Esq., advocate, Sheriff-Substitute of the county of Lanark, to investigate into these averments, and report either the evidence taken by him or the result thereof, as he shall judge the most fitting for the information of this Court, and also report as to any circumstances in connection with the procedure which may seem to him to be material—such report to be lodged with the Clerk of Justiciary *quam primum.*

Counsel for the Appellent—M'Kechnie and Charles Scott.

Counsel for the Defender—Moncrieff.

Monday, December 8.

JOHN MARTIN.

(Before Lord Neaves.)

Indictment — Relevancy—"Locus"—*Theft—Breach of Trust.*

A prisoner was charged with theft, in so far as he, being an inmate of a poorhouse, and having received leave of absence for a day, took away from or near the poorhouse certain articles of clothing which he was wearing. The relevancy of the indictment was objected to, because (1) the panel was in the lawful possession of the articles alleged to have been stolen, (2) the "locus" was incorrect, and (3) the crime was breach of trust and not theft. *Objections repelled.*

John Martin, from the prison of Jedburgh, was indicted for theft, aggravated by previous conviction, and by his being habit and repute a thief. The indictment proceeded as follows—"In so far as on or about the date hereinafter libelled, you the said John Martin, being an inmate as a pauper of the Union Poorhouse in Kelso, and having received leave of absence for a day, and being at the time wearing the articles of clothing after libelled, the property of the Parochial Board of Kelso, you the said John Martin did, on the 15th September 1873, from or near the said Union Poorhouse, wickedly and feloniously steal and theftuously away take an overcoat, a jacket, a vest, and a pair of shoes, the property and in the lawful possession of the said Parochial Board."

Council for the panel took objections to the relevancy of the indictment and argued—(1) The circumstances set forth in the minor proposition show that the prisoner had been in the lawful possession of the articles alleged to have been stolen. He had been wearing these articles, and had obtained leave of absence from the poorhouse. (2) It cannot be said that the prisoner stole these articles from the poorhouse, and the *locus* of the crime charged is therefore incorrectly stated. It is upon the prosecution that the *onus* of proof is thrown, and they are bound to show how and when the illegal appropriation of the articles in question took place. (3) Further, if the circumstances set forth do instruct any crime at all, it is not that of theft, but of breach of trust. It is laid down in Hume and in Alison that a servant who carries away his master's livery, which he is wearing, commits only a breach of trust. A pauper in the poorhouse is in a position precisely analogous. In the only reported case of a similar description, that of *Anderson,* the indictment was differently laid.

Authorities—Hume on Crime, i. 60; Alison's Principles, 355; *Anderson,* April 21, 1858, Irv. 65.

Argued for the prosecution—The old distinction formerly admitted, set forth by Hume and Alison between theft and breach of trust, has been given up. The indictment in the present case is similar in form to that in the case of *Brown,* which overruled the former authorities.

Authority—*Brown,* 2 Swinton, 394.

Lord Neaves—I have no doubt that the objections taken to the relevancy of this indictment cannot be sustained. If the circumstances as set forth against the prisoner should be proved, I think the case would certainly amount to one of theft. There is here a sufficient statement by the public prosecutor on the indictment to entitle him to put the prisoner on his trial, and endeavour to prove to the satisfaction of a jury that the articles in question actually were stolen.

Objections repelled.

The prisoner pleaded guilty to the charge of theft, and was sentenced to 18 months' imprisonment.

Council for the Crown—Solicitor-General (Clark), Q.C., and Rutherfurd. Crown Agent.

Counsel for Panel—Scott Moncrieff. Agent—Harry H. Inglis, W.S.

COURT OF SESSION.

Thursday, December 4.

FIRST DIVISION.

[Sheriff of Mid-Lothian and Haddington.

ROBERTSON AND MANDATORY *v.* LINDSAY.

Mutual Deed—Completed Contract—Delivery.

