

further sum of £9500 is to be paid for the claim for loss of business, which is not and could not be vested under this deed in the purchasers.

Upon these grounds I entirely concur with your Lordship that the judgment of the Commissioners in this case is wrong.

The Court pronounced the following interlocutor:—

“Reverse the determination of the Commissioners: Declare that the sum of £9499, 18s. 3d. is not to be reckoned part of the consideration for the sale on which the conveyance mentioned in the case was granted: (Ordain the Commissioners to repay to the appellant the sum of £47, 10s.); and decern.”

Counsel for the Glasgow and South-Western Railway—Mackintosh—Pearson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Inland Revenue—Sol.-Gen. Robertson—Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Saturday, January 23.

FIRST DIVISION.

(Sheriff-Substitute of Ross, Cromarty, and Sutherland.

MITCHELL v. SUTHERLAND.

Process—Appeal—Jury Cause—Proof—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 40.

A tenant having sued his landlord in the Sheriff Court for damages in consequence of injury done to his crops by rabbits, and a proof having been allowed, the defender appealed for jury trial, but on the case being called in the summar roll, moved that the case should be tried in the Court of Session by a Judge. The Court refused the appeal, and remitted to the Sheriff-Substitute to proceed with the proof.

William Mitchell held an agricultural lease, dated in 1868, of the lands of Pulrossie and others from Mr Sutherland of Skibo. The lease contained a clause reserving to the proprietor the whole game upon the lands, hares and rabbits included, and also the whole fishings in the waters passing through or bounding the lands thereby let, with the sole and full right to the proprietor, either by himself or others to whom he might give authority so to do, to hunt, shoot, and course on the lands thereby let, and to fish in or upon the waters, with the right of using the banks along the same for that purpose, and that without paying to the said William Mitchell or his foresaids any damage therefor. And it was thereby agreed that the said William Mitchell or his foresaids should not have any claim against the proprietor for any damage which might be done to his crops, either by game, hares or rabbits, the proprietor, however, keeping down the rabbits to the best of his ability to a fair and reasonable stock.

In 1885 Mitchell brought an action against Mr Sutherland in the Sheriff Court of Ross, Cromarty, and Sutherland at Dornoch for £433 in

name of damages. He alleged that during 1884 and 1885 the stock of rabbits on the said lands had been increased by the defender, or suffered to exist to an unfair and unreasonable extent, and that he had in consequence sustained damage to the extent of the said sum sued for.

The defender pleaded—“(2) The defender should be assoiized in respect the claim is excluded by the lease, and in respect the defender has not failed in the performance of any obligation incumbent on him. (3) The stock of rabbits during the period complained of not having been more than fair and reasonable, and *separatim*, the defender having kept them down to the best of his ability to a fair and reasonable stock, he should be assoiized.”

The Sheriff-Substitute (MACKENZIE) pronounced this interlocutor—“The Sheriff-Substitute having heard parties’ procurators, reserves consideration *hoc statu* of the defender’s plea that the present demand for damages is excluded by the lease between the parties, and before answer allows the pursuer a proof of his averments (so far as denied or not admitted), and the defender a conjunct probation, and directs that the case be put to the roll of the 3d November next, to have a diet of proof fixed.

“*Note.*—The foundation of the pursuer’s claim is that he has suffered damages from rabbits, which the defender has allowed to increase beyond what was ever contemplated by the lease. He is thus entitled to an opportunity of showing that the restrictive clause in that lease (upon which the defender founds his plea) is inapplicable to the actual state of matters about which he complains, and a proof before answer has accordingly been allowed him.”

The defender appealed to the Court of Session for jury trial, and the pursuer accordingly lodged a proposed issue in the following terms:—“It being admitted that between 1st January 1884 and 1st July 1885 the pursuer was the defender’s tenant, under lease dated 27th April and 5th May 1868, in All and Whole the lands and mains of Pulrossie, and the lands of Newton and Balnoe, and Polnahard, all lying in the parish of Creish and shire of Sutherland, together with the pasturage of the woods of Newton, Balnoe, and Sheneval, but excepting and reserving from the said lands the portions described in the said lease, and that the pursuer had right to the crops and pasture on the lands let to him by said lease between the two dates above mentioned—Whether during the whole or any part of said period the defender wrongfully kept or suffered to exist on the lands let to the pursuer, or any part thereof, rabbits in excess of a fair and reasonable stock, to the loss, injury, and damage of the pursuer?”

On the case being called in the summar roll, the defender (appellant) moved to have the case tried before a Judge in the Court of Session, on the ground that a difficult question of construction of the lease was involved—*Cadzow v. Lockhart*, 2 R. 928, 3 R. 666.

