Lang's case the parents had been separated, and the children were aged 7 and 5. *Nicolson's* was quite a unique case. In *Steuart's* case there was a family of eight children all living with the father, and the child whose custody was asked by him was 4 years old. In *Symington's* case (H. of L., March 18, 1875, 2 Rettie 41), the Lord Chancellor lays it down that in such a question the Court must attend to the interest of the children above all.

At advising—

LORD PRESIDENT—The question is, Whether in the circumstances of this case the father or the mother is entitled to the custody of their only child? The child is 8 months old, and has been weaned. It was not born in the father's house, the mother having left his house while in an advanced stage of pregnancy, and gone to live with her sisters, where she still remains. The case would not be substantially different if the child had been born in the father's house and the mother had recently left the house taking the child with her. Neither the father nor the mother are personally disqualified to have the custody of the child. There are no other considerations of a special nature affecting the question.

In these circumstances, the Court is of opinion that, in accordance with previous cases, the right of the father must prevail. We shall therefore make an order substantially in terms of the prayer of the petition. But before the order is signed some arrangement must be made to secure that the mother shall have proper and reasonable access to the child.

The Solicitor-General, for the petitioner, proposed that the child should be sent to the mother's house in Arbroath once a-week, from eleven till six, and that the mother should have an opportunity of visiting it at the father's house at anytime.

BALFOUR, for the respondent, stated that he had no authority to say that that arrangement would be satisfactory, and therefore left it in the hands of the Court.

The respondent moved for expenses. In *Nicolson's* case, quoted above, the husband was found liable in expenses, and that is the rule in all such questions between husband and wife. That the respondent here is possessed of considerable private estate is immaterial, for the question is eminently personal.

The Court pronounced the following interlocutor:—

"Find that the petitioner is entitled to the custody of the child of the marriage between him and the respondent: Therefore decern and ordain the respondent forthwith to deliver up the said child to the petitioner, or anyone having his authority to receive delivery, but reserving to the respondent right of access to the said child as follows, *videlicet*:—The petitioner to send the child to the respondent's residence in Arbroath on a visit to her once a-week, on any day she may select, to remain with the respondent from eleven a.m. to six p.m.; the respondent to be also entitled, but without any attendant, to visit the said child in the petitioner's house, without the petitioner being present, at any time she may desire: *Quoad ultra* continue the cause, that either party may here after move the Court in the event of any change of circumstances: Find the petitioner liable to the respondent in the expenses hitherto incurred, and remit to the Auditor to tax the account thereof, and report."

Counsel for Petitioner—Solicitor-General (Macdonald)—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Lord Advocate (Watson)—Balfour—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Wednesday, January 31.

SECOND DIVISION.

HAY'S TRUSTEES *v.* YOUNG.

Interdict—Trespass.

Where a person entered upon the lands of another, and executed certain operations thereon, in good faith, and believing that he had the authority of the proprietors, and where there was no apprehension of the recurrence of the offence, the Court refused an application for interdict at the instance of the proprietors.

This was an appeal against an interlocutor pronounced by Sheriff Pattison in a petition presented on 1st February 1876 by the Trustees on the Dunse estates, as proprietors of the Lands of Berrywell, against George Young, farmer and plumber, Blackadder, Westside. The petitioners prayed for interdict against the respondent "from unlawfully entering and trespassing upon said lands of Peelrig, and of Berrywell, or on any part of the said lands and estate of Dunse Castle, or in any other way interfereing with or disturbing the petitioners or their tenants in the possession of the same." From the statements of the parties it appeared that during 1875 an action between Mr Milne Home of Wedderburn and the Police Commissioners of Dunse was pending in regard to the pollution of certain streams by the Dunse sewage, and several persons, including Young, went upon the lands of Berrywell, unchallenged, for the purposes of examining the streams, and particularly the Berrywell Burn. On 24th December 1875 the respondent wrote as follows to Buchanan, the overseer at Dunse Castle:— "*Dunse, Friday morning.* Mr Buchanan,—Dear Sir, I saw Mr Hannan yesterday in Edinburgh, and am going to wire him just now. Evidence was given by Mr Homes, engineer, of the flow of water in the sewage run, which is about double Mr Hannan's measurement. He told me you had been with him. Could you come down and go with me? I want to check the flow at several places to-day (this afternoon) and try for a drain at Berrywell. Say, per bearer, if you can come, and as early as possible, and bring anything with you. Yours truly, GEORGE YOUNG." Buchanan accordingly went, and getting one of the Dunse Castle labourers, was joined by Young at Berrywell, and they proceeded to dig in the plantations there and near

