incurred which this proceeding must have occasioned to the parties, and it certainly does appear to me that those costs should be borne by the appellants.

Interlocutors affirmed, with costs.

Appellants' Agent, J. F. Wilkie, S.S.C.—*Respondents' Agents*, Wotherspoon and Mack.

APRIL 3, 1855.

JOHN FLEEMING and JAMES FORRESTER, *Appellants*, *v.* JOHN ORR, *Respondent.*

Reparation—Culpa—Negligence—Liability for dog worrying sheep—*Some sheep belonging to A having been killed by a dog, the property of B, then in the keeping of C, an action was brought by A for recovery of the loss against both B and C.*

HELD (reversing judgment), *that it was not enough to allege mere ownership of the dog, but it must also be alleged and proved that the owner or keeper of the dog knew that it was a dog of vicious habits and dangerous to sheep, and did not take care to secure it: or at all events must allege some negligence in the keeping of the dog.*[1]

This was an action to recover the value of 18 sheep belonging to the respondent, alleged to be worried by two dogs, a collie and a foxhound, the latter the property of the appellant Fleeming. The foxhound was a puppy seven months old kept by Forrester, a tenant of Fleeming's farm. The dog was allowed to go at large.

The Court of Session held that the owner of the dog was liable, and that it was unnecessary to allege that the owner knew its propensity was to worry sheep.

The defenders appealed, arguing in their case that the judgment of the Court of Session should be reversed—"1. Because no relevant ground of action had been libelled, in respect the summons contained no allegation that the dog was of a vicious disposition and dangerous to sheep, and that this was known to the appellants, or either of them. 2. Because the respondent was bound to have averred *culpa* or negligence on the part of the appellants, or either of them, as the ground of liability sought to be enforced. 3. Because the Court below had, by their judgment, sustained as a sufficient ground of the appellants' liability, the proof of the fact that the respondent's sheep were worried or destroyed by a dog, the property of the one appellant, at the time in the charge and custody of the other appellant; whereas, in order to entitle the respondent in law to recover, he was bound to have alleged and proved that the dog was of vicious habits and dangerous to sheep, and that this was known to the appellants; or, all events, that the dog was of a fierce and savage disposition, and that the appellants were aware of it.—Ersk. iii. 1, 13; Stair, i. 9, 5; Exodus xxi. 28 and 29; *Turnbull* v. *Brownfield*, Dec. 6, 1735, Elchies, *voce* Reparation, i. 1; *ibid.* ii. 1; *Todridge* v. *Andrew*, Fountainhall, iii. 223; *Brown* v. *Stewart*, 3 S. 187; *Gray* v. *Brassey*, 15 D. 135; Buller's Nisi Prius, p. 77."

The respondents maintained—"1. The judgment pronounced by the Court below is only subject to appeal in so far as it depends on, or is affected by, matter of law; but, in so far as it relates to facts, it must be held to have the force and effect of a special verdict of a jury, conclusively fixing the several facts specified in the interlocutor.—6 Geo. IV. c. 120, § 40. 2. The sheep having been destroyed by a foxhound belonging to the appellant Fleeming, while under the charge, or in the keeping, of the other appellant Forrester, both of these parties are liable in law for the value of the sheep.—Ersk. iii. 1, 13, and Bell's Prin. § 553. 3. Due effect being given to the averments of parties and evidence, the judgment of the Court is warranted, even on the principles of law contended for by the appellants."

Rolt Q.C., and *Wood*, for the appellants.—We admit we are bound by the facts as they are found in the Sheriff Court, for the Court of Session merely repeated these findings of the Sheriff. It, however, nowhere appears throughout the proceedings, that the dog was ferocious, or was kept negligently. The question therefore arises—Whether the bare ownership of a dog subjects the owner in liability for whatever damage it does, without any negligence on his part? for negligence is only another mode of saying that he knew that the dog had vicious habits, and yet took no precautions to protect the public. There is no difference between the law of England and Scotland on this subject. It is established in England, that an action on the case cannot be sustained without an averment of negligence on the part of the owner—in other words, the *scienter* is of the essence of the action.—Buller's Nisi Prius, 77 a; *Judge* v. *Cox*, 1 Stark. Rep. 285; *Beck* v. *Dyson*, 4 Camp. 198.

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[1] See previous report 15 D. 486; 25 Sc. Jur. 297. S. C. 2 Macq. Ap. 14; 27 Sc. Jur. 364.

