nary reclaimed against, of date 22d June 1866: Find that the defender, as tenant in the lease libelled, having failed to fulfil the condition of building dwelling-houses on the ground (as provided by the 5th section of the statute 10 Geo. III., c. 51), subject to which condition only the parties could lawfully contract in terms of said lease, the said lease is ineffectual and not binding on the pursuer as heir of entail succeeding to the granter: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account thereof to be given in, and remit the same when lodged to the auditor to tax and report: Appoint the report to be made to the Lord Ordinary; and remit to the Lord Ordinary to proceed with the cause as shall be just and consistent with the above finding; with power to decern for the expenses now found due. Five words delete.

"JOHN INGLIS, *I.P.D.*"

Agents for Pursuer—Hay & Pringle, W.S.
Agents for Defender—Campbell & Smith, S.S.C.

Saturday, March 30.

SECOND DIVISION.

WALKER *v.* MARTIN.

Reparation—Culpa—Unfenced Machinery. In an action of damages by a young girl for personal injury caused by unfenced machinery, £30 awarded.

This is an advocation from the Sheriff Court of Lanarkshire of an action in which Martin sued the advocator for damages in respect of injuries sustained by her while in his service in his bleachfield at Castlebank, Partick. The pursuer was injured at one of the windows in the wall of one of the rooms at the work, in which there is a series of wheels called dash or cog wheels, into which the cloth for bleaching is put, with a shaft and gearing to drive the wheels between them and the wall. While standing there the dash wheel caught her dress, and drew her into the machinery, by which she was seriously injured, having had the flesh on her thighs and back lacerated. The defence was that at the time the accident happened the pursuer was not engaged at her usual employment, but had left it prior to the usual hour of ceasing to work, and was idling away her time; that her duty in the defender's works never required her to be in that part of the works at which she was injured; that she had no right to be there; and that the accident was caused through her own fault.

The Sheriff-Substitute (Murray) assoilzied the defender.

The Sheriff (Alison) altered, and modified the damage to £30.

The defender advocated.

To-day the Court adhered to the judgment of the Sheriff.

Counsel for Advocator—Mr Shand and Mr Brand. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—Mr Pringle. Agent—J. D. Bruce, S.S.C.

SMEATON *v.* ST ANDREWS POLICE COMMISSIONERS.

Police—Public Commissioners—Drainage—25 & 26 Vict., c. 101*—Agreement.* Held (1) that Police Commissioners, in carrying through a system of drainage operations for the public benefit, are entitled to follow what course they may consider most expedient, but *suo periculo*, and *interim* interdict granted to a party complaining that his lands were to be used for the purpose recalled. (2) Circumstances in which proof of an alleged agreement with the Commissioners allowed, and to that extent a plea that it was *ultra vires* of the Commissioners to enter into such an agreement after a line of operations had been resolved upon and sanctioned by the Sheriff, repelled.

The pursuer is proprietor of the lands of Abbey Park, in the burgh of St Andrews, and conducts a large boarding-school for boys there. In 1863 the defenders, acting under the Act 25 and 26 Vict., cap. 101, proceeded to construct a system of drainage in St Andrews, and gave the requisite notices. The main sewer was to go through the pursuer's lands. The pursuer took several objections to the procedure of the Commissioners, but the Sheriff of Fifeshire, whose decision in such cases is final, in October 1865, confirmed the order of the defenders. The pursuer then intimated a claim for compensation. After several communings, with the view of avoiding litigation, the defenders agreed, on 12th February 1866, by a majority of one, to come to an amicable arrangement with the pursuer on the basis of a memorandum of agreement proposed by him. Thereafter the Commissioners, on 3d March 1866, resolved to proceed with the line of drainage sanctioned by the Sheriff. Smeaton then brought an action against the Commissioners to have them ordained to carry out the plan contained in the agreement. The Commissioners defended, contending that the memorandum founded on by the pursuer was not a final and binding agreement, and that it would be illegal and *ultra vires* for them to deviate from the line sanctioned by the Sheriff. In December 1866 the Lord Ordinary pronounced a judgment assoilzieing the Commissioners, on the ground of the finality of the Sheriff's judgment. Smeaton reclaimed. In February 1867, before the reclaiming note for Smeaton was heard, the Commissioners passed a resolution to proceed with the execution of the line sanctioned by the Sheriff. Smeaton thereupon brought a suspension and interdict against the Commissioners to have them prevented from carrying out their resolution. The Lord Ordinary on the bills granted interim interdict, and reported the case to the Court. The Court recalled the interdict, holding that it was for the Commissioners to proceed or not with the works as they chose, *suo periculo*. The case was then heard on the defenders' plea that it was *ultra vires* of the Commissioners to make any agreement such as that alleged by the pursuer.