A mutual deed having been fully executed in duplicate by both parties to the contract,—*held* that the contract was thereby completed, and no additional stipulation could then be introduced by one of the parties as a condition of delivery, *Question* as to jurisdiction of Sheriff-Court.

The petitioner, John Jamieson Robertson, as sole surviving trustee of the deceased Robert Robertson, was principal lessee of a piece of ground at Juniper Green near Edinburgh, and this petition was presented to have the respondent, James Lindsay, contractor, ordained to remove a quantity of stones placed by him on said piece of ground. The respondent claimed a right to the occupation of the ground as tenant under a concluded agreement of sub-lease between the petitioner and him.

It appeared that early in the year 1870 the respondent entered into negotiations with the petitioners for taking the said ground for building purposes on a sub-lease for the remaining period of an original lease for 95 years, with a right of renewal for 99 years. It was one of the conditions of the said proposed sub-lease that the respondent should erect a dwelling-house on the ground of the value of £400. The said sub-lease was extended in duplicate and both copies sent to respondent's agents for execution by the respondent, accompanied by a letter from Mr Macara, the agent

for the trustees, and one of the petitioners, in which he stated, that after the deeds had been executed by the respondent they would require to be sent to the trustees for their signatures, but that he would hold the transaction settled as soon as he got Mr Lindsay's signature. The respondent on 27th April executed the deed, which was on the same day returned to the trustees' agent, with the necessary information for filling up the testing clause, for the purpose of obtaining the signatures of the trustees. In May following Mr Macara again wrote to the respondent's agents in these terms—"I have just heard that the Dublin trustee of Mr Robertson" (the petitioner) "is presently in Italy, whither the sub-tack has been sent to him, but Mr Lindsay" (the respondent) "may proceed with his operations. I have intimated to the agricultural tenant that he" (the respondent) "has had the stance allotted to him." The signatures of all the trustees were adhibited in June, and Mr Macara then intimated to the respondent's agents that the deed was ready for delivery on payment of the fees, nothing being said at that time as to any other condition of delivery. In pursuance of the said authority and contract, the respondent took possession of the stance by placing stones, sand, and a variety of building material thereon. Some delay thereafter occurred in proceeding with the buildings, and various correspondence passed between the parties, in the course of which the agent demanded that the respondent should satisfy the trustees that he possessed sufficient means to enable him to proceed with and complete the buildings contemplated, and declining to deliver the sub-lease to him till he did so. To this the respondent demurred, on the ground mainly, that he came under no such obligation in the completed contract of lease. The petitioner, however, on the respondent positively declining to comply with his demand, declined to deliver the duplicate sub-lease, and, as they averred, cancelled it. On the assumption that no lease had been entered into with the respondent, the agent let part of the ground to another party, but was prevented from letting the remainder only, as he averred, on account of the obstructions caused by the respondent refusing to remove the material which he had placed on the ground; and accordingly the petitioners made the present application to the Sheriff-Court of Mid-Lothian and Haddington.

On 11th June 1873 the Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—"The Sheriff-Substitute having considered the closed record and productions, and having heard Mr Macara, one of the petitioners, and the respondent's solicitor thereon: Finds that in the year 1870 negotiations took place between the parties with reference to a piece of ground at Juniper Green, of which the respondent was to become tenant under the petitioners: Finds that these negotiations were completed by the execution in duplicate of the sub-tack produced, dated April and June of said year: Finds that on 15th May 1870, Mr Macara wrote to the respondent's agents a letter stating that 'Mr Lindsay may proceed with his operations. I have intimated to the agricultural tenant that he has had the stance allotted to him:' Finds that under this letter, and under the mutual contract of sub-tack. the respondent took possession of the ground in question by laying stones and other building material thereon: Finds that this is a petition to have the respondent ordained to remove said stones from the ground as having no title whatever to the possession thereof: Finds, on the contrary, that the respondent has a good and valid title of possession under his completed sub-tack as above set forth: Sustains his pleas to that effect: Dismisses the petition: Finds the respondent entitled to expenses, allows an account to be given in, and remits the same to Mr Robert Barclay Selby, solicitor, to tax and report, and decerns.

