

maintain her there along with the other members of the family.

This special case was presented to the Court, the parties of the first part being Mr Barry's trustees, Mrs Barry being the party of the second part, and Mary Barry being the party of the third part.

The parties were agreed that if Miss Barry should be held entitled to separate maintenance from Mrs Barry, the sum of £40 per annum should be held to be the amount to be paid by Mrs Barry.

The question of law was—"Is Mrs Barry bound to pay to Miss Barry a sum of money for her separate maintenance?"

Argued for the trustees and Mrs Barry—It was quite clear that the testator when he provided that his wife should educate and maintain his children, had also in view that they should all live in the same house as Mrs Barry, for he specially permitted her to occupy and possess his dwelling-house. It was unreasonable, then, and contrary to his obvious wishes, to expect Mrs Barry to support her stepdaughter outside that house. If the third party chose to disregard her stepmother's offer to maintain her in the Ferry Road home, and elected to reside in the nunnery, then there could be no obligation on her stepmother, and the clause of the will in regard to education and maintenance ceased to operate—Lewin on Trusts, p. 139.

Argued for the third party—Mrs Barry had no power to insist on her stepdaughter coming to live with her at Ferry Road. Her father alone, as in right of the *patria potestas*, could have asserted such a right. She had a perfect right to go into the nunnery, and that did not debar her from her claims to be maintained under the express provisions of her father's will. It was no answer that her stepmother had offered to receive her to live with her in the Ferry Road house—*Ayton v. Colvill*, 1705, M. 451; *Moncrieff v. Fairholm*, 1736, M. 454; *Jackson v. Jackson*, November 17, 1825, 4 S. 188.

At advising—

LORD JUSTICE-CLERK—The claim here made on the part of the daughter can only be sustained if the provisions of the will bear out her contention. There is no doubt at all that the mother has £700 a-year as her jointure, and that she is bound to maintain out of that sum her unmarried daughters. That however is in my view only an obligation on her to maintain them in the house which apparently has been left to her for that purpose. It appears to me therefore that as Mary Barry has elected to live in a convent, that her stepmother is not bound to pay for her board there out of her alimentary allowance.

LORD YOUNG—I am of the same opinion. Mrs Barry has no interest in the estate of her deceased husband except to the extent of an annuity of £700 a year. That annuity and the residence in Ferry Road is provided by her husband on the condition that she shall out of this provision educate and maintain her children in a way befitting their station in life until, they shall respectively attain the age of twenty-one years, or if daughters, until they are married. The question depends upon whether payment of an alimentary

provision to this daughter for her maintenance in the convent is incumbent on the widow as the condition of her annuity. I am without any doubt of opinion that it is not. I think she is bound out of her provision to maintain and educate her children till they are twenty-one, though she is freed at an earlier period from alimentering the daughters if they marry. Mary Barry, however, is not within the obligation at all. I am therefore of opinion that there is no obligation on Mrs Barry to pay the alimentary provision sought from her.

LORD CRAIGHILL—I agree. I am clearly of opinion that there is under the will no obligation whatever on the widow to support Mary Barry in the convent.

LORD RUTHELFURD CLARK concurred.

The Court answered the question of law in the negative.

Counsel for the First and Second Parties—Dickson. Agent—Andrew Wallace, Solicitor.

Counsel for the Third Party—Crole. Agents—Tait & Crichton, W.S.

Friday, March 2.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SUTHERLAND *v.* THE PRESTONGRANGE
COAL AND FIREBRICK COMPANY (LIMITED).

Process—Jury Trial—Inspection of Locus by
Juryman—New Trial.

In the course of the trial of an action of damages for personal injuries, caused by the pursuer being run over by a coal hutch, one of the jurymen visited the *locus* and examined for himself the defenders' method of working the hutches.

The Court allowed a new trial on the ground that the verdict had not been returned on the evidence laid before the jury.

Charles Sutherland, carter, Meadowhill, Tranent, raised this action against the Prestongrange Coal & Fire Brick Company (Limited) for personal injuries sustained by him through fault of the defenders.

The pursuer averred that while he was filling his cart with coal from one of the defenders' hutches, another hutch was culpably and recklessly despatched along the rails without warning to him, by the fault of a servant of the defenders, and that it knocked him down and ran over him.

The case was tried by Lord Fraser and a jury, and a verdict was returned for the pursuer by a majority of seven to five.

The defenders then obtained a rule on the pursuer to show cause why the verdict should not be set aside on the ground, *inter alia*, that one of the jurymen had before the conclusion of the case visited the scene of the accident, and had examined for himself the *locus* and the method of working the hutches.

