is the possibility of actually discharging cargo, and days when discharging is necessarily stopped ought not to be counted. The considerations which lead to the inclusion of such days, where a fixed number of working days is stipulated, appear to me to be inapplicable to the present case. I allow nothing for ballast, because it appears that the loading of ballast can proceed simultaneously with the discharging of cargo, and would in this case have been completed before the 27th May. The discharging was not actually completed till the evening of 7th June. It follows that the ship was detained eleven days on demurrage, no deduction being to be made for Sundays or rainy days, because the ship ought then to have been on her voyage. The amount of demurrage, calculated at the rate of £24, 3s. per day, is thus £265, 13s. The principal sums due by Thomson & Gray, the owners, to Messrs Price amount to £607, 16s. 11d., which is to be reduced by the amount of the demurrage, and the balance of principal due to Messrs Price is £342, 3s. 11d. Messrs Price will also be entitled to interest on the £607, 16s. 11d., from 8th August 1882, less interest due by them on £265, 13s. from 8th June of that year."

Messrs J. & A. Price reclaimed.

At advising—

Lord Craighill—I agree with the Lord Ordinary on the question as to demurrage, which is the only question on which a complaint has been made against his interlocutor. I had at first some doubt upon the subject, but in the end I have come to be perfectly satisfied with his judgment.

Twenty-one days' demurrage was claimed by the defenders, the shipowners; the Lord Ordinary has allowed eleven, thinking that the cargo could easily have been delivered, and delivery taken by the charterers, in ten days. These eleven days in our consideration of the case may conveniently be divided into two periods, one of four and one of seven days, the first extending from 27th to 31st May, and the second from 1st to 7th June. With regard to this last period I have found no difficulty at all. By their contract the charterers undertook to supply and put on board ballast, and this obligation not only might but ought to have been fulfilled as the cargo was in process of delivery, that the ship when the cargo was put out might be sufficiently stiffened and all fear of accident be avoided. The defenders, however, between the 12th, when delivery began, and 29th May, when that was still going on, denied all liability to supply, and did not supply, any ballast whatever. The consequence was that the master found it necessary to refuse to allow more cargo to be put out because of danger to his ship, and then only the defenders acknowledged their obligation. The delay between 1st and 7th June was thus the plain result of the defenders' refusal timeously to acknowledge their obligation for ballast, and demurrage for this period is damage which they must make good, and demurrage for the earlier four days of the eleven also appears to me to be due as the Lord Ordinary has found. The defenders raised a controversy as to the terms of the contract, denying, contrary to the truth of the case, that they were bound to take the cargo as fast as it could be put out of the ship. By so doing they obtained a slower delivery than could, and but for this reason would have been given. In such circumstances it cannot be held that the master acquiesced in the operations of the stevedore and those employed by him. What at first sight appears most adverse to a claim for demurrage—the want of a written complaint and of a protest—is also thus accounted for, and the result is, that there being no bar to the making of the claim, the claim when made ought to be allowed. The rate of demurrage is not in controversy. If eleven days are to be allowed for, the sum due is that for which upon this point the Lord Ordinary has given judgment.

Lord Rutherfurd Clark—I agree with Lord Craighill.

Lord Justice-Clerk—I am substantially of the same opinion.

Lord Young—I regret to differ from the judgment of Lord Craighill. The case is one which involves no question of law, but is one of facts and circumstances merely, and it is therefore unnecessary for me to say any more than that I am unable to concur in that opinion.

The Court adhered.

Counsel for J. & A. Price (Reclaimers)—Guthrie Smith—Dickson. Agent—John Gill, S.S.C.

Counsel for Thomson & Gray (Respondents)—Solicitor-General Asher, Q.C.—Lang. Agent—Thomas Carmichael, S.S.C.

Wednesday, June 3.

SECOND DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

WINANS *v.* MACRAE.

Interdict—Trespass—Deer-Forest—Lamb Straying on Unfenced Ground.

A pet lamb belonging to a cottar who lived close to a public road which passed through a large deer-forest, and who had no right to graze any animal therein, strayed on various occasions from the roadside, which was not fenced, on to the forest. The Court *refused* to grant the lessee of the forest interdict against the cottar grazing any animal upon the forest, on the ground that he had not shown that he had suffered any appreciable injury.

