circumstances. From the terms of that interlocutor it is plain to my mind that parties at the first diet joined issue in regard to the expenses claimed by the pursuer, and that a defence must have been stated and discussed.

In my opinion that is sufficient to distinguish the present from the case of *Montgomery*. I am aware that during the advising two of my brethren expressed views which, although not necessary for the decision of the case, would, if well-founded, lead to my deciding this appeal in favour of the respondent. Founding on the language of the 13th section of the Small Debt Act of 1837 they indicated an opinion that if the pursuer or defender is absent, whether at the first or any subsequent diet, and a decree is pronounced in respect of absence, the absent party is entitled to a rehearing under section 16.

With all respect I do not agree in this view. It is not to be readily assumed that after witnesses have been examined and other procedure has taken place one of the parties is entitled to have the proceedings begun *de novo* on consigning expenses and a sum of ten shillings. Now, I think that the 16th section of the statute refers to proper decrees in absence where no procedure amounting to litiscontestation has previously taken place. The 13th section on the other hand deals primarily with cases where "the parties shall appear," and although it contains a provision that if one of the parties is not personally present when judgment is pronounced a charge of ten free days shall be given, a provision which may apply equally where the decree is one in absence or one by default, I do not think it is to be inferred that in the Small Debt Court there can be no such thing as a decree by default as distinguished from a decree in absence.

I therefore think that in this case the decree of absolvitor was a decree by default and not one in absence, and that the pursuer was not entitled to be reponed against it. I therefore sustain the appeal, and modify the expenses to three guineas.

Counsel for the Appellant—Crabb Watt. Agents—Robertson & Blair, Writers, Glasgow.

Counsel for the Respondent—Ralston. Agent—Howie.

Friday, March 13.

(Before the Lord Justice-Clerk, Lord M'Laren, Lord Trayner, Lord Wellwood, and Lord Kyllachy.)

TODRICK *v.* WILSON.

Justiciary Cases—Prevention of Cruelty to Animals (Scotland) Act 1850 (13 *and* 14 *Vict. c.* 92), *sec.* 1—*Dishorning Cattle.*

In a prosecution for cruelty to animals committed in the dishorning of cattle it was proved that the operation was customary over a large district of Scotland, that its object was the benefit of cattle-feeding in courts, that it accomplished that object more effectually than any other means, and that it had been skilfully performed. *Held* that no offence had been committed under the statute.

This was a case brought in the Sheriff Court of the Lothians and Peebles at Haddington under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of Thomas Todrick, Procurator-Fiscal of Court, against George Wilson, cattle dealer, Cupar-Fife. The complaint set forth that the respondent did, on the 20th day of November 1889, within a cattle court at the farm steading of North Berwick Abbey, in the parish of North Berwick and county of Haddington, cruelly ill-treat, abuse, or torture, or cause or procure to be cruelly ill-treated, abused, or tortured, 32 or thereby oxen, by sawing off with a saw or other instrument the horns of the said 32 oxen close to their skulls, whereby the said 32 oxen were subjected to great, unnecessary, and cruel pain and suffering, and were thus cruelly ill-treated, abused, or tortured, or caused or procured to be cruelly ill-treated, abused, or tortured by the said respondent, contrary to the Act 13 and 14 Vict. c. 92, particularly section 1 thereof, whereby the said respondent was liable to the penalties particularly set forth in the said complaint. The Sheriff-Substitute assoilzied the respondent. A case was taken for the opinion of the High Court of Justiciary. The facts held proved by the Sheriff-Substitute were as follows:—"In consequence of complaints by the cattleman in charge of the animals, to the effect that they were preventing each other from taking their food and injuring each other, it was resolved to dishorn them." The cattle were mostly eighteen months old. They were dishorned by the respondent, with the assistance of four of the farm servants at the Abbey farm, at the time and place libelled. Each animal was drawn by a rope to a pillar in the cattle court. Its legs were secured by straps connected by a rope, and the animal was cast upon its side upon a bed of straw. The horns were then sawn off by the respondent as close to the skull as possible with a fine tenor saw. The skin at the base of the horn was in some cases cut with a knife after the saw had passed through the horn, and skin remained attached to it, and in some cases