[LORD CHANCELLOR.—Of course at Nisi Prius the question will always be, whether there is sufficient evidence in support of the averment, but these cases don't show that the averment was necessary.]

There are many other cases.—*Jones* v. *Perry*, 2 Esp. 482; *Hartley* v. *Harriman*, 1 B. & Ald. 620; *Thomas* v. *Morgan*, 2 C. M. & R. 496; *May* v. *Burdett*, 9 Q.B. 101. In those cases it is either expressly shewn or assumed, that the gist of the action is the keeping of the animal after knowledge of its vicious habits.

[LORD CHANCELLOR.—But is the law of Scotland the same as that of England?]

The law of Scotland is founded chiefly on the civil law, and the latter is referred to in *Card* v. *Case*, 5 C.B. 622. The law is stated in Stair, i. 9, 5, and Ersk. iii. 1, 13; and the principle seems to be exactly the same. There are also cases which settle the law in Scotland.—*Turnbull* v. *Brownfield*, Dec. 6, 1735, Elchies; *Brown* v. *Stewart*, 3 S. 187; *per* Lord Ivory in *Gray* v. *Brassey*, *supra*. The law of Scotland, therefore, in no way differs from that of England. The Judges below seemed to differ as to the grounds of the appellants' liability. One Judge said the dog was untrained; another assumed that the nature of foxhounds is to worry sheep—of which assumptions there was no proof in the case. It seemed to be also assumed, that the mere fact of not tying up the dog implied negligence, and that it made a difference that the dog went into an inclosed field.

Solicitor-General (Bethell), and *Anderson* Q.C., for the respondent.—It was incompetent for the appellants to add the plea which they did after advocation to the Court of Session. In the Sheriff-Court the defence was a denial of the fact that the dog killed the sheep, and which admitted the point of law; but when the cause was advocated an entirely new case was set up by them, viz., that they were not liable in point of law. This was inconsistent with the original defence.

[LORD CHANCELLOR.—It seems strange if there is anything in this point, that it was never taken in the Court of Session.]

[LORD BROUGHAM.—You say that the whole question on the record was—worry or no worry; and that it was going out of the record to prove anything else.]

Yes. Then, as to the merits.—The rule of law in England is this: that if a man has in his possession a mischievous animal, he is bound to keep it safely, and if it break out and do damage he is responsible; but then if the animal is *mansuetae naturae*, he is not liable unless it also be shewn, that the animal has changed its nature, and that the owner knew of this change. We admit the law as stated in Buller's Nisi Prius. But here a foxhound is not an animal *mansuetae naturae;* on the contrary, it is naturally ferocious. When, therefore, it commits damage, the owner must be held *primâ facie* liable, and the *onus* lies on him to shew that he took proper care of the dog. In this respect the law of Scotland differs from the law of England. In cases of damage done, the law of Scotland presumes there was negligence, and it lies on the party who commits the damage to prove there was no negligence. In England the party injured must allege and prove negligence on the party who did the damage.—1 Bell's Com. 454; *Macaulay* v. *Buist*, 9 D. 245. It was therefore quite enough to prove that the appellant was the owner of the dog which did the damage; and it was for him to get rid of the liability by shewing that he took proper care of the dog.

[LORD BROUGHAM.—Then, if the bare ownership subject me to an action, it will follow, that whenever my dog trespasses in your field I am liable to be sued. The law of England is, that if I trespass on my neighbour's field by walking across it, he can bring an action of trespass against me, and he will, as a matter of course, recover one shilling damages, because, though no substantial damage may have been done by me, yet I had committed a trespass in the eye of the law, for which he may recover nominal damages. Is there such a thing as an action of trespass in such circumstances, and to such an effect, in Scotland?]

We think not. If trespassers go over your field, you may have an interdict or a declarator; but an action of trespass, and a verdict of nominal damages, is not known. The passages cited from Stair and Erskine do not support the doctrine contended for on the other side, nor do the old or modern cases in Scotland.