On 30th July 1884 William Louis Winans, who in 1882 became tenant under a twenty-one years' lease of the estate of Kintail (the property of J. T. Mackenzie), including the lands of Morvich, which he had turned into a deer-forest, brought an action in the Sheriff Court of Rossshire to interdict Murdoch Macrae, a shoemaker who occupied a house at Cairngorm on the lands of Morvich, "from putting any lamb, lambs, sheep, cattle, or other bestial upon the lands of Morvich, in the parish of Glenshiel and county of

Ross, or any part of said lands, for the purpose of grazing, and from grazing any lamb, lambs, sheep, cattle, or other bestial upon the lands of Morvich aforesaid, or any part thereof, and to grant interim interdict."

Macrae was a cottar occupying without rent a house close to the high road which passes through the grazing lands of Morvich. These lands were not separated by any fence from the public road. Macrae's house lay between the sea (Loch Duich), and the road, which at this point runs near the sea.

The pursuer stated—"(Cond 2) The defender occupies, against the wish of the pursuer, a cottar's house upon the lands of Morvich, for which he pays no rent. In April last he, without the leave of the pursuer, commenced grazing two sheep upon the farm and lands of Morvich. The pursuer objected to his doing so, and he removed the sheep. (Cond. 3) In or about the commencement of the month of July 1884, or in the preceding month, the defender, without the leave of the pursuer, put a lamb to graze upon the farm and lands of Morvich, and upon being remonstrated with by the pursuer's gamekeeper, acting upon the special instructions of the pursuer, refused to take the lamb off the grazings, and intimated his intention of placing both sheep and cattle upon the grazings, and to keep them thereon whether the pursuer objected or no." In Cond. 4 the pursuer stated that on 19th July 1884 he had written to Macrae threatening this action if he did not remove the lamb. "The defender has taken no notice of the said letter, and he continues to graze the lamb on the farm and lands of Morvich, and the pursuer has reason to fear that he will, if not prevented by interdict, place other sheep and cattle, or at least a cow, upon the said farm and lands, and graze the same thereon." "(Cond 5) The defender neither has nor asserts any legal right to graze sheep, cattle, or other bestial upon the farm and lands of Morvich, and Mr Mackenzie, the proprietor, repudiates ever having given authority to the defender, or any of the other cottars, to graze sheep or cattle on Morvich. The defender's proceedings, actual and threatened, are and will be seriously detrimental to the rights of the pursuer."

The pursuer pleaded—"The defender having trespassed and continued to trespass upon the said farm and lands by putting a lamb to graze thereon, and having threatened further to trespass by putting sheep and cattle thereon without the consent of the pursuer, interdict ought to be granted as craved, with expenses."

Interim interdict was granted.

The defender admitted that he had, on the pursuer objecting to them, removed two sheep from the lands of Morvich. He stated that he had been in the habit of grazing sheep there for many years with the knowledge and acquiescence of the proprietor and the previous tenant. He denied that he had threatened to put a sheep to graze on the lands, and explained that the lamb complained of was a pet lamb which was chiefly fed in his house by scraps from his table, and which grazed on the roadside near the house, but which he was not aware had ever entered the pursuer's deer forest. He admitted that he had not asserted any legal right to graze sheep or cattle on Morvich, or any lands except those in his own possession, and to which he had right.

The defender pleaded—"The defender not having trespassed or threatened to trespass on the said farm and lands, the interim interdict should be recalled, the action dismissed, and the pursuer found liable in expenses."

The petition, with deliverance granting interim interdict, was served on 1st August; on the 3d August the defender removed the pet lamb.

A proof was led, the import of which very fully appears in the notes of the Sheriffs and the opinions of the Lord Justice-Clerk and Lord Young.

On 11th December 1884 the pursuer lodged a minute, in which he stated that his object in "bringing this action was if possible to prevent the further spread of lawlessness in Kintail, by stopping at the outset the defender and other cottars in his position, who had neither crofts nor sheep or cattle, but were handicraftsman or labourers, from trespassing on the grazings of Morvich and Inchcroe, by putting sheep or other bestial thereon, which the defender admits they have no legal right to do; that the defender having put away the lamb mentioned in the record, and being apparently now in the position of not asserting any right to put sheep or bestial on the grazings without the consent of the pursuer, the latter is willing, in place of pressing for perpetual interdict, to accept from the defender an assurance or undertaking by minute, lodged in this process, that the defender will not in future, so long as the pursuer's lease endures, trespass on the lands of Morvich or Inchcroe by placing sheep or cattle to graze thereon. If such an assurance or undertaking is given the pursuer will not ask for expenses."

The defender declined the pursuer's offer.

