

peculiarly Scottish, not much help is to be expected from the practice of any other country except by way of analogy or illustration, but it is not uninteresting to observe that the law of England seems to agree with ours in this particular. In a passage which is still referred to as authority by the lawyers of that country, Lord Coke says—'If a man come to distreyn for *damage feasant*, and see the beasts on his soyle, and the owner chase them out of purpose before the distress is taken, the owner of the soil cannot distreyn them, and if he doth the owner of the cattle may rescue them, for the beasts must be *damage feasant* at the time of the distress.' (Coke, Inst., p. 161.)

"So in *Clements v. Milner*, 3 Espinasse 95, an action for seizing a cow alleged to be trespassing, Lord Eldon directed the jury that if the defendant in the act of coming up to distrain the cow had actually got into the field where the cow was committing the trespass before she had been turned out of it, the justification was proved, and they should find a verdict for the defendant. If they were of opinion that the cow was actually out of the *locus in quo* before the defendant had got into it, though he might be in the act of approaching in order to distrain her, they must find for the plaintiff."

The defender appealed to the Court of Session, and argued—Whenever the defendant's servant with an efficient dog and with the intention of taking possession of the cattle got within six yards of them they must be held to have been in his possession sufficiently for the purposes of the Act.

Authorities—*Clements v. Milner*, 3 Espinasse 95; *M'Arthur v. Miller*, Dec. 3, 1873, 1 R. 248.

Argued for defender—What was created by the statute was a security for a debt grounded on possession. There was not that in the present case, for before the seizure was effected the cattle were 200 yards along the public road, where they could not be lawfully reduced to possession. Possession must be obtained on the ground.

Authorities—Ersk. iii. [6, 28; *Carlberg, &c. v. Borjesson, &c.*, Nov. 21, 1877, 5 R. 188.

At advising—

LORD JUSTICE-CLERK—This is a very narrow case, but I am of opinion, and without much difficulty, that both the Sheriffs are right, and that although there was a *conatus* to detain the cattle they were not actually detained till past the ground of the appellant. That seems to me to be the result of the evidence, and I am not at all inclined in any way to stretch the Act in question, which is one of a highly penal nature, and has been so little put in force that there is not a single case in the books relating to it.

The whole question is, Whether there was an inchoate detention? for I think a detention commenced may be completed although the object has got beyond the place or the custody where it originally was. Were the cattle detained at all before they got to the road? I think they were not, and if it be admitted that the detention did not begin till then, I think the circumstances would not fall under the statute.

In regard to the two cattle which are said to have remained on the pursuer's ground, they were in a different position, and it is possible that they might have been properly detained, but the evi-

dence in connection with them is very obscure, and as the *onus* lay upon the appellant I do not think we have materials sufficient to enable us to come to a conclusion in his favour in regard to them.

On the whole matter, I think the Sheriffs were right, and that the appeal should be dismissed.

LORD ORMDALE and LORD GIFFORD concurred.

Appeal dismissed, with expenses.

Counsel for Pursuer (Respondent)—Balfour—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Appellant)—Solicitor-General (Macdonald)—Mackintosh. Agent—John Gill, S.S.C.

Saturday, October 19.

FIRST DIVISION.

[Lord Ormdale, Bill Chamber.

MAULE V. TAINSH.

Process—Act of Sederunt 11th July 1828, sec. 72—Suspension of a Decree pronounced in Defender's Absence, and Extracted, without Application to be Reponed.

After a decree *in foro* had been granted owing to the alleged negligence of the defender's agent, and had been extracted, and the reclaiming days allowed to pass without any application to be reponed being made—held, on the authority of the case of *Lumsdaine v. Australian Company*, December 18, 1834, 13 S. 215, that a note of suspension of the charge upon the decree fell to be refused.

In a petitory action at the instance of James Tainsh, liquidator of the firm of William Stewart & Company, timber merchants, Leith, against John Maule, builder, in the earlier stages of which the defender had appeared, decree was on the motion of the pursuer's counsel given against him by the Lord Ordinary (RUTHERFURD CLARK) "in respect of no appearance by counsel or agent for the defender at repeated callings of the cause this day in the procedure roll." The days allowed for reclaiming elapsed without any application being made by the defender to be reponed, and the decree was extracted, and a charge given thereon. Maule then presented a note of suspension of the charge, and on consignment the Lord Ordinary on the Bills (ORMDALE) sisted execution. He afterwards, after hearing counsel, refused the note, and added the following to his interlocutor:—

"*Note.*—It cannot be doubted, and was not disputed, that the decree in question must be dealt with as one *in foro*, and that the reclaiming days were allowed to elapse without the complainer availing himself of the opportunity they afforded of getting reponed.

"The decree being now extracted, and a charge having been given thereon for a balance of £32, 11s., the complainer has presented the present note of suspension, in which he refers to an action of reduction which he has also brought, and yesterday executed, against the respondent.