Rolt replied.—The technical objection that we were not entitled to add the plea on advocation to the Court of Session, that there was no allegation of knowledge of the dog's vicious habits, is unfounded, for such is the constant practice, and is sanctioned by Act of Sederunt July 1828, § 25. The usual form of directing issues in actions for negligence includes an allegation that the party knew of the danger, and did not provide against it.—See Macf. Issues, 167, *Muir* v. *Wallace*, *Neilson* v. *Rogers*, *Black* v. *Croall*. It is, therefore, not the law of Scotland that a mere allegation of the fact of damage done is sufficient to fix liability without averring and proving negligence. The other side assume that it was negligence not to have the dog tied up, but that is by no means to be taken for granted; and, generally, no authority has been produced to shew that the law of Scotland differs from the law of England.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case the action was brought before the Sheriff of Dumbartonshire, and the summons, dated 6th June 1851, was in these terms:

"That the pursuer Major Orr was the proprietor of the lands and estate of Dallater, in the parish of Cumbernauld, and on the night of the 6th of February 1851, he had, in two grass fields adjoining the parish road leading from Cumbernauld, and part of his estate, a flock of 26 sheep or thereby pasturing there, his property, or in his lawful possession." "That upon the morning of the 7th day of the said month of February 1851, it was discovered that 18 sheep belonging to the pursuer, and part of the said flock, had been, during that morning or the preceding night, worried and destroyed by dogs." "That one of the dogs found among the said sheep in the pursuer's fields was of the foxhound breed, and was the property of the defender Captain John Fleeming, and had been for some time, and after said occasion, in the custody or keeping or care of the other defender James Forrester, at his farm." Then the summons states a great deal of correspondence which passed between Major Orr and Captain Fleeming. Then it states that Captain Fleeming, as owner of the foxhound, and James Forrester, as keeper of, and having charge of, the same, are conjunctly and severally liable to the pursuer in the sum of £25 sterling, the sum at which the sheep had been valued, and a certain sum for expenses.

Defences were duly lodged for the defenders, by which the defender Captain Fleeming admitted that he was the owner of a young foxhound in the keeping of the other defender Forrester, but denied that such foxhound had destroyed the sheep. The defender Forrester further insisted that he was under no circumstances liable; that even if the dog did destroy the pursuer's sheep, still it was the owner alone who could be made responsible.

Condescendence and answers thereto were then duly lodged, and the same points were made as upon the summons and defences. The cause then proceeded to proof, the trial occupying six or seven days, and eventually the Sheriff-substitute, on 24th June 1852, pronounced an interlocutor as follows:—"The Sheriff-substitute having resumed consideration of the process, finds, that on or about the 6th February 1851, 18 sheep belonging to the pursuer, and then pasturing in his fields near Dallater House, were attacked and destroyed by two dogs, and one of these dogs, the only one that has been traced, was a foxhound, the property of the defender Mr. Fleeming, and then in the keeping and under the charge of the other defender James Forrester: Finds, in these circumstances, that the said defenders are liable for the loss thus sustained by the pursuer: Therefore repels the defences, and decerns against the defenders, in terms of the conclusions of the summons: Finds the defenders liable in expenses; allows an account thereof to be given in, and remits to the clerk of Court to tax the same and to report, and decerns." This interlocutor was afterwards, on appeal to the Sheriff-depute, adhered to by him, and the Sheriff-substitute thereupon fixed the pursuer's costs at £39 17*s.* 10*d.*

The cause was brought by advocation to the Court of Session, and the defenders lodged additional pleas, insisting, in addition to their former grounds of defence, that "even if it should be held to be proved that the advocator's dog killed any of the sheep, the advocator cannot be found liable in reparation therefor to the pursuer, in respect it has not been alleged or proved that the advocator's dog was of vicious habits, or dangerous to sheep, and that this was known to the advocator." The pursuer insisted, as he had done before, that the defender Fleeming, as owner, and the defender Forrester, as custodier of the dog, were both liable, the fact of the destruction of the sheep by that dog having been sufficiently established by the proof. The case was argued in the Court of Session, and the following interlocutor was pronounced:—"The Lords having advised this case, and heard the counsel for the parties thereon, repel the reasons of advocation; adhere to the interlocutor complained of on the merits; repeat the findings therein, and remit to the Sheriff, with instructions to disallow in the pursuer's account the expenses incurred in making up a record by condescendence and answers, and any revisals of the same, such condescendence having been moved for by the pursuer, and being wholly useless; and with power to the Sheriff to decern of new for the expenses after such deduction: Find the pursuer entitled to the expenses in this Court; remit to the auditor to tax the account thereof, and to report."

Against these interlocutors the defenders have appealed; and on behalf of the appellants it was argued, that by the law of Scotland, as by the law of England, in order to make the owner of a dog or other animal responsible for damage done by it, the person injured must both aver and prove that the owner was aware of its vicious propensities; and that as no such averment or proof occurred in the Court below, the decision cannot be sustained. On the other hand, the respondent argued that by the law of Scotland, differing from the law of England, knowledge on the part of the owner of the vicious propensities of his dog, is not necessary to make him responsible for any damage that the dog may occasion; and that it is sufficient to shew that in fact the dog occasioned damage, or at all events, it did so in consequence of want of due care on the part of its owner.

