be a reason for awarding expenses against him. But it must be added that the whole history of this road does not read well for the pursuer. On the contrary, one cannot help feeling that there was rather a breach of fair understanding between the parties. It was not such an arrangement as could afford any legal obstacle to the present claim, but it is an unfavourable aspect of the case for the pursuer. I am therefore disposed, on the whole matter, to give the defender the expenses of the first as well as of the second trial.

The other Judges concurred, in consideration of the special state of facts, and the Court accordingly applied the verdict, and found the defender entitled to expenses, including the expenses of the first trial.

Agent for Pursuer—James Webster, S.S.C.
Agent for Defender—Alex. Howe, W.S.

Thursday, November 21.

SUTHERLAND AND MACKAY *v.* MACKAY.

This was the first appeal to the Court under the Debts Recovery (Scotland) Act 1867, 30 and 31 Vict., c. 96.

The appellants having, in terms of the 14th section of the Act, presented to the Lord President of the First Division (to which Division the appeal had been taken) a note craving his Lordship to move the Court to send the appeal to the Summar Roll, were ordered to print the Sheriff-court process, and the appeal was sent to the Summar Roll.

The Lord President intimated that, although the case was sent to the Summar Roll, it was not to be taken for granted that the same course would be followed with regard to all cases under the "Debts Recovery Act"; for although the Act required that parties should move the Court to send the appeal to the Summar Roll, it did not bear that the Court were bound to send it there.

Counsel for Appellants—Mr Black.
Agent—D. Forsyth, S.S.C.

Thursday, November 21.

WALDIE *v.* GORDON'S TRUSTEES AND ANOTHER.

Landlord and Tenant—Lease—Concluded Contract—Offer and Acceptance—Conditional Acceptance—Issue. A party made a written offer for a farm. The landlord sent a written acceptance, under certain conditions and stipulations. In an action by the offerer, founding on the offer and letter of acceptance as forming a contract of lease—*Held* that there was no concluded agreement. Opinions, that if such letters had been followed by possession, the offerer might have been held to have acquiesced in the stipulations contained in the landlord's acceptance, so as to make a concluded contract.

Dismissal of Action—Remit to Lord Ordinary—Issue—Consent. A case being reported on adjustment of issues, the Court holding that the pursuer had not stated a case entitling him to go to a jury, of consent of pursuer, the case was not sent back to the Lord Ordinary, but was finally disposed of by the Court.

This was an action of declarator and damages at the instance of George Waldie, stabler in Montrose, against the trustees of the late Mr Gordon of Charleton and Kinnaber, and another, founded on alleged failure to implement a contract of lease.

In March 1866 the farm of Kinnaber was advertised to be let. The pursuer, on 27th June, sent in an offer for the farm in the following letter:—"I here offer for the farm of Mains of Kinnaber as advertised, say £140 per annum, payable in two instalments, the first half at Candlemas after shearing, and the other half of above sum at Lammas, the term of lease for nineteen years and crops, and £16 per annum for the wood, except the first year, which will be £8, and entry at Whitsunday 1867. The propritor, if wanted, to git possession of the wood for a rabbit warren, and the land on the east side at valuation, by giving one year's notice previous. The propritor gits the wood at £16, and no valuation, except what fencing may be at time of exchange of such, he (the propritor) will have to take at valuation. £170 to be spent in repairs of house and steading, and to leave them in fair and habitable condition. Should any damage buy rabbits to amount of £5 of valuation per annum, the propritor to pay for same, and the propritor to give say £10 per annum for the first five years to me, to be expended on town's manure.

(Signed) "George Waldie."