Berrywell House for the purpose of opening up a drain supposed to lead the sewage from the house, Young showing them where to do this, and how to trace the drain by digging holes in the earth. The men accordingly worked all that day at digging as directed, and they made numerous openings in the plantation. They also gauged the flow of water in the burn, and next day went on searching for the drain until stopped by Mr Hannan. From the respondent's statements it appeared that a telegram was after Buchanan's arrival sent to Mr Hannan, in these terms:— "From George Young, Dunse, to J. D. Hannan, Parliament House—Dunse Sewage Case, Edinburgh. I have got Buchanan, and will test several of the gaugings. Carter's appears to have been taken during high flood"—and that no answer was received thereto. The first intimation received by Young that his going to Berrywell was resented was contained in a letter, dated 30th December 1875, from the factor, in reply to which he wrote as follows:— "*Dunse*, 31*st December* 1875. Sir, I am favoured with your inquiry of yesterday's date, and beg to state that I am entirely responsible for asking the workmen to help me in what I did at Berrywell on Friday last, and will be glad to have a note of the time occupied, with the charge for the same, which shall be at once settled. My wire to you will show that I had no wish to do anything without your knowledge. I regret that this should have been the occasion of any unpleasantness, as I had no intention to give any offence. I am, etc., (Signed) GEORGE YOUNG. J. D. Hannan, Esq., Dunse." Thereafter the respondent heard no more of the matter till the petition was served.

The Dunse Trustees pleaded—"(1) The respondent having unlawfully trespassed upon the lands of the petitioners, interdict ought to be pronounced against him as craved. (2) The petitioners having been interfered with and disturbed in the possession of the said lands by the respondent, the prayer of the petition ought to be granted. (3) The circumstances set forth by the respondent in his statement of facts are irrelevant, and the defences are untenable, and ought to be repelled, with expenses."

The respondent pleaded, *inter alia*—"(1) The respondent having gone to Berrywell with the reasonable belief that the factor of the petitioners knew of his intentions, and did not disapprove thereof, he ought to be assoilzied from the prayer of the petition, with expenses. (4) There having been no prior remonstrance against the respondent's conduct, and there being no likelihood of its repetition, the remedy of interdict is unnecessary and uncalled for."

On 31st March 1876 the Sheriff-Substitute (DICKSON) pronounced an interlocutor refusing the prayer of the petition, and adding the following note:—

"*Note.*—This is a petition for interdict against trespass on the petitioners' lands. Interdict is a remedy by decree of Court either against a wrong in course of being done or against an apprehended violation of a party's rights, only to be awarded on evidence of the wrong, or on reasonable grounds of apprehension that such violation is intended. After full consideration of the circumstances of this case as disclosed in the record, the Sheriff-Substitute does not think that these circumstances warrant the exercise of this remedy.

