western district of the burgh of Perth should be discharged into the Tay at any point above the said General Prison; and, in point of fact, a different point of discharge is recommended in a report by Mr John Young, C.E., the respondents' engineer, dated in 1862. A copy of that report is produced. (9) By the 198th clause of the said 'General Police and Improvement (Scotland) Act 1862,' it is provided, 'That it shall not be lawful to the Commissioners to authorize the construction of any sewer, the sewage from which will be discharged into any river or stream from which water is taken for domestic purposes, so as to injure or affect such supply.'"

The respondents pleaded, in bar of the suspension, that the note of suspension was incompetent, in respect that the jurisdiction of the Court of Session was excluded by the jurisdiction conferred upon the Sheriff in the 396th section of the General Police Act; and further, that, in any view, the complainers were not entitled to neglect the appeal to the Sheriff provided by the Act, and come to the Court of Session for suspension and interdict. By section 396 of the General Police Act (1862) it is provided that "any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the Commissioners relating thereto, may at any time, within seven days next after the making of any such order, give notice in writing to the Commissioners that he intends to appeal against such order to the Sheriff, and along with such notice he shall give a statement in writing of the grounds of the appeal; and if within four days next after giving such notice, the party grant bond to the Sheriff, with two sufficient cautioners, to the satisfaction of the Sheriff, to abide the order of the Sheriff, and pay such costs as shall be awarded by the Sheriff thereupon, the work so appealed against shall not be begun until after the judgment of the Sheriff upon such appeal; and the Sheriff, upon due proof of such notice, and upon such caution being found, shall hear and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, or varying the same, and shall award such costs to either of the parties as the Sheriff in his discretion thinks fit, provided always that the appellants shall not be heard in support of such appeal unless such notice and statement have been given, and such caution found as aforesaid; nor on the hearing of such appeal shall he go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid."

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the respondents' first two pleas in law, and having considered the argument and proceedings,—Repels the first of said pleas, and also repels the second in so far as it was or could be urged as a preliminary bar to the present note of suspension and interdict being entertained in this Court, to the effect of its being ascertained how far the suspender's ground of complaint is well founded, and, if well founded, of the redress to which he is entitled being given; *quoad ultra*, and under a reservation in the meantime of all questions of expenses, appoints the case to be enrolled with a view to further procedure.

"*Note.*—What the suspenders complain of are certain threatened operations of the respondents for constructing a drain or sewer, by which they say the sewage of the burgh of Perth, or a portion of it, would be discharged into the river Tay at such a point as to pollute and render the water of that river, which has hitherto been taken for the domestic purposes of the General Prison at Perth, unfit for these purposes. If this complaint be well founded, it follows that the respondents are proposing to carry into effect operations which they by section 198 of the General Police Act are declared to be unlawful and beyond their authority; for by that section it is declared not to be lawful for the respondents to authorise the construction of any sewer the sewage from which will be discharged 'into any river or stream from which water is taken for domestic purposes.' As the suspenders undertake to show that the operations complained of are of this unlawful and unauthorised character, and supposing it were to turn out, after due inquiry, that this were so, then clearly the operations in question would be in excess of the respondents' powers, and the pursuers' note of suspension would not be incompetent. On the other hand, if after the necessary inquiry it turned out that the operations complained of are not unlawful or unauthorised by the statute, then the respondents would be entitled to prevail, and to have this note of suspension and interdict refused.

"As very little was said at the debate in regard to the mode of inquiry to be gone into, parties will have a further opportunity of being heard on that point. The Lord Ordinary, however, may say that such a remit as that which was proposed in the Bill Chamber to Doctors Christison and Maclagan, appears to him at present to be the most expedient course. But in the event of the interlocutor now pronounced being taken to review and affirmed, it would be very desirable, as calculated to save subsequent needless litigation, were the opinion of the Court at the same time elicited on the mode of inquiry that should be adopted."

The respondents reclaimed.

Fraser and Scott for them.

Solicitor-General and T. Ivory in answer.

The Court held that, according to the allegations of the complainers, the operations threatened were outwith the statute and unlawful; and that being so, the case could not be said to be, on the face of it, one of those in which the Sheriff had exclusive jurisdiction. The object of the appeal to the Sheriff provided by the Act was to have questions determined which arose in the administration of the statute and within its admitted scope. On these matters the Sheriff was the sole judge, and he was final; but in this case, if the facts alleged were true, the Sheriff would have gone beyond his powers if he had sanctioned the operations of the respondents.

Agent for the Complainers — The Solicitor of Her Majesty's Works.

Agents for the Respondents — Hill, Reid & Drummond, W.S.

Wednesday, December 8.

FIRST DIVISION.

LEITCH *v.* MUNRO.

Tenant — Agreement — Evidence — Parole — Stock — Valuation. In the improbative lease of a public-house, the landlord was bound to take over the tenant's stock on his leaving at a

valuation. *Held*, on proof, that an incoming tenant, who had purchased the stock from the outgoing tenant, was entitled under a verbal agreement to have certain bad stock replaced by good stock by the latter.

Opinion, per Lord President, that an improbative written agreement became part of the evidence of the parole agreement.