The sum of £140 was explained by the pursuer to be a clerical error for £240. On 8th July Mr G. M. Gordon, one of the defenders, and who acted for the other defenders in the management of the lands, transmitted the following letter to the pursuer:—"Sir,—I accept your offer of 27th ultimo on the following understanding, viz.:—That it is for a lease of the farm of Kinnaber, as at present occupied by Mr Milne, and as to the extent of which you must satisfy yourself, for nineteen years from Martinmas next, at an annual rent for the first five years of £230, and for the remainder of £240; and for a lease of the grazing in the Kinnaber wood, lying between the Kinnaber farm-steading and the dwelling-house of the gardener at Charleton, and on the east side of the high road which passes near that house, for eighteen and one-half years from Whitsunday next, at an annual rent of £16." The letter contained several reservations and stipulations, *inter alia*,—"Proprietor not to put up fences or renew existing ones. Tenant to fence where necessary to prevent sheep or cattle from entering on lands not let to him. Proprietor to pay damage which may be caused by rabbits to the arable ground, if such damage in any year exceeds £5, according to valuation. But, to avoid vexatious questions, proprietor to have power to intimate to tenant that the latter may keep down rabbits on arable land, in which event latter to have no claim for damages. Lease to be under conditions similar to those in current lease to Mr Milne, of which a copy is herewith sent, except that wood rent should be payable at expiry of each six months for the preceding six. . . . . That if tenant die, proprietor may declare lease at an end as at date of death or first term of Whitsunday and Martinmas thereafter, and that tenant insure stock. Lease to be under the conditions in favour of Mr Milne specified in his lease, and in favour of Mr Burgess as to access to a field through corner of Kinnaber wood, in terms of his lease.—I am," &c.

Various correspondence passed between the parties. The pursuer alleged that he agreed to the con-

ditions expressed in said letter of acceptance, in so far as they differed from or were additional to the terms of his offer. He farther alleged that, in dependence upon this letter, and on the transaction for the lease of said farm so concluded, he proceeded to make arrangements for entering upon the tenancy of the farm, and made various purchases of crop, and stocking, and manure. In the end the farm was let to another offerer. The pursuer pleaded (1) that "the defenders, or otherwise the defender George More Gordon, acting as aforesaid, having agreed to give the pursuer a lease of the farm in question, were bound, in fulfilment of the contract completed between them as aforesaid, to give the pursuer entry to the said farm in the manner and at the terms agreed on, and the defenders were not entitled to resile from said contract; and (2) that the defenders, having failed to give the pursuer possession of said farm in the manner and at the terms agreed on, and, in violation of their said contract with the pursuer, having given possession of said farm to another tenant, are liable to the pursuer in damages therefor."

The defenders denied that there was any completed contract of lease, and pleaded, in particular, that the pursuer never having agreed to the conditions and stipulations insisted in on behalf of the defenders, but, on the contrary, having expressly refused so to agree, no contract of lease was ever completed; and they founded on the correspondence between the parties.

The pursuer proposed this issue:—

"It being admitted that the defender George More Gordon wrote the letter of date 8th July 1866, printed in the schedule hereto annexed, under the authority of the other defenders, and for their and his behoof:

"Whether, under the letters printed in the schedule hereunto annexed, the defenders agreed to let to the pursuer the farm of Kinnaber, or Mains of Kinnaber, for the period of nineteen years from the term of Martinmas 1866; and whether the defenders have wrongfully failed to implement the said agreement, to the loss, injury, and damage of the pursuer?

"Damages laid at £1000."

The schedule contained the letters of 27th June and 8th July, given above.

The Lord Ordinary (Jerviswoode) reported the case on the issue to the Court.

Gifford (with him A. R. Clark), for the defender, objected to an issue being granted.

Trayner (with him Watson) for pursuer.

