

# CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1825.

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DUKE OF ROXBURGHE, Appellant.—*Brougham—Denman.*

No. 1.

GEORGE WALDIE, Esq. Respondent.—*Abercromby.*

*Reparation—Implied Obligation—Master and Servant.*—Circumstances, under which (affirming the judgment of the Court of Session), a master, against whom an interdict had been granted, was held not answerable for a breach of it committed by his servant.

THE lands of Quarryholes, situated on the north bank of the Tweed, a little below Kelso, belonging to the Duke of Roxburghe, extend towards the east along the banks of the river, until they are bounded by the western march of the lands of Sharpitlaw, belonging to Mr Waldie. A short way on the Duke's side of the march, the river divides into three branches,—that on the north side of the river forming a small island, or *anna*, the property of Mr Waldie. Except for a short distance on its western point, it lies opposite and within the limits of the lands of Sharpitlaw.

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2D DIVISION.  
Lord Pitmilley.

Mr Waldie having in 1805 erected a corn-mill, and formed a dam-dyke, he thereafter, in 1808, proceeded to build a subaqueous dam-dyke or cauld, for the purpose of increasing the force of the water, opposite to the lower end of the island, where his mill was situated, and authorized his tenant of the mill to remove the accumulated gravel ex adverso of his property, so as to deepen the stream. At this time a competition was depending for the Roxburghe estates, which had been sequestrated, and a judicial

Feb. 10. 1825. factor appointed, who complained to the Sheriff, and prayed to have it found, 'that Mr Waldie has no right to carry off ' gravel from the bed of the river contiguous to the lands of ' Roxburghe, or to deepen the channel of the stream betwixt the ' said lands and the anna, nor to erect or build any dam-dyke ' across the river Tweed: and in the mean time to interdict and ' prohibit him from any of these operations.' An interim interdict was issued; and after a litigation, and the process had been brought into the Court of Session, Mr Waldie was perpetually interdicted from deepening the channel of the northern branch of the river opposite Quarryholes, and ordained to remove the subaqueous dam-dyke or cauld.

During the dependence of this litigation, Mr Waldie's servants having completed the dam-dyke in contempt of the interim interdict, the Court of Session found the same is 'to be held to ' have been done with the knowledge and approbation of the de- ' fender Mr Waldie;' found him liable in damages, ordained him to remove the dyke, and to pay a fine for the breach of interdict.

In 1813 it was alleged by the judicial factor that Mr Waldie's servants had again begun to deepen the north channel at the prohibited place, and that a complaint was only dropped in consequence of Mr Waldie's assurances that matters should be forthwith restored to their former state. But in 1817, when Mr Waldie was in England, several persons, servants or dependants of Mr Waldie, came by night, furnished with shovels and other instruments, and proceeded to deepen the north channel at the interdicted place. Among these individuals was one Cockburn, (Mr Waldie's gardener), who had been engaged in the former breach of interdict.

Of this violation of the interdict the Duke (who had now succeeded to the estate) complained to the Sheriff, and prayed him to ordain Waldie to restore the channel, so far as it has been altered, to its former state; and to prohibit and discharge Waldie, by himself, his servants, or others in his employment, or acting under authority derived from him, from farther violating the interdict of the Supreme Court, and that under a penalty, with expenses.

A proof having been allowed, the Sheriff found the complaint proved; prohibited and discharged Mr Waldie, by himself, his servants, or others in his employ, or acting under authority derived from him, from farther violating the interdict under a penalty; and found Mr Waldie liable in expenses. In consequence of erroneous information that the action of the river Tweed,

when in flood, upon the chingle above the by-stream, had restored the channel to the state in which it was previous to the operations complained of, the Sheriff found it unnecessary to give any order on that part of the cause. Afterwards, however, on advising a report by Mr Jardine, civil engineer, the Sheriff ordained Mr Waldie to employ persons at his own expense to restore the channel of the by-stream, or the north branch of the river Tweed, to the exact state it was in in 1813. Feb. 10. 1825.

The case having been brought to the Court of Session by advocacy, Lord Pitmilley remitted to the Sheriff, ‘with instructions to ordain the defender, Mr Waldie, to employ persons at his expense to restore that part of the stream, or north branch, of the river Tweed which runs opposite to the petitioner’s (Duke’s) lands, at or above the point C on the plan, to the exact state it was in before the operations complained of in the petition took place; and to adhere quoad ultra.’

Mr Waldie reclaimed. He denied that he had committed any breach of interdict; alleged that some idle people and herd boys, retainers of the Duke, had thrown stones and rubbish into the stream; and that these only, and not any part of the natural bed of the river, had been removed: and he maintained that, at any rate, it was unjust to ordain him to be at the expense of restoring the channel, as he had been in England when the operations complained of had been carried on; that he had not in any way sanctioned them; and that, on the contrary, he had admonished his people on no account to trespass on the Duke’s property, or give any cause whatever of complaint, having most pointedly and positively ordered his servants and tenants on their peril not to touch or interfere with the bed of the river, or any part of it that might in the slightest degree counteract the effect of the decision of the Supreme Court.

The Duke answered, that the encroachment and breach had been distinctly proven, and that Mr Waldie was responsible for the acts and conduct of his servants.

The Court altered, advocated the cause, assoilzied the defender, and found him entitled to expenses; and on the 1st of March 1822 refused a petition by the Duke without answers.\*

The majority of the Judges of the Court of Session proceeded on the principle, that Waldie could not be responsible for the illegal act of his servants, done in his absence, and directly contrary to his express prohibition.

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\* See I. Shaw and Ballantine, No. 415.

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Against these judgments the Duke appealed.

*Appellant.*—The breach of interdict is fully proved, and the appellant is entitled to a decree against the respondent, since without such decree the restoration of the channel cannot legally be made. The respondent's servants were the guilty parties, in particular the gardener, who had been formerly implicated in a similar offence; and for these parties the respondent is answerable, especially as through these illegal operations the respondent has been benefitting by the rent produced by the mill.

*Respondent.*—The operation in question was not executed in the respondent's service; it was executed not only without any authority from the respondent, but in direct disobedience to his positive and repeated orders. Even those actually concerned would not be liable, as they only removed rubbish thrown into the stream by others, the appellant's own dependants.

The House of Lords 'ordered and adjudged that the interlocutors complained of be affirmed.'

*Appellant's Authorities.*—Lord Keith, June 10. 1812, F. C.; Linwood, May 14. 1817, F. C.; Stair's Inst. 1. 9. 5.; Kames' Prin. of Equity, B. 1. p. 1. c. 1. § 2.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 2.

WILLIAM DUNN, Appellant.

ROBERT M'GAVIN and Company, Respondents.

*Sale.*—Circumstances under which it was held, (affirming the judgment of the Court of Session), That statements made by the agent of a seller to a purchaser, relative to the shipping of certain bags of cotton wool at Liverpool to Glasgow, did not amount to such a misrepresentation as to liberate the purchaser.

Feb. 23. 1825.

2D DIVISION.  
Lord Reston.

ON the 22d November 1814, when the price of cotton wool was very fluctuating, Dunn, a merchant in Glasgow, bought from M'Gavin and Company, also merchants there, through the intervention of Donaldson, a broker, (who appeared to have acted in that character for both parties), 50 bags of cotton wool, which at the date of the sale were at Liverpool, and were to be delivered on arrival at Glasgow.

Dunn alleged, that at this time the sellers had 176 bags of cotton at Liverpool, of which, however, only 100 were actually shipped: That by the average sample of these 100 bags, he bought the 50 bags; and on the same day other parties bought