

LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

“Find that the name ‘Water of Ayr Stone’ has never been used as a trade name in commerce to denote exclusively the stone taken from the pursuer’s quarry: Find that the pursuer is not entitled to the exclusive use of the name of ‘Water of Ayr Stone’: Find that the defenders have not infringed the pursuer’s trade-mark: Therefore dismiss the appeal, and, subject to the foregoing findings, affirm the judgment of the Sheriff-Substitute and of the Sheriff appealed against: Find the defenders entitled to expenses,” &c.

Counsel for Complainer (Appellant)—Mackintosh—Pearson. Agents—Cairns, Mackintosh, & Morton, W.S.

Counsel for Respondents—J. P. B. Robertson—Graham Murray. Agents—Dove & Lockhart, S.S.C.

Friday, February 1.

SECOND DIVISION.

[Sheriff of Selkirkshire.

MOFFAT v. BOOTHBY.

Master and Servant—Reparation—Wrongous Dismissal—Order to do Work outwith Duty for which Servant was Engaged.

A lad was engaged by a farmer to act as a shepherd and to give assistance in farm work at busy seasons, such as the harvest. After being some time in the service he was ordered, in addition to his work as a shepherd, to tend some cattle which were being wintered at the steading. He refused to obey the order as not being any proper part of his duty, and was dismissed. *Held (dub.* Lord Rutherford Clark) that the dismissal was unjustifiable and that he was entitled to damages.

In January 1879 William Moffat, a youth of about 15 years of age, was engaged by C. Boothby, tenant of the farm of Hyndhope, as one of his shepherds for the period from Whitsunday 1879 to Whitsunday 1880, at the yearly wage of £22, permission in addition being given to him to graze one ewe on the farm, his master also to pay for his board. At Whitsunday 1880 he remained in the service without any new agreement, and so continued till 13th November 1882, when he refused to obey an order given him on the 11th by Mr Boothby to attend to the cattle at the steading during the winter, on the ground that it was no part of his bargain to do that work, and that it was impossible for him to perform both it and his duty as a shepherd satisfactorily, and was accordingly dismissed. In this action he sued his master for £36, 8s., being a year’s wages, less a sum of £5 paid to account, board wages from the day of his dismissal to Whitsunday 1883, and the value (10s.) of a sheep’s grazing from 13th November to Whitsunday, on the ground that his dismissal was in the circumstances wrongous.

The defender averred that the dismissal was

justifiable, and that the pursuer had been engaged to do farm work as well as that of a shepherd, his duties as such being only such as to occupy him during much of the year for about three hours a day.

A proof was led from which the following facts appeared:—When the pursuer was engaged he was informed by the defender that he would have to attend to the sheep on a hill known as the Dodhead, and assist in the operations of cutting hay and corn, and (according to defender) singling turnips, and other farm work, without specifying what work; nothing was said about cattle. He was boarded with the upper shepherd Beattie, whom he was told to consult as to the management of the sheep. Beattie was present when the pursuer was engaged, and gave evidence in this action that the duties mentioned by the defender, apart from those as a shepherd, were assistance at the corn and hay harvests. At the time of the proof he also was leaving the defender’s service. In November 1882 the order was given to attend to the cattle at the steading during the winter. These cattle were ten in number and were in the sheds at the steading. This he was advised by Beattie not to undertake, because in his opinion as a shepherd it was impossible for him to attend to that work in addition to his duties as shepherd. From the time of his entering on the service he had done such work as singling turnips, herding the cattle when they were on Dodhead along with the sheep, and carrying hay to them when necessary, “turniping” the sheep at certain seasons, and cutting turnips for them at others. In 1882 the whole of Hyndhope was sown in grass, so that the pursuer had no more work at turnips. The pursuer deponed that he went over the hill, which carried twenty four score sheep, twice a day, which took three hours each time. Beattie as well as the pursuer deponed that the work of attending to the sheep could not be done in three hours. Besides those on Dodhead the pursuer had to see to two score of sheep in the parks. The defender and another farmer deponed that, except at busy seasons, three hours a day was sufficient for the work in good weather. It was admitted that at busy times, such as lambing time and the stormy weather, the pursuer’s whole time would be occupied. He was told when the order to attend the cattle was given, that this would not be required of him at such times.

The Sheriff-Substitute (MILNE), after findings in fact to the effect just stated, pronounced these findings in point of law:—“Finds in point of law that there is no evidence to show that when the pursuer was engaged by the defender as shepherd he was told that he would be expected to make himself generally useful on the farm, or that any other farm duties would be required of him besides his proper duties as shepherd, than to assist at hay-time and harvest, and that the pursuer undertook to perform none other: Finds, therefore, that he was wrongously dismissed by the defender on 13th November, and that he is entitled to wages and board wages accordingly: Finds, further, that there is no evidence to show that the charge of sixpence per week for grazing his ewe on another farm, from 13th November 1882 to Whitsunday 1883, is excessive; therefore decerns against the defender for £36, 8s. sterling, as concluded for.”