YOUNG and BALFOUR, for the pursuer.

COOK and CAMPBELL SMITH, in answer.

At advising,

Lord COWAN—When this cause was formerly advised, we were all of opinion that the Lord Ordinary had gone wrong in dismissing the action on the ground he did, namely, upon the finality of the judgment of the Sheriff in relation to the objections stated by the pursuer to the contemplated operations of the commissioners. The interlocutor was consequently recalled, and the cause ought then to have returned to the Lord Ordinary to proceed further on the merits, but it was pressed on the point that there were pleas stated by the defenders which might, if sustained, lead to the same result, and the cause was again heard on the question whether there were grounds for thus

disposing of it, and at once sending it out of Court. I am of opinion that the defenders have entirely failed in the argument addressed to the Court with that view. The argument maintained was to the effect that it was *ultra vires* of the defenders, as a statutory body, to enter into any binding agreement with reference to operations under the statute, however rational and beneficial they might be shown to be, and that no such agreement with parties whose property might be affected could be availing in law, or be enforceable, supposing the statutory commissioners subsequently to adopt a resolution to the effect of recalling what had been agreed to between them and third parties—in short, that their operations were incapable of being controlled by any agreement, whether entered into by the same body of commissioners, or by their predecessors in office. As regards this incapacity, I cannot find in the statute any enactments that should lead to the result contended for. It would, indeed, in my apprehension, be very unfortunate if there had been such. The greatest benefit may be secured to the public by the commissioners under a public statute like this entering into arrangements with individuals whose property is to be affected by their proposed works. Are they to have their hands tied up so as to debar them beforehand from making such arrangements, or, if made, are such arrangements to be binding only so long as the commissioners continue of the same mind? I cannot think that that is their position, and I see nothing in any of the statutory provisions founded on that can justify a result so singular, and so unfortunate, in my opinion, for those interests to promote which this useful public Act was passed. But if there be nothing to prevent such agreements at the outset of projected works, before notices are given in terms of the statute, and as are required previous to their being actually carried through, there can be nothing illegal in agreements by the commissioners after the notices, or even after the commencement of their works. This course, indeed, may be a most advisable one, and the only one to obviate emerging difficulties, unforeseen when the plan was at first resolved on, or to secure the unopposed, and, it may be, the more economical execution of their works. In order to the effectual carrying through of such changes on their plans, new notices may be necessary, or may not; but if so, it is within the competency and power of the commissioners to give such notices, as was expressly decided by the First Division of the Court, in the case, reported 17th May 1865, between the same parties. And this being so with regard to changes adopted *proprio motu* by the commissioners, the same course, when necessary, cannot but be open to them, in relation to operations which they had found it to be for the public interest to make matter of agreement with third parties. Holding, then, that there is nothing illegal in the commissioners for the time being becoming bound by agreements with third parties to alter or modify the contemplated operations under the statute, the agreement on which the pursuer founds may be enforced, if otherwise unobjectionable. The defenders, however, have various objections to the scheme of operations contained in the heads of agreement sought to be enforced by the pursuer; and, in particular, it is maintained that they are of a nature, as regards the gradients, which renders them altogether unfit, if not impossible, to be safely executed. At this stage of the proceedings in the cause, it is manifestly impossible for the Court to take these allegations, which are all of them denied by the pursuer to have any real foundation, into their consideration further than to guard in their interlocutor against the interests of the public being injured by these objections, if really well founded, being disregarded without thorough investigation. All this will be matter for inquiry and disposal at a subsequent stage of the cause on its merits, because that the defenders now say that operations which appeared at one time to have had their sanction, would be injurious to the public interest, and indeed useless for the drainage purposes contemplated, certainly affords no reason for throwing out the action as untenable. Notwithstanding the agreement entered into with the pursuer, the commissioners may succeed in setting it aside, either in this action or in an action of reduction. I do not wish to say that they cannot. All that I would venture to say—and it is enough in my apprehension for the disposal of the present argument—is, that there is not in the statements on the record any relevant ground stated for holding the agreement *ultra vires* and illegal, whatever may be the issue of the investigation that must follow in the discussion on the merits. The argument addressed to the Court proceeded, on both sides of the bar, on the assumption that there was a concluded agreement capable of being enforced. As the object of the defenders was to have the action thrown out of Court without further discussion, they were willing to take the argument on that assumption. It is on the same assumption that I have proceeded in arriving at the conclusion that the pleas thus urged ought not to receive effect at present. On the record, however, it is disputed that any part of the agreement was finally arranged or completed between the parties, to admit of its being legally enforced as concluded for in the summons. The whole matter of the alleged agreement is stated by the defenders to stand merely *in nudis finibus contractus*. This is obviously the primary question to be discussed, now that the preliminary pleas urged by the defenders are found groundless to the effect at least to which they are pleaded to have the action dismissed. Until it is settled that there has really been a concluded agreement, it would be idle to discuss whether it is capable of being carried into execution, or open to such radical objections that it cannot be enforced. Under the remit which I think ought to be made to the Lord Ordinary, to proceed with the cause, this matter will be for discussion; but should the parties desire it, the Court may be inclined to hear further argument, and to dispose of this question without a remit to the Lord Ordinary. Should this latter course, however, be proposed, it ought to be acceded to, I think, only on the footing that the whole elements necessary for the decision of the cause are to be found in the written evidence in process. The interlocutor to be now pronounced, as it seems to me, should repel the third plea in law stated for the defenders, and with reference to the third division of the second plea, should contain a finding that the defenders have not shown any sufficient grounds for the action being dismissed, because of the agreement being *ultra vires* or illegal, but the whole pleas of parties, the third excepted, being specially reserved to every other effect.