"It seems to the Sheriff-Substitute that the alleged trespass was not more than the result of a misunderstanding, and he is not sure that it was even so much. The respondent and the petitioners' factor were both interested in the defence of the Dunse Sewage case, then under trial with a jury in the Court of Session. They had some conversation in Edinburgh on 23d December, in the Parliament House, during the trial, in regard to a considerable difference between the evidence adduced for the pursuers and that furnished by the petitioners' factor, acting as engineer for the defenders in that case. The respondent, who was also actively engaged in the defence, thinking that it was their common interest to check the calculations of the pursuers' witness, and not perhaps sufficiently considering that he might offend the defenders' own skilled witnesses, having returned to Dunse, telegraphed in the forenoon of the 24th December to the latter, in Edinburgh, that he proposed to test the accuracy of the pursuers' calculations. This was no doubt also in effect testing the defenders' calculations. This telegram was received by the petitioners' factor at twelve o'clock, and he made no reply, never challenged the respondent's proceedings, but suffered him to carry them out; and now the petitioners complain of trespass. Had the petitioners' factor replied by telegram, forbidding the examination, it is fair to assume that the respondent would have stopped the operations forthwith. If such telegram had been sent, and the operations had been continued, a very different case would have been presented. But no reply having been sent, the respondent was in the circumstances entitled to assume that silence implied consent. It would be stretching matters far indeed to hold that under these circumstances the respondent committed an illegal trespass, or that reasonable grounds exist for apprehending that trespass will be committed by him.

"It is further complained that the respondent not only trespassed, but caused pits to be dug in the petitioners' lands. Assuming, however, that he was not trespassing, but was on the ground with the implied consent of the petitioners' factor, and for the purpose of aiding the defence of the case in which they were both interested, these operations being evidently directed to this end, and no damage being averred, cannot form a ground of interdict.

"The Sheriff-Substitute thinks that the whole circumstances warrant the conclusion that the respondent acted in *bona fide* throughout, and that there was no intentional concealment in their being no reference made in the telegram to searching for the drain."

The Sheriff-Depute (PATTISON) recalled this judgment, and granted interdict, adding a note as follows:—

"*Note.*—The fact is undoubted—indeed it is admitted by the respondent—that he did in the month of December 1875 enter upon the lands of Berrywell, and did there make or cause to be made several openings within the grounds by persons employed by him and on his sole responsibility. This he did without the leave of the original petitioners, then proprietors of the lands, or any of them or of any one authorised by them.

"It is said that the respondent believed this was agreed to, or at least that it would not be objected to. The Sheriff thinks that he had no

good ground for such belief. The mere fact that Mr Hannan, their factor, was a witness for the defenders in the cause mentioned upon record in his capacity as civil engineer, and that the respondent's operations were with a view to aid the defence in that action, and to corroborate Mr Hannan's evidence, supposing it to be established, is really not of any relevancy. The petitioners or the proprietor of the land were not parties to that action, and there is no evidence to show that they had any interest in it. The respondent ought to have known, and must be presumed to have known, that he had no right to enter upon their lands and to make holes and open drains therein without their express consent; and he had no ground for assuming that consent or acquiescence. His telegraphic message to Mr Hannan did not import that he was to enter upon the lands and perform the different operations which he did without first obtaining the consent of the petitioners. The respondent admits that he had no direct authority from the petitioners or others acting for them to search or dig for the drain, or to employ the petitioners' servants for that purpose. The excuse that what the respondent did was in furtherance of the defence in the action, and that he acted in *bona fide* does not appear to the Sheriff to be of any importance. This is not an action to punish the respondent for an offence, but to prevent him from committing a trespass.

"It appears further that in the year 1870 the respondent had entered upon the lands of Peelrig, also belonging to the petitioners, and caused various drains to be opened at several parts thereof—in particular, in the barnyard field. This he says he did by authority of Mr David Milne Home of Wedderburn, but he does not allege that he had authority or permission from the petitioners or proprietor of the lands to enter upon them, or to perform these operations. He knew that Mr Milne Home of Wedderburn was not the proprietor of Peelrig, and although he says that he believes that Mr Milne Home had a legal right to examine a pipe which was in the lands, he gives no sufficient reason for that belief; he does not allege that Mr Milne Home represented that he had such a right, or that he had permission from the petitioners to cause the respondent to perform the operations which the respondent did upon his employment. His employment did not and could not justify the respondent in entering upon these lands without the proprietor's leave.

"In short, the respondent seems to have very loose and inaccurate notions of the rights of proprietors in matters of this kind, and as he does not admit that he was wrong, or undertake not to transgress in the same way again, the Sheriff thinks that the petitioners were justified in taking the present procedure to protect themselves against any repetition of such procedure on the part of the respondent, in case another occasion should arise where he might think himself entitled to do so.

