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In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Wednesday, October 16.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

FIFE *v.* ORR.

Reparation — Wrongous Interdict — Too Wide Interdict—Periculo petentis.

In an action of damages for the wrongful use of interdict the pursuer averred that in consequence of interim interdict obtained against him at the defender's instance, he had been prevented from carrying out a sale by public auction on the date advertised, and had by the postponement of the sale sustained loss and damage. He further averred that in his application for interim interdict the defender had stated that a number of the articles exposed for sale were his property, which were afterwards found to belong to the pursuer.

Held that the action was relevant, the application for interdict being unwarranted in so far as it related to the pursuer's property, and the remedy being granted *periculo petentis*.

On 8th November 1894 Mr Robert Orr, thread manufacturer, Crofthead, Neilston, agreed to purchase the lands and works known as Lintmill Bleach-works from the trustees of the late Mr Heys, proprietors of the heritable subjects, and from Mr William Fife, writer, Glasgow, liquidator for the firm of Messrs Muir & Company, who had been in occupation of the premises as bleachers and dyers.

By the terms of the articles of roup the subjects sold to Mr Orr included "the whole fixed and moveable machinery situated on the several subjects hereby exposed to sale, and particularly (but without prejudice to said generality) the whole machinery and other effects specified in the inventory hereto annexed." . . .

Subsequent to the agreement, but before Mr Orr had entered on the subjects, Mr Fife advertised for sale by auction on 21st November the "bleachers and dyers' moveable plant, drysalteries and dye stuffs, spring vans, weighing machines, tools," and other articles, to the number of 266, included in the catalogue of the sale which was printed and issued to the public.

Upon this advertisement being brought to his knowledge Mr Orr presented a petition in the Sheriff Court at Renfrew against Mr Fife and the auctioneers who were to conduct the sale, craving the Court "to interdict the defenders . . . from selling, carrying away, or in any way interfering with or disposing of within Lintmill, Neilston, by public auction or otherwise, the bleachers and dyers' moveable plant and other effects belonging to the pursuer, and advertised for sale by the defenders without the pursuer's consent or concurrence . . . and to grant interim interdict."

He averred—"(Cond. 7) The defenders have also included in said advertisement a considerable amount of machinery which is covered by the pursuer's purchase, and is now his property. The machinery referred

to embraces a large number of the entries in the catalogue herewith produced, and more particularly from and after the entry marked No. 130." . . .

On 19th November the Sheriff-Substitute granted interim interdict as craved, with the effect that the sale was postponed pending further consideration of the interdict. In the subsequent proceedings a reference was made to an arbiter, in terms of the articles of roup, in order to determine which of the articles enumerated in the catalogue of the sale were included in the subjects previously sold to Mr Orr. The arbiter held that out of the 266 articles, 9 were the property of Mr Orr, and the interdict was ultimately recalled, on 24th December, except as to these articles.

The present action was raised by Mr Fife against Mr Orr in the Sheriff Court of Renfrew craving for payment to him of a sum of £230 in respect of damage which he alleged he had sustained through the defender's wrongous use of interdict.

The pursuer, after narrating the facts above set forth, averred—"(Cond. 12) The interdict obtained by the defender in the circumstances before mentioned was illegal and unwarrantable in so far as it related to articles belonging to the pursuer, in which the defender had no right and interest."

On 14th May 1895 the Sheriff-Substitute pronounced an interlocutor allowing the parties a proof before answer.

The defender appealed to the Sheriff, who on 20th June 1895 dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

The defender appealed for jury trial, under section 40 of the Judicature Act 1825, to the First Division of the Court of Session.

Argued for appellant — The averments were irrelevant, and did not support a plea for damages. The appellant was entitled to have the *status quo* preserved till the questions at issue were determined, and the only method of securing this was to apply for interim interdict. There had been nothing unreasonable in his action; at most he had taken too high a view of his rights, while the respondent had admittedly taken too low a view. If there was *culpa* on the part of the appellant, there was also *culpa* on the part of the respondent in including in the sale articles belonging to the appellant. It was a startling proposition to say that anyone who obtained interim interdict should be found liable in damages if it were set aside. In *Moir* v. *Hunter*, 11 S. 32, this doctrine was expressly repudiated, though the allegations in that case were stronger than here. A person obtaining interim interdict should not be found liable in damages if he has acted fairly and reasonably. There were special grounds, such as did not exist in this case, for giving damages in the case of *Glasgow and City District Railway Company* v. *Glasgow Coal Exchange Company*, 12 R. 1287.

Argued for respondent — The interdict craved was too wide. Although the condescendence may have shown that it was intended only to apply to the appellant's property, the prayer itself was so framed as to have the effect of stopping the entire sale. It was quite enough to show that wrongous interdict had been obtained — that is, that articles of which the sale had been interdicted did not belong to the appellant. There was no occasion to aver malice or want of probable cause. This was what distinguished the remedy of interdict from that of diligence, where such averments must be made in order to found an action for damages — *Wolthekker* v. *Northern Agricultural Company*, 1 Macph. 211, as contrasted with *Kennedy* v. *Police Commissioners of Fort-William*, 5 R. 302; and *Robinson* v. *North British Railway Company*, 2 Macph. 841. That was an intelligible distinction, for the persons whose goods were attached by diligence had a remedy against the inconvenience caused thereby, by finding caution, but in the case of interdict there was no such remedy. The present case was distinguished from that of *Moir* v. *Hunter*, because there the person applying for interdict only retained what was already in his possession; here, on the other hand, the person interdicted was in possession. The case was accordingly ruled by *Kennedy* v. *Police Commissioners of Fort-William*.