At the beginning of December 1868 the defender was tenant of a public-house at Jock's Lodge, Edinburgh, which he was then endeavouring to dispose of. After some negotiation the pursuer took a lease of the premises from the landlord, Mr Adamson, and an arrangement was entered into between the defender and the pursuer, by which the latter agreed to purchase the whole stock of liquors in the shop, in so far as sound, at the invoice prices, under deduction of discount thereon at the rate of 25 per cent., being the usual trade discount. In virtue of this arrangement, the defender prepared an inventory of the whole stock of ales, wines, spirits, &c., then in the shop. On or about 7th or 8th December 1868 the pursuer and defender met at the shop, along with Mr Adamson and some other parties connected with the trade, who were present to inspect and value the stock. While the valuers were examining the stock they discovered various casks of ale to be sour. It was arranged between the pursuer and the defender that, as the pursuer was to obtain immediate possession of the shop, with the entire stock of liquors, &c., he should in the meantime pay to the defender, by a bill at 3 months' date, £92, 9s. 4d., consisting of (1) £86, 13s. 10d., being the amount (less 25 per cent. discount) of the full invoice price of the liquors, &c., and (2) £6, less 4s. 6d., in respect of licence, &c., the defender agreeing and undertaking that he should afterwards remove the casks of ale which had been discovered so to be defective, and any others which the valuators had not gone over and which might be afterwards discovered to be defective, and to replace them with ales of a similar value, and of a good marketable quality. The defender having thereupon stated that he would give 5 per cent. off the amount of the bill to any one present who would cash it, the landlord, Mr Adamson, agreed to do so, and it was arranged between Mr Adamson, the pursuer, and the defender, that the bill should be granted in favour of Mr Adamson, which was thereupon done, Mr Adamson at the same time paying to the defender the amount less 5 per cent. The bill was accordingly granted.

The pursuer frequently requested the defender to have the defective casks of ale removed and replaced by others of a sound quality, in terms of his agreement to that effect and in virtue of the obligation to do so otherwise incumbent on him at common law, and according to the custom of the trade, or otherwise to pay to the pursuer the sum of £24, 15s., with interest, as the value of the ales not in good condition. In consequence of the defender's refusal to pay, the present action was brought. The defender alleged that his dealing was with Mr Adamson. But, on a proof being led, the pursuer's contentions were borne out by the evidence. The Lord Ordinary (Ormidale) assoilzied the defender.

The pursuer reclaimed.

Black and Strachan for him.

Gifford and Mackintosh in reply.

At advising—

Lord President—I cannot agree with the interlocutor of the Lord Ordinary. He finds the pursuer has failed to prove the ground of action on which he has libelled. This was an alleged agreement on the part of the defender to see the sour ales replaced by good ones. This was the only statement necessary for him to prove, and he has done so. The defender says it was part of a contract of sale to Mr Adamson, the landlord. But this is, to say the least, very doubtful. It is, I think, plain that it was perfectly well known that Leitch was present at the meetings on the 7th and 8th December as the incoming tenant. Two of the parties were mere clerks, and they were there to inventory the stock. But there were other two persons there as judges of the ale. It is shown the ales were sour—such as brewers are in the habit of taking back. Now there are five witnesses who state it was expressly agreed that though these appeared in the inventory, they were to be replaced by Munro by good sound ale. And there is nothing in the evidence to justify us in setting aside the evidence of these five men in the assertion of the defender alone. But it is said that parole testimony is inadmissible to prove the conditions of a written agreement. If this agreement had been fully out written with the date and the price inserted I should sympathize with this argument very much. But it is itself only a part of the evidence to a verbal agreement.

The other Judges concurred.

Agent for Pursuer—David Forsyth, S.S.C.

Agents for Defender—Cotton & Finlay, W.S.

Wednesday, December 8.

MILNE *v.* KIDD.

Railway shares—Cautionary obligation—Allotment—Guarantee. Certain parties bound themselves by letter of guarantee that if the secretary of a railway company obtained for them a certain allotment of shares, within three years after the completion of the line they would pay to him the loss upon these shares if only disposable below par. *Held* this agreement was not a cautionary obligation; the secretary was justified in allotting forfeited shares to the parties; and they were not entitled to resile on the ground that by a subsequent Act of Parliament debentures and preference shares had been created.

By Act of Parliament passed in 1858 a company was authorised to form a railway to be called "The Fortmartine and Buchan Railway." Its capital was to consist of 30,000 shares at £10 each; and the line was to be carried to Peterhead and Fraserburgh. By an Act passed in 1863 the company was authorised to abandon the extension to Fraserburgh, and to make another line instead; and to make a new road in connection with the Peterhead extension. As the company had not funds to construct the Peterhead line, and it seemed likely that it would not be made, an arrangement was, after various communications, entered into between the directors of the company and certain inhabitants of Peterhead, in consequence of which the following letter was addressed by them to the directors.

"*Aberdeen, 19th November* 1860.

"Gentlemen,—On your undertaking, as Directors of the Fortmartine and Buchan Railway Company, forthwith to construct your line of railway