the territory of the Sheriff, and which, as amounting to a contract, gave a ground of jurisdiction to the judge of the *locus contractus*. But there was nothing that can be called a contract here, and there was, further, no personal citation. A fourth ground was also stated, namely, that the defender had prorogated the jurisdiction. I see no ground whatever for this statement either. The two grounds, therefore, on which the pursuer's action really rests are the two I first mentioned, namely, arrestment and reconvention. Now, the arrestments were used, not with reference to this action, but to found jurisdiction in, and also on the dependence of, a previous action, out of which it is said that this action has grown. In that action the pursuers obtained decree, and the sum was paid by the defender on the day of the decree, so the action was then and there finally disposed of, and the arrestments at an end. These arrestments cannot therefore have any effect in sustaining the present action. It is a separate and independent proceeding, even though it may arise out of the same facts and circumstances as the previous one. It is by no means plain that this is a maritime cause, but even if it was, I should be equally of opinion that the former arrestments are no ground of jurisdiction in this action.

The plea of reconvention is founded upon quite different circumstances altogether. It is founded upon a proceeding taken by the defender on 7th Dec. 1870 to obtain recall of the arrestments. The small debt action was raised on the 6th December, and on that or the previous day the arrestments were laid on. It was on the following day therefore that the petition for recalling the whole arrestments, as groundless and oppressive, was presented. It was during the dependence of the small debt action that the petition was brought. That action, and that alone, made it competent. The petitioners could not have gone to any other than the Sheriff-Court of Ayr. The proceeding was therefore incidental to the small debt action. If the petitioners were to have the arrestments recalled at all—and on the face of it they seem to have had a perfectly good ground of complaint—then their only course was to go to the Court in which the original action was laid. This makes the petition for recall clearly incidental to the small debt action. The question therefore comes to be, Whether this petition can be looked upon as an *actio conventionis*, so as to found a plea of reconvention? It is quite true that the petition was still in dependence at the time this present action was brought, though it seems to have hung over rather as a matter of negligence than anything else. The question of law comes up therefore purely enough, Whether such a petition can be looked upon as an *actio conventionis*? I do not think it can. I do not think that the petition was an action in any proper sense of the term at all. I do not think that it was an action in which the petitioners, the defenders in the present action, submitted themselves voluntarily to the jurisdiction of the Sheriff of Ayr. They had been brought into Court before him; proceedings had been taken against them which they considered unjustifiable; and they had no resource but to go before him for redress. This is in no sense of the term an *actio conventionis*, and therefore I think the Sheriff-Substitute and the Sheriff did right in dismissing this action.

The other Judges concurred.

Agents for the Appellants—Fyfe. Millar, & Fyfe, S.S.C.

Agents for the Respondent—Millar, Allardice, & Robson, W.S.

Friday, December 8.

THOMAS JACKSON *v.* MRS MARGARET KEDDIE OR SMITH AND HUSBAND.

Heir-Apparent — Title-Deeds, Custody of. Held (*diss.* Lord Kinloch) that an apparent heir was not entitled, as matter of absolute right, to recover possession of her ancestor's title-deeds, even where the holder asserted no particular right to retain them.

But, under the circumstances, the prayer of the petitioning heir-apparent *granted*, reserving extract until a general service should be produced.

The action in which this appeal was taken was a petition at the instance of Margaret Keddie or Smith, only child and heir-at-law of the late James Keddie, farm-servant at Kinglassie, against Thomas Jackson, writer in Kirkcaldy. The object was to recover the title-deeds of certain property in the village of Kinglassie which had belonged to the petitioner's father, and which title-deeds it was asserted the respondent wrongously and unwarrantably withheld and refused to deliver up, "notwithstanding he has no hypothec or right of retention of any sort over the same. The petitioner was not served heir to her said father.

The respondent pleaded, *inter alia*, no title to sue, in respect of want of service as heir.

The Sheriff-Substitute (A. BEATSON BELL) pronounced the following interlocutor:—

"*Cupar, 17th February* 1871.—The Sheriff-Substitute having heard parties' procurators on the closed record and proof, finds, in point of fact—(1) That the female petitioner is the only child of the late James Keddie, formerly residing in Kinglassie; (2) that shortly before his death, which occurred about twenty-one years ago, the said James Keddie placed in the hands of the respondent the title-deeds of a property in Kinglassie belonging to him; (3) that the respondent still retains said title-deeds, and has not placed on record any plea claiming to retain the same in virtue of any hypothec or right of retention: Finds, in point of law, that the respondent is bound forthwith to restore the said title-deeds; therefore decerns and ordains him instantly to do so in terms of the prayer of the petition.

"*Note.*—It appears that the title-deeds were deposited with the respondent in security of a loan of £5; but as no statement is made by him on record that said loan is still unpaid, it must be held that no right of retention on that ground exists. The respondent did not lead any proof, and the evidence led by the petitioner is thus quite conclusive that the deeds are actually in the respondent's hands."

The Sheriff (CRICHTON) adhered on appeal.

The respondent appealed to the First Division of the Court of Session.