also the skin was cut through before sawing in order to clear a way for the saw. The operation caused a considerable amount of bleeding, some blood squirting out from the wound when the horn was cut off. The respondent immediately after the operation applied a balsam to the wound. The sawing off of the horns occupied a few seconds in the case of each horn, and caused considerable pain. The sinuses of the head in each case were exposed, and atmospheric air was drawn into the sinuses and expelled therefrom at each movement of respiration. Some of the animals commenced to eat immediately after the operation, but they had not been fed that morning; others did not eat. After four or five days, there was considerable inflammation and consequent discharge of pus in the case of some of the animals. Some were unable to eat, being in a state of fever, and evidently suffering considerable pain. With the exception of applying a little balsam, as above stated, no treatment followed the operation. The animals operated upon were afterwards more manageable than before, and ultimately they put on flesh and throve well. It was further proved that in England and Wales, in Berwickshire and Roxburghshire, total dishorning was not practised unless for surgical purposes, and that in East Lothian total dishorning was only carried out to a limited extent. It was proved that the total dishorning of cattle was regularly practised by farmers and breeders of cattle in Fifeshire, Perthshire, Forfarshire, Kinross-shire, and Kincardineshire. The object for which the operation was performed was the safety of the animals feeding in cattle courts, which frequently suffered painful and serious injuries from goring and butting, the weaker animals being often prevented from feeding by the stronger, when the horns were allowed to remain. It was further proved that the respondent had considerable experience in dishorning cattle, and that the operation on the cattle in question had been performed with skill and in the usual manner.

Under remit from the High Court the Sheriff-Substitute reported that "he was of opinion at the trial of the cause that it was proved that when cattle fed in courts are troublesome, total dishorning, which effectually prevents them from injuring each other, is for the benefit of the cattle. That other ways of dealing with troublesome animals, viz., by fastening wooden balls to the tips of the horn, and partial dishorning, do not so effectually prevent cattle from injuring each other."

The question of law for the opinion of the High Court of Justiciary was—"Do the facts, as above set forth, infer a contravention of the Act 13 and 14 Vict. cap. 92?"

The Prevention of Cruelty to Animals (Scotland) Act 1850 (13 and 14 Vict cap. 92), sec. 1, provides, that "Whereas it is expedient to prevent wanton cruelty in the treatment of horses, cattle, and other domestic animals in Scotland, be it therefore enacted . . . that any person who shall from and after the passing of this Act cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal shall be guilty of an offence."

Argued for the appellant—The operation fell within the words of the statute. There was the infliction of great pain for an object which could have been attained by other and painless means. The Sheriff-Substitute had found that these other means were not so effectual, but the difference in result was entirely out of proportion to the pain inflicted. There was therefore not an adequate and reasonable object in view—*Ford* v. *Wylie*, 23 Q.B.D. 283; *Brady* v. *M'Argle*, 14 L.R., Ir. App. 174.

Argued for the respondent—The object of the statute was to prevent "wanton cruelty." This appeared not only from the use of these words in the preamble, but also from the enacting words of section 1. The operation in question was not of that nature. It was conducted so as to reduce pain to a minimum. It was for the benefit of the cattle. It was for the commercial benefit of the owner—*Lewis* v. *Fermor*, 18 Q.B.D. 532; *Renton* v. *Wilson*, June 1, 1888, 2 White, 43; *Callaghan* v. *Society for Prevention of Cruelty to Animals*, 16 L.R., Ir. App. 325. *Ford* v. *Wylie* could not rule the present case. In that case the Court upon the evidence before them came to findings in fact, different from those at which the Sheriff-Substitute had arrived.

At advising—

Lord M'Laren—This is an appeal in the form of a case stated under the Summary Prosecutions Appeals Act, from a sentence of absolvitor pronounced by the Sheriff-Substitute at Haddington in a complaint at the instance of the Procurator-Fiscal of the County, charging the respondent with contravention of the Act 13 and 14 Vict. c. 92, passed for the prevention of cruelty to animals. In a previous complaint against the same respondent—*Renton* v. *Wilson*—it was determined that the dishorning of cattle performed in circumstances set forth in the case did not amount to a contravention of the statute. In a case which afterwards came before the High Court of Justice in England, a Court consisting of the Lord Chief-Justice and Mr Justice Hawkins, they came to a contrary conclusion on the facts laid before them, and the case which we are now to decide was instituted, as I understand, with the view of having the question of the legality of dishorning considered by a Court differently constituted, and consisting of a greater number of Judges. I may observe in the outset that the question put to us is not very well devised for the purpose of obtaining a decision on any general proposition, because the terms of the question are, Do the facts, as above set forth, infer a contravention of the statute? It is necessary however that we should endeavour to generalise these facts—so far as the Sheriff's findings enable us to do so—in order that we may compare the act done with the description of acts prohibited by the

statute. The operation of dishorning, as performed by the respondent on 32 cattle, is described somewhat minutely in the case, and it is not necessary that I should occupy time by reading the description. The operation consists in sawing off the horns with a fine saw close to the sinuses of the head, and it is evident that in this case the operation was not only very painful during the few seconds which sufficed for its performance, but that it was the cause of prolonged pain and distress to the animals until their wounds were healed. So much is found by the Sheriff-Substitute, who also finds that the respondent had considerable experience in dishorning cattle, and that the operation on the cattle in question was performed with skill and in the usual manner.