The Sheriff-Substitute (Crawford Hill) pronounced this interlocutor—"Finds that at Whitsunday 1882 the pursuer became tenant, under a twenty-one years' lease, of the estate of Kintail, comprehending the grazing or pasture farm and lands of Morvich, and that the defender occupies a cottage on the said lands of Morvich: Finds it admitted by the defender that he has no right to graze sheep or cattle on the said grazing lands: Finds that the pursuer has failed to prove that the defender trespassed on said lands by putting a lamb to graze thereon in June or July last, or that he threatened to put more sheep or cattle thereon: Therefore refuses the interdict craved: Recals the interim interdict granted on 30th July last: Assoilzies the defender.

"*Note.*—The defender occupies one of the houses forming the small village of Cairngorm on the lands of Morvich, of which the pursuer, is lessee. His house is separated from the public road by a very small plot of ground. Immediately adjoining the village are the grazing lands of Morvich, on which the alleged trespass is said to have been committed, and it is of importance to observe that they are not separated by any fence from the public road on either side of which they lie. Evidence was led to show that these grazing lands form part of the pursuer's deer forest. Had this been a question of damages, that might have been of importance with a view to assessing the amount of damages due, but it is of no consequence here. It is enough for the present case that the grazing land belongs to the pursuer, and that the defender has no right to graze any animal upon it. If he did so without the pursuer's permission,

and threatened to continue to do so, as is alleged, the pursuer is entitled to interdict.

"In the condescendence two occasions are specified on which the defender is said to have trespassed by putting animals on the lands of Morvich to graze. The first was in April last. The defender admits that he had two hoggs there at that time, and there can be no doubt that he put them to graze there. But it is necessary to keep in view the circumstances in which he did so. It appears from the evidence of the defender, of C. M'Rae, and of Mr Mackenzie, the proprietor, that while the lands were in the proprietor's own hands the cottars had been allowed to graze a few sheep or cattle on a part of these lands, and that they continued to do this without objection during the tenancy of the pursuer's predecessor. And it seems to have been in the belief that in like manner no objection would be made by the pursuer that these two hoggs were put on the lands by the defender. But when he was told that this would not be allowed by the pursuer, he at once removed them. Here, then, there was no ground for asking interdict, for he ceased doing what was objected to, and there was no reason to apprehend a repetition of the act.

"But in the end of June or beginning of July last a lamb belonging to the defender was occasionally seen on the lands of Morvich. And the question here is, did the defender put it there to graze, and did he threaten to continue to graze it and other animals on the pursuer's lands?

"The Sheriff-Substitute thinks that both these questions must be answered in the negative. There is no evidence whatever that the defender or anyone belonging to him ever put the lamb on the lands, and its being there at times is easily accounted for without supposing that he put it there. The account of the matter given by the defender is a very simple and natural one, and there is no reason to doubt its accuracy. It appears that about Whitsunday last he found a lamb about three weeks old lying on the bank of a stream in the neighbourhood, apparently in a dying state; that he carried it home to his wife, who nursed it, and under her care it lived and throve. For a time, of course, it was fed entirely in the house. But as it grew stronger it would be less under control, it would go out to the public road to pick what it could get, and as there are no fences along the road, it would sometimes stray into the adjoining fields of Morvich. Now, it cannot be doubted that the defender and his wife must have known that the lamb did sometimes so stray. And they may be deserving of blame for allowing this to go on. They may have been guilty of negligence. But negligence in not preventing the lamb from straying into the pursuer's land is a very different thing from putting it on his ground to graze. It may have been wrong, but it was not a wrongous act which could be the subject of interdict.

"But then it is said that when he was asked to remove it he refused to do so, and even threatened to put more sheep and cattle on the ground. In the Sheriff-Substitute's opinion nothing of the kind has been proved. It was Ross, the gamekeeper, and M'Leay, a watcher, who went to the defender's house and spoke to him on the subject. Ross says—'I told the defender that I received a letter from the pursuer telling me to go to him and tell him that unless he would remove the lamb within three days, he (the pursuer) would apply to the Court for an interdict against trespassing.' The defender said, 'Devil a hair of the lamb will I put away for Winans.' Now, it seems to the Sheriff-Substitute quite clear that what Ross said did not mean, and was not intended to mean, merely that the defender must remove the lamb from the grazings. He was entitled to insist on that being done at once, and that was a thing that could easily have been done at once. But if Ross's expression, 'remove the lamb,' meant only to remove it from the grazings, he was giving the defender permission to graze it still for three days. There is no reason to suppose that that was what he meant, or what the pursuer meant him to tell the defender. And it seems equally plain that the defender did not so understand what Ross said. It would be a most unnatural meaning to attach to the words used by him, 'put away the lamb,' to say that they meant only 'remove off the grazings.' They evidently meant 'part with,' or put out of his possession altogether.