In order to come to a just conclusion on this appeal, it is necessary to look attentively to the terms of the interlocutor appealed from. I say interlocutor, for, though the appeal is directed in form against four interlocutors, the whole question turns, in fact, on the first, that is, the interlocutor of the Sheriff-substitute, which "finds, that, on or about the 6th day of February 1851, 18 sheep belonging to the pursuer, and then pasturing in his fields near Dallater House, were

attacked and destroyed by dogs, and one of these dogs, the only one that has been traced, was a foxhound, the property of the defender Mr. Fleeming, and then in the keeping and under the charge of the other defender James Forrester: Finds, in these circumstances, that the said defenders are liable for the dogs." Whether the facts proved before the Sheriff did or did not warrant this finding in point of fact, is not a matter on which your Lordships have any right to adjudicate. By the Judicature Act, 6 Geo. IV. c. 120, § 40, it is enacted, "that when, in causes commenced in any of the Courts of the Sheriffs, or of the Magistrates of Burghs, or other inferior Courts, matter of fact shall be disputed, and a proof shall be allowed and taken, according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide. And the judgment in the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on or is affected by matter of law." Here the Court of Session merely repeats the finding contained in the interlocutor of the Sheriff, which, therefore, must be taken as specifying all the facts material to the case, which were established in proof. To the evidence itself your Lordships have no right to look. The only question for decision is—whether the facts found do or do not make the appellants liable to the respondent for the loss of his sheep. The only facts found are, that the sheep of the respondent, while pasturing in his fields, were attacked by dogs, one of which, a foxhound, was the property of the appellant Fleeming, and then in the keeping of the other appellant Forrester. Unless, therefore, by the law of Scotland, the owner of a dog, and the person in whose keeping the dog is, are necessarily, and in all cases, responsible for the damage occasioned by that dog in the destruction of the sheep of another, the interlocutor does not state facts warranting the finding which makes the appellant liable.

Now, my Lords, I think it clear on all the authorities, that the liability of the owner cannot be carried to the extent which such a proposition involves. It cannot be, that because I am the owner of a dog of gentle habits, which I have properly secured, therefore, if another person, without my consent, or, it may be, contrary to my express prohibition, lets that dog loose, and urges him to attack the sheep or cattle of another, I am responsible for the injury thereby caused.

If it be said that this was not the state of facts actually existing in the case now under appeal, I answer, that the legislature has forbidden us to look for the facts to anything beyond the four corners of the interlocutor. The Court of Session was bound to take care that all the facts which they considered material to a right decision should be there found, and all which there appears is, that the damage was caused to sheep which were pasturing on the lands of the respondent, by a foxhound, of which one of the appellants was owner and the other keeper. If, in order to make the owner liable, it was necessary that he should have been aware of the mischievous propensities of the dog, that should have been found. If that is not essential by the law of Scotland, in order to fix the owner with responsibility, but if some *culpa* or negligence on his part is essential, then that *culpa* or negligence ought to have been found. The interlocutor cannot be sustained, unless, without either knowledge of the vicious habits of the dog, or any want of care in securing him, the owner is, in all cases, responsible for any damage which he occasions to sheep which are depasturing on the land of their owner.

That this is not the law of Scotland may, I think, be safely assumed, not only from the absurdity to which a contrary doctrine would lead, but even from the judgments of the learned Judges in this very case. It is true that the Lord Justice Clerk, at the end of his judgment, does intimate an opinion, that, without any negligence on the part of the owner, he might have been made liable from the mere fact that his dog had got loose and worried the sheep. This cannot be relied upon as the deliberate opinion of that very able Judge, and his judgment clearly proceeded on other grounds. Lord Cockburn clearly considers negligence in the keeping of the dog to be necessary in order to constitute liability in the owner, and he likens the case to the law as to using a dangerous weapon. Lord Murray considers that the law of Scotland does not differ from that of England; but that, in neither country, can the owner be made responsible unless he was aware of the vicious propensities of the animal. Lord Wood, though he concurred with the majority of the Court in holding the appellant liable, yet considers, that, in order to create responsibility, there must be *culpa* or negligence on the part of the owner.

