

Tuesday, January 31.

FIRST DIVISION.

[Sheriff of Inverness.

FRASER v. SMITH.

*Property—Trespass—Statute 1686, cap. 11—
Pounded Sheep—Statutory Remedy—
Tender.*

In an action for the recovery of pounded sheep, or alternatively for damages for their having been lost, it was proved that the owner of the sheep had offered to settle for them immediately on their being pounded, and that the poulder declined to settle unless he was paid the statutory penalty and expenses of keep, under the Act 1686, c. 11, for them and for 101 sheep previously pounded by him but no longer in his possession, and that alternatively he offered to restore the sheep if the owner would sign a receipt for them. The owner refused to sign a receipt or to settle for more than the sheep then in the possession of the poulder. The sheep went amissing from the poulder's field. *Held* that the poulder was not entitled to attach any condition to the satisfaction of his rights under the statute, and that he was bound to restore the sheep to the owner in exchange for the statutory penalty and expenses of keep, failing which he was liable in damages for their loss.

Observed that when a debtor calls upon his creditor to ascertain the amount of the debt due and to settle it, it is unnecessary for him to make any formal tender if the creditor refuses to state the amount of his claim.

This was an action raised in the Sheriff Court at Inverness by Alexander Fraser against Allan Smith, both crofters in the parish of Abernethy, for recovery of ten sheep, or alternatively for damages for their loss.

On 16th February 1898 the defender found ten sheep belonging to the pursuer straying on his land, which he immediately pounded in exercise of his rights under the Statute 1686, cap. 11. That Act provides that all "possessors of lands or houses shall cause herd their horses, nolt, sheep, swine, and goats the whole year, as well in winter as summer, and in the night time shall cause keep the same in houses, folds, or inclosures so as they may not eat or destroy their neighbour's ground, woods, hedges, or planting, certifying such as shall contraveen they shall be lyable to pay half a merk *toties quoties* for ilk beast they shall have going on their neighbour's ground, by and attour the damage done to the grass or planting; and declares that it shall be lawful to the heritor or possessor of the ground to detain the said beasts until he be paid of the said half-merk for ilk beast found upon his ground, and of his expences in keeping the same." The pursuer averred (Cond. 4) that he "at once offered the defender the statutory penalty for each

of the ten sheep, but the defender refused to part with them unless he were paid the statutory penalty for 150 sheep, which he said he had at various times pointed of the pursuer's stock. The pursuer refused to pay this sum, and the defender refused to part with the ten sheep." (Cond. 5) "On the morning of Friday the 18th February 1898 pursuer went to defender's farm . . . to ask the delivery of his sheep. This was refused, on the pretence that they had been stolen from the defender's field." The defender stated in answer that on 16th February he "wrote out a receipt to be taken from pursuer in exchange for delivery of said sheep, and asked the pursuer to sign it. This the pursuer refused to do, but said, 'I'll settle for them.'" The receipt was annexed to receipts signed by a brother of the pursuer for sheep formerly pounded.

At a proof before the Sheriff-Substitute the pursuer deponed, referring to what passed on 16th February—"I said I would not sign any paper—that I would rather pay the penalty at once. . . I did not offer the defender any money on that day, but I was prepared to pay any sum he put on the sheep. I asked him to say what the sum was, but he would not separate the ten sheep from the whole of the others which he said had strayed. I said to him that I would settle there and then." The defender's evidence as to what passed is quoted in the opinion of the Lord President.

It further appeared from the proof that on the morning of the 17th February it was found that the gate of the field in which the defender had placed the pounded sheep had been forced open and the sheep were gone. The pursuer tendered payment of the statutory penalty on record.

On 6th April 1898 the Sheriff-Substitute (SCOTT MONCRIEFF) pronounced the following interlocutor:—"Finds in point of fact that the defender on 16th February last pounded ten sheep belonging to the pursuer; that the pursuer, upon ascertaining the fact, went to the house of the defender and offered to settle for said sheep, but that the defender refused to settle except upon condition that the pursuer would also settle for a number of sheep which, according to the defender, had been pounded by him on previous occasions, or at least acknowledge that these had been lawfully pounded: Finds that the pursuer having refused to make such a settlement, the ten sheep were left in the possession of the defender, and during the following night taken out of his ground by some unknown person or persons, and that the pursuer has in consequence lost these sheep: Finds, in point of law, that the defender was bound to accept the pursuer's offer of settlement, and had no right to impose the condition referred to, and that having unlawfully retained these sheep in his possession, the defender is bound either to restore them to the pursuer upon payment by him of the statutory penalties, or compensate him for his loss: Therefore ordains the defender, within fourteen days of this date, to make delivery to the pursuer of said sheep as sought for

in the prayer of the petition, the pursuer making payment of said penalties; or alternatively, ordains him to pay to the pursuer the sum of £23 in name of damages, and decerns: Finds the defender liable to the pursuer in expenses of process, but subject to modification," &c.