"M'Leay's evidence is to the same effect, and he makes still more clear what the defender understood Ross to mean, for he says that the defender added, 'It would be very hard for him having to send away the lamb as he was feeding it in the house. This view of the meaning and understanding of the parties is quite borne out by the defender's evidence, so that the defender did not refuse to take the animal off the grazings, he only refused to part with it altogether.

"If this be so, then neither is there any foundation for saying that the defender threatened to put more animals on the ground. He said, according to Ross, 'Instead of putting away this lamb I am only thinking of getting more sheep or a cow.' If the 'putting away' had no reference to the pursuer's ground, neither had the 'getting more.' In fact, it seems only to have been an emphatic way of expressing his refusal to comply with what he understood to be demanded of him, that he would part with his one lamb. No doubt the defender seems to have said something as to his having as good right to keep a cow on the ground as others. But this was said when he was angry at the demand made upon him, and it cannot be regarded as the serious assertion of a right, or as expressing a threat which could give ground for reasonable apprehension that he would encroach on the pursuer's land. There seems therefore to be no reason for granting the interdict craved."

The pursuer appealed to the Sheriff.

At the suggestion of the Sheriff, when the case was argued before him, the defender was given an opportunity to grant an undertaking in terms of the offer which the pursuer had made. He lodged a minute therefore in which "the defender now states, as he did in his defences, that he does not, and never did, assert any right to graze animals on any part of the farm of Morvich, except those portions which are now in his possession, and to which, as far at least as concerns this action, the pursuer now admits he has right. Further, that he never had any intention of violating the pursuer's rights, and he disclaims all intention to use the lands not in his possession for grazing, and asserts that he never contem-

plated doing so since the removal of the hoggs in April 1884."

The Sheriff (MACKINTOSH) recalled the interlocutor appealed against and pronounced as follows:—"Finds that at Whitsunday 1882 the pursuer became tenant, under a twenty-one years' lease, of the estate of Kintail, comprehending the grazing or pasture lands of Morvich, and that the said subjects were let to him, with power, *inter alia*, to convert the same into a deer forest: Finds that the defender occupies a cottage with small garden, which is situated on the public road, but is surrounded by the said lands of Morvich: Finds that by tolerance or by some arrangement with the previous tenants, the defender and neighbouring cottagers had, prior to the pursuer's entry, been allowed to graze cattle and sheep on the said lands of Morvich, and, in particular, that the defender had been in use to graze without payment two or more sheep on the said lands: Finds that in the autumn of 1882 the defender was informed, on behalf of the pursuer, that this privilege was to be discontinued, and was asked to remove his sheep, and that he undertook to do so, and did so: Finds, however, that in the spring of 1883 the defender replaced the said sheep or other sheep upon the said grazings, and was again called upon to remove them: Finds that he did ultimately remove them, but that in or about December 1883 he again placed two sheep upon the said grazings, and grazed them thereon until April 1884, when, complaints being again made, he again removed them to the neighbouring farm of Leanassie: Finds that shortly before Whitsunday 1884 the defender found on the said farm of Leanassie the lamb of one of his said sheep, which lamb had got separated from its mother, and that the said lamb was taken home and for some time hand-fed in the defender's house: Finds that in June or July following the defender turned out the said lamb to graze on the said lands of Morvich: Finds that early in July the pursuer's head keeper called on the defender and requested him to remove the said lamb: Finds that the defender refused to remove the said lamb, and made a statement to the effect that he was, on the contrary, 'thinking of keeping a cow,' and that he had as good a right as others (meaning his neighbours) to graze in the forest: Finds that the pursuer's agents thereafter addressed to him the letter dated 19th July quoted in the condescendence, to which he made no reply: Finds that he continued to graze the said lamb in the forest, and that it was found so grazing on the first of August, when service was made of the present petition, and of the interim interdict: Finds that the pursuer, by minute, has offered to accept an undertaking by the defender that he will not in future—so long as the pursuer's lease endures—trespass on the lands of Morvich or Inchcroe, by placing sheep or cattle to graze thereon; but that the defender has declined to give such an undertaking: Finds that in these circumstances the pursuer is entitled to interdict: Therefore interdicts, prohibits, and discharges, in terms of the prayer of the petition, and decerns.