Lord President—My Lords, the question before us is whether the issue proposed by the pursuer is to be allowed or not; not merely whether the precise terms of the issue are to stand, but whether any issue putting this question to the jury is to be allowed? Now, I am clear that our judgment should be to disallow the issue. This is an action founded on a completed contract of lease. The pleas in law are that—[*reads first and second pleas, ut supra*]. It is plain that the pursuer cannot maintain this action to any effect unless he makes out a completed contract of lease. That is said to be contained in and completed by two letters, and it is on these that the pursuer proposes to go to the jury. But it is a question of law, in the first instance, whether these two letters do make a completed contract of lease. Now, nothing can be better settled than that, where an offer is accepted under conditions, it is necessary that the offerer should consent to the conditions in the letter of acceptance. The only question is, Was that done here? I am clear that it was not. There are a good many conditions in Gordon's letter of 8th July, but I think the two most important conditions have never been assented to as regards writing. One was as to the fences, who was to put them up and maintain them. The other was still more important, that the lease was not to descend to the tenant's heir. Neither was assented to by the pursuer, and neither was given up by the defenders, so far as writing is concerned. Therefore, so far as writing is concerned, at no point of time were both parties consenting to the same thing. Is there anything beyond that? The pursuer says he agreed to and acquiesced in the conditions expressed in said letter of acceptance, in so far as they differed from or were additional to the terms of his offer. If so, he should have laid before us writings to support this statement. But I take it for granted that there are no further writings, and therefore we must take this as meaning that, by words or by facts and circumstances, the acquiescence of the pursuer was exhibited so as to take off the effect of the conditions. I give no opinion as to whether such conditions can be agreed to in such a way, but it is clear that, if the pursuer had meant to make this case, he should have condescended very particularly on the words or facts and circumstances having the effect of taking off these conditions. But there is a total absence of such averments, and I think we must therefore disallow the issue. That does not mean that the issue in the words now put is objectionable, but that the matter in issue cannot be allowed to be put.

Lord Curriehill—I concur.

Lord Deas—The question is, whether there is to be an issue to ascertain whether there was a concluded lease between the parties? Now, the lease is said to be contained in those letters. I don't say there might not be a case in which, though the letters were not conclusive, it might not be made out that the conditions in the acceptance had been acquiesced in. If the tenant had entered into possession, and possessed for some time, a question might arise whether some things had been acquiesced in. But there are no averments of that sort here. There is nothing set forth to help us to construe the letters, and in no view is it a case to go to a jury. I have no hesitation in saying that I have a strong impression that the pursuer has no case at all. I think there never was a concluded agreement; and I don't think it is of any moment in such cases whether the things about which the parties are not agreed are important or not. A landlord and tenant are entitled to judge what is important. It is clear that there was no agreement, and the result is, as the tenant seems to have said on one occasion, that he has outwitted himself in not at once agreeing to the lease.

Lord Ardmillan concurred. There was no doubt that the pursuer could not get the issue he proposed. He had no case. Possession might have made the lease a good one, and the tenant might have been held, by taking possession, to have agreed to the stipulations; but there was no possession; and although it rather appeared that the landlord had acted somewhat strictly, the tenant had no case in law.

Issue disallowed.

A discussion followed as to whether the case ought, in point of form, to be remitted back to the Lord Ordinary. Finally, of consent, the Court disallowed the issue; found that there was no completed contract of lease; and therefore assoilzied the defenders, with expenses.

Agents for pursuer—H. &. H. Tod, W.S.

Agents for defenders—Mackenzie & Kermack, W.S.

Friday, November 22.

WALLACE *v.* WINGATE AND BRUCE.

Landlord and Tenant—Lease of Minerals—Joint-Tenant—Assignee—Consent—Contract. A, a tenant in a mineral lease, which excluded assignees and sub-tenants, formed a copartnery with B, and arrangements were set on foot for obtaining the consent of the landlord to B being assumed as a joint-tenant under the lease. In an action by the landlord against A and B as joint-tenants, *held*, on the facts of the case, that there was never any concluded agreement between the parties sufficient to infer liability against B as joint-tenant.

In October 1860 the pursuer, Mr Wallace of Auchinvole, let, on a fifteen years' lease, to the defender Walter Wingate, a seam of coal in his lands of Easter Shirva, in the county of Dumbarton. The lease secluded assignees and sub-tenants. In January 1862, Mr G. C. Bruce, C.E., entered into a contract of copartnery with Mr Wingate as coalmasters at Shirva and elsewhere. It was proposed that Bruce should become joint-tenant with Wingate in the colliery. To this the landlord's consent was necessary. Various correspondence passed between the parties. Towards the end of May there was prepared a draft minute of agreement between Bruce and Wingate, which narrated the lease to Wingate and bore that "the parties hereto some time ago agreed to enter, and have entered into, a copartnership in the trade or business of coalmasters, and that from and during the space yet to run of the said agreement of lease, to be carried on under the firm of Walter Wingate and Company; and, therefore, the said Walter Wingate hereby acknowledges and declares that the foresaid missive or agreement of lease is granted to him, and stands in his person in trust only, for the joint use and benefit of himself and the said George Cadell Bruce; . . . . . it being understood that the said firm of Walter Wingate & Company, and the partners thereof, shall be bound to free and relieve me, the said Walter Wingate, not only of the whole arrears of tack-duty," &c.