Lord BENHOLME—I concur generally in what Lord Cowan has said. The only point on which I have some difference of opinion is with regard to the subsequent course that the action should take. My impression is, that if the parties are inclined, I should be very willing to keep the case here, and go on with the discussion on the other points.

That is the only matter on which I entertain any difference of opinion.

Lord NEAVES—This is a case of very considerable importance, and it certainly does not stand on a very satisfactory footing. The defenders persuaded the Lord Ordinary that the action should be thrown out upon the plea which is virtually embodied in their third or principal plea. [Reads third plea.] Now, we have all been of opinion that that will not do—that that is not a good plea. We have recalled the Lord Ordinary's interlocutor, and I agree that we should follow that up by repelling this plea, which is only giving effect to the opinion we have already expressed. Then, in order to dispose of the case, if we could do so with justice to the parties, we heard them upon the third branch of the second plea, and upon the fifth plea. [Reads pleas.] Now, if I had been able to make up my mind upon the purposes for which this was done, that it was not possible for these commissioners to enter into any agreement with a party in the same situation as Mr Smeaton, that would have been conclusive of the case, and would have terminated the litigation without any further inquiry into matter of fact. But I am unable to arrive at that conclusion. I think that the question of what is *intra vires* and *ultra vires* of such commissioners is one attended with very great delicacy. I am quite clear that there are some things which it would be *ultra vires* of them to do. On the other hand, I am not quite clear that there are not some things of this kind that they may do. It depends upon circumstances, and the boundaries between the two things may often be very narrow and delicate. They cannot preclude themselves from doing their duty to the public fairly, or devolve it upon others, or tie up their hands by a scheme—that is really abdicating their functions under the Act of Parliament. But, on the other hand, in the position in which these parties stood, according to their own statement, I am not satisfied that every agreement was incompetent. I can conceive minor deviations from a plan that is suggested, the moment we have got rid of that third plea, that it is incompetent for them to change anything in a plan. Suppose they meet with an obstacle in making a drain through a gentleman's lands, an obstacle in point of expense, or in point of practicability, from strata or levels or something of that kind, I am not satisfied they may not make a certain change, provided it is not a very serious and substantial change affecting the interests of third parties; and then when I read the statement of those gentlemen, I find that they were threatened with a very large claim of compensation, £3000, which may be an imaginary claim altogether, but, if it was imaginary, certainly it seems to have had the effect of thoroughly frightening them. They thought it was not a joke, but a very serious affair; and accordingly they immediately entered into a negotiation for the purpose of making a deviation, which, though small, was to cost some more money, to which he was to contribute something, but in consequence of which he was to relinquish his whole claim for compensation, which appeared to loom in the distance in such a formidable shape. They also got rid of a jury trial, or valuation trial, at the expense of some few hundreds of pounds more; but that was the aspect in which it presented itself to them, and this