

Scotland, and living with her as his wife, principally in a house belonging to herself, for several years, and then throwing her over because he wanted to marry another woman. I cannot conceive any circumstances in which a man was more bound in honour and justice to provide for the woman who had been his companion. I think the settlement ought to be sustained. I confess I am surprised at the opposition which has been made to the claim. I quite assent to the rule of law of which several cases that were cited to us are illustrations. But they are no more than illustrations, and I agree with Lord Deas [in *Young v. Johnson and Wright, supra*] in thinking that some of the cases go beyond illustration of the rule and apply the rule of law with a sternness that we should not follow. Now the rule is this. If a bond is given for a sum to be paid as an inducement to vice, or for a *turpis causa*, then the bond is not maintainable in law. It may be stated even in the bond itself that that was the reason for which it was granted. Or it may appear otherwise than in the narrative of the bond, and if the Court is satisfied that it was granted as an inducement to vice, the result is the same, *i.e.*, the bond is reducible. But there is a distinction where the bond is granted to make reparation to the woman with whom the granter of the bond has been living, when the intention of granting the bond is to put her beyond the reach of destitution after the connection between them has ceased. That is not within the rule of law. The case of *Hamilton* is a peculiar one. I do not say whether in a case in which the same circumstances arose I should follow the same course as in that case, although I rather think I should not. In that case the man was living in adultery with a married woman, and there was also living in the house a daughter of the woman. Sir James Hamilton granted an heritable bond of annuity to the woman with whom he was living, and a like bond to the daughter. I suppose—but it is not clear—the adulterer's connection continued after the bond was granted until the death of the granter. An action was brought against his executors for the amount in the bond, and it was not sustained so far as the instance of the woman with whom he had committed adultery went, but it was sustained so far as regarded the bond granted to her daughter. But as I said before, I think I would decline to follow the authority of that case, even if the same circumstances should arise. But in this case I have no hesitation in deciding that in my opinion the bond ought to be sustained on the simple consideration that in granting it the man was merely fulfilling the ordinary obligations of honour and justice, and that with the approbation of the law, as not to have made some provision for this woman would have been brutal conduct.

LORD CRAIGHILL—I think that the appellant has not been able to show any case against the judgment that is to be pronounced. I think so, because, in the first place, he has not shown any *turpis causa*, and in the second place, because the circumstances are such as to make it a matter of obligation that such a bond should be granted.

LORD RUTHERFURD CLARK—I am of the same opinion. I do not think that this case comes within the rule laid down in the case of *Hamilton*

or the doctrine deduced by Professor Bell from that case. There is no doubt that if the woman acted in *bona fides* as to her marriage—and I see no allegation that she did not so act—she might think that a marriage that was legal in Norway was legal all the world over, and therefore might regard herself as a married woman in Scotland. But I state no opinion as regards that point.

In regard to the case of *Hamilton*, I can only say, to use the words of an eminent legal writer, that it “deserves to be considered.”

The Court pronounced this interlocutor :—

“Dismiss the appeal: Affirm the judgment of the Sheriff-Substitute appealed against, except in so far as neither party is entitled to expenses: Of new ordain the appellant William Couper Tait to rank the respondent Mrs Isabella M'Diarmid or Webster in terms of her claim: Find the respondent Mrs Isabella M'Diarmid or Webster entitled to expenses in the Inferior Court and in this Court: Remit,” &c.

Counsel for Appellant—Comrie Thomson—Salvesen. Agent—James Skinner, S.S.C.

Counsel for Respondent—Guthrie Smith—Shennan. Agents—Gill & Pringle, W.S.

Wednesday, November 17.

SECOND DIVISION.

[Sheriff of Inverness.

MACLEOD AND ANOTHER *v.* DAVIDSON
AND OTHERS.

Property—Interdict—Encroachment.

The assertion judicially by a party, of rights which are subsequently admitted not to exist, is such a threatened encroachment on the rights of the party against whom they are asserted as will justify the granting of interdict in his favour against the person so asserting them.

Where the owner of a field sought interdict against encroachment thereon by certain persons, and they stated on record a legal right to encroach thereon, but subsequently, after maintaining such right before the Sheriff, admitted in an appeal that it did not exist—*held* that the fact of its being put forward was a good ground for the granting of an interdict.

This was an action by Alexander MacLeod, tenant of the farm of Scuddaburgh under William Fraser, Esq., of Kilmuir, in the island of Skye (concurring pursuer), his landlord, for interdict against the Rev. James M. Davidson, minister of the *quoad sacra* parish of Stenscholl, Skye, and tenant of two lots of the township of Garrafada, Kilmuir, and a number of other persons, also tenants of lots in the same township. The petition was brought in the Sheriff Court of Inverness, Elgin, and Nairn at Portree, and asked the Court to interdict the defenders, or others acting for them, “from encroaching upon or in any way interfering with that field or park of land called Staffin Park, extending to 42 acres or

thereby," belonging to the pursuer William Fraser, and tenanted from him by the pursuer Alexander MacLeod. The pursuers also asked interdict against the defenders interfering with the fences of the park, and an order to ordain them to remove such bestial as they had put thereon, and to leave it void and redd.