It may also be taken as proved that dishorning makes the cattle more valuable to the owner. This might perhaps be assumed, as it is not to be supposed that stock farmers would be in the habit of inflicting torture on their cattle without motive. But it is found in the case that the animals after being operated upon became more manageable than before, and that eventually they put on flesh and throve well.

It appeared to us when we first considered the case, that the findings of the Sheriff-Substitute were not sufficiently specific as to two points, which are indicated in our interlocutor of 14th July remitting the case to the Sheriff-Substitute for further findings on these points. The report of the Sheriff-Substitute is quite explicit on both the points referred, and is in these terms—[*His Lordship read the report*]. The facts being as stated, we have now to consider whether the dishorning of cattle, when performed with skill and in the usual manner, for the purpose and with the effect of preventing the animals from injuring one another, is an offence under the statute.

It is plain enough that the restraining effect of the statute does not amount to a universal prohibition of operations which cause pain to the lower animals, irrespective of the motives of the operator and of the objects sought to be attained. The cases of surgical operations, and the pain and punishment inflicted in the training of domestic animals are instances to the contrary, and it appears from the preamble to the Scottish Statute that the thing which the Legislature meant to prevent was the infliction of "wanton cruelty"—that is, as I understand, purposeless cruelty. I am far from saying that legislation may not very properly be directed against the infliction of pain for purposes which are inadequate, though not unlawful or immoral; and we know, for example, that the performance of painful experiments on animals for the mere instruction of the operator is prohibited absolutely, while the performance of such experiments for the purposes of proper scientific research is subjected to certain restrictions which I do not stop to specify. What we have here to consider is not the question of the expediency of prohibiting dishorning of cattle, but whether the practice is prohibited, as being included in the general enacting words of the statute libelled. The offence prohibited is the cruelly ill-treating, abusing, or torturing of animals. These words must be construed according to the ordinary use of language, because they contain nothing that is technical. Comparing them with the facts as found by the Sheriff-Substitute, I am of opinion—an opinion in which I believe your Lordships are agreed—that the language of the statute is not in fair and just construction applicable to the case of the operation of dishorning when performed with skill, and for the legitimate purpose of preventing the cattle from injuring one another. It is of course open to anyone to say that total dishorning is unnecessary for the purpose in view, and that partial dishorning, or some mechanical expedient—such as tipping the horns—might be found to answer the purpose equally well. If I were sitting as a juryman with the evidence of experts before me, it is possible that I might take this view: I should certainly have a leaning towards the view that dishorning as practised by sawing off the horns close to the skull is not necessary. But sitting as a member of the Court of Appeal, I must take the facts as they are found by the Sheriff, because under the constitution of this court we cannot review a sentence of any kind on the merits, but only on questions of law arising on the facts as stated in the case.

In the argument addressed to us at the rehearing on the amended case, all the authorities bearing on the interpretation of the Cruelty to Animals Acts were brought before us; but with the exception of the English case of *Ford* v. *Wylie*, and the case of *Renton* v. *Wilson* in this court, I cannot say that the previous decisions throw much light on this question.

I am sure that on a question of statute law all your Lordships are disposed to give the greatest weight to the decision of a co-ordinate English Court, and I have certainly no desire to criticise in any way the opinions of the very eminent Judges by whom the case of *Ford* v. *Wylie* was decided. Indeed, I am not sure that I should dissent from the reasoning or the conclusions embodied in these opinions as applicable to the case before the English Court, because I observe that the learned Judges had agreed, on the evidence before them, in holding it proved that the operation of dishorning was neither necessary nor customary in England. In their view of the facts, dishorning is treated as a purely experimental proceeding, not productive of benefit to the owners of the animals, and a cause of needless and therefore cruel suffering to the animals themselves. I need hardly repeat that the facts as laid before us point to a very different conclusion, and while our decision is necessarily different in its legal consequences from the decision of the Supreme Court in England, it does not appear to me that there is any fundamental difference in the principles of interpretation which have been applied by the Courts of England and Scotland to the construction of this statute. These principles are very fully

expounded in the opinion delivered by Lord Young in the case of *Renton*, in which I concurred at the time, and I may be allowed to add that I see no reason to recede from anything said by myself on that occasion. I of course assume, in accordance with the Sheriff-Substitute's findings, that the dishorning was performed with skill and without the infliction of unnecessary pain. Under these conditions, I am of opinion that the respondent has not rendered himself liable to a criminal prosecution, and that the judgment of the Sheriff-Substitute ought to be affirmed.