"*Note.*—The questions in this case are—(1) Whether the defender has without title grazed sheep or cattle on the lands of Morvich? and (2) Whether the pursuer is justified in apprehending a recurrence of the trespass thus committed?

"That the first of these questions falls to be answered in the affirmative was scarcely disputed. Apart from all questions about the lamb which has figured so largely in the evidence, there is ample proof, and indeed admission, to the effect that on three previous occasions, extending over a period of two years, the defender had for longer or shorter periods grazed at least two sheep on the lands of Morvich. And it appears that on the latest of these occasions (being that mentioned in the second article of the condescendence) these sheep were so grazed continuously from December 1883 to April 1884. This makes it, in the opinion of the Sheriff, unnecessary to consider whether the lamb referred to, which grazed in the forest between June and August 1884, was put upon the lands to graze, or was merely allowed to stray upon the lands. Upon that matter the Sheriff holds it sufficiently proved that the lamb was grazed just as the sheep had been grazed. But in truth the story of the lamb is a mere episode in the history of these proceedings, and was simply the last of a series of what the law must regard as acts of trespass.

"That the defender therefore had, without title, grazed animals in the forest the Sheriff holds to be quite clear.

"The second question, however, is that upon which the defence mainly turns,—and here there can be no doubt that the defender's conduct in the matter of the lamb may be of importance. The Sheriff is not indeed prepared to say that what occurred in the spring of last year—taken in connection with all that had previously occurred—would not of itself have justified an interdict. Sheep belonging to the defender were then grazed, and deliberately grazed, upon the forest; and although it is true that they were removed in April, they had previously been more than once removed, only to be shortly afterwards replaced. It may therefore be that the pursuer had sufficient grounds for apprehending a continuance of the defender's trespass, apart altogether from what occurred about the lamb. But the defender's conduct with respect to the lamb threw light upon his previous conduct, and his previous conduct gave the affair of the lamb some significance. The Sheriff holds it to be established—(1) That the putting of the lamb into the forest (or what comes to the same thing, the 'scaring it away from the door' so as to send it into the forest) was, in the circumstances, a direct challenge to the pursuer; (2) That at the meeting with Ross, the gamekeeper, in July the defender repeated that challenge, and threatened, in addition, to keep a cow, meaning thereby to keep a cow in the forest; and (3) That this attitude was maintained until the service of the interim interdict—if indeed the defender's refusal to grant the undertaking asked by the pursuer's minute does not indicate that the same attitude is still maintained.

"In face of these facts the Sheriff considers that the law of the case is clear, and that the petition for interdict was justified. He refrains from commenting on the irrelevancy of a great part of the proof, and he has entirely disregarded the merits of the controversy between the pursuer and Mr Mackenzie of Kintail, which has somehow got imported into the case. Both gentlemen appear to have expressed themselves in the course

of the London commission granted by the Sheriff-Substitute in the course of proof with somewhat unseemly warmth. The Sheriff is glad that he is not called upon to express an opinion as to their respective responsibilities for the circumstances out of which the present question has arisen.

"The Sheriff has delayed pronouncing judgment in order to give the defender an opportunity of considering whether he would not even now grant an undertaking in terms of the pursuer's minute. If such an undertaking had been given, the case would probably have been at an end, because the pursuer at the debate repeated his willingness to accept such an undertaking, and to depart from any claim for expenses. The defender's agent has, of this date (4th February 1885), lodged a minute, in which he states that 'he never had any intention of violating the pursuer's rights, and disclaims all intention to use the lands not in his own possession for grazing, and asserts that he never contemplated doing so since the removal of the hoggs in April 1884.' The Sheriff regrets that he cannot regard this as an undertaking in terms of the pursuer's minute, such as would relieve him (the Sheriff) of the duty of deciding the case. If the terms of the minute are due to an apprehension that the undertaking asked would apply to the defender's house and garden, it appears to the Sheriff that that is an unnecessary apprehension; and for the same reason the Sheriff has not thought it necessary to restrict or qualify the terms of the interdict, which of course does not apply to the defender's house, or the small plot of garden ground around it, which is, it appears, fenced off by a dyke from the adjacent lands."