The pursuer argued—This was plainly not a *bona fide* appeal for jury trial, but an attempt by a landlord to increase expense and litigation by having the case conducted in the Court of Session, and rendering an appeal to the House of Lords possible. Such a course of procedure,

though competent—see *Cochrane v. Ewing*, July 20, 1883, 10 R. 1279—would not be encouraged by the Court. It would defeat the leading provision of the enactment—*Dennistoun v. Rainey, Knox, & Company*, 9 Macph. 739. The case having been brought here by the defender should be tried by jury. It was not in its nature unfitted for a jury. The clause in the lease was not at all so intricate and difficult as that in *Cadzow's* case. The proposed issue raised the whole point—*Sime v. Earl of Moray*, 6 Macph. 217. Alternatively, if the case were not to be tried by jury it should go back to the Sheriff Court.

At advising—

LORD PRESIDENT—I think this case should go back to the Sheriff. It ought never to have come here at all.

LORDS MURE and ADAM concurred.

LORD SHAND was absent.

The Court refused the appeal with expenses, and remitted to the Sheriff-Substitute to proceed with the proof.

Counsel for Pursuer (Respondent)—Comrie Thomson—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Appellant)—Pearson—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Wednesday, January 27.

SECOND DIVISION.

THE POLICE COMMISSIONERS OF THE BURGH OF PARTICK v. GREAT WESTERN STEAM LAUNDRY (LIMITED).

Road—Building—Restriction—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 102—8 and 9 Vict. cap. cxcv. sec. 18.

A local Act provided that “all houses and every other building whatever” should be at least 30 feet from the centre line of a certain road. A proprietor who was erecting a house more than 30 feet from this line proposed to erect on his ground in front of it, but within 30 feet of the centre line, an ornamental fence consisting of a stone parapet a foot high surmounted by a railing. *Held (diss. Lord Young)* that such a fence was not objectionable as a building in the sense of the provision.

This was a Special Case to have the opinion of the Court upon certain questions arising between the Police Commissioners of the burgh of Partick, who were, as local authority, vested under the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) with the management and maintenance of the highways within the burgh, and certain proprietors and superiors of ground, under the following circumstances:—The burgh of Partick is intersected by various roads and streets, and amongst others by a road of communication leading from the main road from Glasgow to the drawbridge over the

Forth and Clyde Canal, thence to the Yoker Road near Blawarthill. This road was known as the “Crow Road.” Prior to the coming into force of the Roads and Bridges (Scotland) Act 1878 the Crow Road was under the charge of the Yoker Road trustees under various local statutes, including the Act 8 and 9 Vict. cap. 195.

The Great Western Steam Laundry Company (Limited), incorporated under the Companies Acts 1862–1880, were proprietors of certain property lying along the Crow Road, the superior of which was James Gordon Oswald, Esq. of Scotstoun and Balshagray. The company were in the course of erecting and completing on their own ground certain buildings to be used as a steam laundry, the front wall of which buildings was at least 60 feet from the centre of the Crow Road. They intended, however, to erect along the Crow Road, so far as their ground extended, a parapet wall of 1 foot in height, surmounted by an ornamental iron railing. This wall—which in the Special Case was designed a “fence”—was to be placed 25 feet from the centre of the Crow Road. The result of their whole operations would have been to increase the breadth of the road by a width of from 6 to 9 feet. The Police Commissioners of the burgh of Partick, acting under this Act, insisted that this parapet wall and railing erected by the Steam Laundry Company, should be placed at a distance of 30 feet from the centre of the Crow Road. The ground on which they maintained this contention was that section 18 of the Act 8 and 9 Vict. cap. 195 (the preamble of which set forth that “it is expedient that further and more effectual powers should be granted for widening, repairing, and improving” certain roads therein mentioned, including the Crow Road), enacts “that all houses, and every other building whatever,” to be built on the sides of the said roads should be erected at the distance of at least 30 feet from the centre of said roads under a penalty; and that 1 and 2 Will. IV. cap. 43, incorporated with the Roads and Bridges (Scotland) Act 1878, enacts by section 91 (referred to in section 102 of the Act of 1878, quoted *infra*) “that no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of 25 feet from the centre of any turnpike road.”

The Roads and Bridges (Scotland) Act 1878, sec. 102, provides—“Notwithstanding the hereinbefore contained enactments that the local Acts now in force relating to turnpike roads and statute-labour roads shall cease to be in force at the respective times hereinbefore provided, all the provisions of such Acts which provide that houses, walls, or other buildings shall not be erected, or that new enclosures or plantations shall not be made within certain distances therein specified from the centre of such respective roads which are greater than the distance prescribed by section ninety-one of the Act first and second King William the Fourth, chapter forty-three, applied by this Act to those roads, are hereby continued in force; and the trustees, boards, district committees, and burgh local authorities, having the management of such respective roads, and their officers, may enforce such provisions in the same manner as the trustees having the management