LORD TRAYNER—The question submitted for our judgment is one of importance, and I have carefully considered the argument addressed to us as well as the whole cases cited by the parties. I am of opinion that the case of *Renton* v. *Wilson* was rightly decided, and concur in the opinions expressed by Lords Young and M'Laren in deciding that case. I do not think it necessary to go over the various cases in which conflicting decisions on a similar question have been pronounced in England and Ireland, but content myself with saying that the reasons given for the judgment in *Ford* v. *Wylie* (so far as not based upon the particular facts there found proved) seem to me inadequate and inconclusive, while the judgment in *Lewis* v. *Fermor* appears on the other hand to be well founded both in sense and law. I am therefore of opinion that the question before us should be answered in the negative.

LORD WELLWOOD—What we are asked by the appellant to decide practically is, that the dishorning of cattle is in all circumstances illegal and an offence against the Act 13 and 14 Vict. cap. 92, section 1. The question which is submitted to us is one of law and not of fact. We must take the facts from the Sheriff-Substitute, and we can only decide in favour of the appellant if the facts so found infer in our opinion a contravention of the Act.

Now, the Sheriff-Substitute finds that the operation was skilfully performed; that it effectually prevents the animals from injuring each other, and is for the benefit of the cattle; and that other remedies suggested do not so effectually prevent cattle from injuring each other. In this state of the facts he has acquitted the respondent.

Now, in order to a conviction of cruelty in the sense of the Act, I think there must be evidence of wanton cruelty in the sense of pain inflicted without reasonable and adequate cause. I do not think that mere *bona fides* on the part of the operator is of itself a sufficient defence, but if there is *bona fides*, and if the object is reasonable, a broad view of the matter must be taken, and the question of adequacy or inadequacy should not depend on the individual views of the Judge as to propriety of the act or operation. In order to justify conviction the inadequacy of the object must, I think, be such as would lead any reasonable and humane man capable of weighing evidence to hold that the pain inflicted was out of all proportion to the object in view. On the facts stated I cannot hold that the Sheriff-Substitute's decision is wrong; on the contrary, I think it is right.

As to the previous cases, I agree with Lord Trayner in preferring the grounds of judgment in *Renton* v. *Wilson* and the English case of *Lewis* v. *Fermor* to the judgment of the Court in the later case of *Ford* v. *Wylie*. In the last-named case the facts on which the Justices of Norfolk dismissed the information were practically the same as those in the present case, and if those facts were correctly found by them, I am humbly of opinion that their decision (which was reversed by the Queen's Bench Division) was right. It appears from the report that the learned Judges in the Queen's Bench Division took a different view of the evidence from that on which the Justices proceeded, but even on the facts as set forth in the opinions of the Judges, I should not have been prepared to agree in the result at which they arrived.

I therefore think that we should answer the question put to us in the negative.

LORD KYLLACHY—I agree with all your Lordships that the facts of this case as now found by the Sheriff-Substitute leave really no room for doubt as to the propriety of the Sheriff's judgment. He finds as matter of fact—and we must assume, correctly—that this operation of which we have heard so much is not merely useful in the interest of the owner of the cattle, but is also useful and even necessary in the interest of the beasts themselves. In these circumstances it is plainly impossible to affirm that the operation is one which comes within the scope of the statute, unless indeed it is to be held—which nobody has suggested—that the statutory offence is committed by the mere infliction of pain.