memorandum of agreement was made. It is not admitted that it was concluded, and that may be a point of very considerable nicety; but it is so far followed out that the agent who acted for the commissioners, Mr Grace, certainly seems to have thought it concluded, because he writes he is satisfied with the acceptance he has got, and says he will immediately prepare a deed of agreement, and requested Mr Smeaton to withdraw his notice of compensation, which he agreed to do. That is the aspect of the case as it stands. When we are asked, therefore, to throw out the action in these circumstances just now, I confess I am not able to do so. I don't feel prepared to dispose of an abstract question of that kind. Let us see whether there is an agreement or not. That may be a question of very great nicety. What is the mode by which these commissioners can bind themselves in their corporate capacity, so as to conclude an agreement? Some indication was made that there was not a simple acceptance here, but unless Mr Grace understood that it was an explicit acceptance to his satisfaction, he had no right to act upon it. Mr Grace is not the commissioners, no doubt; but I am only speaking of the *prima facie* view of that point of the case. But let us see what this agreement is—whether in its nature it was an agreement of that minor kind, which, being within Mr Smeaton's own grounds, was just one that judicious parties—acting for the public interest, and seeking to avoid a serious and most expensive investigation and jury trial or valuation trial before the Sheriff, or whatever is the proper mode of proceeding—could enter into by really making only an inconsiderable concession, with no detriment to themselves, and with material benefit to him—keeping, then, in view that under these empowering statutes, enabling persons for public purposes to enter a man's grounds, it is generally stated in the statute—I think it is in this statute, at any rate it is in the Lands Clauses Act—that they are always to do as little damage as they can possibly do. If that is the case, and if it turns out that this was a deviation that might be fairly adopted with a view to satisfy all parties, and to save expense on the one hand, and be no detriment to any other party on the other, that may be a very good agreement. On the other hand, if it is a very grave or serious deviation, but above all, if it was never entered into at all, the case would be different. Now, before we can, in my opinion, satisfactorily dispose of whether this was a binding agreement ultimately, we must know how it was concluded, and what are the documents on which it rests, so that we may see their construction and interpretation, for one of the pleas of the defenders is rather a singular plea. They say, the whole object of this was to avoid litigation, but that the other party is breaking the bargain by entering into litigation; that is to say, parties enter into an agreement to do a thing for a man, so as to save litigation, and then when they refuse to implement it, but take another agreement, they say, "Oh, you are breaking the bargain by a litigation to enforce that which we entered into to save litigation." That is rather a singular view of the case, but it is one of the pleas stated upon record, and I would like to see upon what foundation it is that that rests—upon this document, or on the minute of acceptance. Now, then, however reluctant I may be to postpone the ultimate decision of the case, I think we cannot do it justice without seeing the facts brought out—whether there was a concluded agreement binding in law—if it is unexceptionable in itself; and then, when we have seen what it consists of, we must resume consideration of it as