Separate defences, the nature of which appears below, were lodged for Davidson and for the other defenders.

A proof was led. It appeared that the defenders were all owners of cattle, and that these cattle were tended by a herd employed by the township. The park in dispute was let by Major Fraser to MacLeod, and lay along the bank of a stream. Owing to the nature of the banks it was by far the most suitable place for watering cattle, and after a conference between the pursuers and the people in the township, it was arranged in July 1884 that the township cattle, 88 in all, might be driven through the park and watered, but should not be allowed to remain or graze in the park. Shortly prior thereto a body of persons unknown had broken down, violently and illegally, the wall of the park for a considerable distance, and it still remained broken down at the date of this action, it having in consequence of the disturbed state of the district been found impossible to get it mended. The township cattle were not, according to the permission, prevented from grazing in the park, but were allowed to graze notwithstanding the pursuer's remonstrances, and the park was eaten bare, and this action of interdict was brought. The pursuers averred, but failed to prove, that the defenders were guilty of the destruction of the wall.

The defender Mr Davidson, while denying that his cattle had been in the park longer than was necessary to pass through to the water, maintained that the park had formerly formed part of the ground on which his predecessor in the benefice had enjoyed the right of grazing as part of the common grazings, and that it had been taken away and no compensation given for it.

He pleaded—“(3) The park in question having formed part of the land on which the minister of Stenscholl was entitled to exercise the right of grazing, and the proprietor having illegally excluded the minister from said lands, he is not entitled to interdict against the present defender. (4) The pursuers, or those in whose right they are, having deprived the minister of Stenscholl of the right of grazing in Staffin Park, without making any provision in lieu thereof, or without his consent, or that of the Presbytery, they are not entitled to prevent the present defender, as incumbent of the charge, from exercising the right of which his predecessor was improperly deprived.” He also pleaded (6) that the pursuers' statements as to him being unfounded in fact, he should be assolizied.

The other defenders stated that the park in question had always formed part of the township grazings till they had a few years before given it up to Major Fraser, and that the effect of what had since been arranged between them was a restoration of their former rights. Their contentions fully appear from the following pleas which they stated:—“(3) The defenders having received the permission of the proprietor of the park in question, who is also their own landlord, to take their

cattle through the park, and that permission having become a condition of their tenancy, and a part of their rights as tenants of the concurring pursuer, and the permission never having been withdrawn, or the right thereby conferred exceeded, the pursuers are not now entitled to the interdict craved for. (4) The permission given by the pursuer William Fraser to the defenders, his tenants, to water their cattle in, and to use the path through the field in question, being a part of the defenders' rights as his tenants, and being a restoration of part of their original rights as tenants of Garrafada, the pursuers are not now entitled to deprive them thereof by summary action of interdict.”

The Sheriff-Substitute (SPEIRS) assolizied Davidson but interdicted the other defenders as craved.

On appeal the Sheriff (IVORX) found that Davidson had not established the right he claimed, that the other defenders had failed to implement the condition on which they were allowed to let their cattle pass through the park, and openly allowed them to graze in it. He therefore repelled the defences and gave decree of interdict against all the defenders.

They appealed to the Second Division, and argued—Major Fraser had given the tenants of the Garrafada township permission to drive their cattle through Staffin Park to the water, and that was all they did. It was impossible to prevent a herd of cattle going through a park from taking a bite of the grass, but that was all that had happened, and such a slight infringement of the loose verbal permission granted them did not entitle the pursuers to interdict. They did not now contend that they had any right to graze in the park, or to enter upon it except to pass through it for watering as Major Fraser had allowed them to do. This left only the question whether they had acted in violation of the pursuers' right, and on that question the Sheriff was wrong.

Their counsel put in this minute —“That they never claimed, and did not now claim, any right of grazing their cattle on the park in question called Staffin Park, or of entering upon the said park, except in virtue of and for the purposes specified in the permission granted by the pursuer Major Fraser on 5th July 1884, and that they will use due care to prevent their cattle grazing or encroaching on the park in question.”

Counsel however did not ask to have the claims stated upon record struck out.

The respondents' counsel was not called on.

