the charge was not proved against his dog. The identification was incomplete, and the defence of *alibi* was well established. (2) No fault or negligence had been proved on the part of Murray. This was necessary to the pursuer's success, the statute of 1863 not relieving him of the previous common law duty to prove *culpa* on the owner's part—*Fleeming* v. *Orr*, April 3, 1855, 2 Macq. 14; *M'Intyre* v. *Carmichael*, February 18, 1870, 8 Macph. 570.

Argued for defender Porteous—(1) On the evidence the guilt of the dog for which Porteous must under section 2 of the statute be held responsible was not made out. (2) No fault or negligence on Porteous' part had been proved. The Scotch Act of 1863 did not relieve the pursuer of the necessity of establishing fault on the owner's part. The absence of such a provision was marked strongly by comparison with the corresponding clauses of the Irish (25 and 26 Vict., c. 59, 1862) and English Acts (28 and 29 Vict., c. 60, 1865), which provided that it should not be necessary for the person claiming damages in such cases "to show a previous mischievous propensity in such dog, or the owner's knowledge of such propensity, or that the injury was attributable to neglect on the part of such owner." See also *Barr* v. *M'Isaac and Kemp*, December 2, 1864, Guthrie's Select Cases in Sheriff Court, 498. (3) In any view, Mr Porteous should not be found liable in more than half the estimated damage, as two dogs had undoubtedly been engaged in the worrying. The principle of the conjunct liability of wrongdoers could not fairly be extended to the case of dogs, who cannot be held to have any mischievous intent—Inst. iv. 9—*Si quadrupes pauperiem fecisse dicatur.* In *M'Intyre* v.

Carmichael, though this point did not appear to have been taken, the Court gave effect to the principle of several liability now contended for.

Replied for the pursuer—(1) The case, though stronger against Porteous' dog, was well made out against both dogs. (2) Fault had been proved against both owners in respect of allowing their dogs to be loose at night. But even assuming otherwise, it was not necessary to the pursuer's success to establish fault. The intention of the Scotch Act, though its terms were less explicit, was obviously the same as that of the Irish and English Acts. The effect of the statute was to reverse the previous legal presumption that the dog was an animal *mansuetæ naturæ*. The establishment of the mere fact of ownership was sufficient to infer the owner's liability—Campbell on Negligence (ed. 1878), p. 53. (3) The principle of conjunct liability applied.

At advising—

Lord Shand—This is an appeal from the Sheriff of Kincardineshire in an action brought at the instance of William Brown, farmer at Burnton, and directed against Mr Scott Porteous of Lauriston and William Murray, farmer, Stoneydale. The sum concluded for was £250, and the ground on which that is claimed is thus stated in the condescendence—[*reads Cond. 2 as above*]. The Sheriff-Substitute found the case proved as against the defender Porteous—or rather as against the dog for which he is in law responsible, and so against him—and decerned against him for half the estimated amount of damage, and he also assoilzied Murray on the ground that the identification of his dog had not been completely made out. The Sheriff on review recalled this interlocutor, and found the charge proved as against both dogs, and accordingly decerned against both defenders for £120 as the amount of damages proved. There is no question raised by the defenders that these sheep and lambs were attacked as detailed in the record and proof, and damage done to the extent of £120, but each of the defenders contends that the case as against his dog is not made out. I am of opinion, after careful consideration of the evidence, that the case has been established against both the dogs.

Postponing for a little the consideration of the proof, I may notice that it was contended on behalf of the pursuer that under the Statute 26 and 27 Vict., c. 100, proof of mere ownership of the dogs identified as having worried the sheep was sufficient to infer liability against their owners. It is certainly unfortunate that the corresponding statutes applicable to England and Ireland are differently expressed from the Scotch Act, which is intermediate in point of time, but in this case I think it unnecessary to express any opinion on the argument maintained to us on this point. I adopt the expressions of the Lord President in the case of *M'Intyre* v. *Carmichael*, February 18, 1870, 8 Macph. 570. His Lordship there says—"The next question is, whether the Act 26 and 27 Vict., c. 100, introduced any change in the common law with regard to the liability of the owner of a dog in a case of this kind. I must say that I do not think that the statute deals very intelligibly with the matter. I have no doubt that the intention of the Legislature was to abrogate the law laid down by the House of Lords in the case of *Fleeming* v. *Orr*, 2 Macq. 14, and to make the owner of the dog liable on proof of its being the cause of the mischief, whether there be proof of fault on his part or not, but certainly that is not very satisfactorily declared by the statute." As a second case has now come up which raises the same point, and we have now to repeat that the words of the statute are unsatisfactory, it may be for the consideration of those in whose hands such matters are placed whether our law should not be put upon a clearer footing. But I think that in this case we may rest our judgments upon fault proved against the owners. For in the proof there is a good deal of evidence which tends to show that, looking to the history and habits of each of these dogs, they ought not to have been allowed freedom at nights to range all over the country as they liked. There is evidence to show that if collies accustomed to hunt sheep are kept without duties for some length of time, and are not secured at nights, there is great risk of their falling into habits of sheep-worrying, and there is evidence here that each of these dogs had been seen to handle sheep roughly. I think therefore that it was the duty of those who had the custody of each of these dogs to take care that they did not range about at nights as they are proved to have done.