The Court ordered the defenders to procure an

affidavit from the juryman, of whose conduct they complained, setting forth the facts. The affidavit contained this statement—"The evidence for the parties was finished on Saturday the 21st, and the case continued till Tuesday the 24th. On Monday the 23rd, I took the train to Prestonpans and walked to Morrison's Haven Pit, where the accident to the pursuer had occurred. I did not inform the agent on either side of my intention to do this. I went to the office of the company, and I there saw Mr Luke, the manager. He recognised me as one of the jurymen, and I told him I had come for the purpose of examining and seeing for myself the working of the pit-bank. Mr Luke conducted me over the place, and on my request showed me the different matters spoken to during the trial, including the shoving of the hutches, and the tilting both at the back and front shoots. I examined for myself the gangways, the rails and points, the cradles, and hutches, &c. I myself took a hutch, and pushed it along the rails for a few inches to enable me to ascertain the strength necessary to move it. I made an examination of the whole place. I told Mr Luke I had come merely to see the place, and that I would not speak a word relative to the case, and I carefully avoided doing so. Mr Luke did not seek to discuss the case with me. On the Tuesday morning when I arrived in Court I told the jurymen whom I saw that I had visited the scene of the accident on the previous day, but at this time there was no opportunity of discussing the matter. I am quite willing to state what passed when the jury retired if desired by the Court to do so."

The pursuer showed cause, and argued—The visit of the juryman to the *locus* was a mere accident, and it would be hard to find that such could invalidate the verdict. The defenders could not assume that the jurymen voted against them. It was true he was foreman, but his election as such was the first act of the jury, and he was bound to deliver the verdict whatever his opinion was. The ground relied on was not essential to the justice of the case. Suppose instead of going to see the place he had known it, and talked to his fellow-jurymen on the strength of this, that would not have been objectionable under the statute. [LORD PRESIDENT— I think you cannot assume that that proposition is perfectly clear.] It would surely have been no objection if he had met someone on the street who had talked to him of the nature of the *locus*. The circumstances were actually in favour of the defenders, for their manager would make no observations hostile to them. It was admitted that between the beginning of the speech for the defenders, and the Judge's summing up, the defenders had received intimation of this visit, and no objection was taken then. They were willing to take the verdict if it had been in their favour, and could not now object—*Williams v. Great Western Railway Company*, 28 L.J., Ex. 2.

Argued for the defenders—It was a grave irregularity that one juryman should have obtained independent evidence. It was apparent from the terms of the affidavit that he had communicated his views to the other jurymen. He made himself a witness in the case. His oath was taken to return a verdict according to the

evidence before him. So far as this juryman was concerned, the verdict proceeded on independent evidence. [LORD ADAM—Suppose the verdict had been the other way, would it have stood, the juryman being in communication with the other side?] No. The manager was a representative of the other side. [LORD FRASER—The affidavit omits an important element. Did this juryman convey to his fellows the information he got or the impression that was made on his mind? He only says he is willing to state what took place in the jury's retiring room, but surely we ought to know that.] They thought it beyond their rights to ask what had occurred in the jury room without an order of the Court. The affidavit contained enough without this element. His mind must have been influenced by the examination he made of the *locus*, and the explanations of the working of the hutches given to him, and that was enough for their contention.

At advising—

LORD PRESIDENT—The question for our consideration is, whether there has been assigned here a cause for setting aside the verdict, which is essential to justice. I am of opinion that there is such cause. I think there has been a gross miscarriage of justice in this case. There has been irregularity without precedent, for I am not aware that the question has ever before been raised for consideration, and it is certain that that irregularity is of vital importance to the justice of the case. The jury is empanelled, and sworn to return a verdict according to the evidence laid before them. They are not entitled to proceed on anything except that evidence, and if they proceed on information otherwise obtained, they do not return a verdict according to the oath which they have taken. In the present case it is impossible not to believe, when this juryman went to the *locus*, and informed himself of the nature and method of the working of the hutches in question, that his mind must have been impressed by what he saw. We cannot say what that impression was. It is possible he might not be able to say clearly himself. But it is impossible to doubt that he was impressed, and if that was so, he was in a position, as a jurymen, in which he ought not to have been, and that by his own fault.

Whether he influenced the minds of the other jurymen is another matter. It is exceedingly probable that he mentioned his views to them, and it is plain from what occurs at the end of his affidavit that something did pass as to it, although it does not appear what was its nature. Whether any communications did pass on this subject, or whether they influenced the other jurymen, I have no doubt that this juryman was influenced, and that it is essential to the justice of the case that there should be a new trial.

LORD ADAM—I am of the same opinion. I think it is impossible to be satisfied that the verdict in this case was returned on the evidence laid before the jury. I think we cannot doubt that the juryman, who not only saw the *locus*, but got an explanation of the method of working the hutches with which this case was concerned, must have been impressed with what he saw and heard. But the juryman who was so influenced was not proceeding on the evidence before him. What the ex-

tent of his influence on the other jurymen was we cannot say, but I agree that it is essential to the justice of the case that there should be a new trial.