“*Note.*—The pursuer and his father and Beattie all concur in saying that when the pursuer was engaged by the defender as shepherd there was no mention of farm duties which the pursuer was expected to perform other than assisting at hay-time and harvest. Nor does the defender allege that there was. It is true that during the three years and a half the pursuer was in the defender's service he, as well as Beattie, did other farm work, but, as explained by Beattie, not because he was bound, but to help forward with the work. The defender had never before the 11th November asked the pursuer to attend to the cattle at the steading during the winter; and that is a duty so entirely outwith the duties of a shepherd, that in the absence of a special agreement on the part of the pursuer and of his father on his behalf, that he should do that work if required, the defender had no legal right to impose it upon him. The defender gives the pursuer a most excellent character—‘A good and willing servant, and I was unwilling to dismiss him.’ This ought to have made him hesitate before putting upon a young man, of whom he had formed so high an opinion, the disgrace of dismissal.”

On appeal the Sheriff (Pattison) recalled the interlocutor appealed against, found that the order of 11th November was a reasonable and lawful order with which the pursuer was bound to comply, and that his persistent refusal to do so justified the defender in dismissing him from his service, therefore assolized the defender from the conclusions of the action.

“*Note.* When the cattle were in November 1882 removed to the steading, it was, in the Sheriff's opinion, a reasonable order to require him to continue to attend them there. He was told that this would not be required of him during lambing-time, which lasts about a month or six weeks, beginning about the 18th of April, during which time the pursuer's main duties in regard to the sheep required him to be oftener on the hill than in ordinary times. The evidence generally shews that it was not inconsistent or incompatible with the performance of his main duties as shepherd to do this. The order of course implied that he was to do so only when it did not interfere with his duties as to the sheep, as in lambing-time or during severe weather, as the defender explains. It was not as if he had been asked to act as ploughman or as groom. It is a general rule that servants in husbandry must perform any part of the labour of the farm which the master points out to them. The work required in this case did not infer any danger to the pursuer's person or belong to a different class of duties from those for which the pursuer was paid. And to the Sheriff it appears that to encourage such hair-splitting as to the duties of a young man engaged on a farm as the pursuer was would be fraught with injury both to master and servant.”

The pursuer appealed, and argued—The dismissal was wrongous inasmuch as the order to attend to the cattle was a manifest deviation from the line of the pursuer's engagement, about which there could be no doubt on a consideration of the proof—Bells Prin. sec. 176.

The defender in reply argued that the order was a reasonable one, and not outwith the general assistance in the farm operations which pursuer was bound under his engagement to give.

Authorities—*Wilson v. Simson*, 11th July 1844, 6 D. 1256; *Hamilton v. M'Lean*, Dec. 9, 1824, 3 Sh. 379.

At advising—

Lord Young—In this case, which is a dispute between a farmer and his shepherd, the two Sheriffs who considered the case have come to a different opinion. This is unfortunate, for it is a dispute of such a character that I think all of your Lordships will agree it ought to have taken end after it had been investigated and decided by the Sheriff-Substitute, who, as having been Sheriff in a pastoral country for so many years, was very well qualified in my opinion to deal with the evidence. The question was a very simple one, and just whether this herd lad, who had been engaged as a herd, though he might be called on to perform other duties, could, after he had been three years in service, be called on to perform the further duty of attending the cattle at the steading during the winter. That is the question, and there is no dispute as to the engagement. He was engaged as a shepherd, though it was mentioned that he might be called on to perform other duties, and he did act as shepherd and performed the other duties which occasionally presented themselves, and which he was asked to perform, so well as to win a high character as an obliging servant. But on the 11th November 1882, after he had been three years in service, he was put to this new duty, which was said to be cognate to those he had performed before. Now, I should attach great weight not only to the evidence of Beattie, an experienced herd, but to the opinion of the Sheriff-Substitute when he says—“The defender had never before the 11th November asked the pursuer to attend to the cattle at the steading during the winter, and that is a duty so entirely outwith the duties of a shepherd that in the absence of a special agreement on the part of the pursuer, and of his father on his behalf, that he should do that work if required, the defender had no legal right to impose it on him.” There is no evidence to the contrary, and there is evidence that it is so in the deposition of Beattie and the opinion of the Sheriff-Substitute. I must therefore conclude that it was a duty entirely outwith a shepherd's duty, and in the absence of special agreement not a duty which he could be called upon to perform. On the whole matter, then, I agree with the Sheriff-Substitute, and I propose that we should recal the Sheriff's judgment and revert to that of the Sheriff-Substitute.