a matter that we must then deliberately apply our minds to, and see if it was liable to any objection. I agree with what one of your Lordships stated, that if this is a concluded agreement, it can only be resisted on grounds that would be available to reduce it, and to set it aside. I don't say that a formal action is necessary when it rests in this form; but still the grounds must be the same on which it can be set aside, and I need not say that these must be clear and plain. We must see the facts; and I should like very well, as the Court think that further proceedings are necessary, to consult the parties upon whether they should go on before us or before the Lord Ordinary.

LORD JUSTICE-CLERK—I concur with your Lordships in considering that we must repel the third plea. I concur also with your Lordships that it is desirable that we should hear and determine whether there is in this case a finished and completed agreement or not, and the precise nature of the agreement. It is certainly very inexpedient to be called upon to determine with reference to an agreement, whether or not that agreement is *ultra vires* and incapable of being enforced by law, while we are not in possession of facts to enable us to say whether there is a completed agreement or not. I quite perceive the difficulty of determining as a mere speculative question, whether or not this agreement must be considered as *ultra vires*, and therefore incapable of being enforced, while we have not determined the question as to whether there has been a completed agreement, yea or nay. I confess that, suppose I were called upon to give an opinion upon that speculative view—assuming that parties came to an agreement, and that the agreement was completed between the parties with reference to the subject-matter of the present case—I should be inclined to say that, in the position in which these gentlemen stand who are defenders in this action, the Court could not put in force the obligations as set out in the summons, and certainly could not pronounce decree in the terms either of the leading declaratory conclusion, or of the conclusion for interdict. The view which I take, or am disposed to take, of the matter—and I hold it with very great distrust, both because it seems to be opposed to the views of the majority of your Lordships, and because I, having been counsel in the case for the defenders, may be thought to have some bias in the matter—appears to me to be this, that if a statutory body are to be held as bound, by an act of their predecessors, to perform a statutory duty in a way contrary to their conviction of the manner in which that duty should be performed, you really cannot call upon a Court to intervene. These parties represent the proposition which is sought to be enforced against them as embracing great inconvenience to the public, and great damage; and although at a meeting of their predecessors an agreement may have been come to, they taking their stand upon their position as such statutory commissioners, and affirming that, according to the state of their conviction, their duty will not be performed by carrying it into effect—I rather desiderate authority for holding that in these circumstances a court of law will enforce against them such an obligation. There appears to me to be also another view of the question which is very material to be considered. As it appears to me, taking the question as one of a completed agreement, the actual agreement is for the positive and unconditional construction of a particular work. Now, I have considered the statute, and it humbly appears to me that, with reference to this individual work as disclosed upon the face of the record, it is a work of such a description—so large, and so different in character from the original design which had been submitted to the public, and which had received their sanction—as that it is absolutely necessary that the commissioners should set about the giving of notices, the lodging of plans, the invitation of objections, the judgment to be given upon objections, and the whole course of procedure which is necessary in ordinary cases where plans are announced for the public good with reference to carrying out the public drainage of a town. It appears to me that the very fact of a very much enlarged expenditure being required in order to carry out this drain necessitates notice to be given to the public in order that objectors may appear. Now, I cannot bring myself to hold that if they are not in a condition *de plano* to do that which they certainly *ex facie*, in that view of the case, undertook to do, a party can send them to the different process of giving notices and going through the whole course of statutory procedure. It seems to me that the two agreements are essentially different in their kind and character. I quite agree that if the matter were such as that the Commissioners could execute it, and that by their own power and authority, then a binding obligation would be effectual against them. I think such cases as Lord Neaves has referred to, of payments made in the ordinary course of the contracts of their corporation, and suchlike things, are of that nature; but it does not occur to me, with reference to a statutory corporation, or a *quasi* corporation, that you can read out of an obligation to execute a particular work, an obligation to go through a set or series of requirements which may put the party into a position to be enabled to carry out that work. It rather occurs to me that in any case that I have heard of statutory corporations or *quasi* corporations contracting beyond their power —the contract was held to be null. For example, a railway company might contract to do a certain thing which they had no power to do, and were incapable of carrying out *de plano*. It occurs to me that you could not read out of that an obligation to go to Parliament to acquire power; and so I think you cannot read out of a proceeding by which the parties agree to carry out a certain work, an obligation to do what is required in order to carry out the work, on the footing that it is now presented to us. For example, what is to be done by these commissioners if they are bound hand and foot to do all that is necessary to carry out this scheme? The notice is given, and an objector appears; and that an objector will appear seems most likely, seeing that out of the body itself there are thirteen out of fourteen who opposed the resolution. Well, what is their duty? If that agreement is binding upon the consciences of all the gentlemen, what are they to do? They are, of course, to carry out, according to this hypothesis, the agreement into which they have entered; but that agreement, as it necessitates the doing of everything that is necessary to carry it out, necessitates their giving judgment against the objector — it necessitates their removing the surveyor, who will not attest that the matter can be done; in short, if you were to read out of a plain and simple agreement, which turns out to be *ultra vires*, the necessity of following out a long and continuous course of acting and expenditure of money in dealing