There remains the question, whether it has been proved, as the pursuer says it has, that both dogs have been identified satisfactorily as the worryers of these sheep. There is undoubtedly a great distinction in the proof between them, and I do not hesitate to say that I think the case is clearer and stronger against Porteous' dog; but though the case is stronger against one dog than the other, I am of opinion that the guilt of both has been established—[*His Lordship then entered into a detailed review of the evidence*].

The only other point was that upon joint and several liability, and upon that, as the case is one of wrong and fault, I think the legal result is that the liability is joint and several.

I therefore propose that we should affirm the Sheriff's judgment, altering some of his findings however, as he appears to go a good deal upon the fact of ownership, and inserting a distinct finding of fault on the part of the owner of each of the two dogs.

Lord Mure—I agree with the Sheriff-Substitute in thinking that the charge as against the defender Murray's dog has not been made out. On the general question, whether it is necessary under the statute of 1863 to prove *culpa*, I think it is still necessary to allege fault on the part of the owner of the dog, and that that has been here alleged and sufficiently proved—[*His Lordship then analysed the evidence in detail, holding in result that the identification of Murray's dog was incomplete, and that the defence of* alibi *was well founded*].

Lord President—I have no doubt about the liability of the defender Porteous. But as regards Murray I think there is great difficulty. Notwithstanding, however, the great force of the observations made by my brother Lord Mure, I have come to the conclusion that the pursuer has proved that Murray's dog also was engaged in the sheep-worrying in question. I quite agree with the observation that our interlocutor ought to include a finding of fault. There is a distinct

averment of fault and negligence on the record, and I think it has been sufficiently proved, and we must therefore add a finding to that effect. I think it is unnecessary to decide the question whether under the statute it is necessary to prove *culpa* on the part of the owner of a dog which worries sheep.

His Lordship intimated that Lord Deas, who was absent at advising, concurred with the majority of the Court.

The Lords pronounced this interlocutor:—

"Find that on the morning of 25th July 1880, two dogs, one the property of the defender Murray, and the other dog, for which the defender Porteous is responsible under the Statute 26 and 27 Vict., c. 100, as owner or occupier of the premises where he was usually permitted to live, trespassed on the grazings occupied by the pursuer adjacent to his farm of Burnton, and attacked and worried a flock of sheep, his property, to the loss, injury, and damage of the pursuer: Find that the trespass and attack on the said sheep were owing to the fault of the defenders respectively in culpably and negligently allowing the said dogs to go at large during the night; assess the damage at £120; decern against the defenders jointly and severally for the said sum; find the defenders liable in expenses in both Courts," &c.

Counsel for Defender (Appellant) Murray—Macdonald, Q.C.—Murray. Agent—D. Lister Shand, W.S.

Counsel for Defender Porteous—Lord Advocate (Balfour, Q.C.)—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Pursuer (Respondent)—Robertson—Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 17.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

BAIRD & COMPANY *v.* M'MONAGLE.

Master and Servant—Reparation—Negligence—Contributory Negligence—Servant going on with Work in face of a Seen Danger—Act 35 *and* 36 *Vict. cap.* 76 (*Mines (Coal) Regulation Act* 1872), *sec.* 52, *et seq.*—43 *and* 44 *Vict.* (*Employers Liability Act* 1880), *cap.* 42, *secs.* 1 *and* 2.

A miner who observed the roof of a part of the pit close to which he had to pass to be insecure, gave warning of it to the overs-man, who told him to go on working and he would get it propped. The oversman had it propped insufficiently and the miner went on working, though not satisfied with the way in which it had been propped. Shortly thereafter the roof fell in at the place of the state of which the miner had complained, and he was injured. *Held* that he was not barred from recovering damages by the fact that he had gone on working in the knowledge of the danger.

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) provides by sec. 1—"Where after the commencement of this Act (1st January 1881) personal injury is caused to a workman" (sub-sec. 1) "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. Section 2 provides—"A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say—(sub-sec. 1) under sub-sec. 1 of sec. 1, unless the defect arose from or had not been . . . remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways . . . were in proper condition. . . . (Sub-sec. 3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

The Mines (Coal) Regulation Act 1872 (35 and 36 Vict. cap. 76) by sec. 52 provides that there shall be established in every mine to which that Act applies such special rules for the conduct and guidance of the persons acting in the management of the mine as may appear best calculated to prevent dangerous accidents and to provide for the safety and proper discipline of the persons employed in or about the mine, and by the same section statutory force is given to such special rules when duly published and approved by the Secretary of State. Section 57 provides for the posting up at a conspicuous place at or near the mine of such special rules, and for the furnishing of a copy to each person employed in the mine who may apply for a copy.

This was an action raised by Conn M'Monagle, miner in Uddingston, against William Baird & Company, coal and iron masters. The pursuer concluded for £50 as damages for bodily injury sustained by him through the fall of a stone from the roof in the defenders' Bothwell Castle Pit, from the fault of the defenders.

The mine was one to which the Mines (Coal) Regulation 1872 Act applies, and the pursuer knew and had a copy of the Special Rules. He deponed—"I noticed something wrong with the roof in the morning, and went to the oversman and the roadsman about it—John Kirkpatrick and Osborne. Kirkpatrick told me to work away, and that he would get a man and get it propped up. The roadsman came afterwards and put up two props and one across, and went away leaving the rest undone. I did not think it was propped all right, but I worked away, expecting them to come back and get it finished. I had drawn sixteen hutches by this time, taking them in and out. I was going with the sixteenth when the fall took place. . . . I knew that the place was dangerous whenever I saw it. It was my place to warn