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

having pronounced an interlocutor allowing a proof, remitted, under the power conferred upon him by the 10th section of the Sheriff Court Act to grant commission to examine witnesses outwith his jurisdiction, to the Sheriff-Substitute of Elgin "to take the proof." The explanation of this devolution was that it was supposed that all the witnesses in the cause resided in Elginshire; but the result of the commission was that a number of witnesses residing in Banffshire were examined before the Sheriff-Substitute of Elgin.

GIFFORD and R. V. CAMPBELL, for the advocator, argued—No step having been taken in the ordinary action between 16th February 1859 and 19th October 1859, that process at the end of six months stood dismissed, and all the subsequent procedure in it and in the conjoined processes was of no effect. The minute of 6th July could not keep the process alive, because the Sheriff-Substitute did not revive the process within the six months. Cause must be shown to the satisfaction of the Sheriff within the six months, and there being no interlocutor within that period to that effect, the inference was that cause was not shown. The whole proof taken in the cause was incompetent. The Sheriff-Substitute had power to remit to a commissioner to examine witnesses specified outwith his jurisdiction, but he could not devolve upon any other person "to take the proof in the cause." The Act provided that that must be done by himself—16 and 17 Vict., c. 80, sec. 15; Gillon, 21 D. 243; Campbell *v.* Blackwood, 1 M'P. 1; Mackintosh, 2 M'P. 48; Forbes *v.* Byres, 4 M'P. 389.

WATSON and W. A. BROWN, for the respondent, answered—The revival of the first sequestration process, in which the ordinary action was produced, had the effect of reviving the ordinary action; *separatim*, the effect of the Sheriff-Substitute's interlocutor ordaining the ordinary action to be produced in the sequestration process operated as a sist, and the Act did not apply to a process that was not current. The minute of 6th July 1859 effectually revived the process. The docquet "tendered at the bar and taken to avizandum" was a judicial proceeding, and of itself was sufficient to revive the process. But the Act does not require that the interlocutor of the Sheriff reviving the process shall be pronounced within the second period of three months, the period of grace; the requirement of the Act is satisfied if within that period the parties take a step in the cause. It is true that the Act provides that cause must be shown to the satisfaction of the Sheriff, but it does not say that that must be evidenced within the period of grace. The advocator's argument does not fall either within the letter or the policy of the Act, for even supposing that no interlocutor, or what could be held to be an interlocutor, had been pronounced by the Sheriff within the six months, the Act did not contemplate the case of failure to proceed when it was at avizandum and beyond control of the parties. The proof taken at Elgin under the interlocutor of the Sheriff-Substitute, allowing a proof and remitting to the Sheriff-Substitute at Elgin, was competent and admissible, in respect the whole procedure followed of consent of parties. But the interlocutor of the Sheriff-Substitute allowing proof was pronounced in the belief that all the witnesses in the cause were resident outwith the jurisdiction, and the Act in conferring that power does not limit it in any respect. The interlocutor of the Sheriff-Substitute must be interpreted, *ex necessitate rei*, to signify that the proof in the cause must be the result of the evidence outwith the jurisdiction; and as there was no limit in the extent to which such evidence could be taken, there was no incompetency in the interlocutor. The Act did not provide that the Sheriff should hold a diet of proof, if proof was not to be obtained within his jurisdiction.

The Court held, that although the interlocutor of the Sheriff-Substitute reviving had not been pronounced within the six months, the minute of 6th July, being a proceeding in the cause to keep the process alive, had that effect. On the second point, on the ground that the proof was incompetent, and on the authority of Forbes *v.* Byres, from which they said they could not discriminate the present case, the Court cancelled the whole evidence, holding that the Sheriff had no power under the Act to remit to any person to take the proof in the cause. If proof was necessary, his duty was to fix a diet within his own jurisdiction, at which it should be resolved what witnesses should be examined under the remit.

At the request of parties, the Court then took up the case upon the merits, the question being, in the absence of proof, the construction of the lease.

GIFFORD and R. V. CAMPBELL argued—The sound construction of the lease is that the respondent was to pay at the rate of £25 for 47 acres, and if at any time it appeared that the arable ground consisted of more than 47 acres, then he was to pay additional rent for the excess in proportion. If more than 47 acres of arable ground were held not to be let to the respondent under the lease, it was clear that he was in possession of more, and he must be held to possess the additional ground under implied contract, and to be liable therefor over and above the stipulation in the lease.

WATSON and W. A. BROWN answered—The theory of implied contract is ludicrous. When a lease is entered into and specially reduced to writing, no implication will import into it anything beyond its own terms. The meaning of the lease is that the pursuer was to pay rent for the arable ground, which was supposed to consist of 47 acres, under this stipulation, that if, on measurement, these specified 47 acres should turn out to be more or less, there should be rent in proportion.

The Court gave effect to the respondent's view of the lease, and therefore held that the advocator had set forth no relevant case to remit to proof.

Neither party was found entitled to the expense of leading the evidence before the Sheriff-Substitute which was cancelled, but *quoad ultra* the advocator was found liable in all the expenses in the inferior court, subject to modification, and in the expenses of the advocation.

Agents for Advocator—Maitland & Lyon, W.S.
Agent for Respondent—J. C. Baxter, S.S.C.

JURY TRIALS—SPRING SITTINGS.

FIRST DIVISION.

(Before Lord Ormidale.)

Monday—Tuesday, March 25—26.

PHILLIPS *v.* SIDEY AND CRAWFORD.

Breach of Contract. Verdict for pursuers.

In this case, in which J. & A. Phillips, provision merchants, 74 Trongate, Glasgow, are pur-