versation took place, and Major Fraser admitted that it was reasonable that the tenants should have access to the water, and he allowed them to drive their cattle over his ground for that purpose, but stipulated that they should not allow the cattle to trespass elsewhere. He wanted to build up the wall again, and contracted with the witness Lamont to have that done, but influences which we can guess at prevented this, and the wall is not built up yet, and is still open to the incursions of the Garrafada tenants' cattle. In these circumstances Major Fraser brought an action for interdict, and the minister of the parish and others were called as defenders.

The rioters who broke down the wall have not been discovered, neither do I think it proved that the individuals who are called as defenders were participants in the destruction of the wall. But what we do find on the record is, that the defenders claim to have rights in this pasturage which are inconsistent with the case of the pursuer upon record. If these pleas remained upon record I think that would be quite enough to warrant interdict being granted. It is matter of everyday practice that a threatened charge may be suspended or a threatened encroachment prevented by means of an interdict. There is no better ground for granting interdict than that an encroachment has been threatened, and there can be no doubt that such an encroachment has been threatened on the part of the minister and the other defenders here. The Sheriff-Substitute has assoilzied Mr Davidson, but the Sheriff has directed interdict against him as well as against the other defenders.

On these grounds I think the judgment of the Sheriff ought to be supported. Mr Davidson's contention is quite clear. He says that the park in question formed part of the land on which he and his predecessors, as ministers of Stenscholl, were entitled to exercise the right of grazing, and that he had been illegally excluded from these lands. The other defenders say that the permission given by Major Fraser was merely a restoration of a right which they had formerly possessed. We are now told that all these pleas have been abandoned, but they were threats of encroachment and that was enough to justify interdict.

Without going into the evidence in the case, much of which is unpleasant, I think we ought to sustain the judgment of the Sheriff.

Lord Young—I am of the same opinion, and only wish to say this, that I agree with what your Lordship has said that the rights which are asserted on record and the pleas which are standing there being admittedly unfounded, the rule of law is that the complainer is entitled to interdict. That is not an absolute rule, and the respondents may be able to show that interdict is not necessary—that is to say, although the position of the complainer may be a perfectly right one in his claim to have another party restrained by interdict, the whole circumstances of the case may be such that the Court may be of opinion that the protection sought may be obtained some other way than by interdict. I think it quite right here that the complainer should have his legal right to protection by interdict affirmed, and the claim of the other parties negatived, and so far as I see there are no circumstances to induce the Court to refuse the interdict asked.

Lord Craighill—I am of the same opinion. It has been proved that the pursuer, the owner of this place Staffin Park, and his tenant the other pursuer, who was in occupation of the park, were entitled to some protection, and in the circumstances, as these have been established by the proof, I think it reasonable that interdict should be granted. It has been established that the only persons who were interested in the destruction of the dyke were the tenants of Garrafada, and that immediately after the destruction of the dyke they sent their cattle into Staffin Park. Whether or not in these circumstances it has been proved who were the persons who actually pulled down the dyke, is it not reasonable for the pursuers to have the protection which they ask? I think it is.

In regard to the use made of the permission given by Major Fraser on the 5th July, this permission was used as nothing but a pretext to allow the cattle to graze in the park when they were allowed merely to drive them through to the water, and it is necessary that the pursuers should be protected in this way. I agree with what your Lordship has said, and also with the grounds of judgment.

Lord Rutherfurd Clark—I am of the same opinion.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute of 28th and 30th December 1885, and the interlocutor of the Sheriff of 23d February last: Find that the pursuer Major William Fraser is proprietor, and the pursuer Alexander MacLeod is tenant, of the field or park described in the prayer of the petition, and that the defenders assert right to graze their cattle in the said field, and to lead them through it to water in the Kilmartin river: Find that the rights so asserted are unfounded: Therefore repel the defences; interdict, prohibit, and restrain the defenders in terms of the prayer of the petition: Ordain the defenders within fourteen days from the date of this decree to remove such bestial as they have upon the said field, and to have the field made void and redd, that the pursuers, or others in their name, may enter thereto and peaceably possess and enjoy the same in time coming; and failing the defenders removing the said bestial, Grant warrant to the pursuers to carry the foregoing order into effect," &c.

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Rutherfurd Clark. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for Defenders—Scott—Rhind. Agent —William Officer, S.S.C.

Thursday, November 18.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

SMITH *v.* RIDDELL, *et e contra.*

Agreements and Contracts—Conditional Agreement—Family Arrangement.

A farmer, who was childless and advanced in years, arranged with his niece's husband

to come and take up the management of his farm, assigning to him the whole stocking thereon, but stipulating to be alimented for life by him in his family. The arrangement was acted on for some months, when the niece's husband died, and the landlord gave notice of removal from the farm. *Held* that the condition of the family arrangement having failed, the stocking of the farm did not pass to the executrix of the deceased, but remained the property of the farmer.