"The idea thrown out in the answers to the reclaiming petition, that the respondent's character or reputation is in any way involved in this dispute, is one for which the Sheriff sees not the slightest foundation. It is not a question of character at all. It is simply a question of legal right, in which the respondent happens to be in the wrong, from what may be bad advice or *bona fide* ignorance, not involving any question of his character or reputation.

"The Sheriff has found the respondent liable in expenses, because, how honest soever his belief may have been as to his right to enter upon the petitioners' lands on the recent occasion, or their implied consent to his doing so, he should at once, when this was challenged and repudiated, have confessed himself in the wrong, and voluntarily undertaken never to offend in the same way again, instead of resisting the application and making up a long record, without setting forth any fact relevant to justify a defence. The Sheriff has given modified expenses only, because the respondent may have been partly misled by the petitioners' apparent tolerance of the trespass in 1870, but the modification will not be great."

The respondent appealed to the Second Division.

At advising—

LORD JUSTICE-CLERK—I am unable to concur in the view taken by the Sheriff-Depute in this matter. The case is one which I very much regret to see before the Court. The real point and sting of the matter appears to have reference not so much to the damage done as to the discovery of the drain by the respondent Young. It is very probable that in taking the course he did Young was thinking only of the points in the lawsuit between Mr Milne Home and the town of Dunse, and of the interests of the defenders in that action, and that he did not sufficiently consider the interests of the proprietor.

Mr Hannan, the petitioners' factor, and the respondent had been together engaged in an inquiry as to the state and volume of the water flowing down the Berrywell burn, for the purposes of the *Milne Home* case, and there having been a discrepancy between two of the witnesses as to the amount of water guaged by them, and Mr Hannan being in Edinburgh and Young at Dunse, the latter proposed to go and guage the volume of water again. Accordingly he sent the telegram we have before us to Mr Hannan, and receiving no reply he went and guaged the water, but at the same time he resolved to try and find the direction of the old drain from Berrywell into the burn, and he dug the holes complained of in this search, which proved successful. He sent a telegram, as I have said, to Edinburgh, to Mr Hannan, and he also sent a letter to Buchanan, the overseer, asking him to go with him, which he accordingly did. Now in all this I do not suppose that he thought anything about authority for his actions; he no doubt thought that no questions would be asked if no damage were done.

The question then comes to be, Whether he had reasonable grounds for thinking that there would be no objection to what he was doing? It did not evidently occur to him that this search might or would bring the proprietor into trouble in connection with the *Milne Home* case. Mr Young says that on 25th December he called at the office of the factor to give him the results of his examination on the previous day, but did not find him at home. For five or six days no notice was taken by Mr Hannan, but on the 30th December he wrote to Young saying that his going to Berrywell had been resented, and Young replied on the 31st —[*His Lordship read the letter*]. The proper course

in such circumstances ought to have been dictated by the good feeling which every proprietor and every man should exhibit—the Dunse Trustees ought to have said "You have given offence by what you have done, and you must give us your assurance that you will not come back." But that was not what happened; this petition for interdict against Young was served upon him without any further communication, and in presenting it the petitioners must have known quite well that Young was not in the least likely to come back to dig again, and I think that they acted from irritation at the discovery made by Young. This will not, however, give a good ground for interdict; indeed, I am of opinion that there was not a shadow of foundation for the application, and I never saw a case in which there was less.

