Counsel for the Alloa Coal Company.—Dean of Faculty (Clark) — Guthrie Smith. Agent — Alex. Morrison, S.S.C.

Saturday, October 23.

[Sheriff of Midlothian.

SECOND DIVISION.

ROBERTSON *v.* COCKBURN.

Jurisdiction—Sheriff—Lease.

A raised an action in the Sheriff-court against B for implement of a contract of lease. B denied that he had ever entered into such a contract. *Held*, that as the action involved no competition of real rights, the Sheriff had jurisdiction to deal with it.

This was an appeal from the Sheriff-court of Midlothian in an action at the instance of Andrew Robertson against John Cockburn. The summons concluded that "the defender ought to be decerned and ordained forthwith to implement and fulfil the contract or agreement entered into between him and the pursuer, on or about the 5th day of October 1874, for a lease of the shop No. 64 Grove Street, Edinburgh, for five years, at the rent of £45 for the first three, and £50 for the remaining two years, conform to draft of such lease prepared by the agents of the said pursuer, and revised by the said defender." Then followed the usual conclusion for damages in the event of the defender failing to implement. The defender, in his minute of defence, denied that any lease had been entered into between him and the pursuer, although he admitted that negotiations for a lease had been gone into. He further pleaded *locus penitentiæ*, in respect that there was no written agreement or lease. The plea of no jurisdiction was not however raised by him.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—"Finds that this action is in substance one to have it found and declared that the defender is bound to accept from the pursuer a lease for five years, at the rent of £45 for the first three, and £50 for the remaining two years: Finds that it is *ultra vires* of this Court to pronounce a judgment to the above effect: Therefore dismisses the action; finds the defender entitled to expenses, &c.

"*Note.*—The Sheriff-Substitute has read the authorities to which he has been referred by the pursuer's agent. These bring out pretty clearly that a declaratory conclusion and decree are necessary to give the pursuer the remedy he seeks. This Court is not competent to give that remedy. Moreover, the proposed deed is intended to give a leasehold title to an heritable subject; and the conclusion for damages is subordinate to the leading conclusion, which, as already said, is in substance and effect a declaratory one. See *Robertson* v. *Lindsay*, Dec. 4, 1873."

The pursuer reclaimed to the Sheriff, (DAVIDSON) who upon 12 April 1875 issued an interlocutor dismissing the appeal. The following note was appended to the Sheriff's judgment.

"*Note.*—The case of *Gordon* in 1802 (p.12,245) to which the respondent has referred, and also another case of recent date, *Cox and Others v. Kerr*, Oct. 25, 1873, which followed the case of *Gordon*, were not, at least apparently, quite the same as this. In both these cases there were disputes as to the terms of the dispositions, which in each case the petitioner asked that the respondent should be ordained to deliver to him. Thus, questions of heritable right were clearly involved in these cases.

"But here, supposing the alleged agreement for a contract of lease were to be proved by the petitioner, the exact terms and conditions of the lease to which the petitioner is entitled would or might be subject of discussion, and equally raise such incompetent questions. The petitioner of course means that if he proved his agreement for a lease, the Sheriff should read the written lease to be executed in respect of the agreement, and decide all questions that might arise thereanent. Therefore, though with hesitation, the Sheriff concurs in holding this action incompetent.

"The respondent did not plead incompetency. The Court was, however, *ex proprio motu* entitled to consider that; and it is not thought there should be any modification of expenses inasmuch as the progress of the case has been at once arrested, and no additional expenses caused by the respondent's act."

The pursuer appealed.

Argued for him—The Sheriffs are wrong in holding that this action is in substance one of declarator, or that it involves questions having reference to the title to an heritable subject. It is not even an action to compel a party to grant a lease, but simply to obtain the fulfilment of a bargain which has been entered into. If the defence had struck at the pursuer's title to give the lease it might have been different, but here there is simply a question of fact, with which the Sheriffs can competently deal.

Argued for respondent—This action has for its object the constitution of an heritable right. There is no executed lease, and what the Sheriff has been asked to do is practically to adjust a lease. An action competent in itself when brought in the Sheriff-court, may be rendered incompetent from the nature of the defence. The constitution of the lease is here denied, and this renders it incompetent for the Sheriff to deal with the action.

Authorities cited—*Hall* v. *Grant*, May 19, 1831, 9 Shaw 612; *Corbet* v. *Douglas and Jarvie*, March 5, 1808, Hume 346; *Robertson* v. *Paton*, May 23, 1815, Hume 658; *Murdoch* v. *Wyllie*, March 8, 1832, 10 S. 445; *Gordon*, February 6, 1802, M. 12,245; *Earl of Aberdeen* v. *Laird*, February 7, 1822, 1 Shaw 294; *Earl of Moray* v. *Pearson*, June 11, 1842, 4 D. 1414; *Harley Maxwell* v. *Glasgow and South Western Railway Company*, February 16, 1866, 4 Macp. 447; *M'Laren's Trustees* v. *Kerr*, October 25, 1873, 1 Rettie 60; *Robertson's Trustees* v. *Lindsay*, December 20, 1873, 1 Rettie 323.