The defender appealed, and argued—Originally there was no law of trespass of the kind complained of here. Lord Stair in his Institutes (ii. 3, 67) states the law to be that a man must herd his own ground and turn off his neighbour's beasts. This was the condition of matters till the Act 1686, c. 11, was passed, which permitted a man to poind animals found trespassing, and to recover any damages he might prove to have been committed by the animal trespassing. There was no case in the law of Scotland where the remedy of interdict was permitted for such cases. Interdict was usually only granted where the offender himself could be made amenable to the sanction of the Court. The only exceptional case for interdict for the trespassing of animals is where the Court finds that the trespass has not been fortuitous or casual, but where there is a deliberate conspiracy to do an unlawful act; here there was nothing of this kind. There was no assertion of a right, and no putting the animal down to trespass. It only strayed off the public road, and it was the pursuer's fault in not fencing his lands from the road if it did so.—*Tillet* v. *Ward*, Nov. 27, 1882, 10 Q. B. Div. 17; *Goodwin* v. *Chievelly*, June 14, 1859, 28 L.J. Exch. 298; *Hay* v. *Young*, January 31, 1877, 4 R. 398; *Stewart* v. *Steven*, June 12, 1877, 4 R. 873. In *Goodwin* v. *Chievelly* it had been observed that a man has a right to take his cattle along the highway. If there are no fences it is certain they will stray off the road; as that is a necessary consequence of using the highway, it is a necessary evil which those lands bordering the highway must sustain. Section 103 of 41 and 42 Vict. cap. 57 (Roads and Bridges Act 1878) specially made an exception from the penalty to be inflicted on animals allowed to stray on the sides of the road—the exceptions being "such parts of any road as pass through or over any common or waste ground or land not enclosed or arable on both sides." The Sheriff-Substitute's judgment therefore was right.

The pursuer replied—All the forest law relied on by the defender must be discarded as applying only to forests proper and not to deer-forests. The facts of the case clearly showed that this lamb was regularly turned out to pasture on the pursuer's lands, it being frequently seen 40 or 50 yards on the forest lands. The defender's whole story showed he was not sincere in his admissions of the pursuer's legal rights. There was, then, in every aspect of the case a reasonable apprehension on the pursuer's part that his rights were being and were to be in the future violated. He was then—*Hay* v. *Young* and *Stewart* v. *Steven* (*supra*)—clearly entitled at law to interdict.

At advising—

Lord Justice-Clerk—We have now heard the debate and also read the proof that has been taken. The Sheriff-Substitute and the Sheriff differed, and to the opinion of the Sheriff I attach very great weight. The Sheriff-Substitute, however, heard the evidence, and in some views of the case that gave him an advantage in arriving at his result. I do not think it necessary to go at length into the facts of this unfortunate case. I call it unfortunate, because the matters of fact out of which it arose were really trivial. The views and positions of both parties were held with great strength. That is not altogether wonderful. On the one hand we have a proprietor, or rather a tenant, of very great wealth, and with a very extensive range of country which he has turned into a deer forest, which in law he was perfectly entitled to do; and his anxiety is that the forest should not be disturbed, a very natural anxiety on his part. On the other hand we have cottars alongside of the road, who had been in the habit of pasturing sheep and lambs and cows on the adjoining parts of this large tract of country which is now a deer forest. It is not unnatural that these cottars should have continued that practice until told that that was not to be allowed. I do not find any evidence to the effect that they endeavoured, notwithstanding, to make any right good, if they conceived they had any right at all. The important matter is that, so far as the proof is concerned, and so far as the action for interdict is concerned, the Court has nothing to do with any of these assertions. On the two occasions referred to, where it was stated that Macrae had also put sheep to pasture on this corner of this enormous tract of country, whenever he was remonstrated with he sent them away. And all that was done before this little, and, in one view of it, picturesque incident occurred. It seems that Macrae found a three weeks old lamb lying in a watercourse, which had either been deserted by its mother or had strayed. It was nearly dead, and he took it home, and the cottar's wife cherished and fed it, and it became the pet of the children and played with the shepherds' dogs and was a little favourite with all. Of course it could not stay in the

house all day, and it was allowed to stray out, and in straying it necessarily went on the grass that had no fence. No doubt, if we took the thing very strictly, that was a trespass on the part of the lamb, just as it would have been on the part of a cat or lap-dog or any creature domesticated in a house. But surely it was not worth while to regard it as a trespass, and I do not think it was wrong at all. I think that as the creature could do no mischief, and did no mischief, it was not the assertion of any right whatever to leave it to its own devices; and I do not think there was any evidence to show that Macrae had in any way encouraged it to stray upon the pasture. I do not wonder that Mr Winans wished to take the first opportunity of checking any supposed right on the part of the cottars to pasture their animals on the forest; but I do not think this was an occasion. I think it was eminently an occasion when matters might have been allowed to take their course. I do not think interdict should have been applied for, and neither do I consider there was ground for such an application. I am therefore in favour of sustaining the appeal, and of reverting to the judgment of the Sheriff-Substitute.

