Wednesday, February 3.

FIRST DIVISION.

[Sheriff of Linlithgow, Clackmannan, and Kinross.

J. AND D. PATON & CO. *v.* ALEXANDER HUNTER.

Contract—Lease—Grass-mail.

In a case where the tenant of a grass field let grazing therein for a certain number of cows, *opinion* that in the event of proved injury to the cows by the operations of a third party, which the lessor took no steps to prevent, the lessor would be liable.

The pursuers in this case were tenants of a grass field at Tillicoultry, and they let to the defender grazing in it for three cows from May 1 to November 11, 1872, at the rate of £5 for each cow. This amount was not paid, and this action was brought to recover it. The defence was a counter claim in name of damages for injury done to the cows by the wet condition of the field, that condition being caused by the operations of the Tillicoultry Gas Company, who had pumped large quantities of water from their works, which had accumulated on the field—operations which the pursuers had taken no steps to put a stop to. The Sheriff-Substitute found for the pursuers, and, his judgment having been reversed by the Sheriff on appeal, the pursuers appealed to the Court of Session, and pleaded —(1) "The defender's cows having been grazed in the said field under an agreement with the pursuers that he should pay to them the rent or grass-mail condescended on, he is liable in the amount sued for, and decree should be pronounced therefor, with interest and expenses as concluded for. (2) The defender's claim of damages for alleged injury to his cows cannot be maintained as a set-off against the rent or grass-mail sued for, seeing that the said claim is illiquid and denied. (3) The pursuers are not responsible for the acts of the Tillicoultry Gas Company. (4) The pursuers are not liable in the damages claimed by the defender, in respect, 1st, that these alleged damages were not caused by any act of the pursuers, or of any party for whom they are responsible; 2d, that under the contract the pursuers were only bound to allow the defender a share of the grazing afforded by the said field, which they did; 3d, that the agreement between the parties did not impose on the pursuers warrandice to keep the field or pasture in any particular condition, or to protect the defender against the unauthorised acts of third parties, for whom the pursuers were not answerable; and 4th, that the defender got the same grazing in the field as the pursuers themselves and the other grazing tenants. (5) *Separatim.* The defender is not entitled to maintain a claim of damages against the pursuers, as the latter took legal measures to stop the operations of the Gas Company complained of by the defender immediately after the defender lodged his claim, and the same was rejected by the Gas Company. (6) The defender is barred from maintaining his said claim of damages by his having at his own hand removed his cows from the said field without notice to the pursuers, and disposed of them without allowing the pursuers or the Gas Company an opportunity of ascertaining the alleged injury to the animals. (7) The damages alleged to have been suffered by the defenders being denied, he must instruct the same. (8) The real question in dispute in this case being the defender's counter claim of damages, which claim could not competently be sued or discussed under the Debts Recovery Act, the pursuers were not bound to bring their action under that Act, as it could not have been suitably disposed of except in the Ordinary Court."

The defender pleaded—"(1) The pursuers having failed to furnish the defender with the grazing bargained for, and for which the rent now sued for was agreed to be paid, are not entitled to payment of said rent. (2) The pursuers are liable to the defender in the damages sustained by him through their failure to implement their agreement, as well as for the injury, sustained through the wet state of the field let for grazing. (3) More especially are the pursuers liable for such damage and injury in respect that they were partners of the Company through whose operations the said damage was caused, and that they aided in causing the said damage. (4) In no view are the pursuers entitled to claim expenses in this case, in respect that the claim, being one for rent under £50, should have been made under the 'Debts Recovery (Scotland) Act, 1867.'"

At advising—

LORD ARDMILLAN—Mr Hunter is defender in an action at the instance of Mr Paton for grass-mail or rent. He pleads a claim for damages in respect of injury to his cows in the field let to him. I am, in the first place, of opinion that if Mr Hunter's cows were really injured, as alleged by him, in consequence of the water being discharged into the field by the operations of the Gas Company, and being permitted to accumulate in a portion of the field, then Mr Paton, who had let to Mr Hunter the grazing of his cows in that field, must be held responsible. It may be that the Gas Company, by whose operations the flow of water into the field was caused, would in that case be bound to relieve Mr Paton. That question is not now before us.

But, in the second place, I am of opinion that Mr Hunter has not proved that his cows were injured in health by the flow of water or the accumulation of water on a portion of the field—a portion only 1½ acres out of 8 acres.

The season of 1872 was very unfavourable to the keeping of milk cows and to dairy produce. Of this there is evidence in the proof before us. Special injury from the special cause alleged has not, in my opinion, been proved. For the effect of the weather—for "the season's difference," which Shakspeare calls "the penalty of Adam,"—Mr Paton cannot be responsible. The proof of special injury and special cause, of which the burden in this respect rests on Mr Hunter, is, in my view, not only unsatisfactory and insufficient, but unfavourable to his plea. The decided preponderance of evidence is with Mr Paton.