At the debate it was pointed out by the Bench that the summons was defective, inasmuch as it failed to show how the lease was to be implemented. Accordingly, with the approval of the Court, a minute was lodged amending the summons by setting forth that the lease was to be implemented by the defender "entering into possession of the premises and paying the rent when due."

At advising—

The Lord Justice-Clerk—In this case we have had a question of general application argued to us. Looking to the conclusions of the summons as originally laid, I confess that I am not surprised that the Sheriff should have viewed the case as substantially one of declarator. A conclusion to have a lease implemented is not a proper one unless it is set forth in what way this is to be done. But that difficulty has been removed by the minute now put in, and by which the pursuer explains that the lease is to be implemented by the defender entering into possession of the premises and paying the rent when due.

I don't think it necessary to go at large into this question of the Sheriff's jurisdiction. But I think it quite clear that he is entitled to decide whether a tenant is bound to take possession. There is nothing properly of the nature of a declarator in such a decision. I wish to reserve my opinion upon some of the points raised at the bar, but I would not say that a question between landlord and tenant is in the same position as a competition of titles. Here there is nothing in the shape of real right — the landlord asserts and the tenant denies a contract of lease, and surely the Sheriff is competent to decide between them.

Lord Neaves—The summons as it originally stood was not a satisfactory one, but that was because it was not specific. It has now been explained to us and amended in such a way as to render it precise. I fail to discover that when a proprietor seeks to enforce a lease there arises a competition of real rights. In order to have a competition there must be two rights. Here there is only one, in the pursuer; and the case of the defender is this—that he himself has no real right, and is not even a tenant.

When there is a competition of heritable rights the Sheriff is unable to decide between them, but it does not therefore follow that he is unable to judge of the validity of a title upon one side. He may satisfy himself, for example, that a man who is pursuing an action of removing has a good title to pursue, and he may throw out an action for want of title. I think, therefore, that this objection of want of jurisdiction is wholly groundless. The real objection was a want of precision as to the manner in which the decree sought was to be enforced.

Lord Ormidale—This case has been oddly dealt with from the beginning. The defender did not take this objection to the jurisdiction. Then the Sheriff failed to detect what was obvious—the irrelevancy of the summons as laid. It asked for a decree to implement a certain lease. Suppose decree had been pronounced in terms of the summons, could one have ventured to proceed to charge upon it? How was the lease to be implemented?

But that defect has been supplied by the amendment now made, and the case presents itself to us in a different aspect. I concur in doubting whether the views of the learned Sheriffs are sound. I think they are not. Suppose the summons relevant, I don't think there was any want of jurisdiction entitling the Sheriff to take the objection. The pursuer might have failed to make out a valid lease. But the Sheriff should not have refused to make the inquiry into the facts of the case. If the objection as to the relevancy had been taken at the first, the pursuer would probably have amended his summons. I must say that it is impossible to hold that, merely because a summons has relation to heritable property, that therefore the Sheriff has no jurisdiction to deal with it. Surely there must be questions having such a relation occurring daily in the Sheriff Courts.

Lord Gifford—I concur. The Sheriff has always jurisdiction to enforce the stipulations of a lease, whatever they are. Nor does it deprive him of this jurisdiction that an objection is stated to the existence of the lease. There may be a question of expediency as to sisting the action until a reduction is brought, but there is always jurisdiction.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recall all the interlocutors in the cause, allow the amendment to be added to the summons: Find that the action as thus amended is competent in the Sheriff-court, reserve all questions of expenses, and remit to the Sheriff to proceed with the cause, with power to decide the question of expenses in this Court when the case shall be decided on its merits, and decern."

Counsel for Pursuer — Trayner — Brown. Agents—Richardson & Johnston, W.S.

Counsel for Defender—Mackintosh—Robertson. Agent—Alexander M'Dougal, L.A.

TEIND COURT.

Monday, Oct. 25.

LECK *v.* THE HERITORS OF KILMALCOLM.

Teinds—Stipend — Glebe — Feu — The Glebe Lands (Scotland) Act 1866 (29 *and* 30 *Vict. c.* 71).

In an application for augmentation of stipend—*Held* that the Court will not take into consideration the value of the glebe, arising from its having been feued in terms of the Glebe Lands (Scotland) Act, 1866.

Mr Leck, the minister of the parish of Kilmalcolm, raised a process of augmentation against the heritors. In 1867 he had obtained authority from the Court to feu the glebe. The extent of the glebe was 11½ acres, and 2¾ acres had been feued under the foresaid authority, from which the minister derived annually about £45. The stipend was stated to be seventeen chalders—the last augmentation having taken place in 1854—and an augmentation of five chalders was asked. This the heritors opposed, chiefly on the ground of the unusual value of the glebe, arising from its being feued.

Argued for the minister—The Glebe Lands Act of 1866 was intended for the benefit of the ministers, and not to relieve the pockets of the heritors, and to take into consideration the feuing value of the glebe would be directly contrary to