No application for trial of the case by a jury was made on behalf either of the appellant or of the respondent.

At advising—

LORD PRESIDENT — In my opinion the pursuer's action is relevantly laid. He alleges that a sale of certain articles which he had exposed for roup were interdicted at the instance of the defender, and he claims damages because the ground on which the sale was postponed was unfounded in fact, certain articles claimed by the defender as belonging to him having turned out not to belong to him at all, but to belong to the pursuer, who was exposing them to sale. He says also that damage resulted. I think that a case so stated is one to be tried upon the legal footing set out in the issue settled by Lord Rutherfurd Clark in the case which was cited in debate—*Kennedy* v. *Police Commissioners of Fort-William*.

But neither party in the present instance asked for jury trial although the appeal is taken under the 40th section of the Judicature Act. And I desire to note the absence of any claim for jury trial on either side, because that leaves it to the Court to consider whether any reason has been relevantly stated for bringing this action into the Court of Session, not for trial by jury, but for trial by proof. I have not heard anything which marks out this case as one in which there should be any departure from the ordinary routine of an action in the Sheriff Court.

I have not entered with any elaboration into the questions of law which have been argued at the bar. It seems to be perfectly clear that the contention of Mr Campbell that liability for damages is to be determined by the fairness and reasonableness

of the person who applies for interdict is not borne out by the authorities. If any person asks interdict on statements of fact made by him to the judge, he does so at his own peril, and the mere circumstance that he may have been misled or sanguine will not justify him in a question with the person whom he has injured. The argument in fact on the side of Mr Campbell's client proceeded upon a disregard of the plain distinction drawn between a case of interdict and a case of diligence, and that being a matter settled by decision, I think that the case does not present any legal difficulty.

LORD M'LAREN—The ground of action averred by the pursuer is that he has suffered damage by reason of the defenders having wrongously obtained interim interdict, with the result of interfering with the sale of his goods. *Prima facie* such an averment constitutes a relevant case for damages. There is a very well-settled distinction between rights of action for wrongous use of interdict and for wrongous use of personal diligence. It is unnecessary to enter into the grounds of this distinction, further than to say that interdict is an extraordinary remedy almost always productive of great inconvenience, and therefore our law does not allow a party to get interim interdict as a matter of course, but only on sufficient representations made to the judge, on which alone, in the case of interim interdict, the judge acts. Where interdict is improperly obtained no distinction can be taken between the cases when it is based on positive false statements, and when it is obtained by the suppression or non-disclosure of facts which are necessary to enable the judge to determine the question of the expediency of granting interim interdict. Here, according to the averments of the pursuer, the judge was misled, with the result that he granted interdict against the sale of the aggregate of all the articles constituting the stock of a trader, when, if the facts had been properly set before him he would have limited the application of the interdict to certain articles which were the complainer's property. It is true that there are expressions in the condescendence annexed to the petition for interdict which indicate that the applicant was not entitled in whole to the remedy he asked, all the goods not being his property, but this was not brought forward by him in such a prominent way as to attract the attention of the Sheriff, and, in particular, the complainer did not directly inform the Sheriff that he did not desire interdict to the full extent. According, therefore, to the pursuer's averments the defender obtained an interdict to which, in fact as it now appears, he was not entitled. I agree that these averments constitute a case for damages, such as is proper to be disposed of by the Sheriff.

LORD ADAM and LORD KINNEAR concurred.

The Court dismissed the appeal, and remitted the case to the Sheriff for proof.

Counsel for the Pursuer and Respondent —H. Johnston—Salvesen. Agent—F. J. Martin, W.S.

Counsel for the Defender and Appellant — Vary Campbell — Craigie. Agents — Miller & Murray, S.S.C.

Wednesday, October 16.

FIRST DIVISION.

HOOD AND ANOTHER *v.* GORDON.

Election Law—Member of Parliament—Petition against Election — Process — Amendment—Corrupt Practices Act 1883 (46 *and* 47 *Vict. cap.* 51), *sec.* 40 (2), *sec.* 68 (4).

The Corrupt Practices Prevention Act 1883 provides in sec. 40 (2) that "any election petition presented within the time limited by the Parliamentary Elections Act 1868, may, for the purpose of questioning the return or the election upon an allegation of an illegal practice, be amended with the leave of the High Court." . . . .

Held (1) that an application for leave to amend an election petition under this section fell to be made to one of the Divisions of the Court, and not to the Election Judges; (2) that on leave to amend the petition being granted, it was unnecessary to remit the petition to the Election Judges, inasmuch as it was already before them except as to questions which were statutorily outside their jurisdiction and within that of the Inner House.

On 19th August 1895 James Hood and Andrew Gillanders, qualified voters at the election of a Member of Parliament for the combined counties of Elgin and Nairn, presented an election petition under the Parliamentary Elections Act 1868 against John Edward Gordon, the elected candidate, praying to have it declared that the election and return of the respondent was null and void. The petitioners averred that the election had been brought about by bribery, treating, and undue influence.

On September 6th, after a date had been fixed by the Election Judges for the trial of the petition, the petitioners presented to the First Division a supplementary petition, in which they prayed to be permitted to amend the said petition by adding thereto certain statements. The prayer also proceeded to crave that the election should be pronounced null and void. The statements proposed to be added consisted of averments of contraventions by the respondent and his agents of various provisions of the Corrupt Practices Prevention Act 1883 in relation to the return and declaration respecting election expenses.

By section 5 of the Parliamentary Elections Act 1868 (31 and 32 Vict. cap. 125) it is provided—"From and after the next dissolution of Parliament a petition complaining of an undue return or undue election of a member to serve in Parliament for a county