Lord Young—I am of the same opinion. I thought the Sheriff-Substitute's judgment was altogether right, and I must regret that the Sheriff should have felt himself bound to alter it. The facts of the case are within very small compass indeed. The pursuer is tenant of an extensive estate in this place, and I cannot help sympathising with his landlord, Mr Mackenzie of Kintail, who said in his evidence that when he heard or saw in the newspapers that Mr Winans, who had 200,000 acres of shootings, was going to bring an action for the trespass of a pet lamb, it seemed so ridiculous that he did not believe it. Mr Winans' prayer in this action, which is directed against a shoemaker who lives in a cot on the roadside, is that he should be interdicted from putting any lamb, sheep, cattle, or other bestial on the lands of Morvich for the purpose of grazing, and from grazing any lamb, sheep, cattle or other bestial upon the lands of Morvich; and his averments upon which he founds this claim for interdict, so far as material, are only two in number The first was that in April 1884—and the proceedings were instituted in July 1884—he (the defender) without the leave of the pursuer, commenced the grazing of two sheep on the land. The pursuer objected to his doing so, and the defender removed the sheep. The Court has no concern with any cow. We begin with two sheep that were put on the land and removed in the same month. The second averment is that in or about the commencement of the month of July 1884, or in the preceding month, the defender, without leave of the pursuer, put the lamb to graze upon the farm and lands of Morvich, and upon being remonstrated with by the pursuer's gamekeeper, acting upon the special instructions of the pursuer, refused to take the lamb off the grazing, and intimated his intention of grazing both sheep and cattle, and keeping them thereon whether the pursuer objected or not. The two sheep were removed when objected to in April, but the lamb which made its appearance—no doubt it must have been only days or weeks old at the time when objection was stated to it, and a lawyer's letter sent from Inverness about the lamb—the defender declined to remove it. These are the pursuer's only two averments in support of this action. But condescendence 5 excludes the notion that the action was brought to try any question of right, because the pursuer says there—"The defender neither has nor asserts any right to graze sheep, cattle, or any bestial upon the lands of Morvich." The pursuer's own statement was that no right was asserted, and the answer to that averment is—"Admitted that the defender has asserted no right." Therefore there was no question about right, and I think there was no question about sheep, because it is stated upon record that the only two sheep that went upon the grass, and which were there in April, when objected to were removed, and the Sheriff-Substitute points out in his note that that was proved. Therefore we are confined to the lamb, and nothing but the lamb. Notwithstanding that the Sheriff-Principal says in his note, that in truth the story of the lamb was a mere episode in the history of these proceedings, the only predecessors of the mere episode were the two sheep which were removed in the April preceding. There is nothing but the mere episode in the case. The first plea-in-law for the pursuer (very curiously following upon his statement that no right has ever been asserted, and with that statement admitted), is that "the defender having trespassed and continuing to trespass upon the said lands by putting a lamb to graze thereon, and having threatened further to trespass by keeping sheep and cattle thereon without consent of the pursuer, interdict ought to be granted." Now, I am not of opinion that there was any trespass by the pet lamb of which a man could complain. I think trespass as an invasion of a man's right may be committed by means of a pet lamb. But if we take 200,000 acres of rough grass land, with a public road running through it and a cot on the side of it, the land being unfenced—to fence that land against children or against a pet lamb by the interdict of a Court of Justice would, I think, be an outrageous proceeding. It is impossible that children could be confined to the high road; it is impossible that a pet lamb can be confined to the high road, any more than a cat or a dog. Life in that country would not be possible if these unenclosed lands were fenced by interdict of this Court against trespasses of that description. Interdict is granted by this and other courts of law where appreciable wrong was done, whether a man's property or other right was threatened or apprehended. Here there was no appreciable wrong whatever. This lamb was brought up by the cottar, and when a few weeks old followed the cottar and his wife and children, and then followed dogs along the road, and scampered on the grass. It was not doing any appreciable wrong whatever, and I decline to be a party to any interdict to protect unenclosed land against trespasses of that kind. To talk about a lamb growing into flocks of sheep and herds of cattle is to talk in a way that makes no impression upon my mind whatever. We will protect a man against his right being trespassed on, but not against children toddling on the land at the roadside, or