Note.—"The question raised by this unfortunate case, which arises under the old Act of 1686, c. 11, seems to be simply this—who was to blame, the pursuer or defender, for the fact that no settlement was arrived at between the parties on the 16th of February last? Because if the defender had in the circumstances right to continue the retention of these sheep, I do not hold it proved that he acted carelessly with regard to them, or that by his subsequent conduct he has rendered himself liable for their loss. I think he retained them in a place sufficiently protected so far as fencing was concerned. The sheep did not escape through any weakness in the fence; they were taken away in a deliberate fashion by someone.

"But had the defender any right to retain them after the offer of settlement which the pursuer made? I have felt considerable difficulty over this question. On the one hand it is true that the pursuer did not in so many words say that he would pay the requisite number of half-merks, nor did he lay down any money. But, on the other hand, he offered to settle, and was at once met by a refusal on the part of the defender to come to any arrangement which would not include an unsubstantiated claim for alleged previous poundings. What was the use, it may be asked, of offering money to a man who admits that he did not wish it? The defender wanted to send in a bill for his numerous poundings at the end of the season, and settle in that way. Now, it is clear that the defender could not retain the sheep in security of former claims. The pursuer was entitled to get them upon payment of five merks, and the expenses, if any, of keeping the sheep for a few hours. But it is tolerably certain that he would not have got them for any such payments. In these circumstances I think that the pursuer's offer to settle must be held as an equivalent to a tender, the defender himself having prevented any more formal tender being made. The only decision which I know of bearing upon the subject is that of *Macarthur v. Miller*, 1 R. 248. It is quoted by Professor Rankine as an authority for the statement that the 'detainer cannot be required to give up possession until he has received a tender of the statutory penalties. But in that case the pursuer made no offer of settlement. In his lawyer's letter to the defender the Winter Herding Statute was entirely ignored, and the defender accused of taking the law into his own hands, and threatened with damages accordingly. The pursuer, as one of the judges pointed out, made no tender whatever. He took it into his head that he was entitled to have the sheep restored without any condition. That was not the position taken up by the present pursuer, and therefore I do not think the case of *Macarthur* applies. I am of opinion that

the expenses should be modified in this case. In the first place, the pursuer's offer to pay the statutory penalty, which only appears at adjustment of the pleadings, should have been in them from the outset. In the second place, as already pointed out, I do not think that the defender can be said to have neglected the safety of the sheep after he did retain them. But some of the pursuer's evidence was led with a view to this aspect of the case."

On appeal by the defender the Sheriff (IVORY) pronounced the following interlocutor on 2nd May 1898:—"Recals the interlocutor appealed against: Finds in point of fact (1) that the defender on 16th February pointed ten sheep belonging to the pursuer, which had trespassed on the defender's ground in consequence of the pursuer's failure duly to herd the same, and that immediately afterwards he intimated the pointing to the pursuer; (2) that on the same day the pursuer had a meeting with the defender, when he told the latter that he would settle for the ten sheep, but he did not pay to the defender the sum of five merks due for the ten sheep under the statute, or tender payment of the said sum to the defender; (3) that at the said meeting the defender offered to deliver the ten sheep to the pursuer if the latter settled for the ten sheep and also for a number of sheep pointed by the defender on previous occasions, or, alternatively, if the pursuer signed a receipt for the ten sheep, but the pursuer declined to agree to either alternative; (4) that the ten sheep were accordingly retained by the defender, and were put by him in a safe and sufficient place, from which during the following night they were surreptitiously removed by some person or persons unknown and that in consequence the defender is unable to deliver the same to the pursuer; (5) that in the original petition, which was presented on 21st February last, the pursuer did not tender payment of the statutory penalty of five merks for the ten sheep, but prayed that, without any such payment, the defender should be ordained to deliver the ten sheep, or alternatively to pay damages; and that it was only on 10th March last, when the record was adjusted, that he tendered payment thereof: Finds, in point of law, that in the circumstances the defender was entitled to point and retain the ten sheep, as he did, under the statute; and that he is not liable in damages to the pursuer: Therefore refuses the prayer of the petition; assoilzies the defender; and decerns: Finds the defender entitled to his expenses."