with objectors, I think you would proceed to make a different arrangement altogether from that which the parties contemplated at the time. But as I have said, these views are not shared by your Lordships, and I have the utmost distrust of any opinion I may express on the subject; but I concur with your Lordships in the proposition that it is most desirable, at this stage of the proceedings, that we should really know and ascertain distinctly whether there was a completed contract or not, and perhaps if the parties are to direct their attention to that subject, I may be permitted to bring before them some of those views which occur to me to be important. I think the question important, not merely with reference to this body, but with reference to all other bodies, constituted by statute, with corporate powers, or *quasi*-corporate powers. How shall parties in these circumstances be bound? In the case of an ordinary corporation you have the seal of the corporate body, or the intervention in writing of the corporate officers. Is there or is there not any enforceable agreement till that something is done, in order to fix the matter as in a contract? Does a resolution of a body fix it as in a contract with a third party? Or is a corporate or *quasi* corporate body not to be considered in the matter of resolutions, as in the situation of a private party having intentions which are expressed, but which are not carried into effect, and before they are carried into effect, he alters his intentions, and so changes his position? Is a corporate or *quasi* corporate body in that position, or is it not? Does it result from the fact that a meeting of the body a certain approval is given, that thereby the matter is fixed and determined? I do not know whether it is exactly so contended, or whether it is the fact of alleged homologation, or intervention following upon these matters, or the expression of the Clerk of Police that matters had been satisfactorily and thoroughly adjusted, that is founded on. I think an inquiry is absolutely necessary in that case with reference to the powers of the statutory officer of Police, as to whether the extent of powers he may possess, and the extent of intervention or authority he may have exercised, had any reference to the contract in question. It also occurs to me that a matter of difficulty arises on the condescendence itself. It is upon the statement in art. 22, which, stating the alleged completion of the contract, seems to refer to something which, being matter referred to, is not therein matter of averment. I have directed the attention of parties to these points with the view of having my doubts upon the matter cleared up if they are unfounded; but upon the matter of proceeding, I entirely agree with your Lordships; and I agree also that the parties should themselves give us their views with respect to the mode in which the further prosecution of the inquiry should be conducted, and whether the case should go back to the Lord Ordinary, or be taken here.

Mr Balfour—On the part of the pursuer, I have to say that I am afraid the conditions which Lord Cowan suggested as those alone on which your Lordships would consider the matter here are scarcely satisfactory. His Lordship said that you would only be willing to entertain the consideration of that matter if we could take the discussion on the footing that the documents alone would satisfy all that was required in the case.

Lord Cowan—You think further evidence is necessary?