"According to the complainer's statement the decree was allowed to pass against him through

the negligence of his agent, and it is obvious, and was not disputed, that the merits of the case have never been considered and determined *causa cognita*.

“In this state of matters, the Lord Ordinary would have been inclined to pass the note, especially as consignment has been made of the sums charged for, had it not been for the case of *Lumsdaine v. Australian Company*, December 18, 1834, 13 S. 215, which appears to him to be in all essential respects a precedent in point. Indeed, even supposing the complainer had timeously presented a reclaiming note in order to be reopened, it is by no means clear, looking to the authority of the case of *Arthur v. Bell*, June 16, 1866, 4 Macph. 841, that the Court would have reopened him. That a party's agent has neglected his duty may be a reason for subjecting that agent in the consequences, but it is not a ground upon which the rules of Court can be set aside or disregarded and the present note passed.

* “The matter was very amply discussed in the case of *Lumsdaine*, and there two bills of suspension were successively refused—the first by Lord Medwyn, and the second by Lord Corehouse; while ultimately the Court, upon considering minutes of debate, refused a reclaiming note, holding that although the case was one of hardship, yet, keeping in view that the party had not reclaimed within the days allowed for that purpose, and the decret being extracted, it could not be suspended. In that case also it was remarked—as the Lord Ordinary now remarks—that the complainer might possibly obtain the redress he desires under the Act 48 Geo. III. c. 151, sec. 16, which provides a remedy for the case of a Lord Ordinary's interlocutor becoming final through inadvertence.”

The complainer reclaimed.

The Court adhered, holding that the case was ruled by that of *Lumsdaine*.

Counsel for Complainer (Reclaimer)—Balfour—Pearson. Agents—H. & A. Inglis, W.S.

Counsel for Respondent—Harper. Agent—Wm. Duncan, S.S.C.

Saturday, October 19.

SECOND DIVISION.

[Exchequer Court.

ANDERSON v. COMMISSIONERS OF INLAND REVENUE.

Revenue—Statute 33 and 34 Vict. c. 97 (Stamp Act) sec. 70—Conveyance on Sale of Property—Ad valorem Stamp-Duty.

A, a creditor and shareholder of a building association, had paid considerable sums of money towards the discharge and liquidation of claims due by it; he had also completed the erection of certain buildings belonging to it, and had acquired for onerous considerations the right, title, and interest of all its members in its estate. Various deeds had been granted to him, the result of all of which was that he was liable for all the debts and entitled to all the assets of the association.

The judicial factor who was vested in the estate of the association thereupon obtained authority from the Court to convey his whole vested interest in the subjects to A. Held that the disposition granted was not a “conveyance on sale” within the meaning of the 70th section of the Stamp Act (33 and 34 Vict. c. 97), but merely a conveyance for conformity, and that it was not subject to an *ad valorem* stamp-duty.

This was a Case stated by the Commissioners of Inland Revenue under the Act 33 and 34 Vict. cap. 97, sec. 19, on behalf of Thomas Anderson, builder in Leith, to enable him to appeal to the Court of Exchequer against the determination of the Commissioners as to the stamp duty chargeable on the instrument aftermentioned. An instrument titled “Disposition” was granted by Charles Prentice, chartered accountant in Edinburgh, judicial factor on the estates of the New Imperial Building Association, and as judicial factor vested in the subjects disposed to and in favour of Thomas Anderson, builder, Leith, with entry at Martinmas 1877. Anderson, a creditor and shareholder of the Association, had paid on behalf of the Association considerable sums of money towards the discharge and liquidation of claims due by it, and had at his own expense completed the erection of certain heritable property, afterwards valued at £5400 or thereby, in Prince Regent Street, Leith, belonging to the Association. He had made sundry other payments on account thereof, and had further acquired for onerous considerations the right, title, and interest of all the members or partners in the estate of the Association, or those representing them. The judicial factor on 1st November 1877 had presented a petition to the Lords of Council and Session setting forth, *inter alia*, these circumstances, and also that in respect Anderson had acquired the whole rights and interests of the members and partners, and in respect of the obligations undertaken by him, the judicial factor was desirous of obtaining authority to convey to Anderson his whole vested title in the subjects, and praying the Court to authorise him as factor to convey them accordingly under burden of the ground-annual and other burdens affecting the same, and the Court on 27th November 1877 authorised and empowered the petitioner as judicial factor to assign and dispose the subjects to Anderson.

By the schedule of the Act 33 and 34 Vict. cap. 97, there were charged the following stamp duties, viz. :—

“Conveyance or transfer on sale of any property (except such stock or debenture stock or funded debt as aforesaid).

“Where the amount or value of the consideration for the sale does not exceed £5 . . . £0 0 6.”

And so on.

“Conveyance or transfer of any kind not hereinbefore described . . . £0 10 0.”

Sections 70, 73, and 78 were referred to as interpreting the terms in the schedule.

On the instrument above described being presented to the Commissioners of Inland Revenue they were of opinion that the heritable property was by the conveyance legally transferred to or vested in Anderson, in consideration of debts due