At advising—

LORD JUSTICE-CLERK—I think in this case we should adhere to the Sheriff's interlocutor. It appears that Major Fraser is proprietor of a field which seems to be a strip of ground along a river, the grazings of which field are let, and that the tenants of Garrafada have the right of putting their cattle to graze on the ground on the other side of the fence which bounds the field. A question arose as to the right of the tenants of Garrafada to get to the water, and in going there to pass over Major Fraser's ground. One night the wall which separated this ground from that used by the tenants was knocked down violently and illegally—it is not known by whom—but in the morning sixty yards of it, I think, were found levelled with the ground. In consequence of the encroachments that followed, a meeting and con-

versation took place, and Major Fraser admitted that it was reasonable that the tenants should have access to the water, and he allowed them to drive their cattle over his ground for that purpose, but stipulated that they should not allow the cattle to trespass elsewhere. He wanted to build up the wall again, and contracted with the witness Lamont to have that done, but influences which we can guess at prevented this, and the wall is not built up yet, and is still open to the incursions of the Garrafada tenants' cattle. In these circumstances Major Fraser brought an action for interdict, and the minister of the parish and others were called as defenders.

The rioters who broke down the wall have not been discovered, neither do I think it proved that the individuals who are called as defenders were participants in the destruction of the wall. But what we do find on the record is, that the defenders claim to have rights in this pasturage which are inconsistent with the case of the pursuer upon record. If these pleas remained upon record I think that would be quite enough to warrant interdict being granted. It is matter of everyday practice that a threatened charge may be suspended or a threatened encroachment prevented by means of an interdict. There is no better ground for granting interdict than that an encroachment has been threatened, and there can be no doubt that such an encroachment has been threatened on the part of the minister and the other defenders here. The Sheriff-Substitute has assozied Mr Davidson, but the Sheriff has directed interdict against him as well as against the other defenders.

On these grounds I think the judgment of the Sheriff ought to be supported. Mr Davidson's contention is quite clear. He says that the park in question formed part of the land on which he and his predecessors, as ministers of Stenscholl, were entitled to exercise the right of grazing, and that he had been illegally excluded from these lands. The other defenders say that the permission given by Major Fraser was merely a restoration of a right which they had formerly possessed. We are now told that all these pleas have been abandoned, but they were threats of encroachment and that was enough to justify interdict.

Without going into the evidence in the case, much of which is unpleasant, I think we ought to sustain the judgment of the Sheriff.

LORD YOUNG—I am of the same opinion, and only wish to say this, that I agree with what your Lordship has said that the rights which are asserted on record and the pleas which are standing there being admittedly unfounded, the rule of law is that the complainer is entitled to interdict. That is not an absolute rule, and the respondents may be able to show that interdict is not necessary—that is to say, although the position of the complainer may be a perfectly right one in his claim to have another party restrained by interdict, the whole circumstances of the case may be such that the Court may be of opinion that the protection sought may be obtained some other way than by interdict. I think it quite right here that the complainer should have his legal right to protection by interdict affirmed, and the claim of the other parties negatived, and so far as I see there are no circumstances to induce the Court to refuse the interdict asked.

LORD CRAIGHILL—I am of the same opinion. It has been proved that the pursuer, the owner of this place Staffin Park, and his tenant the other pursuer, who was in occupation of the park, were entitled to some protection, and in the circumstances, as these have been established by the proof, I think it reasonable that interdict should be granted. It has been established that the only persons who were interested in the destruction of the dyke were the tenants of Garrafada, and that immediately after the destruction of the dyke they sent their cattle into Staffin Park. Whether or not in these circumstances it has been proved who were the persons who actually pulled down the dyke, is it not reasonable for the pursuers to have the protection which they ask? I think it is.

In regard to the use made of the permission given by Major Fraser on the 5th July, this permission was used as nothing but a pretext to allow the cattle to graze in the park when they were allowed merely to drive them through to the water, and it is necessary that the pursuers should be protected in this way. I agree with what your Lordship has said, and also with the grounds of judgment.

LORD RUTHERFURD CLARK—I am of the same opinion.

The Court pronounced this interlocutor:—

“Recal the interlocutors of the Sheriff-Substitute of 28th and 30th December 1885, and the interlocutor of the Sheriff of 23d February last: Find that the pursuer Major William Fraser is proprietor, and the pursuer Alexander MacLeod is tenant, of the field or park described in the prayer of the petition, and that the defenders assert right to graze their cattle in the said field, and to lead them through it to water in the Kilmartin river: Find that the rights so asserted are unfounded: Therefore repel the defences; interdict, prohibit, and restrain the defenders in terms of the prayer of the petition: Ordain the defenders within fourteen days from the date of this decree to remove such bestial as they have upon the said field, and to have the field made void and redd, that the pursuers, or others in their name, may enter thereto and peaceably possess and enjoy the same in time coming; and failing the defenders removing the said bestial, Grant warrant to the pursuers to carry the foregoing order into effect,” &c.

Counsel for Pursuers—D.-F. Mackintosh, Q.C.—Rutherford Clark. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for Defenders—Scott—Rhind. Agent—William Officer, S.S.C.

Thursday, November 18.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

SMITH v. RIDDELL, *et e contra*.

Agreements and Contracts—Conditional Agreement—Family Arrangement.

A farmer, who was childless and advanced in years, arranged with his niece's husband