"*Note.*—The sub-tack was completed; the sub-tenant was expressly authorised to take possession, and did so accordingly.—His duplicate of the sub-tack was retained by Mr Macara until the fees should be paid. Payment of these fees, and of rent which might be due, was duly tendered to Mr Macara by the respondent's agents. Meanwhile the respondent, having taken possession by placing building material on the ground, did not proceed any further, and Mr Macara ascertained, as was naturally to be inferred, that the delay in building proceeded from the respondent's want of means. It is an obligation incumbent on him under the sub-tack that he shall erect on the ground a dwelling-house of the value of £400 sterling.

"In the Sheriff-Substitute's opinion, the petitioners are no longer entitled to found upon the respondent's want of means as a reason for refusing to acknowledge him as their sub-tenant. They should have ascertained this before granting him the sub-tack, and authorising him to take possession; neither can they found on their retention of the respondent's duplicate of the sub-tack. It is trite law that a mutual contract does not require delivery. The petitioners' remedy against the respondent for any breach of obligation committed by him must be found within the deed itself, which bears both his signature and theirs."

The Sheriff (DAVIDSON) adhered, on appeal, to the interlocutor of the Sheriff-Substitute.

The petitioners appealed to the First Division of the Court of Session, and argued that no concluded contract of lease was or could be entered into without delivery of the sub-lease.

Argued for the respondent that the writings passing between and signed by the parties constituted a concluded and valid mutual contract or agreement of sub-lease under which the petitioners and the said trustees were bound to give the respondent his duplicate of the executed sub-lease in exchange for the fees thereof; and whether retained by them or not, the sub-lease was valid.

A plea was stated for the respondent, but not pressed either in the inferior court or on appeal, to the effect that the action was incompetent in the Sheriff-Court.

Authorities relied on by the respondent—Bankton i. 334, 337; Erskine's Inst. iii. 2, 44; Erskine's Prin. iii. 2, 21; Stair, i. 7, 14; Bell's Prin. §§ 84 and 24; *Stewart* v. *Riddock*, M. 11,406; *Crawford*, M. 12,304; *Lockhart*, M. 8430; *Cormack* v. *Anderson*, July 8, 1829, 7 Sh. 868.

At advising—

LORD PRESIDENT—The petitioners in the Sheriff-Court craved an order on the respondent to remove certain stones from a piece of ground of which the appellant was lessee; and the answer was an assertion that the respondent was sub-lessee under a concluded agreement of lease in the petitioner's hands. Under order of the Court the sub-lease was produced,

and is now before us. The question is, whether the respondent has a title as sub-lessee. The respondent pleaded, among other pleas, that the application was incompetent in the Sheriff-Court, inasmuch as the question raised was one pertaining to heritable right and involving a judgment of heritable title. They do not seem to have insisted very seriously on this plea in the Inferior Court, and they have not insisted on it here. If it had been urged I think it would have been very strong. I am not sure that it is not *pars judicis* to give effect to such a plea whether urged or not; but I shall, in the circumstances, rest satisfied with saying that I have very great doubts if it was competent to try the question in the Sheriff-Court.