Mr Balfour—I think so, because we make a good many averments on record as to matters of fact which are not proved by documentary evidence. I think it is plain that whatever my case is, the case of the defenders is one upon fact purely, and cannot be proved by writing. At least, there has been no suggestion of that. When we go back to the Lord Ordinary, I will be prepared to say that they have no relevant averment whatever of impracticability in point of fact; that the only impracticability alleged on record is a legal impracticability, which is now disposed of. I think all these matters point, as the proper course, to a remit to the Lord Ordinary to proceed with the case.

Mr Cook—I don't object to a remit to the Lord Ordinary, but my learned friend will understand that the first question which I think it is necessary to consider is whether there is a concluded agreement; and I do not admit that it is competent to him to establish that agreement by parole proof, whether these commissioners may bind themselves otherwise than by minutes.

Lord Neaves—I understand Mr Balfour's views as to the impracticability of the agreement, but does he contemplate parole proof with regard to the constitution of the agreement?

Mr Balfour—No; I don't contemplate parole proof with regard to the constitution of it; but there is a statement as to certain actings that followed upon it.

Lord Neaves—These seem to be either admitted, or capable of being proved *scripto*. Is it not worthy of your consideration whether the actual constitution of the contract should be considered here, and whether you should have a diligence to recover documents?

Mr Balfour—I should not like at this stage to renounce parole proof. I feel confident that we should be able to establish, without any *rei interventus* at all, that we have a good agreement; but I should not like to be foreclosed from an opportunity of proving that it was followed by *rei interventus*.

Lord Neaves—Under a diligence you would recover all the documents bearing on the import of the agreement and its terms.

Mr Balfour—That would certainly dispose of one part of it.

Lord Neaves—If there is no completed agreement there is nothing else to be done in the case.

Mr Cook—The case may remain here in the meantime, and parties may consider these points.

Lord Cowan—I think it is desirable for all the parties that the case should go back to the Lord Ordinary, who can give it precedence, and I think I may say, when the case comes back to us, we shall certainly give it precedence.

Lord Neaves—Would it be of any use to give the parties a diligence to-day to recover documents?

Mr Balfour—I am afraid we are not ready with our specifications, but if your Lordships will give it in general terms—all documents bearing on matters mentioned in the record—then the commissioner for executing the diligence would see that we kept within the scope of it.

Mr Cook—It would be better to give in a specification, but I think the whole documents bearing on the execution of the agreement are already before the Court.

Mr Balfour—The effect of that is quite a separate matter; but I think we are entitled to see everything that was done in the shape of writing, either before or after.

Lord Justice-Clerk—Perhaps Mr Balfour will, in the course of to-day, give in a list of the docu-

ments for which he proposes to ask, and then we can remit the case to the Lord Ordinary.

A specification of the documents called for was accordingly then prepared and adjusted in the following terms:—"All documents tending to instruct the agreement between the pursuer and defenders mentioned in the record or *rei interventus* following thereon, or homologation thereof." Diligence, at the pursuer's instance, against witnesses and havers was granted for recovery of these documents.

Mr BALFOUR then asked for expenses.

The LORD JUSTICE-CLERK said the Court would give expenses since the date of the Lord Ordinary's interlocutor.

The following interlocutor was accordingly pronounced:—

"*Edinburgh, 30th March* 1867.—The Lords having resumed consideration of the cause, and after hearing counsel further thereon, repel the third plea in law stated for the defenders, and with reference to the third division of their second plea, find that sufficient grounds have not been stated for dismissing the action *de plano* on that ground, but that the other questions between the parties as to the legal completion of the contract and the terms and import thereof, ought to be disposed of, the whole pleas of parties relative thereto and otherwise being reserved entire, so far as not now or formerly disposed of: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor complained of. Grant diligence for recovery of the writings mentioned in the specification, No. 78 of process, and grant commission to Mr Charles Neaves, advocate, to take the deposition of witnesses and havers, and to receive the exhibits: Remit to the Lord Ordinary to proceed with the cause, with power to decern for the expenses now found due, and remit to the auditor to tax said expenses and to report.

"GEORGE PATTON, *I.P.D.*"

The Court accordingly repelled the defenders' preliminary plea, and remitted to the Lord Ordinary to hear parties on the alleged agreement.