The water covered but a small portion of the field. The rest was grass, and dry. Cows will stand in water—they sometimes enjoy it; but mere standing in it will not injure the cow who does not lie down in it. If the cows did not prefer the water to the dry grass, and if they did not lie down in the water, so as to bring the udder into contact with the water, there is nothing to explain how they met with any special injury But there is no sufficient proof of the cows actually lying down in the water when there was

plenty of dry ground and grass. It is not established as matter of fact that they did so, and as matter of inference, or suggested probability, it appears to me to be so unnatural and contrary to experience as to be quite out of the question. I can't say I ever heard of such a thing.

Mr Lindsay, a veterinary surgeon, and the only one examined, was called by Mr Hunter, but he gives no support to the suggestion of this probability; and Mr Mitchell and Mr M'Leish, and Mr Thomson and Mr Brown, men of practical experience, witnesses for the pursuer, speak to the same effect, and negative the suggestion.

Then it is to be remembered that the cows are stated by Mr Hunter himself and by his wife to have been affected in the middle of July, before the time when the pumping operations of the Gas Company, which caused a flow of water, commenced, and before any accumulations of water on the field.

The alleged effect preceding the alleged cause is peculiar.

It is plain to me that the case turns on the question of fact. Both Sheriffs have applied themselves carefully to the consideration of the case. But the Sheriff-Principal seems to have viewed it as turning rather on the question of liability than on the question of fact on the proof. I concur with him in regard to liability, but not as to the fact.

On the question of the evidence of injury and of the cause of injury to Mr Hunter's cows, my opinion is in accordance with that of the Sheriff-Substitute.

I do not think that special injury has been proved, or that any injury has been traced to the special cause alleged.

LORD MURE—I concur in thinking, on the question of law, that Paton & Company would be liable for the injury if it were proved that the damage was occasioned by the Gas Company. They would have had relief against the Company, but, in the first instance, the party injured would have had recourse against them.

LORD PRESIDENT—There are two questions before us—one of law and another of fact. Assuming that the defender's cows sustained injury by disease produced by the operations of the Gas Company, I am of opinion that the pursuers would be liable to repair that injury. The relation between the parties is not that of landlord and tenant; there is simply a contract between them of grass-maill. I apprehend that gives no proper title of possession, and I doubt if it would give the defender a title to apply for interdict against the Gas Company; but, anyhow, I think the tenant of the field was bound to protect the interest of his grass tenant.

LORD DEAS dissented on the question of fact.

Counsel for Paton & Company—Dean of Faculty (Clark), Q.C., and Asher. Agent—Alexander, Morrison, S.S.C.

Counsel for Hunter—Solicitor-General (Watson) Q.C., and Balfour. Agents—Keegan & Welsh, S.S.C.

Saturday, February 6.

FIRST DIVISION.

[Lord Young, Ordinary.

ANDREW CLARK *v.* JAMES HENDERSON.

Process—Agent and Client—Husband and Wife.

An action of separation and aliment at the instance of a wife against her husband having been stopped before decree by a reconciliation, *held* (after consultation with the Second Division) that the necessary expenses incurred by the wife's agent, being a debt due by the husband, might be recovered either by decree in the original action or by a fresh action, in the discretion of the Court.

This action was raised by Mr Andrew Clark, S.S.C., to recover from the defender the expenses of an action of separation and aliment which he had brought, on the instructions of the defender's wife, against her husband. The action proceeded as far as the lodging of defences when the parties were reconciled, and the defender's agent enrolled the case with a view to obtaining decree of absolvitor, and then Mr Clark moved that he should be found entitled to his expenses. This motion was refused, and he raised the present action, in which the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 10th December* 1874.—The Lord Ordinary having heard counsel for the parties and considered the record and process: Finds that, in the circumstances averred by the pursuer, the action is not maintainable: therefore assoilzies the defender from the conclusions of the summons, and decerns: finds the pursuer liable in expenses, and remits the account to the Auditor to tax and report.

"*Note.*—It is well settled, and was not disputed by the defender, that in conjugal actions, as, indeed, in all actions, the Court before whom they depend has very ample jurisdiction in the matter of expenses, and may, and habitually does, exercise it in favour of the agents disbursers, as well as the parties themselves. It may also be stated as a general rule that a wife pursuing an action of divorce or separation against her husband, or defending such an action at his instance, is entitled by herself or her agent to have decree against him for the expenses properly incurred by her, even when unsuccessful. There are exceptions to this rule, and whether the case falls under the rule or an exception is judged of and determined by the Court in the case itself.

"In the present case the pursuer, having been employed by the defender's wife to raise an action of separation and aliment against him, which was dismissed at an early stage without expenses in the circumstances stated in the record, sues the defender for his account of expenses, either as being his own proper debt, or that of his wife, for which as her husband he is liable.

"The pursuer cited no authority for such an action, and relied on the principle of liability involved in the practice of the Court to which I have referred in dealing with the matter of expenses in conjugal actions, undertaking to establish by evidence that he had reasonable grounds for accepting of the wife's employment to take proceedings against her husband.