LORD FRASER and LORD KINNEAR concurred.

LORD SHAND and LORD MURE were absent from illness.

The Court granted a new trial.

Counsel for the Pursuer—Rhind—Gunn.
Agent—C. B. Hogg, L.A.

Counsel for the Defenders—Young—Clyde.
Agents—Drummond & Reid, W.S.

Friday, March 2.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

CAMERON v. DRUMMOND.

Lease—Fence—Removal of Wire Netting by Landlord—Damage by Ground Game—Reparation.

Under the lease of a farm the landlord was taken bound to repair the fences where necessary, and it was declared that on this being done the tenant accepted of the fences on the farm as in sufficient tenable condition and repair, and bound himself to uphold them in tenable condition during the currency of the lease, and to leave them in the like condition at the expiry thereof. When the tenant entered upon the farm there was a wire fence lined with wire netting, which bounded the farm on one side from a plantation belonging to the landlord. The wire netting, which was intended to prevent inroads of ground game from the plantation, was, after the tenant's entry, removed by the landlord. The tenant then raised an action to have the landlord ordained to restore the wire netting, and for damages for the injury done to his crops by the ground game. *Held* that as the wire netting was delivered to and accepted by the tenant as part of the lease, and served a purpose useful to him, the landlord was bound to restore it, and was liable for the damages caused by its removal.

This was an action at the instance of Alexander Cameron, tenant of the farm of Hutcheson, on the estate of Cromlix, Dunblane, against the Honourable Arthur Drummond, proprietor of Cromlix.

The conclusions of the summons were that the defender should be ordained "to bring back and restore to its original position the wire netting removed by the defender from the wire fence which runs from the north end of the farm of Hutcheson, on the estate of Cromlix, in the parish of Dunblane and county of Perth, tenanted by the pursuer, in a south-westerly direction, and forms the march-fence between a plantation belonging to the defender and the said farm, thereafter for a short distance in a north-westerly direction, and which forms a part of said march fence, and then south-west to the

farm of Crofts on said estate, partly through the hill pasture on said farm of Hutcheson, and which lies on the west thereof, and partly separating the said hill pasture from the remainder of said farm of Hutcheson, which wire netting lined the said wire fence and formed a portion thereof, or otherwise to line the said wire fence with new wire netting of the same height, quality, and dimensions," and to pay £150 damages.

By the conditions of let of the farm of Hutcheson it was stated that "the farm extends per Ordnance Survey to about 233 imperial acres, of which about 183 acres are arable and 50 pasture, all as delineated on the plan or sketch thereof shown herewith, and presently possessed by Mr Malcolm Macfarlane."

By the lease the defender let to the pursuer for fifteen years from Martinmas 1885—"All and whole the farm of Hutcheson as presently possessed by Malcolm Macfarlane." The proprietor was taken bound to "repair the fences where necessary, and sub-divide the 40 acre field with one fence; on these things being done the said Alexander Cameron hereby accepts of the buildings, fences, hedges, gates, roads, drains, ditches, and water-courses on the said farm as in sufficient tenable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenable condition during the currency of this lease, and to leave them in the like condition at the expiry thereof, . . . and the tenant shall also be at half the expense of upholding plantation and march-fences."

The pursuer averred that previous to making an offer for the farm he had examined the fences on it, "and observed that on the west side the farm was bounded by a plantation belonging to the defender, which was closely preserved for game, but that the farm was effectually protected from inroads of ground game by a wire fence lined with wire netting, which ran from the north end of said farm tenanted by the pursuer, in a south-westerly direction, and formed the march-fence between the plantation and the farm, thereafter for a short distance in a north-westerly direction, and which formed a part of the march-fence, and then south-west to the farm of Crofts, also belonging to the defender, partly through the hill pasture of the farm of Hutcheson, which lay on the west thereof, and partly separating the hill pasture from the remainder of the farm tenanted by the pursuer. The wire fence so lined with wire netting extended to about 1000 yards. . . . The wire netting lined the wire fence not only when the farm was examined by the pursuer with a view to becoming an offerer thereof, but when he entered into possession. As the plantation on the west side of the farm was full of ground game, it was thus the most important part of the fence, and its existence formed an important consideration affecting his becoming an offerer. On or about 9th September 1886 the defender removed the wire netting. The wire netting was about 3 feet high, and the mesh thereof about two inches wide, and formed an effectual protection against hares and rabbits getting access to the farm from the plantation." The pursuer further averred that his crops and grass had, since the removal of the wire netting, suffered seriously from hares and