

1794. February 18. ALEXANDER GOVAN *against* THOMAS LANG.

ALEXANDER GOVAN and Thomas Lang were tenants, each for one year, of two adjoining inclosures, which belonged to different proprietors, and which were separated from each other by a hedge and ditch, forming a fence sufficient at least to keep in horses or black cattle.

Govan had his inclosure under tillage; Lang kept sheep in that possessed by him.

Govan brought an action before the Sheriff, against Lang, concluding for damages and penalties, in terms of the act 1686, c. 11. on account of certain trespasses said to have been committed by the defender's sheep upon the pursuer's corns. The sum demanded in name of penalties exceeded L. 13 Sterling; and that for actual damages, amounted to about four guineas.

The Sheriff allowed a proof; from which it appeared, that during the time libelled, the defender kept two herds, who relieved each other in succession, the one herding during the day, and the other during the night; and that in general, though it was sometimes otherwise, the one did not leave the field till the other arrived.

The Sheriff found the defender liable in payment of the actual damage done to the corns; but, "in respect he appeared to have kept a herd, found him not liable to the penalties."

The defender acquiesced in this interlocutor; but the pursuer presented a bill of advocation against it, in so far as it refused him the penalties of the statute. The bill being passed, the defender

Pleaded, imo, The sole object of the act 1686, 'for winter-herding,' was to put an end to the old practice, so prejudicial to the improvement of the country, of allowing the cattle to pasture promiscuously, after the crop was off the ground; Stair, b. 2, tit. 3. § 67. Accordingly, as it required no interposition of the legislature to enforce the herding of cattle during summer, and while the crop was on the ground, though the act speaks of the preservation of hedges, trees, and inclosures, there is no mention of corns through the whole of it.

The exacting penalties in such cases is peculiar to the law of Scotland; Voet. lib. 9. tit. 1. § 3.; Blackstone, b. 3. c. 1. § 5.; and the circumstances which required their introduction, being now removed, the act ought no longer to be enforced; and in all events, being of a penal nature, it should receive the most strict interpretation.

2do, As the defender, by keeping a herd, did every thing in his power to prevent his cattle from trespassing on the pursuer's property, he cannot be subjected in the penalties. For, although a person may be so far responsible for the conduct of his servants, as to be obliged to repair the actual damage which another sustains through their negligence; it would be unreasonable to punish him on their account.

No 20.
Act 1686, c.
11, 'for win-
'ter-herding,'
applies where
damage is
done to corns,
as well as
where it is
done to grass
or planting.

No 20.

3tio, The act applies only where the cattle are *brevi manu* detained by the person on whose grounds they have trespassed; Bankt. b. 4. tit. 41. § 16. The legislature did not intend that he should have it in his power, by lying by, and keeping an account of repeated trespasses, afterwards to harrass his neighbour, by the exaction of accumulated penalties. Besides, by obliging him to detain the cattle, all disputes, both as to their number, and the person to whom they belong, are voided.

Answered, 1mo, The statute orders all persons to herd their cattle, 'so as not to eat or destroy their neighbour's ground, woods, hedges, or planting.' In using the word 'ground,' the legislature could not mean to protect the soil, and leave a valuable crop on it unprotected. The act applies to grass; it must likewise apply to other crops, which may be much more valuable.

Penal statutes, it is true, are not to be extended *de casu in casum*, but they must be fairly interpreted. The act clearly applies to this case, and it is highly expedient in itself, both because it is often difficult to ascertain the real damage, and because the party injured ought, in a case of this sort, to receive the *pretium affectionis* for his property.

2do, Wherever a trespass is committed, the penalties are due. It is not sufficient that a herd is kept, the cattle must be herded 'so as not to eat or destroy' the property of others.

3tio, It was the intention of the statute, to give the same means of recovering the penalty, which were competent at common law for recovering the actual loss sustained; and as the cattle might either be *brevi manu* detained, or an action brought for payment of the latter, the person injured has the same alternative with regard to the former.

It never could be meant that no penalties could be exacted, wherever either the cattle got off the ground before they could be caught, or where the person suffering the injury had no proper place to put them into; in which last case, if he did detain them, he would be liable to the penalty of a spuilzie; Stair, 10th February 1676, Duncan against Kidd, *voce* POINDING.

The Lord Ordinary having reported the cause on informations, the Court were divided in opinion with regard to it.

Several Judges, upon the grounds stated for the pursuer, thought all the defences ill-founded. And of those who thought the penalties could not be exacted, some gave as the sole ground of their opinion, that in this case the defender had, *bona fide*, kept herds, and had done every thing in his power to prevent the trespasses from being committed; others, that the act applied only where the cattle were detained.

THE LORDS, by a narrow majority, 20th November 1793, repelled the reasons of advocacy; and, upon advising a reclaiming petition and answers, "adhered."

Reporter, Lord Stonefield. Act. Tait. Alt. Cullen. Clerk, Sinclair
D. D Fol. Dic. v. 4. p. 81. Fac. Col. No 105. p. 234.