against a dog or kitten going on it. If the pursuer wishes to exclude these things he must get the means himself, and not apply to Her Majesty's Judges for interdict against them. I am therefore entirely prepared to affirm the findings in point of fact of the Sheriff-Substitute's judgment on the 15th January last, "that at Whitsunday 1882 the pursuer became tenant, under a twenty-one years' lease, of the estate of Kintail, comprehending the grazing or pasture farm and lands of Morvich, and that the defender occupies a cottage on the said lands of Morvich: Finds that the pursuer has failed to prove that the defender trespassed on said lands by putting a lamb to graze thereon in June or July last, or that he threatened to put more sheep or cattle thereon: Therefore refuses the interdict craved on 30th July last, and assoilzies the defender." I think that is altogether right. But it is also right to take notice of the fact that when the officer was sent to serve the interim interdict upon this cottar, the defender took it for an order of the Court, or it had been explained to him that he should remove his pet lamb, the pet of his children, and he did remove it. It was removed on 3d August. The sheep therefore complained of, or rather I should say not complained of—because it is merely said that they were there in April, and these proceedings were not instituted till the end of July—had been removed. The lamb was removed in August. Nothing remained but all these proceedings, and an immense amount of expense was incurred after that, not even a pet lamb existing to justify them. That may be sufficient for judgment in itself, but I prefer rather to take it, as the circumstances showed, that there was here no appreciable wrong apprehended, or reason to apprehend any appreciable wrong at the hands of this cottar, and that the Sheriff-Substitute's judgment is right in point of fact. I therefore entirely concur with your Lordship that we should revert to the judgment of the Sheriff-Substitute.

Lord Craighill—I think the second ground of judgment proposed by Lord Young sufficient to decide this case.

Lord Rutherfurd Clark—I agree with the Sheriff-Substitute in thinking that the facts as proved do not entitle the pursuer to the remedy asked.

The Court pronounced this interlocutor:—

"Find that at Whitsunday 1882 the pursuer became tenant under a twenty-one years' lease of the estate of Kintail, comprehending the grazing or pasture farm and lands of Morvich, and that the defender occupied a cottage on the said lands of Morvich: Find that it is admitted by the defender that he has no right to graze sheep or cattle on the said grazing lands: Find that the pursuer has failed to prove that the defender trespassed on said lands by putting a lamb to graze thereon in June or July last, or that he threatened to put more sheep or cattle thereon: Therefore sustain the appeal; recal the interlocutor of the Sheriff of 7th February last; affirm the interlocutor of the Sheriff-Substitute of 15th January last; of new assoilzie the defender from the conclusions of the action: Find him entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer (Respondent)—Comrie Thomson—Pearson. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Defender (Appellant)—Graham Murray—Kennedy. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Friday, June 5.

FIRST DIVISION.

[Sheriff of Lanarkshire.

JOHNSON *v.* MITCHELL & COMPANY.

Reparation—Personal Injury—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42).

In an action at the instance of an employé in a match-work against his employers to recover damages for injuries which his hand had sustained in shutting a sliding door on the occasion of an alarm of fire, it was proved that the door in question was for the purpose of preventing fire communicating from one room to another, and that it was regularly closed at meal-times and at night; that it was not usually the duty of the pursuer to shut the door, and that he had never done so until the day of the accident, when he did so in obedience to an order from the foreman; that the door was moved by means of a handle, but that there was no check in the wall to stop the door, which in consequence ran on until brought up by the handle; and that a very small alteration would have made the door safe. *Held* in these circumstances that there was fault on the part of the defenders, and that the pursuer was entitled to damages.

This was an action of damages for personal injuries at the instance of Charles Johnson against Mitchell & Company, the Clydesdale Match Works, Govan, brought under the Employers Liability Act 1880 in the Sheriff Court at Glasgow.

The pursuer was in the employment of the defenders, and the following facts were proved:—There were in the match-works, on account of the great risk of fire, iron sliding doors running along on wheels or pulleys for the purpose of preventing a fire which had broken out from communicating to the drying-room or stores where the matches were stored. At the time of the accident these doors were pulled backwards and forwards by a handle, but there was no post or casework at the point where the door should have stopped. These doors were regularly closed at meal-times and at night by one of the girls in the work. On the occasion of an alarm of fire it appeared from the evidence of the foreman that it was the duty of all concerned to see to the closing of the doors. The pursuer never had occasion to close any of these doors until the day of the accident. On that day an alarm of fire was given and the foreman called to the pursuer to shut one of these doors which was between the slab and drying-rooms. The pursuer rushed