The truth plainly is, that the Judges in fixing the appellants with liability in the present case, proceeded on grounds to which by the express enactment of the legislature your Lordships are disabled from attending. We can look only to the interlocutor of the Sheriff, adopted as it is by the Court of Session, and negligence on the part of the appellants certainly is not expressly or by necessary implication to be inferred from anything there to be found.

I regret that we should be obliged to decide the present appeal on this apparently technical ground; but the legislature has for good reasons forbidden us to do more than decide whether the facts stated on the face of the interlocutor warrant its conclusions. And as the interlocutor here contains nothing necessarily shewing either knowledge of the vicious propensities of the

dog, or want of due care in keeping him, I think it is quite clear that there is nothing to fix the appellants with liability.

This view of the case excludes the consideration of what was addressed to your Lordships in argument as to the difference or supposed difference of the law of England and the law of Scotland on this subject. According to Lord Stair, indeed, the law in the two countries is the same. This opinion was adopted by Lord Murray, and receives great confirmation from the two old cases of *Todridge* v. *Andrews*, and *Turnbull* v. *Brownfield*. Supposing those authorities not to have existed, and that by the law of Scotland it is sufficient, in order to fix liability on the owner, to allege and prove that he was guilty of negligence in the mode of keeping his dog, and that it is not necessary to add that he was aware of its vicious propensities, how far is this substantially different from the English law? The reason why by the English law it is necessary to allege and prove the *scienter* is, that in the case of an animal *mansuetae naturae*, the presumption is, that no harm will arise from leaving it at large. Starting from that presumption, it follows that there cannot be blame or negligence in the owner, merely from his allowing liberty to an animal which has not by nature the propensity to cause mischief. Blame can only attach to the owner when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits; and therefore, according to the English law, it is necessary to aver and prove this knowledge on the part of the owner. But after all, the *culpa* or negligence of the owner is the foundation on which the right of action against him rests, though the knowledge of the owner is the medium, and the only medium, through which we in England arrive at the conclusion that he has been guilty of neglect; and in that sense it is said that the *scienter* is the gist of the action.

If a different rule prevails in Scotland, and if there it is sufficient to allege negligence on the part of the owner, without averring or proving his knowledge of the animal's habits, it is not that the foundation of the action is different, but that the Scotch law does not so readily permit the owner of an animal to rely on the general consequences flowing from its being supposed to be an animal *mansuetae naturae*— a supposition which experience shews to be very often far from the truth, and which I am inclined to think that we in England have sometimes too readily acted on.

I have made these few remarks for the purpose of shewing that the difference in the laws of Scotland and England on this subject, if difference there is, consists not in the fact that *culpa* on the part of the owner is the foundation on which redress is given in Scotland, whereas something more is required in England, but that in England it is assumed that *culpa* (which in both countries is the sole ground of the action) cannot exist without knowledge on the part of the owner of the animal's habits. But however this may be, as the present interlocutor states no *culpa* whatever, I am clearly of opinion that it cannot be supported.

Two objections of a technical nature were relied on. First, it was said that the plea disputing the appellants' liability on any ground other than by denying the fact that the dog in question caused the mischief, was a plea raised for the first time on the advocation; and it was said that no plea inconsistent with the original pleas before the Sheriff ought to be admitted by the Court of Session. There are several answers to this objection. In the first place, on such a point, being a mere matter of practice, this House would be very unwilling to act on grounds not urged before the Court below, or which, if brought before them, must have been considered by the Judges as entitled to no weight, for it is not even glanced at in their judgments. But further, the Act of Sederunt of July 1828, § 25, to which we were referred in argument, expressly authorizes the adding of additional pleas when a judgment is removed by advocation; and it is palpably a mistake to treat this as a plea inconsistent with what had been pleaded before the Sheriff; it is additional to, but in nowise inconsistent with, what was there pleaded.

The other point was that made by the Solicitor-General, that, by the law of Scotland, it is sufficient to allege damage, and that this *primâ facie* imputes negligence or blame, and that it lies on the opposite side to set up circumstances of justification. This can obviously be a rule of pleading only if any such rule exists, as to which I offer no opinion. It is impossible that it can apply to the finding of the Court, which, by express statuteable provision, must state the material facts—that is, all the material facts warranting the conclusion against which the opposite party have no opportunity or right to make any observation.

My Lords, I have only further to mention, that my noble and learned friend, who is absent, (LORD BROUGHAM,) fully concurs in the views which I have taken of this case.

Under these circumstances, I have to move your Lordships that the interlocutor be reversed. I do not think that the Court of Session ought to have given any costs below, and therefore I shall move that the interlocutor be reversed, without costs.