BRAND, for him, contended that as this was not an action of exhibition, but a mere petition for recovery of title-deeds, the petitioner had no title to sue without serving heir—Ersk. iii, 8, 57; Stair,

iii. 5, 1; *Nisbet* v. *Whitelaw*, July 1, 1626, M. 3982 and 3995; Ross's ed. of Bell's Dict., *voce* "Exhibition."

HALL, for the petitioner and respondent—*Craig* v. *Howden*, May 24, 1856, 18 D. 863.

At advising—

LORD PRESIDENT—There is no authority for saying that an apparent heir is entitled to recover or demand possession of all the title-deeds of his or her ancestor as a matter of absolute right in all circumstances. An entered heir certainly has that right. It might be, though I should be sorry to anticipate the decision in that case, that an apparent heir could not exercise some of the undoubted rights of an apparent heir without possession of his ancestor's titles. In such circumstances a case might be made out which would vindicate his right to recover the title-deeds. But no such circumstances are here laid before us. The case, as presented, is one of the purest and simplest possible. The question is just this—Is an heir-apparent entitled to instant delivery of his ancestor's title-deeds from the holder, without serving, and without instructing any special necessity? As at present advised, I am not inclined to assent to such a proposition. But at the same time I should be sorry to see this petitioner, where the property is so small, and the expenses already incurred so considerable, put entirely out of Court. We are not informed whether it is her intention to make up a title and enter heir or not. I do not wish to insist upon her committing herself to that course, but, at the same time, all the length I think we can go is this, to dismiss the appeal, and sustain the interlocutor of the Sheriff, but superseding extract until a decree, at any rate of general service, is produced by the petitioner. The competency of setting up a title *cum processu* is quite established, and that is, I think, all the favour we can show the petitioner under the circumstances.

LORD DEAS—It cannot be denied that a great deal of responsibility lies upon any stranger who happens to be the holder of title-deeds, in whatever manner he may have come by them. And I think that from that responsibility he is entitled to demand a certain relief, more particularly if he came honestly by the deeds in question. Suppose, for instance, that an heir-apparent comes and gets from a party, who is for some cause the custodier of them, possession of the title-deeds of a large estate, and after all does not enter heir, the next heir, entitled to pass him over and serve to the common ancestor, may very well come to the former custodier and say, Where are my title-deeds? and if they are not forthcoming, may have a very good case against him. We cannot, of course, here go into the question whether this woman is going to die in a position which would entitle the next heir to pass her over?—but still it is an example showing the difficulties which might occur.

According to my own recollection in the *Bredalbane* case, though we found the heir-apparent entitled to enter into possession and draw the rents, we refused to grant his application for possession of the title-deeds of the estate, which were in the hands of the late Earl's trustees. I am disposed to think with your Lordship that it is not absolutely necessary to decide this point in such a small case as the present, but that we are entitled to take the intermediate course proposed by your Lordship.

LORD ARDMILLAN—There are three different cases in which an application such as the present may be made. *First*, against a person making a competing claim to the estate; in which case an apparent heir could not succeed in his demand, as that would be only to arm one competitor out of the other's arsenal. *Second*, where the case is such as that referred to by Lord Deas in his remarks upon the *Bredalbane* case, where there is a competition, and the title-deeds are in the hands of a third party. And *third*, where, as in the present case, the holder alleges no right whatever to the custody of the deeds, but simply says he is to keep them until the heir chooses to serve. I think that in such a case the holder cannot resist the proposition that he is not to keep them perpetually, but I am inclined at the same time to adopt your Lordship's opinion that he may be entitled to some protection, and I think your Lordship's proposal entirely meets the case.

LORD KINLOCH—I feel great difficulty in qualifying the right of the petitioner as proposed by your Lordships, because it is impossible to say that that qualification does not import that the lady has no right to the title-deeds without serving heir. I can see no sufficient authority for that proposition. It is true that she is not entitled to the property of the title-deeds. She is no more entitled to the property of the title-deeds than to that of the estate, without expeding a service of some kind. But the present is simply a question of custody or possession, and I view it as a case in which the party who has the titles has no right or interest to keep them. He seems to be no better than a party who has come into possession of the title-deeds by accident, and the question is, Whether he is not bound to give up their custody to this lady, who is the heir-apparent? Certainly, as apparent heir, she is not the legal proprietrix. But she is entitled to perform a great many acts of proprietorship which require the use of the titles. She is entitled to the possession of the subjects, and I cannot see why she should not equally be entitled to the possession of the title-deeds. If Mr Jackson could say that any serious risk was incurred by him in giving them up, then we should be bound to take steps to protect him. But nothing of the kind is pretended; and I think a decree of this Court will prove sufficient protection.

The Court accordingly refused the appeal; adhered to the interlocutor of the Sheriff, but under condition that extract should be superseded until a general service was produced by the petitioner.

Agent for Appellants—James Barton, S.S.C.

Agents for Respondents—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, December 9.

KEITH *v.* DEAN & SON.

Debts Recovery Act, 30 and 31 Vict. c. 96, § 9—Competency of Appeal—Note of Evidence. In an action under the Debts Recovery Act, the defender objected to the action as incompetent, on the ground that he was not subject to the Sheriff's jurisdiction. The Sheriff, after evidence, of which he was not required by either party to take a note, found certain facts proved which established his jurisdiction, repelled the defender's plea, and, on the merits,