Agents for Pursuer—Maclachlan, Ivory, & Rodger, W.S.

Agents for Defenders—Maitland & Lyon, W.S.

STEWART *v.* GRANT.

Sheriff—Process—Sheriff Court Act, sec. 15—*Revival of Process.* Held that parties to a cause having taken a judicial proceeding during a period of six months after the date of the last interlocutor the process was thereby kept alive, although the interlocutor of the Sheriff reviving was not pronounced until after the expiry of the six months.

Sheriff—Proof—Power to grant Commission. Held that it is incompetent under section 10 of the Sheriff Court Act for a Sheriff to remit to any person, either in or outwith his jurisdiction, to take the proof in a cause depending before himself, that being a duty which the Act devolves upon him, and proof in a cause so taken cancelled.

Lease — Construction — Relevancy. Averments which held not relevant to admit of proof in explanation of the terms of a written missive of lease.

This is an advocation of three actions from the Sheriff Court of Banffshire, all at the instance of Mr Stewart of Auchlunkart, against his tenant Mr Grant of Delmore—(1) an ordinary action for rent applicable to the year 1856; (2) a process of sequestration for rent for 1856; (3) a second process of sequestration for rent for 1857. All the three actions libelled a missive of lease entered into between the pursuer and defender in 1849 for 19 years, according to which the defender was to pay £25 for 47 acres of Delmore pointed out, and the fiars prices of 30 quarters oats payable at Whitsunday, &c.; and there was a clause in the lease that "if the measurement of the farm, if required to be measured, is more or less, rent in proportion." In 1856, when the first action was raised, Mr Grant was admittedly in possession of more than 47 acres, his explanation of that being that along with the 47 acres of arable ground, he had upon entry got possession of a certain amount of waste ground which he had improved, and for which, according to his lease, he was to get encouragement. The object of the action was to find the defender liable in rent at the rate fixed by the missive, not only for 47 acres, but also for the improved land consisting of 12 acres, the pursuer contending that the clause above quoted was intended to provide a sliding scale for the payment of rent, as the extent of the arable ground increased. The defender did not deny his liability for rent in terms of the missive, but disputed the construction put upon it by the pursuer, and refused to pay additional rent; in the sequestration process the sums due under the missive were consigned. After very protracted procedure, the three actions were conjoined, and on advising a proof, the Sheriff-Substitute (Gordon) and the Sheriff (Bell) decided in favour of the defender. The action was not finally decided till 1865.

Stewart advocated, and maintained two preliminary pleas, on which a great part of the discussion turned. In the first place, it was said that the ordinary action stood dismissed in 1859, because more than six months had elapsed without any proceeding being taken in it, and that had the effect of vitiating all the subsequent procedure. This plea was rested on the following facts. Before the record was closed in the ordinary action a record was being made up in the first process of sequestration; and on account of the contingency of the subject-matter, the Sheriff-Substitute in the latter pronounced an interlocutor on 22d December 1858 ordaining the ordinary action to be produced in the sequestration process. After this interlocutor, the interlocutors in the ordinary action were one on 16th February 1859, and another on 19th October 1859. There was none between these two, but on 6th July 1859 a joint-minute was put in by the parties, asking the Sheriff on various grounds stated to revive the process which was marked on the back "Tendered at the bar and taken to avizandum," with the initials of the Sheriff-Clerk. On 19th October 1859 the Sheriff-Substitute revived the ordinary action, and his interlocutor bore that he did so in respect of its production in the sequestration process. Subsequent stages in the procedure were relied upon in support of the argument that the process was dead under the Sheriff Court Act, in respect no step had been taken within the period of grace allowed by the Act, but these objections were answered by reference to extrajudicial proceedings, such as lodging of reclaiming notes, answers, &c., which the Court held kept the process alive, and the discussion did not to any extent involve these. In the second place, the advocator maintained that all the proof taken in the cause fell to be cancelled by reason of its incompetency. The Sheriff-Substitute of Banffshire, after