On 22d November 1884 John Smith, tenant of the farm of Bogmill, on the estate of Balquhain, in the county of Aberdeen, who was then about eighty years of age, entered into an arrangement with James Riddell, designed in the deed as "at present residing at Woodside, Wester Fintray, the husband of my niece." The agreement, which was entitled an assignation, proceeded on the narrative that Smith was in consequence of old age unable efficiently to attend to his farm and business, and desired to be relieved of it, and that Riddell should succeed him as tenant, and have the stocking transferred to him, and that Riddell had agreed thereto. It was further agreed that Riddell should give Smith suitable aliment in his own family for the rest of his life, whether at Bogmill or whether the parties went elsewhere. On the other hand, Smith assigned to Riddell the lease, with the stocking, crops, and other effects thereon, giving him power to take the stocking, &c., as his absolute property.

Riddell signed the assignation in token of his assent to its terms.

Riddell and his family came to Bogmill, and he managed the farm for about six months, but died in July or August 1885. His widow was appointed executrix. On 31st August 1885 Smith sent a letter of removal to the landlords, the trustees of the late Colonel Charles Leslie, proprietor of Balquhain, and a notice of removal in terms thereof was served upon him as tenant on 26th October 1885. He was merely a yearly tenant, and his lease had expired at Whitsunday 1883.

Mrs Riddell, as executrix of her late husband, claimed the whole stocking on the farm, and as Smith was to leave and her husband was dead, advertised for sale on a certain day the stocking of the farm of Bogmill.

On the 24th April Smith brought an action before the Sheriff against Mrs Riddell, as executrix of her late husband, to interdict her from advertising the sale of the said stocking, or from selling the stocking, &c., on the farm of Bogmill, which he averred to be his property. He, on his part, advertised a sale of the stocking. Mrs Riddell brought a counter action to prevent Smith from selling the crop, stocking, &c., on the farm, or advertising the sale. From the admissions in the record it appeared that Mrs Riddell had offered Smith an aliment of £15 a-year, but without security, and offered alternatively an aliment at Woodside, whither she had gone, but he had declined the offer. It appeared from the statements of both parties in these actions that there were rumours prejudicial to Mrs Riddell's character, and Smith stated that he declined to take up his residence with her.

In the action *Smith* v. *Riddell* the pursuer pleaded — "The defender having threatened to interfere with the property and rights of the pursuer as libelled, the pursuer is entitled to be protected against such interference." He also pleaded—"The defender being unable to perform James Riddell's part of the agreement libelled, which is of a strictly personal nature, the pursuer is not bound, and the defender having no interest beyond that of an ordinary creditor in the stocking and other effects at Bogmill, she is not entitled to interdict. (2) *Esto* the agreement subsists, the defender's author not having fulfilled, and being now unable to fulfil his part thereof, the defender is barred from insisting on the performance of the counterpart by the pursuer. (4) There being a strong *delectus personæ* between the parties to the agreement, and the defender's author having failed in the performance of his part, the defender cannot fulfil the obligations incumbent on the defender's author, and parties should now be restored."

The defender pleaded—"The defender having only advertised a sale of the effects belonging to her as executrix of her deceased husband, the pursuer is not entitled to interdict. The assignation being for onerous causes, and having been completed by possession, cannot now be resiled from."

The pleadings in the action *Riddell* v. *Smith* appear from the narrative already given.

Interim interdict was granted in both actions.

On 12th May 1886 the actions were conjoined, and on 7th June 1886 the Sheriff-Substitute (Dove Wilson) recalled the interim interdict obtained at the instance of Riddell against Smith, and declared perpetual the interdict at his instance against her.

"*Note.*—The agreement which the defender founds upon contemplated that her deceased husband should be substituted as tenant for the pursuer in his farm, and should thereafter manage it, or any other farm to which they might remove, and should likewise maintain the pursuer at bed and board for the rest of his life. In return for this the deceased was to get the pursuer's whole stocking on the farm as his own property. In virtue of this agreement, the deceased, with the defender, went to reside in the pursuer's house, and to manage the farm, but before he had done so for six months, and before he had been accepted as tenant, he died. As the agreement could not be carried out, the pursuer gave up the farm, and the present dispute as to the stocking has arisen.

"Whatever difficulties might have arisen had the deceased not died till after he had been received as tenant by the landlord, and after the assignation and delivery of the stocking to him had been thus completed, it seems to me that his death while delivery was incomplete put an end to the agreement. At that time if the pursuer had refused to go on and complete the deceased's entry, or if the landlord had refused to accept him, or if anything whatever had then occurred to prevent the pursuer from giving complete implement, the deceased might have refused to go on. In the same way it seems to me that the defender's inability to give implement of the agreement puts an end to it. The obligation on the defender's side was not that she or somebody whom she might select was to board the pursuer and manage his farm for him. It was an obligation that the deceased was to do so, and to substitute for the deceased a person with whom the pursuer might have no comfort, and in whom he might have no confidence, would not be just.