I therefore concur in the previous judgment of this Court in the case of *Renton* v. *Wilson*, and I am unable to agree with the judgment of the Court of Queen's Bench in the case of *Ford* v. *Wylie*. At the same time, with respect to the general question of the purpose and constitution of the statute, I should like to say this—that I am not disposed to quarrel with the definition or rather test proposed in the English judgment, according to which the question always is, whether the pain inflicted on the animal is inflicted for an adequate object, and is no more than necessary for that object. I confess that as an abstract statement that strikes me as correct enough. The objection to it is that for practical purposes it does not much advance the argument. Because the question always is, Who is to judge of the adequacy of the object? Is the reference to be to the mind and judgment of the accused, or to the opinion of the Judge who tries the case, or to that of the Court of Appeal, or to the general sense of the community as indicated for example by established custom. You must, in short, determine what is to be your standard of adequacy. And it is at that point—as it seems to me—that the real

difficulty exists. And it is a difficulty which does not perhaps admit of being quite satisfactorily solved. Each case must largely depend on its own circumstances. For my own part, all that I should be disposed to say is that the statute is not contravened by the infliction of pain for an object which a man of ordinary humanity might reasonably consider adequate, the operation, whatever it is, being performed in a proper manner, and with a due regard to the infliction of as little pain as possible. It is not, however, necessary for the purposes of the present case to lay down any general principle. It is enough that upon the facts as found by the Sheriff-Substitute, and upon any construction of the statute which has been or can be reasonably suggested, the operation here complained of was not within the statute.

LORD JUSTICE-CLERK—As your Lordships are aware, I have no vote in deciding this case unless there should be an equality of opinion among your Lordships, when I have a casting vote in order to make a majority. Your Lordships are all agreed as to what the judgment in this case should be, and there is therefore no duty upon me to express my opinion, but in the circumstances I may be allowed to say that the view I take of the case is entirely in consonance with the opinions which your Lordships have expressed. Where pain is inflicted, it may be inflicted as deliberate and wanton cruelty for no purpose at all except for the infliction of pain. There may also be the infliction of pain for another purpose altogether, not of cruelty, but still so inflicted as to amount to an offence against the statute. It is quite plain that the verdict in such a case must be a verdict of opinion, not of opinion whether certain facts are proved, but whether certain facts being proved, cruelty in the sense of the statute had been established as matter of opinion. I agree in the opinions expressed by your Lordships, that that can only be decided by the opinion, the reasonable opinion, of ordinary humane men, or of a jury, if such a question could come before a jury on the facts.

It appears to me that where we are dealing with a case of pain undoubtedly inflicted not for a wanton and cruel purpose but for the ultimate purpose of advantage to the owner of an animal, or to the animal itself, or to both, three elements must be present to free the party from a charge of cruelty under the Act. In the first place, the purpose must be reasonable; in the second place, the mode of carrying out the purpose must be a reasonable mode; and in the third place, I think the manner of carrying out the operation under that mode must be reasonable. But all these questions are questions of fact. As regards the first, the fact that it possibly improved the value of the animal itself—improved its marketable value—may be a reasonable purpose. I think that prevention of injury to other animals with which it is enclosed may also be a reasonable purpose. As regards the mode adopted of carrying it out, I do not think there is any suggestion that the mode of carrying it out in this case was not as skilful as could be, and therefore reasonable, if the act of removing horns was to be effected. Lastly, as to the manner of carrying it out in this particular case, I think that not only was the mode adopted skilful, but the mode in which it was carried out by the operator was skilful, and therefore it appears to me we have all the three elements, one of which must be negatived before a case of infliction of pain could be shown for which there could be a conviction. I think the findings of the Sheriff-Substitute amount to this, that the accused here did with skill in the usual manner an operation customary, and which has not been pronounced illegal, but on the contrary, has been pronounced legal by the Supreme Court in Scotland.

I therefore entirely concur in thinking that the acquittal by the Sheriff-Substitute on the facts he found proved was right.

The Court dismissed the appeal.

Counsel for the Appellant — Wallace — Chisholm. Agent—James Auldjo Jamieson, W.S.

Counsel for the Respondent — Comrie Thomson — Orr. Agent — W. J. Lewis, S.S.C.

COURT OF SESSION.

Tuesday, March 17.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

MUIRDEN *v.* COWIE.

Personal or Real—General Disposition—Annuity Declared to be a Real Burden—Completion of Title by Notarial Instrument—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 19, *and Schedule L.*

In a general settlement a testator conveyed to his son his whole estate, heritable and moveable, "but declaring that this disposition and conveyance is granted and is to be accepted of under the following burdens, . . . which are hereby declared to be real burdens on the estate hereby conveyed." These burdens included, *inter alia*, an annuity of £35 in favour of the disponee's sister. The disponee completed his title by notarial instruments (in terms of Schedule L, sec. 19, of the Titles to Land Consolidation Act 1868), each of which, after setting forth the conveyance in the general disposition, and describing the several subjects in which the disponer was infeft, narrated at length the clause declaring the said annuity to be a real burden. These notarial instruments were duly recorded.