Lord Justice-Clerk—I confess I felt no favour towards the pursuer's case when I read the papers. The lad was bound by his contract to do any odd job which might be required of him, of course within the scope of his employment, and if the duty put upon him was one he could competently perform I do not think he would have shown a proper spirit in refusing to perform it. But I have come to be very clearly of opinion that what he was required to do was outside the service for which he had been originally engaged, and this is cleared up by Beattie, who was present when the bargain was made, and whom he was advised by the defender to consult in matters connected with his work. Beattie tells us that he advised the lad not to undertake the work, as it would be impossible in his opinion to do justice

to his work as shepherd as well. It is true that Beattie might have thought that if additional work was put upon the under shepherd it would also be put upon him, but if his evidence is true the work was clearly one outside the original bargain, and therefore not within the ordinary category of the law in which a servant is held bound to put his hand to whatever is required of him by his master. I repeat that I believe Beattie's story, and therefore on the whole matter I concur with Lord Young.

LORD CRAIGHILL—I am of the same opinion, and I proceed principally on the ground that previous to November 1882 the pursuer was never called upon to perform the duty of tending the cattle. I am not disposed to interfere too strictly in construing a contract between parties bearing the relations the present parties to the action bear to one another. There is some controversy, but none I think as regards the terms of the contract. The pursuer was engaged as a shepherd, but there was another shepherd, Beattie, and when not otherwise engaged the pursuer was employed in other duties. We have some specification of what these duties were. They were the duties of assisting in cutting hay, carrying it away, and, it also appears, of shawing turnips. It does not appear that the pursuer was unwilling to do anything of which he thought he was capable, and it is quite clear that as regards the above duties he was not to be alone, but to have the assistance of others. The work of tending the cattle was not a work of this kind, and it is inconceivable, if it was a work within the contemplation of parties at the date of the contract, that he should not have been asked to do it before. But then, more than that, whether within the contract or not, there is evidence that it could not have been done, and that is a thing we know from what the upper shepherd tells us; therefore it was in my opinion unreasonable for the defender to call on the pursuer to do what he had never been called upon to do before, and what he could not perform adequately together with his ordinary duties. It is to be regretted that the defender did not have evidence in support of his contention that the new duty was one which the pursuer was capable of performing along with his other duties. On the whole matter I concur entirely with Lord Young.

LORD RUTHERFURD CLARK—I confess I have great misgivings as to the judgment which is to be pronounced. If I thought that the work which the pursuer was required to do was beyond his power, then the order was an oppressive and illegal one, and the defender had no right to dismiss his servant in respect of his refusal to obey it. But I find it very difficult to believe that the order was of that kind. It is, in the first place, difficult to believe that any considerate master, such as the defender was, would in his own interest have thought it necessary to insist on an oppressive order; and in the second place, I cannot well understand how the duty of tending some six or ten cows could be a duty which it was impossible for the pursuer to perform consistently with his duties as a shepherd. No doubt he thought it so, and so did Beattie, the upper shepherd, but still I have misgivings of the truth of that story, and I do see this, that Beattie

was about to leave the defender's service when he gave this evidence. That makes me hesitate to think there was anything so out-of-the-way in the order as to entitle the pursuer to refuse to obey it. I cannot think his duties were particularly heavy. No doubt his principal duty was to act as shepherd, but that was not to be his sole duty. Now, it seems a matter of great indifference to him and to his relation to his master whether he should be put to shaw turnips or fodder cattle, and whether this should be done together with others or exclusively by himself. I cannot imagine that he was asked to do anything which could be called oppressive, but I think the defender is to blame in not having led evidence to show that it was not of that nature. While we have evidence adduced by the pursuer to show that it was oppressive, we have none adduced to meet it on the part of the defender. There is no evidence of what time the duty would take. On the whole matter, then, I cannot help thinking that if the defender had thrown more light on the case he might have succeeded in justifying the dismissal.

The Court pronounced the following interlocutor:—

“Find in fact that the pursuer was engaged by the defender to take charge of the sheep on the farm of Hyndhope, and to assist at hay time and at the cutting of the corn for the year ending Whitsunday 1880, at the yearly wage of £22, with board, and grazing for a sheep, and that the engagement was renewed for the years ending at Whitsunday 1881–2–3: Find that the pursuer discharged his duties to the satisfaction of the defender till 11th November 1882, and that he was then required by the defender, in addition, to take charge of cattle at the farm-stead during the winter, which the pursuer declined to do, on the ground that such charge did not fall under his agreement with the defender, and was incompatible with the performance of his duties in herding the sheep: Find that the pursuer was thereupon dismissed by the defender: Find in law that such dismissal was wrongous and unwarranted in the circumstances: Sustain the appeal; recal the interlocutor of the Sheriff of 15th November last; affirm the interlocutor of the Sheriff-Substitute of 26th April 1883; of new ordain the defender to make payment to the pursuer of the sum of £36, 8s. sterling,” &c.

Counsel for Appellant—Hon. H. J. Moncreiff—Strachan. Agents—Horne & Lyell, W.S.

Counsel for Respondent—Darling—Low. Agents—Mylne & Campbell, W.S.