An unforeseen circumstance has put an end to the possibility of carrying out this agreement, before delivery under it was complete, and as the defender can no longer offer the consideration, she seems to me no longer entitled to demand the completion. It seems to me that it cannot well be questioned that, so long as the pursuer was tenant of his farm, and resided on it, he could not be held to have given complete delivery of it or of its stocking to any other party.

"If the defender has any claims against the pursuer for board supplied to him, or for remuneration to her husband for the services he rendered, or upon any other ground, these are fully reserved to her by the judgment."

The defender appealed to the Sheriff. On 23d June the Sheriff (GUTHRIE SMITH) dismissed the appeal and affirmed the Sheriff-Substitute's interlocutor.

"*Note.*—I think that this case has been rightly decided by the Sheriff-Substitute. The respondent, an old man of over 80 years of age, wished James Riddell to come and manage his farm for him and succeed him in the tenancy—an arrangement to which the landlord apparently had no objection, being willing to 'grant a new lease in which Riddell would be recognised as tenant or joint-tenant.' But before this could be carried out Riddell died, and now neither the respondent nor the landlord will have anything to do with the widow. It is quite clear, in these circumstances, that she has no title to enforce the contract to the effect of demanding delivery of the stocking and other effects which were to have been given to Riddell when the new lease had been arranged, in consideration of the respondent being allowed to live in family with him when he was managing the farm. The whole arrangement has proved abortive. The property had never passed out of the respondent's possession. The contract was as purely a personal contract as could be—for it was Riddell, and not his wife, that he had in view when he entered into it, and it would not be fulfilled by his being offered a home somewhere else.

The defender appealed to the Court of Session, and argued—The agreement between Smith and Riddell acted as an assignation of the stocking on the farm of Bogmill, and the widow as executrix of her late husband was therefore entitled to it. As the proprietors of Bogmill would not keep on the widow as tenant, she was entitled to sell the stocking to enable her to stock another farm. She was willing to implement the agreement and aliment the old man, her uncle.

Argued for the respondent—According to the agreement Riddell was to take the management of the farm and succeed Smith as tenant, while alimenting him during his life, but when Riddell died the agreement fell. This was merely a family arrangement and not a business contract. Now that the agreement could never be carried out, affairs ought to be put back into the position they were in before.

At advising—

LORD JUSTICE-CLERK — The Sheriffs have agreed that the agreement on which this case is founded cannot and ought not to be enforced according to its letter. Apparently the ground of their judgment is that supervening events totally unforeseen have prevented the substantial consideration for which this agreement was given from being fulfilled, and that this old man cannot receive the only equivalent for which he gave up his property. I am inclined to agree with that view. It is an unusual kind of case—a family agreement in respect of the arrangement made by the parties, viz., in respect of living in family with his niece and her husband at the farm he gave up all interest in the farm and all title to the lease. But before this arrangement was well in force the husband of the niece with whom he was to live died, and consequently the obligation could not be fulfilled. Now, the old man says in answer to the statement of the niece that she will carry out the agreement, that this was not the agreement he made. I am of opinion that this is a reasonable view. It is, as I said before, a peculiar case, but I think it is against reason and conscience that this agreement should be enforced.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court dismissed the appeal and affirmed the interlocutors of the Sheriff-Substitute and Sheriff.

Counsel for Mrs Riddell—J. A. Reid. Agent—Robt. C. Gray, S.S.C.

Counsel for Smith—Jameson—Younger. Agent—J. D. Macaulay, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, November 19.

(Before the Lord Justice-Clerk, Lord Young, and Lord Craighill.)

DICKSON *v.* LINTON (P.-F. OF EDINBURGH POLICE COURT).

Justiciary Cases—Hotel—Breach of Certificate—Sunday Traveller.

Circumstances in which it was *held* that a hotel-keeper had been wrongly convicted of supplying exciseable liquors on Sunday to persons who were not "travellers" in the sense of his certificate.

This was a Case stated on appeal from the Police Court of Edinburgh. The appellant, keeper of the Beehive Hotel, Grassmarket, Edinburgh, was charged before the *interim* Sheriff-Substitute (Sym) with "an offence against the laws for the regulation of public-houses in Scotland, in so far as upon the 8th day of August 1886 years, that day being Sunday, the said accused did open his licensed house in Grassmarket aforesaid, for the sale of exciseable liquors, and did sell exciseable liquors, videlicet, whisky and ale, or one or other of them, therein, or on the premises belonging thereto, to Thomas Hatton and to Cecilia Stenson or Hatton, both residing in Stewart Terrace, Edinburgh, or to one or other of them, they not being lodgers in the said licensed house, nor travellers; and such offence is the first offence."

On the evidence the Sheriff-Substitute convicted the appellant, and on his application stated the following Case for appeal, viz.—

"The following are the facts proven:—The appellant holds a hotel licence for premises known