Solicitor-General.—Will your Lordships forgive me. Probably the course which the House would think fit to adopt would be to reverse the interlocutor, and make a declaration and remit the cause, because the House knows nothing of the evidence which was taken. It knows only the finding in the Sheriff's interlocutor. One of the Judges speaks of there being proof of negligence, but that it was unnecessary to go into it. Your Lordships, therefore, would merely

remit the cause, because there may be abundant proof of negligence or *culpa* in the evidence that was actually taken.

LORD CHANCELLOR.—I have looked through the evidence, although I have not adverted to it, and I do not think there was proof of negligence; but, in mercy to the parties, I should recommend your Lordships not to give any countenance to further litigation by remitting the cause. I need hardly say that we shall not give expenses.

Mr. Anderson.—The reversal will include that.

Mr. Connell.—Is it not intended, my Lords, to give the appellants their own costs in the Court below?

LORD CHANCELLOR.—No, certainly not. The appellants misled the respondent by pleading wrongly below. I do not wish to give any costs at all.

Interlocutors reversed.

Appellants' Agents.—G. and G. Dunlop, W.S.—*Respondent's Agents.*—Morton, Whitehead, and Greig, W.S.

APRIL 23, 1855.

WILLIAM R. BAILLIE, W.S., Tutor *ad Litem* to Sir Norman Macdonald Lockhart, *Appellant*, *v.* Dame MARGARET MACDONALD LOCKHART, Relict of the late Sir Norman Macdonald Lockhart, and his Trustees and Executors, *Respondents*.

Apportionment Act, 4 and 5 Will. IV., c. 22—Heir and Executor—Entail—Construction.

HELD (affirming judgment), *That the Apportionment Act applies to Scotland, and to rents derived from an estate held under the fetters of an entail, though payable at terms postponed to the death of the heir in possession.*[1]

The late Sir N. Macdonald Lockhart, who was heir of entail in possession of the estate of Lee and others, died on 9th May 1849. Thereafter the respondents brought an action, founding on the Statute 4 and 5 Will. IV. c. 22, for payment, up to the day of his death, of £6786 6*s.* 6*d.*, as the sum due to them, under the provisions of the act.

The claim was resisted. In defence it was explained, that the farms were not held under written leases, there being simply an entry of the occupiers in the rental book of the landlord; that the entry to all the farms, or most of them, was at a Martinmas term, (11th Nov.,) and that the payment of the first half year's rent was postponed till the following Martinmas, and the second till the following Whitsunday. In these circumstances, it was contended—(1) That the statute did not apply to the case of an entailed proprietor. (2) That there being no written instruments under which the leases were held, it was further inapplicable; and, (3) That at all events it was inapplicable to cases of rents due, not at the time of the death, but at a postponed term.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, allows the proposed second plea for the defenders to be added to the record; and, in respect of the judgment in the case of *Blaikie* v. *Farquharson*, 18th July 1849, and the authorities referred to in the opinions of the consulted Judges—Repels the first plea and defence accordingly: Finds that the rents, feu duties, and other proceeds of the estate, fall under the operation of the Act 4 and 5 Will. IV. cap. 22, and decerns; and appoints the cause to be enrolled, with the view of ascertaining the amount for which the pursuers are entitled to decree." The Second Division of the Court adhered, 27th Nov. 1852.

On appeal to the House of Lords it was maintained—That the Apportionment Act, 4 and 5 Will. IV. cap. 22, was not applicable to the rents claimed by the respondent. *Browne* v. *Amyot*, 3 Hare, 173; *Countess of Glencairn* v. *Graham*, M. Heir-apparent, Appendix No. 1; Ersk., iii. 8, 29; *Lang* v. *Lang*, M'L. & Rob. 893; *Markby*, 4 My. & Cr. 484.

The respondents maintained—1. The Act of the 4 and 5 Will. IV. cap. 22, is operative within Scotland. *Brydges* v. *Dingwall Fordyce*, 6 Bell Ap. 1. 2. Because the statute is applicable to the rents of lands in Scotland, held under settlements of strict entail. *Blaikie* v. *Farquharson*, 11 D. 1456; *Browne* v. *Amyot*, 3 Hare, 173; Bell's Principles, § 1720.

R. Palmer Q.C., and *Anderson* Q.C., for the appellant.—The interlocutor of the Court below

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[1] See previous report 15 D. 914. S. C. 2 Macq. Ap. 258: 27 Sc. Jur. 367.