On the merits, I entirely agree with the Sheriff in the conclusion at which he has arrived. There is no doubt that negotiations for a lease were going on for a considerable time between the parties, and certainly some possession was given before both signatures were obtained to the lease. Stones were laid down upon the ground which was the subject of the lease—a very unequivocal form of possession where the subject was a building lease. The sub-lease was executed by the sub-tenant in April 1870, and would have been executed by the trustees of the landlord at the same time but for the fact that one of them was abroad. It was in these circumstances that possession was allowed before the sub-lease was executed by the trustees. If it had been executed by the trustees, of course no leave would have been necessary. Two duplicate sub-leases were put into the hands of the landlord's agent in order to obtain the signatures of the trustees. He got the signatures adhibited, and the question is, what ought then to have been done with the two deeds. One of course was to be retained by the landlord's agent, and the other ought to have been handed (perhaps I should not say delivered) to the sub-tenant. The agent, however, withheld the other deed on the ground that he was not satisfied that the sub-tenant had sufficient means to carry out the purpose of the lease—that is to say, the agent took it upon him, at that stage, to introduce a suspensive condition of the lease. Now that was a position entirely untenable. He was bound to hand over the deed to the sub-tenant. The position assumed by the landlord seems to have proceeded upon an erroneous conception of delivery. The law of delivery of mutual deeds is distinct enough—viz., that whoever holds the deeds holds it for and against all parties. But it is contended that where a mutual deed is executed in duplicate there must be delivery of both deeds as if each were a unilateral deed, or as if one contained the obligations come under by the one party, and the other those binding on the other party. But this is not so. In the present case both deeds, after execution, were in the hands of the landlord's agent. But when a deed is executed in duplicate, both copies are usually in the hands of the same party at first, and clearly the one does not require delivery. Only one therefore, on the contention of the petitioner, required delivery. But how does this stand? The one is in a position not requiring delivery, and is therefore complete, and could be enforced; but the other, requiring delivery, is incomplete till delivery, and therefore cannot be enforced. So that, according to this view, the one party to the contract would be bound while the other remained free. This is manifestly an untenable position, and is founded on a misapprehension of the 6th exception mentioned by Erskine to the doctrine that deeds are not obligatory on the granter before delivery. That exception is in these terms—"Mutual obligations or contracts signed by two or more parties for their different interests require no delivery, because every such deed, the moment it is executed, becomes a common right to all the contractors. The bare subscription of the several parties proves the delivery of the deed by the other subscribers to him in whose hands it appears; and if that party can use it as a deed effectual to himself, it must also be effectual to the rest." That is the very doctrine applicable to this case; each deed is complete in itself. But if the proposition of the petitioner were to be given effect to, it would be sanctioning the very reverse of the doctrine laid down by Erskine.

The question as to whether the deed was a delivered deed while still in the hands of the agent, is not of much importance. If it was not, then the agent was bound to deliver forthwith. At the same time, I rather think it had the effect of a delivered deed. On these grounds, I am of opinion that the judgment of the Sheriff is quite sound.

Lord Deas concurred. On the question of competence, his Lordship observed:—In the circumstances of the case as pleaded, the question of form is not necessarily before us for decision, but if it had been before us I would have had the greatest difficulty in not sustaining the plea of incompetency. Apart from the question whether the Sheriff has jurisdiction in this matter, though a grave consideration, I have this difficulty, that a summary removal, which this really is, is only possible where there is no shadow or pretence of a title, the intending party being in the position of a mere squatter, which is a very different case from the present.

Lord Ardmillan and Lord Jerviswoode concurred.

The Court accordingly sustained the judgment of the Sheriff, and dismissed the appeal.

Counsel for Petitioner—Solicitor-General (Clark) and Watson. Agent—L. M. Macara, W.S.

Counsel for Respondent—Lord Advocate (Young) and Robertson. Agents — Keegan & Welsh, S.S.C.

Saturday, December 6.

SECOND DIVISION.

[Sheriff of Midlothian.

APPEAL—PARTRIDGE.

Bankruptcy (Scotland) Act, 1856, *sec.* 16.

Held that section 16 of the Bankrupt Scotland Act recognised the competency of granting a petition for the appointment of a judicial factor on an estate after sequestration, but before the appointment of a trustee.

This was an appeal from the deliverance of the Sheriff of Midlothian on a petition presented to him by Frederick John Partridge, of the firm of Matthew, Wright, & Partridge, London, and his mandatory, with consent and concurrence of Peter Cunningham, Stockbroker, Edinburgh. The peti