Lord Ormidale—I entirely agree. People should know when and when not to apply for such a remedy as interdict. I think that the rules upon this subject are very tersely and very accurately stated by the Sheriff-Substitute in his interlocutor. If a wrong was done here at all it was all done and over a month before the petition was served. Again, the petitioners must show that a violation of their rights was intended. No doubt a person may do one act of wrong in the circumstances which lead to the conclusion that it may be followed by another similar act, but that is not the case here. Trespass is the nature of the wrong alleged, and this is a serious delict almost in the nature of a crime—[*His Lordship referred to Bell's Principles*, § 961]. But the Sheriff-Depute here in the note appended to his judgment has in my opinion entirely mistaken the true meaning of an interdict for trespass when he says—"This is not an action to punish the respondent for an offence, but to prevent him from committing a trespass." He also remarks that whether Young acted in *bona fide* or not was of no importance; it appears to me that in such a case *bona fides* is of the utmost consequence. This party was perfectly entitled to defend himself against this application for interdict. Was he then there as a trespasser or not? If ever there was a case in which it most clearly appears that no offence was intended, this is it. Whether Young was right or wrong in proceeding to do what he did, I cannot doubt that he acted in *bona fide*, and that he cannot in any sense be regarded as a trespasser, and his whole subsequent actings illustrate this. There never was a case so ill founded for interdict as the present.

Lord Gifford—I concur. The remedy of interdict by a court of law is a serious one, and not to be given without reasonable ground. The petitioners here do not even say they apprehend a repetition of the offence. Now, that is the essence of such an application. The offence may be going on or there must be apprehension of its recurrence. Here Young had no idea of doing wrong; he even took the Dunse overseer and labourers with him, and then when he was pulled up for what he had done he made an apology; that I regard as an implied assurance that the action on his part would not be repeated. There is a failure in the relevancy of the petition and in that apprehension of wrong which is the essence of the application.

The Court pronounced the following interlocutor—

"The Lords having heard counsel on the appeal, Sustain the same: Recal the judgment complained of: Dismiss the petition: Find the petitioner liable to expenses in both Courts; and remit both these accounts to the Auditor of this Court to tax and to report."

Counsel for Petitioners—Keir. Agents—Renton & Gray, S.S.C.

Counsel for Respondent—Mackintosh—Jameson. Agents—Dundas & Wilson, C.S.

Wednesday, January 31.

SECOND DIVISION.

DOW AND OTHERS *v.* MILLER AND OTHERS (KILGOUR'S TRUSTEES).

Succession—Trust—Annuity.

A truster directed his trustees to invest the whole residue of his estate in the purchase of an annuity for each of certain beneficiaries. The whole beneficiaries having demanded payment of the capital from the trustees, *held* that the latter were bound to pay—the direction being one which, if carried into effect, could immediately be undone by a sale of the annuities.

This was a Special Case, presented by Miss Mary Ann Dow and Miss Ellen Dow, residing at Oporto, Portugal, and Misses Mary Dick, Marjory Dick, and Catharine Mitchell, all living in Scotland, of the first part; and the trustees of the late John Cunningham Kilgour, merchant, Dundee, of the second part. The truster died on 15th July 1875; leaving a trust-disposition and settlement, dated 29th May 1875, by which *inter alia* he directed his trustees after the residue of his estate should be fully realised to divide the same into three equal shares, one of which should be invested by them in the purchase of a Government annuity, an annuity by the Scottish Widows' Fund and Life Assurance Society, and an annuity by the Scottish Provident Institution, each of these annuities being in favour of and payable to his cousins Mary Ann Dow and Ellen Dow, both daughters of the late James Dow of Oporto, in Portugal, his mother's brother, and then residing at No. 4 Entre Quintas, Oporto, jointly, and the survivor of them; another of the shares to be similarly invested by his trustees in purchasing similar annuities in favour of and payable to his cousins Mary Dick and Marjory Forbes Dick, both daughters of the late Catharine Dow or Dick, his mother's sister, and then residing at No. 1 East Adam Street, Edinburgh, jointly, and the survivor of them; and another of the shares to be invested by his trustees in the purchase of similar annuities in favour of and payable to his housekeeper Catharine Mitchell. He directed that in purchasing the annuities each of the three shares should be divided into three equal parts, and one of the said parts should, in the case of each of the said three sets of annuitants, be invested in the purchase of each kind of annuity. The truster further directed his trustees, "in purchasing the foresaid annuities, to provide as far as possible that the same shall be payable to the said annuitants, exclusive of the