Against this interlocutor the pursuer appealed, and argued—There had been a good tender for the ten sheep. Actual production of money was not necessary in all cases; if the party about to tender was led to suppose that the tender would produce no effect, that dispensed with the formality. The defender's only remedy was under the Statute 1686, cap. 11, and under that statute a pointer of cattle was not entitled to attach any condition to delivery of the cattle in exchange for the statutory penalty and expenses of keep.

By declining to settle unless paid for more sheep than he had to deliver, and by demanding a receipt, the defender had put himself outside the statute; for the loss of the sheep he was liable in damages. The judgment of the Sheriff-Substitute should be restored except as to expenses, which should be awarded without modification.

Argued for the defender—In order to make a good tender it was necessary to table the money, even in the knowledge that it would be refused. The pursuer never asked what sum was due, and the defender had no means of knowing when or how he proposed to settle. The purpose of a tender was not for acceptance but to prevent ulterior consequences, and none having been made by the pursuer, the defender was justified in retaining the sheep; his offer to deliver on signature of a receipt for ten sheep, to be settled for subsequently, was perfectly legitimate. The pursuer was responsible for the failure to settle on 16th February; the defender was entitled to retain the sheep until paid half a merk for each one and the expense of their keep. The sheep were securely enclosed, and the defender was not responsible for their disappearance. It was not maintained for the defender that he had any lien over the ten sheep for the penalties and expenses due for the sheep which he had poinded previously.

LORD PRESIDENT—I agree with the Sheriff-Substitute. It is convenient to consider what the rights are of a person who has poinded sheep under the Act of 1686, cap. 11. It is clear that he is entitled to poind them if they stray upon his ground, and having poinded them, is entitled to detain them until he be paid the statutory penalty for each beast found on his ground and his expenses of keeping the same. These are his rights. Now, what are the duties of the proprietor of the sheep when he comes to claim delivery? He is entitled to delivery; but he must pay the statutory penalty, the amount of which is expressed in the statute, and the detainer's expenses of keeping the sheep. Now, suppose a man were going with his pockets full of money, and therefore quite in a position to meet his liabilities under the statute, I suppose he would say—"I have come to settle for the sheep." He does not know what the amount which he has to pay is, because it is only upon ascertaining the expenses of the detainer that he knows what the figure is which he is required to pay. And accordingly I think that the pursuer did just what was the right thing to do when he said he had come to settle, which I think, plainly meant—"How much have I got to pay for the sheep which you are now going to deliver to me?" It is therefore quite a different case from a man who coming to pay or tender payment of a liquid debt, or a debt a claim for which has been rendered to him, comes knowing that he has a definite sum to pay, and is therefore bound to produce that sum or make manifest that it is producible. Now, what is the position which the detainer, the defender, took up

in this case. I take his own evidence, because one requires no more than that, and what he says is this: First of all—"He (the pursuer) "came into my house. I had No. 7 of process with me, and to it I added a receipt for the ten sheep, I asked him to sign it, but he said he would not sign it." Now, I pause on that to say that under the statute he had no right to get a receipt of that kind at all. That is to say he gets his statutory claim to the penalty satisfied, delivers over the sheep, and there is an end to it. But what the pursuer said, according to the defender, is this—"He said he would settle. I said to him, if you are to settle, you will have to settle for 111, as there were 101 sheep before." And he goes on in cross-examination to say—"I did not want money then; I was to wait until the end of the season, when I could have a settlement, and if not I could take him into Court." His claim, therefore, was that he was not going to make delivery of the sheep upon payment of the half merk for each and the expense of keeping the sheep which he had to deliver, but would only deliver if he got payment for 111, he not having more than ten which he could deliver. Therefore his demand was far in excess of his rights, and I read his words as meaning very plainly this, that he declined the money of the pursuer to pay for ten sheep, and would not take it though it was on the table. He would take nothing less than payment for 111 sheep, and he would have that at his own convenience at the end of the season, and if he did not get it he would take pursuer into Court. Therefore it seems to me that the defender was entirely wrong, and that the pursuer had no occasion to make any valid or legal tender of the debt, for he did not know what the debt was, and that owing to the refusal of the defender to state the amount of his legal claim. He would only state a claim which he had no right to make or by statute to enforce. I therefore think the Sheriff-Substitute was right, and the grounds of his judgment seem distinctly enough stated in his interlocutor and note. I ought to add, as to the matter of expenses, the Sheriff-Substitute says, "subject to the modification," and I do not think we should interfere with the Sheriff's judgment on that detail.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the Sheriff's interlocutor and affirmed the judgment of the Sheriff-Substitute.

Counsel for the Pursuer—Dewar—C. D. Murray. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender—Craigie—Munro. Agent—Robert D. Ker, W.S.