The pursuer brought an action of declarator and damages against the defenders, alleging that this draft was signed by both defenders in token of their approval, and that a suggestion was made by them, and agreed to, that the pursuer should become a party to the deed in evidence of his consent; that he became a party to the minute; and that the minute was extended and was signed by the pursuer and defenders in May or June 1862. The pursuer alleged, farther, that the defender Bruce had in many ways conducted himself as joint-tenant of the colliery. The object of the action was to make Bruce liable conjunctly and severally with the other defender in rent or lordship under the lease, and in damages for desertion of the works.

Decree in absence was taken against Wingate.

Bruce pleaded non-liability, on the ground that the draft-minute libelled on had never been executed by him, and that he had never been assumed as joint-tenant.

A proof was taken, and the correspondence between the parties was produced. Thereafter, the Lord Ordinary (JERVISWOODE) pronounced an interlocutor in which he found "as matter of fact, 1*st*, That by missive of agreement between the pursuer and Walter Wingate, who is called as a defender in this action, and which missive is dated 6th and 8th October 1860, the pursuer let, for the term of fifteen years, with certain breaks in favour of the tenant, to the said Walter Wingate and his heirs, that seam of coal then worked by William Dunsmure in the pursuer's lands of Easter Shirva, secluding assignees and sub-tenants: 2*d*, That in or about the month of January 1862, a copartnership was formed between the said Walter Wingate and the other defender, George Cadell Bruce, in relation to the trade or business of coalmasters, which copartnership was to subsist for and during the endurance of the lease above mentioned: 3*d*, That on application by the said Walter Wingate, and after certain inquiries regarding the position of the defender, the pursuer agreed, on or about the 20th January 1862, to assume the defender Bruce as joint-tenant with Mr Wingate in the lease of the coal above mentioned; and, on or about the 21st January foresaid, the defender (in terms of his letter of that date, No. 9 of process) stated that he would be glad to enter into a lease as soon as was convenient for the pursuer to get a regular lease prepared: 4*th*, That thereafter a meeting took place, towards the end of January 1862, in the office of Messrs Fisher & Watt, writers in Glasgow, and then the ordinary agents of the pursuer, at which the pursuer and defender and Mr Wingate were present, and on which occasion the defender Bruce requested the said Messrs Fisher and Watt to propose a draft-minute of agreement which, as then contemplated, was to be signed by the pursuer in testimony of his approval, and under which the said Walter Wingate was to acknowledge and declare that the missive of lease above referred to was granted to him and stood in his person in trust only for the joint use and behoof of himself and the defender Bruce: 5*th*, That thereafter a draft-minute was prepared by the said Messrs Fisher and Watt, and by the first transmitted to the pursuer, who personally returned it; and that the said draft was thereafter handed by Mr Fisher to the defender Wingate, who took possession of it for the purpose, as he stated, of submitting it to an agent on his behalf: 6*th*, That the said draft was thereafter handed by Mr Wingate, or sent by Mr Fisher, to the defender Bruce, who thereafter, and on or about the 27th January of the said year (1862), personally returned the same to Mr Fisher: 7*th*, That the said draft-minute when so returned bore the addition of the signatures of "George C. Bruce" and "Walter Wingate," opposite to the title and on the margin thereof the words "by whom" (as referring to the pursuer) "these presents are also signed in testimony of his approval thereof:" 8*th*, That the said draft-minute, when so returned, did not bear the words "but without prejudice to the legal rights," which now appear therein, and which words were added by Mr Fisher, acting on behalf of the pursuer, in the absence and without the knowledge or approval on the part of the defender Bruce: 9*th*, That Mr Fisher